

GRAND CHAMBER

KURT

Applicant

V

AUSTRIA

Respondent

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENERS

The European Human Rights Advocacy Centre

Equality Now

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This intervention comprises two sections:

- I. The application of the Osman test in the context of domestic violence;
- II. The necessity of adopting a gender perspective in assessing States' compliance with their positive obligations in responding to cases of domestic violence, including marital rape.

I. The 'Osman' test clarified and /or re-conceptualised

1. This case provides a key opportunity for the Grand Chamber to clarify and develop the jurisprudence of the Court on the nature of the test to be applied regarding the positive obligations of the authorities in cases of domestic violence concerning a threat to life and safety. Domestic violence is a global phenomenon affecting 30% of women, representing one of the predominant sources of humiliation, violence and death worldwide; roughly comparable to all of the killing and abuse caused by armed conflict.¹ It comprises prevalent behaviours and objectives to control, intimidate and humiliate, often on an escalatory trajectory with known triggers. It is therefore different to any other situational violence to which the Osman test applies and requires a contextualised understanding of the dynamics, and recognition of a purposeful pattern of behaviour and impact rather than a series of isolated acts.

The *Osman* test as applied by the Court

2. It is established law that Article 2 not only requires the State to refrain from the intentional and unlawful taking of life (including inducement to suicide), but to take steps to safeguard those within its jurisdiction. This requires putting in place effective criminal law provisions to deter the commission of offences, backed up by effective law enforcement machinery to prevent, investigate and prosecute such breaches. In order to trigger the positive obligations of the State to prevent risks to life posed by non-state actors, the *Osman* test requires that the authorities 'knew or ought to have known of a real and immediate threat to life'.²
3. From the outset the Court has contextualised this test, holding that 'this is a question that can only be answered in the light of all the circumstances of a particular case'.³ It is also clear on examination of the application of the test that the Court has often taken a flexible case-context driven approach to the key components '*knew or ought to have known*', '*real and immediate*' and '*identified individual or individuals*'.

'real and immediate'

4. The positive obligation of the State under Article 2 has been applied and interpreted in different contexts by the Court. The interpretation of '*real and immediate*' has varied depending on the nature of the case, and it is not clear that in every case both real and immediate are examined as distinct criteria. In *Maiorano and others v Italy*⁴ the State was held to have violated its positive obligations under the substantive limb of Article 2 by failing to adequately assess the *potential threat*, in the light of worrying indications, a convicted prisoner posed to the general public when authorised for day release. In *Saso Gorgiev v the Former Yugoslav Republic of Macedonia*⁵ and *Gorovenky and Bugara v Ukraine*,⁶ the positive obligation of the State was triggered by the requirement to regulate and safeguard against the *inherent* risk to life (of unidentified persons) that the provision of service weapons to law-enforcement personnel entails. In *Mehmet Kaya v Turkey*,⁷ the Court found that Mr Kaya, a doctor suspected of aiding and abetting the PKK, was at particular risk of falling victim to an unlawful attack (by unspecified individuals) that could in the circumstances be regarded as real and immediate. The Court's assessment of risk was based on the prevailing context in South Eastern Turkey at the time, rather than any reported threat. In *Bljakaj and*

¹ UN Special Rapporteur on torture and other cruel and inhuman or degrading treatment or punishment: *Relevance of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment to the context of domestic violence*, 12 July 2019, para 3

² *Osman v UK* No. 23452/94

³ *Ibid* para 116

⁴ No.28634/06

⁵ No. 49382/06

⁶ No. 42418/05

⁷ No. 22535/93, para 89

Others v Croatia,⁸ the Court held that indications of mental instability and suicidal thoughts (as evidenced by witnesses but not assessed by medical professionals) in a man with a history of family violence, was sufficient to constitute a real and immediate threat to life, despite no specific threats having been made. The police, who had contact with him twice that morning, were required to act with due diligence to protect the general public. The authorities were held responsible for the failure to protect the victim, the divorce lawyer of the perpetrator's wife, killed later that morning in her office, towards whom no threats or indications of risk had been made. In *Kayak v Turkey*,⁹ which concerned the unpredicted killing of a child in a school, the authorities were responsible on the basis of the education authorities' general obligation to secure the safety and well-being of children placed under their supervision.

5. Notably in each of these cases no specific threat was reported identifying either a victim, location or, other than in the cases where the threat emanated from the possession of a firearm, method of harm. With the exception of *Kaya*, in which the particular context was decisive, the threat in these cases, against which the authorities should have taken preventive action, was predicated on unpredictable human behaviour against unknown targets. Furthermore, in none of these cases was there separate evidence of specific 'imminence'. The criterion appears to have been satisfied by the 'realness' of the threat, meaning a significant likelihood that the risk will materialise unless preventive measures are taken.
6. The Interveners submit that there is no identified requisite time frame for the 'immediacy' of the threat in the Court's jurisprudence, and in many cases the threat is presumed real and immediate once it has materialised and is on-going. This is the approach taken by the Court in the cases cited above and in *Oneryildiz v Turkey*,¹⁰ where the State was held to have violated its positive obligations to take preventive measures to protect nearby slum dwellers from the dangers to health and life posed by a municipal rubbish tip. Despite almost two years elapsing between the report warning of the risk, on 7 May 1991, and its materialisation nearly two years later, on 28 April 1993, it was nonetheless held to be '*real and immediate*' throughout that period by the Court, in that the risk had been identified and was ongoing.

Application of 'real and immediate' in the particular context of domestic violence

7. The Court has held that the risk of a real and immediate threat must be assessed taking due account of the particular context of domestic violence, and above all the recurrence of successive episodes of violence within a family.¹¹ This requires taking a gender sensitive approach, which has recently been recognised by the Court in *Volodina*: '*combatting substantive gender inequality requires a gender-sensitive interpretation and application of the Convention provisions that takes into account the factual inequalities between women and men and the way they impact women's lives*'.¹²
8. Domestic violence is by its very nature cyclical, recurring in time with a tendency to escalate.¹³ It therefore occurs within known parameters, with known risks and escalatory triggers (including drug and alcohol abuse, separation and divorce). The violence constitutes a purposeful pattern of behaviour aimed at achieving control over the victim. It is repeated by the same perpetrator against the same victim, facilitated by the perpetrator's unique access to the victim and knowledge of the victim's daily routine. The violence often takes place in the home as that is the arena of control and access. However, *access*, not location is the defining feature of where the violence occurs, as demonstrated by the Court's cases in which the fatal violence took place outside the home.¹⁴
9. In the majority of domestic violence cases the victim indicates in the first report of violence that there is a history of abuse, in other words the authorities are *already* on notice that this is not an isolated incident. Much emphasis has rightly been placed by the Court on treating separate *reported* incidents as a

⁸ No. 74448/12

⁹ No. 60444/08 paras 56, 59, 66

¹⁰ No. 48939/99, para 100

¹¹ *Talpis v Italy* No. 41237/14 para 122

¹² *Volodina v Russia* No. 41261/17 para 92

¹³ GREVIO Third Party Intervention, *Kurt v Turkey* No. 62903/15, para 9

¹⁴ *Inter alia*, *Civek v Turkey* No. 55354/11; *Kurt v Austria* No. 62903/15; *Tkheldize v Georgia* No. 33056/17; *Opuz v Turkey* No. 33401/02

continuum of harm, despite a time lapse, in assessing risk.¹⁵ However, the Court and the domestic authorities should also recognise that the latter are often on explicit notice (even without the heightened due diligence required in such cases)¹⁶ from the *first* report that the violence is not a single incident (and at this point a lethality risk assessment should be conducted).¹⁷ This is apparent on a brief review of the Court's cases including, *inter alia*, *Talpis v Italy*;¹⁸ *Kurt v Austria*;¹⁹ *Kontrova v Slovakia*;²⁰ *Civek v Turkey*;²¹ *Halime Kilic v Turkey*;²² *Valiuliene v Lithuania*;²³ *M.G. v Turkey*;²⁴ *E.M. v Romania*;²⁵ and *D.P. v Lithuania*.²⁶

10. The definition of '*immediate danger*' provided by the explanatory report of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence ('Istanbul Convention') acknowledges this context: 'any situations of domestic violence in which harm is imminent or has already materialised and is likely to happen again'²⁷ (*emphasis added*). This Court applied a similar interpretation in the fatal domestic violence case of *Opuz v Turkey*,²⁸ where it held that: "*when examining the history of the relationship, it was obvious that the perpetrator had a record of domestic violence and there was therefore a significant risk of further violence*" and that the violence should be considered a chain of interconnected events. Judge Pinto de Albuquerque echoes the Istanbul Convention definition in his observation that '*the recurrence and escalation inherent in most cases of domestic violence makes it somehow artificial, even deleterious, to require an immediacy of the risk. Even though the risk might not be imminent, it is already a serious risk when it is present.*'²⁹
11. An interpretation of the *Osman* test in which context is decisive in assessing threat is not new to the Court; it was applied in the South Eastern Turkey cases,³⁰ and has already been applied in domestic violence cases.³¹ The Court has also found the *Osman* test to be satisfied on the basis of the 'realness' of the risk (even without direct threats) in circumstances where the 'immediacy' of the threat is neither specific nor definable.³² In contrast to many cases in which the *Osman* test is applied, in domestic violence cases the perpetrator of the threat is known and the victim or likely victims (including and particularly children of the victim)³³ are known, as is the gender-based motive to control, intimidate, punish, retaliate. It is submitted that once the authorities are on notice of an incident of domestic violence, the threat of harm has 'materialised and is on-going' in that there is a significant likelihood that the harm will occur again unless preventive measures are taken.

'knew or ought to have known'

12. It is not always clear from the Court's case law when it is making a finding of *actual* knowledge and when it is making a finding of *constructive* knowledge in fatal domestic violence cases, what is required for each and whether the distinction matters. In some cases the Court does not distinguish, finding that

¹⁵ *Opuz* para 111

¹⁶ See Section II below

¹⁷ See Art 51 Istanbul Convention

¹⁸ *Talpis*, para 9

¹⁹ *Kurt* para 7

²⁰ No. 7510/04 para 8

²¹ *Civek* para 12

²² No. 63034/11 para 7

²³ No. 33234/07 para 9

²⁴ No. 646/10 para 7

²⁵ No. 43994/05, para 13

²⁶ No. 27920/08 para 4

²⁷ Explanatory Report to the Istanbul Convention, para 260

²⁸ *Opuz* paras 111 and 134

²⁹ *Valiuliene v Lithuania* No.33234/07, Concurring Opinion

³⁰ *Kaya*, paras 88-101; *Kilic v Turkey* No. 22492/93 paras 62-77; *Avsar v Turkey* No. 25657/94 paras 368-9, 411

³¹ *Volodina v Russia* No. 41261/17

³² See cases cited above (non-exhaustive)

³³ See GREVIO Third Party Intervention in *Kurt* [GC] paras 13-15 and as evidenced in *Talpis*, *Kontrova* and *Kurt*. *Talpis* para 99: '*In that connection reiterates that children and other vulnerable individuals – into which category fall victims of domestic violence – in particular are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity*'.

the authorities ‘knew or ought to have known’ of the risk.³⁴ The Court in *Kontrova*³⁵ appears to assume actual knowledge by the authorities in finding that the situation in the applicant's family was known to the local police, including reports of serious allegations of long-lasting physical and psychological abuse, severe beating with an electric cable and threats with a shotgun. The Court held that the police had an array of specific obligations with which they failed to comply. In *Opuz*, in which there were eight reported incidents against the applicant and her mother, including numerous life-threatening physical attacks with knives and a car, possession of weapons and repeated death threats (reported as putting their lives in immediate danger), the Court held that it was obvious that the perpetrator had a record of domestic violence that gave rise to a significant risk of further violence and that the victims’ situation was known to the authorities. Given this the local authorities ‘could have foreseen a lethal attack’.³⁶ Judge Spano refers to this finding as one of ‘constructive knowledge’.³⁷ This begs the question what more evidence the Court required for a finding of actual as opposed to constructive knowledge that the victims’ lives were in danger in this case?

Constructive knowledge and due diligence in the context of domestic violence

13. In order to establish whether the authorities ought to have known of a threat to the life or health of a person the Court must consider not just the information of which they were on notice, but what they ought to have been aware of, with the application of due diligence, and in the particular circumstances and context of the case.³⁸ International human rights bodies, including the UN Committee on the Elimination of All Forms of Discrimination Against Women,³⁹ the Inter-American Commission on Human Rights and the Follow-up Mechanism to the Convention on the Prevention, Punishment, and Eradication of Violence against Women (‘Belem Do Para Convention’)⁴⁰ and the UN Special Rapporteur on Violence Against Women⁴¹ have consistently noted that where the State fails to act with *due diligence* to prevent violence against women, including by private actors, operating in the private sphere, or to investigate and punish such violence or provide compensation, the State may be internationally responsible for private acts.
14. Consideration of due diligence is therefore essential to any assessment of constructive knowledge. In order to conduct such an assessment, account must be taken of the particular context of domestic violence as set out above, as well as the requirement of due diligence in promptly investigating an incident of domestic violence and providing protection to the victim.⁴² Any investigation should ascertain whether there is any history of abuse; previously reported incidents; criminal record of the perpetrator; possession, use of, or access to weapons; threats made, and evidence of addiction, as relevant to the conduct of a lethality risk assessment.⁴³
15. This Court has repeatedly held that ‘special diligence’ is required in dealing with domestic-violence cases, and the specific nature of the domestic violence must be taken into account in the course of the domestic proceedings.⁴⁴ Furthermore it is recognised by international and regional bodies that the failure by the State to act with due diligence contributes to a climate of impunity:
 - CEDAW General Recommendation 35: *The failure of a State party to take all appropriate measures to prevent acts of gender-based violence against women when its authorities know or*

³⁴ *Civek v Turkey* para 53

³⁵ *Kontrova*, para 52

³⁶ *Opuz* paras 133-136

³⁷ *Talpis*, Partly Dissenting Opinion of Judge Spano, paras 5, 6

³⁸ See for example the relevance of the situation in South Eastern Turkey to the Court’s assessment of the existence of a threat and the issue of knowledge in *Kilic v Turkey* (App.22492/03)

³⁹ General Recommendation 19 at 9; *A.T. v Hungary*, Communication No. 2/2003 at 9.2; see also the 1993 Declaration on the Elimination of Violence against Women adopted by the General Assembly in resolution 48/104, Article 4 (c).

⁴⁰ Inter-American Convention on Prevention, Punishment and Eradication of Violence against Women ‘Convention Belem Do Para’(1994), Article 7. *Velasquez Rodriguez v Honduras*, Judgment of 29 July 1988, Inter-Am. Ct. H.R. (ser. C) No. 4, § 172; *Maria Da Penha v Brazil* Case 12.051.

⁴¹ Report of the Special Rapporteur on violence against women, its causes and consequences, Radhika Coomaraswamy 1996

⁴² See Istanbul Convention Articles 5, 18, 49-56

⁴³ As required by Article 51 of the Istanbul Convention

⁴⁴ *Volodina*, para 92; *Opuz*, para 141-51; *T.M. and C.M. v The Republic of Moldova* para 46; *Talpis* paras 106, 129

*should know of the danger of violence, or a failure to investigate, prosecute and punish, and to provide reparation to victims/survivors of such acts, provides tacit permission or encouragement to acts of gender-based violence against women. These failures or omissions constitute human rights violations.*⁴⁵

- The UN Special Rapporteur on Torture: *Domestic violence amounts to ill-treatment or torture whenever States acquiesce in the prohibited conduct by failing to protect victims and prohibited acts, of which they knew or should have known, in the private sphere ... States are internationally responsible for torture when they fail — by indifference, inaction or prosecutorial or judicial passivity — to exercise due diligence to protect against such violence or when they legitimize domestic violence by, for instance, allowing husbands to ‘chastize’ their wives or failing to criminalize marital rape, acts that could constitute torture.*⁴⁶
- The Inter-American Commission on Human Rights: *‘...general and discriminatory judicial ineffectiveness also creates a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts’*⁴⁷

16. Such impunity has been condemned by this Court: *‘...the general attitude of the local authorities – such as the manner in which the women are treated at police stations when they report domestic violence and judicial passivity in providing effective protection to victims – creates a climate that is conducive to domestic violence.’*⁴⁸ The Court has also found in many cases that, even when the authorities did not remain totally passive, they still failed to discharge their obligations under Article 3 of the Convention because the measures taken had not stopped the abuser from perpetrating further violence against the victim.⁴⁹

17. Judicial or investigative ‘passivity’ is a misleadingly benign term (alternative and perhaps more accurate dictionary definitions include indifference, acceptance and quiescence) that ignores the fact that by *not* acting the police and prosecutor are contravening their positive obligations to protect, and often the domestic legislative framework requiring them to act. It also belies the *actions* as well as the omissions that constitute such ‘passivity’: the decisions *not* to report an incident of domestic violence, *not* to open or pursue an investigation, *not* to prosecute, *not* to issue a protection order - in fact all the *decisions* that remove the victim from the sphere of legal protection and place her back in the private sphere.

18. As the Court held in *Talpis*,⁵⁰ the failure to assess a risk to life or health cannot be relied on to deny knowledge of the existence of a threat. This approach is endorsed by the Explanatory Note to the Istanbul Convention’s Article 51 on Risk Assessment and Risk Management.⁵¹ The Interveners submit that it would be inimical to the protection afforded by the Convention if a State could circumvent its responsibility to protect life by relying on the negligence or discriminatory attitude of its agents.

Conclusion

19. The Interveners submit that the Chamber in *Kurt* failed to follow the developments in the Court’s jurisprudence in domestic violence cases, and the application of the *Osman* test more generally, as set out and analysed above. The Chamber did not adopt a gender-sensitive approach or take into account the particular context of domestic violence as required by the Court and appeared to set a higher threshold for the *Osman* test than is justified by the Court’s jurisprudence.

⁴⁵ At para 24(b)

⁴⁶ UN Special Rapporteur on Torture, 31st Session HRC, 5 January 2016, A/HRC/31/57, para 55

⁴⁷ *Maria da Penha Maia Fernandes v Brazil*, 2001, para 56

⁴⁸ *Volodina* para 113, see also *Talpis* para 117

⁴⁹ *Volodina* para 86, see also *Bevacqua and S*, para 83; *Opuz*, paras 166-67; *Eremia* paras 62-66; and *B. v. the Republic of Moldova*, No. 61382/09, para 53

⁵⁰ *Talpis* para 118

⁵¹ The Explanatory Note to Article 51 states: *Many perpetrators threaten their victims with serious violence, including death, and have subjected their victims to serious violence in the past. It is therefore essential that any risk assessment and risk management consider the probability of repeated violence, notably deadly violence, and adequately assess the seriousness of the situation.*

20. The Court has recognised its role in combatting gender-based violence and its underlying structural inequality, and that to do so it must adopt a gender-sensitive interpretation of the *Osman* test that takes account of the context in which the threat in domestic violence cases materialises and the special diligence required to prevent escalation into fatal violence.⁵² This interpretation is consonant with the Court’s approach to the test but requires clear and consistent application.

II. Necessity of applying a gender perspective in gender-based violence cases

1. It is fundamental to embed a gender perspective to responses to domestic violence, including marital rape. This duty stems from the established principle (adopted by this Court) that violence against women, including domestic violence, is a form of gender-based discrimination against women, the root causes and manifestations of which can only be effectively addressed if those responsible for its prevention understand its inescapably gendered nature. The Intervenor submit that applying a gender perspective must be central in all measures adopted to address domestic violence, which requires particular attention to be paid to not only the structural inequalities between women and men, but also the acute vulnerability of domestic violence victims, as well as the gender based stereotypes which are too often applied to the expected behaviour of domestic violence victims and suspects, including with respect to marital rape. It is especially incumbent on national investigative bodies and courts, as well as regional and international courts and mechanisms, to adopt a gender perspective in all matters concerning domestic violence in order to effectively combat the systemic nature of the violations.
2. When adjudicating cases of gender-based violence, the Court should be fully guided by its own well-established principles,⁵³ and other human rights mechanisms that violence against women is a form of discrimination against women and is the result of power imbalance and historically established perceptions of the subordinate position of women in society,⁵⁴ in particular:
 - The Istanbul Convention: “*violence against women is a manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women*” and recognising “*the structural nature of violence against women as gender-based violence, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.*”⁵⁵
 - The CEDAW Committee: “*gender-based violence against women [was] rooted in gender-related factors such as the ideology of men’s entitlement and privilege over women, social norms regarding masculinity, the need to assert male control or power, enforce gender roles, or prevent, discourage or punish what is considered to be unacceptable female behaviour. These factors also contribute to the explicit or implicit social acceptance of gender-based violence against women, often still considered as a private matter, and to the widespread impunity for it.*”⁵⁶
 - The UN Special Rapporteur on Torture: “*full integration of a gender perspective into any analysis of torture and ill-treatment is critical to ensuring that violations rooted in discriminatory social norms around gender and sexuality are fully recognized, addressed and remedied.*”⁵⁷

⁵² *Volodina* para 92, 111

⁵³ *Opuz v Turkey* (No. 33401/02, 9 June 2009), §200 (emphasis added); *Bălşan v Romania* (No. 49645/09, 23 May 2017), §88; *Volodina v Russia* (No. No. 41261/17), §111.

⁵⁴ 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.

⁵⁵ Istanbul Convention, Preamble

⁵⁶ CEDAW General recommendation No. 35 on gender-based violence against women, updating General recommendation No. 19, para 19

⁵⁷ Para. 6, A/HRC/31/57.

3. In light of the above principles, the Interveners submit that a gender perspective in adjudicating violence against women cases necessitates:
- applying a gender perspective at every level (prevention, investigation, prosecution, punishment, reparations) while assessing whether the State fulfilled its due diligence obligations in regard to violence against women;
 - identifying and defying gender stereotypes;
 - automatically examining all forms of violence against women, including sexual violence, as a form of discrimination against women under Article 14 of the Convention; and
 - making orders under Article 46 of the Convention and general measures to prevent and combat violence against women as a systemic problem.⁵⁸

Applying a gender perspective in regard to due diligence in GBV cases

4. In this submission, the Interveners set out specific considerations that must be taken into account to ensure the interpretation of due diligence obligations – the duty to *prevent, investigate, punish* and *provide reparations* for acts of violence⁵⁹ - from a gender perspective. The Interveners submit that failure to fulfil these obligations should give rise to a violation of Article 14 of the Convention.

a) *Prevention*

5. The Interveners reiterate the submissions in Section 1 above addressing the application of the *Osman* test in assessing the State’s prevention obligations in violence against women cases, and emphasize that in doing so it is incumbent on the Court to consider:
- whether the measures undertaken by the State to combat violence against women are aimed at achieving *substantive* equality,⁶⁰ and *de facto* improvement of the situation of women, including through temporary special measures,⁶¹ as opposed to ensuring *formal* equality; and
 - whether, through measures combating violence against women, the State is targeting the *root causes* of gender-based violence, including social and cultural beliefs about the perceived inferiority of women and their subordinate role, as required by Article 5 of CEDAW and Article 12.1 of the Istanbul Convention.⁶²

b) *Investigation and punishment*

6. The Interveners submit that to assess whether the State complied with the obligation to investigate and punish with a gender perspective, this Court should examine whether the State provides a *prompt and effective* response to all forms of violence against women, including sexual violence,⁶³ by *adequately trained professionals* who work on such crimes, including with victims, using a *victim-centred* approach;⁶⁴ whether the State has ensured that investigations into or prosecution of violence against

⁵⁸ See Separate Opinion of Judge Pinto de Albuquerque and Judge Dedov in *Volodina* (paras 13-20)

⁵⁹ See e.g. Istanbul Convention, Article 5 CEDAW Committee, General Recommendation No. 19, para. 9; CEDAW Committee, 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 (Dec. 16, 2010), para. 5. The Special Rapporteur declared that it also includes the obligation to protect women from every act of violence and the obligation to provide victims of violence against women with redress and reparation. Report, UN Doc. A/HRC/23/49 (May 14, 2013), para. 20.

⁶⁰ This principle established by CEDAW Committee was recently referenced in *Volodina v Russia*, (No. 41261/17), §111; See also Article 1 Istanbul Convention.

⁶¹ See Art. 4.4. of Istanbul Convention. CEDAW General Recommendation No. 25.

⁶² Article 12.1 of the Istanbul Convention: “Parties shall take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men.”

⁶³ UN Handbook for Legislation on Violence against Women, 2012, p 34-36; Istanbul Convention, Article 50(1); CEDAW General Recommendation 35, para 38 (b); *Eremia v Moldova* (No. 3564/11), § 51

⁶⁴ Istanbul Convention, Article 15(1); CEDAW General Recommendation 35, para 38 (b). In addition, in 2019, The CEDAW Committee in its review of Austria recommended that the State monitors and assesses the “responsiveness of the police and the judiciary in cases of sexual crimes and introduce mandatory capacity-building for judges, prosecutors, police officers and other law enforcement officers on the strict application of criminal law provisions on gender-based violence against women and on gender-sensitive investigation procedures.” (para 23(b)); Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences, UN Doc. A/HRC/2017, 2017, § 98.

women, including sexual violence, are conducted *ex officio*⁶⁵ without placing an undue burden on the survivor; and whether there are transparent and accessible procedures for the legal liability of *police officers* and *prosecutors* who fail to properly fulfil the obligation to respond to a criminal offence.⁶⁶

7. The Court has already recognised:
 - a) incidents of domestic violence should be viewed as a continuum of harm, and the overall violence regarded as a chain of connected events;⁶⁷
 - b) in domestic violence cases a perpetrator's rights cannot supersede the victim's human rights to life and to physical and mental integrity;⁶⁸
 - c) the general vulnerability of domestic violence victims, and that they often fail to report incidents, thereby warranting a more robust response from the State;⁶⁹
 - d) there are many types of domestic violence, not all of which result in physical injury (such as psychological or economic abuse), and therefore protective measures should not be dependent on the severity of the injuries;⁷⁰
 - e) special diligence is required in dealing with domestic violence cases and considers that the specific nature of domestic violence as recognised in the Preamble to the Istanbul Convention must be taken into account in the context of domestic violence proceedings;⁷¹ and
 - f) Substantive gender equality can only be achieved with a gender-sensitive interpretation and application of the Convention provisions that takes into account the factual inequalities between women and men and the way they impact women's lives.⁷²
8. The Interveners submit that it is particularly important for the Court to examine whether the State investigates a crime of violence against a woman from a gender perspective and taking into account the systemic nature of violence against women.⁷³ For example, in cases of domestic violence and rape the investigation should start with the presumption that violence might have been committed based on a reason related to gender - as a result of power imbalance, the subordinated position of a woman or the desire to control her behaviour - unless the evidence in the case shows otherwise. Furthermore rape in a domestic violence context should not be considered a 'separate' incident, distinct from domestic violence, but a continuation and culmination of the violence in that rape is the ultimate act of control, domination and subordination (short of murder).
9. The Interveners also submit that the Court should extend its already established principles to violence against women cases and rule that when investigating acts of violence, the State has an additional obligation to take all reasonable measures to identify whether there were *discriminatory motives* underlying the violence. Such a ruling has already been made in regard to discriminatory violence based on race and sexual orientation.⁷⁴ Discriminatory motive in gender-based violence cases can be demonstrated, *inter alia*, in violence that is influenced by social norms regarding masculinity, that asserts male control or power (over the victim and/or children), enforces gender roles, or discourages or punishes a woman for what is considered to be unacceptable female behaviour.⁷⁵

⁶⁵ See, among others, *Volodina*, §92, and *Eremia*, §51

⁶⁶ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012, "establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, art 11.

⁶⁷ *Opuz*, para 111

⁶⁸ *Opuz*, para 147

⁶⁹ *T.M and C.M v Moldova* (No. 26608/11), §46, 60

⁷⁰ *T.M and C.M*, §47

⁷¹ *Talpis*, §129

⁷² *Volodina*, §111

⁷³ The UN Special Rapporteur on violence against women, its causes and consequences, and the Inter-American Court of Human Rights in the case of *González et al. ("Cotton Field") v. Mexico*, § 451 and 455(b)

⁷⁴ See *Nachova v Bulgaria*, (No. 43577/98 43579/98), §160; *BS v Spain*, (No. 47159/08), §58; *Identoba v Georgia*, (No. 73235/12), §67; *Virabyan v Armenia* (No. 40094/05), § 218

⁷⁵ See CEDAW General recommendation No. 35

10. In addition, the Court should examine whether the motive of gender-based discrimination, as well as violence that was committed against a current or former spouse or partner, has been treated as an aggravating factor when determining the punishment for the perpetrator.⁷⁶

c) *Reparations*

11. It is the Interveners' submission that it is important for the Court to find a violation of due diligence obligations if the State fails to provide transformative reparations in cases of violence against women. Measures such as the criminal prosecution of perpetrators and an award of moral damages for the failure of the State to protect a woman from gender-based violence are not sufficient to meet the State's due diligence obligations. In addition, the Court should assess whether there has been an *institutional* recognition of violations by relevant State bodies at the domestic level that has the power to require the State to put in place and/or implement mechanisms to ensure non-repetition of the violations, including through internal oversight and regulatory and/or disciplinary mechanisms.

Importance for the Court to defy stereotypes:

12. States' obligations under Articles 5 of CEDAW and 12.1 of the Istanbul Convention include combating prejudices and social and cultural patterns of behaviour predicated on gender-based stereotypes. In cases of violence against women "*the application of preconceived and stereotyped notions of what constitutes gender-based violence against women, what women's responses to such violence should be and the standard of proof required to substantiate its occurrence can affect women's right to the enjoyment of equality before the law, fair trial and the right to an effective remedy.*"⁷⁷ It has been recognised that victims' reactions to violence vary and the European Institute for Gender Equality⁷⁸ has recently underlined that when authorities undertake a "*risk assessment [it] should not solely depend on a victim's judgement, as they may over or underestimate the risk and be reluctant to share information for a number of reasons, including fear for their safety.*"⁷⁹

13. In regard to assessing the behaviour of victims of gender-based violence, the Interveners endorse the third-party submission of GREVIO⁸⁰ in the present case. Further, the Court must be alert to ensuring that victims of sexual violence, including of marital rape, are *not* perceived as constantly being in a state of willingness to consent to sexual acts; that proof of physical violence is *not* mandatory to establish rape; and that victims are *not* held responsible to assess the risks to which they are exposed and to bear the burden of bringing perpetrators to justice.⁸¹

14. The Grand Chamber in *Konstantin Markin v. Russia* recognised the importance of identifying and dismissing gender-based stereotypes.⁸² This should include:

- Victim-blaming: it is particularly important for this Court to urge States to "*dismantle the commonly held victim-blaming beliefs that make women responsible for their own safety and for the violence they suffer*";⁸³
- Expected behaviours of rape victims: "*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*"⁸⁴ (8.4). In particular the CEDAW Committee criticised the following stereotypes and misconceptions: '*The judgement reveals that the judge came to the conclusion that the author had a contradictory*

⁷⁶ Article 46 Istanbul Convention

⁷⁷ CEDAW General Recommendation 35, para. 26.c.

⁷⁸ European Institute of Gender Equality (EIGE), *Risk assessment and management of intimate partner violence in the EU*, November 2019. Available at: <https://eige.europa.eu/publications/risk-assessment-and-management-intimate-partner-violence-eu>

⁷⁹ EIGE Report Ibid, Section 2.4.1.1.

⁸⁰ Available at: <https://rm.coe.int/grevio-inf-2020-3-third-party-intervention-kurt-v-austria/pdfa/16809987e9>

⁸¹ *Volodina v Russia* No. 41261/17

⁸² *Konstantin Markin v. Russia* (No. 30078/06), §142-3

⁸³ CEDAW General Recommendation N35, para. 35.b

⁸⁴ *Vertido v Philippines* (Communication No. 18/2008), §8.4

attitude by reacting both with resistance at one time and submission at another time, and saw this as being a problem. The Committee notes that the Court did not apply the principle that “the failure of the victim to try and escape does not negate the existence of rape” and instead expected a certain behaviour from the author, who was perceived by the court as being not “a timid woman who could easily be cowed”. It is clear from the judgement that the assessment of the credibility of the author’s version of events was influenced by a number of stereotypes, the author in this situation not having followed what was expected from a rational and “ideal victim” or what the judge considered to be the rational and ideal response of a woman in a rape situation.⁸⁵

- The gender-biased assumption of the credibility of perpetrators: “Perpetrators of family and domestic violence are responsible for and make decisions about their use of violence. This is demonstrated in the fact that perpetrators are rarely indiscriminately violent. Many perpetrators are not violent in their workplaces, social networks or communities but choose when, where and how they use violence.” Additionally, “Perpetrators can be good at hiding the violence, publicly presenting as kind, loving, charming and likeable, but behave in cruel, violent, undermining and manipulative ways in private”.⁸⁶

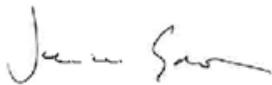
Article 14 should be automatically considered in all cases of GBV:

15. The Interveners refer to their third party intervention in the case of *T.V. v. Russia* of 29 January 2020, and submit that in recognition of the fact that gender-based violence is a form of discrimination against women,⁸⁷ it is vital that all cases of gender-based violence, and in particular domestic and sexual violence, should be considered under Article 14 of the Convention. Any assessment of State responses to such violence and compliance with its positive obligations should be considered under this provision, and this consideration should be automatic. Undertaking this assessment is “key to properly understanding the causes, consequences, solutions and impacts of such violence.”⁸⁸ The Grand Chamber in the present case has the opportunity to develop its jurisprudence and recognise the inherent discriminatory nature of gender-based violence and the need to implement gender-sensitive and gender-specific measures which address the particular needs of victims of gender-based violence, including children (male or female).

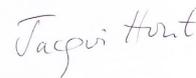
Need for Article 46 orders and general measures:

16. The Interveners submit that based on the systemic and structural nature of violence against women, it is important for the Court to apply general measures and injunctions under Article 46 of the Convention to address this human rights violation. These measures are important to fully recognise the suffering and experiences of women victims of gender-based violence and remedy the failure of the State in transforming the structural inequality, discrimination, subordination and gender hierarchies, which are among the root causes of violence against women.⁸⁹

The Interveners request that the Grand Chamber takes the above submissions in to account in its consideration of *Kurt v Austria*.



Jessica Gavron, EHRAC



Jacqui Hunt, Equality Now

⁸⁵ *Vertido*, §8.5; see also GREVIO Third Party Intervention in *Kurt v Austria*, paras 10-11.

⁸⁶ Department for Child Protection, Government of Western Australia, Fact Sheet 3 on Perpetrator Characteristics, 2013, pp 1, 3 (<https://www.dcp.wa.gov.au/CrisisAndEmergency/FDV/Documents/2015/FactSheet3Perpetratorcharacteristics.pdf>)

⁸⁷ See footnote N3 above.

⁸⁸ Equality Now, Equal Rights Trust and the European Human Rights and Advocacy Centre, Third Party Intervention to the ECtHR in the Case of *T.V v Russia* (Application No. 31323/19), para 31. Available at:

https://www.equalitynow.org/equality_now_the_equal_rights_trust_and_the_european_human_rights_advocacy_centre_join_tly_intervene_in_tv_v_russia_ecthr

⁸⁹ As advocated by Judges Pinto de Albuquerque and Dedov in their Separate Opinion in *Volodina*, Paras 13-20. See also *González et al.* (“*Cotton Field*”), §450; See also Report of the Special Rapporteur, UN Doc. A/HRC/23/49 (May 14, 2013), para. 75