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

### **A. Introduction**

The Inter-American Convention to Prevent, Punish and Eradicate Violence Against Women, also known as the Belém do Pará Convention, came into force in 1995<sup>1</sup>. The Convention affirms that violence against women constitutes a violation of human rights and that it prevents the partial or whole recognition, enjoyment and exercise of women's human rights<sup>2</sup>. In addition, the Convention defines violence as any gender-based action or behavior that causes the death, injury or physical, psychological or sexual suffering of women, whether in the public or private sphere<sup>3</sup>.

The Committee of Experts, known as the CEVI, of the Follow-up Mechanism of the Belém do Pará Convention (MESECVI), is the technical organism of the Mechanism responsible for analyzing and evaluating the implementation of the tenets of the Convention by the States Parties. In the course of their duties, the CEVI points out that violence against women in the region remain a reality. This is particularly visible with respect to femicide/femicide<sup>4</sup> and most especially, although not exclusively, in the violence committed against women by their romantic partners and ex partners.

The Committee notes a recurring situation, many women who have killed or injured their aggressors while defending themselves from attack within the context of an interpersonal relationship, do so in a domestic situation and these defensive acts are in response to gender-based violence. Add to this the existing structural problems related to access to justice for women in the region<sup>5</sup>, and many women end up being tried for the crimes of homicide or grievous bodily harm when, in fact, they were fighting for their lives, and/or for the lives of their children. The Committee points out those governmental

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<sup>1</sup> Specifically, May 30, 1995, on the 30th day after the submission of the instrument of ratification.

<sup>2</sup> Articles 4 and 5 of the Convention.

<sup>3</sup> Article 1 of the Convention.

<sup>4</sup> See "The Inter-American Commission on Human Rights condemns the killing of women and urges States to intensify their prevention efforts", May 16 de mayo de 2017, available at: <http://www.oas.org/es/cidh/prensa/comunicados/2017/062.asp>

<sup>5</sup> The Inter-American Commission on Human Rights (IACHR), "Access to justice for women victims of violence in the Americas", January 28, 2007, available at: <https://www.cidh.oas.org/pdf%20files/Informe%20Acceso%20a%20la%20Justicia%20Espanol%20020507.pdf>

organizations that have taken an interest in this topic and have highlighted the need to incorporate a gender perspective into these judicial rulings<sup>6</sup>. Various courts have recognized these situations and applied a gender perspective to their decisions, specifically identifying the need to take into account the violent gender-based situations of the women victims. In one example, the Supreme Court of Justice of the Mexico has ruled that cases that involve women victims of domestic violence, who face charges related to the injury of their attackers, must be judged according to standards that include a gender perspective<sup>7</sup>.

Article 4 of the Convention noted the right of women to have their lives, and physical, psychological and moral integrity respected, as well as the right to “equal legal protection under the law”<sup>8</sup>. Additionally, Article 7 identifies the obligation of the States Parties to take all necessary measures to amend legal or customary practices that perpetuate the persistence or tolerance of violence against women, and their obligation to prevent, investigate and punish violence against women. The Inter-American Court of Human Rights has also defined the obligation to apply a gender perspective to the analysis of evidence<sup>9</sup>.

The CEVI will analyze the international obligations of the States Party to the Convention to ensure women’s ability to argue self-defense in cases where they were themselves the victims of violence. The analysis will begin by examining the required components of self-defense within criminal law theory, and compare that definition with decisions handed down by national courts in the region and the standards of the Convention itself. Following this analysis, the Committee will look at the weighing of evidence with a gender perspective, and finally present conclusions and recommendations on the international obligations of the States Party to the Convention with respect to this topic.

## B. Elements of Self Defense

**1. Existence of illegal aggression.** Illegal aggression is defined as an illicit act, whether by action or omission, that leads to injury or endangers a legally protected asset; it must also include some action,

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<sup>6</sup> For example, the National Institute of Women, the Human Rights Commission of Quintana Roo and the Public Prosecutor of the State, At: SEMLAC. México: *Intervendrá el gobierno en defensa de mujer*. April 11. Available at: <http://www.redsemlac.net/index.php/genero/item/2325-mexico-intervendra-el-gobierno-en-defensa-de-mujer>

See also: Public Prosecutor of the State of Rio de Janeiro: “*Eu não posso me arrepende de uma coisa que eu não queria fazer.*” December 14, 2017. Available at: 14 de dezembro de 2017. Disponível en: <http://www.defensoria.rj.def.br/noticia/detalhes/5429-Eu-nao-posso-me-arrepende-de-uma-coisa-que-eu-nao-queria-fazer->

<sup>7</sup> Supreme Court of the Nation of Mexico. *Women who suffer domestic violence aand confront their attackers should be judged using a gender perspective: First Room.* March 7, 2018. Available in Spanish at: <http://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=4687>

<sup>8</sup> Article 4 of the Convention.

<sup>9</sup> See: Inter-American Court of Human Rights. *Caso González et al. (“Cotton Field”) v México.* Excepción Preliminar, Fondo, Reparaciones y Costas. Sentencia de 16 de noviembre de 2009, *Caso del Penal Miguel Castro Castro Vs. Perú.* Fondo, Reparaciones y Costas. Sentencia de 25 de noviembre de 2006. Serie C No. 160, *Caso Espinoza González Vs. Perú.* Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 20 de noviembre de 2014. Serie C No. 289, *Caso J. Vs. Perú.* Excepción Preliminar, Fondo, Reparaciones y Costas. Sentencia de 27 de noviembre de 2013. Serie C No. 275

both as an attack as well as in defense<sup>10</sup>. “... an illicit attack is not only one that causes injury to a legal asset, but also one that threatens a *legal asset*, and presents a *concrete danger*, a danger that, *ex ante*, is objectively able to cause damage a legitimate self interest or interest of a third party”<sup>11</sup>.

The CEVI maintains that there is no doubt that gender-based violence is illegal, as it is not only prohibited by legislation throughout the region<sup>12</sup> but is also defined and punished in the Convention to Prevent, Punish and Eradicate Violence Against Women (Belem do Para Convention)<sup>13</sup>, which also establishes that physical, sexual and psychological violence is included in the definition:

- a. whether it takes place in the family or domestic unit or within the context of any interpersonal relationship; whether the attacker shares or has shared the same residence as the woman, and includes, among other acts, rape, abuse and sexual assault;
- b. whether it takes place in the community, committed by any individual, and includes, among other acts, rape; sexual abuse; torture; human trafficking; forced prostitution; kidnapping and sexual harassment in the workplace, educational institutions, healthcare institutions or any other location, and
- c. it is committed or tolerated by the State or its agents, regardless of location. (Art. 2 Belem do Para Convention).

**2. Imminent threat or current existence of violence.** The CEVI notes that some national courts have recognized and accepted self-defense as an argument from women victims of gender-based violence committed by their partners. To meet the standards of self defense, there must be an imminent threat of violence or the existence of current violence and must indicate if the violence is sufficiently imminent to merit a legal remedy. This requirement attempts to determine at what point self defense can be legitimately claimed, or at what point the victim can legitimately state, “I couldn’t wait any longer.”<sup>14</sup>

The CEVI believes that the requirement to prove an imminent threat of violence should include a gender perspective, as the failure to do so prevents women from feeling like they can freely defend

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<sup>10</sup> Rioseco Ortega, Luz. Culminación de la violencia doméstica. Mujeres que asesinan a sus parejas – Defensas penales posibles. Disponible en línea: <http://observatoriojyg.org/index.php/313-doctrina/4-victimas/2-derecho-infractoras/814-culminacion-de-la-violencia-domestica-mujeres-que-asesinan-a-sus-parejas-defensas-penales-posibles>

<sup>11</sup> Villegas Díaz, Myrna. Homicide in intrafamilial couples. Women killers and exemption of responsibility. In Revista de Derecho, Vol. XXXIII, N° 2, December 2010, p. 153. The feet of the pages of the original were omitted.

<sup>12</sup> 100% of the countries in the region have a law or public policy to protect women and punish violence against them. Third Hemispheric Report. Page 38. Available at: <http://www.oas.org/es/mesecvi/docs/TercerInformeHemisferico.pdf>

<sup>13</sup> The Belem do Para Convention was ratified by 32 of the 35 member states of the OAS.

<sup>14</sup> Di Corleto, Julieta. Women Who Kill. Self defense in cases of beateen women. Review of Criminal Law and Procedure, Lexis Nexis, N° 5/2006, May 2006.

themselves when confronted with violence<sup>15</sup>. Gender-based violence that exists within a legal or common law couple cannot be considered an isolated occurrence, as its ongoing nature consistently infringes the woman's rights to freedom, security and her physical and psychological integrity<sup>16</sup>.

In the same vein, CEVI finds that the ongoing threat of imminent violence against women can be characterized by two main elements: First, the violence is ongoing within a cohabitating couple as it can occur at any moment and be triggered by any circumstance; second, the woman suffers from the constant fear, anxiety, and worry that she will be attacked at any moment<sup>17</sup>. CEVI considers since this represents a continuously violent situation, the requirement to prove an imminent threat should address more than just the exact moment of the attack<sup>18</sup>, as the action does not take place at one isolated moment in time, but rather is but one incident within a *continuum* of violence wherein the beginning is easily identifiable, but the end cannot be specifically determined.

Additionally, violence tends to be cyclical, as women who have been abused in the past are likely to be abused again<sup>19</sup>. The cycle of violence works like a trap – the woman remains in the relationship because the man assumes a courting attitude and she believes that her dream of romantic love has come true. The behavior of the aggressor reinforces her decision to stay in the relationship. While poverty and a lack of family support are risk factors that intersect with violence and reduce the ability for the woman to escape, they are not the primary reasons women stay<sup>20</sup>.

CEVI, therefore, believes that violence that occurs within the context of interpersonal relationships should be seen as a cyclical problem that exists in daily family life, as it represents an “imminent harm” for those women who fall victim<sup>21</sup>. It is not unreasonable to believe that women who are the victims of regularly occurring violence, and those who expect it at any moment, believe that their attacker intended to kill them<sup>22</sup>.

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<sup>15</sup> See Cassation of the Province of Buenos Aires, Chamber 6, c. 69965 "L. ,S. B. s/ appeal filed by individual victim" and her accumulated N° 69.966, July 5, 2016

<sup>16</sup> See Cassation of the Province of Buenos Aires, Chamber 6, c. 69965 "L. ,S. B. s/ appeal filed by individual victim" and her accumulated N° 69.966, July 5, 2016

<sup>17</sup> See Cassation of the Province of Buenos Aires, Chamber 6, c. 69965 "L. ,S. B. s/ appeal filed by individual victim" and her accumulated N° 69.966, July 5, 2016

<sup>18</sup> (Case “XXX s/Aggravated Homicide by association”, April 28, 2014).

<sup>19</sup> (Case “XXX s/Aggravated Homicide by Association”, April 28, 2014).

<sup>20</sup> Lenore Walker. (1979). *The Battered Women*, Perennial Library, Harper & Row Publishers, New York

<sup>21</sup> (Case “XXX s/Aggravated Homicide by Association”, April 28, 2014) This is related to, “the women finds herself trapped in a circle, where an attack is always imminent, precisely because it is a vicious cycle she cannot escape because of her fear of retaliation, she knows the aggression will reoccur, the jealousy will never end, resulting in a permanently latent imminent threat of violence. Since the victim general does not report the acts out of fear, she becomes increasingly more isolated and rarely tells the whole story of what occurred, whether because of danger or because of shame.” (S.T.J. de San Luis in re “Gómez, María Laura s/ simple homicide”, ruling n° 10/12 February 28, 2,012).

<sup>22</sup> (State v. Nelly, 478 A.2d 364 -1.984-).

Further, the CEVI believes that the permanent threat of imminent violence within the context of violence against women should be broadly interpreted. Some courts in the region have made this connection; for example, the Court in Chile found<sup>23</sup> that the imminent threat of domestic violence suffered by the plaintiff meant that the victim did not have to wait for the actual violence to be about to occur, noting that, “there is no need to wait until the other acts first<sup>24</sup>” and that, “it is not necessary that the attack against the person take place in order for the victim to defend themselves, it is enough that they fear an imminent danger in order to take appropriate measures to avoid it<sup>25</sup>”.

The Convention includes any gender-based conduct or action that causes death, physical suffering or injury in its definition of violence against women. In addition, Article 7 of the Convention requires States Party to take all necessary measures to amend legal practices that perpetuate the existence and tolerance of violence against women. This last obligation implies an in-depth analysis of the requirements necessary to prove an imminent threat of violence to identify the structural inequalities that exist for women, and well as the specific dynamics of violence, particularly within the context of the domestic sphere or interpersonal relationships.

**3. Reasonable use of means employed to repel the attack.** There is a value judgment associated with the proportionality of the conditions, means and risks of attack and the defensive measures employed to repel the violence.<sup>26</sup>

CEVI believes that when women victims of violence claim self-defense, courts must include a gender perspective as they consider the options available to the women. Along these lines, the proportionality of the response is linked to the ongoing nature of the aggression suffered. That is, the degree of response of self-defense is responding to an ongoing and permanent act of violence lived on a daily basis by the victim. The Supreme Court of Justice of the Nation of Argentina noted as much in its decision in, “Leiva, María Cecilia, simple homicide”, November 1, 2011:

*[in response to the requirement for reasonableness of the means employed], in this case, as in others like it, various suggestions are made by the plaintiff regarding what the woman should have or could have done instead of shooting her husband. However, all these suggestions – report him to the authorities, flee with her daughter, separate from her husband – reside in an “ideal” world. Reality, supported by statistics, shows exactly the opposite, and is reflected in the objective and subjective impossibility of an easy escape from the cycle of domestic violence.*

<sup>23</sup> Supreme Court decision, December 28, 2000. Ruling on the merits of appeal Rol 1282-00

<sup>24</sup> Valparaíso Appeals Court ruling March 27, 2006. Rol N° 7356-04. Recurso n° 7356/2004, Decision N° 10736.

<sup>25</sup> Rev. de Derecho y Jurisprudencia, Volume 67, 1970, secc. 4 pp. 291-295. Cit by Campos, M.-Navea, K.-Olivos, F. Uxoricidio: reaction of a women to domestic violence. Masters thesis in Legal and Social Science, directed by Loreley Friedman V. , Law Faculty, University of Chile, 2004, pp. 100-101

<sup>26</sup> Saavedra, Juan Ruiz. Requirement for Reasonableness of the means employed. Available online in Spanish:

<http://lawcenter.es/w/pages/view/2891/necesidad-racional-del-medio-empleado>

*These suggestions contradict the content of international instruments and internal regulations on the topic, as sustained by the Supreme Court, who found, “this affirmation [...] to discredit an assumption of self defense, that, because of the mere presence of the women in the home she shared with the deceased – a presence assumed to be voluntary – promotes the belief that she submitted voluntarily to a hypothetical illicit attack, and not only ignores the provisions of international conventions and internal norms that address the issue, but also directly contradicts their content.*

Women victims of gender-based domestic violence cannot be obliged to “put up with it” and not defend themselves. When the violence occurs within a marriage or a domestic partnership that, by definition, implies unity between the two parties, this obligation ceases to exist between the two<sup>27</sup> and the woman is not obliged to tolerate abuse or be forced to abandon her home instead of defending herself<sup>28</sup>. A court in Brazil used this argument to acquit a woman who had killed her ex partner, arguing that she fired a shot in self defense, as a final act in response to ongoing and worsening domestic violence that occurred when her ex partner began to sell and use drugs. At the same time, she explained that she had not reported him to the authorities because she lacked an alternative means of economic support for her and her daughter.<sup>29</sup>

CEVI notes that the requirement to meet the standard of reasonable need for the means employed does not mention proportionality between the type of violence and the defensive response<sup>30</sup>, and that there is a connection between proportionality and the duration of the violence perpetrated against the woman in these circumstances. The apparent “disproportionality” between the nature of the attack and the means of self-defense that occurs in some of these cases can represent the fear suffered by the women that the method of self-defense they choose will not be effective, that the attacker will recover quickly, and he will unleash the totality of his fury against her. Therefore, the CEVI reiterates that there is a definite connection between the method of self-defense employed by women who find themselves in a situation where they must defend themselves<sup>31</sup>.

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<sup>27</sup> See Claus Roxin, “Derecho Penal. Parte General. Tomo I. Fundamentos. La estructura de la teoría del delito”, Civitas, Madrid, 1997, p. 652, n° 83 (Criminal Law. General. Volume I. Fundamentals. The Structure of Criminal Theory.)

<sup>28</sup> See Claus Roxin, “Derecho Penal. Parte General. Tomo I. Fundamentos. La estructura de la teoría del delito”, Civitas, Madrid, 1997, p. 652, n° 83 (Criminal Law. General. Volume I. Fundamentals. The Structure of Criminal Theory.)

<sup>29</sup> Court of Justice of the State of Para. *Woman Accused of killing her partner found not guilty by Self Defense*. June 12, 2017. Available in Portuguese at: <http://www.tjpa.jus.br/PortalExterno/imprensa/noticias/Informes/568742-Acusada-de-matar-companheiro-e-absolvida-por-legitima-defesa.xhtml>

<sup>30</sup> Tapia Ballesteros, Patricia. Self Defense. Requirements and applicability in resumed gender-based violence. *Doctrina y Jurisprudencia Penal* n° 16, 2014, p. 46.

<sup>31</sup> See *Ibid*. For example, the Chamber of Criminal Cassation of the Supreme Court of Justice of Venezuela in its ruling SSCP 194 of May 30, 2016, found that the accused had defended herself “with the only means available” and had grabbed the knife from her attackers hand during a struggle and caused several wounds that resulted in his death.

As a result, the CEVI believes that the use of a gender perspective during these types of trials implies consideration of the context in which both the attack and the self-defense took place. (The disparity in physical size (often women are physically smaller than their attackers<sup>32</sup>); the socialization of gender roles (often women are not trained to respond in kind to physical threats<sup>33</sup>) or the lack of training in the use of weapons<sup>34</sup>), as well the dynamic of the cycle of violence itself, that deprives women of the emotional tools to react in accordance with the masculine standards presented by traditional criminal law<sup>35</sup>. For the CEVI, the historical inequalities that exist in power relationships between women and men explain the apparent lack of reason in the choice of the method of self defense used, and courts must hear these cases using a gender perspective in accordance with obligations undertaken by the States as a part of their assignation to the Convention.

With respect to the instrument analyzed, the CEVI notes that the law does not require proportionality, but rather the lack of unusual disproportion between the attack and self-defense in terms of the damage caused. It follows that an act of self-defense cannot be considered unreasonable if the physical superiority of the attacker prevents the woman victim from using the same means to defend herself<sup>36</sup>. The final judgment should be *ex ante*, reflecting the situation of the actor at the moment the act occurred<sup>37</sup>. In addition, the CEVI contends that the context of the women victims of violence must be considered when determining the reasonableness of the means of self-defense employed.<sup>38</sup>

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<sup>32</sup> For example, in the case “L.J.S.R. simple homicide”, the Supreme Court of Tucumán (Argentina) considered the smaller physical stature of the accused woman with respect to her attacker and the impossibility of her ability to respond to defender herself in kind. Ruling dated December 22, 2015.

<sup>33</sup> For example, in a case in Chile, the Supreme Court ruled that the use of a weapon by a woman who had been beaten by a boxer with knowledge martial arts to be reasonable, as she had no other way to repel the attack using the same means as her attacker. Supreme Court of Chile. Ruling on the merits of the cassation, Rol 1282-00, December 28, 2000.

<sup>34</sup> Di Corletto suggests that the typical disadvantages of size, strength and the lack of training in its use be considered when evaluating the use of a weapon by women. Di Corletto, Julieta. Women who kill. Self Defence in cases of battered women. Revista de Derecho Penal y Procesal Penal Lexis Nexis n° 5/2006, May 2006.

<sup>35</sup> Cfr. Larrauri, E., 2008. “Mujeres y Sistema Penal. Violencia Doméstica.” Buenos Aires: Euro Editores.

<sup>36</sup> See Zaffaroni, Eugenio Raúl, Alagia, Alejandro and Slokar, Alejandro. Criminal Law manual. General. Ediar, Buenos Aires, 2005, p. 483 and 474-475 respectively. According to the authors, “the law does not require equalization or proportionality of the instrument, but rather the absence of extreme disproportion between the aggression and the defense, especially in their respective passivity. As such, defence will not be irrational ... from one who uses a knife or a gun against someone who is beating them with their fists, if the physical superiority of the attacker prevents an effective defence using the same means”.

<sup>37</sup> See Chiesa, Luis Ernesto. Abused Women and Self defense: the Anglosaxon experience, in the Revista Penal n° 20, July 2007. Available online at: <https://www.uhu.es/revistapenal/index.php/penal/article/viewFile/321/312>. Chiesa maintains that the, “reasonableness of acting (of the person) in these cases should be determined by asking what a reasonable person would have done in the same situation.”

<sup>38</sup> El CEVI finds that this line of argument has been used by different States Parties of the Convention. One example is a case of defense in Ecuador, when a woman killed her husband with a knife to defend herself from attack. The defence highlighted the circumstances under which the woman had stabbed her husband – she was a Jehovah’s Witness, she was completely submissive to him, she did not have her own mobile phone like he did, she was at a physical disadvantage in the fight, and that there was a history of abuse in the marriage. Nevertheless the court still found that excessive force was used, and she was found guilty of homicide. The case is now under appeal (see Court of Criminal Guarantees, based in Canton Ibarra. Case No. 10282-2017-00082. State v. Zolia Elizabeth Pamilo Vásquez).

**4. Requirement to prove a lack of provocation.** The requirement to prove a lack of provocation by the person defending herself from attack has been interpreted in criminal law as the lack of any kind of prior behavior on behalf of the aggrieved, proportional to the degree of the entire attack or up to a certain degree<sup>39</sup>. CEVI has found that this requirement has been misused. It frequently results in women who report sexual assault being accused of provoking the act. Existing gender stereotypes<sup>40</sup> result in the belief that the woman consented to the act – or at a minimum, that her behavior allowed it to happen. Some explanation include that she was walking alone, walking at night, or behaving or dressing in a way that indicated her willingness, for example. Seeing women as objects or property under the control of men is a part of the gender stereotyping, and serves to validate or justify violence against them, including within the family context<sup>41</sup>. Additionally, there is a wrongful belief that a woman has a conjugal duty to behave a certain way with her spouse or permanent partner, from the perspective of subordination. These practices must stop being naturalized or normalized in our Region.

CEVI believes that self-defense is a reaction to an aggression or attack that threatens a protected legal asset such as life and personal integrity. Maintaining that the behavior of the woman is the root cause of the attack demeans self defense and reinforces negative gender stereotypes, ignoring the prologue of the Convention that declares that violence against women is a violation of the human rights of women and their fundamental rights, as well as representing an “offense against human dignity and a manifestation of the historically unequal power relationships between men and women,” and that cannot be provoked under any circumstances.

The CEVI is worried that the persistence of gender stereotypes and the lack of application of a gender perspective in the judgment of these cases could lead to an inaccurate evaluation of the behavior of women in gender-based violent situations when considering whether the requirements form self defense have been met or not. This problem should be observed not only in the modality of relationships, of couple, family or community; the school, work, political, dating, etc., should also be considered.

The CEVI has reevaluated the importance of eliminating gender stereotypes in the reasoning, attitudes and actions of public servants, especially in the judicial sector where they can have serious implications with respect to the effective access to justice for women and girls<sup>42</sup>. The belief that women

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<sup>39</sup> Rioseco Ortega, Luz. Culmination of domestic violence. Women who kill their partners – possible criminal defences. Available online in Spanish: <http://observatoriojyg.org/index.php/313-doctrina/4-victimas/2-derecho-infractoras/814-culminacion-de-la-violencia-domestica-mujeres-que-asesinan-a-sus-parejas-defensas-penales-possibles>

<sup>40</sup> Rebecca J. Cook & Simone Cusack, “Gender Stereotyping: Transnational legal perspectives” available at: <http://187.216.193.232/biblos-imdf/sites/default/files/archivos/00312Estereotperspleg.pdf>, p. 23. The authors define gender stereotypes as the, “social and cultural construction of men and women base don their different physical, biological, sexual and social functions.” “Gender stereotype” is a general term that refers to a “structured group of beliefs based on the personal attributes of men and women. These beliefs can include a variety of components including personality characteristics, behavior and roles, physical charactristics and appearance or occupations and assumptions of sexual orientation.”

<sup>41</sup> Rebecca J. Cook & Simone Cusack, “Gender Stereotyping: Transnational legal perspectives” (2009), available at: <http://187.216.193.232/biblos-imdf/sites/default/files/archivos/00312Estereotperspleg.pdf>, pág. 3.

<sup>42</sup> MESECVI, Third Hemispheric Report on the Implementation of the Belem do Para Convention, Prevention of Violence Against Women in the Americas: Paths to Follow (2017) paragraph 521.

who respond to an act of violence do so for reasons unrelated to self defense or that any behavior that occurred prior to the attack is a “provocation”, is a gender-based stereotype applied to women who do not passively accept gender-based violence, but rather are “bad girls” who chose to behave a certain way in order to cause harm to the aggressor. This attitude also applies when women fail to comply with the gender roles they are assigned, and are thus frequently the victims of violence, disguised as “discipline”.

Judgment that includes a gender perspective includes an understanding of the existence of gender stereotypes and the need for their elimination. The Inter-American Court found that, “one can associate the subordination of women to practices based in persistent and dominant social practices of gender stereotypes, conditions only aggravated when the stereotypes are reflected, implicitly or explicitly, in policies and practices”<sup>43</sup>.

Based on the above, the CEVI believes that the provocation requirement needed to meet the standard of self-defense in cases of violence against women should be evaluated with a gender perspective in order to avoid the application of damaging gender stereotypes of women that perpetuate their subordination.

### **C. Evaluation of evidence with a gender perspective applied to criminal trials and self defense**

The CEVI highlights the need to recognize the existence of the structural discrimination against women that prevents them from enjoying their rights as fully as men<sup>44</sup>. This reality demands that evidence be examined in cases of self-defense, especially within the context of abusive relationships and domestic situations. Not applying a gender perspective to the evaluation of evidence results in outcomes that invisibilize violence against women and contribute to the reigning impunity that surrounds this phenomenon<sup>45</sup>. This is especially problematic when we consider that impunity perpetuates the negative stereotypes of women that make them guilty for the violence committed against them<sup>46</sup>.

The importance of a gender perspective in the evaluation of evidence is clear when we examine the jurisprudence on self-defense in cases of violence against women. In direct contrast, some courts have accepted an absolution of responsibility by self defense when there are witnesses to the physical

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<sup>43</sup> González et al (“Cotton Field”) v. Mexico. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 16 2009. Paragraph 401.

<sup>44</sup> CEDAW has noted: “Violence against women is a form of discrimination that seriously prevents women from enjoying their rights and freedoms equally to men.” Committee for the Elimination of Discrimination Against Women, Recommendation no. 19, paragraph 1.

<sup>45</sup> Impunity has been defined as, “an infraction of the obligations that States have to investigate rape, adopt appropriate measure with respect to the perpetrators, especially in the area of justice, so they can be tried, judged and sentenced appropriately, to guarantee the victims have effective resources and receive adequate reparation for the damage caused and to take all measures necessary to avoid the repetition of the act”. Inter-American Commission on Human Rights, Report No. 53/01, Case 11.565, Merits, Ana, Beatriz, and Cecilia González Pérez (México), April 4, 2001, paragraph 86.

<sup>46</sup> González et al (“Cotton Field”) v. Mexico. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 16 2009. Paragraph. Párr. 154.

violence.<sup>47</sup>, and have ruled that the lack of witnesses reduces the certainty of when injuries actually occurred, since according to them, there can be no illicit attack if it is not clear when exactly it took place<sup>48</sup>.

In addition, the CEVI has found that courts in the region have upheld that the lack of previous reports to the authorities made by the women victims demonstrates the lack of gravity of the situation in their cases<sup>49</sup>, as does their failure to request any type of help from family members or other close friends<sup>50</sup>. The CEVI notes that these examples illustrate one of the main problems faced: the **valuation of the evidence** of the attack. CEVI maintains that the standards set by the Inter-American Court of Human Rights for the valuation of evidence are useful tools that can be used to analyze the evidence with a gender perspective. The adoption of a gender perspective in the investigation and prosecution of gender based crimes, includes the following:

- 1) Initiate, *ex officio* and without delay, serious, impartial and effective investigations when the authorities learn of acts that constitute violence against a woman<sup>51</sup>.
- 2) Understand that victims cannot be expected to show all of the presumed abuse suffered.<sup>52</sup>. Similarly, recognize that that sexual assault is traumatic for the victims and as a result, their recall

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<sup>47</sup> Ruling of the Appeals Court of Valparaiso, March 27, 2006, Rol N° 7356-04. Recurso n° 7356/2004, Ruling N° 10736. The court acquitted an abused women for the death of her partner who had beaten her and wounded her with a knife.

<sup>48</sup> Ruling TOP of San Antonio July 22, 2008, RIT 49-2008, RUC 0700509932-8. Similarly, the ruling TOP of Castro April 5, 2006, RIT 4-2006, RUC N° 0500142125-7: “Recognizes the existence of episodes of domestic violence, but believes that it is unable to establish with certainty, since it is only verified by hear-say. In addition, the accused maintained a romantic relationship with M.C. and as such had another emotional attachment”; “[...] there is no illicit attack since: it has not been established that the deceased had beaten the accused prior to these acts. If the defence tries to connect injuries that theoretically would prove this attack, it is not possible to conclude that those injuries were inflicted on the victim the days of the events, *as there are no witnesses or other evidence to provide proof*, and therefore there it cannot be established with certainty when they occurred”. Cited in “La Law N° 20.066: determination of psychological violence, the origin of commission by omission and the assumptions of admissibility of self defense”. Minute N° 2. Department of National Defense Studies.. Santiago de Chile, November 2009, p. 7. Emphasis added.

<sup>49</sup> “The domestic violence sufference by the accused .... Only allows us to presume that there were mutual discussion and aggressions and perhaps beatings received by the woman, but the existence of a persistent and serious violence that would result in blindness ... [and much less if it was proved that the accused tried other solutions to resolve the problem that would not result in a crime, such as reporting the abuse to the authorities or leaving the family home.” Ruling of the Court of Appeals of Rancagua November 22, 2004. Rol 221196.

<sup>50</sup> “From the beginning of the marriage, the victim was subjected to all forms of physical and psychological pressure, including blows to the face and body, threats and the requirement to fulfill her conjugal obligation when she was ill, including at the risk of losing her unborn child. In spite of all this, she never reported the abuse to the authorities, nor did she communicate it to her parents or complain to her friends”. Decision of the Supreme Court of Chile, December 28, 2000, ruling on the merits of an appeal, Rol 1282-00, Rol 1282-00.

<sup>51</sup> Inter-American Court of Human Rights *Miguel Castro Castro v. Peru*. Merits, Reparations and Costs. Judgment of November 25, 2006. Series C No. 160, Paragraph 378.

<sup>52</sup> Inter-American Court of Human Rights *Espinoza González v. Peru*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 20, 2014. Paragraph 149.

of the events maybe imprecise<sup>53</sup>, and that imprecisions does not mean that the reports are false or that the acts lack credibility<sup>54</sup>.

3) Understand that the statement of the victim is essential, and that the existence of graphic or documented proof of means of the alleged attack cannot be expected<sup>55</sup>. More specifically, the lack of medical evidence does not diminish the veracity of the reported act<sup>56</sup>. However, all efforts must be made to collect medical evidence, as it can play an important role in the investigation<sup>57</sup>.

4) Understand that the lack of visible marks does not prove that no violence has taken place<sup>58</sup>.

These standards have been developed through an analysis of a variety of cases, primarily those dealing with sexual violence; torture and cruel, inhumane and degrading treatment; and arbitrary deprivation of freedom. Nevertheless, the CEVI believes the lessons apply equally well to an analysis of self-defense in cases of women victims of gender-based domestic violence. Below, we consider relevant decisions of the Inter-American Court based on three principle arguments: 1) women victims *cannot* always be expected to report abuse or that there can never be inconsistency in their testimony; 2) there will not always be witnesses or documented evidence; 3) there must be a concerted effort to gather medical evidence.

First, the CEVI notes that when speaking about victims of torture and rape, the reasoning of the Inter-American Court focuses on the fact that **the victims tend to avoid reporting the abuse to the authorities because of fear**, and that it is not reasonable to expect that they express this fear every time they claim it exists<sup>59</sup>. Considering that victims of domestic violence face considerable barriers to report the violence they suffer<sup>60</sup>, it is reasonable they not be required to report each act of violence. It is worth

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<sup>53</sup> Inter-American Court of Human Rights. *J. V. Peru*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 27, 2013. Series C No. 275. Paragraph 325.

<sup>54</sup> Inter-American Court of Human Rights. *Cabrera García and Montiel Flores v. Mexico*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 26, 2010. Paragraph 113.

<sup>55</sup> Inter-American Court of Human Rights. *Fernández Ortega et al. v. Mexico*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 30, 2010. Serie C No. 215. Paragraph 100.

<sup>56</sup> Inter-American Court of Human Rights. *J. V. Peru*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 27, 2013. Series C No. 275, paragraph 329. *Cfr.* Istanbul protocol (Manual for the effective investigation and documentation of torture and other cruel, inhumane or degrading treatment) New York and Geneva, 2001. Paragraph 160.

<sup>57</sup> Inter-American Court of Human Rights. *J. V. Peru*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 27, 2013. Series C No. 275, paragraph 333; *Cfr.* European Court of Human Rights *Korobov v. Ukraine*, No. 39598/03, Judgment of July 21, 2011. Paragraph 69.

<sup>58</sup> Inter-American Court of Human Rights. *Espinoza Gonzáles v. Peru* Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 20, 2014. Series C No. 289, paragraph. 152; *Cfr.* International Criminal Tribunal for Rwanda, *The Prosecutor v. Jean-Paul Akayesu*, Judgment of September 2, 1998, No. ICTR-96-4-T. Paragraphs 134 and 135.

<sup>59</sup> Inter-American Court of Human Rights. *Espinoza Gonzáles v. Peru* Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 20, 2014. Series C No. 289, paragraph 149.

<sup>60</sup> *Cfr.* World Health Organization. *Understanding and Addressing Violence against Women: Intimate Partner Violence*. WHO/RHR/12.36. 2012. P. 3.

remembering that the level of aggression tends to be in proportion to the frustration felt by the attacker, and just the act of reporting it puts the life of the victim at risk:

“If the search for external assistance represents a serious provocation, leaving the home is the most serious act of rebellion against tyranny and will lead to even higher levels of anger and frustration in the attacker. This anger and frustration will ignite an aggressive reaction against the woman, possibly resulting in her death.”<sup>61</sup>

The above quote clearly explains why it is reasonable to expect that women victims of domestic violence, as well as those of torture and rape, experience fear and avoid reporting abuse to the authorities, and why the CEVI insists that agents of the justice system be armed with the tools and knowledge to understand the components of gender-based violence, including the cycle of violence itself, its types and forms of violence the challenges associated with reporting the abuse.<sup>62</sup>

At the same time, when women do file a complaint, it is **reasonable to expect that there will be inconsistencies in their testimony**. In *J. vs. Peru*, the Inter-American Court recognized that the trauma suffered by Mrs. J. could have had an impact on her recollection of the traumatic events. The Court found that, “the mention of some of the alleged abuse in only some of her statements does not indicate that those statements are false or that the reported actions are untrue”<sup>63</sup>. Further, in *Cabrera García and Montiel Flores v. Mexico*, the Inter-American Court placed importance on the inconsistencies in the testimonies of Cabrera and Montiel, indicating that the victims provided additional details on the tortured they suffered expanding their statements, as a result<sup>64</sup>. It is well known that gender-based domestic violence is traumatic for the victims<sup>65</sup>, and therefore this standard is equally applicable to these situations. In addition, the possibility of a severe affectation of the faculties of women victims of violence should be considered, which could generate reactions that should subtract or nullify the imputability of their actions, due to the psychological impact of the violence they suffer.

Second, the CEVI is sharing the analysis developed by the Inter-American Court on the idea that rape is a type of aggression characterized, in general, by its tendency to occur in the absence of other people outside of the attacker(s) and victim. It maintains that visible and documented evidence cannot be

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<sup>61</sup> María Camila Correa Flórez. *Self defence in situations with no confrontation: the death of the tyrant in the house*. Doctoral thesis, Autonomous University of Madrid, 2016, p. P. 368.

<sup>62</sup> MESECVI, Second Hemispheric Report on the Implementation of the Recommendations of the Committee of Experts of the MESECVI (2015), available at: <http://www.oas.org/es/mesecvi/docs/MESECVI-SegundoInformeSeguimiento-ES.pdf>, paragraph 255

<sup>63</sup> Inter-American Court of Human Rights. *J. V. Peru*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 27, 2013. Series C No. 275, paragraph 325.

<sup>64</sup> Inter-American Court of Human Rights. *Cabrera García and Montiel Flores v. Mexico*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 27, 2013. Series C No. 275, paragraph 325. Judgment of November 26, 2010. Series C No. 220. Paragraph 113.

<sup>65</sup> *Cfr.* National Center on Domestic Violence, Trauma & Mental Health, by Carole Warshaw, Cris M. Sullivan, and Echo A. Rivera. A Systematic Review of Trauma-Focused Interventions for Domestic Violence Survivors. February 2013.

expected, and thus, accepts that the **statement of the victims counts as evidence** of the existence of the occurrence<sup>66</sup>. Gender-based domestic violence against women, as the words themselves indicate, primarily takes place in the private sphere and there are often no witnesses to the violence until it intensifies considerably. Therefore, the statement of a victim of domestic violence must be considered as evidence during the investigation and trial, including in the absence of other physical or documented evidence of the alleged attack.

Third, the recognition of the fundamental role of the victim's statement should **in no way diminish efforts to collect medical evidence, whenever it is available**. In *J. v. Peru*, the Inter-American Court found that those arrested should be examined whenever they report abuse, arguing that, "allegations of abuse that occur in police custody are extremely difficult to confirm when the victim is isolated from the outside world, with no access to medical treatment, legal counsel, and family or friends who could support and collect the necessary evidence"<sup>67</sup>. Similarly, victims of domestic violence against women, often feel isolated or abandoned, making attacks against them difficult to substantiate, and therefore, the authorities should do all they can to facilitate the process.

This Committee has also described how impunity has a negative effect on women and society<sup>68</sup>, and reported the high rates of impunity for reported crimes in the region.<sup>69</sup> The Inter-American Court notes that ongoing impunity sends the message that violence against women is tolerated, has perpetuated its existence, and contributed to the feeling of vulnerability experienced by women and their mistrust of the criminal justice system<sup>70</sup>. The CEVI maintains that, at its root, it is difficult for a State to require that women victims of violence report incidents of violence or prior complaints when the authorities themselves do not have the ability or desire to pursue the cases with all due diligence. This has led to women being obliged to take matters into their own hands. The Committee has indicated before how specialized personnel should attend to the woman victim of violence, to include agents of the criminal justice system and the forensic experts who analyze the evidence<sup>71</sup>. The CEVI reiterates that States have

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<sup>66</sup> Inter-American Court of Human Rights. *Fernández Ortega et al. v. Mexico*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 20, 2010. Series C No. 215. Paragraph 100.

<sup>67</sup> Inter-American Court of Human Rights. *J. V. Peru*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 27, 2013. Series C No. 275, paragraph 329. *Cfr.* Istanbul protocol (Manual for the effective investigation and documentation of torture and other cruel, inhumane or degrading treatment) New York and Geneva, 2001. Paragraph 160.

<sup>68</sup> MESECVI, Third Hemispheric Report on the Implementation of the Belem do Para Convention: Preventing Violence Against Women in the Americas: Paths to Follow (2017), paragraph 470.

<sup>69</sup> MESECVI, Second Hemispheric Report on the Implementation of the Recommendations of the Committee of Experts of the MESECVI (2015), available at: <http://www.oas.org/es/mesecvi/docs/MESECVI-SegundoInformeSeguimiento-ES.pdf>, paragraph 227.

<sup>70</sup> Inter-American Court of Human Rights. *Veliz Franco et al v. Guatemala*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of May 19, 2014. Series C No. 277, paragraph. 208.

<sup>71</sup> MESECVI, Second Hemispheric Report on the Implementation of the Recommendations of the Committee of Experts of the MESECVI (2015), available at: <http://www.oas.org/es/mesecvi/docs/MESECVI-SegundoInformeSeguimiento-ES.pdf>, p. 62

an obligation to legally protect women victims, and to combat, without delay, and by all means possible, the ineffectiveness and impunity that exist in the prosecution of these cases<sup>72</sup>.

However, and in light of the previous consideration, the CEVI reaffirms that it is important to understand that **the lack of visible physical marks does not mean there has been no abuse**. The Inter-American Court has found that, “in cases where there are allegations of torture or abuse, the time that passes for the analysis of the corresponding medical tests is essential to determine the existence of the injury, most importantly when there are no other witnesses apart from the victim and the perpetrator”<sup>73</sup>. It concluded that, “as a consequence, the elements of evidence can be scarce”<sup>74</sup>. Further, the Court issued a ruling that specifically addressed sexual violence, writing that the lack of medical evidence does not dimes the truthful nature of the declaration of the presumed victim<sup>75</sup>. It is clear that the decisions of this Court can be extended to include women injured by their intimate partners, and while visible marks corroborate the violent behavior, the lack thereof does not dismiss the possibility that it did, in fact, occur.

#### D. Conclusions and recommendations

The application of a gender perspective in trials where women victims of violence are accused of killing or injuring their attacker in legitimate defense of their or a third party’s rights (this includes defending the life or physical integrity of their children, siblings, or mother, and also applies to familial femicide as we know that the attacker will attempt to kill other members of her close circle as a way of inflicting additional pain on the victim) requires a paradigm shift in how the acts should be evaluated, and the law interpreted, resulting in the elimination of the gender stereotypes that govern our society and criminal justice system from all legal reasoning. In other words, incorporate a contextual analysis that makes it easy to understand that the reactions of victims of gender-based violence cannot be measured according to the traditional standards used to meet the bar for self-defense in other types of cases, since the violence they experience at the hands of their attacker based on their gender has specific characteristics that should permeate the entire legal reasoning of the decision. The jurisprudence of the Inter-American Court should be a useful tool to accomplish this analysis.

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<sup>72</sup> MESECEVI, Third Hemispheric Report on the Implementation of the Belem do Para Convention: Preventing Violence Against Women in the Americas: Paths to Follow (2017), paragraph 471.

<sup>73</sup> Inter-American Court of Human Rights. *Espinoza González v. Peru*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 20, 2014. Series C No. 289, paragraph 333; *Cfr.* International Criminal Tribunal for Rwanda, *The Prosecution v. Jean-Paul Akayesu*, Judgment of September 2, 1998, case No. ICTR-96-4-T. Paragraphs 134 and 135.

<sup>74</sup> Inter-American Court of Human Rights. *Espinoza González v. Peru*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 20, 2014. Series C No. 289, paragraph 333; *Cfr.* International Criminal Tribunal for Rwanda, *The Prosecution v. Jean-Paul Akayesu*, Judgment of September 2, 1998, case No. ICTR-96-4-T. Paragraphs 134 and 135.

<sup>75</sup> Inter-American Court of Human Rights. *J. V. Peru*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 27, 2013. Series C No. 275, paragraph 329. *Cfr.* Istanbul protocol (Manual for the effective investigation and documentation of torture and other cruel, inhumane or degrading treatment) New York and Geneva, 2001. Paragraph 160.

The CEVI reiterates that the States Party to the Belém do Pará Convention should take all necessary steps to ensure that the administration of justice is executed according to the tenets of the Convention and when necessary, should align the justice system with their international obligations on women's human rights. The Committee also believes that the creation and implementation of protocols of investigation and prosecution that include a gender perspective would have a positive impact on the types of cases described here, and could be a useful tool for the agents of the justice systems as they fulfill their functions with all due diligence<sup>76</sup>. Along these same lines, the Committee makes several recommendations listed below, which can be used by the prosecution as they evaluate the behavior of women who report being victims of gender-based domestic violence:

1. Establish ongoing training plans on violence against women and women's rights within the framework of the Convention, in particular for agents of the justice system, police, public defenders and judges, that address the following: identify the application of gender stereotypes as acts that violate the Convention and are contrary to international human rights law; teach the dynamics and structure of violence against women, including within intimate relationships and the particular vulnerability of women to violence as a result of their intersectionality and diversity.
2. Make all necessary efforts to ensure that agents of justice, judges, and public defenders apply a gender perspective in the execution of their functions; considering all types and modalities of violence against women for access to justice, without circumscribing the problem to the violence inflicted by the couple, or in the family.
3. Implement all measures necessary so that when judges and prosecutors apply a gender perspective and adequate contextual analysis of the situation specific to that case as they evaluate whether the standard of self-defense has been met, with an eye toward complying with the international obligations of the States with respect to the human rights of women.
4. Ensure the incorporation of international standards of evidence evaluation in cases of violence against women, including with respect to the testimony of women victims.
5. Ensure access to justice for women, guaranteeing, at a minimum, the following: free legal advice and representation during the trial, including accompaniment at all stages of their case; psychological counseling; therapeutic support; comprehensive healthcare services that include sexual and reproductive health, and legal pregnancy termination; and interpretation services for indigenous languages and sign language.

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<sup>76</sup> MESECVI, Third Hemispheric Report on the Implementation of the Belem do Para Convention: Preventing Violence Against Women in the Americas: Paths to Follow (2017), paragraph 195.

6. Having specialized personnel to deal with violence against women in institutions and have specific spaces for them, 24 hours a day, 365 days a year; guaranteeing that this personnel is in adequate physical and mental health, has a decent salary, and has work schedules that guarantee their work performance free of intra-institutional violence, given the seriousness of the problems they deal with on a daily basis.
7. Have decent and pleasant spaces to care for, or advice women victims of violence, that allows them to feel welcome in the institution that cares for them, in such a way that they have confidence to share their experiences with the staff that monitors these problems. It is suggested that they preferably do not feel like an office environment, but more similar to home spaces.
8. Establish comprehensive and efficient services for the prevention, attention, reporting and monitoring of cases of violence against women, generating the inter-institutional relationships required to avoid the revictimization or institutional violence of the citizens and their families, while they are cared for in these institutions. Likewise, guarantee the adequate mechanisms to implement measures of protection, of reparation of the damage, and the non-repetition of the illicit acts committed against women, in order to eradicate the violence.