THE AIRE CENTRE
Advice on Individual Rights in Europe

THE SUPREME COURT OF MONTENEGRO

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Podgorica

DOMESTIC VIOLENCE

Overview of International Standards and European Court of Human Rights Case Law

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INTRODUCTORY ADDRESS

Dear ladies and gentlemen,

I am extremely pleased to address you on behalf of the AIRE Centre (Advice on Individual Rights in Europe), which prepared this Handbook in cooperation with the Supreme Court of Montenegro within the three-year project we have been implementing to improve the application of international standards in proceedings before domestic courts. The implementation of this project has been supported by the UK Government via the British Embassy in Podgorica.

The Handbook aims to empower professionals fighting against domestic and gender-based violence. It primarily addresses the State's obligations to respond to domestic violence. The Handbook, developed in tandem by international and domestic experts, covers many important issues arising both from the legal instruments and the caselaw of the European Court of Human Rights. They include the States' obligations to: prohibit domestic violence by law and punish the perpetrators; prevent domestic violence; investigate complaints of domestic violence and prosecute the offenders; and, their detailed obligations to act in accordance with the Istanbul Convention.

We hope that you will find this Handbook useful and that it will contribute to the efficiency of the fight against domestic violence.

Biljana Braithwaite
The AIRE Centre Western Balkans Programme Manager

INTRODUCTION

A lot of time had to pass before domestic violence left the sphere of "the family home" and began to be treated as a societal problem, to which the State pays due attention and addresses responsibly, by undertaking adequate measures to prevent and combat it and protect its victims.

Numerous international conventions today provide protection from all forms of violence and domestic violence, recognising domestic violence as a violation of human rights and a form of discrimination against women.

International standards acknowledge that domestic violence is a form of gender-based violence because it disproportionately affects women, although men can be victims of domestic violence as well. Such violence arises from the inequalities in the balance of power between women and men and their gender inequality.

Furthermore, these standards recognise that children are victims of domestic violence as well. Domestic violence cases involving children are especially grave, wherefore particular care should be devoted to the children's right to grow up in a healthy family environment, in an atmosphere of love and happiness. Domestic violence has unfathomable consequences on the psychological development of children, both on those who are directly harmed by such violence and those witnessing it, who thus become its indirect victims.

Domestic violence is a criminal offence in most national legislations. Montenegro for the first time incriminated domestic violence in 2002, when it amended its Criminal Code.[1]

Domestic violence is a universal problem that exists in all countries in the world, including Montenegro. Results of a 2017 UNDP Study show that 42% of the female respondents in Montenegro said that they had experienced violence, most of them in their family environment.[2]

Montenegro has ratified many international documents relevant to the fight against violence against women and children and domestic violence, thus reaffirming its resolve to ensure the full exercise of the human rights of

1 Law Amending the Criminal Code (Official Journal of the Republic of Montenegro, 30/2002 of 26 June 2002)

2 UNDP Study on Family Violence and Violence against Women in Montenegro (2017)

women and the girl child as an inalienable, integral and indivisible part of all human rights and fundamental freedoms.

The Council of Europe Convention on preventing and combating violence against women and domestic violence (hereinafter: Istanbul Convention)[3] is the key document in this area. It entered into force on 1 August 2014 in respect of Montenegro. By ratifying the Istanbul Convention, Montenegro made a large step towards advancing the protection of human rights, especially the protection of women and girls from all forms of violence.

Mention should, however, also be made of some earlier documents adopted by international organisations that substantially contributed to laying the foundations and developing the standards for suppressing all forms of discrimination against women, as well as for promoting the principle of equality between women and men.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[4] holds an important place among international treaties concluded under the auspices of the United Nations. By succeeding to it, Montenegro firmly expressed its resolve to combat discrimination against women and to pursue by all appropriate means and without delay a policy of eliminating discrimination against women. The CEDAW has been supplemented by General Recommendations 19[5] and 35[6], which helped ensure acknowledgement that gender-based violence against women is a form of discrimination against women and that it should be considered a grave violation of women's human rights. These Recommendations obligate States parties to combat violence against women.

3 Law Ratifying the Council of Europe Convention on preventing and combating violence against women and domestic violence (Official Journal of Montenegro 4/2013 of 20 March 2013)

4 The Convention was adopted by the United Nations General Assembly in December 1979 and entered into force in September 1981 after twenty States ratified it. Montenegro succeeded to the Convention after the dissolution of the state union with Serbia.

5 UN Committee on the Elimination of All Forms of Discrimination against Women (CEDAW), General recommendation No. 19 on violence against women (1992)

6 UN Committee on the Elimination of All Forms of Discrimination against Women (CEDAW), General recommendation No. 35 on gender-based violence against women updating general recommendation No. 19 (2017)

The United Nations Convention on the Rights of the Child[7] is the main international legal instrument protecting the rights of the child. Its States parties undertake to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence.

Montenegro has also ratified the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (the Lanzarote Convention),[8] which aims to prevent and combat sexual exploitation and sexual abuse of children and protect the rights of child victims of such exploitation and abuse.

International documents that do not have binding effect but set important standards and guidance for further action should also be borne in mind. One of them is the Declaration on the Elimination of Violence against Women, adopted by the UN General Assembly in 1993.[9] The Declaration was the first international document to address violence against women and urge States to make every effort to pursue by all appropriate means and without delay a policy of eliminating violence against women.

Further work and headway on the international stage was marked by the adoption of the Beijing Declaration and Platform for Action[10] in 1995, in order to advance the goals of equality, development and peace for all women everywhere in the interest of all humanity. These documents reaffirm the commitment to the objective and principles guaranteed, inter alia, in the above-mentioned CEDAW and the Declaration on the Elimination of Violence against Women, and the governments reiterate their resolve to prevent and eliminate all forms of violence against women and girls.

However, the Istanbul Convention, as the first legally binding international instrument on gender-based violence in Europe, holds a special place in

7 UN Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. The Convention entered into force on 2 September 1990, in accordance with article 49.

8 Montenegro signed the Convention on 18 June 2009 and ratified it on 25 November 2010. It entered into force on 1 March 2011.

9 Declaration on the Elimination of Violence against Women, adopted by the General Assembly in its resolution 48/104 of 20 December 1993

10 These documents were adopted at the Fourth World Conference on Women, held in Beijing in 1995, marking the 50th anniversary of the United Nations.

the entire body of international documents addressing violence against women and domestic violence. It is a comprehensive document and its 81 Articles set detailed standards and requirements for States in the following fields: legislation, prevention, measures for extending legal and institutional protection and support to victims, as well as the effective prosecution and punishment of the perpetrators.

By ratifying the Istanbul Convention, Montenegro committed to taking the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non State actors.

For the purpose of the Istanbul Convention, violence against women is understood as "a violation of human rights and a form of discrimination against women and shall mean all acts of gender based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life," whereas domestic violence shall mean "all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim".

Pursuant to the Istanbul Convention, gender-based violence against women shall mean "violence that is directed against a woman because she is a woman or that affects women disproportionately".

The Group of experts on action against violence against women and domestic violence (hereinafter: GREVIO) was established under the Istanbul Convention to monitor its implementation by the states parties.

On 15 October 2018, GREVIO published its first report on Montenegro, after it conducted the first (baseline) evaluation of the implementation of the Istanbul Convention. The Report assessed Montenegro's implementation of the Convention in its entirety, evaluating the level of compliance of Montenegrin law and practice in all areas covered by the Convention. The Report also includes recommendations on strengthening the implementation of the Convention.

The Report highlighted the overall progress made by the authorities in Montenegro towards building a legislative, policy and institutional framework

to prevent and combat violence against women. It welcomed, in particular, the introduction of important legislation, action plans and strategies addressing some forms of violence against women, in particular domestic violence. It said that the most prominent example was the Law on Domestic Violence Protection (LDVP),[11]which stood central in the Montenegrin approach to combating domestic violence and introduced a misdemeanour offence of domestic violence with the main aim of allowing statutory agencies to respond more efficiently to domestic violence. It went on to say that the Law introduced, for the first time, emergency barring and restraining orders, as well as other important rights for domestic violence victims, such as the right to legal aid. GREVIO said that the recent amendments to the Criminal Code ensured the criminalisation of other forms of violence against women as required by the Convention, namely stalking, female genital mutilation and forced sterilisation.[12]

Despite the noted headway, GREVIO held that more needed to be done to improve the legislative framework and prevention and to raise awareness of various forms of violence suffered by women in Montenegro, to strengthen the protection of the victims' rights, and to improve cross-sectoral cooperation in adequately responding to violence that occurs. It also highlighted the need for systematic and mandatory initial training for judges on various forms of violence against women, their detection and causes, and prevention of secondary victimisation.

GREVIO strongly encouraged the Montenegrin authorities to step up efforts against violence against women by ensuring that measures taken in accordance with the Istanbul Convention address all forms of violence against women in a holistic and comprehensive manner with due regard for their gendered nature.

Domestic violence is incriminated in Article 220[13] of the Montenegrin Criminal Code, which defines it as "gross violence violating the bodily and mental integrity of family members". The national legislative framework was

11 Law on Domestic Violence Prevention (Official Journal of Montenegro, 46/2010 and 40/2011-1)

12 GREVIO's (Baseline) Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) Montenegro (2018)

13 Criminal Code of Montenegro (Official Journal of the Republic of Montenegro, 70/2003, 13/2004 - corr. and 47/2006 and Official Journal of Montenegro, 40/2008, 25/2010, 32/2011, 64/2011 - other law, 40/2013, 56/2013 - corr., 14/2015, 42/2015, 58/2015 - other law, 44/2017 and 49/2018)

strengthened by the adoption of the LDVP in 2010, which provides for the misdemeanour liability of family members for domestic violence. The LDVP includes a broader definition of domestic violence as any "act of omission or commission by a family member violating the physical, psychological, sexual or economic integrity, mental health or tranquillity of another family member, irrespective of where it occurred."

The co-existence of two domestic violence offences in criminal and misdemeanour law gave rise to GREVIO's concerns over the lack of clear and uniform criteria applied consistently to distinguish between a misdemeanour offence and a criminal offence of domestic violence.

GREVIO assessed that most domestic violence offences were prosecuted under the misdemeanour offence, which carries extremely low sanctions, leaving those victims that do go through with a case disillusioned with the outcome. It also stressed that the Montenegrin criminal courts' penal policy was mild, that suspended sentences accounted for a substantial share of convictions, and that their wide use did not suggest that these sanctions were dissuasive.

Effective combatting of violence against women and domestic violence requires not only good knowledge of international standards, but continuous monitoring of the case law of the European Court of Human Rights (ECtHR) as well.

The Preamble to the Istanbul Convention takes into account, in particular, the growing body of case law of the ECtHR, which sets important standards in the field of violence against women.

The ECtHR has clearly said that States are under the obligation to take adequate measures to prevent domestic and gender-based violence, protect victims of domestic violence, take appropriate measures against the perpetrators, because they may be held liable for their omission to act as well, e.g. if they fail to take adequate measures to protect women from domestic and all forms of gender-based violence.

The ECtHR has reviewed a number of cases involving various aspects of gender-based violence to date. In 2009, in its judgment in the case of *Opuz v. Turkey*, it held for the first time that gender-based violence was a form of discrimination.

Given that Montenegro has signed the Istanbul Convention and other international treaties establishing the States' liability for private acts of violence and discrimination, there is a major need for strengthening domestic case law in accordance with international standards, especially since the Montenegrin Constitution provides for the direct application of international standards and ratified conventions in the event the issue at hand is not regulated by domestic law or is differently regulated by it. Furthermore, the Istanbul Convention, as the most far-reaching international treaty on combating violence against women and domestic violence, provides numerous possibilities for ensuring the judiciary's adequate response to such violence. This is extremely important in cases where the State failed to prevent domestic violence that led to violations of the right to life or inhuman or degrading treatment.

Although the European Convention on Human Rights (ECHR) does not explicitly deal with the problem of domestic violence, the ECtHR has reviewed a number of cases in which it found violations of individual Convention rights in the context of domestic violence. Therefore, by applying the standard of the ECtHR, which refers to views of other international bodies in its decisions, the Montenegrin courts can apply the modern concept of interpretation to domestic violence and women's rights.

Furthermore, in proceedings involving children, all the relevant authorities must respect the rights of the child and at all times bear in mind the principle of the best interests of the child. Judicial professionals must also be aware of the detrimental effect testimonies have on children and must make every effort to minimise the risk of secondary victimisation.

This is why this Handbook, which presents the leading ECtHR decisions in the field of domestic violence and gender-based violence in general, provides guidance to all professionals on how to successfully deal with this problem.

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Supreme Court of Montenegro

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Supreme Court of Montenegro

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The following table describes the significance of various abbreviations and acronyms used throughout the handbook.

Abbreviation	Meaning
ECHR	European Convention on Human Rights
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
UNCRC	United Nations Convention on the Rights of the Child
ECtHR	European Court of Human Rights
IC	Istanbul Convention
GREVIO	The Group of Experts on Action against Violence against Women and Domestic Violence
CEDAW Committee	Committee on the Elimination of Discrimination against women
DEVAW	Declaration on the Elimination of Violence against Women
GC	UN General Comment

Overview of the legal framework for positive State obligation for acts of domestic violence

This handbook is intended to provide an overview of how the nature of State obligations in relation to domestic violence has evolved under the European Convention on Human Rights ('ECHR'), the Convention on preventing and combating violence against women and domestic violence ('the Istanbul Convention'), the Convention on the Elimination of all Forms of Discrimination against Women ('CEDAW') and the United Nations Convention on the Rights of the Child ('UNCRC').

Section I of this handbook will draw on the case law of the European Court of Human Rights ('ECtHR') to set out the principles that have been established by the ECtHR in respect of violations of ECHR rights committed by private parties.

Sections II and III will discuss other international agreements, specifically in relation to Article 53 of the ECHR and States' duties not to limit or derogate from their obligations under other international agreements. **Section II** will look at the Istanbul Convention and **Section III** will specifically discuss State obligation under CEDAW and UNCRC.

While this handbook acknowledges that men may also be the victims of domestic violence, these sections will specifically address the domestic violence against women and children due to the disproportionate occurrence of domestic violence on them.

SECTION I

State obligations deriving from the ECHR and ECtHR

Can a state be responsible for acts committed by a private party?

The short answer to this question is no – the state cannot be held *generally* responsible for private acts of violence; the long answer is emphatically **yes**. Circumstances where the State fails in its duty to act will give rise to such a responsibility. Contracting States to the ECHR have a responsibility to protect all those within their jurisdiction from acts committed against them by a private party.

As such, States have an obligation to:

- **Prohibit** domestic violence, by establishing appropriate laws;
- **Prevent** its infliction upon victims, by taking all reasonable steps to **protect** them;
- **Investigate** allegations of domestic violence in a prompt and effective manner;
- **Prosecute** allegations of domestic violence where an investigation discloses breaches of the law; *and*
- **Punish** the perpetrators of domestic violence in a manner proportionate to the seriousness of the offences committed.

The main aim of human rights law is to protect the individual from abuse perpetrated by the State and State actors. Consequently, domestic violence between private individuals did not appear to come within the ambit of traditional interpretations of human rights law. However, some of the earliest human rights treaties, such as the ECHR, have been recognised to be "living instruments," allowing them to be interpreted so as to bring issues such as violence in the home within their scope.[14]Crucially, the ECtHR has interpreted the ECHR so as to oblige contracting States to protect the Convention rights of individuals within their jurisdiction from violations committed by other private individuals where the violation in question – here personal violence – can be linked to the State's failure to protect the victim through its acts or omissions.

14 Ronagh McQuigg, The Istanbul Convention, Domestic Violence and Human Rights (1st edition Routledge 2017) 143

Overview of the scope of the State's obligations

The ECtHR has addressed the issue of domestic violence on several occasions over the past decade, developing a substantial corpus of jurisprudence. While the ECHR does not expressly refer to domestic violence, its evolving jurisprudence has meant that violations of the following ECHR provision have all been found in cases involving domestic violence:

i. The obligation of States to secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the ECHR under **Article 1**;
ii. The right to life under **Article 2** – engaged where domestic violence reaches a level at which it poses threat to life;
iii. The right to be free from torture and from inhuman or degrading treatment under **Article 3** - engaged where domestic violence reaches the severity threshold;
iv. The right to respect for private and family life under **Article 8** - engaged, in its "private life" rubric, when there has been an interference with the victim's moral and physical integrity which is not severe enough to engage Article 3;
v. The right to an effective remedy under **Article 13**;
vi. The prohibition of discrimination under Article 14.

State obligations in relation to each of these articles will be discussed further below under the relevant headings.

Overview of procedural and substantive obligations

The ECtHR has made an essential distinction between **'procedural'** and **'substantive'** obligations. The underlying principle behind the distinction lies in the nature of the action expected from States.[15]

Substantive obligation simpose both **negative** and **positive obligations** on States. **Negative obligations** forbid States from directly engaging in prohibited treatment, such as the intentional and unlawful taking of life under Article 2, or torture and degrading treatment under Article 3.**Positive obligations** ensure States also have to take measures designed to safeguard individuals within their jurisdiction from violations, such as breaches of Articles 2 or 3, - or

15 Jean-François Akandji-Kombe, Positive obligations under the European Convention on Human Rights A guide to the implementation of the European Convention on Human Rights (Human Rights Handbook No. 7, Council of Europe 2007) 16

from being put at risk of such violations - including when such ill treatment is perpetrated by private individuals.[16]

A state also has a **procedural obligation** to conduct an effective official investigation into allegations of violations that is capable of leading,[17] if appropriate, to prosecution and conviction.[18] These procedural obligations are considered essential to the practical and effective enjoyment of the rights guaranteed by the ECHR.

It is important to note that the ECtHR has, on many occasions, made clear that the Convention must guarantee rights which **are not theoretical or illusory**, but **practical and effective**.[19] Under this principle the ECtHR ensures that a State's obligation to protect the rights of those within its jurisdiction is **adequately discharged**. However, the ECtHR must and does not replace national authorities and choose, in their stead, possible measures to secure compliance with their positive obligations.[20]

Substantive and procedural obligations will be examined in detail below.

Positive Substantive Obligations

While the principles of State obligation have been developed by ECtHR jurisprudence, the fundamental obligation on States is derived from **Article 1 of the ECHR**. Read in conjunction with other ECHR articles, Article 1 obliges contracting States to secure the rights and freedoms under Section I of the Convention that are relevant to the situation of the individual. Article 1 will be discussed further in conjunction with Articles 2 and 3.

Article 1 of the Convention, taken in conjunction with, *inter alia*, Article 3, imposes positive obligations on States to ensure that individuals within their jurisdiction are **protected against all forms of ill-treatment prohibited under the Article, including when such treatment occurs at the hands of private individuals**. Similarly, when read in conjunction with Article 2, Article

16 A. v. United Kingdom, judgment of 23 September 1998, no. 100/1997/884/1096; Z and Others v. United Kingdom, judgment of 10 May 2001, no. 29392/95

17 M.C. v. Bulgaria, judgment of 4 December 2003, no. 39272/98

18 The meaning of an 'effective investigation' is analysed in both sections I and II

19 Kutic v. Croatia, judgment of 1 March 2002, no. 48778/99; Airey v Ireland, judgment of 9 October 1979, no. 6289/73

20 Bevacqua and S. v. Bulgaria, judgment of 12 June 2008, App no 71127/01

1 imposes an obligation on the High Contracting Party to establish a legal framework which **prohibits** and **prevents** the taking of a human life by any state agent or individual.

Scope of Article 2

Article 2 is engaged when there has been an unlawful deprivation of human life (or threat to that effect) linked to the acts or omissions of a state agent. Regarding a threat to human life, it must be established that **the authorities knew, or ought to have known**, of the existence of **a real and immediate risk to the life of an identified individual** 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. To find a State in violation of Article 2 of the Convention in a domestic violence case, it must be demonstrated that **the government failed to adequately protect an individual from the actions of a private person**.[21]

While this test was initially formulated by the ECtHR in *Osman v United Kingdom*[22] (not a domestic violence case)to determine when States have a positive obligation to intervene to protect individuals from the acts of other private parties under Article 2 of the ECHR, it has subsequently been extended to apply to establishing whether there has been a breach of Article 3[23] and of Article 8.[24] This test will be referred to as the 'Osman test' throughout this handbook.

Scope of Article 3

The Osman test in its usual form, however, is insufficient in cases involving domestic violence because of the 'immediate risk' part of the test.[25] Judge Pinto de Alburquerque in the case of *Valiuliene v. Lithuania*[26] commented that 'the recurrence and escalation inherent in most cases of domestic violence makes it somewhat 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'.[27]

The Judge went on to comment, 'If a State knows or ought to know that a segment of its population, such as women, is subject to repeated violence and fails to prevent harm from befalling the members of that group of people when they face a present (but not yet imminent) risk, the State can be found responsible by omission for the resulting human rights violations. The constructive anticipated duty to prevent and protect is the reverse side of the context of widespread abuse and violence already known to the State authorities'.[28]

The ECtHR has established that ill-treatment of an individual must attain a **minimum level of severity** to reach the threshold of Article 3 and so engage the State's positive obligation.[29] The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the **nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim**.[30] For instance, in the case of *Valiuliene*,[31] the ECtHR held that the 'ill-treatment of the applicant, which on five occasions caused her physical injuries, *combined with her feelings of fear and helplessness*, was sufficiently serious to reach the level of severity under Article 3 of the Convention and thus raise the Government's positive obligation under this provision'.[32]

Scope of Article 8

In respect of **less serious acts between individuals, which may violate physical or psychological integrity**, the ECtHR has considered Article 8 to be engaged when violence threatens an individual's physical and moral integrity protected under the right to a private life found in Article 8. The Court has

21 Osman v. United Kingdom, judgment of 28 October 1998, no. 23452/94; Kontrová v. Slovakia, judgment of 31 May 2007, no 7510/04; Opuz v. Turkey, judgment of 9 June 2009, no. 33401/02; Branko Tomašić and others v. Croatia, judgment of 15 January 2009, no 46598/06, para 50

22 Osman v. United Kingdom, judgment of 28 October 1998, no. 23452/94

23 Valiuliene v. Lithuania, judgment of 26 March 2013, no. 33234/07

24 Hajduova v. Slovakia, judgment of 30 November 2010, no 2660/03

25 Ronagh McQuigg, 'The European Court of Human Rights and Domestic Violence: Valiuliene v Lithuania' (2014) 18(7-8) The International Journal of Human Rights 756, 9

26 Valiuliene v. Lithuania, judgment of 26 March 2013, no. 33234/07

27 Ibid, pg 30

28 Ibid, pg 31

29 Opuz v. Turkey, judgment of 9 June 2009, no. 33401/02, para 158

30 Opuz v. Turkey, judgment of 9 June 2009, no. 33401/02; Costello-Roberts v. the United Kingdom, judgment of 25 March 1993, no. 13134/87

31 Valiuliene v. Lithuania, judgment of 26 March 2013, no. 33234/07

32 Ibid, para 70

reiterated that while the essential objective of Article 8 is to protect the individual from arbitrary action by public authorities, there can in addition be positive obligations inherent in the State's effective 'respect' for private and family life. In particular, under Article 8 States **have a duty to protect the physical and moral integrity of an individual** from infringement by private persons.[33]In numerous cases[34] where applicants have made arguments alleging violations of both Articles 3 and 8, the Court has found a violation of Article 8 and then stated that it was therefore unnecessary to also examine the case under Article 3.

In the case of *Bevacqua*,[35] the ECtHR recognised that while the primary purpose of Article 8 was to **prevent undue state intrusion into private life**, respect for private and family life may include 'a duty to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals'.[36] This positive duty arises particularly in relation to the **safeguarding of vulnerable individuals**. In *Bevacqua*, because local authorities had disregarded Bevacqua's complaints, the Court found the State had been in violation of Article 8 for failing to abide by these positive obligations.[37]

In the case of *Söderman v. Sweden*,[38] the applicant alleged that the Swedish State had failed to comply with its obligation under Article 8 of the ECHR to have an adequate legal framework in place to provide the applicant with protection against the concrete actions of her stepfather and to this end to provide her with remedies against the consequent violation of her personal integrity when her stepfather had attempted to secretly film her naked in their bathroom when she was 14 years old. While the act in that case did not involve any physical violence the ECtHR was called to consider whether Sweden had an adequate legal framework providing the applicant with protection against the concrete actions of her stepfather and assess each of the remedies allegedly

33 Söderman v. Sweden, judgment of 12 November 2013, no. 5786/08

34 Bevacqua and S. v. Bulgaria, judgment of 12 June 2008, no 71127/01; A. v. Croatia, judgment of 14 October 2010, no 55164/08; Kalucza v. Hungary, judgment of 24 April 2012, no 57693/10; Sandra Janković v. Croatia, judgment of 5 March 2009, no. 38478/05

35 Bevacqua and S. v. Bulgaria, judgment of 12 June 2008, no 71127/01

36 Ibid, para 65

37 Tarik Abdel-Monem, 'Opuz v. Turkey: Europe's Landmark Judgment on Violence against Women' (2009) 17(1) Human Rights Brief 29, 30

38 Söderman v. Sweden, judgment of 12 November 2013, no. 5786/08

available to her.[39] The ECtHR concluded that neither a criminal remedy nor a civil remedy existed under Swedish law that could enable the applicant to obtain effective protection against the said violation of her personal integrity in the concrete circumstances of her case, and that therefore there had been a violation of Article 8.[40]

This handbook will now analyse the aforementioned obligations of the States to **prohibit, prevent, investigate, prosecute and punish**.

Obligation to prohibit domestic violence in law and punish perpetrators

Criminal law provisions

States have a positive obligation, inherent in **Articles 2, 3 and 8 of the ECHR**, to establish criminal-law frameworks which effectively prohibit violations of these provisions.[41]

Adequate legal framework

Legislative measures enacted by States should provide not only for **effective prohibition** of violations, but also **protection**, to **vulnerable persons** in particular, from violations. Such protection should include the State taking reasonable steps to prevent prohibited treatment of which authorities had or ought to have had knowledge.[42]Legislation should have an equally **adequate deterrent and protective effect** capable of ensuring the operative prevention of domestic violence.

This means that legislation has to be sufficiently **precise and ascertainable** for potential victims of domestic violence to know that the law publicly **protects** them and for potential perpetrators of domestic violence to know that the law **prohibits** them from inflicting violence as well as that it will ensure their **punishment** under the applicable legal provisions.

39 Ibid, para 89

40 Ibid, para 117

41 Ž.B. v. Croatia, judgment of 11 July 2017, no. 47666/13, paras 49-51

42 Osman v. United Kingdom, judgment of 28 October 1998, no. 23452/94

What is an 'adequate legal framework'?

In *Opuz*[43] the ECtHR observed that a Criminal Code which *'prevented the prosecuting authorities to pursue the criminal investigations because the criminal acts in question had not resulted in sickness or unfitness for work for ten days or more...* fell short of the requirements inherent in the State's positive obligations to establish and apply effectively a system punishing all forms of domestic violence and providing sufficient safeguards for the victims'[44]

Similarly, in *X and Y v. The Netherlands*,[45] the ECtHR considered the Criminal Code of the Netherlands and determined that it did not contain provisions allowing a legal representative to act on the victim's behalf when the victim clearly lacked capacity due to being mentally handicapped.[46] Taking into account the nature of the wrongdoing in question, the ECtHR established that the national legislation did not afford practical and effective protection to the victim and that she was therefore the victim of a violation of Article 8.

It is therefore apparent, that the case law of the ECtHR has been consistent in implying that an 'adequate legal framework' is one that is able to provide the applicants with 'practical and effective' protection. [47]

Civil-law provisions

As discussed in *Söderman* above, when acts between individuals violate psychological integrity but do not reach the level of severity required by Article 3, the State has an obligation under Article 8 to put in place, and apply in practice, adequate legal protection. This legal protection does not always demand a criminal-law remedy but could also consist of civil-law remedies capable of affording sufficient protection.[48] A State also has to make sure that appropriate orders are made against perpetrators of domestic violence that does not constitute a criminal offence, and that these orders have the necessary degree of precision and that they are enforceable in practice.

43 Opuz v. Turkey, judgment of 9 June 2009, no. 33401/02

44 Ibid, para 145

45 X and Y v. the Netherlands, judgment of 26 March 1985, no. 8978/80

46 Ibid, para 28

47 Ibid, para 30

48 Söderman v. Sweden, judgment of 12 November 2013, no. 5786/08, para 85

In *Eremia*, the ECtHR established that the onus rested entirely with the State to ensure that protection orders afforded were complied with.[49]

Civil law remedies will be further addressed under the IC in Section II of this handbook.

Obligation to prevent the infliction of domestic violence in order to protect the victim

ECtHR case law has confirmed that the substantive positive obligation of **prevention** and thus **protection** under Articles 2, 3 and 8 requires states to do **more than simply enact legislation** designed to safeguard the personal integrity of vulnerable persons.[50] It also extends, in appropriate circumstances, to a positive obligation **on the authorities** to take **reasonable preventive operational measures to protect** an individual whose life, or physical safety, is at risk from the criminal acts of another individual.[51]

'In appropriate circumstances' means that not every claimed risk to life places a Convention requirement on the authorities to take operational measures to prevent that risk from materialising. For a positive obligation to arise, 'constructive knowledge' must be established, meaning that the authorities must have known or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party. Authorities will fall short of their positive obligation if they then failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk to life.

What is 'reasonable'?

The ECtHR will interpret the scope of the State's positive obligation it in a way which does not impose an impossible or disproportionate burden on the authorities, always bearing in mind **the difficulties involved in policing modern societies**, the **unpredictability of human conduct and the operational choices** which must be made in terms of priorities and resources.[52]

49 Eremia and others v. The Republic of Moldova, judgment of 28 May 2013, no. 3564/11, para 43

50 Opuz v. Turkey, judgment of 9 June 2009, no. 33401/02

51 Ibid, para 128

52 Talpis v. Italy, judgment of 2 March 2017, no. 41237/14

In *Opuz*,[53] the ECtHR noted that the local authorities, namely the police and public prosecutors, did not remain totally passive as after each incident involving violence, the applicant was taken for medical examination and criminal proceedings were instituted against the perpetrator.[54] The applicant was questioned in relation to his criminal acts, placed in detention on two occasions, indicted for issuing death threats and inflicting actual bodily harm and, subsequent to his conviction for stabbing the applicant seven times, sentenced to pay a fine. Despite such measures taken by the police and public prosecutors, none of them were sufficient to stop the perpetrator from perpetrating further violence. To fall within the scope of reasonable, it might have been expected that the authorities, faced with a suspect known to have a criminal record of perpetrating violent attacks, would take special measures consonant with the gravity of the situation with a view to protecting the applicant's mother. To that end, the local public prosecutor or the judge at the Magistrate's Court could have ordered on his/her initiative one or more of the protective measures enumerated under [national legislation]. [55]

It is not the ECtHR's role to replace the national authorities and to choose in their stead from among the wide range of possible measures that could be taken to secure compliance with their positive obligations under Articles 2, 3 and 8 of the Convention.[56]

What are preventive operational measures?

While the concept of 'preventive operational measures' was first established in *Osman* in respect of Article 2, failing to adopt preventive operational measures has now been established to breach state obligations under Articles 3 and 8 as well. Once the ECtHR has established the State has had **constructive knowledge** of an event, it must consider whether the State had taken all **reasonable preventive operational measures**.

In the case of *Hadjuova*,[57] the ECtHR held that the District Court's failure to comply with its statutory obligation to **order the mentally-ill perpetrator's detention for psychiatric treatment**, following his conviction for having abused

53 Opuz v. Turkey, judgment of 9 June 2009, no. 33401/02

54 Ibid, para 166

55 Ibid, para 148

56 Bevacqua and S. v. Bulgaria, judgment of 12 June 2008, no 71127/01, para 82

57 Hajduova v. Slovakia, judgment of 30 November 2010, no 2660/03

the applicant, violated her Article 8 rights. This inactivity, and failure to ensure that the Applicant's husband was detained for psychiatric treatment, enabled him to continue to threaten both the Applicant and her lawyer **indicating a clear lack of sufficient preventive measures taken by the authorities** in reaction to his behaviour. The ECtHR held that this amounted to a breach of the State's positive obligations under Article 8 of the ECHR to secure respect for the applicant's private life.

The ECtHR also applied the above principles in the case of *Kontrová v Slovakia*.[58] The ECtHR considered that the local police department had been made aware of the situation of the applicant, who had been a victim of domestic violence. Under Slovakian law, the police had various specific duties: such as **accepting and registering the Applicant's complaint**, **launching a criminal investigation** and **commencing proceedings against the applicant's husband immediately**.[59] They had, however, failed to comply with any of these obligations. The ECtHR held therefore that there had been a violation of Article 2 in respect of the deaths of the Applicant's two children.

In this regard, a failure to take reasonable measures, which could have had a real prospect of **altering the outcome or mitigating the harm**, is sufficient to engage the responsibility of the State.[60] For instance, in the case of *Eremia v The Republic of Moldova*,[61]the Court looked at the manner in which the authorities had handled a case of domestic violence where the perpetrator was a police officer. While the authorities clearly had not remained completely passive, they **had imposed fines and a protection order against the perpetrator**. The ECtHR nonetheless held that the State had failed to observe its positive obligations under Article 3: it was clear that the fines and protection order imposed on the perpetrator were of little impact, evidenced by the continued violence and numerous breaches of the protection order by the perpetrator.[62]

The procedural obligations under both Articles 2, 3 and 8 are discussed below.

58 Kontrová v. Slovakia, judgment of 31 May 2007, no 7510/04

59 Ibid, para 53

60 Opuz v. Turkey, judgment of 9 June 2009, no. 33401/02, para 136

61 Eremia and others v. The Republic of Moldova, judgment of 28 May 2013, no. 3564/11

62 Ibid, para 62-63

Key principles

- The positive obligations under Articles 2, 3 and 8 include both setting up a legislative framework aimed at preventing and punishing violations, and then actively affording protection to victims and punishing those responsible for ill-treatment through that framework. In appropriate circumstances the positive obligation on the authorities extends to taking preventive operational measures to protect an individual whose life, physical safety, or physical or psychological integrity are at risk from the criminal acts of another individual.

Procedural Obligations

Obligation to investigate complaints of domestic violence

Effective investigation

Articles 2 and 3 impose a procedural positive obligation on states to **effectively investigate** reported crimes perpetrated by private individuals. As such, there is an operational duty on State authorities to conduct a proper inquiry into behaviour amounting to a breach of rights under Articles 2 and 3. The essential purpose of such investigations is to secure the effective implementation of the domestic laws, which protect the rights of individuals under the ECHR. The purpose of this obligation is to render rights afforded by the ECHR effective in practice.

The procedural obligation arising from Article 2 requires the authorities to act as soon as the matter has come to their attention; they cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures.[63]For Article 3, the procedural obligation arises when the allegations of the existence of prohibited treatment are 'arguable'.[64]

63 Al-Skeini and Others v. the United Kingdom, judgment of 7 July 2011, no.55721/07, para 165; Nihayet Arici and Others v. Turkey, judgment of 23 October 2012, nos. 24604/04 and 16855/05, para 159

64 Chiriță v. Romania, judgment of 29 September 2009, no. 37147/02

How should a State conduct an effective official investigation?

- A requirement of **promptness and reasonable expedition** is implicit in the context of an effective investigation within the meaning of Article 2 of the Convention.[65]
- There is a clear and consistent line of Strasbourg authority stating that a positive obligation to conduct an effective investigation is not limited solely to cases of ill-treatment by state agents.

This existence of a positive duty to investigate ill-treatment has been clearly set out by the Court: 'Article 3 of the Convention creates a positive obligation to investigate effectively allegations of ill-treatment.'[66]

In the case of *Valiulienė*,[67]the Court held that there had been a violation of Article 3 where the administrative practices at issue in that case, and the manner in which the criminal-law mechanisms had been implemented, had not provided the Applicant adequate protection against acts of domestic violence. In particular, there had been delays in the criminal investigation and the public prosecutor had decided to discontinue the investigation.[68]

In the case of *Opuz*, the Court found that the way the Applicant and her mother's complaints had been dealt with in this case was 'manifestly inadequate'.[69] The authorities were at fault for discontinuing the proceedings against the perpetrator considering them to be a 'family matter' which they could not interfere in, and they had ignored the reasons why the complaints had been withdrawn. The Court found a violation of Article 2 (failure to protect the Applicant's mother's right to life) and Article 3 of the Convention.

In the case of *Rumor*,[70] the Court established that the Italian legal framework with regard to domestic violence was effective and the State had conducted

65 Opuz v. Turkey, judgment of 9 June 2009, no. 33401/02; Yasa v.Turkey, judgment of 2 September 1998, no. 22495/93 , paras 102-104

66 Assenov and Others v. Bulgaria, judgment of 28 October 1998, no. 24760/94, paras 101-106

67 Valiuliene v. Lithuania, judgment of 26 March 2013, no. 33234/07

68 Ibid, concurring opinion of Judge Pinto de Albuquerque, pg 32

69 Opuz v. Turkey, judgment of 9 June 2009, no. 33401/02, para 170

70 Rumor v. Italy, judgment of 27 May 2014, no. 72964/10

an effective investigation and prosecution. According to the majority in the ECtHR 'the circumstances were different'[71] from those in cases like *Opuz* as the Italian police, prosecutors and courts had not remained passive. The perpetrator of violence in that case had been arrested and charged with attempted murder, kidnapping, aggravated violence and threatening behaviour and had been convicted and ultimately sentenced to detention for three years and four months.[72] The Court concluded that 'the authorities had put in place a legislative framework allowing them to take measures against persons accused of domestic violence and that that framework was effective in punishing the perpetrator of the crime of which the applicant was victim and preventing the recurrence of violent attacks against her physical integrity'.[73] The Court therefore held that there had been no violation of Article 3.

Section II of this Handbook will discuss investigative obligations further, with a particular focus on the Istanbul Convention.

Efficient and independent judicial system

The essential purpose of an effective investigation under Article 2 is to secure **the effective implementation of the domestic laws** which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.

The positive obligations laid down in the first sentence of Article 2 of the Convention also require by implication that the State should set in place an **efficient and independent judicial system** by which the cause of a death can be established and any guilty parties prosecuted and punished. A requirement of **promptness and reasonable expedition** is implicit in that context. This obligation extends to Articles 3 and 8 as well.

Obligation to prosecute

The ECtHR has held that it is not generally appropriate for the Court to speculate on the question of whether the applicant's criminal complaint should have been pursued by the public prosecutor or by way of a private

71 Talpis v. Italy, judgment of 2 March 2017, no. 41237/14, para. 146

72 Ibid, para 12

73 Rumor v. Italy, judgment of 27 May 2014, no. 72964/10, para 76

prosecution.[74] In *Bevacqua*, the ECtHR could not accept the Applicant's argument that her ECHR rights could only be secured if the perpetrator was prosecuted by the State and that the ECHR required State assisted prosecution, as opposed to prosecution by the victim, in all cases of domestic violence.[75] However, in *Opuz*, the ECtHR said that the legislative framework should have enabled the prosecuting authorities to pursue the criminal investigations against the perpetrator. [76]

Therefore, States do not have an obligation carry out a prosecution as such, but rather have an obligation to enable the authorities to pursue an investigation which, if appropriate, will have the possibility of leading to a prosecution.

Can a state be responsible if the victim withdrew their complaints?

While there is no general consensus among State parties regarding the pursuance of criminal prosecutions against perpetrators of domestic violence when the victim withdraws their complaints, there appears to be an acknowledgment of aduty on the part of the authorities **to strike a balance** between a victim's right to life, freedom from ill-treatment, and her right to a private life free from arbitrary state interference (Articles 2, 3 and 8) in deciding a whether to pursue the prosecution nonetheless.[77] One of the most important conclusions of the ECtHR, concerning State obligations in cases of domestic violence is that considering domestic violence to be a 'private matter' requiring a private prosecution is incompatible with the authorities' obligation to protect a person's family life established by Article 8 of the Convention.[78] In the case of *Bevacqua*, the ECtHR found that Bulgaria had not struck a proper balance between Articles 3 and Article 8 as they had given **exclusive weight** to the need to **refrain from interfering in what they perceived to be a 'family matter'**.[79] Referring to *Bevacqua* in the case of *Irene Wilson v United Kingdom*,[80] where the applicant was assaulted by her husband, suffering a severed artery on the right side of her head and multiple bruising, the ECtHR commended

74 The majority judgment of the European Court in Valiuliene v. Lithuania, judgment of 26 March 2013, no. 33234/07

75 Bevacqua and S. v. Bulgaria, judgment of 12 June 2008, no 71127/01, para 82

76 Opuz v. Turkey, judgment of 9 June 2009, no. 33401/02, para 168

77 Ibid, para 138

78 Bevacqua and S. v. Bulgaria, judgment of 12 June 2008, no 71127/01

79 Ibid, para 82

80 Irene Wilson v. The United Kingdom, judgment of 23 October, 2012, no. 10601/09

the State for proceeding with the investigation and prosecution, despite the applicant's withdrawal of her complaint.[81]

The court listed, *inter alia*, the following factors to be taken into account when deciding whether to pursue the prosecution:

- Whether the victim's injuries are physical or psychological;
- If a weapon was used;
- Any subsequent threats made since the alleged attack;
- The effect (including psychological) on any children in the house;
- The risk of the perpetrator reoffending;
- Any other continuing threat to the health and safety of the victim or anyone else involved;
- The current state of the victim and perpetrator's relationship and the effect on that of the prosecution against the victim's wishes;
- The history of the relationship, i.e. whether there is any violence in the past; *and*
- The perpetrator's criminal history.

From these factors, it can be inferred that **the more serious the offence or the greater the risk of further offences, themore the prosecution should continue to pursue the claim in the public interest**, even if the victims withdraw the complaints.[82] Once the situation has been brought to their attention, **the national authorities cannot rely on the victim's attitude for their failure to take adequate measures**, which could prevent the likelihood of an aggressor carrying out his threats against the physical integrity of the victim.[83]

Nonetheless, in *Bevacqua* the ECtHR reiterated that the margin of appreciation afforded to the State included choosing the particular legal measures used to protect its citizens. However,the ECtHR criticised the provisions of domestic law which prevented prosecutors from proceeding with cases when the applicant withdrew their complaint. The ECtHR also considered

81 Ibid, para 10

82 Opuz v. Turkey, judgment of 9 June 2009, no. 33401/02, para 140

83 Ibid, para 153

situations where victims choose not to proceed in the criminal court.[84] One of the typical characteristics of domestic violence cases is that victims remain in contact with the aggressors after they file their initial complaint. If the prosecution depends on the complaint by the alleged victim, as was the case in *Bevacqua*, the perpetrators will inevitably be tempted to pressure them into withdrawing their complaint.[85] The ECtHR expressed its doubts as to the compatibility with the ECHR of a system where the effectiveness of the prosecution can be hindered by limitations linked with the initiative of filing a criminal complaint. [86]

The right to an effective remedy under Article 13

Article 13 of the ECHR establishes **the right to an effective remedy**, stating that 'everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity'.

In addition to the procedural obligations inherent in Articles 2 and 3, Article 13 imposes a separate, far-reaching, obligation, specifically that 'Article 13 requires, in addition to the payment of compensation where appropriate, a **thorough and effective investigation** capable of leading to the identification and punishment of those responsible, including effective access for the complainant to the investigation procedure'[87]

Where there is an arguable breach of a Convention right, Article 13 requires the provision of an effective remedy at national level. Failing to deal with the substance of arelevant complaint and not granting an appropriate remedy could result in a State violating Article 13.

84 Bevacqua and S. v. Bulgaria, judgment of 12 June 2008, App no 71127/01 part III: the Recommendation 5 of the Committee of Ministers of the Council of Europe, the United Nations General Assembly Declaration on the Elimination of Violence against Women (1993), the third report of the Special Rapporteur on violence against women of the Commission on Human Rights of the United Nations, and judgments from the Inter-American Human Rights system and the CEDAW.

85 https://lib.ugent.be/fulltxt/RUG01/002/060/902/RUG01-002060902_2013_0001_AC.pdf, pg 78

86 Bevacqua and S. v. Bulgaria, judgment of 12 June 2008, App no 71127/01, para 82

87 See, for example, ECtHR 21 June 2011, Isayev v. Russia, judgment of 21 June 2011, no. 43368/04, paras 186-187;, Anguelova v. Bulgaria, judgment of 13 June 2002, no. 38361/97, para 161; Mahmut Kaya v. Turkey, judgement of 28 March 2000, no. 22535/93, para 107; El-Masri v. "the former Yugoslav Republic of Macedonia", judgment of 13 December 2012, no. 39630/09, para 255; Labita v. Italy, judgment of 6 April 2000, no. 26772/95, para 131.

Domestic Violence as Discrimination on the Basis of Gender: Article 14

- States need to ensure that their legislators acknowledge that **domestic violence perpetrated against adults mainly affects women** and that general and discriminatory judicial and authoritative passivity in a State Party creates a climate that is conducive to domestic violence.[88] In that sense, domestic violence has been recognised as gender-based violence

Article 14 ensures that 'the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.' The Article **imposes a duty on the State and public authorities**, acting within the scope of convention rights, **not to discriminate** on the listed grounds or "other status", **unless the discrimination can be justified**.[89]

Article 14 is not a freestanding provision, which means that to rely on it, the Applicant must show that discrimination has affected their enjoyment of one or more of the other rights in the Convention. However, in the *Belgian Linguistic case*,[90] the ECtHR stressed that it is an **'autonomous provision'** - meaning that **it can be violated even where the substantive article relied upon to invoke Article 14 has not been violated**.[91] In cases of domestic violence before the ECtHR, Article 14 has to be been read together with Articles 2, 3 and 8 of the European Convention.

One of the most significant statements of the ECtHR in *Opuz* related to Article 14. The Court found, for the first time in such a case, that Article 14 had been violated: specifically that the violence that the Applicant and her mother had suffered was clearly gender-based. The ECtHR also

88 M.G. v. Turkey, judgment of 22 March 2016, no. 646/10

89 Rory O'Connell, Cinderella comes to the Ball: Article 14 and the right to non-discrimination in the ECHR (2009) 29 (2) Legal Studies: The Journal of the Society of Legal Scholars, 211-229, pg 2 <http://uir.ulster.ac.uk/26272/1/cinderella.pdf> accessed 5 October 2018

90 Case 'relating to certain aspects of the laws on the use of language in education in Belgium' v Belgium, nos.1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, ECHR 1967

91 Ibid, page 24 makes reference to the Commission's opinion of 24th June 1965 on Article 14.

relied on the CEDAW Committee's General Recommendation 19 due to its significance in triggering duties in States.[92] Recourse to the standards of other international bodies by the ECtHR will be discussed further in Section III of this Handbook.

The intervention submitted by the Equal Rights Trust in the case of *Eremia* highlighted that there was well-established evidence that domestic violence impacted disproportionately and differently upon women when compared with the experience of men. If it was to be effectively tackled, such violence demanded a particular response, which included treating such violence as a form of gender-based discrimination. Failing to realise this amounted to a failure to acknowledge the magnitude of the problem and its impact upon the dignity of women.

In the case of *Talpis v Italy*,[93] the applicant filed a complaint against her abusive husband and requested protection orders against him after several episodes of violence against her and their children. The police questioned the applicant for the first time seven months after her complaint and in the following episode of violence the abuse resulted in the death of their son. The *ECtHR found a violation of Article 14* in conjunction with Articles 2 and 3, confirming that discrimination occurs not only when acts of the authorities amount to a failure to respond to episodes of violence, but also when the State has demonstrated a 'repeated tolerance' that 'reflect[s] a discriminatory attitude towards [the] applicant as woman.'[94] As a result, *a failure by the State could include passively creating a situation conducive to domestic violence*.[95] Referring to disturbing data on domestic violence in Italy, the Court acknowledged first that *the phenomenon mainly affects women*, and that secondly, that socio-cultural attitudes of tolerance of domestic violence continue. [96]

92 Committee on the Elimination of all forms of Discrimination against Women (CEDAW), General Recommendatoin No.19 (eleventh session, 1992),

93 Talpis v. Italy, judgment of 2 March 2017, no. 41237/14

94 Ibid, para 18

95 Ibid, para 141

96 Ibid, para 145

Children

The ECtHR has observed that States have a positive obligation to provide dedicated protection to **children and other vulnerable individuals** through measures of **'effective deterrence, against serious breaches of personal integrity'**.[97]

In *A v the United Kingdom*[98], the treatment endured by a nine-year old who had been repeatedly beaten with a cane by his stepfather was deemed to reach the 'minimum level of severity' necessary to trigger the application of Article 3. The Court recalled that, in order to assess the severity of a treatment under Article 3 **'the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim'**[99] have to be considered. As such, it is more likely that ill-treatment which is not sufficient to engage Article 3 in respect of an adult will engage Article 3 in relation to a child or other vulnerable individual.

In *Dordevic v. Croatia*,[100] the Court looked at ill-treatment causing psychological harm, examining its particular impact on a disabled individual. The case concerned the prolonged abuse of a boy with physical and mental disabilities at the hands of a group of children.The ECtHR found violations of Articles 3, 8 and 13 on account of the authorities' failure to act, despite the fact that the mother brought the abuse to the attention of the authorities. Although this case did not concern abuse occurring in the local community, rather than the domestic context, it highlights the importance of ensuring heightened vigilance against acts of harassment against disabled children and vulnerable individuals in general.

Similarly, the failure to place neglected children on the Child Protection Register can amount to a breach of Article 3.[101] In *Z and Others v. United Kingdom*,[102] four children had been subject to emotional abuse and severe physical neglect by their parents that resulted in physical and psychological injuries. The ECtHR found that children's treatment amounted to inhuman and degrading treatment under Article 3 and that, since the local authorities had been made aware of the situation but the children were only taken into emergency care four and half years later, the State had failed in its positive obligations under Article 3.

Under certain circumstances domestic violence can affect children's physical and mental welfare, not only as a consequence of being the victims of such practices, but also **indirectly when they are forced to witness acts of domestic violence** against their siblings or parents. In a series of cases, the ECtHR has considered the specific protection required to cater to the needs of children in these situations.[103]

In *Eremia v. the Republic of Moldova*,[104] the ECtHR held that the applicant children's psychological well-being had been adversely affected by being victims of verbal abuse as well as repeatedly witnessing their father's violence against their mother.[105]Despite the detrimental psychological effects of the children witnessing their father's violence against their mother in the family home, little or no action had been taken to prevent the recurrence of such behaviour. In the ECtHR's view, this amounted to an interference with their right to personal integrity under Article 8.[106] The ECtHR also looked at the psychological impact resulting from both suffering and witnessing domestic violence at home in *ES and others v Slovakia*[107] which was decided in a similar vein to *Eremia*, the ECtHR concluding that Slovakia had failed to fulfil its obligation to protect all of the applicants from ill-treatment, in violation of Articles 3 and 8.

The IC also provides for 'protection and support for child witnesses' in Article 26. The IC will be discussed further in the following section.

97 See for example, X and Y v. the Netherlands, judgment of 26 March 1985, no. 8978/80, O'Keeffe v. Ireland, judgment of 28 January 2014, no 35810/09;Stubbings and Others v. the United Kingdom, judgment of 22 October 1996, nos 22083/93 and 22095/93 and also the United Nations Convention on the Rights of the Child, Articles 19 and 37.

98 A. v. United Kingdom, judgment of 23 September 1998, no. 100/1997/884/1096

99 See A. v. United Kingdom, judgment of 23 September 1998, no. 100/1997/884/1096; cross reference to: Costello-Roberts v. the United Kingdom, judgment of 25 March 1993, no. 13134/87

100 Dordevic v. Croatia, judgment of 24 July 2012, no. 41526/10,

101 Z and Others v. United Kingdom, judgment of 10 May 2001, no 29392/95

102 Ibid

103 For other obligations incumbent on the State in these circumstances, see above in relation to the Istanbul Convention, and in particular Article 26.2 and Article 56.

104 Eremia and others v. The Republic of Moldova, judgment of 28 May 2013, no. 3564/11

105 Ibid, para 74

106 Ibid, para 79

107 E.S. and others v. Slovakia, judgment of 15 September 2009, no. 8227/04

SECTION II

The Convention on preventing and combating violence against women and domestic violence ('the Istanbul Convention')

The Istanbul Convention ('IC') opened for signature on 11 May 2011 on the occasion of the 121st Session of the Committee of Ministers in Istanbul. Following its 10th ratification by Andorra on 22 April 2014, it entered into force on 1 August 2014. 33 countries have ratified the IC so far, including Albania, Bosnia and Herzegovina, Montenegro, Croatia, Serbia and the former Yugoslav Republic of Macedonia. The Convention builds upon the ECHR principlesand marks an important milestone in the evolution of European law with regard to domestic violence. The Council of Europe explanatory document '*Working towards a Convention on preventing and combating violence against women and domestic violence*', states that 'the drafting process [of the IC was] inspired by case-law from the European Court of Human Rights and jurisprudence of the United Nations Committee on the Elimination of Discrimination against Women on violence against women'.[108]

How to use the Istanbul Convention in litigation before the ECtHR

Under Article 53 of the ECHR, the ECHR is not to be construed in a manner which would limit, or derogate from, the protection offered by other international agreements to which the State is a party. Thus, these other international agreements must be studied as they must be taken into account when considering a State's ECHR obligations.[109]

The IC is a Council of Europe Convention and the 'first instrument in Europe to set legally binding standards to specifically prevent violence against women and girls, protect its victims and punish perpetrators'.[110] There is now therefore scope for the ECtHR to refer to the IC in other cases, including when considering the extent of the positive obligations owed to victims of domestic and gender-based violence under Articles 2, 3 and 8 of the ECHR.

108 Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, para 58

109 Article 53 of the European Convention on Human Rights

110 The Istanbul Convention: A tool to tackle violence against women and girls, Ulla Jurviste, Rosamund Shreeves, Members' Research Service PE 630.297 – November 2018

The ECtHR has in fact begun to use the IC as a key instrument to interpret positive legal obligations deriving from the rights enshrined in the ECHR.

In the case of **Bălşan v. Romania**[111] the ECtHR found that, when considering Article 14 claims, it is not sufficient to merely consider past case law but that the ECtHR also has to consider specialised legal instruments as a source of law. As such the ECtHR went on to stress that the IC defines violence against women as a form of discrimination against women, and that therefore this was an **instance of gender-based violence**.

In the case of *Talpis*,[112] when assessing the State's responsibility under Article 3, the ECtHR used the wording of the IC to emphasise the specific nature of domestic violence and the **special diligence needed to deal with domestic violence cases**.[113] The ECtHR went on to say that **the IC imposes a duty on states to investigate** the forms of violence covered by the IC without undue delay and to take into consideration the rights of the victim during all stages of criminal proceedings. [114] The Court went on to elaborate on what this might mean in practice, examining the victim's psychological state, insecurity, etc, and to state that Italy had not complied with this obligation.[115]

In his partly dissenting judgement, Judge Eicke used the IC as a source to evidence the widespread societal presence of domestic violence and violence against women in Italy. In his partially dissenting judgement, Judge Spano used the requirements of the IC to help establish what might be considered an 'immediate danger' to a victim of domestic violence. [116]

More recently in the case of *D.M.D. v Romania*[117] before the ECtHR, in their joint concurring opinion, Judges de Gaetano, Pinto de Albuquerque and Motoc, used the IC to define the current position of the law. In D.M.D., the applicant was physically and emotionally abused by his father while he was a young child. Thatthe investigation lasted three years and six months, the domestic courts offered no compensation to the victim for the delay

111 Bălşan v. Romania, judgment of 23 May 2017, no. 49645/09

112 Talpis v. Italy, judgment of 2 March 2017, no. 41237/14

113 Para, 128

114 Para, 129

115 Para 130

116 Para 13 in partly concurring, partly dissenting opinion of Judge Eicke

117 D.M.D. v. Romania, judgment of 3 October 2017, no. 23022/13

or the abuse he suffered, and the proceedings failed to protect the child's dignity by affording protection against mistreatment violated Article 3 of the Convention. Specifically, they mention the IC requires that the punishment of those responsible for violence against or in the presence of children should be sufficiently severe as to act as a deterrent.[118] The Judges contrasted this with the ECtHR's judgement wording that simply requires States to 'strive' to protect children by creating an adequate legal framework.

State obligations in the text of the Istanbul Convention

Having established that the ECtHR has now begun using the IC as a key instrument to interpret positive legal obligations deriving from the rights enshrined in the ECHR, this handbook will now proceed to briefly identify specific legal obligations for State Parties set out in the text of the IC that can be used in litigation before the ECtHR.

Article 18(1) introduces a general obligation on State Parties to 'take the necessary legislative or other measures to protect all victims from any further acts of violence.' Article 18(2) compels Parties to 'take the necessary legislative or other measures, in accordance with internal law, to ensure that there are appropriate mechanisms to provide for effective co-operation between all relevant state agencies, including the judiciary, public prosecutors, law enforcement agencies, local and regional authorities as well as non-governmental organisations and other relevant organisations and entities, in protecting and supporting victims and witnesses of all forms of violence covered by the scope of the IC, including by referring to general and specialist support services as detailed in Articles 20 and 22 of this Convention.'[119]

Chapter IV of the IC, sets out in detail the obligations of State Parties to take measures to prevent all forms of discrimination against women and children, including through **legislation** and **investigation**.

State obligations when it comes to effective investigations

The IC contains precise provisions that endorse the concept of state obligation when it comes to, *inter alia*, legislative and investigative obligations.

118 Ibid, para 27

119 Article 18, 20, 22 of the Istanbul Convention

Under Article 49(2), State Parties must adopt 'the **necessary legislative** or other measures, in conformity with the fundamental principles of human rights and having regard to the gendered understanding of violence, to ensure the **effective investigation** and prosecution of offences established in accordance with this Convention'. The Explanatory Report to the IC expands on the meaning an effective investigation by offering examples such as, establishing the relevant facts, interviewing all available witnesses, conducting forensic examinations, and using a multi-disciplinary approach and state-of-the-art criminal investigative methodology to ensure a comprehensive analysis of the case.[120]

Under Article 50, State Parties must ensure that law enforcement agencies respond **promptly and appropriately** to instances of violence against women by offering adequate and immediate protection to victims. Article 51 provides that in such cases, assessments must be carried out as regards to the seriousness of the situation and the risk of repeated violence. As stated in the Explanatory Report, 'Concerns for the victim's safety must lie at the heart of any intervention in cases of all forms of violence covered by the scope of this Convention'.[121]

Under Article 56(1), victims must also be informed of their rights and the services at their disposal, as well as of the progress of any investigation or proceedings.

State obligations when it comes to social support measures

The ECtHR has held that in particular circumstances the State has a duty to provide resources to individuals to prevent violations of their rights[122] but has not specifically addressed the necessity for States to ensure that victims are provided with social support measures, such as refuge accommodation and financial support. The IC places an obligation on the State to ensure that the necessary legislative, or other, measures are put in place to provide or arrange for, in an adequate geographical distribution, immediate, short and long-term specialist support services to any victim subjected to any of the acts of violence covered by the scope of the IC.[123] Parties shall also 'take

120 Ronagh Mc Quigg, The Istanbul Convention, Domestic Violence and Human Rights (1st edition Routledge 2017)

121 Ibid, p.103

122 Airey v Ireland, judgment of 9 October 1979, no. 6289/73

123 Article 22 of the Istanbul Convention

the necessary legislative or other measures to provide for the setting-up of appropriate, easily accessible shelters in sufficient numbers to provide safe accommodation for and to reach out pro-actively to victims, **especially women and their children**.'[124]

As treaty ratifications do not 'suffice to ensure the protection of human rights', the Group of Experts on Action against Violence against Women and Domestic Violence ('GREVIO') has been set up as the monitoring body for the IC, to supervise the compliance of states with their convention obligations.

State obligations when it comes to children

Articles 3(f) and 2(2) of the IC extend the provisions therein to children, as both victims and witnesses of domestic violence. Under the IC, it is the duty of the State to raise awareness of the consequences of violence (Article 13) and to consider the '*special needs*' of witnesses of violence (Article 56), which may include '*psychosocial counselling*' (Article 26.2). Article 18 reaffirms a State's obligation to establish preventative mechanisms and ensure that adequate legislation is in place in order to make the protections effective.

The IC is therefore a useful tool for the ECtHR when considering the extent of the positive obligations owed to victims of domestic and gender-based violence under the provisions of the ECHR. The IC envisions a basic standard of assistance, which should be made available to victims across Council of Europe Member States, and the ECtHR could be one of the mechanisms through which this is achieved.

124 Article 23 of the Istanbul Convention

SECTION III

Overview of the relevant international legal instruments

Under Article 53 of the ECHR, the ECHR is not to be construed in a manner which would limit, or derogate from, the protection offered by other international agreements to which a State is a party. Thus, these other international agreements must be studied, as they must be taken into account when considering the content ofa State's ECHR obligations.

Discrimination against women

CEDAW

The primary international instrument governing the rights of women is the **Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW')**. Heralded as the international bill of rights of women, CEDAW contains provisions which aim to end discrimination against women. While CEDAW reflects the developing sophistication of the United Nations in regard to the protection and promotion of women's human rights, it fails to refer to 'violence' specifically. In response to this, in 1992 the Committee on the Elimination of Discrimination against Women (CEDAW Committee), drafted and adopted **General Recommendation no. 19** which expressly articulated the State Parties' obligations to eliminate violence against women.[125]

Two major developments have further expanded the application of the due diligence standard[126] within the context of domestic violence: the issuance of the Declaration on the Elimination of Violence Against Women (DEVAW) by the U.N. General Assembly and the appointment of a Special Rapporteur on Violence Against Women. DEVAW incorporated the principles of General Recommendation 19 and formally adopted the 'due diligence' standard as a tool to assess a State's obligations with regard to all forms of violence against

125 While the Committee adopted General Recommendation No.35 in July 2017, updating and effectively replacing General Recommendation No.19, the latter remains the main facilitator for global developments in the prohibition of violence against women.

126 The report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo (n 25) 13 explains that "the due diligence standard serves as a tool for State accountability, as it provides an assessment framework for determining effective fulfillment of State obligations and analysing State actions or omissions" such as those discussed in Section I of this Handbook.

women. In incorporating this standard, DEVAW declared that all U.N. member states have a duty to 'pursue by all appropriate means and without delay a policy of eliminating violence against women,' including 'due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetuated by the State or by private persons'. DEVAW affirmed that violence against women constitutes a 'violation of the rights and fundamental freedoms of women and impairs or nullifies their enjoyment of those rights and freedoms.'[127]

In addition to being applied by the CEDAW Committee when considering individual complaints, the provisions of CEDAW and General Recommendation No.19 have also been used by the ECtHR when determining cases relating to domestic violence or discrimination against women. On 14 July 2017, the CEDAW Committee marked the 25th anniversary of its adoption of General Recommendation 19 by adopting General Recommendation 35.[128] Inspired by the IC, General Recommendation 35updates General Recommendation 19, providing a strong reference and tool for advocacy action for women's organisations by, amongst other things, giving the concept of 'due diligence' more prominence.

Paragraph 24 (b) of General Recommendation 35 states:

"In particular, States Parties are required to take necessary steps to prevent human rights violations abroad by corporations over which they may exercise influence, whether by regulatory means or by the use of incentives, including economic incentives. Under the obligation of due diligence, States parties have to adopt and implement diverse measures to tackle gender-based violence against women committed by non-State actors. They are required to have laws, institutions and a system in place to address such violence. Also, States parties are obliged to ensure that these function effectively in practice, and are supported and diligently enforced by all State agents and bodies. 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."

127 Declaration on the Elimination of Violence against Women, Proclaimed by General Assembly resolution 48/104 of 20 December 1993

128 Para 3 of General Recommendation 35

Paragraph 24 (c) makes reference to State obligations at the legislative level, reiterating case law from the ECtHR.

"...according to article 2 (b), (c), (e), (f) and (g) and article 5 (a), States are required to adopt legislation prohibiting all forms of gender-based violence against women and girls, harmonising domestic law with the [CEDAW] Convention."

In addition to being applied by the CEDAW Committee when considering individual complaints, the provisions of CEDAW and General Recommendation No.19 have also been used by the ECtHR when determining cases relating to domestic violence or discrimination against women.[129]

Children

The primary international instrument governing the rights of children is the UNCRC, which has almost been universally ratified, including by all the Council of Europe's Member States, and has been applied by the ECtHR when interpreting the Convention.[130] Article 19, the scope of which has been the subject of the **UN General Comment no. 13 (2011)** (GC no.13), regulates the role of the State in its provision of protection against *all* forms of violence against children. According to this GC no.13, Article 19 '*does not leave room for any level of legalized violence against children*'.[131]

The positive obligations placed on States in combating violence against children are further clarified in **General Comment No. 14 (2013)** (GC no.14), **General Comment no. 8 (2006)** (GC no.8) and **General Comment No.5 (2003) (GC no.5).** These stipulate that a State's treaty obligation is not only to put in place legislative measures, but also to ensure that the necessary administrative resources are made available and legislation is effective.

With regard to sexual violence affecting children, Article 30 of the **Council of Europe Convention on the Protection of Children against Sexual Exploitation**

129 See Opuz v. Turkey, judgment of 9 June 2009, no. 33401/02, Talpis v. Italy, judgment of 2 March 2017, no. 41237/14

130 See for example: Sahin v. Germany, judgment of 8 July 2003, no. 30943/96; and Maslov v. Austria, judgment of 23 June 2008, no. 1638/03

131 UNCRC GC no.13.

and Sexual Abuse (Lanzarote Convention) 2007, mandates *'[e]ach Party shall adopt a protective approach towards victims*' during investigation and prosecution. Proceedings shall, thus, not be conducted with 'unjustified delay' unduly prolonging the child's distress.

Vulnerable adults

Under Article 53 of the ECHR, Contracting States should also pay regard to *The Hague Convention of 13 January 2000 on the International Protection of Adults*, which affords international protection for vulnerable adults. Many victims of domestic violence, both adults and children, are already inherently vulnerable because of physical or psychological difficulties.

The object of this Convention is "the protection in international situations of adults who, by **reason of an impairment or insufficiency of their personal faculties**, are not in a position to **protect their interests**."[132] The text contains two factual elements. The "impairment or insufficiency of [the] personal faculties" of the adult means that the Convention affords protection to the physically or mentally incapacitated, as well as persons, usually elderly, suffering from an impairment of the same faculties.[133]

The insufficiency or impairment of the personal faculties of the adult must be such that she or he is not "**in a position to protect [his or her] interests**". This second element in the definition must be understood broadly. The text takes into consideration, not only the property interests of the adult, which his or her physical or mental state may prevent from managing properly, but more generally his or her personal and health interests. [134]

This means that such adults are in a weak position due to their incapacity, and can easily be the object of abuse.[135] As such, the Hague Convention of 13 January 2000 on the International Protection of Adults, puts in place adequate procedural safeguards to protect the human rights of the adults concerned and to prevent possible abuses.[136] These can be found in Article 3 of this Convention

132 Art. 1, The Hague Convention on the International Protection of Adults

133 Explanatory Memorandum, Recommendation Rec(1999)4 on principles concerning the legal protection of incapable adults, pg 44

134 Ibid, pg 44

135 Ibid, para 25

136 Ibid, para 26

and provide inter alia for the placing of the adult under the protection of a judicial or administrative authority or the placement of the adult in an establishment or other place where protection can be provided.[137]The situation of such vulnerable adults was considered by the Court in the case of *X,Y and Z v UK*[138] which eventual reached a settlement.

Protection measures in civil and criminal matters

The granting of protective measures for victims of domestic violence such as a restraining order or a similar protection order, which help prevent further aggression or further assault by the perpetrator, is imperative ineffectively protecting a victim of domestic violence.

If a victim has been granted a protection order in an EU Member State and wishes to continue to benefit from this protection when moving or travelling to another Member State, those who are moving between EU Member States can benefit from the provisions in **Regulation (EU) No. 606/2013 mutual recognition of protection measures in civil matters**. This ensures that while national protection measures vary in nature, duration, scope, and the procedures of adoption between Member States, a victim will not be afforded less protection when moving or travelling to another Member State. [139]

If a victim has been afforded a protection order **in criminal matters** issued in one Member State they may request a European Protection Order on basis of Directive **2011/99/EU on the European Protection Order (EPO)**. This sets up a mechanism allowing for the recognition of protection orders issued as a criminal law measure between Member States.[140]

Conclusion

This handbook has provided an overview of the jurisprudence of the ECtHR and the key state obligations and instruments for the protection of the rights of victims of domestic violence. Examples of how state obligations are applied in practice with reference to the relevant instruments were presented. States' obligations to protect victims of domestic violence have been outlined. The

137 Art 3 (b) and 3 (e)

138 X, Y and Z v. The United Kingdom, judgment of 22 April 1997, no. 21830/93

139 Regulation (EU) No. 606/2013

140 Directive 2011/99/EU

handbook has identified how key instruments for the protection of victims of domestic violence, such as the IC and General Recommendations 19 and 35, can be used in litigation before the ECtHR.

This handbook does not by any means cover all aspects of State obligations in relation to domestic violence. It simply aims to provide a comprehensive overview of the international and European standards and how they are interpreted and applied in practice.

Case Summaries:

1. *Osman v The United Kingdom, judgment of 28 October 1998, no. 23452/94*
2. *Branko Tomašić and others v. Croatia, judgment of 15 January 2009, no 46598/06*
3. *Valiulienė v Lithuania, judgment of 26 March 2013, no. 33234/07*
4. *Bevacqua and S. v. Bulgaria, judgment of 12 June 2008, App no 71127/01*
5. *M.C. v. Bulgaria, judgment of 4 December 2003, no. 39272/98*
6. *E.S. and Others v Slovakia, judgment of 15 September 2009, no. 8227/04*
7. *Kalucza v. Hungary, judgment of 24 April 2012, no 57693/10*
8. *Kontrová v. Slovakia, judgment of 31 May 2007, no 7510/04*
9. *Hajduova v. Slovakia, judgment of 30 November 2010, no 2660/03*
10. *Ž.B. v. Croatia, judgment of 11 July 2017, no. 47666/13*
11. *Sandra Janković v. Croatia, judgment of 5 March 2009, no. 38478/05*
12. *Opuz v. Turkey, judgment of 9 June 2009, no. 33401/02*
13. *Eremia and others v. The Republic of Moldova, judgment of 28 May 2013, no. 3564/11*
14. *A. v. Croatia, judgment of 14 October 2010, no 55164/08*
15. *Talpis v. Italy, judgment of 2 March 2017, no. 41237/14*
16. *Rumor v. Italy, judgment of 27 May 2014, no. 72964/10*
17. *M.G. v. Turkey, judgment of 22 March 2016, no. 646/10*
18. *O'Keeffe v. Ireland, judgment of 28 January 2014, no 35810/09*
19. *Z and Others v. United Kingdom, judgment of 10 May 2001, no. 29392/95*
20. *Söderman v. Sweden, judgment of 12 November 2013, no. 5786/08*
21. *Bălșan v. Romania, judgment of 23 May 2017, no. 49645/09*
22. *Irene Wilson v. The United Kingdom, judgment of 23 October, 2012, no. 10601/09*
23. *Airey v Ireland, judgment of 9 October 1979, no. 6289/73*
24. *X and Y v. the Netherlands, judgment of 26 March 1985, no. 8978/80*
25. *D.M.D. v. Romania, judgment of 3 October 2017, no. 23022/13*

JUDGMENT IN THE CASE OF
OSMAN v. THE UNITED KINGDOM
(Application no. 23452/94)
28 October 1998

1. Principal Facts

The applicants in this case were British citizens resident in London. The first applicant, Mulkiye Osman was the mother of the second applicant, Ahmet Osman, who was a former pupil of Paul Paget-Lewis at Homerton House School.

In 1986 the headmaster of Homerton House School, Mr Prince, noticed that one of his teaching staff, Paul Paget-Lewis, had developed an attachment to Ahmet Osman.

In January 1987 Mrs Green, the mother of Leslie Green, a pupil at the same school, made a complaint to Mr Prince that Paget-Lewis had been following her son home after school and harassing him. After being interviewed by Mr Perkins, Paget-Lewis also submitted a written statement, which Mr Perkins found "disturbing" since it clearly showed that he was "overpoweringly jealous" of the friendship between Ahmet Osman and Leslie Green. Mr Perkins suggested him to seek psychiatric help. In another interview conducted by the school, Ahmet stated that Paget-Lewis had taken photographs of him and given him gifts.

Meanwhile, the school management conducted several other interviews with the relevant individuals. According to the diary of Mr Prince, between 3 March 1987 and 17 March 1987 he met with PC Williams on four occasions. According to the applicants, during these meetings information concerning Paget-Lewis' conduct towards Ahmet Osman was passed on to the police.

By 17 March 1987, an obscene graffiti about Leslie and Ahmet had appeared at six locations around the school. Paget-Lewis denied responsibility for it.

While attempting to arrange a transfer of Ahmet Osman to another school, it was discovered that the files relating to Ahmet and Leslie Green had been stolen from the school office. Paget-Lewis also denied any involvement in the theft.

Ahmet Osman was transferred to a different school, but owing to curriculum difficulties he had to return to Homerton House fourteen days later.

On 14 April 1987, Paget-Lewis changed his name by deed poll to Paul Ahmet Yildirim Osman. Mr Prince wrote about this to the Inner London Education Authority (ILEA), he also informed them that he was worried that the psychological imbalance of Paget-Lewis might pose a threat to the safety of Ahmet Osman.

Mr Prince spoke with two police officers on 4 May 1987, and it emerged that Paget-Lewis had changed his name previously by deed poll to name himself after a pupil called Paget-Lewis.

Paget-Lewis was seen by Dr Ferguson, the ILEA psychiatrist, on 19 May 1987. Dr Ferguson recommended that Paget-Lewis remain teaching at the school but that he should receive some form of counseling and psychotherapy.

In the following days, a brick was thrown through a window of the applicants' house. A police officer was sent to the house and completed a crime report. On two occasions in June 1987, the tyres of the car of Mr Ali Osman (the first applicant's husband and the second applicant's father) were deliberately burst. Both incidents were reported to the police, but no police records relating to the offences could be found.

After another examination of Paget-Lewis, Dr Ferguson concluded that he should be removed from Homerton House and was designated temporarily unfit to work.

Paget-Lewis was suspended pending an ILEA investigation for "unprofessional behaviour" towards Ahmet Osman. On 7 August 1987, ILEA sent a letter to Paget-Lewis officially reprimanding and severely warning him but lifting the suspension. The letter also stated that he was not to return to Homerton House. Shortly afterwards he began working as a supply teacher at two other local schools.

In August or September 1987, a number of attacks were made on the properties of the Osman family, including pouring of engine oil and paraffin on the house, smashing the windscreen of Mr Osman's car, jamming their front door lock with superglue, and smearing of dog excrement on their doorstep and car. All these incidents were reported to the police.

PC Adams visited the Osmans' home and then spoke to Paget-Lewis about the acts of vandalism. In a later statement to the police, Paget-Lewis alleged that he told PC Adams that the loss of his job was so distressing that he felt that he was in danger of doing something criminally insane. The Government denied that this had been said, and referred to the fact that during the interview with PC Adams, Paget-Lewis had denied any involvement in the acts of vandalism and criminal damage.

On 7 December 1987 a car driven by Paget-Lewis collided with a van in which Leslie Green was a passenger.

Following the collision incident, according to the applicants, officers gave assurance regarding the protection of their family on many occasions, however the Government denied that such an assurance was given.

On 15 December 1987 Paget-Lewis was interviewed by officers of ILEA at his own request. An ILEA memorandum dated the same day recorded that Paget-Lewis felt in a totally self-destructive mood, blaming Mr Perkins for all his troubles but stating he would not do a "Hungerford"[141] in a school but would see him at his home.

On 17 December 1987, police officers arrived at Paget-Lewis' house with the intention of arresting him on suspicion of criminal damage, but he was absent. The police were unaware that he was teaching at Haggerston School that day.

In the following day, ILEA informed the police that Paget-Lewis had not attended Haggerston School. He did not return to the school again.

In early January 1988 the police commenced a procedure with a view to prosecuting Paget-Lewis for driving without due care and attention. In addition, Paget-Lewis' name was put on the Police National Computer as being wanted in relation to the collision incident and on suspicion of having committed offences of criminal damage.

On 1, 4 and 5 March 1988 Leslie Green saw Paget-Lewis wearing a black crash helmet near the applicants' home. According to the applicants, Mrs Green informed the police on each occasion, but her calls were not returned.

141 Hungerford was the scene of a 1987 massacre in which a gunman killed sixteen persons before committing suicide.

On 7 March 1988 Paget-Lewis was seen near the applicants' home by a number of people. At about 11 p.m. Paget-Lewis shot and killed Mr Osman and seriously wounded Ahmet Osman. He then drove to the home of Mr Perkins where he shot and wounded him and killed his son. Early the next morning Paget-Lewis was arrested.

Paget-Lewis admitted shooting at Mr Osman and Ahmet Osman. He denied that on earlier occasions he had damaged the windows of the Osmans' house but admitted that he had let down the tyres of their car as a prank. He also denied responsibility for the graffiti and taking the files from the school office.

On 28 October 1988 Paget-Lewis was convicted of two charges of manslaughter having pleaded guilty on grounds of diminished responsibility. He was sentenced to be detained in a secure mental hospital without limit of time.

On 28 September 1989 the applicants commenced proceedings against, *inter alios*, the Commissioner of Police of the Metropolis alleging negligence in that although the police were aware of Paget-Lewis' activities since May 1987 they failed to apprehend or interview him, search his home or charge him with an offence before March 1988.

On 19 August 1991 the Metropolitan Police Commissioner issued an application to strike out the statement of claim on the ground that it disclosed no reasonable cause of action. The Court of Appeal subsequently held that, according to the exclusionary rule of the 1989 ruling of the House of Lords in the case of *Hill v Chief Constable of West Yorkshire*, no action could lie against the police in negligence in the investigation and suppression of crime on the grounds that public policy required immunity from suit.

2. Decision of the Court

Relying on Articles 2, 6, 8 and 13, the applicants applied to the Commission on 10 November 1993, complaining that there had been a failure to protect the lives of Ali and Ahmet Osman and to prevent the harassment of their family, and that they had no access to court or effective remedy in respect of that failure. The Commission found that the there had been no violation of Articles 2 and 8, but there had been a violation of Article 6 § 1 of the Convention and that no separate issue arose under Article 13 of the Convention.

The applicants maintained before the Court that the facts of the case disclosed breaches by the respondent State of its obligations under Articles 2, 6, 8 and 13 of the Convention.

Article 2

The applicant asserted that by failing to take adequate and appropriate steps to protect the lives of the second applicant and his father, Ali Osman, from the real and known danger which Paget-Lewis posed, the authorities had failed to comply with their positive obligation under Article 2.

The Court firstly reiterated that, where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their duty to prevent and suppress offences, it must be established to its satisfaction 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.

Although it had been asserted that by the stage where the police were informed of all relevant connected matters including the graffiti incident, the theft of the school files and Paget-Lewis' change of name, the police should have been alert to the need to investigate further Paget-Lewis' alleged involvement in those incidents or to keep a closer watch on him, the Court was not persuaded that the police's failure to do so at this stage can be impugned from the standpoint of Article 2 having regard to the state of their knowledge at that time. In the Court's view, while Paget-Lewis' attachment to Ahmet Osman could be judged by the police officers who visited the school to be most reprehensible from a professional point of view, there was never any suggestion that Ahmet Osman was at risk sexually from him, less so that his life was in danger.

As Paget-Lewis had denied all involvement when interviewed by Mr Perkins and there was nothing to link him with either incident, the Court considered that the police's appreciation of the situation and their decision to treat it as a matter internal to the school could not be considered unreasonable.

With regards to the acts of vandalism against the Osmans' home and property, and the assertion that the police did not keep records of the reported

incidents, the Court stated that this failing could not be said to have prevented the police from apprehending at an earlier stage any real threat to the lives of the Osman family or that the irrationality of Paget-Lewis' behaviour concealed a deadly disposition. The Court also noted in this regard that when the decision was finally taken to arrest Paget-Lewis it was not based on any perceived risk to the lives of the Osman family but on his suspected involvement in acts of minor criminal damage.

With regard to the alleged fact that Paget-Lewis on three occasions communicated to the police, either directly or indirectly, his murderous intentions, the Court considered that those statements could not be reasonably considered to imply that the Osman family were the target of his threats and to put the police on notice of such.

Consequently, the Court considered that the applicants had failed to point to any decisive stage in the sequence of the events leading up to the tragic shooting when it could be said that the police knew or ought to have known that the lives of the Osman family were at real and immediate risk from Paget-Lewis. The Court accordingly found no violation of Article 2.

Article 8

The applicants contended that the failure of the police firstly to bring an end to the campaign of harassment, vandalism and victimization which Paget-Lewis waged against their property and family and secondly, and in particular, to avert the wounding of the second applicant constituted a breach of Article 8.

The Court recalled that it had not found it established that the police knew or ought to have known at the time that Paget-Lewis represented a real and immediate risk to the life of Ahmet Osman and that their response to the events as they unfolded was reasonable in the circumstances and not incompatible with the authorities' duty under Article 2. In the Court's view, that conclusion equally supported a finding that there had been no breach of any positive obligation implied by Article 8.

As to the applicants' contention that the police failed to investigate the attacks on their home with a view to ending the campaign of harassment against the Osman family, the Court reiterated that the police had firstly taken the view that there was no evidence to implicate Paget-Lewis, and later, in the light of new developments in the case, an attempt had been in fact made to

arrest and question Paget-Lewis on 17 December 1987 on suspicion of criminal damage. Therefore, the Court concluded that there had been no breach by the authorities of any positive obligation under Article 8.

Article 6 § 1

The applicants alleged that the dismissal by the Court of Appeal of their negligence action against the police on grounds of public policy amounted to a restriction on their right of access to a court in breach of Article 6 § 1.

Applicability of Article 6 § 1

The Government maintained that the applicants could not rely on any substantive right in domestic law to sue the police for their alleged failure to prevent Paget-Lewis from shooting dead Ali Osman and seriously wounding the second applicant. Whether or not the police could be considered to owe a plaintiff a duty of care depended not only on proof of proximity between the parties and the foreseeability of harm but also on the answer to the question whether it was fair, just and reasonable to impose a duty of care on the police. The Court of Appeal had answered the latter question in the negative, being satisfied that there were no other public-policy considerations, which would have led it to reach a different conclusion.

The Court accepted that the exclusionary rule did not automatically doom to failure such a civil action from the outset but in principle allowed a domestic court to make a considered assessment on the basis of the arguments before it as to whether a particular case was or was not suitable for the application of the rule.

On that understanding the Court considered that the applicants had a right, derived from the law of negligence, to seek an adjudication on the admissibility and merits of an arguable claim that they were in a relationship of proximity to the police, that the harm caused was foreseeable and that in the circumstances it was fair, just and reasonable not to apply the exclusionary rule outlined in the Hill case.

Compliance of Article 6 § 1

The Court noted that the reasons which led the House of Lords in the *Hill case* to lay down an exclusionary rule to protect the police from negligence actions were based on the view that the interests of the community as a whole were best served by a police service whose efficiency and effectiveness in the

battle against crime were not jeopardised by the constant risk of exposure to tortuous liability for policy and operational decisions.

Although the aim of such a rule might be accepted as legitimate in terms of the Convention, as being directed to the maintenance of the effectiveness of the police service and hence to the prevention of disorder or crime, the Court emphasised the issue of proportionality and stated that the Court of Appeal proceeded on the basis that the rule provided a watertight defence to the police and that it was impossible to prise open an immunity which the police enjoyed from civil suit in respect of their acts and omissions in the investigation and suppression of crime.

The Court observed that the application of the rule in this manner without further enquiry into the existence of competing public interest considerations only served to confer a blanket immunity on the police for their acts and omissions during the investigation and suppression of crime and amounted to an unjustifiable restriction on an applicant's right to have a determination on the merits of his or her claim against the police in deserving cases.

In the Court's opinion, the pursuit of other alternative routes, claimed to be available to the applicants for securing compensation, could not be said to mitigate the loss of their right to take legal proceedings against the police in negligence and to argue the justice of their case. Therefore, the Court concluded that the application of the exclusionary rule in the case constituted a disproportionate restriction on the applicants' right of access to a court and violated Article 6 § 1.

Article 13

The Court considered that no separate issue had arisen under Article 13 in view of its finding of a violation of Article 6 § 1, while noting that the requirements of Article 13 are less strict than, and are here absorbed by, those of Article 6.

Article 50[142]

The Court awarded each of the applicants the sum of GBP 10,000 for damages, and the sum of GBP 30,000 together with any value-added tax that may be chargeable for costs and expenses, less the amount already paid in legal aid by the Council of Europe.

142 Now Article 41.

JUDGMENT IN THE CASE OF
BRANKO TOMAŠIĆ AND OTHERS v. CROATIA
(Application no. 46598/06)
15 January 2009

1. Principal facts

The applicants are Branko Tomašić, his wife, Đurđa Tomašić, and their three children. They are Croatian nationals who were born in 1956, 1963, 1985, 1995 and 2001 respectively and live in Čakovec in Croatia. The applicants are the relatives of M.T. and her child, V.T., born in March 2005, who were both killed in August 2006 by M. M., V.T.'s father.

M.T. and M.M. lived together in the home of M.T.'s parents until July 2005, when M.M. moved out after disputes with the members of the household.

In January 2006 M.T. lodged a criminal complaint against M.M. for death threats he had allegedly made. On 15 March 2006 the first instance court found M.M. guilty of repeatedly threatening M.T. that he would kill her, himself and their child with a bomb. He was sentenced to five months' imprisonment and, as a security measure, was ordered to have compulsory psychiatric treatment during his imprisonment and afterwards as necessary. On 28 April 2006 the appeal court reduced that treatment to the duration of M.M.'s prison sentence.M.M. served his sentence and was released on 3 July 2006.

On 15 August 2006 he shot dead M.T. and their daughter, V.T., before committing suicide by turning the gun on himself.

2. Decision of the Court

The applicants complained, under Article 2 and Article 13, that the State had failed to take adequate measures to protect M.T. and V.T. and had not conducted an effective investigation into the possible responsibility of the State for their deaths.

Article 2

The findings of the domestic courts and the conclusions of the psychiatric examination undoubtedly showed that the authorities had been aware that

the threats made against the lives of M.T. and V.T. had been serious and that all reasonable steps should have been taken to protect them.

The Court noted, however, that no search of M.M.'s premises and vehicle had been carried out during the initial criminal proceedings against him, despite the fact that he had repeatedly threatened to use a bomb. In addition, although the psychiatric report drawn up for the purposes of those criminal proceedings had stressed the need for continued psychiatric treatment, the Government had failed to show that M.M. had actually been properly treated. Indeed, M.M. had not followed an individual programme during his prison term even though it had been required by law. Nor had he been examined immediately before his release from prison in order to assess whether he had posed a risk of carrying out his death threats against M.T. and V.T. once free.

The Court therefore concluded that no adequate measures had been taken by the relevant domestic authorities to protect the lives of M.T. and V.T., in violation of Article 2.

The Court held that there was no need to examine separately the complaint under Article 2 regarding the failure of the State to carry out a thorough investigation into the possible responsibility of its agents for the deaths of M.T. and V.T.

Article 13

Lastly, the Court held that there was no need to examine the applicants' complaint under Article 13 given that it had established the State's responsibility under Article 2.

Article 41

The Court awarded the applicants, jointly, EUR 40,000 in respect of non-pecuniary damage and EUR 1,300 for costs and expenses.

JUDGMENT IN THE CASE OF
VALIULIENĖ v. LITHUANIA
(Application no. 33234/07)
26 March 2013

1. Principal Facts

The applicant in this case, Ms. Valiulienė, lodged an application with the Panevėžys City District Court on 14 February 2001, to bring a private prosecution, stating that she had been beaten up on five occasions by her live-in partner, J.H.L. in January and February 2001.

On 21 January 2002, a judge of the District Court forwarded the applicant's complaint to the public prosecutor, ordering him to start his own pre-trial criminal investigation as J.H.L. had failed to appear in court on a number of occasions.

In 2002 J.H.L. was charged with having deliberately and systematically injured the applicant, resulting in her having sustained minor bodily harm. The investigation was suspended and reopened numerous times because J.H.L. had failed to appear at court and had absconded. Each time the investigation was suspended, the applicant lodged an appeal.

On 10 June 2005 the prosecutor decided to discontinue the investigation on the grounds that the law had changed in 2003 and a prosecution in respect of minor bodily harm should have been brought by the victim in a private capacity. The prosecutor also considered there was no reason for a public prosecution, as the case did not fall within the ambit of Article 409 of the new Code of Criminal Procedure, that is to say, the prosecutor did not consider the crime to be of "public importance". It was therefore up to the applicant to proceed accordingly and to apply to a court to bring a private prosecution against J.H.L.

The applicant appealed, arguing that she had already addressed the law-enforcement authorities about her injuries four years previously and had initiated a private prosecution at that time, however, the judge had transferred her complaint to a public prosecutor, who had initiated the pre-trial investigation that had been continued after 1 May 2003, when the new Code of Criminal Procedure had entered into force. She argued that all those events alongside with the fact that the public prosecutor had not informed her right after the law reform that he would not be prosecuting J.H.L, had led

her to believe that the charges in the case were being pursued by the public prosecutor. She also raised her fear that the end of the limitation period for prosecuting J.H.L. was approaching, and that the prosecution would become time-barred. The District Prosecutor's Office dismissed the applicant's appeal on 19 July 2005.

After another unsuccessful appeal, the applicant lodged a complaint with the District Court, requesting that J.H.L. be privately prosecuted for causing minor bodily harm. The District Court considered that J.H.L.'s acts corresponded to the offence of causing minor bodily harm under the new Criminal Code for which the limitation period was one-year. Accordingly, by a ruling of 15 December 2005 the District Court refused the applicant's request on the ground that the prosecution had become time-barred. This was eventually upheld by the Regional Court in February 2007.

2. Decision of the Court

Relying in substance on Article 3 and Article 8, the applicant complained that the authorities had failed to investigate her allegations of repeated domestic violence and to bring her partner to account, and that the length of the criminal proceedings had been excessive.

Article 3

With regard to the admissibility of the complaint, the Court considered that the ill-treatment of the applicant, combined with her feelings of fear and helplessness, was sufficiently serious to reach the level of severity under of Article 3 of the Convention and it thus engaged the Government's positive obligation under this provision. Therefore, it was declared admissible.

As regards the merits of the case, the Court stated that as early as 14 February 2001 the applicant had addressed the District Court to bring a private prosecution. On the basis of forensic reports produced soon after each incident of violence, she claimed that J.H.L. had ill-treated her on five separate occasions, describing each incident in detail. She gave the names and addresses of five witnesses whom she wanted to call in the case. The Court concluded that the Lithuanian authorities had received sufficient information from the applicant to raise a suspicion that a crime had been committed and thus found that as of that moment those authorities were under an obligation to act upon the applicant's criminal complaint.

While the authorities had initially acted without undue delay, the investigation had been suspended repeatedly following the transfer of the case to the public prosecutor. The fact that the prosecutor's decisions had been quashed by the higher prosecutor as not being thorough enough indicated a serious flaw on the part of the State.

The Court further noted that even though the Lithuanian Code of Criminal Procedure had changed in May 2003, it was only in June 2005, that the prosecutor decided to return the case to the applicant for private prosecution. In this connection, the Court observed that the prosecutor's decision was upheld by a higher prosecutor and then by a court, despite the applicant's pleas that this would risk J.H.L. enjoying impunity given that the statutory time-limit to prosecute him was approaching. The Court also stated that, even after the reform of 1 May 2003 the investigation of acts causing minor bodily harm might still be pursued by a public prosecutor, provided that it is in the public interest.

As a result of the prosecutor's decision, the circumstances of the case had never been established by a competent court of law. Therefore, one of the purposes of criminal prosecution, namely the effective protection against acts of ill-treatment, had not been achieved and there had been a violation of Article 3 on that account.

Article 8

Having regard to the above, the Court found that it was not necessary to examine the complaint separately under Article 8 of the Convention.

Article 41

The Court held that Lithuania was to pay the applicant €5,000 in respect of non- pecuniary damage.

JUDGMENT IN THE CASE OF
BEVACQUA AND S. v. BULGARIA
(Application no. 71127/01)
12 June 2008

1. Principal Facts

The first applicant in this case, Mrs Bevacqua, was a Bulgarian national living in Sofia at the relevant time. Mrs Bevacqua married Mr N. in 1995 and gave birth to S. (the second applicant) in January 1997.

As the relationship between the spouses soured, Mr N. became aggressive and on 1 March 2000 the first applicant left the family home with her son and moved into her parents' apartment. On the same day the first applicant filed for divorce and sought an interim custody order, stating, *inter alia*, that Mr N. often used offensive language and battered her.

On 7 March 2000 a judge at the Sofia District Court examined the case file and fixed the date of the first hearing without examining the request for an interim order.

On 6 May 2000 Mr N. did not bring S. home after a walk. The first applicant complained to the prosecuting authorities. The relevant prosecutor apparently gave instructions that Mr N. should be summoned and served with an official warning. That was not done until 22 June 2000. On 12 May 2000 the first applicant went to see her son at the kindergarten and took him to her home. In the evening Mr N. came shouting and banging on the door. Mr N. managed to enter the apartment and allegedly hit or pushed the first applicant in the presence of her parents and the child and eventually took the child and left.

After visiting a forensic doctor, the first applicant filed a complaint with the District Prosecutor's Office and enclosed the medical certificate. She also sought the help of an NGO and travelled with her child to Bourgas where the NGO provided her with accommodation.

Mr N. complained to the local Juveniles Pedagogic Unit, stating that the first applicant had abducted their son. She was then summoned by the police.

On 31 May 2000, Mr N. visited the first applicant in her home, allegedly threatened her and took their son away. On the following day, the juveniles

inspector organised a meeting between the first applicant, Mr N. and the child, and they agreed that the child would live with his father for a month and then with his mother for another month. As a result of this agreement Mr N. withdrew his complaint for abduction.

On 13 June 2000 the first applicant appeared before the District Court for a hearing in the divorce proceedings where the court fixed a time-limit for reconciliation, as required by law, and adjourned the examination of the case until 29 September 2000.

After Mr N. was summoned in relation to the first applicant's complaint, he allegedly became aggressive and hit the first applicant in their son's presence during a visit. On the next day, she visited a doctor who noted a bruise on her left eyelid and a swollen cheek.

After unsuccessful applications to the juveniles inspector at the local police station and the Ministry of Interior, she filed written submissions with the District Court reiterating her request for an interim order on 11 September 2000.

The hearings were adjourned several times, and the first applicant eventually withdrew her request for interim measure during the hearing on 13 February 2001 and asked the court to rule on the merits of the divorce claims, including the child custody claim. The District Court terminated the interim measures proceedings.

From the summer of 2000 the first applicant could only see her son at his kindergarten. However, on 7 March 2001 she collected her son and brought him to her home. Mr N. complained to the authorities and as a result the first applicant was summoned by the police and given official warnings.

According to the first applicant, Mr N. also threatened her with physical violence but she kept the child. According to Mr N., in March 2001 he was attacked by men hired by the first applicant, in her presence.

The last hearing in the divorce proceedings was held on 24 April 2001. In accordance with the Child Protection Act, an expert of the newly created local Social Care Office gave an opinion that the child was afraid of his father as he had battered his mother and that the child preferred to live with his mother.

On 23 May 2001, the District Court pronounced the divorce and the first applicant was given the custody of her son due to the child's low age, and Mr N. was given visiting rights.

On 18 June 2002 the first applicant visited Mr N.'s apartment, accompanied by two friends, to collect her belongings. Her former husband became aggressive and battered her. After visiting a forensic doctor who noted bruises on her face and body, she complained to the prosecution authorities. They refused to institute criminal proceedings against Mr N., noting that it was open to the first applicant to bring private prosecution proceedings, as the alleged injuries fell into the category of light bodily injuries.

2. Decision of the Court

Relying on Articles 3, 8, 13 and 14, the applicants complained that the authorities had failed to take the necessary measures to secure respect for their family life and failed to protect the first applicant against the violent behaviour of her former husband. The Court considered that in the particular circumstances of the case the complaints fell to be examined under Article 8.

Admissibility

According to the Court, the fact that the first applicant withdrew her request for interim measures after the accumulation of the impugned delays did not necessarily lead to the conclusion that she failed to exhaust domestic remedies as asserted by the Government, or suggest abusive behaviour on her part. Therefore, the complaints were declared admissible.

Article 8

The Court firstly observed that because of its very nature and purpose, an application for interim custody measures must normally be treated with a certain degree of priority, unless there are specific reasons not to do so. No such reasons appeared to have existed in the applicants' case according to the Court.

The Court stated that the District Court had not treated the matter with any degree of priority and, during the first six months, had ignored the issue of interim measures. In June 2000 the District Court started examining the divorce claim instead of dealing with the temporary custody arrangements

first. This delay had been the result of the domestic courts' practice to adjourn custody issues in divorce proceedings pending the expiry of the statutory reconciliation period. While this practice had the legitimate aim to facilitate reconciliation, the Court considered that its automatic application in the applicants' case despite concrete circumstances calling for expedition had been unjustified.

Furthermore, it must have become obvious to the District Court judge that the second applicant had been adversely affected by the failure of his parents, and Mr N. had obstructed the possibility for contact between the first applicant and her child. The Court observed that, despite these facts, the District Court had continued to adjourn the examination of the interim custody application repeatedly and made no effort to collect all relevant evidence in one hearing. Therefore, the Court did not find the first applicant's withdrawal of request for interim measures unreasonable.

The Court considered that the District Court's handling of the interim measures, alongside with its adverse effects on the second applicant, was difficult to reconcile with the authorities' duty to secure respect for the applicants' private and family life.

Concerning the first applicant's complaints about Mr N.'s aggressive behavior the Court noted that, at the relevant time, Bulgarian law had not provided for specific administrative and policing measures and the measures taken by the police and prosecuting authorities on the basis of their general powers had not proved effective. The Court also considered that the possibility for the first applicant to bring private prosecution proceedings and seek damages had not been sufficient as such proceedings obviously required time and could not serve to prevent recurrence of the incidents complained of. In the Court's view, the authorities' failure to impose sanctions or otherwise enforce Mr N.'s obligation to refrain from unlawful acts was critical in the circumstances of this case, as it amounted to a refusal to provide the immediate assistance the applicants needed. The Court concluded that the authorities' view that no such assistance was due as the dispute concerned a "private matter" had been incompatible with their positive obligations to secure the enjoyment of the applicants' Article 8 rights.

In conclusion, the Court considered that the cumulative effects of the District Court's failure to adopt interim custody measures without delay in a situation which affected adversely the applicants and, above all, the well-being of the

second applicant and the lack of sufficient measures by the authorities during the same period in reaction to Mr N.'s behaviour had amounted to a failure to assist the applicants contrary to the State positive obligations under Article 8. Therefore, there had been a violation of Article 8.

Article 6 § 1

The applicant complained of the length of the custody proceedings.

The Court, having regard to the relevant criteria as established in its case-law and taking into consideration the nature of the proceedings but also their overall length and the fact that the examination of witnesses and collection of other evidence inevitably required time, considered that the child custody dispute had been determined within a reasonable time as required by Article 6 § 1. Therefore, there had been no violation of that provision.

Article 41

The Court held that Bulgaria was to pay jointly to the applicants €4,000 in respect of non-pecuniary damage and €3,000 covering costs under all heads.

JUDGMENT IN THE CASE OF
M.C. v. BULGARIA
(Application no. 39272/98)
4 December 2003

1. Principal facts

The applicant, M.C., is a Bulgarian national born in 1980 who alleged that she was raped by two men, A. and P., aged 20 and 21, when she was 14 years old, the age of consent for sexual intercourse in Bulgaria.

M.C. claimed that, on 31 July 1995, she went to a disco with her friend and the two men. She then agreed to go on to another disco with the men. On the way back, A. suggested stopping at a reservoir for a swim. M.C. remained in the car. P. came back before the others, allegedly forcing M.C. to have sexual intercourse with him. M.C. maintained that she was left in a very disturbed state. In the early hours of the following morning, she was taken to a private home. She claimed that A. forced her to have sex with him at the house and that she cried continually both during and after the rape. She was later found by her mother and taken to hospital where a medical examination found that her hymen had been torn. A. and P. both denied raping M.C.

The criminal investigations found insufficient evidence that M.C. had been compelled to have sex with A. and P. The proceedings were terminated on 17 March 1997 by the District Prosecutor, who found that the use of force or threats had not been established beyond reasonable doubt. In particular, no resistance on the applicant's part or attempts to seek help from others had been established. The applicant appealed unsuccessfully.

Written expert opinions submitted to the European Court by M.C. identified "frozen fright" (traumatic psychological infantilism syndrome) as the most common response to rape, where the terrorised victim either submits passively to or dissociates her- or himself psychologically from the rape. Of the 25 rape cases analysed, concerning women in Bulgaria aged between 14 and 20 years, 24 of the victims had responded to their aggressor in this way.

2. Decision of the Court

M.C. complained that Bulgarian law and practice do not provide effective protection against rape and sexual abuse, as only cases where the victim

resists actively are prosecuted. She also complained that the authorities had not effectively investigated the events in question. She relied on Article 3 (prohibition of degrading treatment), Article 8 (right to respect for private life), Article 13 (right to an effective remedy) and Article 14 (prohibition of discrimination).

Articles 3 and 8 of the Convention

The Court reiterated that, under Articles 3 and 8 of the Convention, Member States had a positive obligation both to enact criminal legislation to punish rape effectively and to apply this legislation through effective investigation and prosecution.

The Court then observed that, historically, proof of the use of physical force by the perpetrator and physical resistance on the part of the victim was sometimes required under domestic law and practice in rape cases in a number of countries. However, it appeared that this was no longer required in European countries. In common law jurisdictions, in Europe and elsewhere, any reference to physical force had been removed from legislation and/or case law. And although in most European countries influenced by the continental legal tradition the definition of rape, in case law and legal theory, contained references to the use of violence or threats of violence by the perpetrator, it was lack of consent, not force, that was critical in defining rape.

The Court also noted that the Member States of the Council of Europe had agreed that penalising non-consensual sexual acts, whether or not the victim had resisted, was necessary for the effective protection of women against violence and had urged the implementation of further reforms in this area. In addition, the International Criminal Tribunal for the former Yugoslavia had recently found that, in international criminal law, any sexual penetration without the victim's consent constituted rape, reflecting a universal trend towards regarding lack of consent as the essential element of rape and sexual abuse. In general, law and legal practice concerning rape were developing to reflect changing social attitudes requiring respect for the individual's sexual autonomy and for equality. Given contemporary standards and trends, Member States' positive obligations under Articles 3 and 8 of the Convention required the penalisation and effective prosecution of any non-consensual sexual act, even where the victim had not resisted physically.

The applicant alleged that the authorities' attitude in her case was rooted in defective legislation and reflected a practice of prosecuting rape perpetrators

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only where there was evidence of significant physical resistance. The Bulgarian Government were unable to provide copies of judgments or legal commentaries clearly disproving the applicant's allegations of a restrictive approach in the prosecution of rape. Her claim was therefore based on reasonable arguments, which had not been disproved.

The presence of two irreconcilable versions of the facts obviously called for a context-sensitive assessment of the credibility of the statements made and for verification of all the surrounding circumstances. Little was done, however, to test the credibility of the version of events put forward by P. and A., or to test the credibility of the witnesses called by the accused or the precise timing of the events. Neither were the applicant and her representative able to question witnesses, whom she had accused of perjury. The authorities had therefore failed to explore the available possibilities for establishing all the surrounding circumstances and did not assess sufficiently the credibility of the conflicting statements made. The reason for that failure appeared to be that the investigator and prosecutor considered that a "date rape" had occurred, and, in the absence of "direct" proof of rape such as traces of violence and resistance or calls for help, that they could not infer proof of lack of consent and, therefore, of rape from an assessment of all the surrounding circumstances.

Without expressing an opinion on the guilt of P. and A., the Court found that the effectiveness of the investigation of the applicant's case and, in particular, the approach taken by the investigator and the prosecutors fell short of Bulgaria's positive obligations under Articles 3 and 8 of the Convention - viewed in the light of the relevant modern standards in comparative and international law - to establish and apply effectively a criminal law system punishing all forms of rape and sexual abuse.

Articles 13 and 14 of the Convention

The Court found that no separate issue arose under Article 13 and that it was not necessary to examine the complaint under Article 14.

Article 41

The Court awarded the applicant 8,000 euros (EUR) for non-pecuniary damage and EUR 4,110 for costs and expenses.

JUDGMENT IN THE CASE OF
E. S. AND OTHERS V. SLOVAKIA
(Application no. 8227/04)
15 September 2009

1. Principal facts

The applicants, E.S., a mother, and her three children, Er.S., Ja. S. and Já. S., are Slovak nationals, born in 1964, 1986, 1989 and 1988, respectively. They live in Slovakia.

In March 2001 E.S. left her husband, S., father to her three children, and filed for divorce, which was granted in May 2002. She was subsequently granted custody of the children.

In April 2001 E.S. filed a criminal complaint against her husband claiming that he had ill-treated both her and their children and sexually abused one of their daughters. Two years later he was convicted of ill-treatment, violence and sexual abuse and sentenced to four years' imprisonment.

In May 2001 E.S. requested an interim measure ordering her husband to move out of the council flat of which they were joint tenants. The domestic courts subsequently dismissed her request, finding that under the relevant legislation it lacked the power to restrict her husband's right to use the property. On appeal, the courts upheld that decision noting that E.S. would be entitled to bring proceedings to terminate the joint tenancy after a final decision in the divorce proceedings and, in the meantime, she could apply for an order requiring her husband to refrain from inappropriate behaviour. The Constitutional Court subsequently held that there had been no violation of E.S.'s rights as she had not applied for such an order. However, it held that the lower courts had failed to take appropriate action to protect E.S.'s children from ill-treatment. It did not award compensation as it considered that the finding of a violation provided appropriate just satisfaction.

Following the introduction of new legislation, E.S. made further applications and two orders were granted in July 2003 and December 2004: the first preventing her ex- husband from entering the flat; and, the second awarding her exclusive tenancy.

In the meantime, the applicants had had to move away from their home, family and friends and Er.S. and Ja.S. had had to change school.

2. Decision of the Court

Relying on Articles 3 and 8 of the Convention, the applicants complained that the authorities had failed to protect them adequately from domestic violence.

Articles 3 and 8

The Government submitted that E.S. had failed to exhaust domestic remedies. It accepted that there had been a violation of her children's rights under Articles 3 and 8 but claimed that they had been provided with adequate redress by the domestic courts.

The Court found that the alternative measure proposed by the Slovak Government, that is an order restraining E.S.'s ex husband from inappropriate behaviour, would not have provided the applicants with adequate protection against their husband and father and therefore did not amount to an effective domestic remedy which E.S. was required to exhaust. E.S. had not been in a position to apply to sever the tenancy until the divorce had been finalised in May 2002, approximately a year after the allegations against her ex-husband had first been brought. Given the nature and severity of the allegations, E.S. and her children had required immediate protection. During that period there had therefore been no effective remedy open to E.S. by which she could ensure that she and her children would be protected against the violence of her former husband. In relation to E.S.'s children, the Court did not consider that the finding of a violation amounted to adequate redress for the damage that they had suffered.

The Government accepted that E.S.'s children had been subjected to treatment which had gone beyond the threshold of severity where Articles 3 and 8 could be applied. The Court found that Slovakia had also failed to protect E.S.'s rights, and concluded that Slovakia therefore had failed to fulfil its obligation to protect all of the applicants from ill-treatment, in violation of Articles 3 and 8.

Article 41

The Court awarded the applicants EUR 8,000 in respect of non-pecuniary damage and EUR 2,000 for costs and expenses.

JUDGMENT IN THE CASE OF
KALUCZA v. HUNGARY
(Application no. 57693/10)
24 April 2012

1. Principal Facts

The applicant in this case, Ms. Kalucza, bought a flat with her husband in 2010. Two thirds of the flat were registered in the applicant's name and the rest in her husband's name. Upon their subsequent divorce, they entered into an agreement, according to which the applicant was to acquire the entirety of the property by buying his part of the flat.

In April 2005, the applicant entered into an unregistered partnership with Mr. Gy.B. He paid the former husband's share of the flat, and hence acquired ownership of this part.

Later, Gy.B. moved into the flat to live with the applicant. Upon his request, the Central Document Bureau registered his place of residence at the applicant's address on 24 November 2006.

Their relationship ended in about January 2007, however, Gy.B. continued to stay in the jointly owned flat against the applicant's wishes.

Meanwhile, the relationship between the applicant and Gy.B. deteriorated, resulting in regular disputes involving mutual verbal and physical assault.

Between October 2005 and August 2010, 13 medical reports were drawn up which recorded contusions mostly to Ms Kalucza's head, face, chest and neck with an expected healing time of eight to ten days.

The applicant requested the help of the authorities on many occasions, lodging criminal complaints for assault and harassment. Gy.B. also lodged several criminal complaints against the applicant. On four occasions, Gy.B. was acquitted of the charges, on five occasions the applicant did not wish to continue the proceedings or failed to prosecute privately and the court thus discontinued them, on two occasions Gy.B. was found guilty of assault and released on parole. Two other sets of criminal proceedings for assault were pending against him at the time of this judgment.

The applicant was also found guilty on several occasions of disorderly conduct, grievous bodily harm and assault, respectively. Three investigations against her, for grievous bodily harm, harassment and theft, were discontinued.

During the criminal proceedings, the applicant also made two requests for a restraining order to be brought against Gy.B.. Her first request, made in June 2008, was dismissed by the courts in January 2010 on the ground that both parties were responsible for their bad relationship. Her subsequent second request was dismissed for the same reason.

There were also two different sets of civil proceedings, which were both suspended, concerning the ownership of the flat.

Further, Gy.B. changed the locks on the flat in March 2007 but did not provide the applicant with keys. After the notary had ordered Gy.B. to provide her with keys to the flat, the applicant changed the locks on her door on 11 May 2007 in an attempt to prevent Gy.B. from re-entering the flat. On the same day he arrived with police officers who obliged her to provide access to him, as his registered place of residence was the flat. The applicant requested the notary to delete her address as the place of residence of Gy.B. and to order him to leave the flat. However, as it was not the competent authority to do so, the notary dismissed her request. Moreover, as Gy.B. was actually living in the flat, the deletion of her address as his place of residence was not possible.

On 9 April 2008, the applicant initiated civil proceedings, requesting the court to order Gy.B. to leave the flat. The proceedings were still pending at the time of this judgment, the court having suspended them on 5 September 2008 pending the outcome of the property dispute between Gy.B. and the applicant.

On 2 August 2010 the applicant again changed the locks on the doors in order to prevent Gy.B. entering the flat. Criminal proceedings were initiated against her which were pending at the time of this judgment.

2. Decision of the Court

Relying in substance on Article 8, the applicant complained that the Hungarian authorities had failed to take positive measures to protect her from her violent former common-law husband.

Admissibility

The Government argued that the applicant had failed to avail herself of all effective domestic remedies, as she had failed to pursue several of her criminal charges for assault, had not requested the protection of her possession from the notary or the court and had not requested an interim measure granting her exclusive possession of the flat in question.

The Court, while noting the Government's objections, considered that the applicant had availed herself of several other remedies provided by domestic law. It also noted that there were three separate sets of civil proceedings pending before the domestic courts between the applicant and Gy.B., all of which had been suspended until the determination of yet another civil dispute. The Court therefore considered that for the applicant to avail herself of an additional civil action for the protection of her possession would be redundant. It was satisfied that the applicant had exhausted domestic remedies.

Article 8

The Court firstly reiterated that there was no doubt that the events giving rise to the present application pertained to the sphere of private life within the meaning of Article 8 of the Convention. It noted that the facts of the case had shown that the applicant had made credible assertions that over a prolonged period of time Gy.B. had presented a threat to her physical integrity in her flat and actually attacked her on a number of occasions. In view of these facts, the Court considered that the State authorities had a positive obligation to protect the applicant from the violent behaviour of her former common-law husband exerted in her home, notwithstanding the fact that she had also been violent towards him.

It was striking that the authorities had needed more than one and a half years to decide on the applicant's first request for a restraining order. As to the dismissal of the applicant's requests for a restraining order, the Court took the view that the domestic courts had failed to give sufficient reasons for their decisions and to put in writing the particular reasons justifying their decision.

The domestic court's reasoning that a restraining order could not be issued in view of the aggrieved party's involvement was not acceptable. In the Court's view, in the case of mutually violent parties, restraining orders should be issued in respect of both parties in order to prevent contact between them.

The Court further observed that the applicant was excluded from the protection of the Act on Restraining Order due to Violence among Relatives as the perpetrator was the former common-law husband and that tie was not registered with the authorities.

Lastly, the Court considered that the domestic courts had failed to comply with their obligation to decide on the civil cases concerning the flat, within a reasonable time. Notably, those proceedings were still pending since 2007 and 2008 despite the fact that they would, in theory, eradicate the root of the problem, namely the unwanted residence of Gy.B. in the flat.

The Court therefore found that, even though the applicant had lodged criminal complaints against her partner for assault, had repeatedly requested restraining orders to be brought against him and had brought civil proceedings to order his eviction from the flat, the Hungarian authorities had not taken sufficient measures for her effective protection, in violation of Article 8.

Article 41

The Court held that Hungary was to pay the applicant €5,150 in respect of non-pecuniary damage.

JUDGMENT IN THE CASE OF
KONTROVÁ v. SLOVAKIA
(Application no. 7510/04)
31 May 2007

1. Principal Facts

The applicant in this case, Ms Dana Kontrová, was a Slovakian national who was married and had two children from that marriage.

On 2 November 2002, the applicant filed a criminal complaint against her husband with the Michalovce District Police Department, accusing her husband of having assaulted and beaten her with an electric cable the previous day. She submitted a medical report by a trauma specialist indicating that her injuries would incapacitate her from work for up to seven days.

At an unspecified time between 15 and 18 November 2002 the applicant and her husband went to the District Police Station and sought to withdraw the applicant's criminal complaint. Police officer H. advised them that, in order to avoid a prosecution, they would have to produce a medical report showing that after the incident the applicant had not been incapacitated from work for more than six days. The applicant produced such a report on 21 November 2002.

On 26 November 2002 officer H. decided that the above matter was to be dealt with under the Minor Offences Act and decided to take no further action.

During the night of 26 to 27 December 2002 a relative of the applicant, as well as the applicant herself called the emergency service of the District Police Department to report that the applicant's husband had a shotgun and was threatening to kill himself and the children.

The phone calls were received by police officer B., who instructed police officer P.Š. to arrange for a police patrol to visit the premises. After the visit, the police took the applicant to her parents' home and invited her to come to the police station the following morning.

In the following morning, on 27 December 2002, the applicant went to the Trhovište District Police Station and spoke to the officer M.Š.

In the morning of 31 December 2002, the applicant went to the Michalovce District Police Station, where she talked to officer H and enquired about her criminal complaint of 2 November 2002 and also mentioned the incident of the night of 26 to 27 December 2002.

On 31 December 2002 between 11 a.m. and 11.15 a.m. the applicant's husband shot their two children and himself dead.

Between 31 January 2003 and 12 February 2003 the Police Inspection Service charged officers M.Š., H., and B. with abuse of public authority and officer P.Š. with dereliction of duty for, respectively, failure to accept and duly register the applicant's complaint on the night of 26 to 27 December 2002 and to commence criminal proceedings immediately, altering records pertaining to the applicant's criminal complaint of 2 November 2002 and arbitrarily treating it as a minor offence, failure to take appropriate action in connection with the allegations that the applicant's husband had threatened violence with a shotgun on the night of 26 to 27 December 2002, and failure to take appropriate action in response to the emergency calls, including advising the next shift of the situation.

On 14 March 2006, the District Court found officers B., P.Š. and M.Š. guilty as charged and sentenced them to, respectively, six, four and four months' imprisonment. Appeals were dismissed by the Regional Court.

Meanwhile, the applicant also lodged complaints with the Constitutional Court twice. After the first application was declared inadmissible on 2 July 2003, in her second application she added that the criminal proceedings had ended without producing any positive results in respect of her complaints. She maintained that she had no remedy before any other authority as regards the non-pecuniary damage she had suffered.

On 8 September 2004 the Constitutional Court held, *inter alia*, that the principal questions of whether there had been any illegal action causing damage to the applicant and who was responsible for it fell to be determined by the ordinary courts, and the applicant had no right of petition either of her own or on behalf of her late children in respect of the alleged violation of their right to life. It declared the complaint inadmissible accordingly.

2. Decision of the Court

Relying in substance on Articles 2, 6, 8 and Article 13 in conjunction with Articles 2 and 8, the applicant alleged, in particular, that the police had failed to take appropriate action to protect her children's lives and her private and family life despite knowing of her late husband's abusive behaviour and fatal threats and that it had been impossible for her to obtain compensation for the non-pecuniary damage she had suffered.

Article 2

The applicant complained that the State had failed to protect the life of her two children.

The Court noted that the situation in the applicant's family had been known to the local police department further to the various communications with her and her relatives in November and December 2002. Such communications included, *inter alia*, the criminal complaint of 2 November 2002 and the emergency phone calls of the night of 26 to 27 December 2002 which concerned such serious allegations as long-lasting physical and psychological abuse, severe beating with an electric cable and threats with a shotgun.

In response to the applicant's situation, under the applicable provisions of the Code of Criminal Procedure and service regulations, the police had an array of specific obligations. These included, *inter alia*, accepting and duly registering the applicant's criminal complaint; launching a criminal investigation and commencing criminal proceedings against the applicant's husband immediately; keeping a proper record of the emergency calls and advising the next shift of the situation; and taking action in respect of the allegation that the applicant's husband had a shotgun and had made violent threats with it.

The Court observed that, as established by the domestic courts, the police failed to ensure that the above-mentioned obligations were complied with. On the contrary, one of the officers involved assisted the applicant and her husband in modifying her criminal complaint of 2 November 2002 so that it could be treated as a minor offence calling for no further action. The direct consequence of these failures was the death of the applicant's children.

In the light of the above considerations, the Court concluded that there had been a violation of Article 2.

Article 8

The Court considered that it was not necessary to examine the facts of the case separately under Article 8.

Article 13

The applicant complained that it had been impossible for her to make a claim in respect of non-pecuniary damage.

The effect of Article 13 is to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief. As the Court already found that the respondent State was responsible under Article 2 for failing to intervene to safeguard the lives of the applicant's children, the applicant's complaint in this regard was therefore found as "arguable" for the purposes of Article 13 in connection with Article 2.

The Court noted that it had previously found that, in the event of a breach of Articles 2 and 3, which rank as the most fundamental provisions of the Convention, compensation for the non-pecuniary damage flowing from the breach should in principle be available as part of the range of possible remedies.

In this case, the Court considered that the applicant should have been able to apply for compensation for the non-pecuniary damage suffered by herself and her children in connection with their death. Accordingly, the Court found a breach of Article 13, taken together with Article 2.

The Court considered that it was not necessary to examine the facts of the case separately under Article 13 taken together with Article 8.

Article 6

The Court observed that this complaint related to the same facts as, and had a similar legal background to, the complaint examined above under Article 13 taken together with Article 2, concerning the lack of an effective remedy in respect of the right to life. In the light of its finding of a violation of these provisions, it held that it was not necessary to examine the case separately under Article 6.

Article 41

The Court held that Slovakia was to pay to the applicant €25,000 in respect of non-pecuniary damage and €4,300 covering costs under all heads.

JUDGMENT IN THE CASE OF
HAJDUOVA v SLOVAKIA[143]
(Application no.2660/03)
30 November 2010

1. Principal facts

The applicant, Marta Hajduová, is a Slovak national who was born in 1960 and lives in Košice, Slovakia.

Criminal proceedings were brought against A., her (now former) husband, in August 2001 and he was remanded in custody after he attacked her, both verbally and physically, in public and uttered death threats. Suffering a minor injury and fearing for her life and safety, Mrs Hajduová and her children moved into the premises of a non-governmental organisation in Košice.

A.'s indictment stated that he had been convicted four times in the past, including of two offences in the last ten years involving breaches of court or administrative orders. Rather than imposing a prison sentence, the court ordered, as recommended by experts, that A. be detained for psychiatric treatment as he was suffering from a serious personality disorder.

A. was then transported to a hospital in Košice. That hospital did not carry out the treatment which he required, nor did the District Court order it to carry out such treatment. On being released, A. renewed his threats against Ms Hajduová and her lawyer, who filed new criminal complaints and informed the District Court accordingly. Following A.'s visit to Ms Hajduová's lawyer and his threats against her and her employee, he was arrested by the police and charged with a criminal offence.

The District Court arranged for psychiatric treatment of A. who was consequently transported to the hospital.

The complaint filed by Mrs Hajduová with the Constitutional Court – that the District Court had failed to ensure that her husband be placed in a hospital for the purpose of psychiatric treatment immediately after his conviction – was rejected.

143 This judgment is not final, see fn.1.

2. Decision of the Court

Relying on Article 8 (right for private and family life), the applicant complained that the domestic authorities had failed to comply with their statutory obligation to order that her former husband be detained in an institution for psychiatric treatment, following his criminal conviction for having abused and threatened her.

Article 8

The Court recalled that States had a duty under Article 8 to protect the physical and psychological integrity of an individual from others, in particular in the case of vulnerable victims of domestic violence, as emphasized in a number of international instruments.

The Court noted that the reason why the District Court had held that, instead of being sentenced to imprisonment, A. should be sent to a hospital, had been the domestic court's reliance on expert opinions according to which he was suffering from a serious personality disorder and should be treated as an in-patient in a psychiatric facility. However, due to the District Court's failure to discharge its statutory obligation to order the hospital to detain him, A. had quickly been released from that hospital, an omission following which Mrs Hajduová and her lawyer had been subjected to renewed threats from him.

Although, unlike other cases brought before the Court, A.'s threats had not actually materialised into concrete physical violence, the applicant's fear that they might be carried out had been well-founded, given A.'s history of physical abuse and menacing behaviour.

While the Court appreciated the police intervention, it noted that it had happened only after Mrs Hajduová and her lawyer had filed fresh criminal complaints. Moreover, the Court could not overlook the fact that A. had been able to continue to threaten them because of the domestic authorities' inactivity and failure to ensure his detention for psychiatric treatment. Finally, the Court noted that the domestic authorities had had sufficient indications of the danger of future violence and threats against the applicant and should have consequently exercised a greater degree of vigilance.

The Court therefore concluded that the lack of sufficient measures in reaction to A.'s behaviour, notably the District Court's failure to comply with

its statutory obligation to order his detention for psychiatric treatment, had amounted to a breach of the State's obligation to secure respect for the applicant's private life, in violation of Article 8.

Article 41

The Court held that Slovakia was to pay the applicant EUR 4,000 in respect of non-pecuniary damage and EUR 1,000 in respect of costs and expenses.

JUDGMENT IN THE CASE OF
Ž.B. v. CROATIA
(Application no. 47666/13)
11 July 2017

1. Principal Facts

The applicant in this case, Ms Ž.B., was a Croatian national, who lodged a criminal complaint with the police on 3 May 2007, alleging that in the past two years she had been the victim of multiple acts of domestic violence by her husband, B.B.

After finding that there was a suspicion that the applicant had been the victim of psychological and physical violence by B.B, the police forwarded the applicant's criminal complaint to the relevant State Attorney's Office. The police also forwarded the applicant's medical records showing that in April 2007 she had sustained a contusion on her back after being pushed from a chair by B.B.

On 3 July 2007 the P. Municipal State Attorney's Office asked an investigating judge of the S. County Court to open an investigation into the matter, and on the basis of the results of the investigation, on 29 January 2008 the State Attorney's Office indicted B.B. in the P. Municipal Court on charges of domestic violence.

B.B. was found guilty as charged and sentenced to seven months' imprisonment, suspended for two years on 21 April 2009.

Following an appeal lodged by B.B., the S. County Court quashed the first-instance judgment and remitted the case to the Municipal Court on 2 March 2010.

Although the Municipal Court found B.B. guilty as charged again and sentenced him to seven months' imprisonment, suspended for two years, the S. County Court also quashed this judgment on 14 October 2011.

In the resumed proceedings, on 16 January 2013 the Municipal Court discontinued the proceedings on the grounds that the 2011 Criminal Code had abolished the criminal offence of domestic violence under Article 215a of the 1997 Criminal Code and that further proceedings against B.B. were therefore barred.

The applicant's appeal was declared inadmissible by S. County Court.

2. Decision of the Court

Relying on Article 8, the applicant complained of a failure of the domestic authorities to effectively discharge their positive obligations in relation to the acts of domestic violence perpetrated against her.

Article 8

With regard to the adequacy of the legal framework for the protection from domestic violence, the Court firstly noted that the legislative amendments introduced with the 2011 Criminal Code were only applicable until the 2015 amendments to the Criminal Code reintroduced a separate offence of domestic violence, which had initially existed under the 1997 Criminal Code. The Court, however, stated that its task was to review under the Convention the existence and adequacy of legal mechanisms for protection from domestic violence that were relevant for the applicant's case.

The Court noted that although the 2011 Criminal Code abolished the separate criminal offence of domestic violence, it provided that instances of violence within a family constituted an aggravating form of other offences, which it subjected to public prosecution. In particular, it criminalised threatening behaviour and causing bodily injuries within a family or against a close person as aggravating forms of the general offences of threatening behaviour and causing bodily injuries under Articles 117 and 139, making them liable to public criminal prosecution.

In the Court's view, the 2011 Criminal Code thereby provided for a possibility of effective prosecution and, if appropriate, punishment of such acts of violence against the applicant by creating a continuity of criminal proscription previously provided for under the 1997 Criminal Code. Moreover, such a criminal-law framework was complemented by the comprehensive mechanisms of protection of victims of domestic violence existing in the minor offences law, civil law and other Government policies.

The Court also noted that the legislative solution provided for under the 2011 Criminal Code did not appear to be contrary to the relevant international standards. For instance, the Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) requires that intentional conduct of violence within a family be criminalised but it does not oblige States to introduce specific provisions criminalising the conduct

described by that Convention. It requires, however, that certain forms of domestic violence be provided for either as a constituent element of a particular offence or as an aggravating circumstance in the determination of a penalty for other offences established by the Convention.

The Court thus found that the 2011 Criminal Code, complemented by other comprehensive measures of protection from domestic violence, provided for an adequate legislative framework in Croatian law securing effective criminal-law mechanisms for protection from domestic violence at the relevant time.

However, under Article 19 of the Convention and under the principle that the Convention is intended to guarantee not theoretical or illusory, but practical and effective rights, the Court also examined the manner in which the criminal-law mechanisms were implemented in the case.

The Court noted that the competent State Attorney's Office failed to consider reclassifying the charges against B.B. as offences of making serious threats and causing bodily harm to a family member under Articles 117 and 139 of the 2011 Criminal Code. It also noted that the competent criminal court discontinued the proceedings against him on charges of domestic violence without examining the possibility of continuing the proceedings under the 2011 Code of Criminal Procedure by establishing the continuity of incrimination under the new provisions of criminal law as required under the relevant domestic law.

Therefore, the Court considered that the domestic authorities had brought about a situation in which the circumstances of the alleged domestic violence were never finally established by a competent court of law, resulting in B.B.'s virtual impunity.

In the Court's view, the conduct of the domestic authorities, together with the manner in which the criminal-law mechanisms were implemented, were defective to the point of constituting a breach of the respondent State's positive obligations under the Convention concerning the applicant's allegations of domestic violence. The Court therefore found that there had been a violation of Article 8.

Article 41

The Court held that Croatia was to pay to the applicant €7,500 in respect of non-pecuniary damage and €115, plus any tax that may be chargeable to the applicant, in respect of her costs and expenses.

JUDGMENT IN THE CASE OF
JANKOVIĆ v. CROATIA[144]
(Application no. 38478/05)
5 March 2009

1. Principal facts

The applicant, Sandra Janković, is a Croatian national who was born in 1964 and lives in Split, Croatia.

In October1996, she rented a room in a flat shared with other tenants. In August 1999, she found the lock of that apartment changed and her belongings removed from the flat. She complained before the civil court which ruled in her favour in May 2002 ordering that she regain occupation of her room in the apartment. The court's decision was implemented about ten months later on the basis of an enforcement order.

Ms Janković's access to the apartment, however, only lasted one day. The day after the court's decision was implemented, she was assaulted by two women and a man, and thrown out of the flat. The attackers were initially found guilty of insulting Ms Janković and sentenced to pay a fine in minor-offence proceedings brought against them by the police; however, those proceedings were ultimately terminated as the offences with which they were charged became time-barred while Ms Janković appealed unsuccessfully.

In the meantime, Ms Janković asked the court to resume the enforcement proceedings in order for her to regain access to her room in the flat. Her request was dismissed on 8 January 2008 as inadmissible.

In October 2003, Ms Janković brought a criminal complaint against seven individuals, alleging that she was physically attacked, abused and threatened by them, including with being killed. The authorities decided not to open an official investigation into the matter as they found that the acts complained of represented an offence for which prosecution had to be brought privately by the victim. Ms Janković brought her private complaint, which was ignored and her request for investigation was dismissed by the domestic courts as inadmissible. She complained to the Constitutional Court of the excessive length of these criminal proceedings; her complaint is still pending.

144 This judgment is not final, see fn.1.

Ms Janković complained, to the Constitutional Court in 2002 and to the general jurisdiction court in 2007, of the excessive length of the enforcement proceedings she had brought. While the Constitutional Court dismissed her complaint, the general jurisdiction court ruled – in March 2008 - in her favour awarding her 5,000 Croatian kunas (approximately EUR 678) in compensation.

2. Decision of the Court

Relying on Articles 3 and 8, Ms Janković complained that, despite her attempts to have her allegations of being attacked and threatened by her flatmates investigated, the authorities failed to ensure her adequate protection. She also complained under Article 6 § 1 of the excessive length of the civil and enforcement proceedings taken together which she had brought.

Article 8

The Court first took note of the allegations of Ms Janković that three individuals had shouted obscenities at her in front of her apartment, that one of them had kicked her several times, pulled her by her clothes and hair and thrown her down the stairs, as well as the medical documentation showing that she had sustained blows to her elbow and tailbone. The Court attached particular importance to the fact that the attack occurred in connection with the Ms Janković's attempt to enter a flat in respect of which she had obtained a court decision allowing her to occupy it.

The Court then observed that the relevant State authorities had decided not to prosecute the alleged attackers and had not allowed Ms Janković's attempts to prosecute privately. In addition, the minor-offences proceedings had been terminated as time-barred without any final decision on the attackers' guilt. The Court concluded that the national authorities had not provided adequate protection to Ms Janković against an attack on her physical integrity and that the manner in which the criminal-law mechanisms had been implemented constituted a violation of Article 8 of the Convention.

Article 6 § 1

The Court noted that the civil and enforcement proceedings had to be regarded as a whole because the enforcement of the court decision in Ms Janković's favour constituted an integral part of her trial. Both sets of proceedings having lasted in total eight years, five months and six days, the

Court held that this had been an excessively long period, in violation of Article 6§1 of the Convention.

Article 3

In view of its finding under Article 8, the Court considered that no separate issue remained to be examined under Article 3.

Article 41

The Court awarded Ms Janković EUR 3,000 in respect of non-pecuniary damage and EUR 2,820 (less EUR 850 already received in legal aid from the Council of Europe) for costs and expenses.

CHAMBER JUDGMENT IN THE CASE OF
OPUZ v. TURKEY[145]
(Application no. 33401/02)
9 June 2009

1. Principal facts

The applicant, Nahide Opuz, is a Turkish national who was born in 1972 and lives in Turkey. In 1990 Ms Opuz started living with H.O., the son of her mother's husband. Ms Opuz and H.O. got married in November 1995 and had three children in 1993, 1994 and 1996. They had serious arguments from the beginning of their relationship and are now divorced.

Between April 1995 and March 1998 there were four incidents of H.O.'s violent and threatening behaviour towards the applicant and her mother which came to the notice of the authorities. Those incidents involved several beatings, a fight during which H.O. pulled out a knife and H.O. running the two women down with his car. Following those assaults the women were examined by doctors who testified in their reports to various injuries, including bleeding, bruising, bumps, grazes and scratches. Both women were medically certified as having sustained life-threatening injuries: the applicant as a result of one particularly violent beating; and, her mother following the assault with the car.

Criminal proceedings were brought against H.O. on three of those occasions for death threats, actual, aggravated and grievous bodily harm and attempted murder. As regards the knife incident, it was decided not to prosecute for lack of evidence. H.O. was twice remanded in custody and released pending trial.

However, as the applicant and her mother withdrew their complaints during each of those proceedings, the domestic courts discontinued the cases, their complaints being required under the Criminal Code to pursue any further. The proceedings concerning the car incident were nevertheless continued in respect of the applicant's mother, given the seriousness of her injuries, and H.O. was convicted to three months' imprisonment, later commuted to a fine.

On 29 October 2001 the applicant was stabbed seven times by H.O. and taken to hospital. H.O. was charged with knife assault and given another fine of almost 840,000 Turkish lira (the equivalent of approximately EUR

145 This judgment is not final, see fn.1.

385) which he could pay in eight instalments. Following that incident, the applicant's mother requested that H.O. be detained on remand, maintaining that on previous occasions her and her daughter had had to withdraw their complaints against him due to his persistent pressure and death threats.

Finally, on 11 March 2002 the applicant's mother, having decided to move to Izmir with her daughter, was travelling in the removal van when H.O. forced the van to pull over, opened the passenger door and shot her. The applicant's mother died instantly.

In March 2008 H.O. was convicted for murder and illegal possession of a firearm and sentenced to life imprisonment and was released pending the appeal proceedings. In April 2008 the applicant filed another criminal complaint with the prosecution authorities in which she requested the authorities to take measures to protect her as, since his release, her ex-husband had started threatening her again. In May and November 2008 the applicant's representative informed the European Court of Human Rights that no such measures had been taken and the Court requested an explanation. The authorities have since taken specific measures to protect the applicant, notably by distributing her ex-husband's photograph and fingerprints to police stations with the order to arrest him if he was spotted near the applicant's place of residence.

In the meantime, in January 1998, the Family Protection Act entered into Force in Turkey which provides for specific measures for protection against domestic violence.

2. Decision of the Court

The applicant alleged that the Turkish authorities failed to protect the right to life of her mother and that they were negligent in the face of the repeated violence, death threats and injury to which she herself was subjected. She relied on Articles 2, 3, 6 and 13. She further complained about the lack of protection of women against domestic violence under Turkish domestic law, in violation of Article 14.

Article 2

The Court considered that, in the applicant's case, further violence, indeed a lethal attack, had not only been possible but even foreseeable, given the

history of H.O.'s violent behaviour and criminal record in respect of his wife and her mother and his continuing threat to their health and safety.

According to common practice in the member States, the more serious the offence or the greater the risk of further offences, the more likely it should be that the prosecution continue in the public interest, even if victims withdrew their complaints. However, when repeatedly deciding to discontinue the criminal proceedings against H.O., the authorities referred exclusively to the need to refrain from interfering in what they perceived to be a "family matter". The authorities had not apparently considered the motives behind the withdrawal of the complaints, despite the applicant's mother's statements to the prosecution authorities that she and her daughter had felt obliged to do so because of H.O.'s death threats and pressure. Despite the withdrawal of the victims' complaints, the legislative framework should have enabled the prosecuting authorities to pursue the criminal investigations against H.O. on the basis that his violent behaviour had been sufficiently serious to warrant prosecution and that there had been a constant threat to the applicant's physical integrity.

The Court therefore concluded that the national authorities had not shown due diligence in preventing violence against the applicant and her mother, in particular by pursuing criminal or other appropriate preventive measures against H.O.. Nor could the investigation into the killing, to which there had been a confession, be described as effective, it having lasted so far more than six years. Moreover, the criminal law system had had no deterrent effect in the present case. Nor could the authorities rely on the victims' attitude for the failure to take adequate measures. The Turkish authorities had therefore failed to protect the right to life of the applicant's mother, in violation of Article 2.

Article 3

The Court considered that the response to H.O.'s conduct had been manifestly inadequate in the face of the gravity of his offences. The judicial decisions, which had had no noticeable preventive or deterrent effect on H.O., had been ineffective and even disclosed a certain degree of tolerance towards his acts. Notably, after the car incident, H.O. had spent just 25 days in prison and only received a fine for the serious injuries he had inflicted on the applicant's mother. Even more striking, as punishment for stabbing the applicant seven times, he was merely imposed with a small fine, which could be paid in instalments.

Nor had Turkish law provided for specific administrative and policing measures to protect vulnerable persons against domestic violence before January 1998, when the Family Protection Act came into force. Even after that date, the domestic authorities had not effectively applied those measures and sanctions in order to protect the applicant.

Finally, the Court noted with grave concern that the violence suffered by the applicant had not in fact ended and that the authorities continued to display inaction. Despite the applicant's request in April 2008, nothing was done until after the Court requested the Government to provide information about the protection measures it had taken.

The Court therefore concluded that there had been a violation of Article 3 as a result of the authorities' failure to take protective measures in the form of effective deterrence against serious breaches of the applicant's personal integrity by her ex-husband.

Article 14

According to reports submitted by the applicant, drawn up by two leading non-governmental organisations, and uncontested by the Government, the highest number of reported victims of domestic violence was in Diyarbakır, where the applicant had lived at the relevant time. All those victims were women, the great majority of whom were of Kurdish origin, illiterate or of a low level of education and generally without any independent source of income. Indeed, the reports suggested that domestic violence was tolerated by the authorities and that the remedies indicated by the Government did not function effectively.

The Court therefore considered that the applicant had been able to show that domestic violence affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence. Bearing that in mind, the violence suffered by the applicant and her mother could be regarded as gender-based, which constituted a form of discrimination against women. Despite the reforms carried out by the Government in recent years, the overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors, as found in the applicant's case, indicated that there was insufficient commitment to take appropriate action to address domestic violence. The Court therefore concluded that there had been a violation of Article 14, in conjunction with Articles 2 and 3.

Articles 6 and 13

Given the above findings, the Court did not find it necessary to examine the same facts in the context of Articles 6 and 13.

Article 41

The Court awarded the applicant EUR 30,000 in respect of non-pecuniary pecuniary damage and EUR 6,500 for costs and expenses.

JUDGMENT OF

EREMIA AND OTHERS V. THE REPUBLIC OF MOLDOVA[146]

(Application no. 3564/11)

28 May 2013

1. Principal Facts

The applicants, Lilia Eremia, and her two daughters, Doina and Mariana Eremia, are Moldovan nationals who were born in 1973, 1995 and 1997 respectively and lived in Valcine in Moldova.

The husband and father of the applicants, A., was a police officer. Commencing around the time of the birth of the second daughter, A. would often come home drunk and assault his wife physically and his daughters verbally. It was accepted by the Court that the two girls' psychological well being were adversely affected by this. Ms Eremia applied for divorce on 2 July 2010 for which a six month waiting period was imposed. Meanwhile the violence continued and in August Ms Eremia contacted the police. After having been fined and given a formal warning by the Moldovan authorities, A. became even more violent and allegedly attempted to suffocate his wife in November 2010.

On 12 December A. was served with an order to not come within a radius of 500 m of the house and prohibiting A. from contacting or committing any acts of violence against the applicants for 90 days. A. however broke this order several times. The order was extended for another 90 days in March but was partially revoked a month later after a successful appeal by A. Due to a clerical mistake, it was not enforced until 15 March.

Simultaneously in December, Ms Eremia requested a criminal investigation to be initiated into A.'s acts of violence. She alleged that she was pressured by police officers to withdraw her criminal complaint about A., as if he lost his job, this would have a negative impact on their daughters' educational and career prospects. In January the public prosecutor refused to initiate criminal proceedings against A. The applicants appealed this decision. In April, the public prosecutor released A. from criminal liability and suspended investigations for a year on the condition that A. would not reoffend during that time.

146 This judgment is final.

The first applicant requested an urgent divorce in December 2010 and for the six month waiting period to be revoked in light of the protection order against her husband but this was refused.

2. Decision of the Court

Article 3

Considering first the claims made by the first applicant, Ms Eremia, the Court considered that both in light of the evidence of actual ill-treatment of Ms Eremia and the fear of further assaults was sufficiently serious to cause the applicant to experience suffering and anxiety amounting to inhuman treatment in violation of Article 3.

The Court hence turned to assessing whether the authorities' response had met its positive obligations under the Convention. The Court found that the authorities had sufficient evidence of A.'s violent behaviour and that the first applicant was at risk of further domestic violence because of A.'s blatant disregard of the protection order. Further, seeing that A. was a police officer and trained to overcome resistance, Ms Eremia was particularly vulnerable and unable to defend herself. It considered that the risk to the applicant's physical and psychological well-being was imminent and serious enough as to require the authorities to act swiftly. Further, the absence of decisive action by the authorities in dealing with A. was even more disturbing considering that the aggressor was a police officer whose professional requirements included, under domestic law, the protection of the rights of others, the prevention of crime and the protection of public order.

While the authorities clearly had not remained completely passive but had imposed fines and a protection order on A., it was clear that these were of little impact, evidenced by the continuous violence and numerous breaches of the order by A.

Consequentially, the Court found that the State had failed to meet its positive obligations in violation of Article 3 in regard of the first applicant.

Article 8

While the two daughters had brought claims under Article 3 as well, the Court decided to consider these under Article 8.

The Court noted that the children's psychological well being had been adversely affected by repeatedly witnessing their father's violence against their mother, a fact that was also recognised by the domestic court. In the Court's view, this amounted to an interference with their right to private life and respect for their home within the meaning of Article 8 of the Convention. In light of the fact that the authorities issued a protection order keeping A. from contacting, insulting or ill-treating not only the first applicant, but also her children, it was evident that the national authorities were aware of the interferences with the rights of the children. Hence, similarly to the observations made under Article 3, the inaction of the authorities amounted to a violation of the positive obligations under Article 8.

Article 14 in conjunction with Articles 3 and 8

The Court reiterated that a State's failure to protect women against domestic violence breaches their right to be equally protected under the law. In this case, Ms Eremia had been repeatedly subjected to violence from her husband whilst the authorities had been well aware of the situation. However, they had refused to treat her divorce as an urgent request. She had even allegedly been pressured by the police to withdraw her criminal complaint against her husband. Furthermore, the social services had acknowledged that they had not enforced the protection order until 15 March 2011 owing to a clerical error. Indeed, they had allegedly insulted Ms Eremia, suggesting reconciliation, and telling her that she was neither the first nor the last woman to be beaten up by her husband. Finally, although he had confessed he had been beating up his wife, A. had essentially been exempted from all responsibility following the prosecutor's decision to conditionally suspend the proceedings against him.

Therefore, the Court held that the authorities' failure to deal with the violence had effectively amounted to repeatedly condoning it, which reflected a discriminatory attitude towards Ms Eremia as a woman. Accordingly, the Court concluded that there had been a violation of Article 14 taken in conjunction with Article 3 in respect of Ms Eremia. The complaint under Article 14 taken in conjunction with Article 8 did not raise any separate issues in the eyes of the Court and was not examined separately.

Article 41

The court held that the Republic of Moldova was to pay Ms Eremia 15,000 euros (EUR) in respect of non-pecuniary damage and EUR 2,150 for costs and expenses.

JUDGMENT IN THE CASE OF
A. v. CROATIA[147]
(Application no. 55164/08)
14. October 2010

1. Principal Facts

The applicant, A, is a Croatian national who was born in 1979 and is currently living in Z, in hiding from her ex-husband, B. They have a daughter together, who was born in 2001. Their marriage was dissolved in November 2006.

According to two psychiatric reports of December 2004 and January 2008, B, who was captured in 1992 during the Homeland War and detained in a concentration camp where he was tortured, suffers from severe mental disorders. The reports emphasised his tendency towards violence and impulsive behaviour, and recommended compulsory psychiatric treatment.

Between November 2003 and June 2006, the applicant's ex-husband subjected her to repeated violent behaviour. The violence was both verbal, including serious death threats, and physical causing injuries. B often abused the applicant in front of their daughter and, on several occasions, turned violent towards her too.

Between 2004 and 2009 the national courts and the applicant brought a number of separate proceedings against B (three sets of criminal proceedings and four sets of minor offences proceedings), in the context of which they ordered certain protective measures such as periods of pre-trial detention, psychiatric or psycho-social treatment, restraining and similar orders and even a prison term. Some protective measures such as pre-trial detention and restraining orders were implemented. Others were not, including the prison term, as the Z. Prison was full to capacity. B has not undergone the psycho-social treatment ordered during the latter proceedings either due to lack of qualified individuals or agencies in the domain.

147 This judgment is not final, see Article 43 of the ECHR: Referral to the Grand Chamber

1. Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.

2. A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance.

3. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.

B was arrested in September 2009 and is apparently still in detention, following his conviction in October 2009 and sentencing to three years' imprisonment for making death threats against a judge (and her small daughter) involved in one of the sets of criminal proceedings brought against him for domestic violence. It is not known though where he is being held or whether he is being provided with any psychiatric treatment.

2. Decision of the Court

The applicant complained about the authorities' failure to adequately protect her against domestic violence. She relied on Articles 2, 3, 8 and 13. She also alleged that the relevant laws in Croatia regarding domestic violence were discriminatory, in breach of Article 14.

Article 8

At the outset, the Court found that the applicant would have been more effectively protected from her ex-husband's violence if the authorities had had an overview of the situation as a whole, rather than in numerous sets of separate proceedings.

Although the courts did order protective measures, many of them (such as periods of detention, fines, psycho-social treatment and even a prison term) have not been enforced, thus undermining the very deterrent purpose of such sanctions. Indeed, the recommendations for continuing psychiatric treatment, made quite early on, were complied with as late as in October 2009 and then only in the context of criminal proceedings unrelated to the violence against the applicant. In addition, it is still uncertain whether B has as yet undergone any psychiatric treatment.

Therefore, the authorities' failure to implement measures ordered by the national courts, aimed on the one hand at addressing B's psychiatric condition, apparently at the root of his violent behaviour, and on the other hand at providing the applicant with protection against further violence, has left her for a prolonged period in a position in which her right to respect for her private life has been breached, in violation of Article 8. In view of that finding, the Court considered that no separate issue arose under Articles 2, 3 and 13.

Article 14

The Court found that the applicant had not given sufficient evidence to prove that the measures or practices adopted in Croatia against domestic violence, or the effects of such measures or practices, were discriminatory. The applicant's complaint under Article 14 was therefore declared inadmissible.

Article 41

The Court held that Croatia was to pay the applicant EUR 9,000 in respect of non-pecuniary damage and EUR 4,470 in respect of costs and expenses.

JUDGMENT IN THE CASE OF
TALPIS v. ITALY
(Application no. 41237/14)
2 March 2017

1. Principal Facts

The applicant, Ms Elisaveta Talpis, was born in 1965 and was of Moldovan and Romanian nationality. At the time of the events, she lived in Remanzaccio, Italy. The applicant married A.T., a national of Moldova, and subsequently gave birth to two children: a daughter in 1992 and a son in 1998. The applicant alleged that soon after her marriage her husband had begun to beat her. He also developed alcoholism. She agreed in 2011 to follow him to live in Italy in order to provide a better future for her children.

On 2 June 2012 the applicant first called the police regarding A.T., stating that he had assaulted both herself and her daughter. The police report noted that A.T. was found intoxicated and that the applicant and her daughter had been injured. The police informed them of their rights and they elected to go to hospital to have their injuries recorded, however after waiting for three hours they returned home. The applicant alleged that she was not informed of the possibility of lodging a complaint, nor of contacting a women's shelter.

On 19 August 2012 the applicant was attacked by A.T. with a knife in her home. The applicant alleged that A.T. then made her follow him outside to force her to have sexual relations with other men. In the street she asked a police patrol for help, but they merely told A.T. to keep away from her, fining him for carrying the knife. The hospital subsequently recorded that she had suffered injuries across her head and body.

After leaving hospital the applicant was given shelter by an association for the protection of female victims of violence. On 5 September 2012 the applicant lodged a complaint with the authorities against A.T. for bodily harm, ill-treatment, and threats of violence. The police sent the criminal complaint to the prosecution who then asked for an urgent investigation. In December 2012 the applicant left the shelter, at first sleeping on the street before finding a job and renting a flat. Throughout this period A.T. harassed the applicant by phone.

In April 2013 the applicant was finally interviewed by police regarding A.T. During this interview the applicant denied that A.T. had hit her or her daughter

in June 2012, and said that A.T. had hit her but not threatened her with the knife in the incident of August 2012. She also denied that he had threatened to force her to have sex with other people and that she had gone from the hospital to live in a shelter. When she had lived in the shelter she denied having phone contact with A.T., or that A.T. was an alcoholic. Indeed, she claimed that he was a good husband and father and that the situation at home was calm. The applicant later submitted that she had been forced through psychological pressure from A.T. to change her original statements.

In May 2013 the prosecutors asked the investigating judge to close the complaint against A.T. for ill-treatment of family members and threats of violence. However, A.T. was committed for trial on a charge of causing grievous bodily harm regarding the incident in August 2012.

A.T. received the news of his trial on 18 November 2013. On 25 November 2013 the police were called by the applicant to the home. The police found numerous alcohol bottles in the flat and the bedroom door had been broken down. The applicant said that she had called the police because she thought A.T. needed a doctor, and neither she nor her son showed any sign of violence.

A.T. was then taken to hospital because of intoxication but subsequently checked himself out. He was arrested on the street at 2.25 am and fined for his drunken state. At 5 am he entered the family flat with a 12cm knife. The applicant's son was stabbed three times while trying to protect his mother. The applicant initially escaped but was caught by her husband in the street and stabbed several times in the chest. The applicant's son died of his injuries.

On 8 January 2015 A.T. was sentenced to life imprisonment for the murder of his son, the attempted murder of his wife, the ill-treatment of his wife and daughter, and unauthorised possession of a prohibited weapon. He was also ordered to pay the applicant €400,000 in a joined civil case. On 1 October 2015 A.T. was convicted of causing grievous bodily harm regarding the incident in August 2012.

2. Decision of the Court

Relying on Articles 2 (right to life), 3 (prohibition of torture), 8 (right to respect for private and family life), and 14 (prohibition of discrimination) in conjunction with Articles 2 and 3, of the European Convention on Human Rights the applicant complained to the European Court of Human Rights

that the Italian authorities had not taken the necessary measures to protect her and her son's life from the risk presented by her husband, and had not prevented the commission of further domestic violence. She also submitted that the Italian authorities had discriminated against her as a woman, and that Italian domestic violence legislation was inadequate. The Court decided to examine the complaint under Articles 2, 3 and 14.

Article 2

The positive obligations under Articles 2 and 3 require an efficient and independent judicial system that is prompt and reasonably expeditious. It also imposes a duty to put in place and apply an adequate legal framework affording protection in certain cases against acts of violence by private individuals and to take operational measures to protect individuals whose life is at risk from the criminal acts of other individuals. This last duty only arises in very specific circumstances when an immediate risk to a known individual is clear.

While Article 2 certainly covered the situation involving the death of the applicant's son, the Court stated that while the force used against the applicant was not lethal, Article 2 would still apply in her case as she was the victim of inherently life-endangering conduct.

The Court considered that the conduct of the government must be judged from the incident in August 2012 when the applicant first expressed a fear for her life to the authorities. While an urgent investigation was ordered into the applicant's situation, the applicant was not in fact heard for another seven months. While during this period the applicant was not subject to further violence, she was being harassed by telephone and living in fear at a shelter. In these circumstances the Court stated that the national authorities had a duty to provide appropriate support to the applicant which was not carried out in this case. While the Government submitted that there was no tangible evidence of an imminent danger to the applicant's life, the Court ruled that they had never assessed the nature of any risks facing the applicant from A.T, even during the grievous bodily harm proceedings.

The Court ruled that the authorities' failure to act rapidly after the applicant lodged her complaint deprived the complaint of its effectiveness and created a situation in which A.T. could continue to act violently against his wife and family. This situation culminated in the night of the 25 November 2013. The Court reiterated that a failure to take reasonable measures which

might realistically have altered the outcome or mitigated harm is sufficient to engage the State's responsibility. In the context of domestic violence the assessment of risk must take account of the recurrence of successive episodes of violence within the family. As A.T. was stopped twice due to his state of intoxication and the police were in a position to check his police records in real time, the Court ruled that the police should have known that the applicant's husband constituted a real risk to the applicant, the imminence of which could not be excluded. Therefore, the authorities failed to use their powers to take measures which could reasonably have prevented, or at least mitigated, the materialization of a real risk to the lives of the applicant and her son.

In these circumstances the Court concluded that the authorities did not display due diligence, failed in their positive obligation to protect the right to life under Article 2, and therefore violated Article 2 of the Convention.

Article 3

The Court began by stating that the applicant could be considered a vulnerable person entitled to State protection, and that the physical injuries and psychological pressure inflicted on the applicant were sufficiently serious to be classified as ill treatment under Article 3.

During the domestic proceedings regarding the events of 18 November, the domestic courts established that the applicant and her children were living in a climate of violence. The Court reiterated that delay can work to the detriment of an investigation, the amount and quality of evidence available, and the experience of the complainants. Domestic violence is also a specific issue requiring special diligence, as recognised in the preamble to the Council of Europe Istanbul Convention on preventing and combating violence against women and domestic violence.

The Istanbul Convention requires State Parties to make sure that investigations into domestic violence are "carried out without undue delay while taking into consideration the rights of the victim during all stages of the criminal proceedings". Violence against women requires the authorities to expeditiously examine the victim's psychological, physical and material insecurity and assess the situation accordingly.

The Court found that there was no explanation for the seven month delay before the investigating authorities began their work, and no explanation as

to why the grievous bodily harm proceedings lasted three years. The Court concluded that the authorities' conduct could not be deemed to satisfy the requirements of Article 3.

Article 14

The Court reiterated that a State's failure to protect women against domestic violence breaches their right to equal protection before the law, and that this failure could include passively creating a situation conducive to domestic violence. Discriminatory treatment occurs when it is established that the authorities' actions amount to condoning such violence and reflect a discriminatory attitude towards the complainant as a woman.

The authorities' complacency regarding the applicant's situation and their underestimating the seriousness of the violence faced by the applicant amounted, in the Court's eyes, to the authorities effectively condoning A.T.'s behaviour. The applicant was therefore a victim of discrimination as a woman, in breach of Article 14. Referencing the findings of the UN Special Rapporteur on violence against women, the Committee on the Elimination of Discrimination Against Women, and the Italian National Statistics Institute, the Court emphasised the problem of domestic violence in Italy and the accompanying discrimination against women. Considering its conclusions regarding the violation of the applicant's Article 2 and 3 rights, the Court concluded that the violence perpetrated against the applicant must be regarded as based on her sex and thus a form of gender-based discrimination. Consequently, there was a violation of Article 14 in conjunction with Articles 2 and 3.

Article 41

The Court held that the applicant should be awarded €30,000 in respect of non-pecuniary damages, and €10,000 in respect of costs and expenses.

JUDGMENT IN THE CASE OF
RUMOR v. ITALY
(Application no. 72964/10)
27 May 2014

1. Principal Facts

The applicant, Ms. Giulia Rumor, was born in 1968 and is of Italian nationality. She lives in Colognola ai Colli in the province of Verona.

In 2003 the applicant began a relationship with J.C.N., a Kenyan national. They had two children, P. and A., who were born in August 2006 and March 2008 respectively. In 2008 the applicant and J.C.N. had relationship therapy after their relationship deteriorated. On 16 November 2008 J.C.N. hit the applicant several times, threatened her with a knife and a pair of scissors, and locked her in the flat with their children to prevent her from leaving. One of the children was woken by their mother's screams and witnessed part of the aggression. After the *carabinieri* arrived the applicant was taken to hospital in shock and diagnosed with concussion, head injuries, and bodily bruises.

J.C.N. was arrested and subsequently sentenced on 2 April 2009 to four years and eight months detention. On 11 December 2009 the Verona Court of Appeal reduced the sentence to three years and four months detention.

On 3 November 2009 the Venice Court of Appeal dismissed J.C.N.'s application to serve the remainder of his sentence under house arrest in Colognola ai Colli where Ms. Rumor lived, citing the proximity to her home, the psychological condition of J.C.N. and the risk that he might try to contact the applicant. On 18 June 2010 the Venice Court of Appeal granted J.C.N.'s request to serve the remainder of his sentence under house arrest in a reception facility some 15 km from the applicant's home. The *carabinieri* assessed the suitability of the facility for housing J.C.N. and concluded that it was adequate. On 24 September the Venice Court of Appeal granted J.C.N. permission to work outside the reception facility during the grape harvest. On 2 August 2011 J.C.N. finished serving his sentence and was released but continued living at the reception facility.

On 15 May 2009 the applicant was granted sole custody of her children, and the domestic court also ordered the forfeiture of J.C.N.'s parental rights and prohibited any form of contact between him and his children. The domestic

court stressed that J.C.N. could regain his parental rights once he had served his sentence and followed a path aimed at acquiring the parental skills he had previously lacked.

The applicant reported that since the violent episode with J.C.N. she lived in constant fear of recurring violence against her and her children. She underwent therapy along with the child who witnessed the violence. At an unspecified time the applicant applied to an association that specialised in providing assistance to victims of crime.

The applicant visited J.C.N. five times during his imprisonment between 2008 and 2010, and after he was released he and the applicant resumed contact through email.

2. Decision of the Court

Relying on Article 3 (prohibition of torture) and Article 14 (prohibition of discrimination) in conjunction with Article 3 of the European Convention on Human Rights the applicant complained to the European Court of Human Rights that the Italian authorities had failed to protect and support her after the violence she had suffered, and that the inadequacy of the domestic framework in combating domestic violence proved that she had suffered gender based discrimination.

Article 3 alone, and in conjunction with Article 14

The Court considered that the applicant was a vulnerable individual and that the violence she suffered along with the psychological consequences were sufficiently serious to amount to ill-treatment within the meaning of Article 3. The Court determined that its role was to ascertain whether the authorities' actions in response to the applicant's complaints complied with the positive requirements of Article 3 and whether they took all reasonable measures to prevent the recurrence of violent attacks against the applicant.

The positive obligations under Article 3 included both setting up a legislative framework aimed at preventing and punishing violations, and then actively affording protection to victims and punishing those responsible for ill-treatment through that framework.

The Court noted that the *carabinieri* immediately arrested and remanded J.C.N. in custody after the violent incident. He was then charged and sentenced

to over three years with due expedition. The applicant was also granted sole custody and J.C.N.'s parental rights were forfeited.

While it was recognised that the presence of the applicant's former partner some 15 kilometers from her house had a negative impact on the applicant, the Court noted that the post-sentencing judge had carefully assessed the suitability of the facility chosen to house J.C.N., taking into account the gravity and the nature of the crime. The Court felt that the decision seemed to have been taken after a careful assessment of the situation.

The applicant reported in her submissions to the Court that J.C.N. had contacted her over the phone more than once while under house arrest. The Court considered that these episodes were not attributable to the location of the facility, and indeed by not reporting the incidents the applicant denied the authorities an opportunity to intervene and reassess the facility's suitability.

The applicant complained that her former partner had not undergone any psychological therapy, however the judgements of the domestic courts had not ordered that any psychological therapy be followed. Indeed, as part of the preconditions for J.C.N. to apply to recover his parental rights he had participated in a psychological support programme.

The Court noted that while the applicant complained that she had not been informed about the criminal proceedings against her former partner, the Convention should not be interpreted as imposing a general obligation to inform victims about all aspects of criminal proceedings. Under Italian law such information is available but only to victims of crime that have intervened as a civil party to proceedings, which the applicant chose not to do.

The Court also reasoned that based on the email exchange between the applicant and J.C.N., the relationship between the two after his release appeared to be relatively calm and harmonious. On top of this no further threats or episodes of violence had occurred.

In light of these factors, the Court ruled that the authorities had put in place an adequate legislative framework and that the framework was effective in actually punishing the perpetrator of the crime and preventing the recurrence of violent attacks against the applicant. Therefore, there has been no violation of Article 3, nor Article 14 in conjunction with Article 3.

Domestic Violence — Overview of International Standards and European Court of Human Rights Case Law

JUDGMENT IN THE CASE OF
M.G. v TURKEY
(Application no. 646/10)
22 March 2016

1. Principal Facts

The applicant, who was born in 1973, married her husband in 1997. They had three children. On 18 July 2006, the applicant made an allegation to the State prosecutor of, among other things, physical and verbal domestic abuse and rape, stating that she and the children had been subjected to the abuse from the beginning of her marriage. The same day, the prosecutor requested that the applicant undergo a medical examination. The report produced stated that she had several areas of swelling and scarring corresponding to some of the alleged injuries inflicted. A subsequent report, requested on 27 July 2006, concluded that the injuries had not been life threatening, and could have been treated by simple medical procedures.

On 19 July, the applicant underwent a psychiatric examination. The relevant report concluded that she suffered from post-traumatic stress disorder and depression linked to the alleged events: non-consensual sexual acts, injuries and deprivation of her liberty perpetrated by her husband.

On 7 September 2006, the applicant's husband was summoned for interview. As he did not attend, on 6 October 2006 a warrant was issued for his arrest.

On 21 September 2006, the prosecutor requested a subsequent medical report to establish whether what the applicant alleged had indeed occurred. Furthermore, he requested on 17 October 2006 that the medical institute produce a report dealing with whether the essential elements of the crime of assault were present. On 7 December 2006, he requested that these reports were produced as a matter of priority.

The applicant's husband was finally interviewed by the police on 15 December 2006, where he denied all the allegations against him and insisted that the applicant had left the family home on numerous occasions to live with another man, assuming that the historical evidence of violence – i.e. the swelling and scars – had been caused during this time. Neghbours were subsequently interviewed but were unable to corroborate either party's version of events. They did however note that the applicant had left the home

for prolonged periods on multiple occasions. On each occasion she had been brought back by her husband.

On 26 January 2007, the prioritised medical report was produced. It stated that the crime of 'sexual aggression' appeared to be applicable to the facts.

On 20 October 2008, the applicant complained about the unreasonable length of the process. The same day, the prosecutor requested a final and definitive medical report be produced. Its aim was to determine whether the crime of assault was applicable to the facts and whether her recollection of the events had been affected. The applicant was referred for examination.

Formal charges were brought by the prosecutor against the applicant's husband on 22 February 2012.

In the intervening period, the applicant had applied for a divorce, which was granted in September 2007. On 6 September 2006, the applicant requested protective measures against her husband, including, among other things, removal from their family home. This was granted for 6 months. Breach of this injunction would entail his detention. The court placed the children with social services, finding that both parents had contributed to the breakdown of the marriage and neither were capable of caring for the children.

After the divorce was pronounced on 24 September 2007 and until the entry into force of a new Law on 20 March 2012, the legislative framework in place did not guarantee that the applicant could benefit from protection measures, which meant that she had been forced to live in hiding because of fear of her ex husband's conduct.

On 9 November 2012, the applicant requested further protective measures, which were granted and renewed in October 2013 and June 2014.

On 6 March 2014, the organisation which had assisted the applicant following her escape from the family home produced a report. It explained that, following her divorce, the failure of the authorities to apprehend her former husband had caused the applicant a significant amount of mental anguish.

2. Decision of the Court

The applicant complained of a violation of Article 3, taken alone and in conjunction with Article 14, that the domestic authorities had failed to prevent

the alleged domestic abuse and left her in a situation where she and her children were prevented from living peacefully and in security. Regarding Article 14, the applicant argued that the non-availability of preventative measures for divorced women as regards their former spouse is discriminatory.

Article 3

The Court reiterated its longstanding principle that domestic abuse victims are entitled, under the State's positive obligation, to effective protection against this abuse. In this regard, Article 3 requires that a legal framework be elaborated in order to protect victims and punish the actions of those mistreating them. This framework must also be supported and implemented by the effective action of the domestic authorities. This does not require a successful conviction, but that the application of the legal rules is pursued effectively. According to the Court, this implicitly involves a requirement of 'speed and diligence'.

Based upon the evidence before it, the Court considered the applicant's allegations, regarding the gravity of the domestic abuse suffered and the threat posed by her former husband, to be credible. The pertinent question therefore was whether the response by the authorities had met the requirements of Article 3 to effectively protect victims and punish those responsible.

Here, the Court recalled that the very day that she made the complaint she underwent a medical examination, which described her visible physical injuries. Equally, the following day, she underwent a psychiatric examination. This made clear that she suffered from depression and post-traumatic stress disorder. Indeed, the family court which granted the applicant's divorce was convinced that what she alleged had occurred. However, the applicant had to wait for more than five years in order for charges to be brought against her former husband.

The Court noted that the passage of time itself reduces the likelihood of a result. In particular, it erodes the quality and quantity of evidence available. The Court hence took the opportunity to restate its insistence upon the particular diligence that is required for domestic violence cases. Indeed, the Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention), requires that such instances of violence are dealt with without unjustified delay and taking into consideration all of the rights of the victim at each stage. This Convention is relevant international law in this regard.

Therefore, the domestic authorities are required to consider the particularly vulnerable status of victims of domestic violence and to deal with their allegations with the briefest possible delay. In the facts of this case, the Court found that the delay of more than five years lacked any justification. Equally, the delay in the criminal process following its initiation also lacks such a justification.

The Court also noted the importance of the psychological impact as regards domestic violence. The non-availability of protective measure due to the law in force during the period immediately following her divorce meant that the applicant had to live virtually in hiding for several years. Such measures were not available in relation to divorced spouses. Throughout this period, she alleges that she feared violent reprisals from her former husband. This is supported by the information contained in the report of 6 March 2014. The Court considered this unacceptable, and found a violation of Article 3.

Article 14 in conjunction with Article 3

Relying upon *Opuz v. Turkey*[148],the Court took the opportunity to reiterate that domestic violence impacts principally upon women and can therefore, as per the Istanbul Convention, be described as a form of discrimination against women. In that case, it was held that the general passivity of the Turkish authorities had created a climate conducive to this kind of violence.

It went on to lay out the well-established principle that discrimination consists in treating differently, without objective and reasonable justification, people in comparable situations. In this regard, the Court states that the failure of States to protect women against domestic violence can be regarded as a violation of the right to equal protection of the law.

Therefore, the Court considered that the lack of protection available to divorced women through protective measures was a violation of Article 14 taken with Article 3.

Article 41

The Court held that Turkey was to pay the applicant €19,500 in respect of non-pecuniary damage and €4,000 in respect of costs and expenses.

148 Opuz v. Turkey, judgment of 9 June 2009, appl no. 33401/02.

GRAND CHAMBER JUDGMENT IN THE CASE OF
O'KEEFFE v. IRELAND[149]
(Application no. 35810/09)
28 January 2014

1. Principal facts

The applicant, Ms Louise O'Keeffe, was an Irish national, born in 1964 and residing in Cork, Ireland. From 1968 she attended Dunderrow National School that was owned, through trustees, by the Catholic Bishop of the Diocese of Cork.One of the lay teachers ("LH") was also the school's principal and a married man. The first allegations of LH sexually abusing a child emerged in 1971, but were never acted upon. Subsequently, from January to mid-1973, the applicant was subject to constant sexual abuse by LH during music lessons in his classroom. Later that year the applicant's parents became aware of similar allegations concerning LH from other parents. Eventually LH resigned from his post but no further action concerning these allegations was taken by any State authorities. In 1974, LH resumed teaching in another National School where he remained teaching till his retirement in 1975.

The applicant made a statement to the police in January 1997 as a part of a police investigation into a complaint made by a former pupil of Dunderrow National School against LH. Subsequently a number of other pupils made statements during the investigation and as a result LH was charged with 386 criminal offences of sexual abuse. After he pleaded guilty he was sentenced to imprisonment and his licence to teach was withdrawn.

In 1998, the applicant applied to the Criminal Injuries Compensation Tribunal and she was awarded approximately €54,000. Subsequently, the applicant instituted civil against LH and the Irish State, claiming damages for personal injuries suffered as a result of assault and battery including sexual abuse by LH. LH did not defend the civil action and was ordered to pay damages of approximately €305,000, however due to his insufficient means the applicant had at the time of the present judgment recovered approximately €30,000. However, the claims against the State were dismissed.

149 This judgment is final.

2. Decision of the Court

The applicant complained, under Articles 3, 8, 13 and 14, Article 2 of Protocol No. 1, that the State had failed to protect her from sexual abuse by a teacher in her National School and that she did not have an effective remedy against the State in that regard.

Article 3

In relation to the substantive aspect of Article 3, the Court found it necessary to assess the issue of State responsibility from the point of view of facts and standards in 1973. The Court found that it is an inherent obligation of the authorities to protect children from ill-treatment, especially in a primary education context, and this obligation also had its implication in 1973. Hence the Court went on to assess whether the State had fulfilled its positive obligations in this respect. It acknowledged that the ill-treatment fell within the scope of Article 3 and that there was little disagreement between the parties on this issue, as well as to the structure of the Irish primary school system. Even if the National Schools were educational institutions managed by non-State actors, the State had to have been aware of the level of sexual crime against minors in schools through the enforcement of its criminal laws on the subject. The State should have also been aware of potential risks to the safety of children in that context, and that there was no appropriate framework of protection. Since the mechanisms on which the State had relied were not effective, Court held that the State had failed to fulfil its positive obligations to protect the applicant from sexual abuse and this constituted a violation of Article 3.

In relation to the procedural aspect of Article 3, the Court found that as soon as a complaint about sexual abuse by LH from the National School in question was made in 1995, an investigation was opened, and the applicant had been able to make a statement. The Court held that there had been no violation of Article 3 in this respect.

Article 13

As the applicant had had no effective remedy available to her regarding complaints made under Article 3, the Court held that there had been a violation of Article 13 in conjunction with Article 3.

Domestic Violence — Overview of International Standards and European Court of Human Rights Case Law

Article 41

The Court held that Ireland was to pay the applicant €30,000 in respect of non-pecuniary damage, and €85,000 for costs and expenses.

JUDGMENT IN THE CASE OF
Z. AND OTHERS v. THE UNITED KINGDOM
(Application no. 29392/95)
10 May 2001

1. Principal facts

The applicants, four siblings, Z, a girl born in 1982, A, a boy born in 1984, B, a boy born in 1986 and C, a girl born in 1988 are all British nationals.

In October 1987, the applicants' family was referred to the social services by its health visitor because of concerns about the children, including reports that Z was stealing food. Over the next four-and-a-half years, the social services monitored the family and provided various forms of support to the parents. During this period, problems continued. In October 1989, when investigating a burglary, the police found the children's rooms in a filthy state, the mattresses being soaked with urine. In March 1990, it was reported that Z and A were stealing food from bins in the school. In September 1990, A and B were reported as having bruises on their faces. On a number of occasions, it was reported that the children were locked in their rooms and were smearing excrement on the windows. Finally, on 10 June 1992, the children were placed in emergency foster care on the demand of their mother who said that, if they were not removed from her care, she would batter them. The consultant psychologist who examined the children found that the older three were showing signs of serious psychological disturbance and noted that it was the worst case of neglect and emotional abuse she had seen.

The Official Solicitor, acting for the applicants, commenced proceedings against the local authority claiming damages for negligence on the basis that the authority had failed to have proper regard for the children's welfare and to take effective steps to protect them. Following proceedings which terminated in the House of Lords, the applicants' claims were struck out. In the judgment given on 29 June 1995, which concerned three cases, Lord Browne-Wilkinson held, among other things, that public policy considerations were such that local authorities should not be held liable in negligence in respect of the exercise of their statutory duties safeguarding the welfare of children.

2. Decision of the Court

The applicants alleged that the local authority had failed to take adequate protective measures in respect of the severe neglect and abuse which they

were known to be suffering due to their ill-treatment by their parents and that they had no access to court or to an effective remedy in respect of this. They invoked Articles 3, 6, 8 and 13 of the Convention.

Article 3

Article 3 enshrines one of the most fundamental values of a democratic society, prohibiting in absolute terms torture or inhuman or degrading treatment or punishment. States which ratified the European Convention on Human Rights should take measures to ensure that individuals within their jurisdiction are not subjected to inhuman or degrading treatment, including such ill-treatment administered by private individuals. These measures should provide effective protection, in particular, of children and other vulnerable people and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.

There was no dispute that the neglect and abuse suffered by the four child applicants reached the threshold of inhuman and degrading treatment. The Government did not contest the Commission's finding that the treatment suffered by the four applicants reached the level of severity prohibited by Article 3 and that the State failed in its positive obligation under Article 3 of the Convention to provide the applicants with adequate protection against inhuman and degrading treatment. This treatment was brought to the attention of the local authority, at the earliest in October 1987, which was under a statutory duty to protect the children and had a range of powers available to it, including removing them from their home. The children were however only taken into emergency care, at the insistence of their mother, on 30 April 1992.

Over the intervening period of four-and-a-half years, they had been subjected in their home to what the child consultant psychiatrist who examined them referred to as horrific experiences. The Criminal Injuries Compensation Board had also found that the children had been subject to appalling neglect over an extended period and suffered physical and psychological injury directly attributable to a crime of violence. The Court acknowledged the difficult and sensitive decisions facing social services and the important countervailing principle of respecting and preserving family life. The present case however left no doubt as to the failure of the system to protect the applicants from serious, long-term neglect and abuse. Accordingly, there had been a violation of Article 3.

Article 8

Having regard to its finding of a violation of Article 3, the Court considered that no separate issue arose under Article 8.

Article 6

Concerning the applicability of Article 6, the Court was satisfied that, at the outset of the proceedings,there was a serious and genuine dispute about the existence of the right asserted by the applicants under the domestic law of negligence and that the applicants had, on at least arguable grounds, a claim under domestic law. Article 6 was therefore applicable to the proceedings brought by the applicants alleging negligence by the local authority.

Concerning compliance with Article 6, the Court found that the outcome of the domestic proceedings brought was that the applicants, and any children with complaints such as theirs, could not sue a local authority in negligence for compensation, however foreseeable – and severe - the harm suffered and however unreasonable the conduct of the local authority in failing to take steps to prevent that harm. However, this did not result from any procedural bar or from the operation of any immunity which restricted access to court. The striking out of the applicants' claim resulted from the application by the domestic courts of substantive law principles and it was not for this Court to rule on the appropriate content of domestic law. Nonetheless, the applicants were correct in their assertions that the gap they had identified in domestic law was one that gave rise to an issue under the Convention, but in the Court's view it was an issue under Article 13, not Article 6 § 1. Considering that it was under Article 13 that the applicants' right to a remedy should be examined, the Court found no violation of Article 6.

Article 13

In deciding whether there had been a violation of Article 13, the Court observed that where alleged failure by the authorities to protect people from the acts of others was concerned, there should be available to the victim or the victim's family a mechanism for establishing any liability of State officials or bodies for acts or omissions involving the breach of their rights under the Convention. Furthermore, in the case of a breach of Articles 2 and 3, which ranked as the most fundamental provisions of the Convention, compensation

for the non-pecuniary damage flowing from the breach should in principle be available as part of the range of redress.

The applicants had argued that, in their case, an effective remedy could only be provided by adversarial court proceedings against the public body responsible for the breach. The Court noted that the Government had conceded that the range of remedies at the disposal of the applicants was insufficiently effective and that, in the future, under the Human Rights Act 1998, victims of human rights breaches would be able to bring proceedings in courts empowered to award damages.

The Court found that the applicants did not have available to them an appropriate means of obtaining a determination of their allegations that the local authority had failed to protect them from inhuman and degrading treatment or the possibility of obtaining an enforceable award of compensation for the damage suffered thereby. Consequently, they were not afforded an effective remedy in respect of the breach of Article 3 and there had, accordingly, been a violation of Article 13.

Article 41

Under Article 41 of the Convention, the Court awarded in respect of pecuniary damage 8,000 pounds sterling (GBP) to Z., GBP 100,000 to A., GBP 80,000 to B., and GBP 4,000 to C. The Court also awarded GBP 32,000 to each applicant for non-pecuniary damage and a total of GBP 39,000 for costs and expenses.

GRAND CHAMBER JUDGMENT OF
SÖDERMAN V SWEDEN
(Application no. 5786/08)
12 November 2013

1. Principal Facts

The applicant, Eliza Söderman, was born in 1987 and lives in Ludvika, Sweden.

In September 2002 when she was 14 years old, she discovered that her stepfather had hidden a video camera in the laundry basket in the bathroom, which was in recording mode and directed towards the spot where she had undressed before taking a shower. Immediately after the incident, the film was burned without anyone seeing it.

Ms Söderman's mother reported the incident to the police about two years later. The stepfather was prosecuted for sexual molestation, and Ms Söderman submitted a compensation claim for violation of her personal integrity, to be joined to the criminal proceedings. In 2006, the stepfather, who admitted to having tried to film her with a hidden camera, was convicted of sexual molestation by the first instance court and ordered to pay damages. He was acquitted on appeal in 2007. The appeal court found that although his motive had been to film the girl for a sexual purpose, the act could not be covered by the provision on sexual molestation as he had not intended for her to find out about the filming. The court pointed out that there was no general prohibition in Swedish law against filming an individual without his or her consent. While the act in question was a violation of the girl's personal integrity, the stepfather could not be held criminally responsible for the isolated act of filming her without her knowledge. The appeal court also noted that the stepfather's act might have theoretically constituted attempted child pornography, but such a charge had not been brought, and therefore the court could not examine whether he could be held responsible for that crime. The cassation appeal was dismissed by the Supreme Court in December 2007.

2. Decision of the Court

The applicant complained that the Swedish State had failed to comply with its obligation under Article 8 to provide her with remedies against her stepfather's violation of her personal integrity. She also invoked Article 13 of the Convention. The Chamber originally found no violation of Article 8 in their judgment from 21 June 2012. The case was then referred to the Grand Chamber.

The Court considered that the applicant's complaint concerned exclusively the remedies available to her against her stepfather, not those available against the State to enforce her rights at a national level. The Court therefore decided to examine the case only under Article 8 and not Article 13.

Article 8

The question before the Court was whether, in the circumstances of the case, Sweden had complied with its positive obligations under Article 8 and had an adequate legal framework to protect Ms Söderman against the actions of her stepfather, both in terms of criminal and civil law.

Considering whether the stepfather could have been found guilty of the offence of attempted child pornography, the Court considered it unlikely that the recordings would constitute pornographic material for the purpose of the legislation. The intention of the legislation was not to criminalise every exposure of naked children, even if such pictures stimulate some people's sexual instincts. Hence the possibility that the offence might have afforded the applicant protection seemed rather theoretical.

Concerning the offence of sexual molestation, the applicant challenged the interpretation of the Court of Appeal that covert filming without the intention for the applicant to discover it, could not in itself constitute molestation under the legislation. The Court agreed with Ms Söderman that it was not on account of a lack of evidence that the stepfather had been acquitted of sexual molestation, but rather because, at the time, his act could not have constituted sexual molestation. The provision on sexual molestation was since amended, in April 2005. While it was not clear whether the amended provision could be applied to covert filming, it sufficed to conclude that the provision as worded before April 2005 could not have legally covered the act in question and thus had not protected Ms Söderman against the lack of respect for her private life.

As regards possible civil-law remedies available to Ms Söderman, the Court noted that when acquitting the stepfather, the appeal court had also dismissed her civil claim for damages. As pointed out by the Swedish Government, under the code of judicial procedure, when a civil claim was joined to a prosecution, the courts' finding on the question of criminal liability was binding for the

decision on the civil claim. There were moreover no other grounds on which Ms Söderman could have relied in support of her claim for damages. In particular, her counsel could not have been expected to invoke negligence, as the stepfather had not claimed that he had left the camera in recording mode in the bathroom by accident. Finally, the Court was not persuaded that the Swedish courts could have awarded her compensation on the basis of finding a breach of the Convention alone.

In conclusion, the Court was not satisfied that Ms Söderman had been ensure protection of her right to private life under Article 8 and accordingly found there had been a violation of the Convention.

Article 41

The court held that Sweden was to pay Ms Söderman €10,000 in respect of non-pecuniary damage and €29,700 in respect of costs and expenses.

JUDGMENT IN THE CASE OF
BĂLȘAN v. ROMANIA
(Application no. 49645/09)
23 May 2017

1. Principal Facts

The applicant, Angelica Camelia Bălșan, is a Romanian national who was born in 1957 and lives in Petrosani (Romania). The applicant was married to N.C. in 1979 and had four children with him. The applicant claimed that N.C. used violence towards her and their children throughout their marriage. The violence intensified in 2007 during their divorce proceedings, and continued into the following year when the divorce was finalised. She was assaulted by N.C. a total of eight times during this period, and sustained injuries recorded in medical reports as requiring between two to a maximum of ten days' medical care.During this period, Ms Bălșan asked for help by way of emergency calls to the police, petitions to the head of police for protection, and formal criminal complaints. Concerning the latter, it was considered both at the investigation level and before the national courts that she had been provoking the domestic violence, and that it was not serious enough to come under the scope of criminal law. Therefore, concerning the three incidents which occurred in 2007, the national courts ultimately decided to acquit N.C. of bodily harm. Concerning the five incidents in 2008, the prosecuting authorities decided not to press charges. N.C. was given an administrative fine of 200 Romanian lei (approximately €50) following each of these decisions. During the criminal investigations and the court proceedings, Ms Bălșan continued to bring N.C.'s abuse to the authorities' attention, warning them that she feared for her life. No concrete measures were ever taken, however, and her requests that the courts order protective measures went unanswered.

2. Decision of the Court

Ms Bălșan alleged that the Romanian authorities had failed to protect her from repeated domestic violence and had not held N.C. accountable, despite her numerous complaints. She also submitted that the authorities' tolerance of such acts of violence had made her feel debased and helpless. The case was examined under Article 3 (prohibition of inhuman and degrading treatment) and Article 14 (prohibition of discrimination) in conjunction with Article 3.

Article 3

The Court affirmed that the physical violence to which Ms Bălșan had been repeatedly subjected by N.C. and her resulting injuries, as documented in medical and police reports, had been sufficiently serious to reach the required level of severity under Article 3 of the Convention. Moreover, the Romanian authorities would have been well aware of the abuse, given Ms Balșan's repeated calls for assistance to both the police and the courts. The authorities had therefore been under an obligation to take all reasonable measures to act upon her complaints and prevent the assaults from happening again. Indeed, there was a legal framework in Romania through which to complain about domestic violence and to seek the authorities' protection, and Ms Bălșan had made full use of it.

However, the Court observed with grave concern how the authorities had found that Ms Bălșan had provoked the domestic violence against her, and how it had been considered not serious enough to fall within the scope of the criminal law. Such an approach, taken in a case where the fact of the domestic violence itself had not been contested, had deprived the national legal framework of its efficacy and purpose. This was inconsistent with international standards on violence against women and domestic violence in particular. Furthermore, despite the fact that Ms Bălșan had continued to complain of further abuse throughout the related proceedings, the authorities had apparently taken no measures to protect her. The only sanctions imposed, administrative fines, had been an ineffective deterrent against further abuse. The Court therefore found that the manner in which the authorities had dealt with Ms Bălșan's complaints had not provided her with adequate protection against N.C.'s violence, in violation of Article 3.

Article 14 in conjunction with Article 3

The Court took note of official statistics demonstrating how domestic violence in Romania was tolerated, and was perceived as normal by the majority of the population. Furthermore, the general population might not be sufficiently aware of the extensive legal and policy framework in Romania for the elimination of discrimination against women, and women themselves might not be aware of their rights. The authorities did not, moreover, fully appreciate the seriousness and extent of domestic violence in Romania, as demonstrated in the current case by their failure to apply the relevant legal provisions. Their passivity reflected a discriminatory attitude towards Ms

Bălșan as a woman. The Court therefore considered that the violence to which Ms Bălșan had been subjected had been gender-based violence, which is a form of discrimination against women. Despite the Government's adoption of a law and national strategy on preventing and combatting such abuse, the lack of a proper response by the judicial system and the impunity enjoyed by aggressors, as in Ms Bălșan's case, indicated that there had been insufficient commitment to address the problem of domestic violence in Romania. Consequently, there had been a violation of Article 14, read in conjunction with Article 3.

Article 41

The Court held that Romania was to pay Ms Bălșan €9,800 euros in respect of non-pecuniary damage.

JUDGMENT IN THE CASE OF
IRENE WILSON v. THE UNITED KINGDOM
(Application no. 10601/09)
23 October 2012

1. Principal Facts

The applicant, Ms Irene Wilson, was born in 1958 and is of British nationality. In October 2007 the applicant was assaulted by her husband, Scott Wilson, at their home in Londonderry after they had both been out drinking. Ms Wilson suffered a severed artery on the right side of her head, as well as severe bruising and another blow to her head when she fell against a banister. The applicant maintained that this was only the last in a series of assaults made against her by her husband over their thirty-two year marriage. The Government claimed that in a police statement the applicant stated that she had suffered psychological abuse until 2006 with the abuse turning physical from that point onwards.

Mr Wilson was arrested and charged with causing grievous bodily harm with intent to cause grievous bodily harm. He was subsequently granted bail but ordered to reside at a different address than the matrimonial home. There was a subsequent reconciliation between the applicant and her husband, and Mr Wilson was successfully applied to return home. Later in October 2007 the applicant informed the police that she no longer wished for Mr Wilson to be prosecuted. However, following consultation with the regional prosecutor and after considering the evidence available, the public prosecution service decided that the prosecution should proceed.

By this point the reconciliation between the married couple had broken down and the applicant reinstated her complaint. After deciding that there was insufficient evidence to prosecute on the original charge, the charge was reduced to causing grievous bodily harm only. Mr Wilson pled guilty to this offence and was sentenced to eighteen months' imprisonment, suspended for three years. The applicant then arranged for a meeting with the senior public prosecutor who explained the prosecution's handling of the case. The applicant subsequently complained to various public bodies in Northern Ireland about the perceived excessive leniency of the sentence but without success. The applicant then sought compensation for her injuries, which was initially refused by the Northern Ireland Compensation Agency on the basis that her injuries were not sufficiently severe. However, following a review of

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this decision and the receipt of a psychiatrist's report, in May 2010 the applicant accepted an offer of £2,800 as compensation.

2. Decision of the Court

Relying on Articles 6 (right to a fair trial), 8 (Right to respect for private and family life), 10 (freedom of expression), and 13 (right to an effective remedy) of the European Convention on Human Rights the applicant complained to the European Court of Human Rights that the court proceedings and sentencing had violated her rights under the Convention. The Court ruled the applicant's complaint should be heard under Articles 8 and 13 of the Convention only.

Article 8

The Court began by noting that it had drawn four principles from similar cases heard in the past. Firstly, Article 8 may impose both positive and negative obligations on the state to ensure effective respect for private and family life. Secondly, the concept of a private life includes a person's physical and psychological integrity, and under Article 8 States have a duty to protect this integrity by effectively maintaining and applying an adequate legal framework to afford individuals protection against acts of violence. Thirdly, victims of domestic violence are particularly vulnerable and active State involvement has been particularly emphasised in these situations in a number of international instruments. Fourthly and lastly, the Court's role is to review, in line with the standards set out in the Convention, the decisions that authorities have taken in the exercise of their power of appreciation.

The Court observed that while the applicant alleged that she had been the subject of many years of violence, no specific allegations on this matter had been made in her submissions to the Court. Furthermore, when she made her first complaint to the police the matter was promptly investigated, her husband arrested and charged, and the criminal proceedings conducted expeditiously. The Court went on to rule that the reduction in the charge against Mr Wilson had been made purely on the basis of evidence and not after any discussion with the accused. Indeed, the prosecution service did all that they could to keep the applicant informed of the progress of the case, seeking to meet with her to discuss the reduction before the matter came to court and then subsequently meeting with the applicant in person to discuss the result. It was accepted by the Court that in the course of this final meeting the applicant indicated that her discontent was not with the prosecutor's handling of the case but with the

lenient sentence. Indeed, the Court noted that the prosecution service took the decision to proceed with the case despite the applicant withdrawing her complaint.

The Court noted that any examination of the inadequacy of the sentence must be done so in the context of the procedure that proceeded it. The Court concluded that the judge had before him at the time of the sentencing all the relevant information and documentation with which to make a reasoned judgment. The judge's decision not to impose an immediate custodial sentence could not amount to a manifestly inadequate response in this case as the length of time for which the sentence was suspended arguably gave her longer and better protection from her husband than if he had simply been imprisoned for eighteen months. This approach seemed to have been successful as there had been no further incidents between husband and wife since October 2007. The Court also thought it significant that there were other measures available under Northern Irish law to the applicant, specifically that she could have applied for either an occupation or non-molestation order against her husband if the conditions of the sentence proved insufficient. There was no evidence to suggest to the Court that such an application would have been ineffective. It is also of some relevance that the applicant was offered and did accept a sum of compensation.

In response to the applicant's argument that she had suffered discrimination, the Court ruled that it did not appear that perpetrators of domestic violence were given more lenient sentences than those who were convicted of other violent crimes. In this specific case the Court concluded that there were good reasons for the specific sentence imposed.

For all of these reasons the Court declared that the authorities had not failed in their positive obligation to secure the applicant her rights under Article 8 of the Convention. Thus, the complaint was considered to be manifestly ill-founded and rejected. The Court likewise rejected the applicant's claim under Article 13, which had relied on the same submission as Article 8, as manifestly ill-founded.

JUDGMENT IN THE CASE OF
AIREY v. IRELAND[150]
(Application no. 6289/73)
9 October 1979

1. Principal Facts

The applicant, Mrs. Johanna Airey, was born in 1932 and is of Irish nationality. Coming from a humble background she left school at a young age, married in 1953, and has four children, the youngest of whom is still a dependent. Mrs. Airey alleges that her husband is an alcoholic, and that before 1972 he threatened her and occasionally subjected her to physical violence. In January 1972 Mr. Airey was convicted by a domestic court of assaulting his wife and fined. In June that year he left the marital home, although Mrs. Airey feared that he might return.

The applicant had been trying to conclude a separation agreement with her husband for around eight years prior to 1972, but her husband refused to co-operate. Since June 1972 the applicant has been trying to obtain a decree of judicial separation on the grounds of Mr. Airey's physical and mental cruelty to her and their children but has been unable to afford to do so. Legal aid was not available at the time for the purpose of seeking judicial separation. She has also applied to an ecclesiastical tribunal for an annulment of the marriage, but even if this is successful it will not affect her civil status.

2. Decision of the Court

Mrs. Airey made an application to eth European Commission on Human rights, which subsequently referred the case to the European Court of Human Rights, in June 1973, her main complaint being that the State had failed to protect her against the physical and mental cruelty of her husband. The applicant invoked the European Convention on Human Rights in four instances: that she had been denied her right of access to court under Article 6 § 1 (right to a fair trial); that the State had failed to ensure that there was an accessible legal procedure to determine the rights obligations which have been created by legislation on family matters under Article 8 (right to respect for private and family life); that she was deprived of an effective remedy under Article 13 (right to an effective remedy); and that judicial separation is more

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easily available to those who can afford to pay than to those who cannot under Article 14 in conjunction with Article 6 § 1 (prohibition of discrimination).

Admissibility

The Government argued that the applicant had not exhausted her domestic remedies as she could have entered into a separation deed with her husband or could have applied for a barring order, or for maintenance. However, none of these remedies could have provided the applicant access to a court, the violation that the applicant complained of. The Government went on to argue that the applicant could have appeared before the High Court without a lawyer. The Court decided that this argument was intimately connected to the applicant's complaint under Article 6 § 1 and so joined it to the merits of the remainder of the plea.

Article 6 § 1

The Court began by stating that if a remedy is provided for by Irish law then it should be available to anyone who satisfies its conditions. The Court went on to explain that the Convention guarantees rights that are practical and effective rather than only theoretical or illusory. Following this line of reasoning the Court concluded that the applicant would be at a clear disadvantage before the High Court if her husband was represented by a lawyer and she were not. It was also clear that in litigation for judicial separation, before the High Court, the applicant could not have effectively conducted her own case, despite the assistance that would have been afforded to her by the High Court, due to the complexity of the law and court procedure, and the fact that in the 255 judicial separation cases heard between 1972 and 1978 no petitioner was without representation. Therefore, the Court concluded that the possibility of appearing in person did not afford the applicant effective access to a court.

The Court noted that the obligation on States to secure effective access to courts had both negative and positive aspects. The Court recognised that the actions of States are restricted by their financial situations but rejected the Government's argument that a positive duty to ensure access to court would inevitably mean providing all applicants to domestic courts with legal aid, stating that the Convention specifically makes no provision for legal aid in such disputes. Only in some instances, determined by the specific type of litigation or by reason of complexity would legal representation be considered necessary. Therefore, having regard to all the circumstances, the Court found

a violation of Article 6 § 1. The Court regarded its decision under Article 6 § 1 to be sufficient to also cover the applicant's complaints under Article 13 and Article 14 in Conjunction with Article 6 § 1.

Article 8

In its reasoning under Article 8 the Court noted that the duty of the state was not simply to abstain from interfering with the applicant's family life but in some cases to ensure that there is effective respect for this life. In Irish law, marriage imposed a duty on a husband and wife to cohabit, with a decree of judicial separation granted in certain situations to relieve them of this duty. In this situation the Court ruled the State should make judicial separation effectively accessible to, when appropriate, anyone who may wish to have recourse to it in order to ensure effective respect for private or family life. As explained above, the applicant did not have effective access to the domestic courts in this regard and so therefore suffered a violation of Article 8.

Article 50

The Court held, in a later hearing on 6 February 1981, that the applicant should be awarded £3,140 as a fair and reasonable amount in respect of her claims.

JUDGMENT IN THE CASE OF
X AND Y v. THE NETHERLANDS[151]
(Application no. 8978/80)
26 March 1985

1. Principal Facts

The applicants, Mr. X and his daughter Miss. Y., were both of Netherlands nationality and born in 1929 and 1961 respectively. Miss. Y was mentally handicapped and had been living in a privately-run care home for children since 1970. The application was made by Mr. X on behalf of himself and his daughter.

On the night of the 14 to 15 December 1977 Miss. Y was forced by a Mr. B., the son-in-law of the directress of the care home, and who lived with his wife on the premises but did not work there, to undress and have sexual intercourse with him. This traumatic incident occurred the day after Miss Y's sixteenth birthday and caused her major mental disturbance.

On 16 December Mr. X went to the local police station to file a complaint and ask for criminal proceedings to be instigated against Mr. B. As Mr. X. considered Miss. Y. unable to sign the complaint due to her mental condition he did so himself, writing, "In my capacity as father I denounce the offences committed by Mr. B on the person of my daughter. I am doing this because she cannot do so herself, since, although sixteen years of age, she is mentally and intellectually still a child." Mr. X's opinion of his daughter's mental capacity was corroborated by the police officer on duty at the time, the headmistress of Miss. Y.'s school, and another teacher at the school.

On 29 May 1978 the public prosecutor's office decided not to open proceedings against Mr. B. provided he did not commit a similar offence within the next two years. In December 1978 Mr X. appealed this decision to the Arnhem Court of Appeal. On 12 July 1979 the Court of Appeal dismissed his appeal, considering it doubtful whether a charge of rape could be proved. The Court of Appeal ruled that a further criminal charge, abuse of a dominant position resulting in indecent acts under Article 248 of the Netherlands Criminal Code, would have been applicable to the case but only if the complaint had been lodged by Miss. Y. herself, as she was now over sixteen. As the police considered Miss.

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Y. incapable of filing a complaint herself, no-one in this situation was legally empowered to lodge a complaint. There was no possibility of appealing this decision.

2. Decision of the Court

Article 8

Relying on Article 8 (right to respect for private and family life) of the European Convention on Human Rights, Miss. Y. complained to the European Court of Human Rights that the impossibility of having criminal proceedings against Mr. B. violated their right to a private life, a concept that covers the physical and moral integrity of a person. Article 8 imposes a positive obligation on states to secure respect for private life even in the private sphere.

The Court ruled that even though there were civil claims that could have been brought against Mr. B. by Mr. X, the nature of the State's obligation will depend on the particular aspect of private life that is at issue. In the case of Miss. Y., the Court ruled that civil law remedies were inadequate for the kind of wrongdoing inflicted on Miss. Y., where fundamental values and essential aspects of private life are at stake. Effective deterrence could only have been achieved by criminal-law provisions. The Netherlands also generally opted to use criminal law protections in this area, and it seems in this case the system had met an unforeseen procedural obstacle.

The Court stated that as no article of the Criminal Code provided Miss. Y. with practical and effective protection it must be concluded that she was the victim of a violation of Article 8. As the Court examined the case under Article 8 in regards to Miss. Y., the Court did not think it necessary to examine further complaints filed by the applicants under Article 14, 3, or 13 as regards Miss. Y.

Article 50

The Court held that the applicant should be awarded 3,000 Dutch Guilders (€2,400) in respect of equitable just satisfaction.

JUDGMENT IN THE CASE OF
D.M.D. v. ROMANIA
(Application no. 23022/13)
3 October 2017

1. Principal Facts

The applicant, Mr D.M.D., was born in 2001 and is of Romanian nationality. Hi parents, C.I. and D.D. divorced in April 2004, due mainly to D.D.'s abusive behaviour towards his wife and son.

D.D.'s abuse of his son and wife was first reported to the child protection authorities in February 2004, with further complaints made by C.I. to the Bucharest Police about alleged violence inflicted by D.D. on the applicant on 5 March, 16 April, 7 May and 30 June 2004. No action was taken in relation to these complaints. On 1 July 2004 C.I. lodged another complaint concerning the domestic abuse. In response, the police heard evidence from witnesses and obtained information from the centre where the applicant and his mother had been relocated. The police passed on their findings to the relevant prosecutor's office.

On 1 November the prosecutor began a criminal investigation into D.D. and heard evidence from C.I., D.D., and six other witnesses, and examined expert psychological evaluations concerning the applicant and D.D. The prosecutor concluded that the applicant had suffered trauma at the hands of D.D. and in December 2007 the prosecutor indicted D.D. for abusive behaviour towards his young son. During the trial the Bucharest District Court heard evidence from a number of sources, including D.D. who denied the charges. In its decision in June 2008 the domestic court acquitted D.D., stating that his 'occasionally inappropriate behavior' did not amount to a crime. This decision was upheld by the County Court but quashed by the Court of Appeal, which sent the case back to the County Court on the basis that evidence from the applicant and psychological reports should have been heard.

In a private hearing the County Court heard evidence from the applicant, who recounted how his father used to hit him, lock him in a small room without lights, throw water on him while he slept, and called him names. His father would also throw his mother, maternal grandmother, and aunt out of the family apartment when they came to bring him food. In December 2009 the County Court convicted D.D. of ill-treatment inflicted on a minor and sentenced

him to a suspended sentence of four years' imprisonment. The domestic court noted that C.I. had not requested damages on behalf of the applicant, but on its own initiative awarded the child 20,000 Romanian lei (€4,700) in respect of non-pecuniary damages.

D.D. appealed this decision but was again convicted of ill-treatment inflicted on a minor. However, the domestic court decided to take into account the length of the criminal proceedings and reduced D.D.'s punishment to one years' suspended sentence, with his parental rights suspended for a further two years. No damages were awarded to the applicant and no explanation was given as to this decision. Both parties appealed again in 2012, with D.D.'s sentence increased to three years' suspended sentence. The domestic court ruled that the decision not to award damages to the applicant was correct as the prosecutor and the applicant had limited their initial appeals to solely criminal aspects of the initial decision and the County Court had been right to limit its examination strictly to the issues brought before it.

2. Decision of the Court

Relying on Articles 3 (prohibition of torture) and 6 § 1 (right to a fair trial) of the European Convention on Human Rights the applicant complained to the European Court of Human Rights that the authorities had failed to investigate the allegations of ill-treatment promptly and effectively, that the criminal proceedings against D.D. had been of undue length, and that domestic courts should have awarded him damages.

Article 3

The Court noted that while the authorities had become aware of allegations of abuse in February 2004, they had not done anything to verify this information, transmit it to the police, or taken any steps to protect the applicant, despite being under a legal obligation to do so. This legal obligation similarly existed in relation to the first four criminal complaints made in 2004. The Court also noted that the domestic court proceedings lasted for eight years and four months and that the initial investigation lasted for three years and six months and consisted only of interviews with six witnesses and the examination of reports. Under the procedural limb of Article 3 the Court accepted that while D.D. was eventually convicted, the domestic courts had reduced his prison sentence on the basis of the length of the proceedings but had failed to offer any comparable compensation to the applicant himself.

Furthermore, the applicant received no compensation for the abuse. The Court went on to state that while the domestic courts had, at first, ruled that violence was occasionally acceptable in the domestic sphere, this contradicted the relevant provisions in domestic law that forbid, absolutely, domestic corporal punishment.

The Court went on to emphasise that the Council of Europe's own instruments recognise that the best interests of the child are the cornerstone of protection afforded to children from corporal punishment. Furthermore, the Court stated that the concept of dignity is crucial to the protections afforded by the 1989 United Nations Convention on the Rights of the Child and dignity could not be compatible with violence against children in any form. The dependence of children on adults and their vulnerability make it imperative that they have more protection from violence than adults. To this end, Member States should strive to protect children from violence falling within the scope of Article 3 by instituting effective deterrence against violence, taking reasonable steps to prevent ill-treatment, and establishing effective investigations into claims of ill-treatment.

The Court concluded that the investigation in this case had lasted too long and been marred by serious shortcomings. Therefore, they had been ineffective and violation of the procedural limb of Article 3.

Article 6 § 1

Considering the applicant's claim under Article 6 § 1 the Court recognised that the right to receive compensation was enshrined in Romanian domestic law. As such, the domestic courts were under an obligation to rule on the matter of compensation even without a formal request from the applicant, who was a minor without legal capacity at the relevant time. Furthermore, the domestic courts and prosecution actively sought information from the victim about the extent of the damage he had suffered, and, taking into account the reinforced protection afforded to vulnerable persons, there was an extended responsibility on the authorities to take an active role in ensuring the applicant's rights. Therefore, the State's responsibilities under Article 6 § 1 had been engaged.

As the domestic courts had an obligation to secure the applicant's rights, the applicant's failure to expressly request damages should have been irrelevant. Domestic courts at all levels failed in their duty to award compensation or

explain their reasoning as to the lack of compensation. Under domestic law the Court of Appeal was also specifically obligated to examine the merits of the applicant's case before it, rather than simply state the lower court's own reasoning for refusing compensation. For these reasons the Court held that the domestic courts' actions amounted to a denial of justice and therefore violated Article 6 § 1 of the Convention.

Article 41

The Court held that the applicant should be awarded €10,000 in respect of non-pecuniary damages, and €2,347.50 in respect of costs and expenses.