



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Exchange of views with the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO)

Speech by Síofra O'Leary

7 February 2023

President Lurasi,
Members of the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO),

It's a real pleasure, as President of the European Court of Human Rights, to have been invited to your session this afternoon. The last exchange of views with the Court took place in June 2019; so it was high time to renew our contacts.

This is my first bilateral engagement with one of the Council of Europe's advisory or monitoring bodies, and I am delighted that it is with GREVIO members, one of whom is a former Judge of the Court.

Preventing and combating violence against women and domestic violence is high on the political agenda of the Council of Europe, as can be seen from the choice of this subject as one of the five priority areas¹ for discussion at the 4th Summit in Reykjavik in May at which I will participate.

As I underlined in my intervention at the Secretary General's 10th meeting three weeks ago, the Court cannot and does not wish to operate in an institutional, political or social vacuum. Maintaining dynamic and regular relations with you is essential to our functioning as well as yours.

As we know, the Convention does not expressly mention domestic and gender-based violence. However, the Court has been true to its characterisation of the Convention as "a living instrument to be interpreted in the light of present-day conditions".²

From the 2009 landmark *Opuz v. Turkey* ruling onwards,³ a succession of domestic violence cases has seen the European Court approach the issue from the angle of several substantive provisions of the Convention – mainly the right to life (Article 2), the prohibition on severe ill-treatment (Article 3), the right to protection of one's physical and psychological integrity as part of the right to respect for private life (Article 8), and the prohibition of discrimination, or the right of women to the equal protection of the law (Article 14).

¹ <https://rm.coe.int/report-of-the-high-level-reflection-group-of-the-council-of-europe-/1680a85cf1>

² *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26 and, more recently, in relation to Article 4 and human trafficking, *S.M. v. Croatia* [GC], no. 60561/14, 25 June 2021, § 292.

³ *Opuz v. Turkey*, no. 33401/02, ECHR 2009.

In 2021, in *Kurt v. Austria*, the Grand Chamber adopted a judgment which marked a qualitative step forward in the perception of and response to domestic violence from the standpoint of the Convention.⁴

The facts of the case are as tragic as they are recurrent in this field, a pattern of escalating violence, directed first at the applicant mother and which progressed into a murder-suicide, with the applicant's 8-year old child fatally injured at school by his father.

The emphasis throughout the judgment is on the need for national authorities to take due account of the particular context and dynamics, as well as the known specific features of domestic violence.

What also marks this case out is the degree to which the Court drew upon the Istanbul Convention – and the expertise made available to it by intervening parties in the proceedings, above all GREVIO.

Rarely has the permeability of the Convention to other human rights treaties been so clear as in this case and on this issue.

The result of the *Kurt* case is the adaptation of the (qualified) duty that the Court has derived from Article 2 for States to take adequate operational measures to protect an individual from a real and immediate risk to their life. Where the threat to life arises in the context of domestic violence, then more specific obligations are triggered on the part of the authorities, starting with an immediate response to such an allegation or complaint.

These are very difficult cases because the violence builds up and manifests itself in the private sphere and the legal and operational burden placed on States cannot be such that it is unworkable. It is the failure to implement reasonable measures, to be assessed in relation to the circumstances of a given case, that might realistically have changed the course of events or mitigated the damage caused, which engages the State's responsibility under the Convention in these types of horizontal situations [*Talpis v. Italy*, § 121]⁵. While the Grand Chamber was unanimous on the legal principles applicable, it split 10:7 on their application to the facts of this case. It is the risk assessment, its outcome and what triggers the obligation to take preventive operational measures which tends to divide in these cases.

This afternoon I'd like to update you on the latest case-law developments of the Court from the year gone by taking a thematic approach:

- firstly looking at the positive obligations on States under Articles 2 and 3 of the Convention;
- secondly, examining the use of Article 8 in domestic and gender-based violence, and
- thirdly, reflecting on the role played by Article 14 of the Convention.

In my conclusion I will attempt to touch upon some possible themes for the future.

I. Positive obligations under Articles 2 and 3 ECHR

In my first example from 2022, *Y and Others v. Bulgaria* (2022)⁶, the applicants were the mother and daughters of a woman shot dead in a café in Sofia by her husband, just after leaving the district

⁴ *Kurt v. Austria* [GC], no. 62903/15, 15 June 2021.

⁵ *Talpis v. Italy*, no. 41237/14, § 121, 2 March 2017

⁶ *Y and Others v. Bulgaria*, no. 9077/18, 22 March 2022

prosecutor's office to complain that the husband owned a handgun and that the victim feared for her life.

In the years and months leading up to the killing the victim had made several complaints concerning her husband's angry, violent and obsessive attitude towards her. The applicants alleged in particular that the Bulgarian authorities had not taken their close relative's complaints seriously and had failed to take measures to avert the risk to her life.

In this case, the Court clarified the methodological approach when assessing the preventive operational obligation *post-Kurt*. It also had to assess whether the authorities' acts and omissions reflected gender-based discrimination.

The Court held that there had been a violation of Article 2 of the Convention. It found, in particular, that the authorities had failed to respond promptly to the credible complaints of the applicants' close relative and to carry out a proper assessment of the risk to her in view of the specific context and dynamics of domestic violence. Had they done so, they would have appreciated that her husband had posed a real and immediate risk to her life, and they could have seized his handgun, arrested him for breaching a restraining order and/or placed the applicants' relative under police protection. All such steps to counter the risk to her would have been possible under Bulgarian domestic law.

What's of particular note in this judgment is the reference to the Istanbul Convention. Bulgaria signed that Convention in 2016. In 2018 the government had proposed ratification by Parliament. However, following a heated public controversy about some of the provisions relating to the terms "sex" and "gender", in February 2018 a group of parliamentarians asked the Constitutional Court to determine whether the Istanbul Convention was compatible with the Constitution. As a result, in March 2018 the government withdrew the ratification bill. In its judgment from July 2018, the Bulgarian Constitutional Court found, by eight votes to four, that the Istanbul Convention was incompatible with the Bulgarian Constitution.

However, for the consideration of the complaint under Article 2 and Article 14, the Court was not prepared to draw conclusions on the facts of this case from Bulgaria's refusal to ratify. The Court found that the applicants had not succeeded in making a *prima facie* case of a general and discriminatory passivity on the part of the Bulgarian authorities with respect to domestic violence directed against women.

While there was no violation found in respect of the complaint under Articles 2 and 14 this case demonstrates that binding judgments delivered by the Court may also concern member states which are not States Parties to the Istanbul Convention. I'll return to the issue of Article 14 in domestic violence cases a little later.

In *Landi v. Italy*⁷ from April 2022, the Court also found a violation of Article 2 based on the passive attitude of the public prosecutors in the face of the serious risk of ill-treatment faced by the applicant. It came to this conclusion despite recognising the existence of an adequate legal framework, the applicable Italian legislation having been overhauled after *Talpis v. Italy* in 2017.

In *Landi*, the applicant alleged that the Italian State had failed to protect her and her two children from the domestic violence inflicted by her partner, leading to the murder of her one-year-old son and her own attempted murder in 2018. Applying the principles set out in *Kurt*, the Court found that

⁷ *Landi v. Italy*, no. 10929/19, 7 April 2022

the national authorities had known, or should have known, of the real and imminent risk the applicant and her children were facing.

According to the Court, the authorities ought to have assessed the risk of renewed violence and adopted appropriate and adequate measures. Relying on GREVIO's report on Italy⁸ the Court held that such measures could have been adopted by the authorities, pursuant to Italian legislation, whether or not there had been a complaint or any change in the victim's perception of the risk.

Indeed, the same GREVIO baseline report on Italy is relied upon in two further judgments in 2022, namely *De Giorgi v. Italy* (2022)⁹ and *M.S. v. Italy* (2022).¹⁰ In both cases the Court found violations of Article 3 of the Convention in relation to the failure on the part of the Italian authorities' to take adequate and appropriate steps to protect the applicant (and in the first case also her children) from the husbands' acts of domestic violence.

II. The use of Article 8 in relation to domestic and gender-based violence

The Article 8 case-law of the Court is, sadly, also replete with cases of sexual violence and rape, in which we have found substantive and procedural violations of Article 8 together with Article 3 or alone.¹¹

We are also finding violations of these provisions in cases involving repeat (*J.I. v. Croatia* (2022)¹²) and secondary victimisation (*J.L. v. Italy* (2021)¹³).

The 2022 case I wish to highlight here is *Malagić v. Croatia*.¹⁴ In this case, the Chamber by a narrow margin of 4 votes to 3, found no violation of that provision.

The case concerned the termination of a precautionary restraining order imposed on the applicant's former husband, a police officer, who had allegedly committed acts of domestic violence or abuse against her and their children. The applicant submitted, in particular, that by terminating the measures, the domestic authorities had failed to protect her without assessing whether her ex-husband still posed a danger.

The Court referenced and interpreted the Istanbul Convention as follows:

"[...] the Court notes that the right to appeal of victims against restraining orders is by no means an absolute requirement under the relevant international standards nor is it provided in many domestic laws of Council of Europe Member States. Although the provisions of both the [EU] Victims' Rights Directive and the Istanbul Convention impose the general obligation to protect the victims of crime, and in particular of domestic violence, from repeat victimisation, intimidation and retaliation, as well as to take into consideration the rights of the victims at all stages of the criminal proceedings (see paragraphs 42-43 above), they do not go so far as to require the specific right of appeal of victims in matters such as restraining orders or detention imposed against the alleged perpetrator."

⁸ (GREVIO's Baseline Evaluation Report Italy, GREVIO/Inf(2019)18 <https://rm.coe.int/grevio-report-italy-first-baseline-evaluation/168099724e>),

⁹ *De Giorgi v. Italy*, no. 23735/19, 16 June 2022

¹⁰ *M.S. v. Italy*, no. 32715/19, 7 July 2022

¹¹ See, for example, *X and Y v. the Netherlands*, 26 Mars 1985, Series A no. 91 (violation of Article 8); *M.C. v. Bulgaria*, no. 39272/98, ECHR 2003 XII (violation of Articles 3 and 8) and *G.U. v. Turkey*, no. 16143/10, 18 October 2016 (violation of Articles 3 and 8).

¹² *J.I. v. Croatia*, no.35898/16, 8 September 2022.

¹³ *J.L. v. Italy*, no. 5671/16, 27 May 2021

¹⁴ *Malagić v. Croatia*, no. 29417/17, 17 November 2022

In the circumstances of the case, the Court did not discern any failure on the part of the relevant authorities to fulfil their positive obligation to protect the applicant's physical integrity. The authorities had been aware of serious accusations against her former husband and had taken various types of appropriate measures at the appropriate times to protect the applicant's physical integrity, taking due account of the recurring nature of domestic violence. A majority of the Chamber therefore held that there had been no violation of Article 8.

I note in this case the finely balanced majority; something one sees in several domestic violence judgments as I said when explaining *Kurt v. Austria*. For the minority, the domestic courts had not sufficiently assessed the interests of the female complainant or the risk of future danger once the protection order, the subject of the revocation, was no longer in place.

In the Italian case I mentioned above *J.L. v. Italy* on secondary victimisation the Court's message in that Article 8 case was clearer and unanimous: "criminal proceedings and penalties play a crucial role in the institutional response to gender-based violence" [*J.L. v. Italy*, § 141]¹⁵.

Courts at national and Strasbourg level have to keep in mind that complainants have to navigate a system designed for police and professional lawyers at what is probably the most vulnerable point in their lives while not losing sight of the Article 5 and 6 rights of the accused.

III. The role of Article 14 in domestic and gender-based violence cases

What role does the non-discrimination clause, Article 14, play in this field, given that it enjoys no independent existence?¹⁶

Having regard to the terms of specialised legal instruments,¹⁷ the Court now recognises that domestic violence is a form of discrimination against women and that a State's failure to protect women against domestic violence or respond to such violence can breach their right to equal protection before the law, irrespective of whether such failure is intentional or not.¹⁸

There are some signs that the Istanbul Convention is interacting with our Convention and relevant case-law to lower what some have regarded as an excessively high threshold in relation to Article 14 complaints in this field.¹⁹

In *Tunikova and Others v. Russia (2021)*,²⁰ decided in December 2021, the applicants complained of a failure on the part of the Russian State to protect them from domestic violence and of a lack of remedies in that regard. They also argued that the general failure to combat gender violence had amounted to discrimination against women. The facts of *Tunikova* reveal the brutal depths to which domestic violence can sink even when victims survive. One of the applicants had had her hand amputated by her partner.

¹⁵ *J.L. v. Italy*, no. 5671/16, § 141, 27 May 2021

¹⁶ See, for a recent authority, *Yocheva and Ganeva v. Bulgaria*, nos. 18592/15 and 43863/15, 11 May 2021, § 71.

¹⁷ Primarily the CEDAW Convention and the work of the CEDAW Committee. In its general recommendation No. 19 (1992) on violence against women, the CEDAW Committee clarified that the definition of discrimination against women in Article 1 of the CEDAW Convention includes gender-based violence, which is understood as violence that "is directed against a woman because she is a woman or that affects women disproportionately". Twenty-five years later, the Committee's general recommendation No. 35 (2017) affirmed that the prohibition of gender-based violence against women as a form of discrimination against women has evolved into a principle of customary international law.

¹⁸ See *Opuz v. Turkey*, cited above, §§ 184-91 and *Volodina v. Russia*, no. 41261/17, §§ 109-14, 9 July 2019

¹⁹ See the reference in *Talpis* to due diligence obligations and the Istanbul Convention

²⁰ *Tunikova and Others v. Russia*, nos. 55974/16 and 3 others, 14 December 2021

The Court held that there had been a violation of Article 3 of the Convention, finding that the Russian authorities had failed to establish a legal framework to combat domestic violence effectively, that they had not assessed the risks of recurrent violence, and that they had not carried out an effective investigation into the domestic violence the applicants had suffered.

It also held that there had been a violation of Article 14 of the Convention in conjunction with Article 3, finding it established that as regards protection against the risk of domestic violence, women in Russia were in a situation of de facto discrimination. It noted, in particular, that the failure of the Government to pass legislation to address the staggering scale of domestic violence against women in Russia, and the systemic problems in securing prosecutions and convictions, had led to a continuing climate that was conducive to domestic violence. As a structural bias had been shown to exist, the applicants had not needed to prove any individual prejudice. Under Article 46 of the Convention, the Court recommended that urgent changes to domestic law and practice to prevent similar violations from occurring be made.

One of the sadder consequences of the Russian Federation no longer being a High Contracting Party to the Convention since September last is the loss of protection of victims of domestic and gender-based violence in that State.

My second example of an interesting authority in relation to Article 14 is *A and B v. Georgia* (2022)²¹. The case concerned the murder of the daughter and mother, by the second applicant's father – himself a police officer - following a troubled relationship. The applicants complained of a failure on the part of the authorities to protect their relative from domestic violence and to conduct an effective investigation.

Following the reasoning in *Tkheldze v. Georgia* (2021)²², the Court proceeded with a simultaneous dual examination under Article 2 taken in conjunction with Article 14 of the Convention

It held that, overall, the case could be seen as yet another vivid example of how general and discriminatory passivity of the law-enforcement authorities in the face of allegations of domestic violence could create a climate conducive to a further proliferation of violence committed against victims, merely because they were women.

It noted in particular that, despite the various protective measures available, the authorities had not prevented gender-based violence against the applicants' next-of-kin, which had culminated in her death, and they had compounded that failure with an attitude of passivity, even accommodation, as regards the alleged perpetrator, later convicted of the victim's murder.

It is interesting to note that the Court underlined that when the perpetrator of domestic violence was a serving police officer, who was alleged to have abused his official status, the State's obligation to investigate and, where appropriate, to punish was more stringent.²³ In *A and B* the accused police officer had been allowed to question the complainant and had later been promoted to a higher rank.

²¹ *A and B v. Georgia*, no. 73975/16, 10 February 2022

²² *Tkheldze v. Georgia*, no. 33056/71, 8 July 2021

²³ *Ibid*, § 48

If one compares the cases when Article 14 is examined in conjunction with Articles 2 and 3 as a separate complaint (see, for example, *Y and Others v. Bulgaria* or *Landi v. Italy*) and cases where the applicants' allegation of discrimination and passivity is rolled into the complaint under Articles 2 and 3 from the outset and treated as central to the application (see *A and B. v. Georgia*, § 32) one can wonder whether the chances of success are not higher when the Court characterises the core complaint with reference to Article 14 from the outset? As a serving Judge, I voice this as a question but do not, you will understand, provide an answer.

Conclusion

I hope that this overview of a selection of cases from 2022 demonstrates the extent to which the provisions of the Istanbul Convention and the GREVIO reports are embedded into our analysis and decision-making. In fact, it is hard to think of another Council of Europe Convention or monitoring body which figures as frequently in our judgments.

What can we expect from the future? Here are four areas which I consider merit close monitoring.

Firstly, the exponential growth of online abuse against women and girls will increasingly feature in our case-law.

Recent cases such as *Buturugă v. Romania*²⁴ and *Volodina v. Russia* (No. 2)²⁵ demonstrate how and in what form the issue of domestic cyber-violence has reached the Court. You have also grappled with this problem in your first General Recommendation specifically devoted to the digital dimension of violence against women.²⁶

In our case-law we will have to come to terms with the changed and varying forms of “violence” three decades into the 21st century and understand the corrosive effects of violence which leaves no physical trace - no marks, no bruises, no blood. Where States have failed to update their legislation sufficiently in order to combat cyber-violence, this will no doubt feature in our reasoning.

Secondly, we may see in cases lodged since 2020, the impact of the global pandemic and periods of lockdowns and increased episodes of domestic violence. As your former President, Marcelline Naudi, stated in 2020, “For many women and children, [...] home is not a safe place”.²⁷ In due course, once domestic remedies have been exhausted, we might expect to see complaints lodged with the Court in respect of these periods mirroring the increase already witnessed at first instance in national courts.

Thirdly, the consequences on women and girls of the Russian Federation's invasion of Ukraine are quickly being understood. We know unfortunately that gender-based violence and war-related sexual violence are often prevalent in conflict situations²⁸. The Court is currently seized of 16 inter-state cases half of which concern Russia and the majority relating to conflict situations. Moreover, around 10,000 of our 75,000 pending cases have been identified as individual complaints related to a conflict. Some of the complaints in the cases lodged between 2014 and 2022 relate to allegations of sexual violence.

²⁴ *Buturugă v. Romania*, no. 56867/15, 11 February 2020

²⁵ *Volodina v. Russia* (no. 2), no. 40419/19, 14 September 2021

²⁶ GREVIO General Recommendation No. 1 on the digital dimension of violence against women, 20 October 2021, accessible online at <https://rm.coe.int/grevio-rec-no-on-digital-violence-against-women/1680a49147>

²⁷ <https://rm.coe.int/grevio-statement-covid-24-march-2020/pdfa/16809cf55e>

²⁸ See the Commissioner for Human Rights' Memorandum on the human rights consequences of the war in Ukraine, CommDH(2022)18, 8 July 2022.

Fourthly, it is my humble view that the Court could be clearer when dealing with Article 14 complaints about the threshold a complaint must reach, the standard of proof required of the applicant and when the burden of proof shifts to the respondent State. Discrimination complaints are always tricky but it is worth asking in each case a) what is the applicant seeking to establish? I think the answer is whether the State has failed in its obligation to provide equal protection before the law, and b) but for the complainant's gender and the crime reported, would the authorities have responded differently? Some recent decisions may point to the excessively high standard established in earlier cases still holding sway. This may be something we will have to keep under review.

Once again, thank you for the invitation to address you. It is clear that through cooperation and dialogue we will be in a better position to surmount these challenges together and safeguard the Convention system so it continues to benefit future generations.

I am very happy to take any questions you may have, while of course navigating any issues which relate to pending cases which it does not fall to me to address as a sitting judge.