University of Miami Inter-American Law Review

Volume 54 | Number 1 Article 3

2-27-2023

Gender Mainstreaming at the European Court of Human Rights: The Need for A Coherent Strategy in Approaching Cases of Violence Against Women and Domestic Violence

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Gender Mainstreaming at the European Court of Human Rights: The Need for A Coherent Strategy in Approaching Cases of Violence Against Women and Domestic Violence

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Any assessment of the jurisprudence of the European Court of Human Right's (ECtHR) in the field of violence against women and domestic violence must start with an acknowledgement of the ECtHR's landmark judgments in this area and the positive practical impact those judgments have had upon the protection of women.

However, much progress is still to be made. This article analyses three ECtHR cases from Russia and Georgia,[1] and

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[1] These cases were litigated by a team of highly committed and talented lawyers based at the former Memorial Human Rights Centre (Moscow), the Georgian

in so doing, highlights the need for greater transparency, proactivity, and coherency on the part of the Court. It considers in turn: a) the seemingly discriminatory impact of the ECtHR's approach to applications for interim measures; b) the need for judicial proactivity in bringing a gender perspective and gender mainstreaming to cases brought before the Court; c) the lack of a reasoned and transparent approach with regard to redress. Ultimately, the article puts forward potential improvements which could be made to ensure that the ECtHR monitors its own practice and procedures in order to address the demonstrable need for a coherent gender mainstreaming strategy.

I. INTRODUCTION TO THE COUNCIL OF EUROPE 2
II. PREVENTION & PROTECTION 8
III. A NEED FOR JUDICIAL PROACTIVITY IN GENDER MAINSTREAMING? 21
IV. REDRESS 34
V. CONCLUSION 38

I. INTRODUCTION TO THE COUNCIL OF EUROPE

The European Convention on Human Rights[2] was the first and foundational convention of the Council of Europe adopted in 1950

Young Lawyers Association (Tbilisi) and the European Human Rights Advocacy Centre (London) at a time when the author was Co-Legal Director of the European Human Rights Advocacy Centre. The lawyers who worked on these cases were Tamar Abazadze, Marina Agaltsova, Nadezhda Borodkina, Toby Collis, Tamar Dekanosidze, Joanna Evans, Jessica Gavron, Dariana Gryaznova, Tamilla Imanova, Kirill Koroteev and Kate Levine. While there is insufficient room in this article to cover all relevant litigation, important cases in this region have been brought by many other dedicated lawyers including Mari Davtyan, Valentina Frolova, Olga Gnezdilova and Vanessa Kogan. The author pays tribute to all colleagues working in this field and in particular to all former colleagues at Memorial Human Rights Centre (Nobel Peace Prize winner 2022) which was liquidated by the Russian authorities in 2022.

[2] *See* Eur. Conv. on H.R., EUR. CT. H.R., www.echr.coe.int/documents/convention_eng.pdf; *See also The Eur. Conv. on H.R*, COUNCIL OF EUR.,

and entering into force in 1953.[3] No state may be a member of the Council of Europe without ratification of the Convention.

The implementation of the Convention falls to the European Court of Human Rights ("ECtHR").[4] Any individual within the jurisdiction of a member state of the Council of Europe may complain to the ECtHR regarding a violation of their rights under the Convention providing all possible domestic remedies have been exhausted in the relevant jurisdiction.[5]

It should be noted that the Council of Europe is distinct from the European Union ("EU"), and its membership goes beyond that of the 27 EU member states to include countries such as Albania, Armenia, Azerbaijan, Georgia, Turkey and Ukraine.[6] As such, the United Kingdom, for example, is able to remain a member of the

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https://www.coe.int/en/web/human-rights-convention (current state of the Convention and its protocols plus declarations and reservations).

[3] *See The Eur. Conv. On H.R.*, *supra* note 2. The Council of Europe was founded in 1949 as part of the process of European construction which followed the two world wars. It is the continent's leading human rights organization. The Council's decision-making body is called the Committee of Ministers ['CoM'] and is made up of the ministers of foreign affairs of each member state or their permanent diplomatic representatives in Strasbourg. The CoM decides Council of Europe policy and approves its budget and activities. The Parliamentary Assembly of the Council of Europe ['PACE'] consists of 306 members of parliament from the 46 member states and provides a democratic forum for debate as well as the examination of current issues through committees. PACE also elects the Secretary General of the Council of Europe, the Human Rights Commissioner and judges to the European Court of Human Rights. For further information about the wider structure and work of the Council of Europe see COUNCIL OF EUR., www.coe.int.

[4] The European Court of Human Rights ['ECtHR'] was established in 1959 and sits in Strasbourg France. The ECtHR rules on alleged individual and state violations of the European Convention on Human Rights ['ECHR']. Its judgments are binding on member states. The judges of the ECtHR are elected by the Parliamentary Assembly of the Council of Europe ['PACE']. The ECtHR is an entirely separate entity from the European Court of Justice ['ECJ'] which is based in Luxembourg and ensures the compliance with European Union law and the application of treaties establishing the European Union.

[5] Article 35(1) of the ECHR provides i*nter alia* that "The Court may only deal with the matter after all domestic remedies have been exhausted . . . ." *See* Eur. Conv. on H.R., *supra,* note 2.

[6] *See Map & Members*, COUNCIL OF EUR. OFF. IN GEORGIA, https://www.coe.int/en/web/tbilisi/thecoe/objectivesandmisions#:~:text=It%20now%20has%2046%20member,%2C%20the%20Czech%20Republic%2C%20Slovakia%2C (last visited Jan. 24, 2023).

Council of Europe despite its departure from the European Union in January 2021.[7]

The Russian Federation's membership of the Council of Europe commenced in 1996 and ended in March 2022.[8] A decision of the Committee of Ministers' of the Council of Europe ("CoM")[9] which ended Russia's membership of the organization was adopted in response to "the war of aggression waged by the Russian Federation against the Ukraine."[10] This decision was the culmination of a series of events,[11] including notification by the Russian Federation of its intention to withdraw from the Council of Europe and to denounce the European Convention on Human Rights.[12] Although the Russian Federation ceased to be a member of the Council of Europe as of March 16, 2022, due to the provisions of the European Convention on Human Rights, it did not cease to be a High Contracting Party to the Convention until September 16, 2022.[13]

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[7] *See id.*

[8] *See* Committee of Ministers, *The Russian Federation is excluded from the Council of Europe*, COUNCIL OF EUR. (Mar. 16, 2022), https://www.coe.int/en/web/portal/-/the-russian-federation-is-excluded-from-the-council-of-europe.

[9] *See supra* note 2 and accompanying text (explaining the CoM).

[10] *See Resolution CM/Res (2022) 2 on the Cessation of the Membership of the Russian Federation to the Council of Europe*, COUNCIL OF EUR. (Mar. 16, 2022), https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a5da51; *Consequences of the Aggression of the Russian Federation Against Ukraine*, COUNCIL OF EUR. (Apr. 6, 2022), https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a60b5e.

[11] For further information on the full chain of events leading up to Russia's exclusion from the Council of Europe see *The Russian Federation is Excluded From The Council of Europe*, COUNCIL OF EUR. (Mar. 16, 2022), https://www.coe.int/en/web/portal/-/the-russian-federation-is-excluded-from-the-council-of-erope#:~:text=On%2015%20March%2C%20the%20Government,European%20Convention%20on%20Human%20Rights;Nikos Vogiatzis, *No Longer a Member State of the Organization: The Expulsion of Russia From The Council of Europe and Articles 7 and 8 of The Statute*, ECHR BLOG (Mar. 17, 2022) https://www.echrblog.com/2022/03/no-longer-member-state-of-organisation.html.

[12] The provisions for a member state's withdrawal from the Council of Europe can be found in Article 7 of the Statute of the Council of Europe. *See Statute of the Council of Europe*, COUNCIL OF EUR., https://assembly.coe.int/nw/xml/RoP/Statut_CE_2015-EN.pdf (last visited Aug. 20, 2022).

[13] This is in accordance with the provisions of Article 58 of the European Convention on Human Rights. *See* Eur. Conv. on H.R., *supra,* note 2, at 31 (providing that a High Contracting Party may denounce the Convention only after a six

By virtue of the geographic breadth of the Council of Europe, the jurisdiction of the ECtHR covers a wide and varied range of countries which span huge regional and cultural variations. With regard to gender equality and violence against women, it is notable, for instance, that the Council of Europe still includes domestic jurisdictions where crimes of sexual violence are not defined by lack of consent.[14] Instead, the focus is placed upon the question of whether the prosecution can establish violence, threats of violence, or the "helpless" condition of the victim.[15] In short, sexual touching or intercourse without consent of both parties is not a crime in these jurisdictions.[16] There are also jurisdictions in which domestic

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month notice period has been provided in a notification addressed to the Secretary General of the Council of Europe and that

> such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective

and that "*any High Contracting Party which shall cease to be a member of the Council of Europe shall cease to be a Party to this Convention under the same conditions"*) (emphasis added). *See also Resolution CM/Res (2022) 3 on Legal and Financial Consequences of the Cessation of Membership of the Russian Federation in the Council of Europe*, COUNCIL OF EUR. (Mar. 23, 2022), https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a5ee2f; Eur. Ct. H.R., *Resolution of the European Court of Human Right on The Consequences of The Cessation of Membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights*, COUNCIL OF EUR. (Mar. 22, 2022), https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a5ee2f.

[14] *Roadblocks to Justice: How the Law is Failing Survivors of Sexual Violence in Eurasia*, EQUALITY NOW, 10-11, https://d3n8a8pro7vhmx.cloudfront.net/equalitynow/pages/1581/attachments/original/1547485403/EN-Eurasia_Rpt_ENG_-_Web.pdf?1547485403

[15] *Id.* at 13.

[16] *See e.g.*, *id.* (Selected legislative provisions set out in the Annex to the 2019 report by Equality Now). For a country specific analysis, *see also* Joanna Evans & Mar Hermosilla Serra, *Gap Analysis of the Legislative and Policy Framework in the Field of Violence Against Women and Domestic Violence in Azerbaijan in line with Council of Europe and Other International Standards*, COUNCIL OF EUR., 19 (June 2022), https://rm.coe.int/gap-analysis-of-the-legislative-and-policy-framework-en-final/native/1680a76b70.

violence is not fully criminalized and where state and institutional support prioritizes the continuation of a marriage and keeping the family together above the protection of women and children from harm. [17]

The Council of Europe has formally recognized that "persisting inequalities between women and men, gender bias and stereotypes also result in unequal access of women and men to justice."[18] These inequalities are compounded in regions where access to legal advice and support is limited and where religious, cultural and community structural barriers and taboos prevent victims from seeking justice. In regions experiencing conflict or widespread oppression of civil society, the 'invisibility' of gender–based violence in the home can be further heightened due to a focus upon high profile atrocities occurring in the public rather than private arena.

In addition to the challenges presented by the breadth and diversity of this jurisdiction, the ECtHR faces enormous practical challenges and pressures due to the high number of applications it receives, its long–standing backlog of cases and often lengthy delays in reaching judgment. The ECtHR's annual report for 2021 reported 70,150 pending cases[19] and applicants can wait many years for judgment to be handed down in their cases. The CoE also faces

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[17] *See e.g. Roadblocks to Justice: How the Law is Failing Survivors of Sexual Violence in Eurasia*, EQUALITY NOW, https://d3n8a8pro7vhmx.cloudfront.net/equalitynow/pages/1581/attachments/original/1547485403/EN-Eurasia_Rpt_ENG_-_Web.pdf?1547485403); Evans & Hermosilla Serra, *supra* note 10. *See generally,* Elisabeth Duban, *Research of Preventing and Combating Violence Against Women and Domestic Violence Including in Situations of Social Disadvantage in the Russian Federation*, COUNCIL OF EUR. (Apr. 2020), https://rm.coe.int/publication-research-on-vaw-and-dv-in-situations-of-social-disadvantage/16809e4a04.

[18] *See Guaranteeing Equal Access of Women to Justice*, COUNCIL OF EUR., https://www.coe.int/en/web/genderequality/equal-access-of-women-to-justice#:~:text=Reasons%20advanced%20include%20lack%20of,of%20various%20forms%20of%20discrimination. *See generally Gender Equality Strategy 2018-2023*, COUNCIL OF EUR., 1, 12, https://rm.coe.int/ge-strategy-2018-2023/1680791246.

[19] Eur. Ct. of H.R., *Annual Report 2021*, COUNCIL OF EUR, 169, 179, https://www.echr.coe.int/Documents/Annual_report_2021_ENG.pdf.

significant challenges in ensuring state implementation of judgments once handed down.[20]

Against this background, while acknowledging the important advances achieved by the ECtHR's existing case law on violence against women and domestic violence,[21] and with ever increasing pressure on resources, it is crucial that the ECtHR takes steps to ensures that its own practice and procedures consistently include a gender perspective and encompass best practice in gender mainstreaming[22] to ensure that the ECtHR itself never plays a role in

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[20] *See Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights*, 15TH ANN. REP. OF THE COMM. OF MINISTERS (2021), https://rm.coe.int/2021-cm-annual-report-en/1680a60140 (At the date of publication of the last annual report, 5,533 of the ECtHR's judgments remained unenforced.).

[21] The ECtHR has produced several fact sheets that summarize some of its key judgments in a range of areas. These areas include violence against women, domestic violence, and gender equality. *See Violence against women*, EUR. CT. H.R. (Mar. 2022), https://www.echr.coe.int/documents/fs_violence_woman_eng.pdf; *Domestic violence*, EUR. CT OF H.R. (July 2022), https://www.echr.coe.int/Documents/FS_Domestic_violence_ENG.pdf; *Gender equality*, EUR. CT. H.R. (July 2022), https://www.echr.coe.int/Documents/FS_Gender_Equality_ENG.pdf.

[22] *What is gender mainstreaming?*, COUNCIL OF EUR., https://www.coe.int/en/web/genderequality/what-is-gender-mainstreaming.

> Notably, in 1998, the Council of Europe defined gender mainstreaming as: 'The (re)organisation, improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in all policies at all levels and at all stages, by the actors normally involved in policy-making . . . .Gender mainstreaming means integrating a gender equality perspective at all stages and levels of policies, programmes and projects. Women and men have different needs and living conditions and circumstances, including unequal access to and control over power, resources, human rights and institutions, including the justice system. The situations of women and men also differ according to country, region, age, ethnic or social origin, or other factors. The aim of gender mainstreaming is to take into account these differences when designing, implementing and evaluating policies, programs, and projects, so that they benefit both women and men and do not increase inequality but enhance gender equality. Gender mainstreaming aims to solve —sometimes hidden- gender inequalities. It is therefore a tool for achieving gender equality.'

perpetuating the cycles of discrimination and neglect that often characterize judicial treatment of this form of abuse.

II. PREVENTION & PROTECTION

An analysis of ECtHR jurisprudence suggests a puzzling lacuna with regard to the protection of victims or survivors of domestic violence from serious harm or death.[23]

Many domestic violence cases come before the ECtHR only after long–term abuse ends in a fatality. These applications are usually brought by the dead victim's family and allegations often focus on the failure of state authorities to protect the dead victim's right to life.[24] A smaller number of cases emanate from survivors of domestic abuse who apply to the ECtHR before any fatality has occurred in the hope of redress for abuse already sustained and protection from future violence. In these circumstances, where a domestic jurisdiction does not offer adequate protection from life–threatening harm, it is open to the survivor – as it is to any applicant facing a real risk of serious irreversible harm – to seek interim protection from the ECtHR in the form of 'interim measures.' Such measures, if granted, are legally binding upon the state concerned.[25]

The ECtHR's power to issue interim measures in urgent cases where there is an imminent risk of irreparable harm is set out broadly within Rule 39 of the Rules of Court.[26] However, Rule 39 is complemented and narrowed by a Practice Direction which notes *inter alia,* that "interim measures are only applied in exceptional cases"

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[23] In addition to the absence of any such cases cited in the ECtHR's fact sheets on interim measures or violence against women, this analysis is based on the personal experience of the author and other lawyers practicing in this area before the ECtHR.

[24] *See generally Violence against women*, *supra* note 21.

[25] Rule 39(1) of the ECtHR's Rules of Court provides that: "The Chamber, or where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule, may, at the request of a party or of any other person concerned, or of their own motion, indicate to parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings."
See also Factsheet Interim measures, EUR. CT OF H.R. (July. 2022), at https://www.echr.coe.int/documents/fs_interim_measures_eng.pdf.

[26] *Rules of Court*, Eur. Ct. of H.R. (June 3, 2022), https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf. *See also* Eur. Ct. of H.R., *supra* note 19.

and that the Court will only issue such a measure against a Member State where, "having reviewed all the relevant information, it considers that the applicant faces a real risk of serious, irreversible harm if the measure is not applied."[27]

The ECtHR fact sheet on interim measures further notes that "as interim measures are indicated by the Court only in well–defined circumstances (where there is a risk of a serious and irremediable violation of the European Convention on Human Rights), most requests are rejected."[28] In 2021, of 1,920 submitted requests for interim measures, 227 were granted.[29] There is, of course, no quota for the issuing of such measures, as each application must be considered individually by reference to the ECtHR's own tests.[30] However, in the absence of reasoned judgements from the ECtHR, it is not always clear why some applications for interim measures are granted while others are not. In particular, there is a notable lack of examples of interim measures being granted by the ECtHR for the protection of applicants facing "a real risk of serious, irreversible harm"[31] as a result of ongoing domestic abuse or other gender–based harm.

Given the ECtHR has the power to provide protection on an interim basis, applicants are entitled to expect that this power will be employed rationally, by reference to the specifics of the application in each individual case and without any form of discrimination. In the context of domestic violence, this is likely to mean that any applicant who is able to establish that she faces a real risk of serious irreversible harm without the application of interim measures would be entitled to the Court's protection. By granting interim measures in such cases, the ECtHR would be using its powers to try to ensure that the applicant in question remains alive and safe from harm while awaiting the ECtHR's judgment (which can sometimes take many

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[27] *Practice Directions: Requests for Interim Measures*, EUR. CT. OF H.R., https://www.echr.coe.int/Documents/PD_interim_measures_ENG.pdf (issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 5 March 2003 and amended on 16 October 2009 and on 7 July 2011).

[28] *See Fact sheet - Interim measures*, EUR. CT OF H.R. (July. 2022), https://www.echr.coe.int/documents/fs_interim_measures_eng.pdf.

[29] *Analysis of statistics 2021*, EUR. CT OF H.R. (Jan. 2022), https://www.echr.coe.int/Documents/Stats_analysis_2021_ENG.pdf.

[30] *See* Practice Directions: Requests for Interim Measures, *supra* note 27.

[31] *Id.*

years). The failure to use such powers risks the spectacle of a human rights court that chooses not to act when harm is still preventable but waits instead to proclaim upon violations after serious harm or a fatality has occurred.

Recent examples of successful applications for interim measures granted by the ECtHR include the high–profile response to the request from the Ukrainian Government to indicate urgent interim measures to the Government of the Russian Federation. The application had been made following what the ECtHR described as "massive human rights violations being committed by the Russian troops in the course of military aggression against the sovereign territory of the Ukraine."[32] The ECtHR decided that, with an aim to prevent such violations, it would

> indicate to the Government of Russia to refrain from military attacks against civilians and civilian objects, including residential premises, emergency vehicles and other specially protected civilian objects such as schools and hospitals, and to ensure immediately the safety of the medical establishments, personnel and emergency vehicles within the territory under attack or siege by Russian troops.[33]

In assessing this application, the ECtHR held that the evidence gave rise to "a real and continuing risk of serious violations of the Convention rights of the civilian population" and the measures indicated were framed in an attempt to protect the civilian population as a whole from violations of the right to life and the right to freedom from torture or inhuman or degrading treatment or punishment.[34]

The power is also regularly used to protect identified individuals in less publicized circumstances. Examples include interim measures granted by the ECtHR:

- to protect asylum seekers from being deported back to countries where the ECtHR has determined that there is a risk of

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[32] Press Release: Interim Measures, EUR. CT OF H.R. (Jan. 3, 2022), https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-7272764-9905947%22]} (stating "'The European Court grants urgent interim measures in application concerning Russian military operations on Ukrainian territory").
[33] *Id.*
[34] *Id.*

treatment contrary to the applicant's Convention rights.[35] This has included instances where it was concluded that the applicant would face risk of ill–treatment in relation to sexual orientation;[36] genital mutilation;[37] social exclusion;[38] and inability to receive medical treatment for an advanced medical condition if deported; [39]

- to ensure that an applicant would benefit from appropriate representation in judicial proceedings;[40]
- to stay an eviction order;[41]
- to prevent the discontinuance of medical care;[42] and
- to release a detainee from detention due to the "nature and extent of risk to the applicant's life . . . seen in the light of the overall circumstances of the applicant's current detention."[43]

Consideration of the selection of cases where the ECtHR has exercised its power to grant interim measures provides little in the way

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[35] *See e.g.* Eur. Ct. of H.R., *Press Release: Further requests for interim measures in cases concerning asylum-seekers' imminent removal from the UK to Rwanda*, COUNCIL OF EUR. (June 15, 2022), https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-7360933-10056317%22]}, (The ECtHR granted interim measures against the United Kingdom preventing an Iraqi asylum seeker from being removed to Rwanda until three weeks after the delivery of the final domestic decision in the applicant's ongoing judicial review.); Eur. Ct. of H.R., *Press Release: The European Court grants urgent interim measure in case concerning asylum seeker's imminent removal from the UK to Rwanda*, COUNCIL OF EUR. (June 14, 2022), https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-7359967-10054452%22]}.

[36] Fact sheet – Interim measures, *supra* note 28, at 4 (describing M. E. v. Sweden App. No. 71398/12 (April 8, 2015).

[37] *Id.*at 5 (describing Abraham Lunguli v. Sweden, App. No. 33692/02, 1, 2 (July 1, 2003)).

[38] *Id.* (describing Hossein Kheel v. the Netherlands, App. No. 34583/08, 1, 2 (Dec. 16, 2008)).

[39] *Id.* at 6 (describing D. v. The United Kingdom, App. No. 30240/96, 1 (May 2, 1997) and Khachaturov v. Armenia, App. No. 59687/17, ¶¶35-36 (June 24, 2021)).

[40] *Id.* at 7 (describing Öcalan v. Turkey, App. No. 46221/99 (May 12, 2005)).

[41] *Id* at 12 (describing Yordanova v. Bulgaria, App. No. 25446/06, ¶56 (April 24, 2012)).

[42] Factsheet – Interim Measures, *supra* note at 10 (describing Lambert v. France, App. No. 46043/14, ¶45 (June 5, 2005)).

[43] *The Court grants an interim measure in favor of Aleksey Navalny and asks the Government of Russia to releasee him*, EUR. CT. H.R., (Feb 17, 2021), https://assembly.coe.int/LifeRay/APCE/pdf/Communication/2022/ECHR-063-2021-EN.pdf.

of additional analysis or guidance as to the basis upon which the ECtHR makes such decisions. Those reasons that are provided by the ECtHR reinforce the test set out in the practice direction,[44] and described in the fact sheet *i.e.* where having reviewed all the relevant information, the ECtHR considers that the applicant faces a real risk of serious, irreversible harm if the measure is not applied.[45] It is not difficult to imagine how domestic abuse cases could meet the requirements of this threshold test and yet the ECtHR's fact sheet on interim measures provides not one example of such use.[46] Considering the diverse breadth of situations in which the ECtHR has granted interim measures to protect applicants from imminent risk of irreparable harm, it is both surprising and disappointing to discover the noticeable absence of protection provided under this provision to applicant victims of domestic abuse. [47] An examination of the following case study highlights the seeming inconsistencies of the ECtHR's approach as well as the lacunae in protection which arises as a result.

In the case of *K v Russia*,[48] the applicant ('K'), was born in 1994 and lived in Dagestan, Russia.[49] She married her husband in 2014 when she was 20 years old and gave birth to their son the following year.[50] At the time of her application to the ECtHR in 2021, she had endured almost seven years of sustained abuse at the hands of her husband and latterly ex–husband and specific threats of future harm.[51] In the absence of protection within her domestic jurisdiction of Russia, K applied to the ECtHR for interim protection

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[44] *See* Practice Directions: Requests for Interim Measures, *supra* note 27.
[45] Fact sheet - Interim measures, *supra* note 28.
[46] *See id*. Although the factsheet does not provide a comprehensive list of all cases in which interim measures have been granted, in addition to the absence of examples from the ECtHR's fact sheet, the author and fellow practitioners in this field are unaware of any such case in practice.
[47] *Id.*
[48] Kazanbiyeva v Russia, App. No. 3731/21, ¶1 (Jan. 22, 2021), https://hudoc.echr.coe.int/eng?i=001-208035.
[49] Dagestan is a republic of the Russian Federation, situated in the North Caucasus in southwestern Russia. It borders Chechnya and Georgia to the west, Azerbaijan to the south and the Caspian Sea to the east.
[50] Kazanbiyeva v Russia, App. No. 3731/21, ¶¶ 3-4 (Jan. 22, 2021), https://hudoc.echr.coe.int/eng?i=001-208035.
[51] *Id.* ¶¶ 4-11.

measures.[52] In spite of the evidence she presented as to the imminent risk of irreparable harm that she faced from her abusive ex–husband, her application was not granted.[53]

K relied upon a history of severe physical and psychological abuse which had endured over more than seven years and which she also relied upon in her substantive application before the ECtHR.[54] Her application set out for the ECtHR a history of escalating abuse over that period which had commenced with a physical assault within months of the marriage and while she was pregnant with their child.[55] She stated that over the years, the abuse had escalated and included dragging her upstairs, repeated threats to her life, severe beatings including with a stick, kicking, choking, and threats with a knife.[56]

She had tried to escape several times but was always pursued and faced violent consequences when caught.[57] In 2018, after K had fled to her parents' home, her husband threw a rock through her parents' window and started pouring petrol over the house threatening "if you don't come out, you're going to burn alive."[58] A police officer who attended did not draw up a report or detain K's husband.[59] In September 2019 K's abuser, who by this point, was her ex–husband, after sending multiple threatening text messages to her phone, broke into her parents' home and launched a lengthy and vicious attack upon her.[60] In the course of the attack, he broke her jaw, fractured her arm by jumping on it, and pressed the blade of a knife into

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[52] *See generally* Applicant Request for Rule 39, Kazanbiveya v. Russia, App. No. 3713/21, (Jan. 22, 2021) (on file with the author) (containing the rejected application for interim measures).

[53] Applicant Request for Rule 39, Kazanbiveya v. Russia, App. No. 3713/21, (Jan. 22, 2021) (on file with the author) (containing the rejected application for interim measures).

[54] Kazanbiyeva v Russia, App. No. 3731/21, ¶ 4-11 (Jan. 22, 2021), https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22kazanbiyeva%22],%22itemid%22:[%22001-208035%22]}.

[55] *Id.*

[56] *Id.* ¶¶ 5-7, 9.

[57] *Id.* ¶¶ 1-18.

[58] *Id.* ¶7.

[59] *Id.*

[60] Kazanbiyeva v Russia, App. No. 3731/21, ¶9 (Jan. 22, 2021), https://hudoc.echr.coe.int/eng?i=001-208035.

her cheek while threatening to kill her.[61] He then attempted to cut off her little finger with a knife while asking "are you blocking my number with these fingers." [62]

Following this attack, K was found unconscious in the street by neighbors who called an ambulance.[63] She required 11 days treatment in an intensive care unit where she was treated for injuries including a traumatic brain injury, a fractured jaw and arm, wounds to her forehead, and contusions to her face and rib cage.[64]

Criminal proceedings were finally brought against K's ex–husband by the authorities.[65] However, in spite of the nature and gravity of the actions and injuries involved, the harm which he caused to her was defined in domestic proceedings only as 'medium gravity,'[66] minimizing the gravity of the offense and limiting the potential sentences available upon conviction. Her abuser was latterly charged with the additional offenses of forcibly breaking into a private residence and threatening the applicant with murder.[67] In November 2019, he was placed in pre–trial detention for one month.[68] In December 2019, this was varied to house arrest with a prohibition from sending or receiving postal or online communications.[69]

The abuse against K continued to occur even during the single set of criminal proceedings that had been instituted.[70] In the course of the December 2019 hearing, both K and her ex–husband were seated close enough together that the defendant was able to threaten her verbally in court during the hearing.[71] He told her that he intended to kill her in order to finish what he had started.[72] Notably, Russia has no procedural provisions in place to protect vulnerable

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[61] *Id.* ¶¶ 9-10.
[62] *Id.* ¶ 10.
[63] *Id.*
[64] *Id.* ¶¶ 10-11.
[65] *Id.* ¶12.
[66] Kazanbiyeva v Russia, App. No. 3731/21, ¶12 (Jan. 22, 2021), https://hudoc.echr.coe.int/eng?i=001-208035.
[67] *Id.*
[68] *Id.* ¶13.
[69] *Id.*
[70] *Id.*; Applicant Request for Rule 39, Kazanbiyeva v. Russia, App. No. 3731/21, ¶¶ 7-8, (Jan. 22, 2021) (on file with the author).
[71] *See* Kazanbiyeva v Russia, App. No. 3731/21, ¶13 (Jan. 22, 2021), https://hudoc.echr.coe.int/eng?i=001-208035.
[72] *Id.*

victims from exposure to their assailants or alleged assailants during the court process nor does any form of restraining or protective order exist.[73]

K, via her lawyer, challenged the categorization of her injuries as "medium gravity," arguing that she had been left with permanent disfigurement of her face which amounted to serious bodily injury rather than harm of "medium gravity."[74] She also requested that the abuse she had suffered prior to the September 2019 assault be the subject of a criminal investigation that considered the pattern of behavior as a whole.[75] However, at the time of submission to the ECtHR in January 2021 no change had been made to the original conclusions that the applicant was challenging and there is no evidence that any amendment followed since.[76]

Ultimately, the defendant was convicted "of making death threats and causing medium–gravity bodily harm to the applicant and unlawfully penetrating into her home."[77] The sentencing judge stated he had taken into consideration that the crimes committed were "of minor gravity," and that the perpetrator had no criminal record[78] thereby emphasizing once again, the deleterious effect of prior abuse being ignored by investigating authorities in cases such as these.

The sentence passed was one of one year and one month's imprisonment.[79] Having been convicted and imprisoned on October 27, 2020, under Russian law, the perpetrator became eligible for

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[73] *See* Tunikova v Russia, App. No. 55974/16, ¶¶ 98, 109 (Dec. 14, 2021), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-213869%22]}.

[74] Kazanbiyeva v Russia, App. No. 3731/21, ¶14 (Jan. 22, 2021), https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22kazanbiyeva%22],%22itemid%22:[%22001-208035%22]}.

[75] *See id.* ¶16.

[76] *See generally,* Kazanbiyeva v Russia, App. No. 3731/21, (Jan. 22, 2021), https://hudoc.echr.coe.int/eng?i=001-208035; L.A. and Others v Russia, App. No. 27368/119 (Oct. 4 2022), https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22kazanbiyeva%22],%22documentcollectionid2%22:[%22JUDGMENTS%22],%22itemid%22:[%22001-219777%22]}.

[77] Kazanbiyeva v Russia, App. No. 3731/21, ¶18 (Jan. 22, 2021), https://hudoc.echr.coe.int/eng?i=001-208035.

[78] *Id.*

[79] *Id.*

release from custody by January 2021.[80] He had served less than three months in custody.[81] In light of the history of his previous conduct, the physical and psychological harm that K had already sustained, and her abuser's ongoing threats to kill her and "finish what he had started" K applied to the courts in Russia and ultimately the ECtHR for protection from further harm in the context of his imminent release.[82]

As no domestic provisions existed for protection or restraining orders in the circumstances of K's case,[83] the applicant made a request instead for 'State protection measures.'[84] This was the only potential measure available to her at domestic level but even that was not forthcoming.[85] In September 2020, the Ministry of Interior refused her application (without a reasoned decision) on the basis that "they did not find any risks to her life, health or well–being."[86]

Having exhausted all possibilities for protection in her home jurisdiction, K submitted her application for interim measures to the

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[80] Applicant Request for Rule 39, Kazanbiyeva v. Russia, App. No. 3731/21, ¶¶ 17-18 (Jan. 22, 2021) (conveying the urgent request for interim measures from the ECtHR sent electronically to the court on Jan. 24, 2021) (on file with the author).

[81] *See id* at ¶18.

[82] *See id.* ¶¶1-2.

[83] *See* Tunikova v Russia, App. No. 55974/16, ¶98, 109 (Dec. 14, 2021), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-213869%22]}.

[84] Kazanbiyeva v Russia, App. No. 3731/21, ¶17 (Jan. 22, 2021), https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22kazanbiyeva%22],%22itemid%22:[%22001-208035%22]}. The ECtHR's Statement of Facts relays that following the applicant's application for State protection measures,

> she was visited at home by men claiming to be from the Dagestan Ministry of Interior who offered her a number of options for protection measures, such as sending two officers to live with her in her house or renting an apartment for her and her children to live with the officers. The applicant declined the first option because there was no free room in the house and told them that she would consider the second option together . . . .The officers proposed a further meeting . . . but left no contact details.

Subsequently, the applicant heard that her application had been refused by the Ministry of Interior.

[85] *Id.* ¶¶ 17-8.

[86] *See id.* ¶17.

ECtHR in the days before it was anticipated that her ex–husband would be released from serving the short prison sentence which had been imposed upon him for his most recent life–threatening attack upon her.[87]

In line with the ECtHR's procedural rules and practice, the application was made on the basis that the history of the case; which included the previous life threatening assaults, the ongoing threats to harm or kill her (made by an assailant who had shown a determination to do so over many years), and the absence of any protection at domestic level amounted to clear evidence of imminent risk of irreparable harm.[88] In summary, there was a real and imminent risk that upon release he would kill or harm her. No lethality assessment had been made by the domestic authorities and no meaningful steps had been taken to protect K from future harm in spite of the authorities being alerted to the ongoing risk to her life and health.[89]

K's application to the ECtHR was refused.[90] As is common with applications for interim measures before the ECtHR, no reasoned decision was provided for the refusal, which necessarily limits the extent to which the decision–making process can be scrutinized.[91] However, on an objective assessment of the facts, it is difficult to understand how this situation of domestic abuse and others like it (providing the relevant evidential threshold is met), do not merit the protection of the ECtHR's interim measures procedure. Furthermore, while domestic abuse is not limited to any specific group, it

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[87] Applicant Request for Rule 39, Kazanbiyeva v. Russia, App. No. 3731/21, ¶20 (Jan. 22, 2021) (conveying the urgent request for interim measures from the ECtHR sent electronically to the court on Jan. 24, 2021) (on file with the author). In January 2021, prior to her abuser's release from custody, K made two requests to the ECtHR for interim measures. Both were refused without any reasoned decision from the ECtHR. *Id.* ¶¶ 2-3; Decision on Interim Measure Application, Kazanbiyeva v. Russia, App. No. 3731/21, 1, (Jan. 22, 2021) (rejecting K's application for interim measures via electronic communication on Jan. 25, 2021).

[88] *See generally* Applicant Request for Rule 39, Kazanbiyeva v. Russia, App. No. 3731/21, (Jan. 22, 2021) (conveying the urgent request for interim measures from the ECtHR sent electronically to the court on Jan. 24, 2021) (on file with the author).

[89] *See generally id.*

[90] Decision on Interim Measure Application, Kazanbiyeva v. Russia, App. No. 3731/21, 1, (Jan. 22, 2021) (rejecting K's application for interim measures via electronic communication on Jan. 25, 2021).

[91] *See id.*

is recognized to disproportionately affect women and children and as such, any failure to provide appropriate protection in this group of cases potentially has discriminatory impact.[92] Once again this raises the crucial question of whether the ECtHR is approaching such cases with an appropriate gender perspective.

The case of *R.R. and Others v. Hungary* presents an interesting comparison.[93] R.R. was a police informant who had previously been a member of a drug–trafficking mafia group.[94] Upon arrest by Hungarian police, he admitted to various offenses and was given a plea–bargain in exchange for information about the mafia group's activities.[95] He was convicted of aggravated abuse of narcotics, firearm offenses, and other such offenses causing him to be sentenced to nine years of imprisonment.[96] The fact that he had testified in open court was recognized to have exposed him to risk of retaliation from the criminal fraternity and he and his family were enrolled in the Hungarian witness protection scheme.[97] However, both he and his family were subsequently excluded from the protection of the scheme when it was discovered that the father, who was in prison, had remained in contact with criminal groups.[98] An application on behalf of the family for interim measures to guarantee the family's safety was granted.[99] The ECtHR indicated to the Government of Hungary that "all necessary measures be taken in order to guarantee

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[92] *See Domestic abuse is a gendered crime*, WOMEN'S AID, https://www.womensaid.org.uk/information-support/what-is-domestic-abuse/domestic-abuse-is-a-gendered-crime/ (last visited Jan. 20, 2023); *The impact of domestic abuse on children and young people*, WOMEN'S AID, https://www.womensaid.org.uk/information-support/what-is-domestic-abuse/impact-on-children-and-young-people/; Mark Brooks, *Male victims of domestic abuse and partner abuse: 55 key facts*, MANKIND INITIATIVE (Apr. 2021), https://www.mankind.org.uk/wp-content/uploads/2021/04/55-Key-Facts-about-Male-Victims-of-Domestic-Abuse-and-Partner-Abuse-Final-Published-April-2021.pdf

[93] *See generally* R.R. v. Hungary, App. No. 19400/11, (Dec. 4, 2012), https://hudoc.echr.coe.int/fre?i=001-115019.

[94] *Id.* at ¶5.

[95] *Id.* ¶6.

[96] *Id*. ¶13.

[97] *Id.* ¶¶ 13,18.

[98] R.R. v. Hungary, App. No. 19400/11, ¶¶ 15-18 (Dec. 4, 2012), https://hudoc.echr.coe.int/fre?i=001-115019.

[99] *Id.* ¶4.

the applicants' personal security pending the Court's examination of the case."[100]

In a decision that provides more expansive reasoning than most ECtHR interim measures decisions, the ECtHR found that

> the applicants were excluded from the programme for reasons other than the elimination of risks, and finds that the Government had not shown . . . that the risks had ceased to exist . . . .Given the importance of witness protection reflected by the Court's case-law . . . the Court cannot but conclude that the authorities' actions . . . fell short of the requirements of Article 2 of the Convention.[101]

In addition to the granting of interim measures, the ECtHR even went so far as to comment on the need for the state to redress the effects of the breach of the rights of the family, who had been excluded from the witness protection programme without the authorities having ensured that the threat against them had ceased or having taken the necessary measures to protect their lives.[102] The ECtHR held that Hungary should take measures to adequately protect the applicants, including proper cover identities if necessary, equivalent to those provided by the Scheme until such time as the threat could be proved to have ceased.[103]

Although far from identical, on a comparison of both decisions, it appears that the test has been applied in an inconsistent and potentially discriminatory manner.[104] An assessment of both decisions side by side, gives rise to the impression (in a familiar experience for those working in the field of domestic violence) that violence within the home or "private" sphere is not accorded the same level of state protection as violence within the public domain. This is a distinction that lawyers working on cases of violence against women

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[100] *See generally* R.R. v. Hungary, App. No. 19400/11, ¶4 (Dec. 4, 2012), https://hudoc.echr.coe.int/fre?i=001-115019.
[101] *Id.* ¶¶ 31-2.
[102] *Id.* ¶¶ 7-40.
[103] *Id.*
[104] *See generally id.*; Kazanbiyeva v Russia, App. No. 3731/21, (Jan. 22, 2021), https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22kazanbiyeva%22],%22itemid%22:[%22001-208035%22]}.

before the ECtHR have noted — some concerned that there even exists an unofficial policy that the ECtHR will not issue interim measures in cases of domestic violence.

Such concerns could best be allayed by the ECtHR providing reasoned judgments for its refusals in future cases. The inclusion of reasons would allow an applicant who has approached the ECtHR for protection from irreversible harm to understand the basis upon which the protection sought has been refused. The provision of such reasoning is usually a basic and minimum requirement of any court decision. Secondly, future applicants — potentially choosing where to focus time and resources at a time sensitive point of great danger in their lives — would be empowered to assess the merits of their individual application by reference to reasoned jurisprudence. In the absence of such reasoning, the current veil of mystery which surrounds the ECtHR's approach to the granting of interim measures can only aggravate both the distress caused to applicants upon refusal, as well as increasing the number of unsuccessful applications received by the ECtHR.

In spite of the refusal of K's application for interim measures, her case was communicated to the Government on January 15, 2021, within a week of its submission.[105] At the time of writing, more than eighteen months have passed since that date and the applicant remains unprotected. In common with many other cases waiting on the court's docket, there is no indication as to when judgment will be handed down.[106] Without reasoned judgment from the ECtHR, it

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[105] *See generally* Kazanbiyeva v Russia, App. No. 3731/21, (Jan. 22, 2021), https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22kazanbiyeva%22],%22itemid%22:[%22001-208035%22]}.

[106] After this article had been written but prior to its publication, on 4 October 2022, the case of Kazanbiyeva v Russia was joined with 13 other cases to be examined jointly with the case of L.A. and Others v Russia (Application 27368/19) in a single judgment ECtHR. L.A. and Others v Russia, App. No. 27368/119 (Oct. 4 2022), https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22kazanbiyeva%22],%22documentcollectionid2%22:[%22JUDGMENTS%22],%22itemid%22:[%22001-219777%22]}.

> All joined applications concerned the Russian authorities alleged failures to protect the applicants from acts of domestic violence or to carry out an effective investigation into these acts. Within the judgment, the ECtHR reiterated that "autonomous, proactive and comprehensive risk assessment is critical

is difficult to understand its rationale for it refusing to grant interim measures with a view to protecting the applicant when it has been prepared to take such steps in response to a wide range of potential harms against others.

III. A NEED FOR JUDICIAL PROACTIVITY IN GENDER MAINSTREAMING?

For all of the victims of domestic violence or wider gender–based violence that reach the ECtHR, it is important to remember the hundreds and thousands of victims who do not. Some because they are killed or intimidated before doing so, others because they are unable to access the physical, emotional, or financial resources required for litigation. Still more are silenced by the taboos and societal pressure which prevail in many cultures.

For this reason, each judgment before the ECtHR in this area, has the potential to exponentially change the circumstances of many other victims of such abuse in the home jurisdiction of the applicant and throughout the Council of Europe. Given the increasing

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to determining whether the victim is at risk of further violence" and that "it is equally important in the cases where the perpetrator's release from detention was anticipated, as it was in the case of Ms. Kazanbiyeva" *Id.* ¶9. The ECtHR also held that " . . . due to a lack of policy and guidance in national law, risk of recurrent violence in applicants' cases had not been properly assessed. Although the police could have taken some reasonable steps within the existing legal framework . . . they either refused to initiate criminal investigations or, if an investigation did take place, did not apply adequate measures of restraint . . . ." The ECtHR recognized more broadly with regard to more than one applicant that "The lack of any form of protection orders in the domestic legislation and the authorities' failure to take appropriate measures to protect the applicants allowed perpetrators to continue threatening, harassing and assaulting them for years without hindrance" *Id.* ¶9 In addition, the ECtHR held (again considering the wider group of applicants) that "the authorities' failure to fulfil the obligation to investigate effectively the applicants' complaints also stemmed from the deficiencies of the substantive law."

Id. ¶10.

challenges for individual applicants to reach the ECtHR, the large backlog of cases and the apparent roll back of women's rights across the globe, it is now more important than ever that the ECtHR stays mindful of the need for a consistent gender perspective and ensures that its case law in this area is as advanced and comprehensive as possible. Wherever the ECtHR is in receipt of evidence or submissions which would enable progress to be made and harmful practices to be eliminated, we should expect a proactive attitude in this regard.

The case of *S.N. v. Russia* provides a helpful illustration as to the impact of missed opportunities where meaningful progress could have been made.[107] S.N. alleged sexual abuse at the hands of eleven men over a period of nearly two years when she was aged between 15 and 17 years old.[108] In June 2012, her father reported to the inter–district investigative committee, that his daughter had been repeatedly forced to have oral and anal sex against her will between 2010 and 2012.[109] It was further alleged that the men in question had filmed their sexual activity with S.N. and that they had threatened to make these videos public if she did not continue to comply with their demands.[110] In response to this complaint, a preliminary inquiry was commenced during which the applicant was subjected to a gynecological examination.[111] At the conclusion of this examination, the author stated that he "did not detect any traces of sexual assault on the applicant's body."[112]

This conclusion was hardly surprising for two reasons. Firstly, S.N. did not allege vaginal rape (her allegations were of oral and anal assault) and as such a gynecological examination can have had little if any evidential value with regard to the allegations under investigation.[113] This being so, it seems likely that the procedure was used either as an attempt simply to show some form of activity in an investigation that was not genuinely directed at achieving justice or, as a clandestine means of testing the '*virginity'* of the applicant. The

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[107] *See generally* S.N. v. Russia, App. No. 11467/15, ¶7 (Nov. 20, 2018), https://hudoc.echr.coe.int/eng?i=001-187739.
[108] *Id.* ¶6.
[109] *Id.* ¶6.
[110] *Id.*
[111] *Id.* ¶7.
[112] *Id.*
[113] *See* S.N. v. Russia, App. No. 11467/15, ¶7 (Nov. 20, 2018), https://hudoc.echr.coe.int/eng?i=001-187739.

results of such an examination within a religious, patriarchal or conservative community might be used, entirely inappropriately, to blacken her character and undermine her credibility as a witness on the basis that she had already engaged in sexual intercourse at her young age and outside of wedlock. Such examinations are said to be commonplace for women who allege sexual assault in certain jurisdictions, regardless of the individual characteristics of the assault alleged. [114]

Had a gender–perspective been applied, one might have expected that this finding alone, subsequently relied upon by the investigating authorities, would be sufficient for the ECtHR to comment upon the incompetence, intrusiveness, and discriminatory nature of this type of investigatory practice. In bald terms, it subjects survivors of sexual violence to unnecessarily invasive and traumatic internal examination which arguably cause further violations to the individual concerned at the hands of state authorities themselves.[115] This evidentially irrelevant and flawed examination report was relied upon by an investigating officer as a reason for not opening a criminal investigation into S.N.'s allegations. Yet, there is not a single word of concern raised regarding the process in the ECtHR's judgment.[116]

The second reason why the result of this examination was irrelevant in evidential terms is that S.N. had alleged that the multiple oral and anal assaults to which she had been subjected took place between September or October 2010 and June 2012, but the examination did not take place until February 26, 2013 — 8 months after the last alleged assault and 8 months after the allegations were made known to the authorities.[117] Not only would most injuries, if sustained, have healed within this 8 month time period, more importantly here, it was never the applicant's contention that the assaults she was subjected to had caused visible physical injuries.[118]

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[114] *See e.g.* Tamar Dekanosidze et al., *The Administration of Justice on Sexual Crimes against Women in Georgia,* COUNCIL OF EUR., (Dec. 2020) https://rm.coe.int/sexual-violence-research-eng/1680a17b78.
[115] *See generally id.* at 27.
[116] *See generally* S.N. v. Russia, App. No. 11467/15, (Nov. 20, 2018), https://hudoc.echr.coe.int/eng?i=001-187739.
[117] *See id.* ¶¶ 7, 14, 21.
[118] *See generally id.*

Therefore, it appears that she was subjected by decision of the authorities to both these highly intrusive intimate examinations —vaginal and anal —without any reasonable likelihood of obtaining relevant evidence to the offenses alleged. It is this sort of investigative behavior that not only re–traumatizes victims of sexual assault, but also has a chilling effect on the likelihood of other victims coming forward in future.[119]

Unfortunately, the failings of the investigation did not stop there. In the course of the investigation, the applicant submitted a DVD recording of one of the alleged assaults.[120] Upon viewing it, the investigator concluded that in his view, it showed the applicant to be engaging in oral sex voluntarily because he could discern from the recording "no visible traces of injuries on the applicant's body."[121] Once again, the ECtHR could and should have highlighted the flawed and discriminatory nature of this conduct, manifesting as it does, a clash with the most fundamental of international standards with regard to sexual violence: that any non–consensual sexual activity is a criminal offense with or without physical violence and that lack of resistance is not in any way commensurate with consent. The ECtHR could also have taken the opportunity to tackle Russia's legislative framework– requiring, as many former Soviet Union countries do, proof not of lack of consent as an element of the crime but proof of force, threat of force, or helpless condition of the victim.[122]

Furthermore, consideration by the ECtHR as to how such inaccurate framing of sexual violence might expose victims to systemic violations of Article 3, Article 8, and Article 14 of the Convention could have had wide reaching effect across the region.[123]

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[119] *See generally* Dekanosidze, *supra* note 117.

[120] *See* S.N. v. Russia, App. No. 11467/15, ¶8 (Nov. 20, 2018), https://hudoc.echr.coe.int/eng?i=001-187739.

[121] *Id.* ¶9.

[122] During the relevant period Rape was defined under Article 131 of the Russian Criminal Code (as amended by Federal Act No. 215-FZ of 27 July 2009) in the following terms: "Rape, i.e. sexual intercourse with the use or threat of violence against the victim or against other persons or by taking advantage of a helpless state of the victim . . . ." Ugolovnyĭ Kodeks Rossiĭskoĭ Federatsii [UK RF] [Criminal Code] art. 131 (Russ.) (July 2009).

[123] *European Convention on Human Rights*, COUNCIL OF EUR. 7, 11, 13, https://www.echr.coe.int/documents/convention_eng.pdf (last visited Jan. 20, 2022).

Disappointingly, the ECtHR failed to grapple with this issue in its judgment, even though it was clearly alive to its existence. Instead, it simply noted in passing, yet without comment or finding, the applicant's contention that "the investigators had failed to employ a context–sensitive and gender–based approach. [124] They had focused on the lack of physical injury rather than S.N.'s lack of consent. The investigators had appeared to blame the applicant and to focus on her behavior and that of her family."[125] The failure to grasp this nettle represents yet another missed opportunity in a case which showcases many of the prejudices, stereotypes, and systemic malpractice that continue to traumatize victims of sexual violence across the region.[126]

Finally, following this cursory completion of a range of inadequate investigative steps and procedures over nearly a four–year period, the criminal investigation was discontinued with the investigator concluding in the following terms

> [T]he allegations that [the applicant was raped] are confirmed only by [the applicant] and her parents . . .who learned about them from [the applicant]. The [applicant's] allegations contradict the statements of many witnesses and the forensic evidence. [The alleged perpetrators] denied the [applicant's] accusations. They maintained their innocence in [the applicant's] presence. The investigation has not produced any additional evidence that would support the [applicant's] allegations. The [sexual] crimes were committed in the absence of witnesses, and obtaining proof of those crimes has become problematic. It should be also taken into consideration . . . that a significant amount of time has passed since the crimes were committed.[127]

The reasoning for this conclusion is not borne out by the evidence in the case. As already outlined above, the "*forensic evidence*"

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[124] *See* S.N. v. Russia, App. No. 11467/15, ¶45 (Nov. 20, 2018), https://hudoc.echr.coe.int/eng?i=001-187739.
[125] *See id.*
[126] *See generally id.*
[127] *Id.* ¶38.

was flawed and could not be said in any way to "*contradict*" the applicant's account.[128] Turning next to the "*many witnesses*'' relied upon by the investigator as people who are also said to "*contradict*" the applicant's allegations: although not mentioned in the investigator's text, an examination of all witnesses questioned in the course of the investigation reveals that the "*many witnesses*" [129] referred to can only be the alleged perpetrators themselves. The investigator's reliance on these contradictions together with the discovery that the alleged perpetrators "*maintained their innocence*,*"* therefore rests on the unsurprising fact that all of those accused of sexually assaulting S.N. denied that they had done so.[130]

Finally, the underlying suggestion that additional evidence is required to "*support the [applicant's] allegations*" [131] takes us back to a time where a woman or child's evidence was deemed insufficient as a matter of law to be reliable in the absence of another witness — in some jurisdictions even, the requirement for another corroborating witness only being made out where that corroborating witness was male. But once again, this critical prejudicial and discriminatory issue is entirely overlooked by the ECtHR.

Countless successful prosecutions and convictions of sexual violence, including many historic allegations, are prosecuted in multiple jurisdictions on the evidence of the victim alone. The suggestion that a denial of a male accused should be accorded more evidential weight than the allegation of a female complainant in the assessment of evidence has no place in a functioning justice system. It is not an unusual feature of criminal proceedings that those accused of crimes deny the offenses they are alleged to have committed. That is why criminal trials take place, and the trial process is the correct forum for resolving such evidential conflicts — not the prejudices and preconceptions of one investigator. The pernicious theme, that no fair prosecution for a sexual assault may take place where it is "one person's word against another" could also have been addressed by the ECtHR in this case. Had it chosen to do so, the ECtHR could

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[128] *See generally id*.
[129] *See id.* ¶38.
[130] S.N. v. Russia, App. No. 11467/15, ¶38 (Nov. 20, 2018), https://hudoc.echr.coe.int/eng?i=001-187739.
[131] *See generally id.*

have played an authoritative role in exposing the flawed and discriminatory nature of this doctrine.

Ultimately, the ECtHR did find in this case that the State had failed to properly investigate the alleged sexual violence. However, the advancement of justice could have been much better served by a more expansive and proactive judgment from the ECtHR which tackled the underlying issues and prejudices that characterized such a flawed and discriminatory investigation process. Notably, the ECtHR commenced its analysis with the following statement:

> The Court observes that, in the instant case, the applicant did not allege that Russian law, as such, did not provide effective protection against rape. Rather, she maintained that the State had not discharged its obligation to carry out an effective investigation of the circumstances of her rape and to identify and punish the perpetrators.[132]

In framing the case in such a circumscribed manner, the ECtHR failed to tackle the interwoven difficulties between legislation and practice which led to the ineffective investigation and ensuing discrimination in this case. Under Russian law during the relevant time period (i.e. 2010 to 2012 for the offenses and 2012 to 2016 for the investigation), the definition of rape was not consent based but reliant instead upon "violence," "threat of violence," or the "helpless state of the victim."[133]

This non–consent based definition contributes to discriminatory investigative processes by shifting the emphasis from whether consent was freely given in any sexual activity to whether violence, threats of violence, or "helpless state" can be proved to the criminal standard. Under this approach, non–consensual sexual activity does not amount to a criminal offense. This approach to sexual violence stands in direct contradiction to international standards as articulated across the board in international human rights law and international criminal law.[134]

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[132] *Id.* ¶47.

[133] *See supra* note 122 and accompanying text.

[134] All of the following sources confirm the necessity for criminalization of all sexual acts that are not conducted with voluntary consent assessed in the context of the surrounding circumstances. *See* Council of Eur. Conv. on preventing and

The ECtHR found that the investigation in S.N. was flawed on the following grounds: (1) it was opened only five months after the applicant had first reported the alleged crimes; (2) it appeared that the investigator's efforts during the initial inquiry were aimed at dismissing her case rather than establishing what had really happened; (3) having questioned the applicant and some of the alleged perpetrators, examined the crime scenes, and commissioned forensic examinations, the investigator did nothing for the next four months but repeatedly duplicate his original decision dismissing the applicant's complaint; (d) the investigation opened in November 2012, did not sufficiently follow up on leads provided by the applicant, did not identify or seize all mobile phones used by the applicant or the alleged perpetrators, did not verify information provided by the applicant about cars used by the alleged perpetrators, polygraph test results were not analyzed, "no effort was made to verify alibis" provided by certain accused or to resolve contradictions in their statements, and insufficient effort made to recover data from mobile phones; and (e) the documentation submitted to the ECtHR in support of its case contained no information supporting the investigator's findings.[135]

Consideration of the multitude of ineffective investigation cases in which the ECtHR has rendered judgment across the region tends to suggest that the ECtHR has not in any way differed its approach in the assessment of this investigation of alleged sexual violence against a female minor from the investigation of any other criminal offence. That is to say, there is no evidence of any account being

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combatting violence against women and domestic violence, COUNCIL OF EUR. (May 5, 2011), https://rm.coe.int/168008482e; Conv. On the Elimination of Discrimination Against Women, *General Recommendation No. 35 on Gender-Based Violence Against Women*, ¶29(e), U.N. Doc. CEDAW/C/GC/35 (July 26, 2017); Committee of Ministers, *Recommendation (2002)5 of the Committee of Ministers to Member States on the Protection of Women Against Violence*, COUNCIL OF EUR., (Apr. 30, 2002) ¶35, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e2612; Dubravka Šimonović (Special Rapporteur on Violence Against Women, Its Causes and Consequences), *Rape as a Grave, Systematic and Widespread Human Rights Violation, A Crime and a Manifestation of Gender-Based Violence Against Women and Girls, and its Prevention*, ¶85, U.N. Doc. A/HRC/47/26 (Apr. 19, 2021).

[135] S.N. v. Russia, App. No. 11467/15, ¶51(Nov. 20, 2018), https://hudoc.echr.coe.int/eng?i=001-187739.

taken for the gender specific aspects of such offending and the gendered impact of such investigations upon the victims of such offenses.

Worse still, the ECtHR chose to include a passage in its judgment which suggests an expression of sympathy for the state in this instance, rather than the victim and in so doing repeats and potentially could be viewed as giving some credence to the poor practice already highlighted:

> The Court does not lose sight of the difficulties that the authorities face when investigating sex crimes, owing to the particularly sensitive nature of the experiences sustained by victims. In the instant case, there were no eyewitnesses, and nobody volunteered any information. Some of the applicant's accusations related to events which took place some two years prior to her complaint. In such circumstances, the investigators were confronted with a difficult task . . . .The Government furthermore pointed out that the applicant's behaviour had had an impact on the effectiveness of the investigation. She had only belatedly reported the alleged rape to the authorities. As a result, it had been impossible to find, collect and preserve traces of the crime.[136]

Strikingly, none of the issues highlighted as "*difficult*" by the ECtHR in this passage[137] are unusual in many domestic jurisdictions where effective investigations and prosecutions of sexual violence are routine.

Finally, there is a danger that the ECtHR's repetition of the government's complaint that the applicant "*only belatedly reported the rape to the authorities*" [138] has an overtone of victim–blaming that could have been countered by the ECtHR in its judgment by explaining why it is common for victims of sexual violence to delay reporting their experiences and illustrating best practice used in other jurisdictions in such circumstances. Overall, even though judgment

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[136] *Id.* ¶52.
[137] *See id.*
[138] *See id.*

was handed down in favor of the applicant in this case, the judgment in *S.N.* represents a disappointing series of missed opportunities for tackling systemic flaws and prejudices in investigating sexual violence across the region.

By contrast, the detailed and progressive judgment of *A & B v. Georgia*[139] provides an example of the kind of positive impact the ECtHR can have when a well–informed and gender sensitive approach is taken to the assessment of evidence and arguments.

In this case, the mother and son of the victim ("C") applied to the ECtHR following the murder of their daughter and mother respectively by ("D") in July 2014.[140] C had been kidnapped for marriage when she was 17 years old by D, who was at that time 22 years old and a serving police officer.[141] They cohabited for six months during which period, C and her family were abused both physically and verbally by D including by way of threats to kill both C and her parents in which D would refer "to his official status as a police officer and his strong connections within the police."[142]

In July 2012, C, who was 2 months pregnant, returned to her parents' home "exhausted by the physical and psychological harassment" from D.[143] That same month, she called the police complaining that D had threatened to kill her mother, but she received no response to her complaint.[144] In August 2013, police were called to C's parents' house after D "beat up C" following an altercation over child support.[145] Three officers responded to the call, all three officers were acquaintances of D, who interviewed C in the presence of D.[146] Neighbors reported that D was on good terms with the officers during the interview and that D was allowed to interfere in the process by mocking C's answers and shouting at her without any of the officers trying to stop him.[147] One of these officers told C that

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[139] *See generally* A *& B v. Georgia*, App. No. 73975/16, (Oct. 5, 2022), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-215716%22]}.
[140] *Id.* ¶5.
[141] *Id.* ¶6.
[142] *Id.* ¶8.
[143] *Id.* ¶7.
[144] *Id.* ¶8.
[145] A *& B v. Georgia*, App. No. 73975/16, ¶10 (Oct. 5, 2022), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-215716%22]}.
[146] *Id.*
[147] *Id.*

"wife–beating was commonplace and not much importance needed to be attached to it."[148] D himself was not interviewed by officers who drew up an incident report which referred to "a minor family altercation related to child support payments" without reflecting in the report the extent of the violence of the incident.[149] Although "C initially refused to sign the report . . . D forced her to do so making threats to kill her." These were overheard by the attending officers with no action taken.[150] One of the officers told C, "not to contact them in the future without a valid reason or face being fined for wasting police time as they were busy with other, more serious matters."[151] D left the home of C in the same car as the responding officers.[152]

On the same day, C complained to the public prosecutor's office for about D's physical abuse towards her as well as he harassment, threats to kill, threats to abduct their child, and physical violence.[153] She also filed a criminal complaint against the three police officers who had attended "for failing to carry out their duties with due diligence."[154] After her complaint, C was interviewed and so was one of the officers who had attended.[155] D provided a written undertaking that he would "never again verbally or physically abuse C or her family members," on which basis the public prosecutor decided not to launch a criminal investigation.[156]

On July 5, 2014, C complained to the General Inspectorate of the Ministry of Interior about two further physical assaults that D had committed against her, in public.[157] Independent witnesses confirmed that D had been using various attributes of his official position to commit abuse against C including flaunting his service pistol, threatening to bring false charges against her father and brother, and

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[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] A *& B v. Georgia*, App. No. 73975/16, ¶10 (Oct. 5, 2022), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-215716%22]}.
[152] *Id.* ¶10.
[153] *Id.* ¶11.
[154] *Id.*
[155] *Id.* ¶12.
[156] *Id.*
[157] A *& B v. Georgia*, App. No. 73975/16, ¶13 (Oct. 5, 2022), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-215716%22]}.

making it known "that he was not afraid of law—enforcement machinery because he was part of it himself."[158] That same month, on July 20, 2014, D was promoted in rank within the police.[159] On July 25, 2014, C attended at the request of the General Inspectorate in relation to her complaint of July 5, 2014.[160] After she left the interview, she was followed by D.[161] Eyewitnesses reported an argument between them in a public park following which D shot C five times with his police service pistol.[162] "She died instantly."[163]

D was charged with murder and in his interview stated *inter alia* that C had "humiliated" him and that was why he used his gun on her.[164] He was found "guilty of premeditated murder of a family member and sentenced to 11 years' imprisonment."[165] In January 2015, C's mother filed a complaint with the Chief Public Prosecutor's Office requesting a criminal investigation into the failure of police and public prosecutors to protect her daughter's life.[166] She argued that this "negligent conduct might have been influenced by gender–based discrimination."[167] Throughout 2015 and early 2016, C's mother repeatedly monitored progress of the investigation.[168] In March 2015, she was informed that a criminal investigation had been launched with regard to the conduct of the police officers, but she received no response regarding her complaint relating to the public prosecutors.[169] In March 2016, she was informed that the criminal investigation against the police officers was pending, but she again received no response with regard to the public prosecutors.[170] On, March 17, 2016, she asked whether a criminal

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[158] *Id.* ¶14.
[159] *Id.* ¶15.
[160] *Id.* ¶16.
[161] *Id.* ¶17.
[162] *Id.*
[163] A *& B v. Georgia*, App. No. 73975/16, ¶17 (Oct. 5, 2022), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-215716%22]}.
[164] *Id.* ¶18.
[165] *Id.* ¶19.
[166] *Id.* ¶20.
[167] *Id.*
[168] *Id.* ¶23.
[169] A *& B v. Georgia*, App. No. 73975/16, ¶24 (Oct. 5, 2022), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-215716%22]}.
[170] *Id.*

investigation had been launched into the actions of the public prosecutors, but received no response.[171]

C's mother took a civil action against the Ministry of Interior and the Chief Prosecutor's Office claiming compensation for failure to protect her daughter's life.[172] Her claim was allowed in part, with the domestic court finding a "causal link between the inactivity of the relevant police officers and public prosecutors and C's killing."[173] The court also stated "that the public authorities were under an obligation to respond promptly and effectively to allegations of discrimination" – an obligation which had been disregarded in this case.[174] "The court concluded that the respondent authorities who ought to be considered liable together with the relevant individual officials, had failed to take measures to put an end to the gender–based discrimination and protect C's life."[175]

In litigation before the ECtHR, the applicants' complaints related to the failures in the authorities' response to D's actions and complaints made by C and her mother prior to and after her murder.[176] The state party did not dispute the facts of the case as submitted by the applicants.[177]

The ECtHR gave a strong and effective judgment. It found not only a breach by the respondent State of its procedural violations under Article 2 read in conjunction with Article 14 but also dealt with the fact that D's trial and conviction did not consider gender–based discrimination.[178] It noted the absence of consideration of the question of "whether the official tolerance of incidents of domestic violence might have been conditioned by the same gender bias" or "whether there had been indications of the relevant law–enforcement officers' acquiescence or connivance in the gender–motivated abuses perpetrated by their colleague."[179]

The ECtHR's conclusion was a powerful one:

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[171] *Id.* ¶ 25.
[172] *Id.* ¶ 26.
[173] *Id.* ¶ 27.
[174] *Id.*
[175] A & B v. Georgia, App. No. 73975/16, ¶45 (Oct. 5, 2022), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-215716%22]}.
[176] *Id.* ¶ 44.
[177] *Id.* ¶ 38.
[178] *Id.* ¶ ¶ 44-5.
[179] *Id*.

The Court thus concludes that the present case can 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 can create a climate conducive to a further proliferation of violence committed against victims merely because they are women. In disregard of the panoply of various protective measures that were directly available, the authorities did not prevent gender–based violence against the applicants' next–of–kin, which culminated in her death, and they compounded this failure with an attitude of passivity, even accommodation, as regards the alleged perpetrator, later convicted of the victim's murder. The respondent State has thus breached its substantive positive obligations under Article 2 of the Convention read in in conjunction with Article 14.[180]

It is this type of progressive and holistic judgment which has the capacity to move forward protections and practice throughout the Council of Europe with regard to tackling violence against women in all its forms.

IV. REDRESS

The ECtHR's approach to redress is not expansive or creative by comparison in particular with the IACHR and there is considerable scope for advocacy in this regard to improve systems and process for all victims (including those of gender–based violence) coming to the ECtHR.

For instance, in the case of *A & B v. Georgia*,[181] in addition to non–pecuniary damages, the applicants asked the ECtHR to indicate to the respondent State a need to put in place a mechanism for "'institutional responsibility of the State organs for preventing and adequately responding to femicide'" and to take legislative measures in order "'to explicitly criminalize femicide and ensure that all killings of women are investigated from a gender perspective.'"[182] However, in line with standard ECtHR practice,[183] the ECtHR considered that

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[180] *Id.* ¶49.

[181] A *& B v. Georgia*, App. No. 73975/16, ¶51 (Oct. 5, 2022), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-215716%22]}.

[182] *Id.*

[183] It is only in exceptional cases that the ECtHR has indicated to state parties the exact means by which it expects the state to implement its findings. One example

> it would be for the respondent State to choose, subject to supervision by the Committee of Ministers, the exact means to be used in its domestic legal order to discharge its obligations under the Convention, including those in relation to the problem of the discriminatory passivity of the law–enforcement authorities in the face of allegations of violence against women.[184]

This could again be seen as a missed opportunity in assisting states to make tangible progress both in providing meaningful redress for victims and applicants but also in terms of preventing systemic ongoing abuse. There are many more options that could be fruitfully explored in this regard if the ECtHR were willing to consider a more directed approach to redress.

In the meantime, it is also of concern that the ECtHR's approach to non–pecuniary damages in itself does not appear to understand or recognize in its awards the wider impact of gender–based violence. Consideration could be given to quantifying damages so as to specifically recognize psychological suffering, which is an integral part of such abuse, or for victimization caused by state failures and delays. At present the ECtHR's approach to damages lacks transparency or meaningful rationale. In general, the awards made for long term domestic abuse suggest a limited understanding of the range of impacts such abuse is likely to have on victims.

In *A & B v. Georgia*, C was shot dead by her abusive ex–partner after years of psychological and physical abuse because of multiple failures on the part of the state to prevent or punish ongoing abuse.[185] The ECtHR awarded 35,000 Euros in non–pecuniary

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is the case of Aslakhanova 2012 where repeat cases of state failure to adequately investigate enforced disappearances led the ECtHR to "exceptionally" set out the measures it expected the state to undertake. *See* Aslakhanova v. Russia, App. No. 2944/06, ¶¶119, 121 (Dec. 18, 2012), https://hudoc.echr.coe.int/eng#{"itemid":["001-115657"]}. On the topic of violence against women *see* Tunikova v. Russia, App. No. 55974/16, ¶127 (Dec. 14, 2021), https://hudoc.echr.coe.int/eng#{"itemid":["001-213869"]}.

[184] A & B v. Georgia, App. No. 73975/16, 54 (Oct. 5, 2022), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-215716%22]}.

[185] A & B v. Georgia, App. No. 73975/16, ¶¶ 8, 17 (Oct. 5, 2022), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-215716%22]}.

damages noting simply that "the Court accepts that the applicants must have suffered non–pecuniary damages."[186] It is not clear on what basis the ECtHR concluded that 35,000 Euros was the appropriate compensatory figure for a violation of Article 2 taken in conjunction with Article 14, as no reasoning is provided; but this is a figure that had previously been used in at least one other violence against women fatality case.[187]

By contrast, where in the case of *Muradyan v. Armenia*, the Court found an Article 2 violation on the basis of the ill–treatment of the applicant's son by superior military officers, followed by the failure to provide him with adequate and timely medical assistance, and a failure to carry out an effective investigation into the circumstances.[188] The applicant, who was the father of the deceased male victim, was awarded 50,000 Euros in non–pecuniary damages.[189]

The following two cases of police violence also raise concerns about apparent discrepancies between cases with a female victim rather than male victim.

In the case of *Fanziyeva v. Russia*, the applicant's daughter, who was the mother of three young children, died in police custody.[190] It was alleged by the applicant the death occurred after her daughter had been beaten by police and thrown from the window of a police station while still unconscious.[191] She later died in the hospital "of complex internal injuries to her head, body and extremities."[192] The authorities refused to investigate the circumstances of her injuries and death and no criminal investigation into her death was ever instituted.[193] The ECtHR found violations of both the substantive and procedural limbs of Article 2 and Article 3.[194] The applicant, who

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[186] *Id.* ¶53.
[187] Tkhelidze v. Georgia, App. No. 33056/17, ¶65 (July 8, 2021), https://hudoc.echr.coe.int/eng#{"itemid":["001-210854"]}.
[188] *See generally* Muradyan v. Armenia, App. No. 11275/07, ¶167 (Nov. 24, 2016), https://hudoc.echr.coe.int/eng#{"itemid":["001-168852"]}.
[189] *Id.* ¶167.
[190] Fanziyeva v. Russia, App. No. 41675/08, ¶¶ 7-12 (Jun. 18, 2015), https://hudoc.echr.coe.int/eng#{"itemid":["001-155194"]}.
[191] *Id.* ¶ 9.
[192] *Id.* ¶ 11.
[193] *Id.* ¶¶ 17-22.
[194] *Id.* ¶¶ 54, 60, 75, 80.

was the mother of the deceased female victim, was awarded 26,000 Euros in non–pecuniary damages. [195]

By contrast, in *Lykova v. Russia*, the applicant's son died in a police station following torture by police officers.[196] The ECtHR again found violations of both substantive and procedural limbs of Article 2 and 3, as well as a violation of Article 5(1) in terms of his unlawful detention.[197] The applicant, the father of the deceased male victim, was awarded non–pecuniary damages of 45, 000 Euros – nearly 20,000 Euros more than the applicant's mother in *Fanziyeva* above.[198] Again, the ECtHR provided little reasoning for the figure put forward noting simply that the applicant had "suffered distress, frustration and a feeling of injustice that cannot be repaired by the mere finding of a violation." [199]

This article does not claim to present anything close to a comprehensive analysis of non-pecuniary damage awards made by the ECtHR. The absence of consistent rationale and internal inconsistency of ECtHR damages awards is a familiar feature of ECtHR judgments, and it is not suggested that such discrepancies arise only in cases of gender–based violence. Nonetheless, the mere fact that it is possible to point to such comparative financial discrepancies in cases relating to the lost lives of young women and the lost lives of young men gives cause for disquiet. Victims and applications should be entitled to consistent and reasoned awards as an integral part of any redress received from the ECtHR in recognition of the violation of their rights.

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[195] *Id.* ¶¶ 13, 89.

[196] *See generally* Lykova v. Russia, App. No. 68738/11, (Dec. 22, 2015), https://hudoc.echr.coe.int/eng# {"itemid": ["001-159378"]}.

[197] *Id.* ¶¶ 127, 132.

[198] *See generally* Fanziyeva v. Russia, App. No. 41675/08, ¶ ¶ 90-2 (Jun. 18, 2015), https://hudoc.echr.coe.int/eng# {"itemid": ["001-155194"]}; Lykova v. Russia, App. No. 68738/11, ¶135 (Dec. 22, 2015), https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-159733%22%5D%7D.

[199] Lykova v. Russia, App. No. 68738/11, ¶131 (Dec. 22, 2015), https://hudoc.echr.coe.int/eng# {"itemid": ["001-159378"]}.

V. CONCLUSION

Should the ECtHR choose to focus its attention and resources upon prioritizing a gender perspective within its process and jurisprudence, it could helpfully start with the following crucial areas:

i) The prioritization of protective measures at both domestic and international levels to protect victims of violence against women and domestic violence. In applications where the Court's own threshold is made out on the face of the application, a reasoned decision should be provided for any refusal.

ii) The urgent need for reform with regard to any domestic legislatures that do not criminalize non–consensual sexual intercourse or touching.

iii) The identification and elimination of discriminatory investigative measures with regard to allegations of violence against women. For example, the use of routine internal or intimate examinations which provide no evidential value.

iv) Recognition of the discriminatory impact of investigative practices founded on the basis that a complainant's account of sexual, physical, or psychological violence may not be relied upon in its own right without corroborating evidence of the alleged complaint.

v) Automatic consideration of Article 14 (protection from discrimination) in all cases of alleged gender–based violence.

vi) Careful assessment and quantification of damages together with reasoned decisions.

The consistent application of a coherent gender mainstreaming strategy for the ECtHR together with consideration of the appointment of a Special Adviser on Gender to the ECtHR.