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To: The Registrar
European Court of Human Rights

Fax No: 00 333 88 41 27 30

Date: 29 January 2020

From: EHRAC

Pages: 13 including this cover sheet

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Re: T.V v Russia Application No. 31323/19



EQUAL RIGHTS TRUST



Equality Now
A just world for women and girls.



**European Human Rights
Advocacy Centre**

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By Fax and by Post

The Registrar
European Court of Human Rights
Council of Europe
F-67075 Strasbourg - Cedex
France

Date: 29 January 2020

Application no. 31323/19
T.V. v Russia: Third Party Intervention

Dear Sir/Madam,

I refer to the Court's letter of 7 January 2020, and I now enclose the third-party intervention, submitted on behalf of the Equal Rights Trust, Equality Now, and the European Human Rights Advocacy Centre.

Please would you kindly confirm the receipt of this submission

Yours faithfully,

Jessica Gavron

EHRAC Legal Director

T.V.

Applicant

V

RUSSIA

Respondent

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENERS

The Equal Rights Trust, Equality Now, The European Human Rights Advocacy Centre

29 January 2020

By letter dated 7 January 2020, the European Court of Human Rights (“the Court”) granted the Equal Rights Trust, Equality Now and the European Human Rights Advocacy Centre (“the Interveners”) leave to make written submissions in these proceedings. This intervention comprises two sections:

- I. Current human rights standards and requirements on the definition and interpretation of rape and its investigation;
- II. The necessity to consider rape complaints and their investigation under Article 14 of the Convention.

I. Current human rights standards and requirements on the interpretation of rape and its investigation

a) Updates about the development of human rights standards on the requirement to put in place a consent-based definition of rape since *M.C. v. Bulgaria* (2003)

1. Many national legal definitions of sexual violence crimes and investigative procedures contain inherent discriminatory gender stereotyping, circumscribing rape only to a victim who physically resists and a perpetrator who uses physical force or threat thereof. The law also too often places the burden on the victim to prosecute the perpetrator, which is particularly problematic in domestic relationships given the unequal power relations prevalent. These two key issues are exemplified in Russian legislation and practice, and the barrier to justice they constitute is demonstrated in the instant case.
2. The requirement of introducing a consent-based definition of rape and other forms of sexual violence is a well-established principle under international human rights and criminal law. This requirement is outlined by the Court¹ and human rights instruments and mechanisms, including the UN Committee on the Elimination of Discrimination against Women (“the CEDAW Committee”) General Recommendation No. 35;² the CEDAW Committee’s jurisprudence;³ the Council of Europe Convention on preventing and combating violence against women and domestic violence (“the Istanbul Convention”); the International Criminal Court (“ICC”);⁴ the Inter-American Court on Human Rights (“Inter-American Court”);⁵ the International Criminal Tribunal for Rwanda (“ICTR”);⁶ the International Criminal Tribunal for the former Yugoslavia (“ICTY”);⁷ and the Committee of Experts of the MESECVI Hemispheric Report on Sexual Violence and Child Pregnancy in the States Party to the Belém do Pará Convention.⁸
3. The Interveners draw the Court’s attention to important developments in human rights standards, which reinforce and further elaborate the approach developed by this Court in *M.C. v. Bulgaria* in 2003 in relation to the consent-based definition of rape and its

¹ *M.C. v Bulgaria* (No. 39272/98) para. 181

² CEDAW Committee, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, UN Doc. CEDAW/C/GC/35 (“CEDAW Committee General Recommendation No. 35”).

³ CEDAW Committee, *Vertido v Philippines*, Merits, Communication No. 18/2008, UN Doc CEDAW/C/46/D/18/2008 (2010); *R.P.B. v Philippines*, Communication No. 34/2011, UN Doc. CEDAW/C/57/D/34/2011 (2014).

⁴ R70, ICC Rules of Procedure and Evidence; Articles 7(2) and 8(2) of the ICC Elements of the Offences; Article 7 (1) (g)-1, Elements of Crimes, International Criminal Court, 2011; *Katanga* ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008, § 440; *Bemba* ICC-01/05-01/08-3343, 21 March 2016, §§ 105-106

⁵ Inter-American Court, Case of *Fernandez Ortega et al v Mexico*, Judgment of May 15 2011, Interpretation of judgment on preliminary objection, merits, reparations and costs.

⁶ *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Chamber 1, 2 September 1998

⁷ *Prosecutor v Kunarac, Kovac and Vukovic* (No. IT-96-23& IT-96-23/1-A), ICTY, 12 June 2002;

⁸ Mechanism to Follow Up on the Implementation of the Convention on the Prevention, Punishment and Eradication of Violence against Women (MESECVI), Second Hemispheric Report on the Implementation of the Belém do Pará Convention (Apr. 2012); Declaration on Violence Against Women, Girls and Adolescents and Their Sexual and Reproductive Rights, OEA/Ser.L/11.710 MESECVI/CEVI/DEC.4/14 (19 Sept. 2014).

investigation. The Court in this case, *inter alia*, considered that “while in practice it may sometimes be difficult to prove lack of consent in the absence of “direct” proof of rape, such as traces of violence or direct witnesses, the authorities must nevertheless explore all the facts and decide on the basis of an assessment of all the surrounding circumstances”.⁹

4. Article 36 of the Istanbul Convention provides a definition of sexual violence, including rape, which requires States to criminalise “engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object”, while stating that “consent must be given voluntarily as the result of the person’s free will assessed in the context of the surrounding circumstances.”
5. As underlined in the Explanatory Report of the Istanbul Convention, the prosecution of sexual violence, including rape, requires a “context-sensitive assessment of the evidence in order to establish on a case-by-case basis whether the victim has freely consented to the sexual act performed”. Moreover, this assessment must appreciate the “wide range of behavioural responses to sexual violence and rape which victims exhibit and shall not be based on assumptions of typical behaviour in such situations”.
6. The CEDAW Committee in *Vertido v Philippines*, recommended:

*Review of the definition of rape in the legislation so as to place the lack of consent at its centre; (ii) Remove any requirement in the legislation that sexual assault be committed by force or violence, and any requirement of proof of penetration, and minimize secondary victimization of the complainant/survivor in proceedings by enacting a definition of sexual assault that either: a. Requires the existence of “unequivocal and voluntary agreement” and requiring proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting; or b. Requires that the act take place in “coercive circumstances” and includes a broad range of coercive circumstances.*¹⁰

The Committee held that there should be no presumption that the victim consents if she does not physically resist unwanted sexual conduct, “regardless of whether the perpetrator threatened to use or used physical violence.”¹¹

7. The CEDAW Committee requires States to “ensure that the definition of sexual crimes, including marital and acquaintance/date rape is based on lack of freely given consent, and takes account of coercive circumstances.”¹²
8. On 22 November 2019, the *Platform of 7 independent United Nations and regional expert mechanisms on violence against women and women’s rights* jointly called upon all States to ensure that the definition of rape is based on the absence of consent, in line with international standards.¹³

b) Interpreting consent in the situation of vulnerability, including in domestic violence situations

9. The Interveners submit that domestic violence, due to its physical and psychological impact on the victim, constitutes a situation of vulnerability, which is a factor that should be fully taken into account and guide the interpretation of whether the sexual act was consensual.

⁹ *M.C. v Bulgaria*, (No. 39272/98), § 181.

¹⁰ CEDAW Committee, *Vertido v Philippines*, Communication No. 18/2008, § 8.9 (b)

¹¹ *Ibid.* §§ 8.9, 8.5.

¹² CEDAW Committee General Recommendation No. 35, § 33.

¹³ Statement available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25340&LangID=E>

10. In the case of *E.B v Romania*, citing *M.C. v Bulgaria*, the Court held that where there is a contradictory dispute as to the facts of a case, this requires a “context-sensitive assessment of the credibility of the statements made and for the verification of all the surrounding circumstances”.¹⁴ Moreover, it is imperative that the complainant’s personal circumstances and situation be assessed by the investigative authorities, as part of the State’s due diligence obligation, which will enable a more thorough analysis of the capacity and ability of the complainant to consent to the sexual acts. The Court condemned the fact that none of the personal circumstances of the applicant nor the circumstances of the incident were considered by those deciding the case.¹⁵ Moreover, the Court stressed that there should not be an undue emphasis on the absence of proof of resistance by the complainant.¹⁶
11. The Hague Principles on Sexual Violence (2019),¹⁷ identify factors affecting whether an act of a sexual nature is committed without genuine, voluntary, specific and ongoing consent.¹⁸ A list of non-exhaustive factors which were identified and considered relevant in the determination of whether an act was committed without consent include, *inter alia*, an “unequal relationship between the perpetrator and the affected person due to a variety of possible factors” which may include an awareness that the perpetrator has previously used violence against the affected person, or a third party, as punishment for non-compliance with the perpetrator’s demands,¹⁹ and a situation where there is reasonable fear of suffering sexual violence based on the surrounding context of terror created by the perpetrator.²⁰ These coercive circumstances, rife in domestic violence contexts, suggest that consent cannot be assumed to be freely given where it has occurred in a “situation of vulnerability”.²¹
12. A presumption of ongoing consent in a marital relationship, particularly where domestic violence has been established, violates a woman’s right to her autonomy, security and bodily integrity. In light of the existence of unequal power dynamics in relationships, particularly when the wife, as in the instant case, has been experiencing ongoing threats and demonstrations of violence, the State should ensure that the assessment of genuine consent is informed by these coercive contexts.
13. Based on the above standards, the Interveners submit that evidence about coercive behaviour, present in domestic violence situations, is a key factor that should guide the authorities in interpreting consent when it comes to marital rape. Coercive behaviour can be physically or non-physically threatening. Evidence of an unequal power relationship between the perpetrator and the victim is relevant to determine the existence of coercive behaviour which would vitiate consent. An unequal power relationship can derive from numerous situations, including those where the affected person has some kind of dependent relationship (familial or personal, financial, legal or professional) with the perpetrator.

c) Necessity to explicitly criminalise marital rape and define it as an aggravating factor

14. International human rights standards highlight the obligation of States to pay specific attention when it comes to crimes committed in a domestic setting, including marital rape. The Istanbul Convention suggests that in cases of violence against women, it should be an

¹⁴ *E.B v Romania*, (No. 49089/10, 19 March 2019), § 58.

¹⁵ *Ibid.* § 60.

¹⁶ *Ibid.* § 63.

¹⁷ Principles developed by civil society to better reflect the voices of survivors (“the Hague Principles”).

¹⁸ The Hague Principles, Part 1, 2(b).

¹⁹ *Ibid.* Part 5, 1(g)

²⁰ *Ibid.* Part 5, 1(j)

²¹ Annex 1, Part 1(1)(b): Consent to the relevant sexual activity must also be specific and ongoing. Thus it will not suffice if the person has consented to similar conduct, if they consented to the relevant activity(ies) on a previous occasion, if they initially consented but later withdrew that consent, or if the nature of the sexual activity changes without their consent.

aggravating circumstance if “the offence was committed against a former or current spouse or partner as recognised by internal law, by a member of the family, a person cohabiting with the victim or a person having abused her or his authority”.²²

15. The CEDAW and Human Rights Committees have recommended that the States of the former Soviet Union specifically criminalise marital rape, including Kyrgyzstan (2018),²³ Tajikistan (2018),²⁴ Belarus (2016),²⁵ Latvia (2014)²⁶ and Lithuania (2014).²⁷ It is important to note that the above countries, formerly being part of the Soviet Union, have similar definitions of sexual violence crimes, as well as similar criminal justice systems as Russia. Therefore, recommendations given to these countries are relevant to the legal context of Russia.
16. The Council of Europe’s Group of Experts on Action Against Violence Against Women and Domestic Violence (“GREVIO”) also recognises that sexual violence and rape are a “common form of exerting power and control in abusive relationships and are likely to occur during the relationship and after its break-up. It is crucial to ensure that there are no exceptions to the criminalisation and prosecution of such acts when committed against a current or former spouse or partner.”²⁸ Furthermore, in GREVIO’s assessment of Albania, it recommended that “sexual violence should encompass domestic sexual violence” as historically “the laws of many countries have implicitly or explicitly condoned marital rape.”²⁹
17. The UN’s Handbook for Legislation on Violence against Women³⁰ further specifically asserts that States criminalise sexual assault within relationships, such as marital rape, and that States should include a broad range of coercive circumstances and “not revert to an emphasis on use of force or violence”.³¹
18. Most recently, on 22 November 2019, the *Platform of 7 independent United Nations and regional expert mechanisms on violence against women and women’s rights* jointly called upon all States to “explicitly criminalize rape and sexual violence within marriage”.³²

d) Need to ensure ex officio/public prosecution of rape and other crimes of sexual violence

19. International and regional standards, including the Court’s jurisprudence³³ and the Istanbul Convention,³⁴ provide that the authorities should respond seriously to all cases of gender-based violence, including through prosecution ex officio (by the State), to ensure access to justice. As sexual violence is particularly traumatising, the aim of such standards is to make

²² Article 46.a.

²³ CEDAW Committee, *Inquiry concerning Kyrgyzstan under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, 21 September 2018, CEDAW/C/OP.8/KGZ/1, § 92.b.

²⁴ CEDAW Committee, *Concluding Observations on the sixth periodic report of Tajikistan*, 9 November 2018, CEDAW/C/TJK/CO/6, § 26.

²⁵ CEDAW Committee, *Concluding Observations on the eighth periodic report of Belarus*, 18 November 2016, CEDAW/C/BLR/CO/8, § 23.a.

²⁶ UN Human Rights Committee, *Concluding Observations on the third periodic report of Latvia*, 11 April 2014, CCPR/C/LVA/CO/3, § 9.a.

²⁷ CEDAW Committee, *Concluding Observations on the fifth periodic report of Lithuania*, 24 July 2014, CEDAW/C/LTU/CO/5, § 25.e.

²⁸ GREVIO Baseline Evaluation Report: Montenegro, §§ 179 and 182

²⁹ GREVIO, Baseline Evaluation Report: Albania, § 135,

³⁰ Handbook for Legislation on Violence against Women, 2010, ST/ESA/32, pp 26 and 27.

³¹ *Ibid.* section 3.4.3.1,

³² Statement available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25340&LangID=E>

³³ See *inter alia* *Opuz v Turkey* (No. 33401/02), §§ 138-139.

³⁴ Article 55.

sure that survivors do not carry the burden of lengthy criminal proceedings and that perpetrators are brought to justice.³⁵

20. In its General Recommendation 35, the CEDAW Committee provides that States should “Ensure effective access of victims to courts and tribunals; ensure authorities adequately respond to all cases of gender-based violence against women, including by applying criminal law and as appropriate ex officio prosecution to bring the alleged perpetrators to trial in a fair, impartial, timely and expeditious manner and imposing adequate penalties.”³⁶
21. In relation to Russia, in the case of *O.G. v. the Russian Federation*, the CEDAW Committee took the view that “the fact that a victim of domestic violence has to resort to private prosecution, where the burden of proof is placed entirely on her, denies the victim access to justice”³⁷ and recommended that Russia “[a]dopt comprehensive legislation to prevent and address violence against women, including domestic violence, [and] introduce ex officio prosecution of domestic and sexual violence”.³⁸ In its concluding observations on Russia’s eighth periodic report, the CEDAW Committee urged the State to “introduce ex officio prosecution of domestic and sexual violence”.³⁹ In its concluding observations on the Russian Federation’s sixth periodic report, the Committee Against Torture noted with concern that the conviction rate in rape cases is very low and urged the State to ensure that all allegations of violence against women are registered by police and promptly, impartially and effectively investigated.⁴⁰ The UN Special Rapporteur on torture has also emphasised that “when a State knows or should have known that a woman is in danger, it must take positive steps to ensure her safety, even when she hesitates in pursuing legal action”.⁴¹
22. In domestic violence cases, this Court has noted that the particular vulnerability of victims of domestic abuse means that the authorities are under a heightened obligation to verify whether a more robust approach is required, and to “investigate of their own motion the need for action”.⁴² In *Opuz v Turkey*, the Court noted that there are certain factors which may be taken into account in determining whether to pursue a prosecution after a victim has withdrawn a complaint, including the seriousness of the offence, whether the perpetrator planned the attack, whether the perpetrator has made any subsequent threats, and the chances of the perpetrator offending again; “the more serious the offence or the greater the risk of further offences, the more likely that the prosecution should continue in the public interest, even if victims withdraw their complaints”.⁴³ It is respectfully submitted that the reasoning of the Court is equally applicable to cases of rape and marital rape. More recently this Court has held that “within the context of domestic violence ... the possibility to bring private prosecution proceedings is not sufficient”.⁴⁴

e) **Failures in the legislation of Russia to put in place the above requirements, denying justice to survivors of sexual violence.**

Absence of consent-based definitions of rape and other forms of sexual violence

³⁵ See Explanatory Report to Istanbul Convention, § 279,

³⁶ CEDAW Committee General Recommendation No. 35, § 44.

³⁷ Communication No. 91/2015 (2017) § 7.7; See also *X and Y v Russia*, No. 100/2016, (2019), CEDAW/C/73/D/100/2016

³⁸ *O.G v Russia* *ibid* § 9

³⁹ CEDAW Committee, *Concluding observations on the eighth periodic report of the Russian Federation*, UN Doc. CEDAW/C/RUS/CO/8, § 22.

⁴⁰ Committee Against Torture, *Concluding observations on the sixth periodic report of the Russian Federation*, UN Doc. CAT/C/RUS/CO/6, §§ 30-31.

⁴¹ Report of the Special Rapporteur on torture 2016, § 12.

⁴² *T.M and C.M. v Moldova* (No. 26608/11), §§ 46 and 60.

⁴³ *Opuz v Turkey* (No. 33401/02), §§ 138-139.

⁴⁴ *Volodina v. Russia*, (No. 4126/17), § 84

23. Russia's legislation fails to ensure justice for sexual violence survivors because of the inadequate definitions and interpretation of sexual violence crimes, including as committed in the context of domestic violence, and the failure to mandate ex officio/public prosecution for these crimes - falling short of the standards developed by this Court and other international instruments.

24. The Criminal Code of Russia defines sexual violence crimes as follows:

Article 131. Rape 1. Rape, that is, a sexual intercourse with the use of violence or of a threat thereof, with respect to the victim [female] or to other persons or with the use of a helpless state of the victim...

Article 132. Violent Actions of Sexual Character 1. Pederasty, lesbianism or other actions of sexual character with the use of violence or with a threat thereof with respect to a male (or female) victim or to other

Article 133. Compulsion to Perform Sexual Actions 1. Compulsion of a person to enter into sexual relation, pederasty, lesbianism, or the commission of other sexual actions by means of blackmail, threat of destruction, damage, or taking of property, or with the use of material or any other dependence of the victim.

25. The existing provisions reveal the following inconsistencies with the established human rights standards outlined above:

- a) A consent-based definition of rape or other forms of sexual violence is absent. Instead, the provision on rape focuses on the requirement of force, threat of force or helplessness when it comes to defining rape (Art. 131);
- b) The restrictive range of coercive circumstances envisaged when defining other forms of acts of sexual nature (Art. 133);
- c) Marital rape is neither explicitly criminalised as a separate article, nor included as an aggravating factor of sexual violence crimes.

Failure to ensure ex officio/public prosecution for rape and other forms of sexual violence, including marital rape

26. The criminal legislation of Russia fails to ensure ex officio/public prosecution for sexual violence crimes, classifying these crimes as the ones prosecuted under private-public prosecution procedures.

27. Article 20.3 of the Criminal Procedure Code of Russia, which is applicable to rape and violent actions of a sexual character, provides that "criminal cases of private-public prosecution are initiated only upon application from the victim, or from their legal representative, but are not subject to termination due to the victim's reconciliation with the accused."

28. This provision implies and is effectively interpreted as the victim having to file a specific complaint for rape for the crime to be prosecuted. This omits situations where the victim includes facts relating to the alleged rape while filing a complaint on domestic violence or on any other crime and, among other issues, even if medical professionals report evidence of rape of their patients to the police, charges will not be filed unless the patient is proactively willing to do so. Consequently rape is not prosecuted in many situations, including where women are not able or willing to file a complaint because they fear the perpetrator.

29. Further, the Interveners submit that the failure to explicitly criminalise marital rape, and classify it as an aggravating circumstance, together with the failure to provide mandatory/public prosecution of the crime by the authorities, means that the authorities are reluctant to investigate and prosecute it and is one of the important factors leading to the crime being overlooked and unrecognised by the law enforcement system. The absence of such regulations encourages States to maintain the discriminatory perception that domestic violence, including marital rape, is a private matter in which authorities should not intervene, and even triggers the use of reconciliation mechanisms for this grave crime, favouring a family's apparent unity over protection of and justice for the victims.⁴⁵

II. The necessity to consider rape complaints and their investigation under Article 14 of the Convention

a) Importance of consideration of rape under Article 14

30. The Court will consider Article 14 if there is an important legal purpose to determining whether the applicant has suffered discrimination, or if inequality of treatment is a *fundamental aspect* of the case.⁴⁶ It is the Interveners submission that it is critical that Article 14 be examined in cases of gender-based violence, which includes cases of rape and marital rape, given that discrimination is a fundamental aspect of such violence, and its acknowledgment is key to properly understanding the causes, consequences, solutions and impact of such violence.
31. It is widely accepted, both by this Court and elsewhere, that gender-based violence “is a form of *discrimination* against women”.⁴⁷ Gender-based violence “impairs or nullifies the enjoyment by women of human rights and fundamental freedoms”, and thus falls within the prohibition of discrimination in Article 1 CEDAW.⁴⁸ In its recent General Recommendation No.35, the CEDAW Committee noted that the prohibition of gender-based violence has evolved into a principle of customary international law.⁴⁹ It is also now well-established under international law that gender-based violence may amount to torture or cruel, inhuman or degrading treatment, including in cases of rape, and that a gender-sensitive approach is required to understand the level of pain and suffering experienced by women.⁵⁰
32. The Court has repeatedly held that “[s]ubstantive gender equality can only be achieved with a *gender-sensitive interpretation and application of the Convention provisions*.”⁵¹ The Court has found that the failure to appreciate the seriousness and extent of the problem of

⁴⁵ See Equality Now, *Roadblocks to Justice: How the Law is Failing Survivors of Sexual Violence in Eurasia*, January 2019, available at: https://www.equalitynow.org/roadblocks_to_justice page 35.

⁴⁶ *Dudgeon v United Kingdom* (No. 7525/76, 22 October 1981), § 49, *Chassagnou and Others v France* ((Nos. 25088/94, 28331/95 and 28443/95, 29 April 1999), *Aziz v Cyprus* (No. 69949/01, 22 December 2004).

⁴⁷ *Opuz v Turkey* (No. 33401/02, 9 June 2009), § 200 (emphasis added); *Bălşan v Romania* (No. 49645/09, 23 May 2017), § 88; see also *General recommendation No. 19: Violence against women*, 1992 (“CEDAW Committee General Recommendation No.19”), §§ 1, 6-7; *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*, UN Doc. CEDAW/C/GC/28 (“CEDAW Committee General Recommendation No. 28”), § 19; *General Recommendation No. 35*, § 1; *O.G. v Russian Federation* (Communication No. 91/2015.), § 7.3; Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/HRC/31/57, 2016, § 55; Istanbul Convention, Article 3(a); Istanbul Convention Explanatory Report, § 1.

⁴⁸ CEDAW Committee General Recommendation No.19, § 7.

⁴⁹ CEDAW Committee General Recommendation No.35, § 2.

⁵⁰ See, for example, CEDAW Committee General Recommendation No. 35, §§ 16 and 17; Report of the Special Rapporteur on torture 2016, §§ 8 and 11; Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/HRC/7/3, 2008 (“Report of the Special Rapporteur on torture 2008”), § 36; Human Rights Committee, *General Comment No. 28 on article 3: the equality of rights between men and women*, UN Doc. CCPR/C/21/Rev.1/Add.10

⁵¹ *Volodina v Russia* (No. 41261/17, 9 July 2019), § 111 (emphasis added).

domestic violence goes beyond a simple failure or delay to deal with violence against women and amounts to a repetition of acts condoning such violence and reflecting a discriminatory attitude towards victims on account of their sex.⁵² It is the Interveners submission that the present case provides the Court with the opportunity to further develop this jurisprudence on the positive obligations of the State in respect of gender-based violence, specifically in respect of complaints of rape and marital rape, taking into account recent developments in international best practice.

33. In light of the above, the Interveners submit that it is essential that the examination of the State's positive obligations with regard to the investigation of allegations of rape in the instant case proceeds under Article 14, rather than Article 3 alone. This is necessary in order to recognise the true discriminatory nature of the violence and the need to implement effective gender-sensitive and gender-specific measures that address the particular needs of victims of gender-based violence. Indeed, it is the Interveners' submission that a State's obligations with regard to allegations of gender-based violence, including rape, should *always* be examined under Article 14 in conjunction with Article 3, as discrimination is a fundamental aspect of any such case.

b) Positive obligations under Article 14, in conjunction with Article 3

34. It is well-established that the authorities are required to conduct an "effective official investigation" into alleged violence, including where such violence is inflicted by private actors.⁵³
35. The Court has held that where an "attack is racially motivated, it is particularly important that the investigation is pursued with vigour and impartiality, having regard to the need to reassert continuously society's condemnation of racism and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence."⁵⁴ The Inter-American Court has applied this by analogy when examining the scope of the obligation of due diligence in the investigation of cases of gender-based violence, holding that the obligation to investigate effectively "has a wider scope when dealing with the case of a woman who is killed or, ill-treated or, whose personal liberty is affected within the framework of a general context of violence against women."⁵⁵ The Inter-American Court has stressed that "when an act of violence against a woman occurs, it is particularly important that the authorities in charge of the investigation conduct it in a determined and effective manner, taking into account society's obligation to reject violence against women and the State's obligation to eliminate it and to ensure that victims have confidence in the State institutions for their protection."⁵⁶ The Court should routinely examine whether an investigation into gender-based violence includes consideration of the discriminatory motive inherent in such violence.
36. In assessing whether an investigation into gender-based violence is effective, the Court requires that the investigation must be opened promptly and conducted in a timely manner.⁵⁷ In determining whether or not to proceed with an investigation into a complaint of rape, it is submitted that it is particularly important that the decision-making process is not tainted by discriminatory stereotypes about rape and rape victims. The CEDAW

⁵² See, for example, *Eremia v Moldova* (No. 3564/11, 28 May 2013), § 89; *Mudric v Moldova* (No. 74839/10, 16 July 2013), § 63; *Bălşan v Romania* (No. 49645/09, 23 May 2017), § 85.

⁵³ See, amongst others, *Volodina v Russia* (No. 41261/17), § 92, and *Eremia v Moldova* (No. 3564/11), § 51.

⁵⁴ *Angelova and Iliev v Bulgaria* (No. 55523/00, 26 July 2007), § 98; see also, *Virabyan v Armenia* (No. 40094/05, 2 October 2012), § 218.

⁵⁵ *Case of González et al. ("Cotton Field") v Mexico* (Inter-American Court, 16 November 2009), § 293.

⁵⁶ *Fernández Ortega et al. v Mexico* (Inter-American Court, 30 August 2010), § 193.

⁵⁷ *Eremia v Moldova* (No. 3564/11), § 51

Committee has stressed that “stereotyping affects women’s right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general.”⁵⁸

37. The Court also considers that discriminatory judicial passivity creates a climate conducive to gender-based violence.⁵⁹ An assessment of the decisions as well as the omissions is thus required. For instance a failure to investigate and prosecute for ‘no signs of a crime’ (despite manifest evidence of violence and injury) is a *decision*, not merely an *omission*, and one that is often shaped by gender-based stereotypes that minimise, circumscribe, or even justify the violence, thereby removing it from the sphere of criminal law protection.

38. There is further need to apply gender-sensitive procedures in order to be attentive to the specific nature of gender-based violence and avoid re-victimisation and stigmatisation. The Committee Against Torture has highlighted that “complaints mechanisms and investigations require specific positive measures which take into account gender aspects” in order to ensure that victims of abuses such as sexual violence and abuse, rape, marital rape, and domestic violence are able to come forward and seek and obtain redress.⁶⁰ The Inter-American Court has summarised the best practice measures required in a criminal investigation of rape to minimise the risk of re-traumatisation in the process of obtaining reliable evidence:⁶¹

- i. the victim’s statement should be taken in a safe and comfortable environment, providing privacy and inspiring confidence;
- ii. the victim’s statement should be recorded to avoid the need to repeat it, or to limit this to the strictly necessary;
- iii. the victim should be provided with medical, psychological and hygienic treatment, both on an emergency basis, and continuously if required, under a protocol for such attention aimed at reducing the consequences of the rape;
- iv. a complete and detailed medical and psychological examination should be made immediately by appropriate trained personnel, of the sex preferred by the victim insofar as this is possible, and the victim should be informed that she can be accompanied by a person of confidence if she so wishes;
- v. the investigative measures should be coordinated and documented and the evidence handled with care, including taking sufficient samples and performing all possible tests to determine the possible perpetrator of the act, and obtaining other evidence such as the victim’s clothes, immediate examination of the scene of the incident, and the proper chain of custody of the evidence, and
- vi. access to advisory services or, if applicable, free legal assistance at all stages of the proceedings should be provided.

39. It is submitted that, in order to ensure that any investigation is gender-sensitive and attentive to the specific nature of gender-based violence, the investigation should be conducted by State agents that have received comprehensive training. The UN Special Rapporteur on violence against women has emphasised the need for judges and law enforcement personnel to be trained “on the realities of various forms of gender-based violence” and on the content and application of relevant national and international laws, including the Convention on the

⁵⁸ CEDAW Committee, *Vertido v Philippines* (Communication No. 18/2008, 22 September 2010), § 8.4. See also, CEDAW Committee General Recommendation No. 35, § 26(c)

⁵⁹ *Talpis v Italy* App. 41237/14, § 141; *Eremia v Moldova* (No. 3564/11), § 89

⁶⁰ Committee against Torture, *General Comment No. 3: Implementation of article 14 by States parties*, UN Doc. CAT/C/GC/3, § 33.

⁶¹ *Ibid.* § 194.

Elimination of all forms of Discrimination Against Women (CEDAW) and the jurisprudence of the CEDAW Committee.⁶² In particular, training on gender-based violence should be mainstreamed into the training of police officers in order to eliminate police mistreatment and bias against female victims of violence.⁶³ The CEDAW Committee has urged the Russian Federation to “provide mandatory training for judges, prosecutors, police officers and other law enforcement officials on the strict application of criminal law provisions on violence against women and on gender-sensitive procedures to deal with women who are victims of violence.”⁶⁴ The Committee against Torture has noted that the State should ensure that such personnel are also trained on the impact of gender-based violence and on how to exercise sensitivity towards victims of such violence in order to prevent re-victimisation and stigmatisation.⁶⁵

40. The Intervenors respectfully request the Court to take the above submissions into account in its consideration of *T.V. v Russia*.

⁶² Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences*, UN Doc. A/HRC/2017, 2017, § 98.

⁶³ *Ibid.*, § 106.

⁶⁴ CEDAW Committee, *Concluding observations on the eighth periodic report of the Russian Federation*, § 22.

⁶⁵ Committee against Torture, *General Comment No. 3: Implementation of article 14 by States parties*, UN Doc. CAT/C/GC/3, § 34.