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## The Istanbul Convention's Evidentiary Requirements in the Light of Laws on Self-Defence and Mitigating Criminal Responsibility

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**THE ISTANBUL CONVENTION'S EVIDENTIARY REQUIREMENTS IN  
THE LIGHT OF LAWS ON SELF-DEFENCE AND MITIGATING  
CRIMINAL RESPONSIBILITY**

*By Alexandra Molitorisová\* and Ciarán Burke\*\**

ABSTRACT

The article argues that the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), a comprehensive international treaty, may necessitate deep changes in its Parties' domestic legal regimes, including reconceptualising laws on circumstances excluding or mitigating criminal responsibility and related evidentiary issues in domestic violence cases. The article first presents the theoretical underpinnings of a gendered understanding of violence and criminal laws. It then proceeds to present different approaches to law reform that have contemplated gendered laws on circumstances that exclude criminal responsibility, mostly in the context of homicides committed by battered women. Traditional approaches to law reform demonstrate how a gendered reconsideration of a single legal concept requires reconsideration of all legal principles governing the structure of that concept and causes a cascade effect. This, in turn, requires specific evidentiary considerations, including the context in which a crime is perpetrated, namely the dynamics of abusive partner relationships, social framework evidence, and the 'demystification' of violence against women. The article suggests that the Istanbul Convention's emphasis on investigation and evidence and the promotion of a "gendered understanding of violence" may potentially open the question of criminal responsibility of female offenders by elevating gendered rules of evidence to gendered criminal law provisions (in a reverse cascade effect).

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## INTRODUCTION

The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Convention) was adopted on 11 May 2011 and came into effect on 1 August 2014. The Convention will impact both common law countries (Ireland and the UK) and continental jurisdictions within the Council of Europe (CoE). As of April 2020, thirty-four countries have ratified the Convention.<sup>1</sup>

The Convention will necessitate many structural as well as technical legal changes in the domestic criminal laws of States Parties

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<sup>1</sup> The Convention is semi-open, meaning that States outside of the CoE system may accede to the Convention.

to the Convention<sup>2</sup>, and aims to engender a shift in thinking with regard to criminal law and domestic violence legislation.<sup>3</sup> Given its gender-oriented philosophy, it is conceivable that some of these changes will involve rather dramatic reconsideration of generally applicable provisions concerning offences against bodily and mental integrity.<sup>4</sup> The Convention combines general criminal law provisions, such as on statutes of limitation and sanctioning, with procedural and substantive provisions. The latter prescribe that Parties take necessary legislative or other measures to ensure that the intentional commission of certain acts, such as of sexual violence, including rape, and of acts which seriously impairing a person's psychological integrity through coercion or threats, are criminalised.<sup>5</sup> The Convention positions itself as a rights-based, victim-centred and gender-sensitive legal instrument.<sup>6</sup> This, above all, entails that victim protection is viewed via a gendered prism: the Convention recognises that women are at greater risk of gender-based violence and are disproportionately affected by domestic violence.<sup>7</sup> Its object and purpose is to protect women against *all forms* of violence and to design a comprehensive framework of policies and measures for the protection of and assistance to *all victims* of violence against women and domestic

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<sup>2</sup> See *Chart of Signatures and Ratifications of Treaty 210*, COUNCIL OF EUR., <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures> (last visited Feb. 7, 2021).

<sup>3</sup> See Ronagh McQuigg, *Domestic Violence: Applying a Human Rights Discourse*, in *DOMESTIC VIOLENCE: INTERDISCIPLINARY PERSPECTIVES ON PROTECTION, PREVENTION AND INTERVENTION* 15-35 (Sarah Hilder & Vanessa Bettinson eds., Palgrave Macmillan, 2016).

<sup>4</sup> See Minni Leskinen, *The Istanbul Convention on Sexual Offenses: A Duty to Reform the Wording of National Law or the Way We Think?*, in *INTERNATIONAL LAW AND VIOLENCE AGAINST WOMEN: EUROPE AND THE ISTANBUL CONVENTION* 133-156 (Johanna Niemi, Lourdes Peroni & Vladislava Stoyanova, eds., Routledge, 2020).

<sup>5</sup> Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence art. 32-40, *opened for signature* May 11, 2011, C.E.T.S. No. 210, <https://rm.coe.int/168008482e> [hereinafter *Convention*].

<sup>6</sup> See *WAVE Fact Sheet Istanbul Convention*, WAVE NETWORK & EUROPEAN INFO CENTRE AGAINST VIOLENCE (Jan. 2016), [http://fileserver.wave-network.org/research/reports/2016\\_WAVEFactSheetIC.pdf](http://fileserver.wave-network.org/research/reports/2016_WAVEFactSheetIC.pdf).

<sup>7</sup> *Convention*, *supra* note 5, at preamble.

violence.<sup>8</sup> The stated objective affects all obligations under the Convention.

This article discusses the changes in national criminal laws of States Parties that may be required in order to align them with the Convention. What adjustments does the “gendered understanding of violence” entail for domestic criminal law?<sup>9</sup>

#### METHODOLOGY

This article engages with national laws from diverse jurisdictions, but should not be considered as a comparative study. Jurisdictions treated include several non-Parties to the Convention, since violence against women is a world-wide problem. However, amongst the States Parties, this article devotes particular attention to France and Germany as two of the three largest jurisdictions, that are signatories of the Convention.<sup>10</sup> The purpose of this approach is to demonstrate the variability in the legal status quo, which will be juxtaposed with certain Convention requirements. Again, this article does not attempt to make conclusions concerning the selected jurisdictions’ compliance with the Convention. Rather, it represents an – incomplete – mapping of the extent of a gendered understanding of violence in national laws. It is, of course, beyond the scope of a single article to comprehensively cover all possible areas of a legal order shaped by a gendered understanding of violence. We therefore focused upon one extreme case – that of a battered woman experiencing domestic violence and killing her abusive partner in alleged self-defence. Examining responses of national laws in this extreme case works as a litmus test concerning the gendered approach to criminal laws dealing with violence against women. It is possible to consider this test as the ultimate test of compliance with the “spirit” of the Convention.

The article proceeds in the following manner: First, it focuses on providing a general theoretical meaning to the notion of “gendered understanding of violence.” Examples are predominantly drawn from

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<sup>8</sup> Convention, *supra* note 5, at art. 1(1)(c).

<sup>9</sup> *Id.* at art. 49(2).

<sup>10</sup> Turkey was the second largest, however, in March 2021, it announced withdrawal from the Convention.

French and German law, the Convention, the European Court of Human Rights' (ECtHR) case law, and the literature in the area of criminal law and gendered law reform. This part highlights the conflict between the Convention's provisions, which states that it should be applied to male as well as female victims of domestic violence, and its promotion of a gendered understanding of violence. Articles 12 and 16 of the Convention, in particular, exemplify this clash. Since this conflict is readily apparent even at the level of a *prima facie* reading of the Convention, we endeavoured to inquire whether it is also present at a deeper level. Academic literature reveals that the clash between a gendered understanding of violence and a "de-gendered" approach is driven by a feminist critique of laws that capture the "male view" of the world and that are regarded as unjust.<sup>11</sup> In particular, self-defence laws attract criticism.<sup>12</sup> In this critique, the case of a killing committed by a battered woman serves as a powerful example of how these laws operate in extreme circumstances.<sup>13</sup> The proposition made in this article is that, although the Convention does not specifically regulate the laws of self-defence, it can have an indirect impact on how they operate, since the Convention contains an entire chapter covering the investigation and prosecution of violence against women and domestic violence, which is becoming a rich source of evidentiary rules and practices.

The article identifies certain "evidentiary requirements" as an element of the gendered understanding of violence that mandate or encourage the use of specific evidence in domestic violence cases, as well as, potentially, in other cases of violence against women. These requirements are not explicitly prescribed by Convention's text; however, they are found in the Explanatory Report accompanying the Convention, and may be inferred from the fact that the Convention

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<sup>11</sup> See Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254, 279-302 (1992); See also Joanne Conaghan, *Reassessing the Feminist Theoretical Project in Law*, 27 J. OF L. & SOC'Y 351 (2000).

<sup>12</sup> See Carol Smart, *WOMEN, CRIME AND CRIMINOLOGY: A FEMINIST CRITIQUE*, at 27-53 (Routledge, 2013). See also Danielle Tyson, *SEX, CULPABILITY AND THE DEFENCE OF PROVOCATION*, at 19-56 (Routledge, 2013).

<sup>13</sup> See generally Wendy Chan, *A Feminist Critique of Self-Defense and Provocation in Battered Women's Cases in England and Wales*, 6 WOMEN & CRIM. JUST. 39-65 (1994); See generally Katherine O'Donovan, *Defences for Battered Women Who Kill*, 18 J. OF L. & SOC'Y 219-40 (1991).

represents a complex legal regulation for combatting violence against women and domestic violence.<sup>14</sup> They may be also inferred from the social scientific evidence on the basis of which the Convention was drafted.<sup>15</sup> In addition, such requirements may be found in the documents accompanying the implementation of the Convention.<sup>16</sup> It is noted that the Convention should not be considered in isolation, and that, in particular in the CoE system, the rulings of the ECtHR must be considered.<sup>17</sup> At this point, a further original contribution to the current scholarship is made, because no other research has addressed the question of the investigation of domestic violence as a distinct category of violence against women in the ECtHR case-law. The argument is then advanced that the Convention represents a more advanced framework than that of the ECHR in terms of a gendered perspective on investigation and evidence.

The next step in our analysis was to demonstrate that evidentiary rules and practices stemming from the Convention have a more far-reaching impact than is necessarily visible in the day-to-day work of the police and the prosecution. We hypothesised that the impact can be sensed in questioning certain substantive criminal laws, and in particular those that concern self-defence or other defences to criminal responsibility of battered women. To prove our hypothesis concerning the ripple effects of the evidentiary requirements, we examined jurisdictions in which discussions about these effects have been taking place for a long time, albeit in the opposite direction, namely starting from considering changes to substantive rules to considering changes to evidentiary rules. Since the 1950s, common law jurisdictions have institutionalised a particular process of reforming

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<sup>14</sup> Council of Europe, *Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence* ¶¶ 191-192, ¶¶ 277-278 (2011).

<sup>15</sup> See Ad Hoc Committee on Preventing and Combating Violence Against Women and Domestic Violence [CAHVIO], *Interim Report*, at 13-17, CAHVIO 4 FIN (May 27, 2009).

<sup>16</sup> See *infra*, at p. 13-17.

<sup>17</sup> See Lisa McIntosh Sundstrom et al., *COURTING GENDER JUSTICE: RUSSIA, TURKEY, AND THE EUROPEAN COURT OF HUMAN RIGHTS* 171 (Oxford University Press, 2019).

laws by establishing law reform commissions<sup>18</sup> These commissions are expert bodies which issue recommendations concerning law reform, to which they arrive via a particular method, namely reviewing how laws operate in practice, receiving submissions from professionals as well as the public, and conducting comparative analysis as well as a literature review.<sup>19</sup> The question of battered woman syndrome and the laws governing self-defence has represented a hot topic amongst such commissions. At least in Australia, a veritable *smörgåsbord* of approaches to common law defences of self-defence and provocation has been created following recommendations from law reform bodies over the last 20 years.<sup>20</sup> We examined every common law jurisdiction with an established law reform commission, but considered only those that published a final report with recommendations to the government concerning the use of self-defence by victims of long-term domestic abuse, either as a part of a broader review of defences, a review of the laws of homicide, a legal response to domestic violence, or a review of the laws of evidence. This analysis was undertaken in order to demonstrate a series of logical steps that take place between the external drive for law reform (social scientific evidence), the substantive law reform (elements of self-defence or other defences), and the consequences of the change in substantive laws (new evidentiary requirements). A variety of approaches and outcomes were evident. However, throughout this variety of approaches, we believe that we observed a universal method of thinking about reforms, the objective of which is to “gender” criminal laws and their operation.

This leads us to the final part of the article in which we endeavoured to mimic the same method of thinking about law reform

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<sup>18</sup> See Neil Rees, Chairperson of the Victorian Law Reform Commission, Speaker at the Australasian Law Reform Agencies Conference 2008: The Birth and Rebirth of Law Reform Agencies (Sept. 10-12, 2008).

<sup>19</sup> See Ciarán Burke & Ray Byrne, CASE STUDIES IN LEGAL RESEARCH METHODOLOGIES: REFLECTIONS ON THEORY AND PRACTICE (Laura Cahillane & Jennifer Schweppe eds., 2019).

<sup>20</sup> See Julie Stubbs, HOMICIDE, GENDER AND RESPONSIBILITY: AN INTERNATIONAL PERSPECTIVE, at ch. 2 (Kate Fitz-Gibbon & Sandra Walklate eds., 2016); See also Thomas Crofts & Danielle Tyson, *Homicide Law Reform in Australia: Improving Access to Defences for Women Who Kill Their Abusers*, 39 MONASH UNIV. L. REV., 864-893 (2014).



prompted by a gendered understanding in the context of the Convention. We considered in detail the laws of homicide of France and Germany. The article argues that the consequences of a gendered understanding of violence are predominantly to be found in opening the question of criminal responsibility of female offenders by elevating gendered rules of evidence to gendered criminal law provisions.

#### THE CONVENTION'S GENDERED UNDERSTANDING OF VIOLENCE

The Convention prescribes in Article 18(2), relating to general obligations, that Parties shall have regard to a gendered understanding of violence against women and domestic violence in taking the necessary legislative and other measures to protect *all* victims from any further acts of violence covered by the scope of the Convention. What exactly the Convention means by a "gendered understanding" must be located elsewhere in the Convention, as well as inferred from its general tenor. The Convention is predicated upon the understanding that: (i) violence against women is a manifestation of historically unequal power relations between women and men; (ii) violence against women as a social mechanism of a structural nature forces women into a subordinate position; and that (iii) domestic violence affects women disproportionately.<sup>21</sup> Having regard to the ideological underpinnings of the Convention, it must, however, be possible to understand the practical consequences of the prescribed gendered approach to violence in criminal justice systems.

Theoretically, a gendered understanding of offences may reflect itself in various considerations: first by differentiating (i.e. explicitly legislating for) violent offences specifically aimed against women from general violent offences against bodily and mental integrity. This approach may be driven by three rationales: (i) by recognising a special (different) value of women's lives and bodily and physical integrity as compared to those of men; (ii) by recognising a statistically important representation of a particular gender in the

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<sup>21</sup> Council of Europe, Council of Europe Convention on preventing and combating violence against women and domestic violence, at 1-2, No.210 (2011).

victim population<sup>22</sup> or the offender population;<sup>23</sup> or (iii) by recognising the motive of the perpetrator, as a stand-alone element of the criminal offence.<sup>24</sup> The final rationale proposes that a perpetrator may be charged with a relevant offence if a violent act was directed against women “because they are women, that is, because of socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women.”<sup>25</sup> Therefore, in the most explicit fashion, the gendered understanding of violence may be located in the formulation of the offences covered by the Convention. Under the Convention, it is not sufficient to prosecute female genital mutilation as a form of bodily harm (*Körperverletzung*<sup>26</sup> or *des atteintes volontaires à l'intégrité de la personne*<sup>27</sup>) or forced marriage as coercion (*Nötigung*<sup>28</sup>).<sup>29</sup> Gendered offences are already enumerated in several

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<sup>22</sup> It is difficult to argue that the offence of bodily injury (or physical violence, using the Convention's terms) is a gendered offence, however, if a legislator differentiates domestic violence as a special type of physical violence, then the recorded statistics of such crime shows that victims and perpetrators are divided according to the gender line. According to Walby and Towers, when harm as well as act is included, the gender asymmetry of domestic violence becomes visible. See Sylvia Walby and Jude Towers, *Measuring Violence to End Violence: Mainstreaming Gender*, 1 JOURNAL OF GENDER-BASED VIOLENCE 1, 11 (2017). See also Sylvia Walby and Jude Towers, *Untangling the Concept of Coercive Control: Theorizing Domestic Violent Crime*, 18 CRIMINOLOGY & CRIMINAL JUSTICE 1, 20 (2018) (arguing that domestic violence is gender asymmetrical at all levels of seriousness and frequency).

<sup>23</sup> See Darrell Steffensmeier & Emilie Allan, *Gender and Crime: Toward a Gendered Theory of Female Offending*, 22 ANN. REV. OF SOCIO., 459 (1996). It is also possible to consider crimes such as infanticide committed by a mother to be gendered in this way.

<sup>24</sup> See also Karen Boyle, *What's in the Name? Theorising the Inter-relationships of Gender and Violence*, 20 FEMINIST THEORY 1, 1 (2018).

<sup>25</sup> Per the definition of the Convention Article 3(c), if gender is conceived as a motive, its definition per the Convention bears utmost significance. See Council of Europe Convention on Preventing and Combatting Violence against Women and Domestic Violence, Council of Eur., art. 3(c) (2011).

<sup>26</sup> STRAFGESETZBUCH [StGB] [PENAL CODE], § 223, translation at [https://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html](https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html) (Ger.).

<sup>27</sup> CODE PENAL [C. PEN.] [PENAL CODE] art. 221-1 – 221-11-1 (Fr.).

<sup>28</sup> *Id.* at § 240.

<sup>29</sup> Domestic legislation may also implement the Convention's explicit formulation of offenses differently. For example, a new criminal offense of coercive control that criminalises psychological violence under Article 42 of the Convention was included

(but not all) of the continental criminal codes.<sup>30</sup> These codes may also contain other gendered crimes not explicitly covered by the Convention, such as forced prostitution (*Zwangsprostitution*<sup>31</sup>), non-consensual termination of pregnancy<sup>32</sup> or forced concealment of the face (*dissimulation forcée du visage*<sup>33</sup>). In some states, calls for legislating for femicide as a separate criminal offence from homicide should be noted.<sup>34</sup>

Second, it is possible to promote a gendered understanding of offences by establishing qualified offences (*qualifizierte Straftaten, infractions aggravées*), which effectively create a separate criminal offence from the basic offence, and therefore, again, to recognise a special value or qualities of the protected object – here women's lives and health and their particular vulnerabilities in the face of violence. For example, an attack against a pregnant woman is automatically an aggravating factor in various jurisdictions in relation to many offences.<sup>35</sup>

Third, a gendered understanding in criminal procedural law may be linked to providing special measures of protection for female victims, such as interviews led by a female police officer or by establishing rape crisis centres for victims of sexual violence.<sup>36</sup>

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in the *Irish Domestic Violence Act 2018*. Irish Domestic Violence Act 2018 (Act No. 6/2018) (Ir.), <http://www.irishstatutebook.ie/eli/2018/act/6/enacted/en/html>.

<sup>30</sup> Strafgesetzbuch, *supra*, note 26 at § 237.

<sup>31</sup> *Id.* at § 232.

<sup>32</sup> *See* Vo v. France, 2004-VIII Eur. Ct. H.R. 42, 58.

<sup>33</sup> Code Penal, *supra* note 27, at Art. 225-4-10.

<sup>34</sup> Kiteri Garcia, *Peut-on imaginer une infraction de femicide en France?*, THE CONVERSATION, <https://theconversation.com/peut-on-imaginer-une-infraction-de-femicide-en-france-71511#:~:text=Il%20y%20a%20deux%20ans,sur%20le%20th%C3%A8me%20du%20f%C3%A9minicide> (last updated Aug. 26, 2019); *See also* Elisa Leray & Elda Monsalve, *Un crime de femicide en France? A propos de l'article 171 de la loi relative à l'égalité et à la citoyenneté*, LA REVUE DES DEOITS DE L'HOMME, Feb. 2017.

<sup>35</sup> Code Penal, *supra* note 27 at Art. 221-4 al. 9.

<sup>36</sup> *See* Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, Council of Eur., art. 25, 2011. *See* Liz Kelly, *Mapping support services for victims of violence against women in line with the Istanbul Convention Standards*, Council of Eur. (Nov. 8, 2018), <https://www.coe.int/en/web/genderequality/-/mapping-support-services-for-victims-of-violence-against-women-in-line-with-the-istanbul-convention-standards>. *See also* Nadera Shalhoub-

Fourth, sanctions may be provided for that reflect the gendered nature of the offences in question. For example, the Convention prescribes that the measures relating to perpetrators of offences covered by the Convention include withdrawal of parental rights<sup>37</sup> – a measure that is often divisive according to gender lines.<sup>38</sup> A gendered approach to sanctions also entails a prohibition on mitigating sentences on the grounds of custom, tradition, or honour for perpetrators of violence against women.<sup>39</sup> It is also possible to “gender” the punishment of offences by establishing aggravating sentencing factors. In France, it is a general aggravating factor at the sentencing stage if a crime is committed against another person because of his or her sex, sexual orientation, or gender identity.<sup>40</sup>

Fifth, it is possible to promote a gendered understanding of offences by providing for other legal concepts that reflect a gendered approach to violence against women, its consequences and impact. This especially concerns the proposition that, on average, women find themselves in a weaker socio-economic position<sup>41</sup> than men.<sup>42</sup> Such a gendered approach may not be explicitly found in the Convention. As such, obligations on custody and visitation rights per Article 31, on

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Kevoorkian and Enda Erez, *Integrating a Victim Voice in Community. Policing: A Feminist Critique*, 9 Int'l R. of Victimology, 113-115 (2002).

<sup>37</sup> According to GREVIO, in the context of domestic violence the exercise of joint custody is regarded as a means for the aggressor to continue maintaining domination over the women and the children. See *GREVIO Rapport d'évaluation de référence France*, Council of Eur. (Nov. 19, 2019), <https://rm.coe.int/grevio-inf-2019-16/168098c619> (last visited May 24, 2020).

<sup>38</sup> See Linda D. Elrod and Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAMILY L. QUARTERLY 3, 381-418 (2008).

<sup>39</sup> *Opuz v. Turkey* App no 33401/02 (ECtHR, 9 September 2009), at 91-95, 101-106 and 196.

<sup>40</sup> Code penal, *supra*, note 27 at Art.132-77.

<sup>41</sup> See Ingrid Westendorp, *The Istanbul Convention; new perspectives for victims of domestic violence?* MAASTRICHT UNIV. (June 8, 2018), <https://www.maastrichtuniversity.nl/blog/2018/06/istanbul-convention-new-perspectives-victims-domestic-violence>.

<sup>42</sup> As per ¶115 of the Explanatory Report to the Istanbul Convention: “[Gendered understanding] means that services offered need to demonstrate an approach, relevant to their users, which recognises the gendered dynamics, impact and consequences of these forms of violence and which operates within a gender equality and human rights framework.”

legal aid per Article 57, or on compensation per Article 30, are formulated in a gender-neutral fashion, as they relate to all victims of violent acts covered by the Convention. They also do not provide for factoring in gender in designing legislative or other measures. For example they could provide for higher compensation for female victims, limit the right to legal assistance to women victims, or state that in the determination of custody and visitation rights of children,<sup>43</sup> incidents of violence perpetrated by men should be taken into account.<sup>44</sup> Such measures are not completely inconceivable if the drafters “aim at the empowerment and economic independence of women victims of violence”<sup>45</sup> but are probably dissonant with the meaning of justice and equality as developed in the CoE system, as it assumes a balancing act between individual rights to family life, non-discrimination, and effective remedies.<sup>46</sup>

On a separate track of the analysis, a gendered understanding may follow the proposition that instead of creating new criminal law rules that would mitigate gender inequality, existing criminal law rules are already gendered in the sense that they disadvantage women.<sup>47</sup> According to this view, criminal law rules must be amended to rectify their inherent gender bias. It is asserted that the existing criminal justice system was built for men by men and may become “a site of re-victimisation and injustice” in cases involving women, and especially female victims of domestic violence.<sup>48</sup> Such consequences

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<sup>43</sup> See Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, Council of Eur., art. 30-31, 57, 2011.

<sup>44</sup> Although it is true that in the countries' evaluations, GREVIO is exclusively concerned with the safety of mothers who are victims of domestic violence and their children in the decision on and exercise of child custody and visitation rights. See *1<sup>st</sup> General Report on Grevio's Activities*, COUNCIL OF EUR. (Apr. 2020), <https://rm.coe.int/1st-general-report-on-grevio-s-activities/16809cd382>.

<sup>45</sup> Convention, *supra* note 21 at Art 18(3).

<sup>46</sup> See Ivana Radacic, *Gender Equality Jurisprudence of the European Court of Human Rights*, 19 THE EUR. J. OF INT'L L., 2008, at 841.

<sup>47</sup> Or de-gendered criminal rules as a default state, depending on the point of view.

<sup>48</sup> See Kate Fitz-Gibbon & Marion Vannier, *Domestic Violence and the Gendered Law of Self-Defence in France: the Case of Jacqueline Sauvage*, 25 FEMINIST LEGAL STUDIES 3, 31 (2017). See also Elizabeth Sheehy and Barbara Hamilton, *Thrice Punished: Battered Women, Criminal Law and Disinheritance*, 8 SOUTHERN CROSS UNIVERSITY LAW REVIEW 96, 104-105 (2004). See also Anthony Hopkins and Patricia Easteal, *Walking in Her Shoes: Battered Women Who Kill in Victoria, Queensland*

may manifest themselves vis-à-vis both female perpetrators as well as female victims – for example, because certain general mitigating circumstances may be applied to female perpetrators only with difficulty, whereas they are more favourably applied to male perpetrators,<sup>49</sup> or because certain legal doctrines such as self-defence were constructed according to male behaviour or not even recognising women's capacity.<sup>50</sup> Historically, this could also be observed in making available the defence of coercion at common law, which could be advanced by a wife who committed a crime in the presence of her husband. It was presumed that she acted under coercion, entitling her to be excused from responsibility.<sup>51</sup> A gender bias may also affect certain sanctions, such as the ban on entry to sporting, cultural, and other social events (for example, football banning orders), which are predominantly imposed on male perpetrators.<sup>52</sup> It can also be argued, hypothetically, that certain criminal offences such as the criminal offence of failure to help after a car accident<sup>53</sup> may be less favourably applied to female offenders because men fear injury less than women and manage distress better than women.<sup>54</sup> A gendered understanding of violence, *de nouveau*, would thus call for accounting for the special qualities and vulnerabilities of female perpetrators or female victims

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and Western Australia, 35 ALTERNATIVE LAW JOURNAL 3, 132 (2010). See also Barbara Hudson, *Beyond White Man's Justice: Race, Gender and Justice in Late Modernity*, 10 THEORETICAL CRIMINOLOGY 1, 29 (2006).

<sup>49</sup> For example, if a perpetrator has taken the initiative to eliminate the harmful consequences of the crime or has voluntarily compensated for the damage caused his or her criminal sanction will be decreased. However, this mitigating factor is based on the premise that women who find themselves in a worse socio-economic situation will be fulfilled with more difficulty.

<sup>50</sup> The gendered argument for self-defense is that the law of self-defense was built around cases of a one-time fight of men of equal size and strength. See Fitz-Gibbon & Vannier, *supra* 48, at 313 (citing Cass. Crim. 16 October 1979).

<sup>51</sup> The abolition of the defence was recommended as early as 1845. See the Law Commission (Law Com. No. 83) *Report on Defences of General Application* (1977).

<sup>52</sup> See Emma Poulton, *Football Hooliganism*, in Bonnie Fisher and Steven Lab, eds. *ENCYCLOPEDIA OF VICTIMOLOGY AND CRIME PREVENTION* (SAGE Publications, e-book, 2010).

<sup>53</sup> § 151 zákona č. 40/2009 Sb., trestní zákoník.

<sup>54</sup> See William R. Smith & Marie Torsensson, *Gender Differences in Risk Perception and Neutralizing Fear of Crime: Toward Resolving the Paradoxes*, 37 THE BRITISH JOURNAL OF CRIMINOLOGY 4, 608 (1997).

in criminal law.<sup>55</sup> If a legal rule is applied to both genders with equal results, such a rule cannot be said to be gendered.<sup>56</sup>

The Convention states that it requires a gendered understanding of domestic violence,<sup>57</sup> but recognises that men may *also* be victims of domestic violence, and Parties are encouraged to apply the Convention to *all* victims of domestic violence.<sup>58</sup> This can only mean that the application of the Convention is gendered with regard to certain aspects of preventing and combatting domestic violence, while with regard to other aspects, it could remain gender neutral. This clash between the Convention's prescription that States Parties should apply its provisions to *all* victims of domestic violence and its mandating of a gendered understanding of violence is already apparent in Group of Experts on Action against Violence against Women and Domestic Violence, the Convention's expert monitoring group's (GREVIO)<sup>59</sup> evaluations of Parties' compliance. In the Netherlands, GREVIO criticised policy documents that aimed to be gender neutral on domestic violence despite recognising that the underlying reason for such policy documents was the underreporting of domestic violence by men.<sup>60</sup> GREVIO, however, noted that "such

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<sup>55</sup> One must also take account of the de-gendering movement. Consider the difference between the statutory definition of rape per the Slovak Criminal Code (Section 199(1)): "Any person who, by using violence or the threat of imminent violence, forces a woman to have sexual intercourse with him...", and the Czech Criminal Code (Section 185(1)), according to which whoever forces another person to have sexual intercourse by violence or by a threat of violence, or a threat of other serious detriment... However, the legislator may also acknowledge that domestic abuse is a gendered crime yet prefer the statutory definition to be gender-neutral so that no victim is inadvertently excluded from protection. *See* Home Office, 'Government Response to the report from the Joint Committee on the draft Domestic Abuse Bill' (Her Majesty's Stationery Office, 2019) <https://www.gov.uk/government/publications/government-response-to-the-report-from-the-joint-committee-on-the-draft-domestic-abuse-bill>.

<sup>56</sup> In fact, if that weren't the case, the difference between gendered and gender-neutral rules would not exist.

<sup>57</sup> Convention, *supra* note 21 at Art. 18(3).

<sup>58</sup> Convention, *supra* note 21 at Art. 1(1)(c).

<sup>59</sup> GREVIO — Group of Experts on Action against Violence against Women and Domestic Violence.

<sup>60</sup> GREVIO, *Baseline Evaluation Report Netherlands*, GREVIO, ¶¶ 29-30, (January 2020), <https://rm.coe.int/09000016809a61f1>.

considerations lead to the problematic effect that violence against women is not recognised as a specific, widespread and gender-based form of violence” that differs in severity and types and in the fact that vast majority of perpetrators (even where the victim is male) are men.<sup>61</sup> According to GREVIO, this runs contrary to the obligation of paying particular attention to women victims of gender-based violence as set out in Article 2(2) of the Convention.<sup>62</sup> Moreover, GREVIO has recently criticised the gender-neutral approach of legal provisions and policy documents that address domestic violence in countries such as Albania, Denmark and Finland.<sup>63</sup>

Thus, it is crucial to understand the extent to which the Convention is gendered and in what way it can be applicable to men who are victims of domestic violence. One must be cautious when searching for a gendered understanding of domestic violence within the Convention.<sup>64</sup> Certainly, a textual reading may identify some gendered provisions: explicit references to female victims appear in certain articles, which would suggest that other provisions may relate to both male and female victims of domestic violence where no such explicit reference occurs. The obligation to establish shelters, per Article 23, for example, relates to victims, although *especially* to women and their children, which suggests that male victims could also be covered by the scope of this article. A second approach involves combining a textual reading with a teleological interpretation of the relevant provisions. There are two provisions that most likely implicate a gendered differentiation of domestic violence: Article 16, which envisages preventive intervention against (male) perpetrators

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at ¶ 30.

<sup>63</sup> GREVIO, *supra* note 44, at 25.

<sup>64</sup> According to McQuigg, “[d]omestic violence is repeatedly separated out as a term within the Convention from violence against women generally. This relates to a broader issue as to whether a gender-neutral approach should be adopted towards domestic violence or whether a gendered approach is appropriate, a matter which has already raised substantial debate.” McQuigg therefore argues that the Convention seeks to strike a compromise between a gender-neutral approach and an approach conceptualising domestic violence as a form of violence against women only. Ronagh McQuigg, *Domestic Violence: Applying a Human Rights Discourse*, in Sarah Hilder and Vanessa Bettinson, eds. *DOMESTIC VIOLENCE: INTERDISCIPLINARY PERSPECTIVES ON PROTECTION, PREVENTION*, at 27 (Palgrave MacMillan, 2016).



of domestic violence and Article 12, which may be seen as casting self-defence and other prevention measures as an intervention that contributes to improving women's agency and reducing their vulnerability to violence.<sup>65</sup>

Article 16 prescribes that Parties should establish or support programmes aimed at teaching perpetrators of domestic violence to adopt non-violent behaviour in interpersonal relationships with a view to preventing further violence and changing violent behavioural patterns. As the Explanatory Report makes clear, the Convention prescribes certain core elements to such programmes, which explicitly assume that those programmes will be visited by male perpetrators of domestic violence, as they "should encourage [them] . . . to examine their attitudes and beliefs towards women."<sup>66</sup> Moreover, a collection of papers on the Convention's implementation introduces two sample curricula which are directed at adult male perpetrators.<sup>67</sup> Therefore, although the Article is formulated in a gender-neutral fashion regarding roles of victims/perpetrators, its implementation may be strongly conditioned by gender. According to Article 12, Parties should take necessary measures to prevent all forms of violence, and especially encourage men and boys to contribute actively to such prevention.<sup>68</sup> Under this Article, preventive measures at the societal level are strongly gender determined and focus on masculinity, devaluing women, male entitlement, honour codes and the masculine self.<sup>69</sup> A handful of other preventive measures are constructed in a

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<sup>65</sup> Opponents of the Convention warn against the breadth of Article 12 which may become a vehicle for substantially redrafting educational material. See ADF International, *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence and Possible European Union Accession to it* (May 12, 2017) <https://adfllegal.blob.core.windows.net/international-content/docs/default-source/default-document-library/resources/media-resources/europe/istanbul-convention-extensive-memo.pdf?sfvrsn=2>.

<sup>66</sup> Convention, *supra* note 21 at 104.

<sup>67</sup> The US Duluth programme and the Swedish Integrated Domestic Abuse Programme.

<sup>68</sup> Convention, *supra*, note 21 at 88.

<sup>69</sup> Marianne Hester and Sarah-Jane Lilley, *Preventing Violence Against Women: Article 12 of the Istanbul Convention*, in A COLLECTION OF PAPERS ON THE COUNCIL OF EUROPE CONVENTION ON PREVENTING AND COMBATING VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE 11 (Council of Europe, 2014), <https://rm.coe.int/16800d383a>.

gender-neutral fashion, such as poverty pockets, family stress, alcohol and drug abuse and early trauma.<sup>70</sup> Article 12 encompasses a plethora of tools, including self-defence training linked to the reduction of victimisation, challenging stereotypes and empowering women.<sup>71</sup> Most likely, it will prove difficult to find proponents of the proposition that self-defence training of men or changing the pattern of devaluing men would constitute an effective means of preventing female-on-male domestic violence. As McQuigg notes, these Articles reveal the Convention as far from gender neutral on issues of domestic violence.<sup>72</sup>

#### THE CONVENTION'S IMPLEMENTATION AND EVIDENCE IN DOMESTIC VIOLENCE CASES

The Convention's ambivalent nature, as gender-neutral and/or gendered, renders its applicability problematic with regard to male victims of domestic violence, and in some respects, to female perpetrators of domestic violence.<sup>73</sup> This problematic applicability is

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<sup>70</sup> *Id.*

<sup>71</sup> Resolution on the Proposal for a Council Decision on the Conclusion, by the European Union, of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, Eur. Parl.Doc. (COM(2016)0109 – 2016/0062(NLE)), (Sep.12, 2017), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017IP0329>.

<sup>72</sup> McQuigg, *supra* note 64, at 32.

<sup>73</sup> Female-to-male violence exists. One may debate its extent, nature, severity or collection of data. Two types of domestic violence are usually distinguished: intimate terrorism and situational violence. Whereas situational violence affects men to the same degree as women, in intimate terrorism. See Jessica Eckstein, *Intimate Terrorism and Situational Couple Violence: Classification Variability Across Five Methods to Distinguish Johnson's Violent Relationship Types*, 32 VIOLENCE VICTIMOLOGY 6, 955 (2017); see also Marianne I. Lien and Jørgen Lorentzen, MEN'S EXPERIENCE OF VIOLENCE IN INTIMATE RELATIONSHIPS, Palgrave Studies in Victims and Victimology, 157 (2019). Data also suggests that men and women have different motivations for using violence, with women usually protecting themselves or their children, retaliating their partner's violence and expressing fear and anger and men acting coercively in an attempt to control their partners. See Rochelle Braaf and Isobelle Meyering, *The Gender Debate in Domestic Violence: The Role of Data*, Australian Domestic and Family Violence Clearinghouse, Issues Paper 25 (2013) (suggesting in almost half of the cases where the perpetrator of domestic violence is a woman, the male victim had previously committed violence against her).

also underlined by the fact that the Convention was drafted on the basis of evidence that showed a predominant gender pattern in domestic violence,<sup>74</sup> whereas there are other solid studies that show that gender differences are relatively small in cases of milder forms of physical domestic violence, and that both men and women are frequently subjected to control and abuse in relationships.<sup>75</sup> Moreover, the respective roles of victims and perpetrators, from a legal point of view, both in symmetrical (equally perpetrated by men and women) and asymmetrical conflicts,<sup>76</sup> may swap rapidly.<sup>77</sup>

The clash between gendered and gender-neutral approaches to domestic violence is, however, not unique to the Convention. For a long time, the clash was subject to a feminist critique of laws that capture the “male view” of the world and that are regarded as unjust.<sup>78</sup> In this critique, the operation of the laws of self-defence have become a paradigmatic case in point.<sup>79</sup> Cases of women killing their abusive partners have become one of the longest debated and best-known examples of the gender tension in criminal laws in many jurisdictions.<sup>80</sup> Under the most extreme paradigm, one may imagine

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<sup>74</sup> See CAHVIO, *supra* note 15; see also Council of Europe, Commissioner for Human Rights, *The Istanbul Convention protects women*, without hidden purposes, 25 (2018) <https://www.coe.int/en/web/commissioner/-/the-istanbul-convention-protects-women-without-hidden-purposes>.

<sup>75</sup> See Lien & Lorentzen, *supra* note 73. See also Braaf & Meyering, *supra* note 73, at 1,10 (observing that family conflict researchers argue that family violence is equally perpetrated by men and women and that men and women are similarly motivated to use violence).

<sup>76</sup> See Michaels S. Kimmel, “Gender Symmetry” in *Domestic Violence*, 8 VIOLENCE AGAINST WOMEN 11, 1332-63 (2002).

<sup>77</sup> See Jiří Hořák, *TRESTNĚPŘÁVNÍ A KRIMINOLOGICKÉ ASPEKTY VRAŽD* (PhD Thesis, Charles University in Prague, 2010).

<sup>78</sup> See Carol Smart, *supra* note 12 at 19-56.

<sup>79</sup> See Joshua Dressler, *Feminist (or “Feminist”) Reform of Self-Defense Law: Some Critical Reflections*, 93 MARQUETTE L. REV. 4, 1477-81 (2010); Victoria Nourse, *Self-defense*, in Markus Dirk Dubber and Tatjana Hörnle, eds. *THE OXFORD HANDBOOK OF CRIMINAL LAW*, Oxford University Press, 623-24 (2014).

<sup>80</sup> See Victoria Nourse, *Passion’s Progress: Modern Law Reform and the Provocation Defense*, GEO. PUB. L. & LEGAL THEORY RES. PAPER, 12-106 (1997); see also Alexandra Lysova, *Victims but also Perpetrators: Women’s Experiences of Partner Violence*, in Helmut Kury, Slawomir Redo and Evelyn Shea, eds. *WOMEN AND CHILDREN AS VICTIMS AND OFFENDERS: BACKGROUND, PREVENTION,*

that a woman suffering from so-called battered woman syndrome who killed her abusive partner in a non-confrontational situation advances a claim of self-defence to avoid criminal responsibility.<sup>81</sup> Cases in which deadly force is employed in response to a relatively minor threat or assault also appear problematic.<sup>82</sup> Depending on the jurisdiction, the woman's actions may fall within the legal definition of self-defence, but may also be considered "excessive," fall within the legal definitions of other defences, or may not fit the legal definitions of circumstances excluding/mitigating criminal responsibility at all. It is often argued that the legal definitions of defences in many jurisdictions do not accommodate the experiences of women who kill in response to long-term grave domestic violence and who therefore cannot escape criminal responsibility.<sup>83</sup> The idea is that the case of women in situations of domestic violence is fundamentally different not only to that of the general population, but also to male victims of domestic violence.<sup>84</sup>

The Convention's applicability to such cases has the potential to be especially controversial. The Convention does not explicitly provide for gendered rules of self-defence or other defences. The Explanatory Report only notes that other legally justifiable acts, for example, acts committed in self-defence, in defence of property, or for necessary medical procedures, would not give rise to criminal sanctions under the Convention.<sup>85</sup> However, the Convention is a comprehensive legal text in the area of criminal law and domestic violence, mandating a gendered approach; it therefore likely has a certain stance, and it is difficult to imagine it permitting diverging practices on this issue amongst its Parties. As already noted by GREVIO, charging victims for injuries inflicted upon the abuser in self-defence is considered a form of secondary victimisation, and is

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REINTEGRATION: SUGGESTIONS FOR SUCCEEDING GENERATIONS, Springer Int'l Pub'g, 505-37, (2016).

<sup>81</sup> See Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 1, 217, 229-231 (2002).

<sup>82</sup> See Aileen McColgan, *In Defence of Battered Women who Kill*, 13 OXFORD JOURNAL OF LEGAL STUDIES 4, 508-529 (1993).

<sup>83</sup> Law Reform Commission of Western Australia, *REVIEW OF THE LAW OF HOMICIDE* ch. 4, 158 [https://www.lrc.justice.wa.gov.au/\\_files/p97-ch04.pdf](https://www.lrc.justice.wa.gov.au/_files/p97-ch04.pdf).

<sup>84</sup> See McColgan, *supra* note 82, at 514.

<sup>85</sup> Convention, *supra* note 21, at 156.

therefore incompatible with the Convention.<sup>86</sup> Currently, diverging practices exist within the CoE on this issue. Looking at the German example, the lower courts have denied any defences and excuses to battered defendants, and have dealt with long-term abuse at the sentencing stage only.<sup>87</sup> Perpetrators who kill their intimate partners via open aggression are likely to face a lower sentence than victims who kill their intimate partners while they are asleep.<sup>88</sup> Separately, the French *Assemblée Nationale* is currently debating a legislative proposal that would introduce a special defence to criminal responsibility based on a history of domestic violence.<sup>89</sup> The proposal arose in the context of a deep public sentiment of injustice originating from the *Jacqueline Sauvage* case, which ended with a complete Presidential pardon in 2016.<sup>90</sup> The UK Government has pledged to consider a new defence based upon a history of domestic violence in the future.<sup>91</sup> The subsequent chapters of this article will provide a more thorough analysis of the controversies around the various English, French, and German laws of homicide, self-defence, and domestic violence.

Without containing explicit gendered provisions, the Convention may secure a converging gendered approach via other means, namely evidentiary rules and practice.<sup>92</sup> Evidence comes to the fore with the centrality of investigations in domestic violence and other criminal law cases.<sup>93</sup> Investigations relate to the obligation of due diligence enshrined in Article 5 that represents one of the overarching obligations, and more specifically in Article 49(2). According to Article 54 (Investigations and evidence), "Parties shall take the necessary

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<sup>86</sup> GREVIO, *supra* note 44, at 25.

<sup>87</sup> Kerstin Braun, *Till Death Us Do Part: Homicide Defences for Women in Abusive Relationships- Similar Problems-Different Responses in Germany and Australia*, 23 VIOLENCE AGAINST WOMEN 10, 1 (2017).

<sup>88</sup> *Id.* at 9.

<sup>89</sup> *See infra* at p. 43 and note 284.

<sup>90</sup> *See Fitz-Gibbon & Vannier, supra* 48, at 316-19.

<sup>91</sup> The UK Government Response to the report from the Joint Committee, *supra* note 55.

<sup>92</sup> Rosemary C. Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARVARD WOMEN'S L. J. 127, 1996.

<sup>93</sup> *See* Elisabeth McDonald, *Gender Bias and the Law of Evidence: The Link between Sexuality and Credibility*, 24 VICTORIA U. WELLINGTON L. REV. 175 (1993); *see also* GREVIO, Evaluation of Italy (Oct. 30, 2018), [www.befreecooperativa.org/wp-content/uploads/2019/03/GREVIO-REPORT-FINAL-convertito.pdf](http://www.befreecooperativa.org/wp-content/uploads/2019/03/GREVIO-REPORT-FINAL-convertito.pdf).

legislative or other measures to ensure that, in any civil or criminal proceedings, evidence relating to the sexual history and conduct of the victim shall be permitted only when it is relevant and necessary.” This Article particularly regards the prosecution of sexual offence. Yet, the Explanatory memorandum shows clearly that the purpose of this provision is to combat “the perpetuation of damaging stereotypes,” and it calls for a context-sensitive assessment of evidence in the investigation and prosecution of violence against women.<sup>94</sup> Certain evidence relating to the behaviour of victims should not lead to moral judgments, seeing the victim as “immoral” and “not worthy” of legal protection, thereby creating inequality before law.<sup>95</sup> The provision is otherwise silent on specific evidence in domestic violence cases and circumstances of self-defence.

GREVIO has already made a number of observations on investigations and evidence in such cases. Per GREVIO, thorough investigations are necessary to differentiate between ill-treatment that would amount to habitual crime and individual episodes of violence, which cannot be ascribed to a pattern of abusive behaviour.<sup>96</sup> In this regard, GREVIO criticised Italian investigations for not even attempting to put together enough information to reconstruct a pattern of behaviour that would enable its proper classification. It also condemned any legal classification of violence against women based on victim’s tolerance, without making a complaint or defending herself.<sup>97</sup> In its report on Finland, GREVIO noted that the Finnish police focus excessively on evidence of physical violence, and do not take into account the context and history of violence and primary aggressor analysis, such that if there is “mutual violence” both persons will be viewed as perpetrators and victims.<sup>98</sup> GREVIO therefore “underscore[d] the importance of a diligent response of the statutory agencies in investigating allegations of domestic violence, based on a proper understanding of the nature and cycles of violence in intimate

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<sup>94</sup> Convention, *supra* note 21, at 191, 277.

<sup>95</sup> *Id.* at 277.

<sup>96</sup> GREVIO. ‘Baseline Evaluation Report Italy’. GREVIO/Inf(2019)18 (Council of Europe, 2020), ¶ 15.

<sup>97</sup> *Id.* at ¶ 14.

<sup>98</sup> GREVIO, *Baseline Evaluation Report Finland*, GREVIO/Inf (2019) 9 (Council of Europe, 2019).

partnerships.”<sup>99</sup> The consequences of a sluggish investigative approach are not confined to the extreme cases of battered women killings but affect day-to-day protection of victims of domestic violence, for example by not being able to obtain barring or protection orders and access to justice.<sup>100</sup>

In this way, the Convention links evidentiary rules and practice to access to justice:<sup>101</sup> gender stereotypes and cultural attitudes towards women represent barriers to justice,<sup>102</sup> as well as discriminatory or gender-blind frameworks which do not take into account women’s social situations.<sup>103</sup> Therefore, in the investigation and prosecution of cases of violence against women and domestic violence, it is compliant with the Convention to use expert testimonies to dispel myths or misconceptions surrounding domestic violence and to provide *context for victim behaviour*.<sup>104</sup> A *Training of Trainers Manual* based on the Convention, and written for the CoE, for example, states that it is a common myth that women are as violent as men and that “controversies about these figures are because women do use violence against their partner often as a reaction or defence to the abuse.”<sup>105</sup> Evidence of prior incidents of violence may be particularly relevant in

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<sup>99</sup> GREVIO — Report Italy, *supra* note 96, at ¶ 16.

<sup>100</sup> *Id.* at ¶ 15.

<sup>101</sup> See Shazia Choudhry, *Women’s Access to Justice: A Guide for Legal Practitioners* (October 2018) <https://rm.coe.int/advanced-womens-access-to-justice-eng/16808e99ef> (last visited 14 October 2019).

<sup>102</sup> GREVIO encouraged French authorities to continue developing, including through training, a non-stereotypical understanding of the phenomenon of violence against women by law enforcement. See GREVIO -*Rapport France*, *supra* note 37, ¶ 229.

<sup>103</sup> Konul D. Gasimova, *Guideline on Gender-Sensitive Approach for Adjudicating Gender-Based Violence Cases*, <http://www.fbih.cest.gov.ba/images/doclink/Gender-Guideline---WB-JTIs.pdf> (last visited 14 October 2019).

<sup>104</sup> *Id.* Gasimova also suggests that battered woman syndrome must be taken into consideration by relevant authorities and that justice actors should be aware of the impact of trauma such as one relating to victim’s perplexing behaviour and other patterns.

<sup>105</sup> Anna C. Baldry & Elisabeth Duban, *Improving the Effectiveness of Law Enforcement and Justice Officers in Combatting Violence against Women and Domestic Violence* (Council of Europe, 2016) <https://rm.coe.int/16806acdfd> (last visited 2 January 2020).

proving the extent of harm and predicting risks.<sup>106</sup> Furthermore, *social framework* experts<sup>107</sup> should be considered in addition to clinical experts in order to *explain victim behaviour*.<sup>108</sup> Accordingly, when reviewing evidence, judges need to consider the dynamics of domestic violence and its impact on victim behaviour when reviewing evidence. The Convention also prescribes that Parties must enable victims to be heard, to supply evidence and have their views, needs, and concerns presented and considered.<sup>109</sup>

These are very detailed evidentiary rules. They mandate not only what evidence is admissible but also what evidence is relevant and probative and what needs to be brought into a case. They tell judicial and police authorities what information to cast doubt upon, and when to call in experts to interpret the information. As is visible at the level of monitoring of the Convention's implementation, gendered evidentiary rules and practices have the primary power to affect the applicability of the Convention in domestic violence cases.

#### ECTHR CASE-LAW ON INVESTIGATION AND EVIDENCE IN DOMESTIC VIOLENCE CASES

The Convention does not exist in a vacuum and is thus not the only source of gendered rules and practices in investigation and evidence. Other legal sources may be considered, particularly Article 2 of the Convention on the Elimination of All Forms of Discrimination

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<sup>106</sup> See Council of Europe, *Preventing and Combating Domestic Violence against Women, A Learning Resource for Training Law Enforcement and Justice Officers* (January 2016) <https://rm.coe.int/16805970c1> (last visited 14 October 2019). It is said that the 2016 learning resource is firmly grounded on the standards of the Istanbul Convention and on good practice in implementing these standards.

<sup>107</sup> To the shift from clinical to social framework evidence, see Rebecca Bradfield, *Understanding the Battered Woman Who Kills her Violent Partner — The Admissibility of Expert Evidence of Domestic Violence in Australia*, 9 *PSYCHIATRY, PSYCHOLOGY AND LAW* 1, 177 (2011).

<sup>108</sup> Council of Europe (2008), *Combating Violence against Women: Minimum Standards for Support Services* [https://www.coe.int/t/dg2/equality/domesticviolence/campaign/Source/EG-VAW-CONF\(2007\)Study%20rev.en.pdf](https://www.coe.int/t/dg2/equality/domesticviolence/campaign/Source/EG-VAW-CONF(2007)Study%20rev.en.pdf) (last visited 14 October 2019).

<sup>109</sup> Article 56 of the Convention.



Against Women (CEDAW Convention),<sup>110</sup> and ECtHR rulings, as they could have a distinct impact upon the implementation of the Convention's obligations.<sup>111</sup> The due diligence obligation imposed upon CoE States regarding the investigation and gathering of evidence in domestic violence cases has been a subject of ECtHR case law for many years.<sup>112</sup> Although the Court's primary concern has not been in the use of expert evidence in dispelling myths surrounding domestic violence, the Court has treated certain issues related to victim-centred and gender-sensitive approaches to investigation.

First, the Court has consistently scrutinised states' records regarding conducting effective investigations into domestic violence cases under various European Convention on Human Rights (ECHR) articles.<sup>113</sup> It recognised that domestic violence cases are of a special character, and that domestic violence can take many forms, including psychological abuse.<sup>114</sup> As Judge Hüseyinov noted in his concurring opinion in *Kurt v. Austria*, the recent trend in the Court's jurisprudence has been "to deviate from an incident-based understanding of domestic violence," and instead to consider risk emanating from domestic violence as from "a continuous practice of intimidation and abuse."<sup>115</sup> It remains to be seen whether this trend will be further maintained in the Court's practice. For now, it is interpreted as a consistently applied requirement emanating from the Court's case law that a state is under an obligation to conduct an investigation with special diligence into all acts of domestic violence that the specific

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<sup>110</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women* (Dec. 16, 2010), CEDAW/C/GC/28, <https://www.refworld.org/docid/4d467ea72.html>.

<sup>111</sup> *Volodina v. Russia*, App no. 41261/17, Eur. Ct. H.R. at 92–98 (2019).

<sup>112</sup> Ilias Bantekas & Lutz Oette. *INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE* (Cambridge University Press, 2016), 506-507; *See also* Lee Hasselbacher. *State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, And International Legal Minimums of Protection*, *Northwestern 8 Journal of International Human Rights* 2, 200-1 (2010).

<sup>113</sup> In particular, Article 2 and Article 8 of the Convention.

<sup>114</sup> *Valiulienė v. Lithuania*, App no. 33234/07, Eur. Ct. H.R., at 69 (2013).

<sup>115</sup> Case of *Kurt v. Austria*, App. no. 62903/15, Eur. Ct. H.R., Concurring opinion of Judge Hüseyinov, at 4 (2019).

nature of domestic violence requires.<sup>116</sup> The authorities must make a “serious attempt to establish the circumstances of the assaults” and take an overall view of the series of violent acts.<sup>117</sup> This obligation also relates to the fact that effective investigation is regarded as a measure that is intended to prevent further violence, injuries, or loss of life. The police must therefore analyse specific evidence concerning the reality and the degree of danger posed by a domestic abuser.<sup>118</sup> The protective function of investigation was emphasised in *T.M. and C.M. v. Moldova*, a case in which the Court held that a law that requires injuries to be of a certain degree of severity in order to initiate a criminal investigation undermines the efficiency of protection afforded to victims.<sup>119</sup> The Court also held that the police cannot raise the bar for evidence required to launch criminal proceedings too high.<sup>120</sup> In *Volodina v. Russia*, the Court also concluded that it is incompatible with Article 3 obligations to make a criminal investigation strictly dependent upon the pursuance of complaints by the victim, given her particularly vulnerable situation,<sup>121</sup> an outcome that is currently reinforced by the Convention.<sup>122</sup> At a deeper level of analysis, the Court’s case law provides practical signposts for a contextual approach to investigation and evidence assessment. It is when an investigation is difficult, when there are conflicting statements and little physical evidence, that the Court is called upon to conduct a “context sensitive assessment of the credibility of the statements made and for verification of all the surrounding circumstances.”<sup>123</sup>

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<sup>116</sup> *Volodina v. Russia*, at 92.

<sup>117</sup> *Id.* at 97.

<sup>118</sup> *Liu v. Russia*, App no. 42086/05, Eur. Ct. H.R. (2007).

<sup>119</sup> *T.M. and C.M. v. The Republic of Moldova*, App no. 26608/11, Eur. Ct. H.R. at 47 (2014).

<sup>120</sup> *Volodina v. Russia*, at 98.

<sup>121</sup> *Id.* at 92-98.

<sup>122</sup> Council of Europe Convention on preventing and combating violence against women and domestic violence art. 55, May 11, 2011, C.E.T.S. 210.

<sup>123</sup> *M. and C. v. Romania*, App no 29032/04 (ECtHR 27 September 2011), at 116. *See also* Maria Sjöholm. GENDER-SENSITIVE NORM INTERPRETATION BY REGIONAL HUMAN RIGHTS LAW SYSTEMS (Brill | Nijhoff, 2018) 250-251. Context-sensitive approach to evidence assessment is also required by Article 36(2) of the Convention with respect of the prosecution of sexual offences.

The Court has focused on at least three important aspects of effective investigation, namely time, reasonableness, and diligence. The investigation must not only be prompt but also thorough.<sup>124</sup> This means that evidence concerning acts of domestic violence must be secured<sup>125</sup> using reasonable means, such as witness testimony, on-site inspection<sup>126</sup> and forensic evidence,<sup>127</sup> or an autopsy in case of injuries causing death.<sup>128</sup> The nature and degree of fact-finding depends on the circumstances of the particular case, and the minimum threshold of an investigation's effectiveness must be assessed with regard to the practical realities of the work involved in the investigation.<sup>129</sup> However, even if it is not possible to reduce the investigation work to a simple check-list, with regard to domestic violence, it is possible to infer certain basic elements.<sup>130</sup> It is almost self-evident that if the police lose time, they may not be able to secure the evidence needed. Passage of time inevitably erodes the amount and quality of the evidence available.<sup>131</sup> Therefore, a medical assessment and other forensic evidence must be scheduled immediately after the reported incident.<sup>132</sup> The same applies to rape cases, where *in situ* inspection must be carried out promptly.<sup>133</sup> In *P.M. v. Bulgaria*, the Court criticized the fact that urgent investigative measures, such as the commissioning of an expert team in the case of rape and interviewing the victim, had taken far too long to be deemed effective investigative measures.<sup>134</sup>

Finally, the Court attempted to tackle certain myths and stereotypes linked to domestic violence, while couching them in terms of discrimination issues. The Court held that it is unacceptable that the

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<sup>124</sup> *Volodina v. Russia*, at 92; *Opuz*, §§ 145-51, 168; *T.M. and C.M. v. the Republic of Moldova*, § 46; *Talpis*, §§ 106 and 129.

<sup>125</sup> *Id.*

<sup>126</sup> *D.K. v. Croatia*, App no. 42418/10 (ECtHR, 24 October 2012), at 96.

<sup>127</sup> *P.M. v. Bulgaria*, App no. 49669/07 (ECtHR, 24 January 2012), at 63-64.

<sup>128</sup> *Salman v. Turkey* (ECtHR, 27 June 2000), at 105.

<sup>129</sup> *Velikova v. Bulgaria*, (ECHR 2000-IV, 18 May 2000), at 20.

<sup>130</sup> *Id.*

<sup>131</sup> *Paul and Audrey Edwards v. the United Kingdom*, App no. 46477/99, ECHR 2002-II 86.

<sup>132</sup> *Volodina v. Russia*, at 96

<sup>133</sup> *D.K. v. Croatia*, at 103.

<sup>134</sup> *P.M. v. Bulgaria*, at 65-66.

police hear the perpetrator's version of the assaults only, and that they should not trivialise reported events.<sup>135</sup> The police must also not seek to assume the role of mediator and try to convince victims to return home.<sup>136</sup> Drawn from analogy to rape cases, the Court stressed that the allegation that a rape victim was under the influence of alcohol or other circumstances concerning the victim's behaviour or personality cannot dispense the authorities from the obligation to effectively investigate.<sup>137</sup> This would amount, in the Court's view, to "the general and discriminatory judicial passivity [of the police] creating a climate that was conducive to domestic violence."<sup>138</sup> Actions of the police or the courts that run contrary to Article 14 of the ECHR would be considered discriminatory and reflect an attitude on the basis of which the police effectively condone violence against women and domestic violence.<sup>139</sup>

The Court has laid down certain procedural as well as substantive requirements regarding investigation and evidence in domestic violence cases, as well as in other cases involving violence against women. However, there have been limitations as to what the Court could achieve in promoting women's access to justice, given the factual situation of the cases presented to the Court and the particular legal framework under which it adjudicates (namely the ECHR). For example, as of January 2020, the Court has not adjudicated any case combining killing in self-defence as a response to domestic violence. However, in June 2019, the case of Natalya Tunikova was communicated to the Court, in which Mrs. Tunikova was subject to a series of assaults by her former partner, and on one occasion, she grabbed a knife and stabbed him. Both suffered injuries, and Mrs. Tunikova filed a private-prosecution complaint; however, she was later found guilty of causing grievous bodily harm. A Moscow Court found that her use of force in self-defence had not been justifiable.<sup>140</sup> It remains to be seen how the Court will further develop standards of

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<sup>135</sup> *Volodina v. Russia*, at 97.

<sup>136</sup> *Case of A v. Croatia*, App no. 55164/08 (ECtHR, 14 October 2010), at 94-104.

<sup>137</sup> *D.K. v. Croatia*, at 101.

<sup>138</sup> *Opuz v. Turkey*, at 191.

<sup>139</sup> *Eremia v. the Republic of Moldova*, App no. 3564/11 (ECtHR, 28 May 2013), at 89.

<sup>140</sup> *Tunikova v. Russia*, App no. 55974/16, (Sep.12, 2016).

access to justice for female victims of domestic violence. However, any action by the Court in this regard will have to take account of several serious limitations of certain inviolable rights of the perpetrator, including Article 3 ECHR, which prescribes that torture, inhumane or degrading treatment or punishment is prohibited in absolute terms, irrespective of the circumstances or the victim's behaviour.<sup>141</sup> From today's perspective, the Court's results may seem moderate, reflecting "common sense," certain gender-neutral standards (forensic evidence), and, at best, basic gender sensitivity.

The Convention goes two steps further than the ECHR framework. It represents a development in international law, which is "supported by the findings of modern psychology" and in which domestic violence emerges "as an autonomous human rights violation."<sup>142</sup> The context in which the Convention is forged by scientific evidence explaining the consequences and effects of violence against women on health,<sup>143</sup> employment,<sup>144</sup> life outcomes, as well as multi-generational trauma;<sup>145</sup> the causes of domestic violence;<sup>146</sup> the vulnerabilities of certain victimised groups; the prevention of victimisation and secondary victimisation;<sup>147</sup> in addition to the social context in which the violence occurs and the context in which battered women kill their abusive partners.<sup>148</sup>

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<sup>141</sup> *Bureš v. the Czech Republic*, App no. 37679/08 (ECtHR, 18 October 2012), at 83.

<sup>142</sup> *Valiulienė v. Lithuania*, App no. 33234/07 ECtHR (Mar. 26, 2013) (Pinto de Albuquerque, concurring).

<sup>143</sup> See, Jill Astbury et al., *The Impact of Domestic Violence on Individuals*, 173 THE MEDICAL J. OF AUSTRALIA 8, 427 (2000).

<sup>144</sup> See Nadine C. Wathen, Jennifer C. D. MacGregor and Barbara MacQuarrie, *The Impact of Domestic Violence in the Workplace: Results from a Pan-Canadian Survey*, 57 JOURNAL OF OCCUPATION AND ENVIRONMENTAL MEDICINE 7, e65 (2015).

<sup>145</sup> See Miguel I. Cordero et al., *Evidence for Biological Roots in the Transgenerational Transmission of Intimate Partner Violence*, 2 TRANSLATIONAL PSYCHIATRY 4, e106 (2012).

<sup>146</sup> See Rachel Jewkes, *Intimate Partner Violence: Causes and Prevention*, THE LANCET 359 (April 2002).

<sup>147</sup> See Ann L. Coker, *Preventing Intimate Partner Violence*, 30 AMERICAN JOURNAL OF PREVENTIVE MEDICINE 6, 528 (2006).

<sup>148</sup> See Bernard Guerin and Marcela de O. Ortolan, *Analyzing Domestic Violence Behaviours in their Contexts: Violence as a Continuation of Social Strategies by other Means*, 26 BEHAVIOUR AND SOCIAL ISSUES, 5-26 (2017).

The question remains as to how to integrate these findings in a legal system, as finding a way of constructing procedural standards and of balancing the procedural relationship between the perpetrator and the victim in the light of these scientific findings seems necessary. Furthermore, the legislator should consider how to construct substantive legal rules against the backdrop of scientific findings that clarify the context in which violence is taking place. It is also a question of further policy choices to design a criminal justice system to help victims to cope as best as possible with the consequences of crimes. In any law reform prompted by a gendered understanding of violence, it is also germane to ask how to account for the behaviour of the victim in assessing the criminal responsibility of the perpetrator. In the most difficult cases, a legislator may further inquire how to assess the victim's criminal responsibility, if scientific evidence can explain the motive, intent, or inevitability of her/his conduct (state of mind). In particular, the development of battered woman syndrome, the cycle of violence, and learned helplessness in the late 1970s by Walker represented a major breakthrough in understanding of criminal behaviour in the context of domestic violence.<sup>149</sup> What general criminal law rules should be adopted to reflect the scientific findings as credibly as possible while avoiding sweeping conclusions about victims of domestic violence? Could the Convention's evidentiary requirements have any bearing on how such criminal law rules are construed? An answer to these questions can be provided by examining certain common law jurisdictions that have methodically considered similar issues in their reform processes in the past. In the next part, the article will focus primarily on various solutions offered to the question of how to reform criminal law and respond to cases where an abused woman kills her domestic tormentor.

#### FROM EVIDENCE TO LAW REFORM, FROM LAW REFORM TO EVIDENCE

Since the 1950s, common law jurisdictions have institutionalised a particular process of reforming laws by establishing bespoke independent law reform commissions.<sup>150</sup> Law reform is

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<sup>149</sup> See Lenore E. A. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J. OF L., ETHICS & PUB. POL. 2, 321 (1992).

<sup>150</sup> Rees, *supra* note 18.

driven by the objective of simplifying, consolidating but also revising and repealing the existing law.<sup>151</sup> Almost all major common law jurisdictions with an established law reform commission have held discussions about the gendered conceptualisation of self-defence as well as other legal defences. In our analysis, we included the final reports and recommendations of the law reform commissions of Australia, England & Wales, Ireland and New Zealand<sup>152</sup> tackling the use of self-defence by victims of long-term domestic violence, either as part of a broader review of defences in criminal law, a review of the laws of homicide, a legal response to domestic violence, or a review of the laws of evidence. We did not consider reports that provided general recommendations in domestic violence cases, such as concerning child custody reform, review of property rights, or orders of protection.<sup>153</sup>

We searched through the outputs of all such commissions that employ a law reform method modelled on reviewing the operation of laws, receiving submissions from professionals as well as the general public, conducting a comparative analysis as well as a literature

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<sup>151</sup> See Commonwealth Secretariat, CHANGING THE LAW. A PRACTICAL GUIDE TO LAW REFORM (2017).

<sup>152</sup> We did not consider issues papers and discussion papers that are published before a final report in the standard process of law reform, and that usually laid down options for consideration but do not recommend a specific legislative option.

<sup>153</sup> In that way, the 2017 Report of the Law Commission of Malawi on the Technical Review of the Prevention of Domestic Violence Act, the 2010 Report of the Law Reform Commission of the Cayman Islands “Protection against Domestic Violence”, the 2005 Report of the Law Commission of the People’s Republic of Bangladesh on the Proposed Law of Domestic Violence, the 1995 Report for Discussion “Domestic Abuse: Towards an Effective Legal Response” of the Alberta Law Reform Institute or the 1995 Report of Law Reform Commission of Nova Scotia “From Rhetoric to Reality: Ending Domestic Violence in Nova Scotia” are not studied in detail although at one point the latter report mentions the Canadian landmark case of a battered woman killing her husband (*R. v. Lavallee* [1990] 1 S.C.R. 852). This article also does not consider the 1997 Report of the New South Wales (NSW) Law Reform Commission on Partial Defences to Murder: Diminished Responsibility, but considers the joint report of the NSW and Australian Law Reform Commissions on Family Violence – A National Legal Response. Finally, this report does not consider the 2000 Report on Self-Defence and Provocation of the Law Reform Committee of the Northern Territory. We also did not consider changes to laws of self-defence induced by a high court ruling in cases concerning battered women (Canada).

review, as we considered this method particularly thorough.<sup>154</sup> This method reflects the fact that the need for law reform may come from the bottom up: from individual cases and the law that they develop, as well as from the top – new scientific evidence and knowledge, as well as legislative (policy) changes.<sup>155</sup> In the selected jurisdictions, law reform in this area has come about as a reaction to the criticism of the operation of the laws of self-defence as well as other defences in the light of new or newly explained social context (criminological and psychological scientific evidence), or to legal uncertainty, and alternatively, to an identified bias in the operation of the laws undermining the idea of fairness and equality before the law. Particularly in the area of legal defences, the law reform method has helped to demonstrate how a gendered reconsideration of a single legal concept requires reconsideration of legal principles governing the structure of that concept and causes a cascade effect. This, in turn, requires specific evidentiary considerations. In the analysis below, we omitted the part of the reports that dealt with the defence of diminished responsibility as a partial defence to murder available to those who were suffering from certain abnormalities of the mind, as it requires case-specific psychological expert evidence, usually on post-traumatic stress disorder or depression.<sup>156</sup>

### 1. New Zealand

The New Zealand Law Commission examined the issue of domestic violence and defences in criminal law in three separate reports. The first report, in 2001, dealt with “Some Criminal Defences with Particular Reference to Battered Defendants.” The second, in 2007, treated “The Partial Defence of Provocation.” The third, from 2016, was entitled “Understanding Family Violence: Reforming the

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<sup>154</sup> See Burke & Byrne, *supra* note 19.

<sup>155</sup> See Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. OF PENN. L. REV. 2, 388-460 (1991).

<sup>156</sup> Diminished responsibility is a statutory defence in England, New South Wales, Queensland, Northern Territory. It has origins in Scottish common law in *HM Advocate v Dingwall* (1867) 5 Irvine 466.



Criminal Law Relating to Homicide,” and is currently awaiting a legislative response.

In the most recent report, the Commission noted that there are differences between the position of men and women in pleading self-defence. In the Commission’s view, “[t]he failure to equally accommodate the ways women use lethal force to defend themselves or another constitutes a gender bias in the operation of the law.”<sup>157</sup> Persisting misconceptions of how family violence operates may affect a jury’s assessment of the defendant’s credibility or the reasonableness of his or her actions.<sup>158</sup> The Commission emphasised the need to understand family violence as “a pattern of harmful behaviour with a cumulative effect and a form of entrapment.”<sup>159</sup> The Commission identified problems with imminence and a lack of alternatives, as two concepts traditionally assisting in the reasonableness assessment, in the context of family violence.<sup>160</sup> Focusing on the proof of the immediacy requirement, the jury may be less likely to hear evidence on relationship history, and even where the evidence of past abuse is admitted it may work against the defendant.<sup>161</sup> In light of the evidence reviewed, the Commission found that the immediacy requirement may impede victims of family violence from relying on self-defence.<sup>162</sup> Therefore, the Commission proposed that a new provision should be inserted into the *Crimes Act 1961* to ensure that, where a person is responding to family violence, self-defence may apply even if that person is responding to a threat that is not imminent.<sup>163</sup>

As regards the proportionality element of the defence, the Commission observed that due to differences in size and strength, women are likely to use a weapon, typically a kitchen knife, to defend themselves against an abusive partner armed only with his fists.<sup>164</sup> The proportionality requirement thus appears particularly problematic in

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<sup>157</sup> *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide. Reforming the Criminal Law Relating to Homicide* (NZLC R139, 2016), ¶ 6.11.

<sup>158</sup> *Id.* ¶ at 2.55

<sup>159</sup> *Id.* at ¶ 6.17.

<sup>160</sup> *Id.* at ¶¶ 6.16-6.87.

<sup>161</sup> *Id.* at ¶ 6.19.

<sup>162</sup> *Id.* at ¶ 6.22.

<sup>163</sup> *Id.* at ¶ 7.39.

<sup>164</sup> *Id.* at ¶ 6.52.

non-confrontational situations and in cases where simplistic measuring of forces fail. Despite the difficulties that appeared in New Zealand case law, the Commission concluded that the proportionality requirement could accommodate victims of family violence, provided there is a proper understanding of all the circumstances, as well as an understanding of family violence that reflects contemporary *social science*.<sup>165</sup>

## 2. Australia

### a) Victoria

In 2004, the Victorian Law Reform Commission (VLRC) published an extensive report on defences to homicide. The work took account of the *social context* in which killings typically occur. The most significant line of inquiry of the VLRC was whether, despite the theoretical possibility that the common law doctrine of self-defence could accommodate the family violence context and other relevant evidence, the practice of the application of the legal concept of self-defence failed to cover women who kill their abusive partners in self-defence.<sup>166</sup>

The VLRC recommended against the introduction of a separate defence for persons who kill in response to family violence. It concluded that reforms should focus on “ensuring that self-defence properly accommodates women’s experiences, rather than on creating a special defence for women who kill in response to family violence.”<sup>167</sup> The VLRC’s recommendations resulted in adoption of the *Victorian Crimes (Homicide) Act*, which came into effect in 2005, amending the *Crimes Act 1958*.<sup>168</sup> The Act involved two key reforms: it defined the law of self-defence in respect of homicide offences and provided legislative guidance on the admissibility of family violence

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<sup>165</sup> *Id.* at ¶¶ 2.4, 7.80, 11.25.

<sup>166</sup> Victorian Law Reform Commission, *Defences to Homicide*, (Final Report, 2004), at ¶¶ 3.1-3.9.

<sup>167</sup> *Id.* at ¶ 3.26.

<sup>168</sup> Danielle Tyson, *Victoria’s New Homicide Laws: Provocative Reforms or More Stories of Women ‘asking for it’?* 23 CURRENT ISSUES IN CRIMINAL JUSTICE 2, 203-233 (2011).

evidence in the context of homicide offences.<sup>169</sup> Since 2014, thanks to further changes to the law, it is possible to rely on self-defence in cases of family violence even where a person uses excessive force or the person is responding to a harm that is not immediate, as long as the person believed it to be a reasonable response in the circumstances as s/he perceived them.<sup>170</sup> This legislation also amended relevant evidence laws and reinforced jury directions to accommodate considerations of family violence.<sup>171</sup>

b) *Queensland*

In Queensland, following a recommendation by the Queensland Law Reform Commission (QLRC), the Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Act 2010 amended the Criminal Code by introducing a new partial defence to murder of killing in an abusive domestic relationship. The QLRC reviewed defences available to battered women who kill as a part of a broader review of the excuse of accident and the defence of provocation in 2008.<sup>172</sup> Its analysis focused, *inter alia*, on modification of the law to obtain substantive gender equality.<sup>173</sup> In the QLRC's view, substantive gender equality may be achieved by modifying the law where it inhibits deserving claims to mitigation only because of rules derived from a particular gender model of human behaviour.<sup>174</sup> However, the Commission refused to distort the defence of provocation in an attempt to accommodate the

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<sup>169</sup> See Section 6 of the *Crimes (Homicide) Act 2005* that inserted new subdivision 1AA to the *Crimes Act 1958* – Exceptions to Homicide Offences. The 2005 Act also abolished the partial defence of provocation (Section 3 of the *Crimes (Homicide) Act 2005*). *Crimes (Homicide) Act 2005* (Vic) ss 3, 6.

<sup>170</sup> See *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic).

<sup>171</sup> See Charlotte King et al., *Did Defensive Homicide in Victoria provide a Safety Net for Battered Women Who Kill? A Case Study Analysis*, 42 *Monash Univ. L. Rev.* 1, 138-178 (2016); see also Naylor & Tyson, *Reforming Defences to Homicide in Victoria: Another Attempt to Address the Gender Question*, 6 *Int'l J. for Crime, Just. and Soc. Democracy* 3, 72-87 (2017).

<sup>172</sup> QUEENSLAND L. REFORM COMM'N, A REVIEW OF THE EXCUSE OF ACCIDENT AND THE DEFENCE OF PROVOCATION 297-300 (2008), [https://www.qlrc.qld.gov.au/\\_data/assets/pdf\\_file/0004/588244/qlrc-report-64-web-with-cover.pdf](https://www.qlrc.qld.gov.au/_data/assets/pdf_file/0004/588244/qlrc-report-64-web-with-cover.pdf).

<sup>173</sup> *Id.* at ¶¶ 19.23-19.27.

<sup>174</sup> *Id.* at ¶ 19.26.

position of a battered person who kills, as long as the circumstances in which battered persons killed their abuser do not resemble a provoked killing.<sup>175</sup> Therefore, it suggested to develop a separate defence for battered persons that *reflects scientific evidence* about the effects of a seriously abusive relationship on a battered person.<sup>176</sup> It presented such a defence as gender neutral.

c) *Tasmania*

The Tasmanian Law Reform Institute (TLRI) noted that “uncertainty about the availability of self-defence at trial means that women tend to plead guilty to manslaughter in cases that ‘demonstrate strong defensive components on the facts’ and might result in an acquittal on the basis of self-defence.”<sup>177</sup> In Tasmania, the law of self-defence in the circumstances of domestic violence has thus far remained untested. The TLRI therefore recommended that the law in Tasmania should be reformed to allow self-defence to better accommodate the claims of those who use violence in response to domestic violence.<sup>178</sup> The Institute followed the Australian Law Reform Commission in recognising broader policy issues behind the law reform: an integrated approach to support of victims of domestic violence.<sup>179</sup> However, crisis accommodation, counselling, or protection are not enough. According to the TLRI, the criminal law must also recognise the experience of victims of domestic violence who themselves kill.<sup>180</sup> “This involves addressing wider consideration than the substantive law of self-defence, such as relevant evidentiary provisions and provisions in relation to jury directions.”<sup>181</sup> However, the TLRI did not choose to follow the Queensland approach as regards a separate partial defence of killing for self-preservation in a domestic relationship. It considered the applicable law on self-defence to be

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<sup>175</sup> *Id.* at ¶ 21.131.

<sup>176</sup> *Id.* at 501.

<sup>177</sup> Tasmanian L. Reform Inst., Review of the Law Relating to Self-defence, ¶ 5.3.3 (2015), [https://www.utas.edu.au/\\_\\_data/assets/pdf\\_file/0009/786483/Self-defence-Final-Report-No-20.pdf](https://www.utas.edu.au/__data/assets/pdf_file/0009/786483/Self-defence-Final-Report-No-20.pdf) [hereinafter *TLRI*].

<sup>178</sup> *Id.* at 59.

<sup>179</sup> *Id.* at ¶ 5.3.7.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at ¶ 5.4.1.

sufficiently broad and flexible to accommodate the experience of women in abusive relationships, as it focuses on the accused's perception of circumstances in assessing the reasonableness of the use of force. Furthermore, unlike Queensland, Tasmania is a jurisdiction with discretionary sentencing for murder.<sup>182</sup>

### 3. England & Wales

In 2004, the Law Commission (England & Wales) published a report on partial defences to murder. The Consultation Paper that preceded the Commission's report stated that special rules relating to domestic killings may only be justified if there is *medical or other evidence* which demonstrates a need and a proper basis on which to ground such rules.<sup>183</sup> The report revealed that not all judges provided directions to juries about the need to carefully consider the disparity of strength and vulnerability between the defendant and the offender.<sup>184</sup> The Commission invited the Judicial Studies Board to consider providing a specimen direction for trial judges that would direct juries to consider the relationship between the defendant and the other party in the assessment of reasonableness and the elevated view of danger that a defendant who experiences previous violence in a relationship may have.<sup>185</sup> This came as a response to criticism of the law of self-defence, which reposed on two arguments: first that the requirement of reasonableness operated in an unreasonable way, if conceived objectively. The assessment of reasonableness takes into account the proportionality of the attack and defence and accommodates only cases in which adversaries are of comparable strength.<sup>186</sup> Second, cases in which abused persons kill their abusers when they are asleep or otherwise defenceless fail to satisfy the imminence requirement.<sup>187</sup> In the absence of a partial defence<sup>188</sup> of

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<sup>182</sup> *Id.* at ¶ 5.3.7.

<sup>183</sup> L. COMM'N, PARTIAL DEFENCES TO MURDER ¶ 3.77 (2004).

<sup>184</sup> *Id.* at ¶ 4.13.

<sup>185</sup> It must be also noted that the issue may be removed from the jury and decided by the trial judge himself.

<sup>186</sup> L. COMM'N, *supra* note 183, at ¶ 4.20.

<sup>187</sup> *Id.* at ¶ 4.21.

<sup>188</sup> Successfully advancing the partial defence leads to diminishing the criminal responsibility from murder to manslaughter.

excessive self-defence, the Commission concluded that the partial defence of provocation (acting out of genuine fear), as recommended, would be available.<sup>189</sup> The partial defence recommended by the Commission introduced an objective test based on a person of ordinary tolerance and self-restraint, and combined it with a partially subjective requirement of two emotions, namely fear of serious violence and anger. The Commission considered this to represent a principled approach.<sup>190</sup>

The UK is currently in the process of adopting a Domestic Abuse Bill.<sup>191</sup> The Joint Committee on the Draft Domestic Abuse Bill suggested to the Government that a new clause be added to the Bill to create a statutory defence for women whose offending is driven by their experience of domestic abuse. The Government responded that it has not yet been persuaded that the creation of a new defence represented a practical or proportionate response in all circumstances but agreed to give the proposal a further consideration in view of recent development on the case law in the area.<sup>192</sup>

#### 4. Ireland

In 2009, the Law Reform Commission (LRC) of Ireland published a report on defences in criminal law, in which it extensively commented on the law of self-defence. One part of this discussion, which concerned threshold requirements for self-defence – that is, whether a minimum level of threat to a person should be required to justify lethal defensive force – was dedicated to the issue of imminence. As the LRC noted, “the rule [of imminence] has come under considerable attack in recent years from those who feel that it places undue emphasis on the time measurement between harm and

<sup>189</sup> L. COMM’N, *supra* note 183, at ¶ 4.29.

<sup>190</sup> *Id.* ¶ 4.25.

<sup>191</sup> Although this part concerned only the law of England and Wales following the chosen methodology, Scottish law is also a rich source of examples dealing with women suffering from battered women syndrome in the context of the defence of diminished responsibility. See *Graham v HM Advocate* [2018] HCJAC 57 [52]. See Rachel McPherson, *Battered Woman Syndrome, Diminished Responsibility and Women Who Kill: Insights from Scottish Case Law*, 83 J. CRIM L. 5, 1-13 (2019).

<sup>192</sup> See The UK Government Response to the report from the Joint Committee, *supra* note 55, at ¶ 122.

defensive response at the expense of the underlying principle of necessity," especially in cases of killings in domestic violence.<sup>193</sup> The LRC outlined three options for law reform: (i) a Presidential pardon, (ii) a broadening of the imminence requirement that would either include a presumption that the threat of harm faced by a woman is always imminent or would result in a different understanding of the concept of imminence such as one partially encompassing the concept of inevitability, and (iii) abandoning the concept of imminence as a threshold requirement.<sup>194</sup>

The LRC recommended retaining the imminence requirement, but that in assessing imminence, the jury or the court may take account of the *circumstances* as the accused reasonably believed them to be. As regards the defence of provocation, the LRC cited a number of authors in support of the contention that the defence is gender biased.<sup>195</sup> The LRC conceded that the defence needed to be reformed in a way that diluted the requirement of immediacy, that is, sudden and temporary loss of control, and that allowed for greater flexibility in dealing with cases of homicides.<sup>196</sup> It recommended the introduction of a remodelled defence that would combine a subjective and an objective test. For the LRC, it was, however, clear that the requirements of provocation "are firmly based on male norms and male emotions."<sup>197</sup> Although the jurisdiction seemed to recognise cumulative provocation in the context of domestic violence, the concept of sudden and temporary loss of control appeared troublesome for women living with domestic violence.<sup>198</sup> The LRC proposed that the immediacy requirement should not be abolished, but that legislation should provide for situations where the defence will not be negated if the act causing death did not occur immediately after provocation.<sup>199</sup> However, the presence or absence of an immediate act represents a relevant consideration that, in conjunction with other evidence may

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<sup>193</sup> L. REFORM COMM'N IRELAND, DEFENCES IN CRIMINAL LAW ¶ 2.100 (LRC 95-2009, 2009).

<sup>194</sup> *Id.* at ¶¶ 2.113-2.118.

<sup>195</sup> *Id.* at ¶¶ 4.26-4.28.

<sup>196</sup> *Id.* at ¶ 4.30.

<sup>197</sup> *Id.* at ¶ 4.128.

<sup>198</sup> *Id.* at ¶¶ 4.28-4.31.

<sup>199</sup> *Id.* at ¶¶ 4.162.

decide the question of lost self-control.<sup>200</sup> The LRC's recommendations have thus far not been implemented.

### 5. Discussion

In summary, all of the reports examined grounded the need for reform in the context of the "deserving claims" of female defendants and the "failure to equally" or "properly accommodate" women's experience in criminal justice systems. In the specific context of common law jury trials, the assessment of the on-the-ground situation revealed problems with juries' appraisals of facts that contain "persisting misconceptions," are not adequately observant of "social context," circumstances of the accused or "differences between men and women." This evokes similar criticism of police work by the ECtHR. The problem is therefore one of evidence evaluation. In the reports analysed, the unfairness in the process of fact-finding is examined in relation to the concept of reasonableness that is criticised if conceived objectively as far as imminence and proportionality are concerned. To this, two responses emerged. The first line of response refused to reform the traditional defences and considered them flexible enough to accommodate women's perceptions. This line of response therefore shifted the focus on how the evidence is admitted and assessed in courtrooms. The second response introduced certain changes in the substantive concept of the respective defences – mingling subjective and objective elements of reasonableness – and accompanied them with corresponding evidentiary rules (jury directions) that would assist in the reasonableness assessment.

From the reports analysed, it becomes clear that evidence rules may have a significant impact on the operation of defences.<sup>201</sup> Some of the reports compiled by law reform bodies included a whole chapter dedicated to evidence of relationships and domestic violence. The VLRC recommended that some clarification should be provided

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<sup>200</sup> *Id.*

<sup>201</sup> *See also* AUSTRALIAN L. REFORM COMM'N, FAMILY VIOLENCE – A NATIONAL LEGAL RESPONSE, REPORT NO. 114 ¶ 14.13 (2010) [hereinafter *ALRC*], <https://www.alrc.gov.au/publication/family-violence-a-national-legal-response-alrc-report-114/14-homicide-defences-and-family-relationships-in-criminal-laws-2/recognising-family-violence-in-homicide-defences/> (last visited 14 October 2019).



concerning what evidence may be relevant where there is a history of prior violence to support a defence of self-defence or duress.<sup>202</sup> It recalled that so-called relationship evidence may assist the jury in assessing the state of the relationship between the pair or the state of mind of the offender and the victim. Such evidence plays a role in establishing *mens rea*. It helps to consider the accused's actions in a broader context that informs on the reasonableness of the actions in light of the nature of the threat the accused faced, available options to escape the violence, and the proportionality of the actions.<sup>203</sup> Since 2015, there is a provision under Part 6 of the Jury Directions Act 2015 (Vic) for a specific jury direction to be given at the start of the trial where self-defence or duress are raised in the context of family violence.<sup>204</sup> Also, Sections 322J and 33M of the Crimes Act 1958 (Victoria) allow for social framework evidence to be adduced, which explains the nature and dynamics of family violence, and social, cultural, or economic factors that impact upon the person affected by domestic violence. The VLRC also had regard to a person's cultural background and social support structures,<sup>205</sup> which were deemed to have a critical impact on the reasonableness assessment. In order to ensure that the evidence is properly understood by jurors, expert evidence on family violence is recommended. This may include both general expert evidence, about the nature and effects of family violence, and also case-specific expert evidence that would place the situation of the accused and his/her reactions into the framework of *current knowledge about family violence*.<sup>206</sup>

In Tasmania, the Law Reform Institute recommended to amend the Evidence Act 2001 (Tasmania) to include provisions based on the Crimes Act 1958 that provide for a range of domestic violence evidence to be admitted and to relate to the subjective and objective components of Section 46 of the Criminal Code (Tasmania) on self-

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<sup>202</sup> VLRC, *supra* note 166, at 132-42.

<sup>203</sup> *Id.* at 137, ¶4.21.

<sup>204</sup> The provisions were initially introduced into the *Jury Directions Act 2013 (Vic)* by the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic)*. On 29 June 2015, the provisions were revised and included in the *Jury Directions Act 2015 (Vic)*.

<sup>205</sup> Specific groups of women such as women from rural areas, women with disabilities, and people in same-sex relationships must be also considered. VLRC, *supra* note 166, ¶ 4.24.

<sup>206</sup> *Id.* at ¶ 4.32.

defence. Despite the Institute's view that the scope of the Evidence Act 2001 (Tasmania) was sufficient for evidence of domestic violence to be admitted, setting out the admissibility and relevance of case-specific as well as general evidence about the dynamics of domestic violence to self-defence was considered to have an important declaratory function.<sup>207</sup> The Institute was further of the view that such provision would serve an educative function for the legal profession. More importantly, the Institute subscribed to Bradfield's opinion that "expert evidence can tie together the varying accounts of witnesses by providing an overarching conceptual framework of domestic violence within which the individual incidents of violence can be positioned and understood."<sup>208</sup> Further, the Institute suggested that the approach based on the Victorian model of the Jury Directions Act 2015 (Victoria) should be reproduced in Tasmania. Similar recommendations were made by the Western Australian Law Reform Commission. The Victorian model was also endorsed by the Australian Law Reform Commission and the New South Wales Law Reform Commission in the joint review of national legal responses to domestic violence.

Queensland is the only other Australian jurisdiction that has a provision addressing the admissibility of evidence of family violence.<sup>209</sup> In Queensland, the amendment brought to the Criminal Code and the Evidence Act 1977 (Qld)<sup>210</sup> after the QLRC's deliberations, has explicitly provided for the relevance of the full circumstances of the relationship between the accused and the deceased in assessing a new partial defence to murder of killing in an abusive domestic relationship.<sup>211</sup> According to the amendment, a history of acts of serious violence may include acts that appear minor or trivial when considered in isolation.<sup>212</sup> In addition, in assessing the reasonableness of the accused's belief that his or her actions were necessary for self-preservation, regard may be had to circumstances

<sup>207</sup> *TLRI*, *supra* note 177, at ¶ 5.4.7.

<sup>208</sup> *Id.* (citing Rebecca Bradfield, *Understanding the Battered Woman Who Kills her Violent Partner — The Admissibility of Expert Evidence of Domestic Violence in Australia*, 9 *PSYCHIATRY, PSYCH. & LAW* 177, 193 (2002)).

<sup>209</sup> *Id.* at ¶ 5.4.3.

<sup>210</sup> *Evidence Act 1977 (Qld)* s 132B (Austl.).

<sup>211</sup> *See Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Act 2010 (Qld)* (Austl.).

<sup>212</sup> *Id.* at s 304B(4).

including acts of the deceased that were not acts of domestic violence.<sup>213</sup>

In New Zealand, evidence of battered woman syndrome is primarily used to correct juror misconceptions about family violence and its effects on victims and is now regularly employed in criminal trials.<sup>214</sup> A number of domestic cases underlined the importance of expert evidence to explain the effects of battered woman syndrome and to claim self-defence. In its 2001 Report, the Law Commission recommended that instead of making reference to the term “battered woman syndrome,” the nature and dynamics of the battering relationship and the effects of battering should be used in this context.<sup>215</sup> The Law Commission also noted that certain legal concepts such as imminence and proportionality exclude the wider context, including the cumulative and compounding nature of family violence and the history of the relationship between the offender and the deceased.<sup>216</sup> The Law Commission recommended to amend the Evidence Act 2006 to provide for a broad range of family violence evidence to be admitted in support of claims of self-defence and to make it clear that evidence may be relevant to both the subjective and objective elements under the relevant provisions.<sup>217</sup>

One may observe a number of parallels between GREVIO's evaluations of Parties' compliance with the Convention, as explained in the preceding part, and the recommendations of the various law reform commissions. In both clusters of sources, the focus is placed on the understanding of the specificities of the context, nature and cycle of domestic violence. The difference is that law reform commissions draw specific implications of considering relationship-social framework-case specific and general-expert-full circumstances evidence on the assessment of reasonableness or other elements of defences in tyrannicide cases. Will it be possible to infer similar implications for substantive laws of Parties to the Convention based on the Convention's evidentiary requirements?

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<sup>213</sup> See Rebecca Campbell, *Domestic Relationship Evidence in Queensland: An Analysis of a Misunderstood Provision*, 42 UNIV. OF N.S.W L. J. 2, 430 (2019).

<sup>214</sup> New Zealand Law Commission, *supra* note 157, at ¶ 6.69.

<sup>215</sup> *Id.* at ¶ 6.76.

<sup>216</sup> *Id.* at ¶ 6.85.

<sup>217</sup> *Id.* at ¶ 7.87; *see id.* at 9.

## EVIDENCE AS A PATTERN CHANGER

The above analysis illustrates that there are a number of possible considerations in searching for the gendered effect of the Convention's evidentiary requirements concerning domestic criminal laws, even in situations in which there is no explicit provision dealing with self-defence or other defences to criminal responsibility of victims of domestic violence in the text of the Convention itself.<sup>218</sup> Instead of first considering a policy question of gender "fairness" in the operation of laws of defences or of the integrated approach to victims of violence against women<sup>219</sup> (a broad analytical question), one may begin by looking at where the obligation to consider certain types of evidence may manifest itself in domestic criminal laws (a narrow analytical question). What follows is essentially a summary of all possible relationships between evidence-substance-procedure, produced on the basis of an analysis of the law reform commissions' reports discussed above.

The first consideration is based on a hypothesis that domestic laws on self-defence (or other defences)<sup>220</sup> of States Parties are gender biased as they stand. It accepts that the laws were modelled on male behaviour in confrontational situations, and do not encompass women's killing of abusive partners. For example, they require the defence to show that the threat that was averted by the act of self-defence was imminent or proportional in an objective sense. Therefore, even very broad and general evidentiary rules, prescribing that evidence can be anything that can help clarify a case and can be freely evaluated may not accommodate situations of killings by persons who

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<sup>218</sup> See AYA GRUBER, *THE DUTY TO RETREAT IN SELF-DEFENSE LAW AND VIOLENCE AGAINST WOMEN*, OxfordHandbooks Online (July 2017) <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935352.001.0001/oxfordhb-9780199935352-e-5> (specifically as regards the evidentiary strategy of introducing expert evidence).

<sup>219</sup> As illustrated by the considerations of the Tasmanian Law Reform Institute. See *TLRI*, *supra* note 177.

<sup>220</sup> It is, however, also interesting to consider that the defence of provocation is regarded as a defence that traditionally protects men's honour. According to Article 42 of the Convention, 'honour' shall not be regarded as justification for acts of violence covered by the scope of Convention. In other words, the compatibility of the defence of provocation and the Convention may be put into question.

have been abused in intimate relationships over a long period.<sup>221</sup> This means that even new scientific evidence and research that attempts to better understand and explain killings in abusive relationships or evidence gathered in individual cases would not “fit” the law of self-defence and enable the abused defendant to benefit from such a defence. As such, the law and the resulting practice may be deemed unsuitable from the perspective of the Convention’s requirements.

The second consideration is based on a hypothesis that domestic laws on self-defence (or other defences) can theoretically encompass the experiences of women who were abused in intimate relationships and killed their partners; however, the practice excludes such women from benefiting from these laws. This may be due to very strict domestic evidentiary practice that renders evidence of social, cultural, psychological, or economic contexts inadmissible or treats evidence of physical violence as essential.<sup>222</sup> The question is then how the evidentiary requirements under the Convention may change the unsuitable practice that may be considered gender biased. A focus on the doctrinal content of laws of defences could be accompanied by appropriate legal professional education on evidentiary issues under the Convention or express guidance about the potential relevance of domestic violence evidence in the context of homicides committed by abused persons.<sup>223</sup> This is also obvious from GREVIO’s monitoring output, in which it encouraged training of law enforcement agencies as to how to handle cases of violence against women, on the basis of a model strongly anchored to a gendered understanding of violence.<sup>224</sup>

Although recognising that the primary purpose of the evidentiary rules under the Convention is to secure vital evidence,<sup>225</sup> decreases in the level of attrition rates, and enhance conviction rates in the prosecution of domestic violence and other forms of violence

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<sup>221</sup> Michael Wutz, *Evidentiary Barriers to Conviction in Cases of Domestic Violence: A comparative analysis of Scottish and German Criminal Procedure*, 76 ABERDEEN STUDENT L. REV. 2, 76 (2011).

<sup>222</sup> Gasimova, *supra* note 103.

<sup>223</sup> Cf. ALRC, *supra* note 201.

<sup>224</sup> GREVIO — Report Italy, *supra* note 96.

<sup>225</sup> COUNCIL OF EUROPE, EXPLANATORY REPORT TO THE COUNCIL OF EUROPE ON PREVENTING AND COMBATING VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE ¶ 255 (Council of Europe Treaty Series – No. 210, 2011), <https://rm.coe.int/16800d383a>.

against women and to establish protection measures;<sup>226</sup> the third question to be explored is for what purpose the contextual evidence under the Convention should be considered in cases of women's killings of abusive partners.<sup>227</sup> Evidence plays a role in each aspect of a criminal case: from the investigation, to establishing the motive of the offender, to sentencing. It can affect criminal responsibility (self-defence), the classification of offences (murder versus manslaughter), guilt (intentional versus unintentional killing), and/or sentencing (mitigating circumstances). Since the evidentiary requirements and the gendered understanding of violence are included under the chapter on investigation, prosecution, procedural law, and protective measures, it can be suggested that evidence in domestic violence cases should play a more prominent role in legal appraisals of the relevant facts than at the sentencing stage. The contextual evidence under the Convention may potentially lead to diminishing or excluding the criminal responsibility of women killing their abusive partners. It is unclear, however, what result from the perspective of substantive criminal law provisions will be deemed sufficient under the Convention. This also means that evidentiary rules cannot secure a completely unified application of substantive laws.

In light of the potential variability at the general theoretical level, we endeavoured to demonstrate the variable effects of the Convention's evidentiary requirements in two jurisdictions, namely France and Germany. These represent two of the largest European jurisdictions that are Parties to the Convention. They are also two jurisdictions operating the classic European continental inquisitorial system of criminal justice,<sup>228</sup> and both have also recently considered criminal law reform regarding the criminal responsibility of women killing their domestic abusers.<sup>229</sup> Unlike common law jurisdictions,

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<sup>226</sup> GREVIO — Report Finland, *supra* note 98.

<sup>227</sup> Evidentiary rules should be considered for legal appraisals of aggravating circumstances since they are explicitly provided for in Article 46 of the Convention.

<sup>228</sup> See John Spencer, *Adversarial vs Inquisitorial Systems: Is There Still Such a Difference?*, 20 INT'L J. OF HUM. RTS. 601, 601-616 (2016).

<sup>229</sup> In France, INSPECTION GÉNÉRALE DE LA JUSTICE, MISSION SUR LES HOMICIDES CONJUGAUX 1-36 (2019); COMMISSION NATIONALE CONSULTATIVE DES DROITS DE L'HOMME, AVIS SUR LES VIOLENCES CONTRE LES FEMMES ET LES FÉMINICIDE 1-25 (2016). In Germany, BUNDESMINISTER DER JUSTIZ, ABSCHLUSSBERICHT DER

both countries employ the free evaluation of evidence principle in criminal cases (*libre appréciation*).<sup>230</sup> Generally, courts in both France and Germany have the responsibility for determining facts, and should accept evidence of all facts that are necessary for reaching a decision.<sup>231</sup> Neither Germany nor France, has any code containing a systematic set of rules of evidence, akin to the common law model. It is therefore not possible to reform evidentiary rules in a fashion similar to New Zealand, Queensland, or Tasmania as seen above. It may, however, be possible to flexibly change the evidentiary practice of courts, for example, by regularly summoning experts on domestic violence to tyrannicide cases. This is also one of the limitations of the fact-finding process in Germany and France: judges cannot consider social framework, psychological, or other scientific evidence on their own, but such evidence must be always channelled into the criminal justice process via an expert testimony.<sup>232</sup> It is the judge who selects the experts to be consulted in criminal cases.<sup>233</sup>

### 1. German law

Depending on the particular case, evidence endorsed by the Convention may be used in diminishing the criminal responsibility of a woman who kills her abusive husband, either from the aggravated form of murder, to the basic offence, or to a killing of still lesser gravity.

This may be done in a number of ways. For example, the German *Strafgesetzbuch* recognises murder under aggravating circumstances (*Mord*), ordinary murder (*Totschlag*), and murder under

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EXPERTENGRUPPE ZUR REFORM DER TÖTUNGSDELIKTE (§§ 211 – 213, 57a StGB) 1-910 (2015).

<sup>230</sup> CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] ART. 428 (FR.).

<sup>231</sup> STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE] § 244(2), <https://dejure.org/gesetze/StPO/244.html>.

<sup>232</sup> See T. Weigend, *The Potential to Secure a Fair Trial Through Evidence Exclusion: A German Perspective*, in DO EXCLUSIONARY RULES ENSURE A FAIR TRIAL? A COMPARATIVE PERSPECTIVE ON EVIDENTIARY RULES 72 (Sabine Gless & Thomas Richters eds., 2019); see also CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] ART. 434 (FR.).

<sup>233</sup> STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], § 73(1), <https://dejure.org/gesetze/StPO/74.html>.

mitigating circumstances (*minder schwerer Fall des Totschlag*).<sup>234</sup> Murder under aggravating circumstances is defined by the motive or means by which it is perpetrated or by the fact that it is committed to cover up another offence. It, *inter alia*, encompasses the killing for pleasure, sexual gratification, out of greed, or otherwise “base motives.”<sup>235</sup> It does not necessarily punish premeditation. However, importantly from the perspective of abused women, it also encompasses murder committed by stealth, in an insidious (perfidious; *heimtückisch*) manner that exploits the fact that the victim is not expecting the attack, for example because he is asleep.<sup>236</sup> As such, it has been suggested that the current version of §211 *Strafgesetzbuch* (StGB) disadvantages physically weaker persons, such as women, who defend themselves by taking advantage of an opportunity to engage in an unexpected attack.<sup>237</sup> This is reminiscent of similar considerations made by the Law Commission of England and Wales, as well as the reports from Ireland and New Zealand concerning the operation of the imminence requirement. It has been suggested that the requirement of insidiousness results from a legal-policy need, but it is considered too wide as it undesirably covers some women’s killings (*Haustyrannmordfälle*) and at the same time, too narrow, as it excludes infants and unconscious people.<sup>238</sup> Moreover, it is not unusual for any perpetrator to exploit the weaknesses of his or her victim. As such, to regard the “honourable duel” as a normal, standard case is mistaken.<sup>239</sup> In 2015, a group of experts established under the auspices of the Federal Ministry of Justice considered a reform of homicide

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<sup>234</sup> STRAFGESTZBUCH [STGB] [PENAL CODE] § 211, <https://dejure.org/gesetze/StGB/211.html>; *id.* at § 212, <https://dejure.org/gesetze/StGB/212.html>; *id.* at § 213, <https://dejure.org/gesetze/StGB/213.html>.

<sup>235</sup> *Id.* § 211(2). Base motives may for example include a scenario under which a daughter is killed by a family member in order to safeguard family honour). *See also* GREVIO — Report Italy, *supra* note 96 (GREVIO takes positive note of this legislative development, as well of the consolidated case law in Italy which tends to harshen criminal punishment under the aggravating circumstance of futile motives (citing *Id.* at § 61(1), <https://dejure.org/gesetze/StGB/61.html>)).

<sup>236</sup> DEM BUNDESMINISTER DER JUSTIZ UND FÜR VERBRAUCHERSCHUTZ, *supra* note 229, at 2.

<sup>237</sup> *Id.* at 2.

<sup>238</sup> *Id.* at 19.

<sup>239</sup> DEM BUNDESMINISTER DER JUSTIZ UND FÜR VERBRAUCHERSCHUTZ, *supra* note 229, at 41.



offences under § 211-213 *StGB*. A part of this group advocated to remove “insidiousness” as a characteristic of the aggravated form of murder.<sup>240</sup> The reason was that the socio-legal disapproval of insidious murders had been the same as in “normal” killings, and there had been no compelling reason to privilege an aggressive approach over a cunning one.<sup>241</sup> The expert group also admitted that *Haustyrannmordfälle* show a conspicuous proximity to self-defence or necessity, so that qualification of murder is hardly justified. This led the experts to consider the supplementation of the “insidiousness” characteristics with the “exploitation of defencelessness existing for other reasons” (*Ausnutzung einer aus anderen Gründen bestehenden Schutzlosigkeit*).<sup>242</sup>

Under § 213 *StGB*, murder under mitigating circumstances is an intentional murder provoked by rage resulting from maltreatment or serious insult made by the victim and immediate loss of self-control.<sup>243</sup> Application of this provision would diminish the sentence from that attached to “ordinary” murder.<sup>244</sup> This may evoke the partial defence of provocation that diminished the criminal responsibility from murder to manslaughter as considered in the common law jurisdictions discussed above. Theoretically, a woman killing her husband may be charged with murder under mitigating circumstances that carries a lower sentence, and her sentence may be further diminished by another set of facts to a suspended sentence.<sup>245</sup> However, where such mitigating circumstances are not provided, and charging that woman under the aggravated form of murder would produce a *prima facie* injustice, it seems that it is possible under German law to resort to the so-called legal consequence solution (*Rechtsfolgenlösung*).<sup>246</sup> A Regional Court, for example, has mitigated

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<sup>240</sup> *Id.* at 19

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 42.

<sup>243</sup> Similarly, to the provocation defence as a partial defence to murder under common law.

<sup>244</sup> ALAN REED & MICHAEL BOHLANDER, LOSS OF CONTROL AND DIMINISHED RESPONSIBILITY: DOMESTIC, COMPARATIVE AND INTERNATIONAL PERSPECTIVES 939 (2011) (ebook).

<sup>245</sup> *Id.* at 953.

<sup>246</sup> BUNDESGERICHTSHOF [BGH] [FEDERAL COURT OF JUSTICE] MAY 19, 1981, ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES [BGH] 30, 105 (1981) (Ger.).

the woman's sentence for "extraordinary circumstances" in just such a case.<sup>247</sup>

Depending on the particular case, evidence endorsed by the Convention may also be used in excluding the criminal responsibility of a woman killing her abusive husband, for example under conditions specified for self-defence and necessity. In principle, self-defence (*Notwehr*) and necessity (*Notstand*) would be available to abused women in German law.<sup>248</sup> As in common law jurisdictions, the problem is that both defences require an imminent attack (threat/danger) to be averted.<sup>249</sup> In principle, self-defence presupposes necessity – the defensive action is the only and the least intrusive means to terminate an unlawful attack.<sup>250</sup> Necessity, on the other hand, presupposes proportional means of averting the danger.<sup>251</sup> Moreover, both defences employ certain proportionality limitations (*Gebotenheit/Abwägung der widerstreitenden Interessen*),<sup>252</sup> which may be further strengthened in light of particular social-ethical norms such as a special relationship between the victim and the defendant, including husband and wife.<sup>253</sup> Earlier case-law of the Federal Court of Germany (*Bundesgerichtshof*) required spouses under certain circumstances to refrain from methods of defence that would prove reliable but fatal, even where less fatal methods would be less effective.<sup>254</sup> The *Bundesgerichtshof* no longer requires spouses to suffer at least minor

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<sup>247</sup> DEM BUNDESMINISTER DER JUSTIZ UND FÜR VERBRAUCHERSCHUTZ, *supra* note 229, at 3.

<sup>248</sup> STRAFGESTZBUCH [STGB] [PENAL CODE] §§ 32-35, <https://dejure.org/gesetze/StGB>. See Bohlander, *supra* note 244, at 944.

<sup>249</sup> However, not *Notstand* as a defence per STRAFGESTZBUCH [STGB] [PENAL CODE] § 35, <https://dejure.org/gesetze/StGB/35.html>.

<sup>250</sup> Kai Ambos and Stefanie Bock, *Germany*, in Alex Reed & Michael Bohlander, eds. GENERAL DEFENCES IN CRIMINAL LAW: DOMESTIC AND COMPARATIVE PERSPECTIVES 231 (Ashgate, 2014).

<sup>251</sup> STRAFGESTZBUCH [STGB] [PENAL CODE] §§ 34(1), <https://dejure.org/gesetze/StGB/31.html>.

<sup>252</sup> *Id.* (It is accepted that a gross discrepancy between the interests protected or harms caused on the side of the victim as well as defendant do not give rise to the right to self-defence); see also Bohlander, *supra* note 244, at 905.

<sup>253</sup> See Bohlander, *supra* note 244, at 947.

<sup>254</sup> MARKUS D. DUBBER & TATJANA HÖRNE, CRIMINAL LAW: A COMPARATIVE APPROACH 402 (Oxford University Press, 2014).

injuries before employing more serious means of protection.<sup>255</sup> However, it is generally expected that a woman should make certain sacrifices, such as calling the police first, leaving her home, and going to a women's shelter, unless this cannot be reasonably expected because she has children who cannot be left behind, she has financial problems, or she is at higher risk of social stigmatisation.<sup>256</sup> In certain circumstances, it can be legitimately expected that she undergoes a certain danger (in case of the defence of necessity).<sup>257</sup> In a landmark case, the *Bundesgerichtshof* required the defendant to retreat before striking in self-defence, which is noteworthy because the defendant aggravated the situation by displaying a knife that further provoked her abusive husband.<sup>258</sup> On the other hand, with respect to women in abusive relationships, it cannot be legitimately expected to "litigate a divorce or the institutionalisation of a cruel and violent husband if during the proceedings the violence would continue."<sup>259</sup>

Under German law, the defence of excessive self-defence (*Überschreitung der Notwehr*) is made available to persons who exceed the reasonable limits of self-defence in confusion, fear, or terror.<sup>260</sup> The purpose of this defence is to exonerate a psychologically stressed (asthenic) state of mind that seriously impacted the defendant's self-control.<sup>261</sup> Scientific evidence would be crucial to make the defence successful. The defence is, however, only available where the defendant went beyond the necessity requirement or violated the socio-ethical restrictions of the defence.<sup>262</sup> The concept of excessive self-defence under German law contrasts with that of excessive self-defence in common law, which has a status of partial defence, merely reducing the charge from murder to manslaughter,<sup>263</sup> and with the

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<sup>255</sup> See Bohlander, *supra* note 244, at 947.

<sup>256</sup> *Id.* at 950.

<sup>257</sup> *Id.* at 920.

<sup>258</sup> BUNDESGERICHTSHOF [BGH][FEDERAL COURT OF JUSTICE] APR.18, 2002, NEUE ZEITSCHRIFT FÜR STRAFRECHT [NSTZ] 509, 2002 (Ger.).

<sup>259</sup> See Bohlander, *supra* at 244, at 916.

<sup>260</sup> STRAFGESETZBUCH [STGB] [PENAL CODE], § 33, *translation at* <https://germanlaw.archive.iuscomp.org/?p=752> (Ger.).

<sup>261</sup> Bohlander, *supra* note 244, at 909.

<sup>262</sup> Ambos & Bock, *supra* note 250, at 227.

<sup>263</sup> The history of the concept of excessive self-defence is quite rocky and was not considered in this article in detail in the part dealing with common-law jurisdictions.

offence of defensive homicide as legislated for in the Crimes (Homicide) Act 2005 on the basis of the VLRC's recommendations.<sup>264</sup> The concept of excessive self-defence under German law may seem akin to the construction of self-defence upon a combination of subjective and objective elements necessary for its assessment, an approach suggested by the LRC of Ireland and by the Law Commission of England and Wales.

It is also possible that an abused woman was mistaken about the ambit of permissible actions under self-defence. This may be considered as putative self-defence, and must be assessed in the context of the severity of the abuse suffered and the time for consideration of these actions.<sup>265</sup> In this context, it is important to note, that the *Bundesgerichtshof* in the *Haustyrannmordfall* considered each action undertaken by the abused woman separately and not in a broader context, as the Convention would require.<sup>266</sup> Commentators note that this can be explained by a lack of expert opinion on the situation regarding battered women.<sup>267</sup> Putative self-defence may potentially lead to avoiding criminal responsibility for intentional

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The defence is currently available in Ireland by common law (*People (Attorney-General) v Dwyer* [1972] IR 416), South Australia by statute (see the *South Australian Criminal Law Consolidation (Self-Defence) Amendment Act 1997* s. 15(2)), in *New South Wales (Crimes Act 1900*, s. 421), Western Australia (*Criminal Code*, s. 248(3)), New South Wales (*Crimes Act 1900*, s. 421) and in South Australia (*Criminal Law Consolidation Act 1935*, s. 15(2)). The defence is not available in New Zealand, Tasmania the Northern Territory, Queensland and Canada. In the England and Wales, Law Commission proposed to reintroduced the defence in 1989 (English Law Commission. *A Criminal Code for England and Wales*, no 177, HMSO, London), however the defence has not been introduced. See NEW ZEALAND LAW COMMISSION. BATTERED DEFENDANTS VICTIM OF DOMESTIC VIOLENCE WHO OFFEND, Preliminary Paper 41; see also Mirko Bagaric, *Australia*, in Alex Reed & Michael Bohlander, eds., GENERAL DEFENCES IN CRIMINAL LAW: DOMESTIC AND COMPARATIVE PERSPECTIVES 189 (Ashgate, 2014).

<sup>264</sup> *Crimes Act 1958*, s. 9AD (Austl.).

<sup>265</sup> STRAFGESETZBUCH [STGB] [PENAL CODE] § 32, <https://dejure.org/gesetze/StGB/32.html> (It is a "mistake about the ambit of permissible reactions under duress."); Bohlander, *supra* note 244, at 951.

<sup>266</sup> BUNDESGERICHTSHOF [BGH] [FEDERAL COURT OF JUSTICE] MAY 19, 1981, ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES [BGH] 30, 105 (1981) (Ger.); see also Dubber & Hörne, *supra* note 254, at 419.

<sup>267</sup> Dubber & Hörne, *supra* note 254, at 418.

offences, while responsibility for negligent manslaughter is preserved.<sup>268</sup>

## 2. French law

Similar to German law, the French *Code pénal* differentiates the basic offence of homicide and aggravated forms of homicide.<sup>269</sup> The substantive construction is, however much more simplistic. There is no mitigated offence of homicide. The basic offence of homicide requires intention.<sup>270</sup> An aggravated form is constructed so as to include actions that have a certain relationship to another criminal offence, actions that are premeditated (*assassinat*), or actions that are directed against certain specified victims.<sup>271</sup> An aggravated form of murder also includes an act committed by the victim's spouse or partner.<sup>272</sup> Although the intention of the legislator was to become tougher on violence committed against women, it is possible that a battered woman killing her abuser would be covered by the same provision.<sup>273</sup> Since France abolished minimum penalties in 1994, homicide in the basic or aggravated form is no longer mandatorily punishable by imprisonment.<sup>274</sup> However, in France, a mandatory safety period for aggravated homicide prevents the individualisation of sentences to a certain degree, namely probationary release.<sup>275</sup> Also, in 2010, an amendment to Article 132-80 of the *Code pénal* was introduced, which increased the sanctions when a crime was committed by the (former) spouse or partner.<sup>276</sup>

French law, just like German law, recognises several defences to criminal responsibility, with the exception of the *Überschreitung der Notwehr*, which does not find an analogy in the *Code pénal*. Under the

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<sup>268</sup> STRAFGESETZBUCH [STGB] [PENAL CODE] § 16(1), <https://dejure.org/gesetze/StGB/16.html>; see Ambos & Bock, *supra* note 250, at 232.

<sup>269</sup> CODE PÉNAL [C. PÉN.] [PENAL CODE], art. 221-1, 221-3 (Fr.).

<sup>270</sup> JR Spencer, *Intentional Killings in French Law*, in HOMICIDE LAW IN COMPARATIVE PERSPECTIVE 42 (Jeremy Horder ed., 2007).

<sup>271</sup> CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 221-2 (Fr.).

<sup>272</sup> *Id.* at art. 221-4 (Fr.).

<sup>273</sup> See Leray & Monsalve, *supra* note 34.

<sup>274</sup> Spencer, *supra* note 270, at 40.

<sup>275</sup> *Id.* at 41-42.

<sup>276</sup> CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 132-80 (Fr.).

defence of duress in French law (*contrainte*), a person is not criminally responsible when acting under the influence of a force or a constraint which he or she could not withstand.<sup>277</sup> Such could possibly encompass fears of specific reprisals from the abusive husband (external psychological constraint).<sup>278</sup> In common law systems, this would correspond to a defence of necessity (duress of circumstances).<sup>279</sup> Consequently, the provision of duress could be favourable to victims of domestic violence, placed under the influence of conjugal terror in a situation of psychological subjugation and extreme dependence, thereby rendering it dangerous to break the spiral of domination.<sup>280</sup> This construct has, however, never been tested in the case-law of French courts.<sup>281</sup> It has been recently proposed by the National Consultation Commission on Human Rights that duress be more commonly accepted by French courts as a defence in the context of domestic violence.<sup>282</sup>

It is also possible to consider the defence of necessity, requiring satisfaction of the requirements of imminence and proportionality.<sup>283</sup> Similar to German law, the danger that is being averted must have truly necessitated the defence. If the offender could have resorted to other means of safeguarding her interests, she could not avail of the defence, "unless this was the best course of action."<sup>284</sup> A lawful use of self-defence (*légitime défense*) requires an unlawful attack; however, an attack on peoples' morals is also sufficient.<sup>285</sup> Comparable to German

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<sup>277</sup> *Id.* at art. 122-2 (Fr.).

<sup>278</sup> Catherine Elliott, *France*, in GENERAL DEFENCES IN CRIMINAL LAW: DOMESTIC AND COMPARATIVE PERSPECTIVES 219 (Alex Reed & Michael Bohlander, eds., 2014).

<sup>279</sup> AP SIMESTER & WARREN J BROOKBANKS, PRINCIPLES OF CRIMINAL LAW 355-358 (Brookers & Wellington, 1998).

<sup>280</sup> Commission Nationale Consultative des Droits de l'Homme, *Avis sur les violences contre les femmes et les féminicides*, Mai 26, 2016 ass. plén. (Fr.).

<sup>281</sup> See Rozenn Le Carboulec, *Violences conjugales: faut-il reconnaître la légitime défense des victimes tuant leur conjoint?*, SLATE FR (Jan. 22, 2020), <http://www.slate.fr/story/186398/violences-conjugales-reconnaissance-legitime-defense-victime-homicide-conjoint-droit-penal-criteres-presomption>.

<sup>282</sup> Commission Nationale Consultative des Droits de l'Homme, *supra* note 280.

<sup>283</sup> C. PÉN. art.122-7 (Fr.).

<sup>284</sup> Elliott, *supra* note 278, at 218.

<sup>285</sup> Ambos & Bock, *supra* note 250, at 227 (In the 1960s, the defence was made available to a mother who assaulted a young woman with loose morals trying to corrupt her under-aged son.).

law, self-defence requires proportionate responses to present or imminent attacks, i.e. no time lapse is permitted between the attack and the response.<sup>286</sup> These requirements also recently came under review by the National Consultation Commission on Human Rights, which recommended that self-defence be modified by integrating elements of individualised assessments such as size, age, sex, previous relationship, or physical capacities of the parties involved.<sup>287</sup> In addition, a recent amendment of the French *Code pénal* proposed to create a separate complete defence to criminal responsibility if the offender experiences psychic or neuropsychic impairment due to repeated domestic violence that alters her discernment or affects her control over her actions.<sup>288</sup> In this way, it is possible to recognise domestic violence as an atypical situation, a product of which is extraordinary psychology that tears apart learned patterns of behaviour.<sup>289</sup>

### 3. Discussion

The above presents an outline of possible venues where the types of evidence endorsed by the Convention (e.g. concerning the proper understanding of the nature and cycle of domestic violence, of its dynamics, and how myths and stereotypes around victims' behaviour may be dispelled) may be subsumed or channelled into. A number of key points emerge.

First, France and Germany have both considered certain reforms to their criminal laws that would better accommodate the situations of women killing their domestic abusers.

Second, both jurisdictions include laws governing self-defence, applying similar elements for its assessment. It is likely that without substantive changes to the concept of self-defence,

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<sup>286</sup> C. PÉN. art. 122-5, Crim 7 déc 1999, B, no 292 and Crim 20 oct 1993, Dr Pén 1993, 34.

<sup>287</sup> Commission Nationale Consultative des Droits de l'Homme, *supra* note 280.

<sup>288</sup> Loi 1808 du 27 mars 2019 *de renforçant la protection des victimes, la prévention et la répression des violences physiques et sexuelles* [Law 1808 of Mar. 27, 2019 on strengthening the protection of victims], Enregistré à la Présidence de l'Assemblée nationale.

<sup>289</sup> See Jiřina Voňková & David Oplatek, *Vraždy v kontextu domácího násilí* (2015); *cf.* Hopkins & Easteal, *supra* note 48 (contesting this view).

comparable to those suggested in France, evidence endorsed by the Convention may be difficult to adduce during legal assessments in court.

Third, the respective classifications and elements of homicide offences in France and Germany are fundamentally different. In any jurisdiction, where such differentiation exists, evidence considered under the Convention could potentially be used to avoid the gravest homicide charge or even to make a legal appraisal of the factual situation to the benefit of the mitigated form of homicide. In this way, Germany offers a more varied selection of potential application of the evidence.

Fourth, in Germany, it would be certainly possible to consider social framework evidence that helps to better understand the circumstances of battered defendants under the so-called *Rechtsfolgenlösung*.

Fifth, social framework evidence could also play a role in the context of assessing the German concept of putative self-defence. Some of the observed practices have clearly been non-compliant with the Convention, such as the non-contextual assessment of battered women's situations in claims of putative self-defence by German courts.

Sixth, in Germany, on the basis of the evidence endorsed by the Convention, it could be equally possible to downplay certain requirements concerning the level of danger and attacks a female defendant needs to demonstrate in order to successfully plead necessity or self-defence.

Seventh, in both jurisdictions, there is a risk that relevant facts will be subsumed under certain legal categories in which the context of any history of a domestic violence relationship is irrelevant, for example insidiousness in German law or whether the victim of the homicide was the defendant's husband in French law. Such categories may automatically aggravate the criminal responsibility of the defendant. If the relevant facts are shown, the legal assessment is inescapable. For that reason, a reform of such, seemingly gender-neutral and potentially gender-biased, legal categories were proposed by the expert bodies.

Eighth, it should be noted that there are also other legal categories that provide a space for contextual (social framework)



evidence. Examples include the mitigated form of murder (§ 213 *StGB*) or excessive self-defence (§ 33 *StGB*).

Ninth, and final, French criminal law is more compact and integrated, and therefore creates fewer apertures for contextual evidence to slip through. The defence of duress could provide such an opportunity (Article 122–2 *Code pénal*). However, for now, it may seem more promising for contextual evidence to wait for the new defence, applicable in cases of repeated domestic violence, to be legislated for.

The above demonstrates that evidence and substantive legal rules interact on at least four levels: first, during the investigation phase, the police and the prosecutor must gather evidence and identify all of the relevant circumstances that relate to the criminal offence. After the establishment of the factual side of the case, one may proceed with the legal appraisal of the relevant facts. Second, elements of legal rules may require certain types of proof, such as the proof of imminence; therefore, certain facts must be “found” to satisfy the legal definition. Third, legal rules may be crafted in a bottom-up process, in which a rule is formulated based on individual cases (such as pub brawls involving men of equal size presented the initial model for the contemporary rule on self-defence). Fourth, legal rules may be crafted in a top-down process, in which a legal norm is created on the basis of scientific evidence of social or other phenomena, such as clinical psychological, medical, criminological, or social framework evidence that would relax the imminence requirement.<sup>290</sup> However, the emphasis on doctrinal coherence may present challenges to such an evidence-law interaction.<sup>291</sup> New legal rules may then require a change in evidentiary rules on their own motion, such as expanding the admissibility rules that would allow for the inclusion of evidence of history of violence, contextual evidence, and other types of evidence. Counter-clockwise, evidentiary rules and practice, as required by international treaties, may be capable of provoking a change in a (substantive) legal rule, such as that governing self-defence.

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<sup>290</sup> See Marilyn McMahon, *Homicide, Self-defence and the (Inchoate) Criminology of Battered Women*, 37 CRIM. L.J. 2, 79 (2013) (McMahon says that “law reform is increasingly underpinned by empirical research.”).

<sup>291</sup> See Braun, *supra* note 87, at 247-70 (citing Bohlander, *supra* note 244); Helmut Gropengiesser, DER HAUSTYRANNENMORD (2008).

## CONCLUSION

International law no longer consists exclusively of a system in which the interests protected are vastly different to those protected at national level. However, international society is not one that lends itself to coherent, homogenous and stable propositions.<sup>292</sup> In the field of women's rights, the Istanbul Convention is a leading example of the problems that may arise in the context of a one-size-fits-all model, even on a regional level. Evidentiary requirements under the Convention that reflect the latest social science research represent a unique driver of change. In the case of the Convention, such scientific evidence derived from the research is presumed to seep deep into domestic laws and individual cases. However, problems arise when evidence endorsed by the Convention can be subsumed under several domestic legal concepts simultaneously. Problems also arise when there is no general or residual category under which evidence may be considered and found legally relevant. Furthermore, even if the Convention sees charging a woman acting against her abuser as secondary victimisation, there is a long way to travel from the legal classification of such an act as intentional killing, to killing under mitigating circumstances, to unintentional killing and ultimately to avoiding criminal responsibility based on the evidence presented, as implicitly envisaged by the Convention.

However, the latest social science, medical, and other research drives compliance and reform. In criminal law, it justified reforms to self-defence, including the removal of the imminence requirement or changes to the defence of provocation. In certain cases, it also necessitated express provisions for the leading evidence about domestic violence that was often misunderstood. The question therefore remains in which direction the evidentiary requirements under the Convention, which include evidence with significant consequences when admitted at trial, actually point.<sup>293</sup> Do they point in the direction of the exclusion of criminal responsibility of women who kill their abusers in extreme cases? Such a question is open to

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<sup>292</sup> See Study Group, Int'l L. Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682, at 10 (Apr. 16, 2006).

<sup>293</sup> See Campbell, *supra* note 213.

domestic debates by individual Parties to the Convention. The evidentiary requirements under the Convention may be capable of fostering a discussion about the gendered operation of self-defence in the domestic law of Parties or may invite domestic judicial actors to reflect upon the gender-neutral applicability of legal categories that mitigate criminal responsibility. Next, sentencing considerations may open. Notably, the Australian examples may offer indications as to what form such deliberations can take.

The authors of this article believe that such debates should include many different aspects of the issue,<sup>294</sup> including support available to victims of domestic violence, and hence the Parties' compliance with this requirement under the Convention.<sup>295</sup> They also believe that if the Convention should prescribe the criminalisation of certain offences, it must also explicitly provide for exclusion from criminal responsibility. "Despite the centrality of concern for battered [women] in much contemporary discussion in criminology and the criminal law [more broadly], it appears that there is still substantial research to be done to clarify [all] circumstances in which [female] victims of [domestic] violence kill their abusive partners."<sup>296</sup> Meanwhile, in Ireland, Italy, or Australia, cases of women who took the law into their own hands continue to re-appear and resonate in the public sphere.<sup>297</sup>

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<sup>294</sup> See Lysova, *supra* note 80, at 508; Australian Law Reform Commission, *supra* note 201.

<sup>295</sup> See McColgan, *supra* note 82, at 529. *But see* FIONA BROOKMAN, UNDERSTANDING HOMICIDE 1743 (2005) (indicating that such support may not suffice in every case).

<sup>296</sup> See McMahon, *supra* note 290.

<sup>297</sup> See Natasha Reid, *Woman possibly under deadly attack from boyfriend when killing occurred, judge hears*, BREAKING NEWS (July 22, 2019) <https://www.breakingnews.ie/ireland/woman-possibly-under-deadly-attack-from-boyfriend-when-killing-occurred-judge-hears-938645.html>; Chris Bayes, *Teenage girl who killed abusive father released after prosecutors say she acted in self-defence*, INDEPENDENT (May 22, 2019) <https://www.independent.co.uk/news/world/europe/deborah-sciacquatoriolorenzo-killed-abusive-father-monterotondo-italy-a8925631.html>; *see also* Giovanni Torre, *Landmark Australian ruling allows woman who murdered her abusive partner out of jail eight years early*, TELEGRAPH (September 26, 2019) <https://www.telegraph.co.uk/news/2019/09/26/landmark-australian-ruling-allows-woman-murdered-abusive-partner/>.