



EHRAC GUIDE TO LITIGATING CASES OF VIOLENCE AGAINST WOMEN

Domestic and Sexual Violence

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Introduction

Violence against women is pervasive and gives rise to the most egregious violations of human rights encompassing physical, psychological, sexual, social and economic harm. Such violence is deeply rooted in and facilitated by societal and cultural values, structures and practices. It is a complex issue to litigate internationally, involving private actors, requiring the knowledge of the authorities, and always entrenched in multi-layered gender-based discrimination, if not intersectional discrimination. This Guide is intended to assist lawyers in making these legal arguments at the international level.

The Guide addresses contexts of domestic and sexual violence and is aimed at practitioners with some experience of litigating these issues and/or of litigating internationally. It provides guidance on drafting particular elements of the core legal arguments that are likely to form the basis for many of these cases. It is by no means exhaustive and does not address the specific facts of any case or provisions of domestic law. The primary focus is on the jurisprudence of the European Court of Human Rights (the Court) and the violations as framed within the Convention, however reference is also made to the standards established by the United Nations Committee on the Elimination of all forms of Discrimination Against Women (the CEDAW Committee), as well as other international mechanisms and conventions.

For aspects of litigation not covered by this Guide the following may be helpful: for practical advice on taking a case to the European Court of Human Rights, please see our [FAQs](#) on applications to the ECtHR; for assistance on taking a witness statement, please see our [Witness Statements in International Human Rights Litigation: Preparation Guide](#); and for guidance on using the CEDAW Committee please see our resource, [Using the UN CEDAW Committee and Special Rapporteur on Violence Against Women](#). In situations in which urgent protection is needed from imminent threat of severe harm, it may be appropriate to make a request for interim measures under Rule 39 of the Court's Rules. See our guide to making [Requests for Interim Measures before the European Court of Human Rights](#). For additional resources on relevant standards in relation to litigating violence against women, see the Useful Resources section on page 23 of this Guide. Note: in any litigation on violence against women it is important to consider issues of re-traumatisation, safety, security, confidentiality and anonymity in relation to the applicant, her family and witnesses.¹

This Guide is written by Jessica Gavron, EHRAC Legal Director². It is based on third party interventions by EHRAC together with Equality Now in the case of *Kurt v Austria* [GC] No. [62903/15](#), and EHRAC together with Equality Now and Equal Rights Trust in the case of *T.V. v Russia* No. [31323/19](#), which concern domestic violence and marital rape. We would like to thank Kate Levine and Dariana Gryaznova of EHRAC, Tamar Dekanosidze and Alexandra Patsalides of Equality Now, Ariane Adam of Equal Rights Trust, for their contributions.

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This Guide covers some of the complex legal arguments to be made in applications under some of the most serious provisions of the European Convention on Human Rights (the Convention): the right to life (Article 2), the right to be free from torture and ill-treatment (Article 3), and the right to be free from discrimination (Article 14). Specifically, it provides guidance and analysis on:

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THE RESPONSIBILITY OF STATES FOR VIOLATIONS OF ARTICLES 2 AND 3 OF THE CONVENTION

1. 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.³ 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 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.
2. It is established law that Article 2 of the Convention not only requires the State to refrain from the intentional and unlawful taking of life, 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 (as is usually the case in domestic and sexual violence), the State has to be on notice of a risk to life. To assess this, the Court has formulated the *Osman* test requiring that the authorities “*knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.*”⁴ The Court has also applied this test to the State’s positive obligation to protect under Article 3 of the Convention (*mutatis mutandis*).⁵
3. In the context of domestic violence this test would usually require that there has to be at least one, and ideally more, report of domestic violence of which the authorities are aware. The *Osman* test was not formulated for the situation of domestic violence⁶ and is not necessarily suited to a context in which the harm and risk of harm is ongoing and ever-present and, in many scenarios, not always clearly articulated as a specific threat. It is therefore helpful to emphasise the flexibility of the Court’s application of the test and specifically of its interpretation of the criteria ‘*real*’ and ‘*immediate*’ in different scenarios, as analysed below.

Assessment of ‘real and immediate’ risk (the ‘Osman test’) as applied by the Court

4. 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’.⁷ 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’

5. 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*⁸ 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, that a convicted prisoner posed to the general public when authorised for day release. *Saso Gorgiev v the Former Yugoslav Republic of Macedonia*⁹ and *Gorovenky and Bugara v Ukraine*,¹⁰ concern fatal shootings by policemen using their service weapons while off duty or acting outside their remit of duty. In both cases 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 (by regulating the possession, use and storage of such

weapons). In *Mahmut Kaya v Turkey*,¹¹ 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 on any reported threat. In *Bljakaj and Others v Croatia*,¹² 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 on the morning of the attack, 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*,¹³ 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.

6. Notably in each of these cases no specific threat was reported that identified 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.
7. 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 ongoing. This is the approach taken by the Court in the cases cited above and in *Oneriyildiz v Turkey*,¹⁴ 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 waste facility. 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

8. 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.¹⁵ This requires taking a gender sensitive approach, which has recently been recognised by the Court in *Volodina v Russia*: '*combating 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*'.¹⁶
9. The Court has also recognised the following specific attributes and requirements with respect to domestic violence:
 - a. that incidents of domestic violence should be viewed as a continuum of harm, and the overall violence regarded as a chain of connected events;¹⁷
 - b. that the general vulnerability of domestic violence victims, and that they often fail to report incidents, thereby warrants a more robust response from the State;¹⁸

- c. that 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;¹⁹
 - d. that special diligence is required in dealing with domestic violence cases and 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.²⁰
10. It is therefore important to draw on the Court's case law and to emphasise the specific characteristics of domestic violence. Domestic violence is by its very nature cyclical, recurring in time with a tendency to escalate.²¹ 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.²²
 11. 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.²³ Much emphasis has rightly been placed by the Court on treating separate reported incidents as a continuum of harm, despite a time lapse, in assessing risk.²⁴ 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)²⁵ from the *first* report that the violence is not a single incident, and at this point a lethality risk assessment should be conducted.²⁶
 12. 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). The 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 as 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
 13. 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, and retaliate. It can be argued 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.

Interpretation of constructive knowledge and due diligence in the context of domestic violence

'KNEW OR OUGHT TO HAVE KNOWN'

14. 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.³⁴ International human rights bodies, including the UN Committee on the Elimination of All Forms of Discrimination Against Women,³⁵ 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')³⁶ and the UN Special Rapporteur on Violence Against Women³⁷ 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.
15. 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.³⁸ 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; presence of children; threats made; and evidence of mental health/addiction issues, as relevant to the conduct of a lethality risk assessment.³⁹ To this extent there can be overlap between the facts and evidence relied on to argue a substantive violation of Article 2 or 3 and the failure, on which this is based, to take adequate investigative and protective measures in response to an earlier incident, which itself gives rise to a procedural violation of Article 3 of the Convention.
16. The 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.⁴⁰ 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:
 - a. 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 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.*'⁴¹
 - b. 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.*'⁴²
 - c. 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.*'⁴³

17. Such impunity has been condemned by the 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.’⁴⁴ 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.⁴⁵
18. Judicial or investigative ‘passivity’ is a misleadingly benign term (alternative 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 so often remove the victim from the sphere of legal protection and place her back in the private sphere.
19. As the Court held in *Talpis*,⁴⁶ 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.⁴⁷ 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.
20. The pending Grand Chamber decision in *Kurt v Austria* may provide further clarification on the application of the Osman test to situations of domestic violence.⁴⁸



SEXUAL VIOLENCE

21. 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. Some domestic laws also place the burden on the victim to prosecute the perpetrator, which is particularly problematic in domestic relationships given the unequal power relations prevalent. Both of these issues constitute significant barriers to justice.

Requirement of a consent-based definition of rape

22. 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 Court⁴⁹ and human rights instruments and mechanisms, including the CEDAW Committee's General Recommendation No. 35;⁵⁰ the CEDAW Committee's jurisprudence;⁵¹ the Istanbul Convention; the International Criminal Court ("ICC");⁵² the Inter-American Court on Human Rights ("Inter-American Court");⁵³ the International Criminal Tribunal for Rwanda ("ICTR");⁵⁴ the International Criminal Tribunal for the former Yugoslavia ("ICTY");⁵⁵ 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.⁵⁶
23. There have been important developments in human rights standards, which reinforce and further elaborate the approach developed by the Court in *M.C. v. Bulgaria* in 2003 in relation to the consent-based definition of rape and its 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".⁵⁷
24. 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."
25. 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".
26. The CEDAW Committee in *Vertido v Philippines*, recommended:
- (i) 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;
 - b) Requires that the act take place in "coercive circumstances" and includes a broad range of coercive circumstances.⁵⁸

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."⁵⁹

27. 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.”⁶⁰
28. 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.⁶¹

Interpreting consent in situations of vulnerability, including in domestic violence

29. 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.
30. 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”.⁶² 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.⁶³ Moreover, the Court stressed that there should not be an undue emphasis on the absence of proof of resistance by the complainant.⁶⁴
31. The Hague Principles on Sexual Violence (2019),⁶⁵ identify factors affecting whether an act of a sexual nature is committed without genuine, voluntary, specific, and ongoing consent.⁶⁶ 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,⁶⁷ and a situation where there is reasonable fear of suffering sexual violence based on the surrounding context of terror created by the perpetrator.⁶⁸ 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”.⁶⁹
32. 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 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. Rape in such a 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).
33. Based on the above standards, 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.

The need to criminalise marital rape and define it as an aggravating factor

34. 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 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”.⁷⁰
35. The CEDAW and United Nations Human Rights Committees have recommended that the States of the former Soviet Union specifically criminalise marital rape, including Kyrgyzstan (2018),⁷¹ Tajikistan (2018),⁷² Belarus (2016),⁷³ Latvia (2014)⁷⁴ and Lithuania (2014).⁷⁵ 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.
36. 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.”⁷⁶ 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.”⁷⁷
37. The UN’s Handbook for Legislation on Violence against Women⁷⁸ 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”.⁷⁹
38. 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”.⁸⁰

The need to ensure ex officio/public prosecution of domestic violence, rape and other crimes of sexual violence

39. International and regional standards, including the Court’s jurisprudence⁸¹ and the Istanbul Convention,⁸² 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 sure that survivors do not carry the burden of lengthy criminal proceedings, and that perpetrators are brought to justice.⁸³
40. 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.”⁸⁴

41. 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”⁸⁵ 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”.⁸⁶ 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”.⁸⁷ 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.⁸⁸ 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”.⁸⁹
42. In domestic violence cases, the 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”.⁹⁰ 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”.⁹¹ The reasoning of the Court should be equally applicable to cases of rape and marital rape. More recently and significantly the Court has held that “within the context of domestic violence ... the possibility to bring private prosecution proceedings is not sufficient”.⁹²



DISCRIMINATION

The necessity of considering domestic violence and rape complaints as discrimination under Article 14 of the Convention

43. The Court will consider Article 14 (which can only be raised in conjunction with another Convention right)⁹³ 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.⁹⁴ 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.
44. It is widely accepted, including by the Court, that gender-based violence “is a form of *discrimination against women*”.⁹⁵ 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.⁹⁶ 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.⁹⁷ 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.⁹⁸
45. 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*.”⁹⁹ The Court has found that the failure to appreciate the seriousness and extent of the problem of 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.¹⁰⁰
46. It is therefore fundamental to embed a gender perspective to responses to domestic violence, including marital rape, the root causes and manifestations of which can only be effectively addressed if those responsible for its prevention understand its inescapably gendered nature. Applying a gender perspective 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.
47. In cases of gender-based violence, reference should be made to the Court’s well-established principles,¹⁰¹ as well as those of 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,¹⁰² 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.*”¹⁰³
 - 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."¹⁰⁴

- 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.”*¹⁰⁵

Positive obligations under Article 14, in conjunction with Articles 2 and 3 of the Convention

48. Gender-based discrimination in cases of domestic and sexual violence can occur at many levels: from the gender-based motive of the perpetrator, to explicit discriminatory comments by police, investigators, prosecutors and judges, to the failure to take a report seriously, to offer legal protection, to prosecute. It is important to set out and differentiate each alleged manifestation of discrimination by the different authorities. The Court to date has not been consistent in its application of Article 14 to these cases and has generally required evidence of systemic discrimination at the national level relating to the investigation and prosecution of these crimes, such as national and international reports and statistics, particularly where there is no direct evidence of discrimination.¹⁰⁶
49. It is also important to consider whether there are any additional grounds of discrimination that could exacerbate the vulnerability of the victim. Women victims of crimes may face multiple forms of discrimination due to factors that can increase their marginalisation, including ethnicity, race, religion, disability, age, sexual orientation, or because they belong to a rural or indigenous community or have immigrant status.¹⁰⁷
50. 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.¹⁰⁸
51. 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.”¹⁰⁹ 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.”¹¹⁰ 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.”¹¹¹ The Court should be urged to routinely examine whether an investigation into gender-based violence includes consideration of the discriminatory motive inherent in such violence.
52. 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.¹¹² In determining whether or not to proceed with an investigation into a complaint of rape it is particularly important that the decision-making process is not tainted by discriminatory stereotypes about rape and rape victims (see below). The CEDAW 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.”¹¹³

- 53.** The Court also considers that discriminatory judicial passivity creates a climate conducive to gender-based violence.¹¹⁴ An assessment of the decisions as well as the omissions is therefore 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.
- 54.** 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.¹¹⁵ 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:¹¹⁶
- a.** the victim’s statement should be taken in a safe and comfortable environment, providing privacy and inspiring confidence;
 - b.** the victim’s statement should be recorded to avoid the need to repeat it, or to limit this to the strictly necessary;
 - c.** 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;
 - d.** 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;
 - e.** 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;
 - f.** access to advisory services or, if applicable, free legal assistance at all stages of the proceedings should be provided.
- 55.** Commonly encountered discriminatory investigative practices into sexual and domestic violence that constitute obstacles to access to justice and should be challenged include:
- the minimising of the offence in the police protocol;¹¹⁷
 - the determination by the prosecutor that there are ‘no signs of a crime’ leading to closure of the criminal case, contrary to the evidence;¹¹⁸
 - emphasis placed on the reputation of the victim, including sexual history (see section on stereotypes below);¹¹⁹
 - the undermining of the credibility of the victim on grounds of age, or mental or physical disability;¹²⁰

- adverse conclusions drawn from a delay in reporting an incident of violence (based on stereotyping a victim's response);¹²¹
- the requirement of corroboration evidence for sexual violence (leading to a refusal to prosecute);¹²²
- assumptions by police that domestic violence or marital rape are private/family matters;¹²³
- official attempts at reconciliation;¹²⁴
- measures such as 'confrontation' and 'investigative experiment' (requiring the victim to return to the scene of the crime and re-live the experience) that re-traumatise the victim and are of no or questionable probative value;
- unnecessary intrusive internal examinations that have no probative value.

56. 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 CEDAW Convention and the jurisprudence of the CEDAW Committee.¹²⁵ 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.¹²⁶ 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."¹²⁷ 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.¹²⁸

The importance of identifying and challenging gender-based stereotypes

57. 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.*"¹²⁹ It has been recognised that victims' reactions to violence vary and the European Institute for Gender Equality¹³⁰ 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.*"¹³¹
58. In regard to assessing the behaviour of victims of gender-based violence the Court should be urged to 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 of domestic and sexual violence are not held responsible to assess the risks to which they are exposed and to bear the burden of bringing perpetrators to justice.¹³²
59. The Grand Chamber in *Konstantin Markin v. Russia* recognised the importance of identifying

and dismissing gender-based stereotypes.¹³³ This should include:

- Victim-blaming: it is particularly important that States “*dismantle the commonly held victim-blaming beliefs that make women responsible for their own safety and for the violence they suffer*”.¹³⁴
- 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*’¹³⁵ (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 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.*’¹³⁶
- 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*”.¹³⁷

60. Such stereotyping is rife in domestic and sexual violence cases and can be evident in the statements of the perpetrator, relatives, friends, and neighbours of the victim (evidencing prejudicial social and cultural patterns), police, investigators, prosecutors, judges (evidencing direct discrimination in the investigation and prevention of crime) and even in the Government’s Observations to the Court. Each instance requires drawing out and challenging.



CONCLUSION & USEFUL RESOURCES

Conclusion

1. Given the systemic and structural nature of violence against women and the litigation challenges addressed in this Guide, it is worth considering whether to request the Court to apply general measures and injunctions under Article 46 of the Convention or specifying recommendations for the CEDAW Committee. These measures could include specific legislative changes to require a consent-based definition of rape or sexual violence provisions, to criminalise marital rape and introduce an autonomous offence of domestic violence (in jurisdictions where it is an administrative offence), to make offences of violence against women public/ex officio prosecutions and legislate for mandatory training of the police and the judicial and prosecutorial authorities. 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.¹³⁸
2. In summary, 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.

Useful Resources

European Court of Human Rights factsheets on violence against women and domestic violence

https://www.echr.coe.int/Documents/FS_Violence_Woman_ENG.pdf

https://www.echr.coe.int/Documents/FS_Domestic_violence_ENG.pdf

The United Nations Handbook on effective prosecution response to violence against women and girls

https://www.unodc.org/documents/justice-and-prison-reform/Handbook_on_effective_prosecution_responses_to_violence_against_women_and_girls.pdf

In particular see sections on stereotypes (p. 31); lethality risk checklist (p.53); protection of victims (p.56 and 97); evidence (p.99) and expert witnesses (p.111).

The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (the ‘Istanbul Convention’)

<https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008482e>

The Convention on the Elimination of All Forms of Violence Against Women (CEDAW)

<https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx>

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

https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_35_8267_E.pdf

1995 Beijing Declaration and Platform for Action:

https://beijing20.unwomen.org/~media/headquarters/attachments/sections/csw/pfa_e_final_web.pdf

The United Nations updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice (2010)

https://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/Model_Strategies_and_Practical_Measures_on_the_Elimination_of_Violence_against_Women_in_the_Field_of_Crime_Prevention_and_Criminal_Justice.pdf

The UN Handbook For Legislation on Violence Against Women

<https://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf>

World Health Organisation, understanding and addressing violence against women, Femicide

https://apps.who.int/iris/bitstream/handle/10665/77421/WHO_RHR_12.38_eng.pdf;jsessionid=BDfE3BF04DE30722EFF4311A1F63A6EC?sequence=1

Endnotes

1. The following guides may be helpful: WHO, 'Guidelines for medico-legal care for victims of sexual violence' (2003) <<https://apps.who.int/iris/bitstream/handle/10665/42788/924154628X.pdf;jsessionid=3CD A026E640ADAFB846790846A274E1B?sequence=1>> accessed 19 January 2021; the Crown Prosecution Service, 'Domestic Abuse Guidelines for Prosecutors' (updated on 28 April 2020) <<https://www.cps.gov.uk/legal-guidance/domestic-abuse-guidelines-prosecutors>> accessed 19 January 2021.
2. EHRAC is an independent legal centre that litigates strategic cases before the European Court of Human Rights and UN mechanisms against Russian, Georgia, Ukraine, Azerbaijan, and Armenia, in partnership with committed partner lawyers and NGOs.
3. UNGA, 'Relevance of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment to the context of domestic violence, Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2019) UN Doc A/74/148, para 3.
4. *Osman v UK*, App. No. 23452/94 (ECtHR, 28 October 1998).
5. *Eremia v the Republic of Moldova*, App. No. 3564/11 (ECtHR, 28 May 2013), para 49.
6. Osman concerned a male teacher's obsession with and harassment of a schoolboy, Ahmet Osman, and his family, of which the school and the police were informed. Various disciplinary measures were taken but no criminal prosecution. Eventually the perpetrator shot and wounded Ahmet and fatally shot his father. The Court developed the test cited above and held in this case that there was insufficient evidence to conclude that the police knew or ought to have known that the lives of the Osman family were at real and immediate risk from the perpetrator.
7. Osman (n.4), para 116.
8. *Maiorano and others v Italy*, App. No.28634/06 (ECtHR, 15 December 2009).
9. *Saso Gorgiev v the former Yugoslav Republic of Macedonia*, App. No. 49382/06 (ECtHR, 19 April 2012).
10. *Gorovenky and Bugara v Ukraine*, App. No. 42418/05 (ECtHR, 12 January 2012).
11. *Mahmut Kaya v Turkey*, App. No. 22535/93, (ECtHR, 28 March 2000), para 89
12. *Blijakaj and others v Croatia*, App. No.74448/12 (ECtHR, 18 September 2014).
13. *Kayak v Turkey*, App. No. 60444/08 (ECtHR, 10 July 2012), paras 56, 59, 66.
14. *Oneryildiz v Turkey*, App. No. 48939/99 (ECtHR, 30 November 2004), para 100.
15. *Talpis v Italy*, App. No. No. 41237/14 (ECtHR, 2 March 2017), para 122.
16. *Volodina v Russia*, App. No. 41261/17 (ECtHR, 9 July 2019), para 92.
17. *Opuz v Turkey*, App. No. 33401/02 (ECtHR, 9 June 2009), para 111.
18. *T.M and C.M v the Republic of Moldova*, App. No. 26608/11 (ECtHR, 28 January 2014), paras 46, 60.
19. Ibid, para 47.
20. *Talpis*, (n.15), para 129.
21. GREVIO, 'Third Party Intervention - Kurt v Austria' (2020) <<https://rm.coe.int/grevio-inf-2020-3-third-party-intervention-kurt-v-austria/pdfa/16809987e9>> accessed 19 January 2021, para 9.
22. Inter alia, *Civek v Turkey*, App. No. 55354/11 (ECtHR, 23 February 2016); *Kurt v Austria*, App. No. 62903/15 (ECtHR, 4 July 2019); *Tkheldze v Georgia*, App. No. 33056/17 (ECtHR, communicated 23 June 2017); *Opuz* (n 17).
23. As illustrated by the Court's own case-law: see, e.g., *Talpis* (n.15), para 9; *Kurt* (n.22), para 7; *Kontrova v Slovakia*, App. No. 7510/04 (ECtHR, 31 May 2007), para 8; *Civek* (n.22), para 12; *Halime Kilic v Turkey*, App. No. 63034/11 (ECtHR, 28 June 2016), para 7; *Valiuliene v Lithuania*, App. No. 33234/07 (ECtHR, 26 March 2013), para 9; *M.G. v Turkey*, App. No. 646/10 (ECtHR, 22 March 2016), para 7; *E.M. v Romania*, App. No. 43994/05 (ECtHR, 30 October 2012), para 13; *D.P. v Lithuania*, App. No. 27920/08 (ECtHR, 22 October 2013), para 4.
24. *Opuz* (n.17), para 111.
25. See: paras 14-20 of this guide.
26. See: Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) [2011] CoE Treaty Series, No. 210, Art. 51; and para 15 of this guide.
27. Explanatory Report to the Istanbul Convention, para 260.
28. *Opuz* (n.17), paras 111, 134.
29. *Valiuliene* (n. 23), Concurring Opinion of Judge Pinto de Albuquerque.
30. *Kaya*, paras 88-101; *Kilic v Turkey*, App. No. 22492/93 (ECtHR, 28 March 2000), paras 62-77; *Avsar v Turkey*, App. No. 25657/94 (ECtHR, 10 July 2001), paras 368-369, 411.
31. *Volodina* (n.16).
32. See cases cited in para 5 of this guide.
33. See GREVIO, 'Third Party Intervention in Kurt v Austria' (n.21), paras 13-15, and as evidenced in *Talpis* (n.15), *Kontrova* (n.23), and *Kurt* (n.22). *Talpis* (n.15), 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'.
34. See, e.g., 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* (n.30).

35. UN Committee for the Elimination of All Forms of Discrimination against Women (CEDAW), 'General Recommendation No. 19' (1992), para 9; *A.T. v Hungary*, Communication No. 2/2003 (CEDAW, 26 January 2005) para 9.2; see also Declaration on the Elimination of Violence against Women (adopted 20 December 1993 UNGA Res 48/104) art 4(c).
36. Inter-American Convention on Prevention, Punishment and Eradication of Violence against Women 'Convention Belem Do Para' (adopted 06 September 1994, entered into force 3 May 1995), Art. 7; Inter-American Court of Human Rights *Velasquez Rodriguez v Honduras* (1998), Series C. No. 4, para 172; Inter-American Commission on Human Rights, *Maria Da Penha v Brazil* (2001) Report No. 54/01, Case 12.051.
37. UNHRC, 'Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy' (1996) UN Doc E/CN.4/1997/47/Add.1.
38. See: Istanbul Convention (n.26), Arts. 5, 18, 49-56.
39. As required by Article 51 of the Istanbul Convention; see also: UNODC, 'Handbook on effective prosecution responses to violence against women and girls' (2014) <https://www.unodc.org/documents/justice-and-prison-reform/Handbook_on_effective_prosecution_responses_to_violence_against_women_and_girls.pdf> accessed 19 January 2021, p. 53 (lethality risk checklist).
40. *Volodina* (n.16), para 92; *Opuz* (n.17), paras 141-151; *T.M. and C.M.* (n.18), para 46; *Talpis* (n.15), paras 106, 129.
41. CEDAW, 'General Recommendation No. 35' (2017) UN Doc CEDAW/C/GC/35 (CEDAW, 'General Recommendation No. 35'), UN DOC A/HRC/31/57, para 55.
42. UNHRC, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2016) UN Doc A/HRC/31/57, para 55.
43. *Maria da Penha Maia* (n.36), para 56
44. *Volodina* (n.16), para 113; see also: *Talpis* (n.15), para 117.
45. *Volodina* (n.16), para 86; see also *Bevacqua and S v Bulgaria*, App. No. 71127/01 (ECtHR, 12 June 2008), para 83; *Opuz* (n.17), paras 166-167; *Eremia* (n.5), paras 62-66; and *B. v. the Republic of Moldova*, App. No. 61382/09 (ECtHR, 16 July 2013), para 53.
46. *Talpis* (n.15), para 118.
47. Explanatory Note to the Istanbul Convention (n.27), para 260: '*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.*'
48. *Kurt* (n.22).
49. *M.C. v Bulgaria*, App. No. 39272/98 (ECtHR, 4 December 2003), para. 181.
50. CEDAW Committee, 'General recommendation No. 35'.
51. *Vertido v Philippines*, Communication No. 18/2008 (CEDAW, 16 July 2010) UN Doc CEDAW/C/46/D/18/2008; *R.P.B. v Philippines*, Communication No. 34/2011 (CEDAW, 21 February 2014) UN Doc. CEDAW/C/57/D/34/2011.
52. International Criminal Court (ICC), 'Rules of Procedure and Evidence' (2013), rule 70; Articles 7(2) and 8(2) of the ICC Elements of the Offences; ICC, 'Elements of Crimes' (2011), art 7 (1) (g)-1; ICC, *The Prosecutor v Germain Katanga* ICC-01/04-01/07, Decision on the Confirmation of Charges, 26 September 2008, para 440; ICC, *The Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08-3343, Decision, 21 March 2016, paras 105-106.
53. Inter-American Court of Human Rights, *Fernandez Ortega et al. v Mexico* (2011), Series C No 224.
54. *Prosecutor v Jean-Paul Akayesu* (Judgment), ICTR-96-4-T (2 September 1998).
55. *Prosecutor v Kunarac, Kovac and Vukovic* (Judgment), IT-96-23 & IT-96-23/1-A (12 June 2002).
56. 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' (April 2012) <<https://www.oas.org/en/mesecevi/docs/mesecevi-segundoinformehemisferico-en.pdf>> accessed 19 January 2021; Declaration on Violence Against Women, Girls and Adolescents and Their Sexual and Reproductive Rights (19 September 2014) OEA/Ser.L/V/II.11.710 MESECVI/CEVI/DEC.4/14.
57. *M.C.* (n.49), para 181.
58. *Vertido* (n.51), para 8.9 (b).
59. *Ibid*, paras 8.9, 8.5.
60. CEDAW, 'General Recommendation No. 35', para 33.
61. Platform of independent United Nations and regional expert mechanisms on violence against women and women's rights, 'Absence of consent must become the global standard for definition of rape' (2019) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25340&LangID=E>> accessed 19 January 2021.
62. *E.B v Romania*, App. No. 49089/10 (ECtHR, 19 March 2019), para 58.
63. *Ibid*, para 60.
64. *Ibid*, para 63.
65. 'The Hague Principles on Sexual Violence' (2019) <<https://4genderjustice.org/ftp-files/publications/The-Hague-Principles-on-Sexual-Violence.pdf>> accessed 19 January 2021.
66. *Ibid*, pt.1, 2(b).
67. *Ibid*, pt.5, 1(g).
68. *Ibid*, pt.5, 1(j).
69. *Ibid*, Annex 1, pt 1, fn.16: '*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.*'

70. Istanbul Convention (n.26), Art.46(a).
71. CEDAW '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) UN Doc CEDAW/OP.8/KGZ/1, para 92(b).
72. CEDAW 'Concluding Observations on the sixth periodic report of Tajikistan' (9 November 2018) UN Doc CEDAW/C/TJK/CO/6, para 26.
73. CEDAW 'Concluding Observations on the eighth periodic report of Belarus' (18 November 2016) UN Doc CEDAW/C/BLR/CO/8, para 23(a).
74. UNHRC 'Concluding Observations on the third periodic report of Latvia' (11 April 2014) UN Doc CCPR/C/LVA/CO/3, para 9(a).
75. CEDAW 'Concluding Observations on the fifth periodic report of Lithuania' (24 July 2014) UN Doc CEDAW/C/LTU/CO/5, para 25(e).
76. GREVIO 'Baseline Evaluation Report: Montenegro' (2018), paras 179, 182.
77. GREVIO 'Baseline Evaluation Report: Albania (2017), para 135.
78. Department of Economic and Social Affairs Division for the Advancement of Women 'Handbook for Legislation on Violence against Women' (2010) ST/ESA/32 (UN Handbook for Legislation on Violence against Women), p. 26, 27.
79. Ibid, section 3.4.3.1,
80. Platform of independent United Nations and regional expert mechanisms on violence against women and women's rights (n 61).
81. See: *inter alia* *Opuz* (n 17), paras 138-139; Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, UNGA Res 65/228 (21 December 2010) UN Doc A/RES/65/228, art 15(b).
82. Istanbul Convention (n.26), Art. 55.
83. See: Explanatory Report to the Istanbul Convention, para 279.
84. CEDAW, 'General Recommendation No 35', para 44.
85. *O.G. v Russia*, Communication no 91/2015 (CEDAW, 6 November 2017) UN Doc CEDAW/C/68/D/91/2015, para 7.7; see also *X. and Y. v Russia*, Communication no 100/2016 (CEDAW, 16 July 2019) UN Doc CEDAW/C/73/D/100/2016.
86. *O.G.* (n.85), para 9.
87. CEDAW 'Concluding observations on the eighth periodic report of the Russian Federation' UN Doc CEDAW/C/RUS/CO/8, para 22.
88. UN Committee Against Torture, 'Concluding observations on the sixth periodic report of the Russian Federation' UN Doc CAT/C/RUS/CO/6, paras 30-31.
89. UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2016) UN Doc A/HRC/31/57, para 12.
90. *T.M and C.M* (n.18), paras 46, 60.
91. *Opuz* (n.17), paras 138-139.
92. *Volodina* (n.16), para 84.
93. Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR). Art. 14 enshrines the right not to be discriminated against in "the enjoyment of the rights and freedoms set out in the Convention". The ECtHR therefore always examines Art. 14 in conjunction with another substantive right under the ECHR. However, Art. 14 is not dependent on the existence of a violation of that other right. Art. 1 of Protocol 12 extends the scope of protection against discrimination and constitutes a free-standing right. For more information see ECtHR, 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention: Prohibition of discrimination' (updated 31 August 2020) <https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf> accessed 19 January 2021, p. 6-10.
94. *Dudgeon v the United Kingdom*, App. No. 7525/76 (ECtHR, 22 October 1981), para 49, *Chassagnou and others v France*, App. Nos. 25088/94, 28331/95 and 28443/95 (ECtHR, 29 April 1999), *Aziz v Cyprus*, App. No. 69949/01 (ECtHR, 22 December 2004).
95. *Opuz* (n.17), para 200; *Balsan v Romania*, App. No. 49645/09 (ECtHR, 23 May 2017), para 88; see also: CEDAW, 'General Recommendation No 19', paras 1, 6-7; CEDAW, 'General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women' (2010) UN Doc CEDAW/C/GC/28 (CEDAW, 'General Recommendation No 28'), para 19; CEDAW, 'General Recommendation No 35', para 1; *O.G.* (n.85), para 7.3; UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2016) UN Doc A/HRC/31/57, para 55; Istanbul Convention (n 26), Art. 3(a); Explanatory Report to the Istanbul Convention, para 1.
96. CEDAW, 'General Recommendation No 19', para 7.
97. CEDAW, 'General Recommendation No 35', para 2.
98. See: e.g., CEDAW, 'General Recommendation No 35', paras 16, 17; UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2016) UN Doc A/HRC/31/57, paras 8, 11; UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak' (2008) UN Doc A/HRC/7/3, para 36; HRC, 'General Comment No. 28 on article 3: the equality of rights between men and women' (2000) UN Doc CCPR/C/21/Rev.1/Add.10.
99. *Volodina* (n 16), para 111 (emphasis added).
100. See, e.g., *Eremia* (n 5), para 89; *Mudric v the Republic of Moldova*, App. No. 74839/10 (ECtHR, 16 July 2013), para 63; *Balsan* (n 95), para 85.
101. *Opuz* (n.17), para 200 (emphasis added); *Balsan* (n.95), para 88; *Volodina* (n.16), para 111.
102. See also: CEDAW, 'General Recommendation No 19', paras 1, 6-7; CEDAW, 'General Recommendation No 28', para 19; CEDAW, 'General Recommendation No 35', para 1; *O.G.* (n 85), para 7.3; UNHRC 'Report of the

- Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2016) UN Doc A/HRC/31/57, para 55; Istanbul Convention (n 26), art 3(a); Explanatory Report to the Istanbul Convention, para 1.
103. Istanbul Convention (n.26), Preamble.
 104. CEDAW, 'General Recommendation No 35', para 19.
 105. UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2016) UN Doc A/HRC/31/57, para 6.
 106. Contrast two judgments delivered in 2016 against the same State: *Civek* (n.22) and *Halime Kılıç* (n.23).
 107. See: CEDAW, 'General Recommendation No 35', paras 11, 2.
 108. See: amongst others, *Volodina* (n.16), para 92, and *Eremia* (n.5), para 51.
 109. *Angelova and Iliev v Bulgaria*, App. No. 55523/00 (ECtHR, 26 July 2007), para 98; see also: *Virabyan v Armenia*, App. No. 40094/05 (ECtHR, 2 October 2012), para 218.
 110. Inter-American Court of Human Rights *González et al. ("Cotton Field") v Mexico (2009)* Series C no 205, para 293.
 111. *Fernández Ortega et al.* (n.5), para 193.
 112. *Eremia* (n.5), para 51.
 113. *Vertido* (n.51) para 8.4; see also, CEDAW, 'General Recommendation No. 35', para 26(c).
 114. *Talpis* (n.15), para 141; *Eremia* (n.5), para 89.
 115. UN Committee against Torture, 'General Comment No. 3: Implementation of article 14 by States parties' (2012) UN Doc CAT/C/GC/3, para 33.
 116. *Ibid*, para 194.
 117. See, e.g., *Volodina* (n.16), paras 97-98.
 118. See: *Ibid*, para 95.
 119. See also: Istanbul Convention (n 26), Art. 54; UN Handbook for Legislation on Violence Against Women (n 78), s 3.9.7.2, p. 43-44.
 120. CEDAW, 'General Recommendation No 19'. On disability see: *R.P.B* (n.51); *L.R. v Republic of Moldova*, Communication No. 58/2013 (CEDAW, 28 February 2017) UN Doc CEDAW/C/66/D/58/2013; *E.B.* (n.62); Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) UNGA Res A/RES/61/106 (CRPD) Art. 12; CRPD, 'General Comment No. 6 on equality and non-discrimination' (2018) UN Doc CRPD/C/GC/6. On children see: Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) UNGA Res A/RES/44/25; CRC, 'General Comment No. 12 on the right of the child to be heard' (2012) UN Doc CRC/C/GC/12; *M.G.C v Romania*, App. No. 61495/11 (ECtHR, 15 March 2016); *M.C.* (n.49); *J.C v Romania*, App. No. 36934/08 (ECtHR, 24 May 2016).
 121. UN Handbook for Legislation on Violence Against Women (n.78) s 3.9.6, p.42.
 122. *ibid*, s 3.9.7.1, p.43.
 123. See: CEDAW, 'General Comment No 35', para 19.
 124. See: CEDAW General Recommendation, paras 29 (c)(ii), 32(b).
 125. UNHRC, 'Report of the Special Rapporteur on violence against women, its causes and consequences' (2017) UN Doc A/HRC/35/30, para 98.
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 127. CEDAW 'Concluding observations on the eighth periodic report of the Russian Federation' UN Doc CEDAW/C/RUS/CO/8, para 22.
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 133. *Konstantin Markin v. Russia*, App. No. 30078/06 (ECtHR, 22 March 2012), para 142-143.
 134. CEDAW, 'General Recommendation No 35', para. 35(b).
 135. *Vertido* (n.15) para 8.4.
 136. *Ibid*, para 8.5; see also GREVIO, 'Third Party Intervention in Kurt v Austria' (n.21), paras 10-11.
 137. Department for Child Protection, Government of Western Australia, 'Fact Sheet 3: Perpetrator Characteristics' (2013) <<https://www.dcp.wa.gov.au/CrisisAndEmergency/FDV/Documents/2015/FactSheet3Perpetratorcharacteristics.pdf>> accessed 19 January 2021, pp.1, 3.
 138. As advocated by Judges Pinto de Albuquerque and Dedov in their Separate Opinion in *Volodina* (n 16), paras 13-20. See also González et al. (n 110), para 450; UNHRC, 'Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo' (2013) UN Doc A/HRC/23/49, para 75.



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