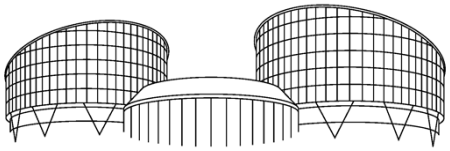

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF KURT v. AUSTRIA

(Application no. 62903/15)

JUDGMENT

Art 2 (substantive) • Positive obligations • Adequate protective measures in absence of discernible real and immediate risk of child's murder by father accused of domestic violence and barred from home • Assessment of nature and level of risk an integral part of *Osman* positive obligation to take preventive operational measures • Requirement of autonomous, proactive and comprehensive assessment of reality and immediacy of risk, taking due account of particular domestic violence context • Operational measures to be adequate and proportionate to level of risk assessed • Domestic authorities' response displaying special diligence and compliant with above requirements

STRASBOURG

15 June 2021

This judgment is final but it may be subject to editorial revision.

In the case of Kurt v. Austria,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Robert Spano, *President*,
Jon Fridrik Kjølbro,
Ksenija Turković,
Paul Lemmens,
Branko Lubarda,
Armen Harutyunyan,
Georges Ravarani,
Gabriele Kucsko-Stadlmayer,
Alena Poláčková,
Pauliine Koskelo,
Jovan Ilievski,
María Elósegui,
Gilberto Felici,
Darian Pavli,
Erik Wennerström,
Raffaele Sabato,
Saadet Yüksel, *judges*,

and Marialena Tsirli, *Registrar*,

Having deliberated in private on 17 June 2020 and 24 March 2021,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 62903/15) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Austrian national, Ms Senay Kurt ("the applicant"), on 16 December 2015.

2. The applicant was represented by Ms K. Kolbitsch and Ms S. Aziz, lawyers practising in Vienna. The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry for European and International Affairs.

3. The applicant alleged, in particular, that the Austrian authorities had failed to protect her and her children from her violent husband, and that this had resulted in him murdering their son.

4. On 30 March 2017 the Government were given notice of the complaints concerning Articles 2, 3 and 8 of the Convention, and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

5. The application was allocated to the Fifth Section of the Court (Rule 52 § 1). On 4 July 2019 a Chamber of that Section composed of Angelika Nußberger, President, Yonko Grozev, André Potocki, Mārtiņš Mits, Gabriele Kucsko-Stadlmayer, Lətif Hüseynov and Lado Chanturia, judges, and also of Claudia Westerdiek, Section Registrar, gave judgment. The Chamber unanimously declared the complaints under Article 2 of the Convention admissible and held that there had been no violation of Article 2 in its substantive limb. The concurring opinion of Judge Hüseynov was annexed to the judgment.

6. On 27 September 2019 the applicant requested the referral of the case to the Grand Chamber in accordance with Article 43 of the Convention. On 4 November 2019 the panel of the Grand Chamber accepted that request.

7. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

8. The applicant and the Government each filed further written observations (Rule 59 § 1) on the merits of the case. In addition, third-party comments were received from the Council of Europe Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), Women Against Violence Europe (WAVE), Women's Network against Violence (Donne in Rete Contro la Violenza – D.i.Re), the Association of Autonomous Austrian Women's Shelters (Verein Autonome Österreichische Frauenhäuser – AÖF), the European Human Rights Advocacy Centre (EHRAC) and Equality Now (jointly), the Federal Association of Austrian Centres for Protection from Violence (Bundesverband der Gewaltschutzzentren Österreichs), and Women's Popular Initiative 2.0 (Frauenvolksbegehren 2.0).

9. A hearing took place by videoconference in the Human Rights Building, Strasbourg, on 17 June 2020.

There appeared before the Court:

(a) *for the Government*

Mr H. TICHY, Ambassador,
Federal Ministry for European and International Affairs, *Agent*,
Ms B. OHMS, Federal Chancellery, *Deputy Agent*,
Mr K. FAMIRA,
Federal Ministry for European and International Affairs,
Ms E. SAMOILOVA, Federal Chancellery,
Mr U. PESENDORFER, Federal Ministry of Justice,
Ms A. ROHNER, Federal Ministry of Justice,
Mr P. ANDRE, Federal Ministry of the Interior,
Mr W. DILLINGER, Federal Ministry of the Interior, *Advisers*;

(b) *for the applicant*

Ms S. AZIZ, Lawyer,

Ms C. KOLBITSCH, Lawyer, *Counsel*.

The Court heard addresses by Mr Tichy and Ms Aziz, and also replies by Mr Tichy, Mr Pesendorfer, Mr Andre and Ms Aziz to questions from judges.

THE FACTS

10. The applicant was born in 1978 and lives in Unterwagram.

11. She married E. in 2003. They had two children, A., born in 2004, and B., born in 2005.

I. EVENTS LEADING UP TO THE FATAL SHOOTING OF THE APPLICANT'S SON

A. First barring and protection order issued against E. and the ensuing proceedings

12. On 10 July 2010 the applicant called the police because her husband had beaten her. In her statement to the police she alleged that she had problems with her husband and that he had been beating her for years. In the preceding months the situation had worsened because he had a gambling addiction, was heavily in debt and had lost his job. She stated that she had always supported him financially, but had also lost her job and therefore could no longer pay his debts. The police noted that the applicant showed signs of injuries, namely haematomas on her elbow and upper arm, which she stated she had sustained through beatings by her husband.

13. Pursuant to section 38a of the Security Police Act (*Sicherheitspolizeigesetz* – see paragraph 48 below), the police handed the applicant a leaflet informing her, among other things, of the possibility of seeking a temporary restraining order (*einstweilige Verfügung*) against her husband under sections 382b and 382e of the Enforcement Act (see paragraphs 54 et seq. below).

14. When confronted with the allegations by the police, E. stated that he did not have any problems with his wife, but that he had had a fight with his brother the night before and had sustained injuries to his face. There were no indications that E. was in possession of a weapon. A barring and protection order (*Betretungsverbot und Wegweisung zum Schutz vor Gewalt*) in accordance with section 38a of the Security Police Act was issued against E. This order obliged him to stay away from their common apartment as well as from the applicant's parents' apartment and the surrounding areas for fourteen days. It appears that E. complied with the order. The police submitted a report to the public prosecutor's office

(*Staatsanwaltschaft*), which brought criminal charges against E. on 20 December 2010.

15. On 10 January 2011 the Graz Regional Criminal Court (*Landesgericht für Strafsachen*) convicted E. of bodily harm and making dangerous threats, and sentenced him to three months' imprisonment, suspended for three years with probation. The applicant refused to testify against E. He was nonetheless found guilty of pushing her against a wall and slapping her, and of threatening his brother and his nephew.

B. Second barring and protection order issued against E. and the ensuing proceedings

16. On Tuesday 22 May 2012 the applicant, accompanied by her counsellor from the Centre for Protection from Violence (*Gewaltschutzzentrum*), went to the St Pölten District Court (*Bezirksgericht*) and filed for divorce. In her oral hearing before the judge, which was held at 11.20 a.m., she explained that the reasons for the breakdown of the marriage were her husband's continuous threats and violence against her throughout their marriage. She indicated that on the preceding Saturday the situation had escalated and she had suffered injuries. She added that she was planning to report him to the police and that she hoped that a barring and protection order would be issued against him.

17. On the same day at 1.05 p.m. the applicant, assisted by her counsellor from the Centre for Protection from Violence, reported her husband to the police for rape and making dangerous threats. She was interviewed by a female police officer who was experienced in handling cases of domestic violence. In her witness statement, the applicant described the following events in detail.

18. According to the applicant, on Saturday 19 May 2012, when the issue of a possible separation came up, the situation with her husband escalated. She arrived home from work that day at around 3 p.m. Her husband sent the children outside to play, because he said that he wanted to talk to her. He asked her what she was going to do, meaning now that he was gambling again. He thought that it was all her fault. He called her a whore and accused her of seeing other men, since she had not slept with him since February 2012. In the course of the ensuing argument E. repeatedly stated that he could not live without her and the children, and that he would take the children to Turkey. He started choking her and, with his hand still on her throat, pushed her onto the couch. He told her that he was a man and she was a woman, so she was obliged to have sex with him. The applicant told him to stop, but he removed the clothes from the lower part of her body and raped her. She said that he did not hold her tightly during the rape, but she did not resist out of fear of being beaten if she did. After the incident

she took a shower, put on her clothes and went to the pharmacy to obtain a contraceptive pill because she was afraid of getting pregnant.

19. The applicant stated further that E. had behaved violently towards her from the very beginning of their marriage, and that in 2010 he had been issued with a barring and protection order for two weeks because he had injured her. E. had been convicted of bodily harm in relation to that incident, and of making dangerous threats against his brother and nephew. The applicant explained that since 2010 she had been in regular contact with the local Centre for Protection from Violence. Because her husband had subsequently gone to hospital of his own accord to be treated for his gambling addiction and mental problems, she had forgiven him, refused to testify in the criminal proceedings against him and decided to give him another chance. However, the situation had worsened in February 2012, when E.'s gambling addiction had resumed. The applicant explained that after his stay in hospital in 2010 her husband had told her that if he started to gamble again she could leave him. That was why he had been even more aggressive since February 2012 – he feared that she would take him up on his promise. The applicant stated that since the beginning of March 2012 he had been threatening her on a daily basis, always with the same phrases: "I will kill you", "I will kill our children in front of you", "I will hurt you so badly that you will beg me to kill you", "I will hurt your brother's children if I am expelled to Turkey" (the applicant's brother lives in Turkey), and "I will hang myself in front of your parents' door". She said that she took these threats very seriously, but that she had not previously reported them because she feared that he would act upon them if she did.

20. The applicant stated that her husband had been beating her regularly, and sometimes slapped the children as well, especially when he came back from the betting shop. For the most part, the children had not sustained any injuries from the slaps in the face; on just one occasion A. had sustained a haematoma on his cheek. She stated that the children were scared of her husband too. She had been thinking about getting a divorce for several months, but she had feared that he would harm her or her children if she did. The applicant added that her husband sometimes took her mobile telephone away from her and locked her in their apartment so that she could not leave. She reiterated that she was in great fear of her husband and that she was reporting all this to the police at that stage because she wanted to protect herself and her children.

21. The police took pictures of the injuries the applicant had sustained (haematomas on her throat and scratches on her chin). A medical examination did not detect injuries in her genital area (see paragraph 28 below).

22. In accordance with a standard procedure, an online search concerning E. was made by the police in a central electronic database containing the personal data of offenders, including the reasons for and scope of previous barring and protection orders, temporary restraining orders and temporary injunctions. The police also checked the firearms registry to ascertain whether the husband had a gun at his disposal, and the result was negative.

23. After the applicant had reported the matter to the police, two police officers (one male and one female) took her to the family home, where E. and the children were present. The police officers also spoke to the children, who confirmed that their father beat their mother and had also regularly slapped them.

24. E. accompanied the police officers voluntarily to the police station. Subsequently, at 4 p.m., he was questioned by the police. E. denied the allegations of violence, rape and threatening behaviour. He admitted that he had had sexual intercourse with his wife on 19 May 2012. However, he contended that sexual contact with his wife had always followed a pattern whereby his wife initially refused but then allowed herself to be persuaded. He explained that he had beaten his wife in the past but had ceased doing so three years earlier.

25. On the basis of the reported facts and section 38a of the Security Police Act, the police officers issued a barring and protection order against E. at 5.15 p.m. This order obliged him to leave the family home for two weeks and prohibited him from returning to it or the surrounding areas; it also barred him from the applicant's parents' apartment and its surrounding areas. His keys to the family home were taken from him.

26. The applicant was handed a "leaflet for victims of violence", informing her, among other things, of the possibility of extending the scope of the barring and protection order in time and place by seeking a temporary restraining order (*einstweilige Verfügung*) against her husband under sections 382b and 382e of the Enforcement Act (see paragraphs 54 et seq. below). The applicant was informed in the leaflet that she could turn to the competent District Court for further information on the court proceedings. Moreover, the leaflet stated that a barring order was binding not only for the person posing a threat, but also for the victim, who must not let the person posing a threat back into the apartment, and that the police would check on the observance of the barring order. Lastly, the applicant was informed that her data would be transferred to a Centre for Protection from Violence, and she was provided with contact details of institutions providing counselling for victims of violence.

27. The police report concerning the barring and protection order described the applicant as "tearful and very scared". E. was described as "mildly agitated" and "cooperative". Under the heading "indications of an imminent dangerous attack" (*Merkmale für einen bevorstehenden*

gefährlichen Angriff), it stated that a rape had been reported, that there was evidence of violence in the form of haematomas, that there had been continuous threats, and that the children had been slapped regularly. Under the heading "indications of an increased risk from the person posing a threat" (*Merkmale für eine erhöhte Gefährlichkeit des Gefährders*), the police noted:

(a) known reported/unreported violent acts (not only currently, but also previous incidents);

(b) escalation (increase in the occurrence and seriousness of violence);

(c) current stress factors (such as unemployment, divorce, separation from partner/children, and so on); and

(d) a strong tendency to trivialise/deny violence (violence seen as a legitimate means).

28. In the evening of 22 May 2012, at 6.10 p.m., the police informed the public prosecutor on duty (*Journalstaatsanwalt*) of the situation in a phone call. In a note added to the file, the public prosecutor wrote the following:

> "The accused is suspected of raping his wife on 19 May 2012, threatening her repeatedly during the marriage and beating her and the children. The wife has pressed charges with the aid of a representative of the Centre for Protection from Violence and a divorce is apparently pending.
>
> The accused admits having had sexual relations with his wife, but denies the subjective element of the crime. Sexual relations during the marriage [according to him] took place in such a way that his wife repeatedly 'played hard to get'. He would then keep touching her until he managed to persuade her to have sexual relations. According to him, this was typical behaviour for Turkish women. She had allegedly been saying for ten years that she did not want to have sex with him, but then had sex nonetheless.
>
> Concerning the injuries, the police officer stated that the woman did not have injuries in her genital area, but had abrasions on her chin. The wife stated that when she had told [the accused] that she did not want to have sexual relations, he had choked her. Finally she had ceased her resistance and allowed intercourse to take place. He did not hold her down and did not use violence during the act, and she did not scream. Since March 2012 he had allegedly been threatening on a daily basis to kill her.
>
> [The person posing a threat] was issued with a barring and protection order by the police.
>
> I order that the children be questioned, that reports on the findings of the investigations so far be transmitted, and that [the person posing a threat] be charged while remaining at liberty (*auf freiem Fuß angezeigt*)."

On the same day, the public prosecutor's office instituted criminal proceedings against E. on suspicion of rape, bodily harm and making dangerous threats.

29. From 6.50 p.m. until 7.25 p.m. the children A. and B. were questioned in detail at their grandparents' home by the police concerning the violence they had been subjected to by their father. A transcript of the

questioning was drawn up by the police. The children both confirmed their earlier statements to the effect that E. often slapped and screamed at them and behaved in the same way towards their mother.

30. At 11.20 p.m. the competent police officer emailed a report on the findings of the criminal investigations concerning the applicant's husband to the public prosecutor, together with transcripts of the applicant's, her children's and E.'s questioning. The report mentioned that a barring and protection order had been issued and, among other things, listed the offences of which E. was suspected (rape, making dangerous threats, and torment or neglect of under-age, young or defenceless persons). Under the heading "Facts", the situation was described as follows:

> "The suspect has been beating his children and his wife for several years already. On 19 May 2012 the suspect choked his wife, as a result of which she suffered haematomas on her chin and her throat, which have been photographically documented. Then he had intercourse with her, even though she told him repeatedly that she did not want it. Furthermore, for months he has been threatening to kill his wife and their children."

31. The police report on the issuance of the barring and protection order containing the list of indications for an elevated risk (see paragraph 27 above) was not sent to the public prosecutor's office.

32. On 23 May 2012 the St Pölten Federal Police Department (*Bundespolizeidirektion*) assessed the lawfulness of the issuance of the barring and protection order against E. (under section 38a(6) of the Security Police Act). It found that the evidence showed "coherently and conclusively" (*klar widerspruchsfrei und schlüssig*) that E. had used violence against his family, and that the barring and protection order was therefore lawful.

33. On 24 May 2012 at 9 a.m. E. went to the police station on his own initiative to enquire whether it would be possible for him to contact his children. The police took the opportunity to question him and to confront him with his children's statements that he had beaten them. E. confessed that he beat them "every now and then", but "only as an educational measure", "not about the face" and "never aggressively". His wife also slapped them from time to time. He added that his children were everything to him, and that he did not have anyone else but his children. He stated that the day before, he had had a telephone conversation with his daughter and she had wanted to see him. He admitted that he had problems with his wife and that he no longer shared the marital bed but slept on a couch in the living room, because she was "such a cold woman". He stated that he had not beaten her in the past three years. The police noted in their report that E. did not exhibit any signs of potential for aggression while in the presence of the authorities.

34. As a consequence of the above-mentioned questioning, additional charges were brought against E. for torment or neglect of under-age, young

or defenceless persons, under Article 92 of the Criminal Code. On 24 May 2012 the public prosecutor requested the St Pölten Regional Court to cross-examine (*kontradiktorische Vernehmung*) the applicant and her children, and requested that an expert in child psychology be involved.

II. FATAL SHOOTING OF THE APPLICANT'S SON

35. On 25 May 2012 E. went to A. and B.'s school. He asked A.'s teacher if he could speak briefly to his son in private, because he wanted to give him money. The teacher, who later stated that she had been aware that money had to be paid for some school events but that she had not been informed of the problems in the family, agreed. When A. did not return to class, she started looking for him. She found him in the school's basement, having been shot in the head. His sister B., who had witnessed her brother being shot, was not injured. E. had gone. An arrest warrant was issued in respect of him immediately. A. was taken to the intensive care unit of the city hospital.

36. The police questioned several witnesses, including the applicant and her daughter. The applicant stated that E. had always presented "extremely different faces": towards strangers he had always appeared friendly, but only she had known his "true face". After the barring and protection order was issued he had called her several times each day. He had wanted to see her and the children together. She had answered that he could of course see the children, but only in the presence of their grandfather. She had also told her children that they could see their father whenever they wanted. She had only preferred to avoid meeting her husband alone with the children, because she was afraid that he would kill the children in front of her. The applicant stated that she had seen her husband in front of the school with his car in the morning, before the shooting. She had been planning to inform the teacher the following day, 26 May 2012, of her family problems.

37. The applicant's counsellor from the Centre for Protection from Violence (see paragraphs 46 and 71 below) stated that she had never thought that E. would commit such a crime. A.'s teacher said that she had never noticed any injuries on the boy or any other indications that he could have been a victim of domestic violence. She had never heard of any threats being made against the children. The mother of one of A.'s schoolmates, a nurse, described E. as a "friendly and courteous person". She had met him an hour before the event in front of the school, and he had greeted her and shaken her hand. A father of another schoolmate had also met E. that morning and described him as "calm and polite".

38. On the same day, at 10.15 a.m., E. was found dead in his car. He had committed suicide by shooting himself. From his suicide note dated 24 May 2012, which was found in the car, it became apparent that E. had actually

planned to kill both of the children as well as himself. He wrote that he loved his wife and children and could not live without them.

39. On 27 May 2012 A. succumbed to his injuries and died.

III. OFFICIAL LIABILITY PROCEEDINGS

40. On 11 February 2014 the applicant instituted official liability proceedings. She contended that the public prosecutor's office should have requested that E. be held in pre-trial detention on 22 May 2012, after she had reported him to the police. There had been a real and immediate risk that he would reoffend against his family. It should have been clear to the authorities that the barring and protection order had not offered sufficient protection, particularly as the police had known that it could not be extended to cover the children's school. The applicant claimed 37,000 euros (EUR) in compensation for non-pecuniary damage. She also applied to the court for a declaratory judgment (*Feststellungsbegehren*) that the Republic of Austria was liable for any possible future damage (such as mental and physical problems experienced by the applicant) caused by the murder of her son, which she assessed at EUR 5,000.

41. On 14 November 2014 the St Pölten Regional Court (*Landesgericht*) dismissed the applicant's claim. It held that, taking into account the information the authorities had had to hand at the relevant time, there had not been an immediate risk to A.'s life. A barring and protection order had been issued against E., which had required him to stay away from the family home and the applicant's parents' apartment, as well as the surrounding areas. E. had never acted aggressively in public before. Even though he had allegedly been issuing threats against his family for years, he had never acted upon them. He had complied with the barring and protection order issued in 2010, and no further misconduct had been reported to the authorities after the incident in 2010 until the applicant had reported him to the police on 22 May 2012. There had not been any indications that E. had had a gun in his possession, or that he had tried to obtain one. Moreover, after the issuance of the barring and protection order, E. had cooperated with the police and had not demonstrated any aggressive behaviour, so the authorities had been able to assume that there would be a reduction in tension. The Regional Court considered it relevant that, at the hearing, the applicant had herself admitted that the police might have had the impression that E. was cooperative and not aggressive. She told the court that her husband had been a good actor and could present himself well. To others he had always been very friendly and kind. She herself had always given him another chance when he showed remorse for his behaviour and promised to do better. The court weighed the applicant's and her children's right to be protected against the rights of E. under Article 5 of the Convention, and held that pre-trial detention should only be used as the *ultima ratio*. A less

intrusive measure had been issued instead, namely the barring and protection order with respect to the applicant's and her parents' residential premises. The court concluded that the public prosecutor's office had therefore not acted unlawfully or culpably by not taking E. into pre-trial detention.

42. The applicant appealed, repeating that the public prosecutor's office should have been aware that there had been an increased threat of further violent acts by E. since she had filed for divorce. She presented statistics showing that the number of homicides committed between partners was significantly higher during the separation phase of a couple, the phase in which the applicant and E. had found themselves. The applicant asserted that the authorities had been aware that E.'s violence against her had increased since February 2012. In fact, he had specifically threatened that he would kill the children in front of the applicant, and that he would kill her or himself. The applicant also argued that the domestic authorities were under a positive obligation under Article 2 of the Convention to protect her and her children's lives by making use of criminal-law provisions and the relevant measures under criminal law, which, in her specific situation, could only have meant detention. The barring and protection order as a "less intrusive measure" had not been sufficient as the police could not have extended it to cover the children's school.

43. On 30 January 2015 the Vienna Court of Appeal (*Oberlandesgericht*) dismissed the applicant's appeal. It held that the public prosecutor's office had some discretion when deciding on whether to take a person into pre-trial detention. Official civil liability could only be established if the decision had not been justified under the particular circumstances. The starting-point for the evaluation of such a decision was the specific information the authorities had to hand at the time the decision was taken. The public prosecutor's office had to decide on the basis of the specific information available and the facts of the case before it. In the absence of such information, any general knowledge concerning increased levels of homicide during divorce proceedings was not decisive. What mattered was whether at the relevant time there had been serious reasons to suggest that there was a real and individual risk that E. would commit further serious offences against the applicant and her children. According to the information available to the public prosecutor's office at the time, and considering that a barring and protection order had already been issued, there had not been sufficiently specific grounds to assume the existence of such a risk, in particular in the public area, for the reasons already set out by the St Pölten Regional Court.

44. On 23 April 2015 the Supreme Court rejected an extraordinary appeal on points of law by the applicant. Its decision was served on the applicant's counsel on 16 June 2015.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW

A. Barring and protection orders

1. Provisions in force at the relevant time

45. Section 22(2) of the Security Police Act (entitled "Preventive protection of legally protected interests"), as in force at the relevant time, stated that "[t]he security authorities [had] to prevent dangerous attacks on life, health, freedom, morality, property or environment, if such attacks [were] likely." In such cases, the police had an obligation to take appropriate and proportionate protective measures of their own motion if the persons who were attacked or otherwise endangered could not protect themselves. Section 22(3) of the Security Police Act provided that after a dangerous attack, the security authorities had to identify the relevant circumstances. As soon as a particular person was identified as a suspect, they had to act in the interests of the criminal justice system and apply the provisions of the Code of Criminal Procedure (see also Article 18 of the Code of Criminal Procedure).

46. Section 25 of the Security Police Act provides, under the title "Security Police advice", that the authorities have a duty to prevent dangerous attacks on life, limb and property by various means and to promote projects which serve to prevent such attacks. Pursuant to section 25(3) of the Security Police Act, as in force at the relevant time, the Federal Minister of the Interior is authorised to contractually commission proven and suitable victim protection institutions to provide advice to victims of domestic violence. At the relevant time and in the case of the applicant, this task was fulfilled by the Centres for Protection from Violence (see paragraphs 16, 17 and 37 above and 71 below).

47. Under section 38a of the Security Police Act (entitled "Barring and protection order" – *Betretungsverbot und Wegweisung zum Schutz vor Gewalt*), as in force at the relevant time, the police were authorised to issue a barring and protection order against an alleged perpetrator of domestic violence, if it was to be expected that further violent acts might be committed by him or her. At the time of the material events, such barring and protection orders were limited to the home of the victim and the immediate vicinity, as well as other private places where the victim might regularly be, such as his or her parents' home.

48. The relevant parts of section 38a of the Security Police Act, as in force at the relevant time, read as follows:

> "(1) If, on the basis of specific facts, in particular because of a previous dangerous attack, it is to be assumed that a dangerous attack on life, health or freedom is imminent, members of the police force are authorised to ban a person who poses a

threat from the home in which an endangered person lives, as well as its immediate surroundings. [The police] have to inform [the person who poses a threat] of the premises to which the ban applies; this area shall be determined in accordance with the requirements of effective preventive protection.

(2) Under the conditions laid down in subsection (1), the public security authorities are authorised to issue a barring and protection order, which is to be defined in accordance with subsection (1); however, the use of force to enforce this prohibition is not permitted. In the case of a ban prohibiting a person from returning to his or her own home, particular attention must be paid to whether such interference with that person's private life is proportionate. Members of the police force ... are obliged to give [the person posing a threat] the opportunity ... to inform him or herself about where he or she can find alternative accommodation ...

...

(4) Members of the police force are ... obliged to inform the endangered person of the possibility of seeking a temporary restraining order under sections 382b and 382e of the Enforcement Act and of suitable victim protection institutions ...

...

(6) The security authorities must be notified immediately of the issuance of a barring and protection order and must review it [as to its legality] within 48 hours ...

(7) The observance of a barring and protection order must be verified by the public security authorities at least once within the first three days of its entry into force. The barring and protection order shall end two weeks after its issuance, unless a request for a temporary restraining order pursuant to sections 382b and 382e of the Enforcement Act (*Exekutionsordnung*) is submitted within [these two weeks] to the competent court ..."

49. When deciding on whether to issue a barring and protection order, the police carry out a danger assessment on the spot.

50. According to statistics published by the Austrian Ministry of the Interior (*Innenministerium*), in 2012 the police issued 7,647 barring and protection orders under section 38a of the Security Police Act.

51. The relevant parts of section 84 of the Security Police Act as in force at the relevant time read as follows:

"(1) A person who ...

2. disregards a barring and protection order issued under section 38a, subsection 2 ... shall be found to have committed an administrative offence and shall be punished by a fine of up to 500 euros, or up to two weeks' imprisonment in the event of failure to pay."

2. Subsequent amendments in law and practice

52. As a consequence of the instant case, section 38a of the Security Police Act was amended. From 1 September 2013, the police could also issue barring and protection orders in respect of schools and other childcare facilities attended by endangered children under the age of 14. The relevant parts of section 38a of the Security Police Act, as amended, read as follows:

"(1) If there is evidence, in particular because of a previous dangerous attack, leading to the necessary assumption that a dangerous attack on life, health or freedom is imminent, members of the police force are authorised to prohibit a person who poses a threat from entering

1. the home where an endangered person lives, as well as its immediate surroundings;

2. and also, if the endangered person is under the age of 14, from entering

(a) a school that the endangered minor attends to fulfil the requirements of compulsory education ... or

(b) an institutional childcare facility he or she attends, or

(c) a day nursery he or she attends,

including an area within a radius of fifty metres.

(2) ... In the event of a barring and protection order prohibiting a person from returning to his or her own home, it must be ensured in particular that such interference with the private life of the person affected is proportionate. ...

...

(4) Members of the police force are further obliged to inform

1. the endangered person about the possibility of obtaining a temporary restraining order under sections 382b and 382e of the Enforcement Act and of appropriate victim protection facilities ... and

2. if persons under the age of 14 are endangered, immediately [inform]

(a) the locally responsible child and youth welfare office for the purposes of section ... and

(b) the head of any institution for the purposes of subsection 1(2) above for which the ban has been imposed. ..."

53. On 1 January 2020 section 38a of the Security Police Act was again amended. Barring and protection orders were supplemented by "no-contact orders" (*Annäherungsverbot*), which prohibit an alleged perpetrator of violence from approaching the endangered person(s) within a radius of 100 metres. Schools and other childcare facilities are no longer specifically mentioned, since the person posing a threat is in any event obliged to stay 100 metres away from an endangered child.

B. Temporary restraining orders

54. Victims of violence also had the possibility of requesting the competent district court to issue temporary restraining orders under sections 382b and/or 382e of the Enforcement Act, with a maximum duration of six months and one year respectively. Such orders could be issued for any places deemed necessary in order to protect the victim from the alleged perpetrator – hence not only the home of the endangered person but also schools, workplaces and so on.

55. The relevant parts of section 382b of the Enforcement Act (entitled "Protection from violence in the home" – *Schutz vor Gewalt in Wohnungen*) read as follows:

> "(1) The court shall, in respect of a person who makes continued cohabitation intolerable for another person through physical attack, threats of such an attack, or behaviour seriously affecting [the endangered person's] mental health, upon an application by [the endangered person],
>
> 1. order such person to leave the home and its immediate vicinity, and
>
> 2. prohibit him or her from returning to the home and its immediate vicinity if the home is the principal and essential residence of the applicant ..."

56. The relevant parts of section 382c of the Enforcement Act (entitled "Procedure and issuance" – *Verfahren und Anordnung*), as in force at the relevant time, read as follows:

> "(1) If there is an imminent threat of further endangerment by the person posing a threat, [he or she] shall not be heard before the temporary restraining order is issued, in accordance with section 382b, subsection 1. This may become apparent especially from the security authorities' report, which the court must acquire of its own motion; the security authorities are obliged to send such reports to the courts immediately. However, [the application] must be served on the respondent immediately, if the application is submitted without undue delay after a barring and protection order has been issued (section 38a, subsection 7, of the Security Police Act) ...
>
> (3) The following must be notified immediately about the content of the court order deciding on an application for a temporary restraining order in accordance with section 382b and about a court order lifting the temporary restraining order ...
>
> 2. in the event that one of the parties is a minor, the local child and youth welfare authority ..."

57. The relevant parts of section 382e of the Enforcement Act (entitled "General protection from violence" – *Allgemeiner Schutz vor Gewalt*) read as follows:

> "(1) The court shall order a person who makes continued cohabitation intolerable for another person through physical attack, threats of such an attack, or behaviour seriously affecting [the endangered person's] mental health, upon application by [the endangered person],
>
> 1. to stay away from certain designated locations, and
>
> 2. to avoid meeting or contacting the applicant,
>
> unless this runs counter to the essential interests of [the person posing the threat] ..."

58. An application for a temporary restraining order under the Enforcement Act, by which a police barring and protection order could be extended in time (section 382b) or in area (section 382e), could be lodged within two weeks of the applicable police order. Although this was not specifically stated in the law, the civil court had to determine a request under section 382e within four weeks at the latest.

59. As indicated above, under the procedural rule contained in section 382c of the Enforcement Act, the district court had to act "immediately" and refrain from hearing the respondent "if there [was] an imminent threat of further endangerment by the person posing a threat". According to well-established case-law and legal opinion in Austria, this rule applied also to orders under section 382e of the Enforcement Act, and therefore allowed such an order to be issued immediately after a victim's complaint about domestic violence. The accused was to be heard only in exceptional cases (Linz Regional Court 15 R 108/06t; Vienna Regional Court 45 R 478/06m, 42 R 573/01b: EFSlg 98.711,115.566-115.568; Linz Regional Court 15 R 125/18k: EFSlg 159.356; Supreme Court 3 Ob 198/08a). The domestic courts' case-law, and legal opinion, have unanimously considered that a restraining order must be issued without hearing the respondent if the effectiveness of the measure "depends on an immediate decision". In practice, the domestic courts regularly made use of this rule and issued restraining orders at the same time as informing the respondent of the application, in order to prevent the purpose of the protection measure from being frustrated (see, for example, Supreme Court 1 Ob 156/10p, 2 Ob 140/10t, 4 Ob 119/14z, 7 Ob 185/17g, and Wels Regional Court 21 R 65/12a EFSlg 136.516). The right of the respondent to be heard is safeguarded by the possibility of making an objection (*Widerspruch*), a special remedy set out in section 397 of the Enforcement Act.

60. Since 1 September 2013, pursuant to Article 211 § 2 of the Civil Code, the Youth Welfare Office (*Kinder- und Jugendhilfeträger*) must be informed by the police if a barring and protection order has been issued in respect of a household where children are present. The Youth Welfare Office is authorised to lodge applications for temporary restraining orders under sections 382b and 382e of the Enforcement Act on behalf of endangered children, if their guardian fails to do so.

C. Risk assessment methods and case conferences

61. In 2011 the so-called MARACs (Multi-Agency Risk Assessment Conferences – see also paragraph 88 below) were created in Vienna, with the participation of members of the Vienna police, officials from the justice system, women's safety organisations, organisations for migrants, non-governmental organisations (NGOs) working with offenders, and other relevant stakeholders. The objectives of MARACS were systematic, coordinated risk assessments and safety planning. Similar multi-agency pilot projects were conducted in two other provinces of Austria in 2015. In 2017 and 2018 the project was evaluated by the Ministry of the Interior, which resulted in the discontinuation of the authorities' participation in the

MARACs. It appears that NGOs and victim protection organisations continue to hold these conferences.

62. A risk assessment tool called SALFAG (*Situationsanalyse bei familiärer und Beziehungsgewalt* – Analysis of situations of violence within the family and relationships) was developed by psychologists at the request of the Ministry of the Interior and was tested in three regions of Austria between November 2013 and June 2014. It appears that the use of this tool was discontinued after its evaluation.

63. According to a decree issued by the Ministry of Justice on 3 April 2019, entitled "Directives for the prosecution of offences within the close social sphere" (*Richtlinien zur Strafverfolgung bei Delikten im sozialen Nahraum*), in April 2017 the Ministry of Justice and the Vienna Intervention Centre against Violence within the Family (Wiener Interventionsstelle gegen Gewalt in der Familie – "the Intervention Centre") reached an agreement according to which, in all cases of domestic violence within the Vienna area, henceforth (1) the police had to inform the public prosecutor's office of any barring and protection orders that were issued and forward all relevant documents; (2) a danger assessment questionnaire had to be filled in by the Intervention Centre and sent to the police, who were then obliged to consult the Intervention Centre regarding the further approach and investigation; and (3) the "danger assessment tool" used by the Intervention Centre had to be forwarded to the senior public prosecutor's office (*Oberstaatsanwaltschaft*) by the Ministry of Justice.

64. On 1 January 2020 section 22(2) of the Security Police Act was amended and the possibility of calling a security police case conference (*Sicherheitspolizeiliche Fallkonferenz*) was established. The purpose of such conferences is for the police to be able to coordinate their response with other relevant authorities in cases where an identified person is likely, on the basis of a previous dangerous attack, to again commit a serious crime against the life, health, freedom or decency of another person.

D. Grounds for arrest and pre-trial detention

65. Article 170 of the Code of Criminal Procedure (included in the chapter on "Arrest") reads as follows:

> "(1) Arresting a person suspected of having committed an offence is permitted:
>
> 1. if the person has been caught in the act of committing an offence or is plausibly suspected of committing the offence, or is caught with items indicating the person's involvement in the offence;
>
> 2. if the person has fled or is in hiding or if there is evidence of a risk that the person will flee or go into hiding;
>
> 3. if the person tries to influence witnesses, expert witnesses or co-suspects, remove evidence of the offence, or hinder the establishment of the truth in any other

way or if there is specific factual evidence that there is a risk that the person will try do so;

4. if the person is suspected of having committed an offence which is punishable by imprisonment exceeding six months or if there is specific factual evidence leading to an assumption that he or she will commit such an offence, directed against the same legally protected interest, or that he or she will carry out the attempted or threatened act (Article 74 § 1 (5) of the Criminal Code).

(2) If the offence is punishable by imprisonment for at least ten years, arrest must be ordered, unless it can be assumed, on the basis of factual evidence, that all the grounds for arrest laid down in paragraph 1 (2) to (4) can be excluded.

(3) Arrest and detention may not be ordered if they are disproportionate to the significance of the case (Article 5)."

66. The relevant parts of Article 171 of the Code of Criminal Procedure, as in force at the relevant time, read as follows:

"(1) The arrest must be carried out by the police on the basis of a warrant issued by the public prosecutor's office which has been approved by a court.

(2) The police may arrest a suspect of their own motion:

1. in the cases referred to in Article 170 § 1 (1), and

2. in the cases referred to in Article 170 § 1 (2) to (4), if, owing to imminent danger, an order from the public prosecutor's office cannot be obtained in time.

(3) In the case of an arrest pursuant to paragraph 1, the suspect must be served with the court approval of the arrest immediately or within twenty-four hours after the arrest; in the case of an arrest pursuant to paragraph 2 a written police statement disclosing the strong suspicion of the offence and the grounds for the arrest [must be issued to the suspect]. Furthermore, the suspect must be informed at once, or immediately after his or her arrest, that he or she has the right:

1. to notify a relative or any other trusted person and defence counsel of his or her arrest, or have them so notified ...;

2. to request the appointment of legal-aid defence counsel where applicable;

3. to lodge a complaint or an appeal against his or her arrest and to request his or her release at any time."

67. The relevant parts of Article 173 of the Code of Criminal Procedure (listed in the chapter on "Pre-trial detention"), as in force at the relevant time, read as follows:

"(1) The ordering and extension of pre-trial detention is permitted only at the request of the public prosecutor's office and only if the accused is strongly suspected of a specific criminal offence and has been questioned by the court on the matter as well as on the preconditions for pre-trial detention, and one of the reasons for detention listed in paragraph 2 is present. It may not be ordered or extended if it is disproportionate to the importance of the matter or the expected punishment, or if its purpose can be achieved through the use of more lenient measures (paragraph 5).

(2) A ground for detention is given if, on the basis of specific facts, there is a risk that at liberty the suspect would:

1. flee or go into hiding owing to the nature and extent of the expected punishment or for other reasons;

2. influence witnesses, expert witnesses or co-suspects, remove evidence of the offence, or hinder the establishment of the truth in any other way;

3. despite the fact that proceedings concerning an offence punishable by imprisonment exceeding six months have been instituted against [the suspect],

a. commit a criminal offence entailing serious consequences, directed against the same legally protected interest as the criminal offence entailing serious consequences of which he or she is suspected,

b. commit a criminal offence entailing not only minor consequences, directed against the same legally protected interest as the offence of which he or she is suspected, if he or she has previously been convicted or is currently suspected of having repeatedly or continually committed such offences,

c. commit a criminal offence punishable by imprisonment exceeding six months, which is directed against the same legally protected interest as the criminal offence of which he or she is suspected and in respect of which he or she has been convicted twice previously, or

d. carry out the attempted or threatened act (Article 74 § 1 (5), of the Austrian Criminal Code) of which he or she is suspected.

(3) A risk of flight shall in any case not be assumed if the person concerned is suspected of a criminal offence that is not punishable by imprisonment exceeding five years, is in a stable living environment and has a permanent residence in Austria, unless he or she has already made arrangements to flee. When assessing whether the suspect will commit an offence pursuant to paragraph 2 (3), the fact that he or she poses a threat to life and limb of a person or presents a risk of committing crimes in a criminal organisation or terrorist association shall carry particular weight. Apart from this, the assessment of this ground for detention shall take into consideration to what extent such risk has been reduced by a change in the circumstances under which the offence of which he or she is suspected was committed.

...

(5) More lenient measures include, in particular:

1. a pledge not to flee or go into hiding or leave [the suspect's] place of residence without permission from the public prosecutor's office until the final conclusion of the criminal proceedings;

2. a pledge not to attempt to hinder the investigations;

3. in cases of domestic violence (section 38a of the Security Police Act), a pledge to refrain from any contact with the victim and to comply with any instruction not to enter a specific home or its immediate surroundings or with an existing barring and protection order pursuant to section 38a(2) of the Security Police Act or an existing temporary restraining order pursuant to section 382b Enforcement Act, including the removal of all keys to the home [from the suspect];

4. an instruction to live at a certain place, with a certain family, to stay away from certain homes, certain places or certain people, to refrain from consuming alcohol or other addictive substances, or to have steady employment;

5. an instruction to report any change of residence or to report to the police or another authority at certain intervals ..."

68. In accordance with Article 173 § 2 of the Code of Criminal Procedure, the factual assumptions regarding a ground for detention must be based on "specific facts" which must result from the individual case. General experience is not sufficient (Supreme Court RS0118185; 13 Os 146/11m, 11 Os 84/08z, 14 Os 5/08d, 15 Os 73/06h). As such, not only external, but also so-called "internal" facts must be taken into account; character traits and features of the accused may constitute such facts (see JAB 512 BlgNR, 12. GP, page 9; Supreme Court 11 Os 31/08f and 12 Os 7/10m). For example, "the fact, based on experience, that the accused flees more often than not and the fact that the accused is likely to face a severe punishment in the specific case" are not in themselves apt to form the basis for an assumption of a flight risk (RV 39 BlgNR12. GP, page 24). The assumption of the risk of an offence being committed requires not the mere possibility, but the concrete probability, of the future commission of an offence (Supreme Court 14 Os 36/14x, 11 Os 119/03 and 13 Os 19/98; see also Nimmervoll, *Strafverfahren*, 2nd edition, Chapter III, paragraph 613).

69. More lenient measures (as mentioned in Article 173 §§ 1 and 5 of the Code of Criminal Procedure, cited above), in so far as they go beyond the barring and protection orders provided for under the Security Police Act and the temporary restraining orders under the Enforcement Act, may only be imposed if grounds for pre-trial detention under Article 173 § 2 (1)-(3) of the Code of Criminal Procedure are made out. More lenient measures may only replace detention if, when viewed in the light of reality, such measures can effectively prevent the grounds for detention from materialising. In contrast to other procedural principles which do not require a negative justification, a decision not to apply more lenient measures must be specifically justified (Article 174 § 3 (4) of the Code of Criminal Procedure [see Nimmervoll, *Strafverfahren*, 2nd edition, Chapter XI, paragraph 635]; see also Supreme Court 11 Os 131/93).

70. According to statistics of the Austrian Federal Ministry of Justice (*Bundesministerium für Justiz*), pre-trial detention was ordered 8,640 times in 2012. Some 470 of these cases concerned offences against personal freedom, and 389 concerned offences against life and limb.

E. Centres for Protection from Violence (*Gewaltschutzzentren*)

71. Advice to victims of violence is provided by officially authorised "Centres for Protection from Violence" (see section 25 of the Security Police Act, paragraph 46 above). These centres are specialised private-law organisations which are commissioned and funded by the government, on the basis of contracts, for the comprehensive and individualised support of victims of domestic violence. There is a Centre for Protection from Violence in each province (*Land*), while the capital has the Vienna Intervention Centre (Interventionsstelle Wien). Their central task is to

protect victims of violence and to increase their safety. This support is free of charge and confidential. Victims can contact these Centres for Protection from Violence directly. If the police issue a barring and protection order, these institutions actively contact the victim(s).

72. The services offered by the Centres for Protection from Violence/Intervention Centre include: assistance with a view to increasing the protection and safety of women and their children, implementation of security measures and risk assessments; information and support, especially after a police intervention; assistance in formulating and submitting applications to the court as well as in contacts with the authorities; accompaniment to police hearings and court hearings; psychosocial and legal process support; if necessary, referral to other facilities (women's shelters, women's and family counselling centres, child protection centres, psychotherapists, and so on); counselling in the person's mother tongue as needed or involvement of interpreters.

II. INTERNATIONAL LAW AND PRACTICE

A. Council of Europe

1. Recommendation Rec(2002)5 of the Council of Europe's Committee of Ministers to member States on the Protection of Women against Violence

73. In its recommendation on the protection of women against violence, the Committee of Ministers of the Council of Europe stated, *inter alia*, that member States should introduce, develop and/or improve where necessary national policies against violence based on maximum safety and protection of victims, support and assistance, adjustment of the criminal and civil law, raising of public awareness, training for professionals confronted with violence against women, and prevention.

74. With regard to domestic violence, the Committee of Ministers recommended that member States should classify all forms of violence within the family as criminal offences and envisage the possibility of taking measures in order, *inter alia*, to enable the judiciary to adopt interim measures aimed at protecting victims, to ban the perpetrator from contacting, communicating with or approaching the victim, or residing in or entering defined areas. They should also penalise all breaches of the measures imposed on the perpetrator and establish a compulsory protocol so that the police and medical and social services follow the same procedure.

2. The Istanbul Convention

75. The Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS 210 – "the Istanbul

Convention") was signed by Austria on 11 May 2011, ratified on 14 November 2013 and entered into force in respect of Austria on 1 August 2014. The Istanbul Convention incorporates the standards set out in the Committee of Ministers' Recommendation Rec(2002)5 to member States on the protection of women against violence.

76. The Istanbul Convention outlines the obligations of States Parties to take the necessary measures to protect women against all forms of violence, and to prevent, prosecute and eliminate violence against women and domestic violence. In the preamble, the States Parties recognise "the structural nature of violence against women as gender-based violence, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men". They further recognise that while men may also be victims of domestic violence, it affects women disproportionately. The term "women" includes girls under the age of 18 (Article 3 of the Istanbul Convention). Moreover, it is recognised that children are victims of domestic violence too, including as witnesses of violence in the family.

77. Article 2 states that the Istanbul Convention applies to all forms of violence against women, including domestic violence, which affects women disproportionately, but that the States Parties are encouraged to apply it to all victims of domestic violence.

78. Article 3 of the Istanbul Convention defines "violence against women" as

> "... a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."

79. "Domestic violence" is defined by the same Article as "all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim".

80. Pursuant to Article 5 § 2 of the Istanbul Convention, States Parties are required to take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of the Istanbul Convention which are perpetrated by non-State actors.

81. Article 15 of the Istanbul Convention stresses the importance of providing or strengthening training for professionals dealing with victims or perpetrators of domestic violence, on the prevention and detection of such violence, equality between women and men, the needs and rights of victims and how to prevent secondary victimisation.

82. The following provisions of the Istanbul Convention are also relevant to the instant case:

Chapter IV – Protection and support
Article 18 – General obligations

"1. Parties shall take the necessary legislative or other measures to protect all victims from any further acts of violence.

2. Parties shall take the necessary legislative or other measures, in accordance with internal law, to ensure that there are appropriate mechanisms to provide for effective co-operation between all relevant state agencies, including the judiciary, public prosecutors, law enforcement agencies, local and regional authorities as well as non-governmental organisations and other relevant organisations and entities, in protecting and supporting victims and witnesses of all forms of violence covered by the scope of this Convention, including by referring to general and specialist support services as detailed in Articles 20 and 22 of this Convention.

..."

Chapter VI – Investigation, prosecution, procedural law and protective measures
Article 49 – General obligations

"1. Parties shall take the necessary legislative or other measures to ensure that investigations and judicial proceedings in relation to all forms of violence covered by the scope of this Convention are carried out without undue delay while taking into consideration the rights of the victim during all stages of the criminal proceedings.

2. Parties shall take the necessary legislative or other measures, in conformity with the fundamental principles of human rights and having regard to the gendered understanding of violence, to ensure the effective investigation and prosecution of offences established in accordance with this Convention."

Article 50 – Immediate response, prevention and protection

"1. Parties shall take the necessary legislative or other measures to ensure that the responsible law enforcement agencies respond to all forms of violence covered by the scope of this Convention promptly and appropriately by offering adequate and immediate protection to victims.

2. Parties shall take the necessary legislative or other measures to ensure that the responsible law enforcement agencies engage promptly and appropriately in the prevention and protection against all forms of violence covered by the scope of this Convention, including the employment of preventive operational measures and the collection of evidence."

Article 51 – Risk assessment and risk management

"1. Parties shall take the necessary legislative or other measures to ensure that an assessment of the lethality risk, the seriousness of the situation and the risk of repeated violence is carried out by all relevant authorities in order to manage the risk and if necessary to provide co-ordinated safety and support.

2. Parties shall take the necessary legislative or other measures to ensure that the assessment referred to in paragraph 1 duly takes into account, at all stages of the investigation and application of protective measures, the fact that perpetrators of acts

of violence covered by the scope of this Convention possess or have access to firearms."

83. In relation to Article 51 of the Istanbul Convention (Risk assessment and risk management), the Explanatory Report to the Istanbul Convention states the following:

"260. Concerns for the victim's safety must lie at the heart of any intervention in cases of all forms of violence covered by the scope of this Convention. This article therefore establishes the obligation to ensure that all relevant authorities, not limited to the police, effectively assess and devise a plan to manage the safety risks a particular victim faces on a case-by-case basis, according to standardised procedure and in co-operation and co-ordination with each other. Many perpetrators threaten their victims with serious violence, including death, and have subjected their victims to serious violence in the past. It is therefore essential that any risk assessment and risk management consider the probability of repeated violence, notably deadly violence, and adequately assess the seriousness of the situation.

261. The purpose of this provision is to ensure that an effective multi-agency network of professionals is set up to protect high-risk victims. The risk assessment must therefore be carried out with a view to managing the identified risk by devising a safety plan for the victim in question in order to provide co-ordinated safety and support if necessary.

262. However, it is important to ensure that any measures taken to assess and manage the risk of further violence allow for the rights of the accused to be respected at all times. At the same time, it is of paramount importance that such measures do not aggravate any harm experienced by victims and that investigations and judicial proceedings do not lead to secondary victimisation.

263. Paragraph 2 extends the obligation to ensure that the risk assessment referred to in the first paragraph of this article duly takes into account reliable information on the possession of firearms by perpetrators. The possession of firearms by perpetrators not only constitutes a powerful means to exert control over victims, but also increases the risk of homicide. ..."

84. Article 52 of the Istanbul Convention deals with emergency barring orders:

"Parties shall take the necessary legislative or other measures to ensure that the competent authorities are granted the power to order, in situations of immediate danger, a perpetrator of domestic violence to vacate the residence of the victim or person at risk for a sufficient period of time and to prohibit the perpetrator from entering the residence of or contacting the victim or person at risk. Measures taken pursuant to this article shall give priority to the safety of victims or persons at risk."

85. The Explanatory Report (paragraph 264) states that in situations of immediate danger, the most effective way of guaranteeing the safety of a domestic violence victim is by achieving physical distance between the victim and the perpetrator. It clarifies (at paragraph 265) that the term "immediate danger" in Article 52 of the Istanbul Convention refers to any situations of domestic violence in which harm is imminent or has already materialised and is likely to happen again.

86. Article 53 of the Istanbul Convention concerns restraining or protection orders:

> "1. Parties shall take the necessary legislative or other measures to ensure that appropriate restraining or protection orders are available to victims of all forms of violence covered by the scope of this Convention.
>
> 2. Parties shall take the necessary legislative or other measures to ensure that the restraining or protection orders referred to in paragraph 1 are:
>
> – available for immediate protection and without undue financial or administrative burdens placed on the victim;
>
> – issued for a specified period or until modified or discharged;
>
> – where necessary, issued on an ex parte basis which has immediate effect;
>
> – available irrespective of, or in addition to, other legal proceedings;
>
> – allowed to be introduced in subsequent legal proceedings.
>
> ..."

87. GREVIO is the independent expert body responsible for monitoring the implementation of the Istanbul Convention by the Parties. It publishes reports evaluating legislative and other measures taken by the Parties to give effect to the provisions of the Convention. GREVIO may also adopt, where appropriate, general recommendations on themes and concepts of the Convention.

88. GREVIO published its first baseline evaluation report on Austria on 27 September 2017. The executive summary (page 6) "highlights a number of positive legal and policy measures in place in Austria and welcomes its long history of policy-making in the area of violence against women. In particular, GREVIO values the strong leadership Austria has shown in the past twenty years in introducing a system of emergency barring and protection orders for victims of domestic violence. Today, this system is well established and is widely considered a success". The executive summary also mentions "a number of issues where improvement is warranted in order to reach higher levels of compliance with the requirements of the Istanbul Convention".

The passages of the baseline evaluation report relevant to the present case read as follows:

> "A. Immediate response, prevention and protection (Article 50)
>
> ...
>
> 154. A separate issue that arises at the investigative stage in domestic violence cases is that of pre-trial detention. Austrian criminal procedural law envisages pre-trial detention on three specific grounds: (i) flight risk, (ii) risk of collusion or (iii) risk of re-offending if the offence in question carries a prison term of more than six months. From the information obtained by GREVIO it emerges that this is rarely made use of by prosecution services as they rarely consider any of the three grounds applicable. The specialist support and counselling services, however, repeatedly pointed out that

even in cases of severe violence and threat where a woman and her children are clearly at risk, prosecution services rely on a (civil law) protection order to ensure their safety rather than opting for pre-trial detention. Whether the reasons lie in an over-reliance on the system of emergency barring and protection orders, shortcomings in how the risk to an individual victim is assessed, or general attitudes regarding domestic violence and the seriousness of threats made in such a context, GREVIO is of the opinion that this practice should be re-assessed. ... This is urgently needed in view of another recent case which led to the death of a woman under an emergency barring order and where pre-trial detention was not ordered despite several requests by the Victim Protection Centre acting on her behalf. ...

155. GREVIO strongly encourages the Austrian authorities to:

a. take further measures to improve the collection of evidence in cases of domestic violence, stalking, forced marriage, female genital mutilation, rape and sexual violence, so that reliance on the victim's testimony is lessened;

b. step up measures to assess the real risk of re-offending in domestic violence cases in order to make more appropriate use of pre-trial detention where warranted.

...

B. Risk assessment and risk management (Article 51)

170. A risk assessment tool for use by the law enforcement agencies has recently been developed by the Federal Ministry of Interior. Its aim is to standardise the assessment of risks in domestic violence cases. It has been tested in a pilot phase in some provinces of Austria and it is now ready for implementation across the country. In addition, some parts of Austria have introduced multi-agency risk assessment procedures or tools in the form of regular meetings or case conferences. Some law enforcement agency districts use MARACs (Multi-Agency Risk Assessment Conference), and representatives of various agencies regularly attend. In Styria, risk assessment is mainly done by the violence protection centre on the basis of DyRIAS (Dynamic Risk Assessment System). This IT-based system is highly respected for its thoroughness and law enforcement agencies and prosecution services take the results extremely seriously and frequently order pre-trial detention on that basis.

C. Emergency barring and protection orders (Article 52); (Article 53)

171. Since the introduction of emergency barring orders in 1997 Austria has been widely known for its leadership in this field. ... Moreover, the standards set in Articles 52 and 53 of the Convention were very much inspired by the Austrian model of emergency barring and protection orders. GREVIO welcomes this pioneering role and congratulates the Austrian authorities on the wide level of implementation of barring and protection orders, including the use of emergency barring orders as a preventive measure exercised by the law enforcement agencies.

172. The system currently in existence in Austria consists of police-ordered two-week bans on perpetrators of domestic violence to enter the residence of the victim(s). In addition and upon application by the victim, a protection order may be issued by a civil law court (family courts division) for up to 12 months. Interestingly, these are not usually general contact bans but "no-go orders", banning a perpetrator from entering certain premises. As a result, protection is linked to places that victims frequent rather than the victim as such. ...

173. Linking protection to places rather than people bears the risk of gaps inherent to any enumerative approach. Such gaps have led to tragic cases in the past, inspiring the legislators to include (in addition to the home) educational institutions and child-

care facilities in the list of places in respect of which a ban may be issued. While GREVIO welcomes the political will to close existing gaps, it considers that general no-contact orders are the better approach.

...

176. Another issue GREVIO would like to raise is the protection of children under domestic violence barring and protection orders. Below the age of 14, they are automatically included in any emergency barring or protection order banning a perpetrator from the family home, whether they are directly or indirectly affected by the violence. The protection obtained through a ban issued in protection of their mother does not, however, extend automatically to the children's school or childcare facility. This has to be specifically applied for.

..."

89. In its report on Austria, GREVIO further noted that legal professionals, in particular judges and prosecutors, did not receive initial or in-service training on violence against women as a form of gender-based violence, and held that this should be addressed. As the quality of investigations and the evidence collected impacts significantly on the level and outcome of prosecution and the number of convictions, GREVIO's report on Austria also highlights the fact that the very low number of convictions in relation to violence against women, including domestic violence, compared to the number of reported cases of violence against women, raises issues regarding the role of the prosecution services in relation to their due diligence obligation as set out in Article 5 § 2 of the Istanbul Convention.

90. On 1 September 2017 the Austrian Government submitted comments in reply to GREVIO's baseline report, prior to the publication of that report. In relation to GREVIO's recommendation to step up measures to assess the real risk of reoffending in domestic violence cases (see paragraph 155 of the baseline report, paragraph 88 above), the Government stated the following:

"Austria recognises the need to further improve assessment of the real risk of re-offending in domestic violence cases and would like to draw attention to the following measures:

The Ministry of Interior Affairs is presently implementing a standardised risk assessment tool that will be applied by law enforcement officers throughout Austria. The respective assessment results will be made available to the public prosecutor in charge.

Moreover, the Ministry of Justice is presently analysing the recent case referred to in paragraph 154 [of the GREVIO baseline report on Austria] ... and assessing the use of pre-trial detention. In addition, a meeting with representatives of Violence Protection Centres, police authorities, the Public Prosecution Authority of Vienna and the Senior Prosecution Authority of Vienna in the Ministry of Justice on 20 April 2017 resulted in an agreement to improve information exchange and communication between Violence Protection Centres, police and public prosecution on the risk of re-offending in order to ensure an immediate follow-up to risk assessments undertaken by Violence Protection Centres and to try to develop a common understanding of risk factors for

re-offending based on indicators that will be provided by the Violence Protection Centres. ...”

B. United Nations

1. Convention on the Elimination of All Forms of Discrimination against Women

91. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted in 1979 by the United Nations General Assembly. In 1992, the Committee on the Elimination of Discrimination against Women (“the CEDAW Committee”) adopted General Recommendation No. 19 on violence against women[1]. Austria ratified CEDAW on 31 March 1982 and the Optional Protocol to the Convention on 6 September 2000.

92. In the case of *Şahide Goekce v. Austria* (CEDAW/C/39/D/5/2005, 6 August 2007), which concerned the killing of Mrs Goekce by her husband in front of their two daughters, the CEDAW Committee found that the State Party had breached its due diligence obligation to protect Şahide Goekce, as the police had failed to respond immediately to an emergency call made by her a few hours before she was killed. Austria had thus violated the rights of the deceased Şahide Goekce to life and physical and mental integrity under Article 2 (a) and (c) to (f), and Article 3 of the CEDAW read in conjunction with Article 1 of the CEDAW and General Recommendation No. 19 of the CEDAW Committee. In addition, the CEDAW Committee made the following remarks on why the public prosecutor should not have denied two requests by the police to detain Mr Goekce on previous occasions:

> “12.1.5 Although the State party rightly maintains that it is necessary in each case to determine whether detention would amount to a disproportionate interference in the basic rights and fundamental freedoms of a perpetrator of domestic violence, such as the right to freedom of movement and to a fair trial, the Committee is of the view ... that the perpetrator’s rights cannot supersede women’s human rights to life and to physical and mental integrity. ...”

93. On 30 July 2019 the CEDAW Committee published its “Concluding observations on the ninth periodic report of Austria” (CEDAW/C/AUT/CO/9). In relation to “Gender-based violence against women”, it noted and recommended the following:

> “22. The Committee welcomes the adoption by the State party of the Protection against Violence Law and the creation of the Inter-Ministerial Working Group on the Protection of Women against Violence. The Committee notes the following with concern, however:
>
> (a) The high number of femicides in the State party and the lack of comprehensive and updated statistical data on the phenomenon;

[1] In 2017 the CEDAW Committee adopted General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19.

(b) The underreporting of domestic violence against women and the low prosecution and conviction rates, resulting in impunity for perpetrators;

...

23. Recalling the relevant provisions of the Convention and the Committee's general recommendation No. 35 (2017) on gender-based violence against women, updating general recommendation No. 19, the Committee recommends that the State party:

...

(b) Monitor and assess the responsiveness of the police and the judiciary in cases of sexual crimes and introduce mandatory capacity-building for judges, prosecutors, police officers and other law enforcement officers on the strict application of criminal law provisions on gender-based violence against women and on gender-sensitive investigation procedures;

...;

(d) Reinforce the protection and assistance provided to women who are victims of gender-based violence, including by strengthening the capacity of shelters and ensuring that they meet the needs of victims and cover the entire territory of the State party and strengthen financial support to and cooperation with non-governmental organizations providing shelter and rehabilitation to victims;

..."

2. Convention on the Rights of the Child

94. The United Nations Convention on the Rights of the Child of 20 November 1989, ratified by Austria on 6 August 1992, also recognises the right of children to be protected from domestic abuse and urges States to put in place adequate procedures and mechanisms to deal with the matter:

Article 19

"1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement."

III. EUROPEAN UNION MATERIAL

95. On 8 December 2008 the Council of the European Union (EU) adopted EU guidelines on violence against women and girls. The document describes violence against women as one of the major human rights

violations of today and focuses on reminding States of their dual responsibility to prevent and respond to violence against women and girls. Physical, sexual and psychological violence occurring within the family is mentioned specifically as a form of violence against women and girls.

96. The EU guidelines on violence against women and girls also highlight the following:

> "3. ... The EU reiterates the three indissociable aims of combating violence against women: prevention of violence, protection of and support for victims and prosecution of the perpetrators of such violence.
>
> ...
>
> 3.1.4. ... The EU will emphasise that it is essential for States to ensure that violence against women and girls is punished by the law and to see that perpetrators of violence against women and girls are held responsible for their actions before the courts. States must in particular investigate acts of violence against women and girls swiftly, thoroughly, impartially and seriously, and ensure that the criminal justice system, in particular the rules of procedure and evidence, works in a way that will encourage women to give evidence and guarantee their protection when prosecuting those who have perpetrated acts of violence against them, in particular by allowing victims and their representatives to bring civil actions. Combating impunity also involves positive measures such as the training of police and law enforcement officers, legal aid and proper protection of victims and witnesses and the creation of conditions where the victims are no longer economically dependent on the perpetrators of violence."

97. According to the publication "Violence against women: an EU-wide survey" containing the findings of a survey carried out by the European Union Agency for Fundamental Rights (FRA) between March and September 2012 (published in 2014), based on interviews with 42,000 women across the then 28 member States,

> "... one in 10 women has experienced some form of sexual violence since the age of 15, and one in 20 has been raped. Just over one in five women has experienced physical and/or sexual violence from either a current or previous partner, and just over one in 10 women indicates that they have experienced some form of sexual violence by an adult before they were 15 years old. Yet, as an illustration, only 14% of women reported their most serious incident of intimate partner violence to the police, and 13% reported their most serious incident of non-partner violence to the police."

98. As regards Austria, the survey found in particular that 13% of Austrian women stated that they had suffered physical and/or sexual violence at the hands of a partner, while 38% of Austrian women stated having suffered some form of psychological violence at the hands of a partner. For 8% of Austrian women the psychological abuse involved threats or actual acts by a partner to hurt children.

IV. COMPARATIVE LAW

99. According to the comparative-law data available to the Court concerning the legislation of forty-two Council of Europe member States

(Albania, Andorra, Armenia, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Monaco, Montenegro, the Netherlands, North Macedonia, Norway, Poland, Portugal, the Republic of Moldova, Romania, the Russian Federation, San Marino, Serbia, the Slovak Republic, Slovenia, Spain, Switzerland, Turkey, Ukraine and the United Kingdom), all the member States surveyed have a number of protective and/or preventive measures set out in various legal provisions (criminal, civil and/or administrative law) applicable in the context of domestic violence. Twenty-eight member States have enacted specific laws on domestic violence. Barring and/or restraining orders are the main protective/preventive measures available. Other protective/preventive measures include the placement of the victim and other family members in shelters (fourteen member States), specific measures aimed at teaching perpetrators of domestic violence about non-violent behaviour (seven member States), and a prohibition on carrying weapons (seven member States).

100. Twenty-nine member States mentioned specific protective and/or preventive measures applicable to children in the context of domestic violence. These measures include the possibility of restricting or removing parental authority and/or placing children in foster care (twenty-three member States) and limiting contact between children and perpetrators (seventeen member States). In twelve member States the protective/preventive measures applied to children included limiting the perpetrator's contact with the victim's children in specific geographical locations, for example their schools. Children and their best interests are taken into account in risk assessments in all the member States surveyed.

101. When the authorities are confronted with a situation of domestic violence, some sort of risk assessment is carried out in all of the member States surveyed in order to determine whether or not the victim is at risk of further violence. In the majority of the member States surveyed the risk assessment is made, first and foremost, by the police, often together with the judicial authorities and social services. In five member States the risk assessment is carried out only by judges. At least twelve member States use general risk-assessment standards. Standardised tools specifically designed for domestic violence cases are used in risk assessments in twenty-six member States. In this connection, some member States apply internationally developed standards, including the Spousal Assault Risk Assessment (SARA) and the Dynamic Risk Analysis System (DyRiAs). Others appear to have developed their own detailed risk assessment standards.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

102. Relying on Articles 2, 3 and 8 of the Convention, the applicant complained, firstly, that the Austrian authorities had failed to protect her and her children from her violent husband. She emphasised that she had explicitly mentioned in her report to the police that she feared for her children's lives. Nonetheless, they had not been listed as endangered persons in the police report. The authorities had had all the relevant information to make them aware of the increased risk of further criminal offences by E. against his family, but had failed to take effective preventive measures. She argued that her husband should have been taken into pre-trial detention.

103. Secondly, the applicant complained that the legal framework for the protection of children in the context of domestic violence had been insufficient, as at the relevant time barring and protection orders could not be extended to childcare facilities, a fact which had left her children unprotected at their school. This was a negligent omission and, as such, a breach of Article 2.

104. Having regard to its current case-law and the nature of the applicant's complaints, the Court, being master of the characterisation to be given in law to the facts of a case, considers that the issues raised in the present case should be examined solely from the perspective of the substantive aspect of Article 2 of the Convention (compare *Fernandes de Oliveira v. Portugal* [GC], no. 78103/14, § 81, 31 January 2019; see also paragraph 49 of the Chamber judgment). The relevant part of Article 2 reads as follows:

> "1. Everyone's right to life shall be protected by law. ..."

A. The Government's preliminary objection

1. The parties' submissions

105. The Government reiterated the objection they had raised before the Chamber (see paragraph 51 of the Chamber judgment). They submitted that the complaint concerning the allegedly insufficient legislative framework for the protection of the applicant's children was inadmissible for non-exhaustion of domestic remedies. While it was true that the barring and protection order issued by the police could not, at the relevant time, have been extended to the children's school, it had been open to the applicant to apply to the competent district court for a temporary restraining order under sections 382b and 382e of the Enforcement Act (see paragraphs 54 et seq. above). Such an order would have been an effective remedy capable of averting any danger at the applicant's children's school. An application to

that effect could be lodged at the competent district court every working day during business hours. It was inherent in a restraining order that it must be issued promptly. The Austrian Enforcement Act therefore explicitly allowed the courts to refrain from hearing the respondent before issuing a temporary restraining order, if "there [was] an imminent threat of further endangerment by the person posing a threat" (section 382c(1) of the Enforcement Act; see also paragraph 58 above).

106. The Government submitted statistics from the year 2012, when 170 applications for temporary restraining orders had been decided on the day of the application; 117 of them had been granted. Of the 180 applications which had been decided on the day after the application, 126 had been granted. 132 applications for restraining orders had been decided within two days of the application, 87 of which had been granted. The Government therefore concluded that, contrary to what the Chamber had found (see paragraph 108 below), it was indeed possible to be granted a temporary restraining order very shortly after making an application. Hence, the applicant had not availed herself of all effective domestic remedies.

107. The applicant submitted that she had exhausted all available domestic remedies, both formally (by instituting official liability proceedings and pursuing them up to the Supreme Court) and substantively (by raising all the arguments before the domestic courts which she had also raised in her application to the Court). In particular, she had not been obliged to apply, in addition, for a temporary restraining order covering her children's school under sections 382b and 382e of the Enforcement Act. Given that the district court had four weeks to decide on such a request, that request could not be considered an effective remedy that would have ensured the necessary immediate protection of her children. Even if she had applied for a temporary restraining order on the same day she had filed for divorce, the district court would probably not have decided on the application within three days, and it was only three days later that her son had been killed. In addition, the judge at the court where she had filed for divorce on 22 May 2012 had not informed her that she had that opportunity, despite the allegations she had made about her husband's violent and threatening behaviour.

2. The Chamber's findings

108. The Chamber considered that an application under sections 382b or 382e of the Enforcement Act would not have provided the applicant and her children with the necessary immediate protection. It was not convinced that such an application would have been an effective remedy against the alleged risk in the instant case and therefore rejected the Government's objection.

3. The Court's assessment

109. The Grand Chamber observes that the main question with regard to the Government's preliminary objection is whether the applicant, in respect of her complaint relating to the alleged deficiency of the legal framework, failed to make use of available remedies in domestic law, particularly those provided by sections 382b and 382e of the Enforcement Act. Taking a different approach from the Chamber, the Grand Chamber considers that the Government's preliminary objection is not strictly a matter of exhaustion of domestic remedies, as the purpose of the provisions in question is the prevention of future harm rather than the remedying of harm that has already been done. The Grand Chamber therefore finds that this question is inextricably linked to that of the adequacy of the legal framework in providing sufficient protection for the applicant and her children against domestic violence, and to the question of the authorities' possible duty of diligence. Accordingly, it joins this question to the merits and will examine it under Article 2 of the Convention (see, among other authorities, *Opuz v. Turkey*, no. 33401/02, § 116, ECHR 2009).

B. The Chamber judgment

110. The Chamber held unanimously that there had been no violation of Article 2 of the Convention under its substantive limb.

111. The Chamber first examined the applicant's complaint concerning the State's positive obligation to take preventive operational measures for the protection of her son's life. It agreed with the domestic authorities that on the basis of the information available at the time, when looked at cumulatively, the authorities had been entitled to conclude that the barring and protection order covering the applicant's and her parents' homes and the surrounding areas would be sufficient for the protection of the applicant's life and the lives of A. and B. A real and immediate risk of a planned murder by E. had not been detectable at the time.

112. Secondly, as to the complaint of the lack of a regulatory framework allowing a barring and protection order for childcare facilities, the Chamber referred to its reasoning as set out above, to the effect that under the circumstances known to the authorities there had been no discernible risk to the applicant's son's life when he was at school.

113. The Chamber concluded that the competent authorities had not failed to comply with their positive obligation to protect the life of the applicant's son.

C. The parties' submissions

1. The applicant

114. The applicant submitted that the domestic authorities had failed to comply with their positive obligation under Article 2 to protect her son's life.

115. The applicant argued that the principles developed by the Court in *Osman v. the United Kingdom* (28 October 1998, *Reports of Judgments and Decisions* 1998-VIII) had been established for incident-type situations, whereas she had been in a situation of ongoing abuse in the family, which was typical in cases of domestic violence. An adequate risk assessment in such cases entailed taking into account general experience and empirical research into the dynamics of domestic violence, in order to allow for a prognosis of a potential future threat. In most cases, domestic violence persisted and escalated over time. Therefore, a context-sensitive assessment, as applied by the Court in *Talpis v. Italy* (no. 41237/14, 2 March 2017), and *Volodina v. Russia* (no. 41261/17, 9 July 2019), was required ("real and immediate risk ... taking into account the context of domestic violence").

116. As to the question whether the authorities ought to have known of the risk to the life of her son, the applicant submitted that in her report to the police she had mentioned not only the acts of violence and threats by her husband against her, but the fact that she considered her children to be endangered too. This was evident from E.'s threat to kill the children in front of her, and from the fact that he had admitted having slapped them as well. In fact, she had expressly mentioned that the protection of her children was her motive for reporting the matter to the police. Despite this, in the barring and protection order the authorities had not listed them as "endangered persons" within the meaning of section 38a of the Security Police Act. The authorities' efforts had been focused on protecting the applicant, without recognising the risk to the children. Moreover, the police had never specifically asked her whether her husband had access to weapons. If asked, she would have been able to tell them that E. had repeatedly told her that a weapon was easy to obtain for him; "one call would have been enough".

117. The applicant reiterated that she had referred to many risk factors in the course of filing the police report, namely her husband's previous criminal conviction (for offences against the same legally protected interests, namely making dangerous threats and bodily harm) in 2010; his relapse into his gambling addiction in 2012 and the resulting increased aggression; his refusal to accept her wish to get divorced and her resulting fear that he would act upon his threats; his gross denial and trivialisation of violence; and the increased frequency and intensity of the violence, culminating in the rape. The applicant pointed out that the police had explicitly mentioned some of these signs of an increased risk in the barring

and protection order of 22 May 2012, and had been made aware of the violence against the children too. The separation from her husband in particular should have been treated as a high risk factor, not only on the basis of general experience of domestic violence, but also because E.'s death threats had always been made in relation to the applicant's wish to separate from him.

118. The applicant stressed that she had thus informed the authorities of all the relevant factors which should have enabled them to recognise the high risk her husband posed for her children and herself. Despite this, the authorities had failed to take the necessary measures to avoid that risk, namely to take E. into pre-trial detention as there was an imminent risk of a further offence being committed (Article 173 § 2 of the Code of Criminal Procedure – see paragraph 67 above). However, this increased risk had not been recognised by the authorities, leading to the killing of her son. The applicant argued that it was well known that domestic violence was never a one-off event. As long as an offender was not successfully kept from contacting the victims, the risk of further violence remained. The fundamentals of domestic violence showed that children were always affected by violence in the family unit. Intimate partner violence was never limited to the direct victim, which was why equal measures had to be taken to protect the children, even more so if the children had already been directly affected by violence and been the target of death threats, as in the applicant's case.

119. The applicant submitted that the authorities had failed to consider the specific context of domestic violence, as would have been required under the Court's line of case-law starting with *Talpis* (cited above). They had attributed considerable weight to the fact that she had only reported the rape three days after it had happened, taking this as a factor mitigating the risk. However, owing to years of domestic abuse the applicant had been very fearful of acting decisively. It was precisely the context of domestic violence that made it unacceptable to blame the victim for hesitating to take action. Women in violent relationships often showed ambivalent behaviour towards the offender. Emotional attachment, the hope for change, but particularly the ongoing fear could all be reasons for this ambivalence, which had an effect on women's attitudes concerning the criminal prosecution of the offender. Being late in filing a report was one possible consequence. This, in turn, meant that special requirements were imposed on the law-enforcement authorities when dealing with victims of domestic violence. Thus, the responsibility for taking the appropriate operational measures should not be shifted from the authorities to the victim.

120. The applicant submitted that neither the police officers nor the public prosecutor who had decided on the measures to take had made use of a specific risk assessment tool designed for domestic violence cases, despite the first such test having been developed by Jacquelyn Campbell in 1986

and danger assessment tools having been widely used by law-enforcement officials, advocates and health professionals for the past twenty-five years. While the police report on the barring and protection order of 22 May 2012 had listed a few risk factors, they were not part of a specific system, and there were no guidelines as to how to weigh them in the final decision on a barring and protection order. Public prosecutors likewise did not use any risk assessment tools or other established procedures when deciding whether or not a person posing a risk to another person should be taken into pre-trial detention.

121. The applicant argued that the decree of the Ministry of Justice of 3 April 2019 (see paragraph 63 above) demonstrated that in 2012 it had not been standard procedure for the police to forward information on a barring and protection order to the public prosecutor's office, and neither had it been standard practice for those authorities to use a danger assessment tool.

122. The fact that standardised assessment tools were still not being used by the Austrian authorities had also been criticised by a screening group established by the Austrian Federal Ministry of the Interior after a major series of femicides at the beginning of 2019. The screening group had consisted of experts from the police, forensic psychologists and the Institute of Criminal Law and Criminology at the University of Vienna and had assessed all murders and attempted murders in the period from 1 January 2018 until 25 January 2019. At the top of their list of recommendations was the implementation of a risk assessment tool for law-enforcement officials when dealing with situations of domestic violence.

123. The applicant argued that the legal framework at the time of the events in question had not been sufficient to protect her and her children from violent acts by E., in particular because of the lack of a possibility of extending the barring and protection order to the children's school. A temporary restraining order under section 382e of the Enforcement Act would not have been issued in sufficient time, as the competent courts had up to four weeks to decide on such an application. The applicant further stated that the judge at the District Court where she had filed for divorce on 22 May 2012 had not informed her of that possibility, even though it should have been clear to the judge from her statements that there was an increased need for protection.

124. Moreover, the applicant pointed out that there had been no law at the relevant time providing for mandatory notification of the Youth Welfare Office after a barring and protection order had been issued, as the relevant Article of the Civil Code (Article 211) had only entered into force on 1 February 2013 (see paragraph 60 above).

2. The Government

125. The Government considered that the national authorities had complied with their positive obligations under Article 2 of the Convention.

They stressed that the scope of these positive obligations had to be interpreted in such a way that it did not impose an impossible or unreasonable burden on the States Parties (the Government compared *Osman*, § 116; *Opuz*, § 129; and *Talpis*, § 101, all cited above) and had to take into account the competing rights under Article 5, Article 6 § 2 and Article 8 of the Convention.

126. They submitted that in the applicant's case the Austrian authorities had acted immediately and fulfilled their obligations under Article 2 in the best possible manner. They had had no information from which they could have concluded that there was a real and immediate threat to the life of the applicant's children, which was why the children had not been expressly mentioned as "endangered persons" in the police report on the barring and protection order. Nonetheless, the barring and protection order had been designed not only for the applicant's protection but also for the protection of her children, as was evident from the reasons given for including the flat of the applicant's parents, which included the words "since the endangered person and her children are staying there". The applicant had first mentioned in the police report of 22 May 2012 that the husband had also beaten the children and had uttered threats to murder them since March 2012. Prior to that report filed with the police, the applicant's husband had come to the attention of the law-enforcement and prosecuting authorities in this connection only once, on account of ill-treatment of the applicant two years previously. In the period of about two years following that police report, no misconduct on the part of the husband had become known to the authorities. The special features of domestic violence had also been taken into account. The husband had not only adhered to the barring and protection order in 2010, but had also subsequently gone to hospital of his own accord to be treated for his mental health problems. Therefore, the police had been entitled to assume in 2012 that he would again comply with the order.

127. The Government argued that the applicant herself had probably only gradually become aware of the risk her husband posed to their children. It had taken her three days after the violence had escalated on Saturday 19 May 2012 to file for divorce and file a report with the police. She had subsequently confirmed to the police on 25 May 2012 that she had agreed after the barring and protection order had been issued that the children could continue to have contact with E. if the applicant's father was present. The applicant had failed to seek a temporary restraining order from the court that would have also included areas and premises outside her home and its vicinity. She had not planned to inform her children's teacher until Saturday 26 May 2012 – as it transpired, the day after the shooting of her son. Even though, according to her own statement, she had seen her husband close to the school in the morning before he had committed the crime, she had not immediately informed the teacher about the risk.

128. The Government argued that the Austrian authorities had – as it had turned out after the event – had only a very limited set of facts at their disposal which they could use as a basis for assessing the potential danger emanating from the husband. When interviewed by the police on the same day, the husband had appeared calm and cooperative, and no evidence of rape had been established by means of a gynaecological examination of the applicant. In view of the fact that the applicant had not reported the act of violence to the police until three days after the offence (although that possibility was available twenty-four hours a day), and that the report concerned a form of violence directed against her but not her children, the public prosecutor's office had not been obliged to assume that a situation of acute danger as set out in Article 170 § 1 (4) of the Code of Criminal Procedure (see paragraph 65 above) existed. The applicant had spent the intervening period with her husband in their common home. According to the applicant's submissions, no further ill-treatment had taken place during those three days either. Moreover, the acts reported by the applicant had only taken place in the domestic sphere; hence, there had likewise been no specific indication of a possible offence being committed in public, such as in the children's school. It had thus not been foreseeable that the husband would shoot the son at school.

129. The Government stated that there was a checklist of steps to be taken by the police in the event of an intervention under section 38a of the Security Police Act, which included noting down certain risk factors such as an indication of dangerous threats, other criminal acts, possession of a weapon, drug or alcohol abuse, and the mental and emotional state of the person posing a threat. The police had to note any indications of an imminent dangerous attack, as well as any indications of increased dangerousness of the perpetrator. Any injuries sustained by the victim had to be documented in writing and by taking photographs; the same applied to any damage done to the victim's clothing or the apartment. That checklist had been used by the police in the applicant's case.

130. The Government submitted that the public prosecutor's office, when assessing the question of pre-trial detention, had carried out an assessment of the risks to the applicant and her two children. Although this had not been done with explicit reference to the Court's judgment in *Osman* (cited above), the circumstances of relevance for assessing the urgency of the suspicion and the grounds for detention, in particular the risk of a further crime being committed, had been examined. The latter ground for detention in itself required a risk assessment. Since Article 5 of the Convention and the corresponding case-law allowed an interference with the right to liberty and security only as a last resort (the Government cited the example of *Saadi v. the United Kingdom* [GC], no. 13229/03, § 70, ECHR 2008, with further references), detention was only lawful if there was a correspondingly strong suspicion. However, after the barring and protection order had been

issued and on the basis of the information available to the police and the prosecutors at the time, no such suspicion had existed. The Government argued that in his analysis of the facts known at the time, the public prosecutor had been entitled to assume that the husband did not pose an immediate and real threat, at least not to the children, and that the barring and protection order issued and monitored by the police would, as a more lenient measure, adequately protect the applicant and her children. From an *ex ante* perspective, all the possibilities available to the authorities and the courts (rapid conduct of investigations to assess the situation, including the hearing in person of the applicant, E. and the two children, and the issuing of a barring and protection order under section 38a of the Security Police Act) had thus been exhausted. According to the assessment of all three public prosecutors involved in the case, these measures had been proportionate at the time and the decision not to arrest E. had been lawful.

131. The Government further submitted that the applicant, who had been receiving counselling at the Centre for Protection from Violence, must have been aware of the possibility of seeking refuge with her children in the nearest women's shelter. In the present case, the expert from the competent Centre for Protection from Violence had conducted a standardised risk assessment, independently and based on a comprehensive set of facts, with an outcome identical to that of the Austrian authorities.

132. The Government argued that in order to produce a sound result, a risk assessment had to include an informed individual evaluation; it could not be replaced by the mechanical use of standardised risk assessment tools. It was essential to have well-trained staff able to check, on a case-by-case basis, the generally accepted factors and patterns, such as heavy alcohol use, controlling behaviour, forced sexual activity and psychological violence. Therefore, the Austrian authorities constantly arranged targeted training activities in general, and for violence prevention officers in particular.

133. The Government submitted that the first Protection from Violence Act (*Gewaltschutzgesetz*) of 1997 had introduced a duty of special training on domestic violence for police officers. In order to implement the second Protection from Violence Act, which had come into force on 1 June 2009, the Federal Ministry of the Interior had organised special training and awareness-raising exercises for the police. The topic "Violence against children" was one of the main focuses of this training. At the relevant time, the (female) investigating officer of the St Pölten municipal police station had already been very experienced and shown great dedication in the field of domestic violence.

134. Since 1 January 2009 it had been mandatory for public prosecutors and judges to work for at least two weeks at a victim protection or welfare facility during training. The public prosecutor who had first dealt with the applicant's case had previously attended two subject-specific training events. The second prosecutor involved in the case had not received specific

training in this area. The third public prosecutor who had handled the case (*aktführende Staatsanwältin*) had been assigned for five months during her training to a lawyer who mainly provided legal support for victims of (mostly domestic) violence. During this time she had gained a comprehensive insight into victim protection.

135. The Government explained that the police had a general duty to prevent dangerous attacks on, *inter alia*, life, health and liberty, if such attacks were probable (under section 22 of the Security Police Act – see paragraph 45 above). The police issued a barring and protection order of their own motion if there was a relevant risk in a particular case (under section 38a of the Security Police Act – see paragraph 48 above); this spared victims of domestic violence the burden of taking the initial steps necessary to break the cycle of violence. The Government stressed that barring and protection orders and court injunctions did not preclude the possibility of arrest or of pre-trial detention (governed by Articles 170 and 173 of the Code of Criminal Procedure, in conformity with Article 5 of the Convention).

136. Since 1 September 2013 the police had to inform the Youth Welfare Office of the issuing of a barring and protection order where children were concerned (see paragraph 60 above). The Youth Welfare Office would then conduct a comprehensive assessment of the risk and take measures to protect the child. In addition, the police had to inform the competent Centre for Protection from Violence about any such barring and protection order. The centre's staff would then contact the victims of violence as promptly as possible, offering advice and support with respect to further legal steps. The police monitored compliance with barring and protection orders and could arrest a person who was not complying with such an order. In order to obtain protection for a longer period of time, victims of domestic violence could file an application with the competent district court for a temporary restraining order (subsequent to, or also independently from, a barring and protection order issued by the police). In cases of serious violence, victims were, as a rule, advised to leave home with the children and seek refuge in a safe place such as a women's shelter, even if the violent partner had already been evicted or barred.

3. The third-party interveners

(a) Council of Europe Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO)

137. GREVIO, the body mandated to monitor the implementation of the Istanbul Convention (see also paragraphs 87 et seq. above), submitted that a gendered understanding of domestic violence, as required under the Istanbul Convention, could only be achieved if the national authorities in charge of preventing the relevant offences and protecting the victims took into

account the specific nature and dynamics of domestic violence and recognised its distinctly gendered nature. Consecutive cycles of domestic violence were generally the norm with an increase in frequency, intensity and danger over time. A request by the abused woman for separation or divorce was in fact one factor that could lead to the escalation of domestic violence against her and her child(ren).

138. The above background explained why victims might not immediately report the violence (including in cases of sexual violence) or might withdraw their complaints or even forgive their violent partner. In that connection, research indicated that women typically sought protection orders after serious levels of victimisation and after abuse over a significant length of time. In other words, any complaints of domestic violence were usually filed after several episodes of violence and often following a very violent incident which had rendered the continuation of the relationship unsustainable, intolerable (or even potentially lethal) for the victim. Factors such as financial dependency, migrant status, disability and age could compound the abuse and impact the victim's ability to break away from the cycle of violence.

139. GREVIO explained that the Istanbul Convention was attentive to the specific risks faced by children in the context of domestic violence, and treated both children who had been the subject of direct violence and those who had witnessed domestic violence as victims in need of protection. Studies and statistical data underlined the fact that perpetrators in the context of intimate partner violence were also often violent towards children with whom they cohabited, including after the end of an abusive relationship. With fewer opportunities available to subjugate their former partners after separation, many domestic abusers retaliated by abusing their children. Harming the children through neglect or psychological, sexual and physical violence, including their deliberate murder, often came as a form of revenge, and many children lived with violence and the threat of death on a daily basis. Women victims of domestic violence who left their abusers were often confronted with threats of harm to the children, which had to be taken seriously. Thus, it was very important to understand these signs and to conduct effective risk assessments for children as well.

140. GREVIO submitted that Article 51 of the Istanbul Convention required authorities to carry out a risk assessment for the victims as of receipt of the complaint using standardised tools with pre-established questions that the competent authorities must systematically ask and answer. The system in place should afford law-enforcement officials clear guidelines and criteria governing action or intervention in sensitive situations. Several internationally recognised tools existed, for example the Spousal Assault Risk Assessment (SARA), the Multi-agency Risk Assessment Conference (MARAC) developed in the United Kingdom, VioGen from Spain, and the domestic violence screening inventory (DVSI,

DVSI-R), and were applied to assess the risk, including the lethality risk, which perpetrators of domestic violence posed to their victims. There were several indicators that were normally included in risk assessments and that were regarded as red flags indicative of a high risk, such as: the fact that the victim had filed for separation or the break-up of the relationship, previous acts of violence, psychological problems of the perpetrator, the prior issuing of a restrictive measure, addictions, unemployment, threats to take away common children, acts of sexual violence, threats to kill the victim and her children, threats of suicide, and coercive and controlling behaviour. A red flag of particular importance under Article 51 was if the perpetrator had access to a firearm. This aspect therefore had to be systematically and methodically addressed in all domestic violence cases and at all stages of the case.

141. GREVIO argued that it was important that the authorities should not rely on the victim's assessment of the risk, which, owing to the dynamics of domestic violence, might not be objective. Moreover, the assessment of risk and identification of safety measures should be conducted continuously and during all the phases of the procedure by police officers, prosecutors and judges from the first meeting with the victim all the way to a possible sentence, as the risk could change and new information might need to be taken into account. If risk management was not reliable and ongoing, victims might be lulled into a false sense of security, exposing them to greater risk. Crucially, any risk assessment had to address systematically the risk not only for the woman concerned, but also for her children.

142. The purpose of the risk assessment was to enable the competent authorities to manage the identified risk and to provide coordinated safety and support to the victims. This meant that all relevant authorities had to provide information on risks to, and coordinated support with, any other relevant stakeholders who came into regular contact with persons at risk, including, in the case of children, with teachers. GREVIO added that the composure/conduct of the perpetrator when dealing with persons outside of the domestic unit should not be given weight in assessing the dangerousness and the risk of further domestic violence. The perpetrator was primarily dangerous to women or children with whom he had intimacy, at home or in similar circumstances.

143. GREVIO submitted that the legal system in place should afford law-enforcement officials clear guidelines and criteria governing action or intervention in sensitive situations such as in domestic violence cases. In line with Article 15 of the Istanbul Convention (see paragraph 81 above), such training could significantly improve the understanding of the dynamics of domestic violence, as well as its links with harm to children, thus enabling professionals to better assess and evaluate the existing risk, respond appropriately and ensure prompt protection. Moreover, training of

police, prosecutors and judges on domestic violence was essential in order to evaluate the risk of reoffending and order the necessary measures of protection.

144. Turning to the States Parties' obligation to equip the competent authorities with the power to order a perpetrator of domestic violence to leave and to bar him or her from entering the residence or contacting the victim (Article 52 of the Istanbul Convention – see paragraph 84 above), GREVIO stressed that there might be a need to extend the protection to the children of the victim, for example by banning the perpetrator from the school and/or childcare facility. Any regulation that was limited only to banning the perpetrator from the residence of the victim but allowed him or her to contact them in other places would fall short of fulfilling the obligation under Article 52 of the Istanbul Convention. Where a no-contact order was issued, the authorities must ensure the enforcement of the order through appropriate monitoring, so that the onus of ensuring compliance with the order did not fall on the victim and/or her children. GREVIO in its reports had highlighted ways in which this could be done in practice, for instance by the use of electronic tools, regular checks on the victim and her children by phone, and follow-up meetings with the perpetrator to explain the order in place and the consequences a breach could have.

145. Lastly, GREVIO submitted that Article 16 of the Istanbul Convention imposed an obligation on Contracting States to develop preventive intervention and treatment programmes to help perpetrators change their attitudes and behaviour in order to prevent further acts of domestic violence. Domestic violence intervention programmes should be based on best practices and what research revealed about the most effective ways of working with perpetrators. Programmes should encourage perpetrators to take responsibility for their actions and examine their attitudes and beliefs towards women. In its evaluation reports, GREVIO had repeatedly pointed to the need to ensure attendance of such programmes with a view to reducing recidivism.

(b) European Human Rights Advocacy Centre (EHRAC) and Equality Now

146. In their joint intervention, EHRAC (European Human Rights Advocacy Centre at Middlesex University, United Kingdom) and Equality Now (an international NGO) submitted that the Grand Chamber should clarify and develop its case-law regarding the scope of the State's positive obligation to prevent risks to life and limb posed by non-State actors in cases of domestic violence. They argued, in particular, that the test developed by the Court in *Osman* (cited above) in order to trigger the State's positive obligation, which required that "the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual", had to be applied taking due account of the particular context of domestic violence. Domestic violence

was by its very nature cyclical, recurring in time and with a tendency to escalate. For an "immediate" threat it should therefore be sufficient that the authorities were on notice – possibly already from the victim's first report of repeated violence to the authorities – that the threat of harm had materialised in an incident of domestic violence and was ongoing. A lethality risk assessment should already be conducted at this point.

147. Furthermore, when determining whether the authorities "ought to have known", with the application of due diligence, of the threat to the victim's life, the Court had held convincingly in *Volodina* (cited above, § 92) that "special diligence" was required in domestic violence cases. As the Court had confirmed in *Talpis* (cited above, § 118), the failure to (properly) assess a risk to life or health could not be relied on to deny knowledge of the existence of a threat.

148. The interveners further submitted that a gender perspective had to be adopted in assessing States' compliance with their positive obligations in responding to cases of domestic violence. As domestic violence was the result of historically established perceptions of the subordinate position of women in society and thus a form of gender-based discrimination against women, such cases should be automatically considered under Article 14 of the Convention. Furthermore, having regard to the systemic and structural nature of violence against women, the Court should order general measures under Article 46 of the Convention.

(c) Federal Association of Austrian Centres for Protection from Violence (Bundesverband der Gewaltschutzzentren Österreichs)

149. The Federal Association of Austrian Centres for Protection from Violence submitted that it was generally essential that the national authorities be aware of the specific dynamics involved in domestic violence, which led to victims frequently not informing the police immediately after a violent attack or to victims refusing to make a statement in a criminal case, and that these dynamics be taken into account in the authorities' risk assessment. In practice, the authorities did not make standardised threat assessments taking into account the particular risk factors characteristic of situations of domestic violence (such as separation, previous violent behaviour, possession of weapons, threats of violence, failure to observe police and court orders, and extreme fear on the part of the victim).

150. The association further reported that in its experience, in cases in which a high risk of a seriously violent act had been identified, police emergency barring orders and judicial interim injunctions – which took several days, if not weeks, to be issued – could not offer adequate victim protection. It was necessary in such cases to place the person who posed a threat in pre-trial detention in accordance with Article 173 of the Austrian Code of Criminal Procedure.

(d) Association "Women's Popular Initiative 2.0" (Frauenvolksbegehren 2.0)

151. Women's Popular Initiative 2.0, an NGO advocating for gender equality in Austria, submitted that legal professionals and law-enforcement agencies received some, but not sufficient vocational training regarding domestic violence, which led to judicial stereotyping on "how victims behave" and to gender-biased policing in the context of a persisting misogynistic culture. When intervening in cases of domestic violence, law-enforcement officers did not use a standardised risk assessment tool, based on a list of scientifically sound risk indicators, in order to evaluate properly the risk of an escalation of violence and the degree of risk. The NGO further contended that in high-risk cases, civil procedural law instruments such as restraining orders did not offer sufficient protection and that pre-trial detention should be used more frequently in such cases.

(e) Association of Autonomous Austrian Women's Shelters (Verein Autonome Österreichische Frauenhäuser – "AÖF")

152. AÖF took the view that while, for a long time, Austria had had a pioneering role in Europe concerning the prevention of violence and the protection of victims, numerous deficits remained in this regard. In particular, judges and prosecutors had to be trained to gain an understanding of gender-specific violence against women and the forms and effects of traumatisation, in order to prevent violence against women from being trivialised. Moreover, it was necessary to implement clear and binding guidelines for law-enforcement authorities on carrying out risk assessments, taking into account specific risk factors, in order for them to be in a position to take effective measures to protect victims. AÖF's experience had shown that protection orders issued by the police or the civil courts were not sufficiently effective to prevent murder and should not be used instead of pre-trial detention in high-risk cases.

153. Moreover, AÖF submitted, with reference to the survey carried out by the FRA (see paragraph 97 above), that reporting rates of incidents of violence against women were generally low. It was common for perpetrators to threaten victims in order to avoid being reported to the police, and it needed immense courage, empowerment and support for victims to turn to the authorities. Therefore, it should not be held against them if they did not report incidents of violence immediately.

(f) Women against Violence Europe (WAVE)

154. WAVE, a network of women's NGOs in forty-six countries working to combat and prevent violence against women and domestic violence in Europe, stressed the importance for the authorities of carrying out a systematic risk assessment, having regard to the now well-known risk factors, including risk factors for children, in cases of domestic violence. It was important to adequately train the law-enforcement authorities in order to ensure a correct understanding of domestic violence and its specific dynamics. When there was a risk of repeated and severe violence, emergency police barring orders and civil-law interim injunctions, which usually took at least four to five days to be issued, were not sufficient to ensure rapid and effective protection by the State. Moreover, responsibility for acting could not be shifted onto the victims of domestic violence. The State had to use criminal-law instruments in such cases and order the perpetrator's pre-trial detention, or issue criminal-law orders under Article 173 § 5 of the Code of Criminal Procedure (see paragraph 67 above) as more lenient measures.

(g) Donne in Rete contro la violenza (D.i.Re)

155. D.i.Re, a network of over eighty Italian women's NGOs running services to combat and prevent violence against women and domestic violence, concurred with WAVE's submissions on the need to adequately train the law-enforcement authorities in the field of domestic violence and to use criminal-law instruments to ensure victims' protection in high-risk cases.

156. D.i.Re further took the view that the test developed by the Court in *Osman* (cited above) in order to trigger the State's positive obligation to prevent risks to life posed by non-State actors – namely that "the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual" – had to be applied with a gender-sensitive understanding of domestic violence, which was a form of gender discrimination. Owing to the particular vulnerability of the victims, "special diligence" was required in dealing with domestic violence cases, as the Court itself had notably confirmed in *M.G. v. Turkey* (no. 646/10, 22 March 2016) and *Talpis* (cited above). The special condition of victims justified lowering the threshold of risk required in order to trigger State intervention from an "immediate risk" to a "present risk" of violence.

D. The Court's assessment

1. General principles

(a) Positive obligations under Article 2 in general

157. The Court has held that Article 2 enshrines one of the basic values of the democratic societies making up the Council of Europe (see *McCann and Others v. the United Kingdom*, 27 September 1995, § 147, Series A no. 324). The first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see *Osman*, cited above, § 115, and *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 48, ECHR 2002-I). The latter obligation involves a primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends in certain circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual (see *Osman*, cited above, § 115; *Kontrová v. Slovakia*, no. 7510/04, § 49, 31 May 2007; and *Opuz*, cited above, § 128).

158. Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the scope of the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Not every claimed risk to life, therefore, can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For this positive obligation to arise, it must be established that the authorities knew or ought to have known at the relevant time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (the so-called "*Osman* test" – see *Osman*, cited above, § 116).

159. The Court notes that the duty to take preventive operational measures under Article 2 is an obligation of means, not of result. Thus, in circumstances where the competent authorities have become aware of a real and immediate risk to life triggering their duty to act, and have responded to the identified risk by taking appropriate measures within their powers in order to prevent that risk from materialising, the fact that such measures may nonetheless fail to achieve the desired result is not in itself capable of justifying the finding of a violation of the State's preventive operational obligation under Article 2. On the other hand, the Court observes that in this

context, the assessment of the nature and level of risk constitutes an integral part of the duty to take preventive operational measures where the presence of a risk so requires. Thus, an examination of the State's compliance with this duty under Article 2 must comprise an analysis of both the adequacy of the assessment of risk conducted by the domestic authorities and, where a relevant risk triggering the duty to act was or ought to have been identified, the adequacy of the preventive measures taken.

160. It is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they had or ought to have had knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case (ibid., and see *Opuz*, cited above, § 130). Moreover, the Court has held that it must be cautious about revisiting events with the wisdom of hindsight (see *Bubbins v. the United Kingdom*, no. 50196/99, § 147, ECHR 2005-II). This means that a given case in which a real and immediate risk materialised must be assessed from the point of view of what was known to the competent authorities at the relevant time.

(b) Positive obligations under Article 2 in the context of domestic violence

(i) General considerations

161. The issue of domestic violence – which can take various forms, ranging from physical assault to sexual, economic, emotional or verbal abuse – transcends the circumstances of an individual case. It is a general problem which affects, to a varying degree, all member States and which does not always surface into the public sphere since it often takes place within personal relationships or closed circuits and affects different family members, although women make up an overwhelming majority of victims (see *Opuz*, § 132, and *Volodina*, § 71, both cited above). Today, the extent of domestic violence is well documented (see, for example, the results of the FRA survey in relation to the experiences of women in the EU member States, paragraph 97 above). Much research has been done in the past two decades into domestic and gender-based violence, and legal and practical responses have developed significantly in many States (see paragraphs 99-101 above for the results of the comparative-law survey).

162. There is a common understanding in the relevant international material that comprehensive legal and other measures are necessary to provide victims of domestic violence with effective protection and safeguards (compare the authorities referred to in *Opuz*, cited above, §§ 72-86 and 145, and the material summarised in the section on "International law and practice", see paragraphs 73 et seq. above).

163. Children who are victims of domestic violence are particularly vulnerable individuals and entitled to State protection, in the form of

effective deterrence, against such serious breaches of personal integrity, notably as a consequence of the States' positive obligations under Article 2 of the Convention (see *Opuz*, § 159; *Talpis*, § 99; and *Volodina*, § 72, all cited above). Violence against children belonging to the common household, including deadly violence, may be used by perpetrators as the ultimate form of punishment against their partner.

164. The existence of a real and immediate risk to life (see paragraphs 158-160 above) must be assessed taking due account of the particular context of domestic violence. In such a situation it is above all a question of taking account of the recurrence of successive episodes of violence within the family unit (see *Talpis*, § 122, and *Volodina*, § 86, both cited above, and *Munteanu v. Moldova*, no. 34168/11, § 70, 26 May 2020). The Court therefore considers it necessary to clarify what it means to take into account the specific context and dynamics of domestic violence under the *Osman* test (see paragraph 158 above).

(ii) The requirement to respond immediately to allegations of domestic violence

165. The Court reiterates at the outset that an immediate response to allegations of domestic violence is required from the authorities (see *Talpis*, cited above, § 114). Where it has found that the authorities failed to act promptly after receiving a complaint of domestic violence, it has held that this failure to act deprived such complaint of any effectiveness, creating a situation of impunity conducive to the recurrence of acts of violence (see *Halime Kılıç v. Turkey*, no. 63034/11, § 99, 28 June 2016, and *Talpis*, cited above, § 117).

166. Moreover, the Court reaffirms that special diligence is required from the authorities when dealing with cases of domestic violence (see *M.G. v. Turkey*, cited above, § 93; *Volodina*, cited above, § 92; and *Barsova v. Russia*, no. 20289/10, § 35, 22 October 2019).

(iii) Obligations relating to risk assessment

167. The comparative-law material available to the Court (see paragraph 101 above) demonstrates that a risk assessment is carried out in all the member States surveyed in order to determine whether a victim of domestic violence is at risk of further violence. The Court further notes that pursuant to Article 51 of the Istanbul Convention, an assessment of the lethality risk, the seriousness of the situation and the risk of repeated violence are crucial elements of prevention in domestic violence cases (see paragraph 82 above, as well as the Explanatory Report on that provision, paragraph 83 above). The Court notes that according to GREVIO, the competent authorities should carry out such a risk assessment for victims as of receipt of a complaint, ideally using standardised, internationally recognised and research-based tools with pre-established questions that the

authorities should systematically ask and answer. The system in place should afford law-enforcement officials clear guidelines and criteria governing action or intervention in sensitive situations (see the third-party submissions by GREVIO, paragraph 140 above).

168. The Court considers this approach to be relevant for the member States' positive obligations under Article 2 in the context of domestic violence. The Court notes that in order to be in a position to know whether there is a real and immediate risk to the life of a victim of domestic violence (compare the *Osman* test in paragraph 158 above), the authorities are under a duty to carry out a lethality risk assessment which is autonomous, proactive and comprehensive.

169. The terms "autonomous" and "proactive" refer to the requirement for the authorities to not rely solely on the victim's perception of the risk, but to complement it by their own assessment. Indeed, owing to the exceptional psychological situation in which victims of domestic violence find themselves, there is a duty on the part of the authorities examining the case to ask relevant questions in order to obtain all the relevant information, including from other State agencies, rather than relying on the victim to give all the relevant details (compare *Valiulienė v. Lithuania*, no. 33234/07, § 69, 26 March 2013, where the Court acknowledged that the psychological impact was an important aspect of domestic violence, and *T.M. and C.M. v. the Republic of Moldova*, no. 26608/11, § 46, 28 January 2014, where the Court held that "it was the duty of the police to investigate of their own motion the need for action in order to prevent domestic violence, considering how vulnerable victims of domestic abuse usually are").

170. In *Talpis* (cited above, §§ 107-25), the Court did not accord decisive weight to the victim's own perception of risk (for instance the withdrawing of the complaint, the changing of statements, statements denying past violence, and the return of the victim to the perpetrator). In *Opuz* (cited above, § 153), the Court noted, in particular, that "once the situation has been brought to their attention, the national authorities cannot rely on the victim's attitude for their failure to take adequate measures which could prevent the likelihood of an aggressor carrying out his threats against the physical integrity of the victim". Any risk assessment or decision on the measures to be taken must therefore not depend on the victim's statements alone. While the Court considers that the victims' own perception of the risk they are facing is relevant and must be taken into account by the authorities as a starting-point (compare *Bălşan v. Romania*, no. 49645/09, § 62, 23 May 2017; *Talpis*, cited above, § 111; and *Halime Kılıç*, cited above, § 93), this does not discharge the authorities, in line with their duty to examine allegations of domestic violence of their own motion, from proactively collecting and assessing information on all relevant risk factors and elements of the case.

171. "Comprehensiveness" in the context of a risk assessment is an element which should characterise any official investigation, and is equally relevant in domestic violence cases. The Court considers that, while the judgment of well-trained law-enforcement officials is essential in each case, the use of standardised checklists, which indicate specific risk factors and have been developed on the basis of sound criminological research and best practices in domestic violence cases, can contribute to the comprehensiveness of the authorities' risk assessment (see also the third-party submissions by GREVIO, paragraph 140 above). The comparative-law material has shown that the majority of the member States surveyed use standardised risk assessment tools (see paragraph 101 above).

172. The Court recognises that it is important for the authorities dealing with victims of domestic violence to receive regular training and awareness-raising, particularly in respect of risk assessment tools, in order to understand the dynamics of domestic violence, thus enabling them to better assess and evaluate any existing risk, respond appropriately and ensure prompt protection (compare Article 18 § 2 of the Istanbul Convention, as well as the third-party submissions by GREVIO, paragraph 143 above).

173. Moreover, the Court considers that where several persons are affected by domestic violence, be it directly or indirectly, any risk assessment must be apt to systematically identify and address all the potential victims (compare also the third-party submissions by GREVIO, paragraph 141 above). In conducting their assessment, the authorities should keep in mind the possibility that the outcome could be a different level of risk for each of them.

174. Given the often urgent nature of interventions by law-enforcement officials and prosecutors in the domestic violence context and the necessity of sharing relevant information among all the authorities involved, the Court considers that some basic documenting of the conduct of the risk assessment is of importance. It reiterates that the purpose of the risk assessment is to enable the competent authorities to manage the identified risk and to provide coordinated safety and support to the victims. This means that the law-enforcement authorities should share information on risks and coordinate support with any other relevant stakeholders who come into regular contact with persons at risk, including, in the case of children, with teachers (compare also the third-party submissions by GREVIO, paragraph 142 above). The Court takes the view that the authorities should inform the victim(s) of the outcome of their risk assessment, and, where necessary, provide advice and guidance on available legal and operational protective measures.

175. Turning to the interpretation of the term "immediate" in the *Osman* test, the Court considers that the application of the immediacy standard in this context should take into account the specific features of domestic violence cases, and the ways in which they differ from incident-based

situations such as that in *Osman* (cited above). The Court reiterates that consecutive cycles of domestic violence, often with an increase in frequency, intensity and danger over time, are frequently observed patterns in that context (compare also the third-party submissions by GREVIO, EHRAC and Equality Now in paragraphs 137 and 146 above). The Explanatory Report to Article 52 of the Istanbul Convention (see paragraphs 84-85 above) clarifies that the term "immediate danger" in that provision refers to any situations of domestic violence in which harm is imminent or has already materialised and is likely to happen again. The Court has observed in numerous other cases that a perpetrator with a record of domestic violence posed a significant risk of further and possibly deadly violence (see, for example, *Opuz*, cited above, § 134; *Eremia v. the Republic of Moldova*, no. 3564/11, § 59, 28 May 2013; *Mudric v. the Republic of Moldova*, no. 74839/10, § 51, 16 July 2013; and *B. v. the Republic of Moldova*, no. 61382/09, §§ 52-53, 16 July 2013). Based on what is known today about the dynamics of domestic violence, the perpetrator's behaviour may become more predictable in situations of a clear escalation of such violence. This general knowledge of domestic violence and the comprehensive research available in this area must duly be taken into account by the authorities when they assess the risk of a further escalation of violence, even after the issuance of a barring and protection order.

176. The term "immediate" does not lend itself to a precise definition. In *Opuz* (cited above, §§ 134-36), for example, the Court concluded in relation to the immediacy of the risk that the authorities could have foreseen the lethal attack against the applicant's mother because of the escalation of violence, which was also known to the authorities and was sufficiently serious to warrant preventive measures. On the basis of the long history of violence in the relationship (six reported episodes) and the fact that the applicant's husband was harassing her, wandering around her property and carrying knives and guns, the Court found that it was "obvious" that the perpetrator posed a risk of further violence. The lethal attack had therefore been imminent and foreseeable. In *Talpis* (cited above, § 122), the Court found that because the police had already had to intervene twice on the same night in respect of the applicant's husband, and because he was intoxicated and had a police record (two successive episodes of violence requiring police intervention on the same night), the authorities "should have known that [he] constituted a real risk to her, the imminent materialisation of which could not be excluded" (ibid.). In its case-law on the issue, the Court has thus already applied the concept of "immediate risk" in a more flexible manner than in traditional *Osman*-type situations, taking into account the common trajectory of escalation in domestic violence cases, even if the exact time and place of an attack could not be predicted in a given case. The Court emphasises, however, that an impossible or

disproportionate burden must not be imposed on the authorities (see *Osman*, cited above, § 116).

(iv) Obligations relating to operational measures

177. The Court reiterates that if the authorities have established that there is a real and immediate risk to the life of one or more identified individuals, their positive obligation to take operational measures is triggered.

178. Such operational preventive and protective measures are intended to avoid a dangerous situation as quickly as possible (compare *Talpis*, cited above, § 114). The Court has found in several cases that even when the authorities did not remain totally passive, they still failed to discharge their obligations under the Convention if the measures they had taken had not stopped the abuser from perpetrating further violence against the victim (compare *Volodina*, cited above, § 86, with further references).

179. Whether sufficient operational measures are available to the authorities in law and in practice at the critical moment of deciding how to react to a situation of domestic violence is closely related to the question of the adequacy of the legal framework (the "measures within the scope of their powers" aspect of the *Osman* test). In other words, the toolbox of legal and operational measures available must give the authorities involved a range of sufficient measures to choose from, which are adequate and proportionate to the level of (lethal) risk that has been assessed. The Court needs to be satisfied, from an overall point of view, that the legal framework was adequate to afford protection against acts of violence by private individuals in any given case (compare *Talpis*, cited above, § 100, with further references).

180. The Court further observes that risk management plans and coordinated support services for victims of domestic violence have proved valuable in practice in enabling the authorities to take adequate preventive operational measures once a risk has been established. This includes the rapid sharing of information among relevant stakeholders. If children are involved or found to be at risk, the child protection authorities should be informed as soon as possible, as well as schools and/or other childcare facilities (see Article 51 of the Istanbul Convention and the third-party submissions by GREVIO, paragraphs 82, 83 and 142 above). A proper preventive response often requires coordination among multiple authorities (compare, for example, the submissions by GREVIO, paragraph 141 above).

181. As an additional preventive measure, the Court considers that treatment programmes for perpetrators are desirable. According to the comparative-law material available to the Court, seven of the member States surveyed provide for specific measures aimed at teaching perpetrators of domestic violence about non-violent behaviour (see paragraph 99 above).

Article 16 of the Istanbul Convention imposes an obligation on Contracting States to develop preventive intervention and treatment programmes to help perpetrators change their attitudes and behaviour in order to prevent further acts of domestic violence.

182. Next, the Court considers that the decision by the authorities as to which operational measures to take will inevitably require, at both general policy and individual level, a careful weighing of the competing rights at stake and other relevant constraints. The Court has emphasised in domestic violence cases the imperative need to protect the victims' human rights to life and to physical and psychological integrity (see *Opuz*, § 147, and *Talpis*, § 123, both cited above; compare also the conclusions of the CEDAW Committee in the case of *Şahide Goekce v. Austria* – see paragraph 92 above). At the same time, there is a need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects due process and other safeguards that legitimately place restraints on the scope of their actions, including the guarantees contained in Articles 5 and 8 of the Convention (compare *Osman*, § 116, and *Opuz*, § 129, both cited above).

183. Turning to the question of preventive operational measures such as may be required under Article 2, the Court emphasises at the outset that any such measures, to the extent that they have an impact on the alleged perpetrator, must, on the one hand, be chosen with a view to offering an adequate and effective response to the risk to life as identified, while, on the other hand, any measures taken must remain in compliance with the States' other obligations under the Convention. In the context of protective and preventive measures in general, it is inevitable that interference by the authorities with the alleged perpetrator's private and family life in particular may be necessary in order to protect the life and other rights of the victims of domestic violence and to prevent criminal acts directed against the victims' life or health. The nature and severity of the assessed risk (see paragraph 168 above) will always be an important factor with regard to the proportionality of any protective and preventive measures to be taken (see paragraph 179 above), whether in the context of Article 8 of the Convention or, as the case may be, of restrictions of liberty falling under Article 2 of Protocol No. 4, which provides for freedom of movement. As regards measures that entail a deprivation of liberty, however, Article 5 of the Convention imposes particular constraints, which the Court will address in the following paragraphs.

184. The Court reiterates, first of all, that in order to be permissible under Article 5 of the Convention, any deprivation of liberty must be both lawful under the domestic law of the State and in compliance with the exhaustively enumerated grounds for detention set out in paragraph 1 of that provision. Even in this context, the positive obligation to protect life arising under Article 2 may entail certain requirements for the domestic legal

framework in terms of enabling necessary measures to be taken where specific circumstances so require. At the same time, however, any measure entailing a deprivation of liberty will have to fulfil the requirements of the relevant domestic law, as well as the specific conditions set out in Article 5 and the case-law pertaining to it.

185. In that connection the Court reiterates firstly, with regard to preventive measures, that for the purposes of Article 5 § 1 (b), which provides for deprivation of liberty for non-compliance with the lawful orders of a court or in order to secure the fulfilment of any obligation prescribed by law, the Court has consistently held that the obligation *not* to commit a criminal offence can only be considered as "specific and concrete" if the place and time of the imminent commission of the offence and its potential victim or victims have been sufficiently specified. In the context of a duty to refrain from doing something, as distinct from a duty to perform a specific act, it is necessary, prior to concluding that a person has failed to satisfy the obligation at issue, that the person concerned was made aware of the specific act which he or she was to refrain from committing and showed himself or herself not to be willing to refrain from so doing (see *Ostendorf v. Germany*, no. 15598/08, §§ 93-94, 7 March 2013). In particular, the Court has stated that the duty not to commit a criminal offence in the imminent future cannot be considered sufficiently concrete and specific as long as no specific measures have been ordered which have not been complied with (see *S., V. and A. v. Denmark* [GC], nos. 35553/12 and 2 others, § 83, 22 October 2018).

186. Secondly, the Court reiterates that Article 5 § 1 (c) is concerned with detention for the purpose of bringing the person before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so. As regards the second limb of this provision, the Court has acknowledged that it provides a distinct ground for detention, independent of the existence of "a reasonable suspicion of his having committed an offence". It thus applies to preventive detention outside criminal proceedings (see *S., V. and A. v. Denmark*, cited above, §§ 114-16). Even in the context of this limb of Article 5 § 1 (c), however, the Court has held that the provision does not permit a policy of general prevention directed against individuals who are perceived by the authorities as being dangerous or having the propensity to commit unlawful acts. This ground of detention does no more than afford the Contracting States a means of preventing a concrete and specific offence as regards, in particular, the place and time of its commission and its victim(s). In order for a detention to be justified under the second limb of Article 5 § 1 (c), the authorities must show convincingly that the person concerned would in all likelihood have been involved in the concrete and specific offence, had its commission not been prevented by the detention (ibid., §§ 89 and 91). The

Court, in its case-law on Article 5 § 1 (b) and the second limb of Article 5 § 1 (c) (detention necessary to prevent a person from committing an offence), has authorised such detention for preventive purposes only for very short periods of time: four hours in *Ostendorf* (cited above, § 75), and eight hours in *S., V. and A. v. Denmark* (cited above, §§ 134 and 137).

187. Thirdly, as regards the first limb of Article 5 § 1 (c), which governs pre-trial detention, the Court reiterates that this provision can only apply in the context of criminal proceedings relating to an offence that has already been committed. It permits detention for the purpose of bringing a person before the competent legal authority on reasonable suspicion of his having committed the offence (see *Şahin Alpay v. Turkey*, no. 16538/17, § 103, 20 March 2018; *Jėčius v. Lithuania*, no. 34578/97, § 50, ECHR 2000-IX; and *Schwabe and M.G. v. Germany*, nos. 8080/08 and 8577/08, § 72, ECHR 2011). Accordingly, pre-trial detention is capable of operating as a preventive measure only to the extent that it is justified on the grounds of a reasonable suspicion concerning an existing offence in relation to which criminal proceedings are pending. The prevention of further offences may thus be a secondary effect of such detention, and the risk of reoffending may be taken into account as an element in the assessment of the reasons for imposing or prolonging pre-trial detention, always on condition that the existence of a reasonable suspicion regarding the offence already committed persists. In this connection the Court reiterates that whereas the persistence of reasonable suspicion is a *sine qua non* for the validity of any pre-trial detention, the requirement of other "relevant and sufficient" reasons in addition to the persistence of reasonable suspicion applies already at the time of the first decision ordering detention on remand, that is to say "promptly" after the arrest (see *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, §§ 92 and 102, 5 July 2016). The Court further reiterates that its case-law has identified certain basic acceptable categories of such reasons, which include the risk of the detainee committing further offences in the event of his or her release. On this point the Court has held that the danger of further offences must be a plausible one, and the measure appropriate, in the light of the circumstances of the case and in particular the past history and the personality of the person concerned (see *Clooth v. Belgium*, 12 December 1991, § 40, Series A no. 225).

188. As far as decisions on pre-trial detention under Article 5 § 1 (c) are concerned, the Court notes that while pre-trial detention can never be used as a purely preventive measure, the facts and results of any risk assessment carried out with an eye to the possible need for preventive operational measures may be taken into account in the context of the assessment of the risk of further offences (past history and prognosis of lethality risk). In addition, as already stated, deprivations of liberty on this ground always require an adequate basis in domestic law. In any event, failure to meet the national standard for pre-trial detention does not relieve the authorities of

their responsibility to take other, less intrusive, measures within the scope of their powers which respond adequately to the level of risk identified.

189. The Court further notes that certain other provisions of Article 5 § 1 regarding permissible grounds for detention may in certain circumstances also be relevant for the assessment of preventive operational measures in the context of domestic violence, in particular Article 5 § 1 (e). In the light of the facts and complaints raised in the present case, however, there is no need to enter into any detailed discussion of this point.

(v) Summary of the obligations incumbent on the State authorities in the context of domestic violence

190. To summarise, the Court reiterates that an immediate response to allegations of domestic violence is required from the authorities (see paragraph 165 above). The authorities must establish whether there exists a real and immediate risk to the life of one or more identified victims of domestic violence by carrying out an autonomous, proactive and comprehensive risk assessment (see paragraphs 168 et seq. above). The reality and immediacy of the risk must be assessed taking due account of the particular context of domestic violence cases (see paragraph 164 above). If the outcome of the risk assessment is that there is a real and immediate risk to life, the authorities' obligation to take preventive operational measures is triggered. Such measures must be adequate and proportionate to the level of the risk assessed (see paragraphs 177 et seq. above).

2. Application of the above principles to the instant case

(a) Whether the authorities reacted immediately to the allegations of domestic violence

191. At the outset, the Court emphasises that in the instant case, unlike in many other cases of domestic or gender-based violence before it (see, for example, *Opuz*, § 136, and *Talpis*, § 114, both cited above), there were no delays or inactivity on the part of the national authorities in responding to the applicant's allegations of domestic violence. On the contrary: both in 2010 and 2012 the authorities responded immediately to the applicant's allegations, took evidence and issued barring and protection orders. In that context, the Court notes that the police had a checklist of specific risk factors to consider in the event of an intervention under section 38a of the Security Police Act (see the Government's observations, paragraph 129 above).

192. The applicant herself confirmed in her observations that she was not complaining about any delay or inactivity on the part of the authorities, but rather about the choice of the measures taken. The Grand Chamber thus endorses the Chamber's findings in that regard (see paragraph 67 of the Chamber judgment).

193. Moreover, the Court notes that the police accompanied the applicant to the family home after she had made her report, hence ensuring that she would not have to encounter her husband alone after having reported him to the police. They also informed her, by means of a leaflet, about the further options available to her in order to be protected from E., namely the possibility of applying for a temporary restraining order under sections 382b and 382e of the Enforcement Act. The officers then took the husband with them to the police station for questioning, and confiscated his keys to the family apartment (see paragraphs 25, 26, 55 and 57 above). In addition, the Court welcomes the fact that one of the police officers who responded to the applicant's allegations of violence was specially trained and experienced in handling domestic violence cases (see paragraph 17 above and the Government's submissions, paragraph 133 above).

194. The Court considers that the above-mentioned measures demonstrate that the authorities displayed the required special diligence in their immediate response to the applicant's allegations of domestic violence.

(b) The quality of the risk assessment

195. Next, the Court will examine the quality of the authorities' risk assessment (see paragraph 168 above). The Court reiterates that it must look at the facts strictly as they were known to the authorities at the material time, and not with the benefit of hindsight (see *Bubbins*, cited above, § 147).

196. Firstly, the Court is satisfied that the authorities' risk assessment can be considered to have been carried out autonomously and in a proactive manner, as the police did not merely rely on the account of the events provided by the applicant, who moreover was accompanied by her long-standing expert counsellor from the Centre for Protection from Violence, but based their assessment on several other factors and items of evidence. On the very day of the applicant's report the police questioned all the persons directly involved, namely the applicant, her husband and their children, and drew up detailed records of their statements. They also took evidence in the form of pictures of the visible injuries the applicant had sustained. The applicant also underwent a medical examination (see paragraph 21 above).

197. The police further carried out an online search of the records regarding the previous barring and protection orders and temporary restraining orders and injunctions issued against E. They were aware that he had one previous conviction for domestic violence and dangerous threatening behaviour, and that he had been issued with a barring and protection order some two years earlier. Moreover, the police checked whether there were any weapons registered in the applicant's husband's name, a check which produced a negative result (see paragraph 22 above). In that context the Court reiterates that it is important for the authorities to check whether an alleged perpetrator has access to or is in possession of

firearms (see *Kontrová*, cited above, § 52, and Article 51 of the Istanbul Convention, paragraph 82 above).

198. Secondly, the Court finds that the risk assessment carried out by the police considered major known risk factors in this context, as can be seen from the report they drew up (see paragraph 27 above). In particular, they took into account the circumstances that a rape had been reported, that the applicant had visible signs of violence in the form of haematomas, that she was tearful and very scared, that she had been the subject of threats, and that the children had also been subjected to violence. The police explicitly noted a number of other relevant risk factors, namely known reported and unreported previous acts of violence, escalation, current stress factors such as unemployment, divorce and/or separation, and a strong tendency by E. to trivialise violence. They further took into account E.'s behaviour, namely the fact that he had been mildly agitated but cooperative and had voluntarily accompanied the officers to the police station. The police also noted that there were no firearms registered in E.'s name.

199. The Court considers that by identifying the above specific factors, the authorities demonstrated that they had duly taken into account the domestic violence context of the instant case in their risk assessment.

200. Turning to the threats, and in particular the death threats uttered by E., the Court notes that they had all been targeted at the applicant, be it directly, or indirectly by threatening to hurt or kill her, those closest to her, or himself (see paragraph 19 above). The Court reiterates in that context that (death) threats should be taken seriously and assessed as to their credibility (see *Kontrová*, § 52, cited above; *Branko Tomašić and Others v. Croatia*, no. 46598/06, §§ 52 and 58, 15 January 2009; *Opuz*, cited above, § 141; *Eremia*, cited above, § 60; *Talpis*, cited above, § 111; and *Halime Kılıç*, cited above, §§ 93-94). It notes that the police did not overlook the fact that E. had been making death threats against the applicant and had choked her, as is evident from the report sent to the public prosecutor's office in the late evening of the same day (see paragraph 30 above), where these factors were explicitly referred to.

201. The Court considers that the public prosecutor on duty also had at his disposal the most relevant facts of the case when deciding what steps to take next. He was informed by telephone on the very same day of the allegations against E. and the circumstances of the issuance of the barring and protection order, immediately after it had been issued. In his note for the file he summarised the main elements of the case, ordered further investigative steps (questioning of the children, submission of the reports on the investigations) and instituted criminal proceedings against E. for the crimes of which he was suspected (see paragraph 28 above). Still on the same evening, the public prosecutor on duty received the reports he had requested (see paragraph 30 above).

202. The Court is therefore satisfied that the risk assessment carried out by the authorities as regards the applicant, while not following any standardised risk assessment procedure, fulfilled the requirements of being autonomous, proactive and comprehensive. It therefore remains for the Court to determine whether, notwithstanding the issuance of the barring and protection order, a real and immediate risk to the life of the applicant's son was discernible.

(c) Whether the authorities knew or ought to have known that there was a real and immediate risk to the life of the applicant's son

203. The Court observes that it is clear from the authorities' risk assessment that the following information was available to them at the relevant time.

(i) On the basis of E.'s criminal record and the victims' police interviews, the authorities knew that E. had a criminal conviction for causing bodily harm to the applicant in 2010, for which he was still within the probationary period (see paragraphs 12-15 above). In her interviews with the police in the days before the tragic event, the applicant had reported other instances of violence by the husband in the course of their marriage, including the events of 19 May 2012. Since the 2010 incident, the applicant had received regular advice from a counsellor from the Centre for Protection from Violence (see paragraphs 16 and 19 above).

(ii) The applicant's children had also both been subjected to violence by their father – physically by receiving slaps, and psychologically by having to witness him abusing their mother – but were not the main target of E.'s violence (see paragraphs 18-20 above).

(iii) According to the applicant's statements to the police, the violence had escalated three days earlier, when her husband had choked and raped her (see paragraph 18 above).

(iv) The applicant had stated that the reason for this escalation was her intention to separate from him (see paragraph 18 above).

(v) The applicant had reported that her husband had a gambling addiction and other mental health problems, which, in her view, had contributed to the worsening of E.'s aggressiveness and violence towards her. In particular, the beatings and the slapping of the children occurred especially when he returned from the betting shop (see paragraph 20 above). The applicant's husband had undergone in-patient treatment at a psychiatric hospital for his gambling addiction and other (unspecified) mental health issues, which, however, appears to have failed (see paragraph 19 above).

(vi) According to the record of her police interview, the applicant found the threats her husband had been uttering against her and her children since March 2012, which included death threats, to be particularly worrisome. She had further told the police that she took these threats very seriously (see paragraph 19 above).

(viii) The applicant had mentioned to the police that her husband at times took away her mobile telephone and locked her in their apartment so that she could not leave (see paragraph 20 above).

204. On the basis of the above evidence, the authorities concluded that the applicant was at risk of further violence and issued a barring and protection order against E. under section 38a of the Security Police Act (see paragraph 25 above). The Court notes, in this context, that police officers with significant relevant experience and training were involved in making this assessment, which the Court should be careful not to question in a facile manner with the benefit of hindsight.

205. While it is true that no separate risk assessment was explicitly carried out in relation to the children, the Court considers that on the basis of the information available at the relevant time this would not have changed the situation, for the reasons set out below.

206. The Court reiterates that the applicant's children had been subjected to slaps by their father and to the mental strain of having to witness violence against their mother, which must in no way be underestimated. However, according to the information which the authorities had to hand in the instant case, the children had not been the main target of E.'s violence or threats. These had all been targeted at the applicant, be it directly or indirectly (see paragraph 200 above). The predominant reason for the applicant's report to the police on 22 May 2012 was the alleged rape and choking the weekend before and the ongoing domestic violence and threats against her. Moreover, the Court agrees with the Government that even though the police report on the issuance of the barring and protection order did not explicitly list the children as endangered persons within the meaning of section 38a of the Security Police Act, the report for the criminal investigation forwarded to the prosecutor on the same day at 11.20 p.m. explicitly mentioned them as "victims" of the indicated crimes. In addition, their witness statements were attached to that report. The authorities could legitimately assume that the children were protected in the domestic sphere from potential non-lethal forms of violence and harassment by their father to the same extent as the applicant, through the barring and protection order (see paragraph 126 above). There were no indications of a risk to the children at their school, let alone a lethality risk (see paragraph 128 above). It also appears – although this is not in itself decisive – that the applicant and her counsellor from the Centre for Protection from Violence did not themselves consider that the level of threat justified requesting a complete ban on contact between the father and the children.

207. Turning to the applicant's argument to the effect that the seriousness of the violence perpetrated against her, combined with E.'s threats of further and possibly lethal violence, was sufficient to justify taking him into pre-trial detention, the Court notes that the applicant's claim

that pre-trial detention should have been ordered rested on a combination of grounds, namely E.'s alleged recent offences, as well as a risk of his reoffending based on his criminal record. E.'s threats were not deemed sufficiently serious or credible by the authorities to point to a lethality risk that would have justified pre-trial detention or other more stringent preventive measures than the barring and protection order. The Court finds no reason to call into question the authorities' assessment that, on the basis of the information available to them at the relevant time, it did not appear likely that E. would obtain a firearm, go to his children's school and take his own son's life in such a rapid escalation of events.

208. Lastly, the Court notes that the authorities appear to have placed some emphasis on the calm demeanour of the applicant's husband towards the police, which the Court considers as potentially misleading in a domestic violence context and which should not be decisive in a risk assessment. However, the Court is not satisfied that this element of the assessment is sufficient to cast doubt on the conclusion that no lethality risk to the children was discernible at the time. Similarly, while in retrospect providing prompt information to the children's school or the child protection authorities would have been desirable, at the time of the events it was not foreseeable for the authorities that such a measure was required to prevent a lethal attack on A. Thus, the omission of this information, the sharing of which was not provided for under domestic law at the time of the events, cannot be regarded as a breach of their duty of special diligence in the context of the authorities' positive obligations under the *Osman* test.

209. For the above reasons, the Court agrees with the Government that, on the basis of what was known to the authorities at the material time, there were no indications of a real and immediate risk of further violence against the applicant's son outside the areas for which a barring order had been issued, let alone a lethality risk. The authorities' assessment identified a certain level of non-lethal risk to the children in the context of the domestic violence perpetrated by the father, the primary target of which had been the applicant. The measures ordered by the authorities appear, in the light of the result of the risk assessment, to have been adequate to contain any risk of further violence against the children. The authorities were thorough and conscientious in taking all necessary protective measures. No real and immediate risk of an attack on the children's lives was discernible under the *Osman* test as applied in the context of domestic violence (see paragraph 164 above). Therefore, there was no obligation incumbent on the authorities to take further preventive operational measures specifically with regard to the applicant's children, whether in private or public spaces, such as issuing a barring order for the children's school.

210. Furthermore, the Court, taking into account the requirements of national criminal law (see paragraphs 65 et seq. above) and those flowing from Article 5 of the Convention safeguarding the rights of the accused (see

paragraph 182 above), finds no reason to question the finding of the Austrian courts that the authorities had acted lawfully in not taking E. into pre-trial detention. In this context the Court reiterates that under Article 5 no detention will be permissible unless it is in compliance with domestic law. The Court further notes that the applicant raised no complaint regarding the domestic legal framework concerning grounds for detention in relation to the positive obligations arising under Article 2. Accordingly, the examination of this issue falls outside the scope of the present case.

(d) Conclusion

211. The Court concludes that the authorities displayed the required special diligence in responding swiftly to the applicant's allegations of domestic violence, and duly took into account the specific domestic violence context of the case. They conducted an autonomous, proactive and comprehensive risk assessment, the result of which led them to issue a barring and protection order. However, the risk assessment did not indicate a real and immediate lethality risk to the applicant's son. Therefore, no obligation was triggered to take preventive operational measures in that regard.

212. Accordingly, there has been no violation of Article 2 of the Convention in its substantive limb.

213. In view of this conclusion, the Court considers it unnecessary to rule on the Government's preliminary objection relating to the question of exhaustion of domestic remedies (see, *mutatis mutandis*, *Bennich-Zalewski v. Poland*, no. 59857/00, § 98, 22 April 2008).

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

214. The applicant alleged that by failing to protect her against domestic violence the State had discriminated against her as a woman, in violation of Article 14 of the Convention. The Court notes, however, that the applicant did not raise this complaint in her initial application to the Court (which was lodged on 16 December 2015), raising it for the first time in her submissions to the Grand Chamber on 10 January 2020.

215. As the last domestic decision was served on the applicant on 16 June 2015 (see paragraph 44 above), this complaint was submitted outside the six-month time-limit provided for by Article 35 § 1 of the Convention and must therefore be declared inadmissible (see *Denisov v. Ukraine* [GC], no. 76639/11, §§ 135-36, 25 September 2019).

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the complaint concerning Article 14 of the Convention inadmissible;

2. *Joins to the merits*, by a majority, the Government's preliminary objection as to the non-exhaustion of domestic remedies and decides that it is unnecessary to rule on it;

3. *Holds*, by ten votes to seven, that there has been no violation of Article 2 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 15 June 2021.

{signature_p_2}

Marialena Tsirli Registrar	Robert Spano President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Koskelo, joined by Judges Lubarda, Ravarani, Kucsko-Stadlmayer, Polackova, Ilievski, Wennerström and Sabato;
(b) joint dissenting opinion of Judges Turković, Lemmens, Harutyunyan, Elósegui, Felici, Pavli and Yüksel;
(c) dissenting opinion of Judge Elósegui.

R.S.
M.T.

CONCURRING OPINION OF JUDGE KOSKELO, JOINED BY JUDGES LUBARDA, RAVARANI, KUCSKO-STADLMAYER, POLACKOVA, ILIEVSKI, WENNERSTRÖM AND SABATO

1. We are in full agreement with the present judgment. The purpose of this opinion is only to present some complementary observations in the interest of clarifying our position on certain points.

I. THE CONTEXT

2. The present case arose from the very tragic killing of the applicant's son by his father, who at the time was the applicant's husband. The applicant's complaint fell to be examined under Article 2, more specifically under the head of the respondent State's positive obligation to take preventive operational measures to protect life. While the case concerns the problem of domestic violence, the context and the scope of the judgment are, as always, limited by the circumstances. Both at the domestic level and in terms of the Convention itself, domestic violence as a social and legal problem is a much wider issue than the specific aspects which the Court is called upon to examine and mandated to consider in a single case. Apart from Article 2, domestic violence may give, and has given, rise to issues under Articles 3 and 8 in particular. While the Court should not lose sight of the wider problem and its multifaceted aspects, especially in elaborating upon the relevant general principles, its assessment must, nonetheless, remain within the factual and legal confines of the case before it.

3. Thus, while the present judgment seeks to address the phenomenon of domestic violence, and whereas this perspective is in part reflected in the manner in which the general principles are developed, the scope of the case is nonetheless limited to addressing that problem from the standpoint of the above-mentioned positive obligation under Article 2 with regard to the specific facts.

II. THE POSITIVE OBLIGATION TO AFFORD PROTECTION

4. The main common thread in the positive obligations arising for the States in combating domestic violence consists in the need for various preventive and repressive measures designed to afford protection for victims from harm and any risk of harm. Both the nature of the relevant risks and the appropriate responses, however, are on a wide scale. Accordingly, the concrete interpretation of the positive obligations arising under the various provisions of the Convention, including the reconciliation to be achieved between any conflicting rights and interests which may be at stake, remain highly dependent on the specific circumstances of each situation. The

breadth of the protective obligations does not and cannot always, in itself, entail a broad latitude in the concrete actions that may be taken, or the powers that may be exercised, in the interest of the protective aims in a certain case, nor can it detract from the duty to fulfil the totality of Convention obligations that may be relevant in each context. The importance of this point is further highlighted by the fact that protective measures must be taken by the authorities promptly and on the basis of allegations and risk assessments but will often entail actual interference with other rights.

5. In particular, while the requirements of autonomous or proactive and comprehensive *risk assessment* covering all potential victims (see paragraphs 167-73 of the judgment) are essential, they can neither dispense the domestic authorities from the duty incumbent on them to carefully determine and tailor the appropriate response on the basis of the concrete circumstances and all the factual and legal considerations pertaining to each individual situation, nor dispense the Court from exercising its supervision in line with all the relevant Convention standards. Although, for instance, the occurrence and the risk of violence between partners and ex-partners may also entail an increased risk of violence against any children in the family, such a general risk factor alone could not suffice as a justification for cutting off contact between a parent and a child in the absence of sufficiently concrete indications of the reality of such a risk in specific circumstances. While the family situation must be taken into account as a whole, this does not mean that a differentiated approach and assessment would not be necessary.

6. As regards the methodology of risk assessment, the Court has noted the importance of standardised tools such as questionnaires or checklists (see paragraphs 167 and 173-74 of the judgment). It has also acknowledged the need for some "basic documenting", even under the constraints of urgency, to attest that the risk assessment was actually performed (paragraph 174). In this respect, certain caution may, at the same time, be called for. Firstly, reliance on standardised tools should not dispense the authorities from also taking into account specific factors which may be relevant in the particular circumstances of a case, but which might not be covered by the standardised risk assessment tools. Secondly, the use of a standardised tool might not be sufficient to show that a genuine assessment was performed, in case it is perceived merely as an administrative routine or a bureaucratic requirement. Nor can it be excluded that a risk assessment might be adequate although not performed on the basis of a specific standardised questionnaire, for instance.

III. THE RISK AND THE ASSOCIATED DUTY

7. Domestic violence is a complex phenomenon which exists in all social spheres and has no easy solution. It can occur in a variety of forms, intensities and dynamics, especially when the notion of violence is understood in a wider sense, not limited to physical violence but also comprising economic, emotional or verbal abuse (see paragraph 161 of the judgment). The risks of such violence occurring in the future also vary in nature and intensity. Furthermore, both the nature and the intensity of the risk may vary in relation to the different members of the family concerned. The responses required from the domestic authorities under their positive obligations will, and must, vary accordingly. The relevant legislation and support for victims in practice require specific research and joint, gender-sensitive political, legal and financial efforts.

8. As regards the preventive operational duties arising under Article 2 in particular, they are determined by reference to the risk and the action. The requisite risk, which triggers the duty, is qualified, and the requisite preventive response is, in turn, qualified in relation to that risk. Even though the obligation at issue is one of means and not one of result, the finding of a violation of that duty could not be based on acts or omissions that are not causally relevant, in time or in substance, to the risk that triggers the duty to respond. The main issues in such cases are, firstly, whether the competent domestic authorities knew or ought to have known of the presence of a lethal danger requiring immediate preventive measures and, if so, whether there was a failure to act that was causally relevant to the fatal outcome.

9. When, as in the present case, Article 2 of the Convention is engaged, what is at issue is a risk to life – not a risk of any kind of violence. Furthermore, what is at stake here is the risk to life of a particular family member, the child whose life was taken. Consequently, what the Court has been called upon to examine in this case is whether the competent domestic authorities have failed in their duty to assess the risk to life in respect of the applicant's son, and more specifically whether there was a real and immediate risk, known or knowable to the relevant authorities, that the child might be killed by his father, despite the barring and protection order issued by the police on 22 May 2012.

10. The preventive operational duty arising under Article 2 is linked with the presence of such a risk, or more precisely, with a diligent and reasonable assessment that such a risk is present. In other words, the duty to take preventive operational measures is triggered by a risk which is specific in kind and in its object. We share the conclusion as set out in the judgment (paragraph 209) that, in the present case, the preventive operational duty was not triggered.

IV. THE BENEFIT OF HINDSIGHT vs. THE DIFFICULTIES OF PREDICTION

11. When examining the manner in which the domestic authorities have dealt with situations such as those relating to domestic violence, in circumstances where the adequacy of preventive action by the domestic authorities is at stake, it is important to avoid relying on the benefit of hindsight. Even where an assessment of risks is carried out in advance, the prediction of concrete acts remains hard and uncertain. A judicial body such as the Court, when reviewing events that have already taken place, should not underestimate the difficulties involved in predicting the concrete nature, targets and timing of violent behaviour. Nor should the Court underestimate in this context the challenges facing the domestic authorities in the determination of the appropriate response in various concrete situations. In some circumstances, a protective measure designed to reduce the risks for potential victims might become a provoking factor for the perpetrator. Even with a high level of professional experience and care, to accurately predict what might happen, when and where, and to know how to ensure prevention with the means available, will at best be difficult. Judging a course of action, or its timing, is much easier with the benefit of hindsight than in the situation prevailing at the time of the original decision-making.

JOINT DISSENTING OPINION OF JUDGES TURKOVIĆ, LEMMENS, HARUTYUNYAN, ELÓSEGUI, FELICI, PAVLI AND YÜKSEL

1. This case involves the tragic loss of the life of the applicant's son at the hands of his own father, triggered by a long history of domestic violence. In a broader sense, the case presents an opportunity for the Grand Chamber of the Court to clarify the scope of State obligations under the substantive limb of Article 2 of the Convention in the context of domestic violence. We are in full agreement with the general and, to some extent, novel principles enunciated by the Court in this connection. Two of these are worth highlighting in particular. First, the Court examines the State's duty to conduct a comprehensive risk assessment of the potentially lethal risks faced by victims of domestic violence. It is only on the basis of such an assessment that the national authorities may be justified in claiming a lack of actual or constructive knowledge that a risk to life was real and immediate. Secondly, the Court sheds light on how the notion of "imminence" itself should be interpreted in this specific context, noting that account must be taken of "the common trajectory of escalation in domestic violence cases" and other factors that distinguish such cases from other (that is, incident-based) *Osman*-type situations (see paragraph 176 of the judgment, citing *Osman v. the United Kingdom*, 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII). Today's judgment has also helpfully summarised the basic principles governing deprivation of liberty under Article 5 of the Convention seen through the prism of potential preventive measures that might be taken *vis-à-vis* perpetrators of domestic violence (see paragraphs 184-89 of the judgment).

2. Our disagreement with the majority relates to the application of the general principles to the facts of the present case. In our view, the proper application of the principles should have led to a finding of a violation of Article 2 of the Convention.

3. We will address first the preliminary objection raised by the respondent Government regarding the issue of alleged non-exhaustion of domestic remedies, concluding that this preliminary objection should have been dismissed. We will then turn to the substance of the applicant's claims under Article 2 of the Convention. As noted in paragraph 159 of the judgment, an examination of the State's compliance with its duty under Article 2 must comprise an analysis of both the adequacy of the assessment of risk conducted by the domestic authorities and, where a relevant risk triggering the duty to act was or ought to have been identified, the adequacy of the preventive measures taken. After examining both aspects of this test, we will conclude that the risk assessment conducted in the present case was inadequate, that a risk to the life of the applicant's son was sufficiently discernible at the relevant time, and that the authorities failed to take

appropriate preventive measures. We will also note that the preventive measures available in the domestic legal system in relation to child victims of domestic violence were rather limited at the relevant time (see paragraph 34 below).

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

4. The respondent Government argued that the applicant should not be able to rely on arguments based on the failure of the domestic legal framework to provide for the extension of the initial barring and protection order to the children's school. The Government contended that such an extension would have been possible under a court-granted temporary restraining order, for which the applicant did not apply in due time (see paragraphs 105-06 of the judgment). The majority held that, in view of their conclusion that no lethal risk to the applicant's son had been discernible to the authorities, it was not necessary to rule on the Government's preliminary objection (see paragraph 213 of the judgment).

5. As we disagree with the majority's premise as to the nature of the risk falling within the knowledge of the authorities, we must address the Government's preliminary objection. That said, we consider that this objection does not raise a genuine non-exhaustion claim. Both barring and protection orders and temporary restraining orders are measures of a preventive nature in the Austrian system. With the killing of the applicant's son, they lost their effectiveness in respect of the child and became moot; there was therefore nothing further for the applicant to exhaust. The Government's argument is essentially one about the sharing of the duties of preventive due diligence between the State and the applicant as (the mother of) a victim of domestic violence. As such, it belongs to the merits and we shall address it as relevant below.

II. WHETHER A REAL AND IMMINENT RISK TO THE LIFE OF THE APPLICANT'S SON WAS DISCERNIBLE AT THE RELEVANT TIME – ADEQUACY OF THE RISK ASSESSMENT

6. Turning to the substance of the applicant's complaint under Article 2 of the Convention, we reiterate our support for the general principle that an examination of the State's compliance with its duty under Article 2 must include an analysis of the adequacy of the assessment of risk conducted by the domestic authorities (see paragraph 159 of the judgment). An adequate assessment requires an immediate response from the authorities to allegations of domestic violence. The authorities must establish whether there exists a real and immediate risk to the life of one or more identified victims of domestic violence by carrying out an autonomous, proactive and comprehensive risk assessment. Finally, the reality and immediacy of the

risk must be assessed taking due account of the particular context of domestic violence. If the outcome of the risk assessment is that there is a real and immediate risk to life, the authorities' obligation to take preventive operational measures is triggered (see paragraph 190 of the judgment).

7. Where we beg to differ with the majority is in their conclusion that the domestic authorities' actions in the case at hand met this standard (see paragraph 211 of the judgment). Although we recognise the domestic authorities' swift initial response to the incidents of violence reported by the applicant (see paragraphs 191-94 of the judgment), we do not find that their overall response was adequate or sufficiently comprehensive or that they took due account of the particular context of domestic violence. Firstly, we consider that the risk assessment procedures in place were flawed in certain important respects. Secondly, we consider that the assessment of the lethality risks was also inadequate as to its substance, as the authorities unjustifiably overemphasised certain factors and underemphasised others.

A. Quality of the risk assessment procedures in place

8. There were, in our view, significant issues that impacted the quality of the risk assessment conducted by the domestic authorities. In particular, the police authorities carried out a non-standardised risk assessment that did not specifically consider lethal risks in relation, in particular, to the applicant's children. These authorities also failed to perform an adequate inquiry into the applicant's husband's access to a firearm. Furthermore, these issues were not remedied at a later stage by the prosecutor's office. As a result, we find that the authorities did not put themselves in a position to know whether a real and immediate risk to the applicant's son's life existed at the relevant time.

1. Assessment of potentially lethal risks for the family unit

9. The respondent Government have not shown, in our view, that the risk assessment carried out by the authorities was designed and apt to identify lethal threats posed by the applicant's husband to the lives of his wife and children. In fact, according to a decree of the Austrian Ministry of the Interior issued on 22 September 2010 (Decree on organisation and implementation in the field of "violence in the private sphere"/ "prevention of violence" – *Erlass für die Organisation und die Umsetzung im Bereich* "*Gewalt in der Privatsphäre*" / "*Gewaltschutz*"), which was in force at the time of the events in question, the police were not authorised to carry out any form of risk assessment beyond the danger assessment made for the purpose of issuing the barring order. While such a danger assessment may not be unreasonable in itself, it serves to highlight the difference between a risk assessment carried out urgently for the purpose of justifying the issuance of a barring order – a justification that requires merely a finding of

a risk of further violence by the alleged perpetrator (see paragraph 48 of the judgment) – and a comprehensive risk assessment that focuses on *lethal* risks to the family members. The police authorities did have the opportunity to carry out a more comprehensive lethality assessment in relation to both the applicant and her children, in less charged circumstances, after they had interviewed the applicant's children on the evening of 22 May 2012 as well as during the further interview of the applicant's husband two days later, on the morning of 24 May. However, there is no record or other information in the file to indicate that a comprehensive assessment of lethal risks was carried out at any time (see paragraph 174 of the judgment), despite the applicant's insistence in her police interviews that she took her husband's threats against the lives of the children "very seriously" (see paragraph 19 of the judgment).

10. Such an omission may be related to the choice of the Austrian authorities not to use a national or regional standardised tool, with pre-established questions or criteria, to conduct lethality risk assessments in cases of domestic violence. While we agree with the majority that the use of such tools is not strictly required under the *Osman* test, they can be highly beneficial in ensuring that law-enforcement officials carry out such risk assessments with the necessary rigour and focus (see paragraphs 167-68 of the judgment). It is relevant, in this regard, that virtually all of the third-party interveners in this case (see paragraphs 137-56 of the judgment) emphasised the lack of standardised risk assessment tools in use by the Austrian authorities as a serious problem, and the respondent Government themselves recognised the need to improve their assessment of the risk of reoffending in domestic violence cases (see paragraph 90 of the judgment). The Austrian authorities appear to have piloted a number of such tools since 2013, but have yet to adopt any of them, for reasons that remain unclear to us (see paragraphs 61-64 of the judgment).

11. As a result, the authorities failed to note significant risk factors that might otherwise have come to their attention. For instance, although the police noted the presence of certain risk factors at the time of issuing the barring order (see paragraphs 27 and 129 of the judgment), they failed to take account of a number of other internationally recognised risk factors, including the husband's gambling addiction and prior mental problems; his economic dependence on the applicant and the applicant's subsequent job loss; and his recent suicidal ideation in addition to his homicidal threats.

2. Lethality risk assessment in relation to the children specifically

12. We note that no separate risk assessment was explicitly carried out in relation to the children (see paragraph 205 of the judgment). Furthermore, the risk assessment conducted in relation to the applicant did not treat the risk of domestic violence as one that impacted the family as a unit. Indeed, the authorities seem to have focused exclusively on the applicant as the

main target of her husband's violence and threats, and the children's specific situation received little attention. We find this particularly problematic given that, as our case-law recognises, children who are victims of domestic violence are particularly vulnerable individuals and entitled to State protection against serious breaches of personal integrity (see paragraph 163 of the judgment, citing *Opuz v. Turkey*, no. 33401/02, § 159, ECHR 2009; *Talpis v. Italy*, no. 41237/14, § 99, 2 March 2017; and *Volodina v. Russia*, no. 41261/17, § 72, 9 July 2019).

13. The Government's case, which the majority largely accept, is based on the supposed non-existence of any discernible risk to the lives of the applicant's children. Given the information that was available at the material time, we cannot agree with this argument. The children themselves gave statements regarding physical abuse at the hands of their father. The judgment emphasises that the children had not been the main target of violence or threats (see paragraph 206); however, the children's father repeatedly made threats to the applicant explicitly stating that he would kill the children. Furthermore, such an approach ignores the fact that attacks on the children may be intended, by an unstable and violent father facing the sudden prospect of separation and perceived social humiliation, as the ultimate form of punishment for their mother.

14. Even if the authorities had not conducted a separate risk assessment for the children, they should have, at the very least, considered that domestic violence against the mother should be understood as posing a risk to the children by extension. Domestic violence should be seen as occurring within the family as a unit even if it is primarily directed at a particular family member (see *Talpis*, § 122, and *Volodina*, § 86, both cited above). Crucially, under the Istanbul Convention, any risk assessment must address systematically the risk not only for the abused spouse, but also for any affected children (see GREVIO's observations, paragraph 139 of the judgment). It is relevant to note that, following the tragic events in this case, Austrian law was amended to require that youth welfare offices be immediately informed if a barring and protection order is issued in respect of a household with children, and also to grant those offices the authority to apply for temporary restraining orders on behalf of endangered children (see paragraph 60 of the judgment).

3. Other shortcomings

15. The police checked whether there were any weapons registered in the applicant's husband's name, a check which produced a negative result (see paragraphs 22 and 197 of the judgment). It appears from the available police reports, however, that the police did not ask the applicant about any weapons in her husband's possession. Given the critical importance in the domestic violence context of determining whether a perpetrator has access to a weapon (see *Kontrová v. Slovakia*, no. 7510/04, § 52, 31 May 2007,

and Article 51 of the Istanbul Convention), we do not consider that a simple check for weapons lawfully registered in the applicant's husband's name was sufficient.

16. Finally, none of the problems regarding the lethality risk assessment were remedied at a later time. We note that any risk assessment that might have been performed by the public prosecutor was based entirely on information which was transmitted by the police, without the prosecutor interviewing the applicant, the applicant's husband or the applicant's children in person. In addition, several prosecutors handled the case intermittently in the span of three days leading up to the fatal attack. We therefore cannot find that any of the domestic authorities carried out an adequate or sufficiently comprehensive assessment of lethal risks to the children.

B. Substantive quality of the risk assessment

17. In addition to finding that the risk assessment procedures in place were flawed, we also consider that the application of the risk assessment was problematic, as the domestic authorities overemphasised certain factors and underemphasised others.

1. Significant risk factors not duly taken into account

18. The authorities did not give enough weight to a number of factors, including the pattern of escalating violence endured by the applicant and her children (culminating in the applicant's alleged rape and strangulation at the hands of her husband before the lethal attack on the applicant's son a few days later), the presence of various triggers of domestic homicide, and the fact that the applicant had reported significant and increased threats against herself and her children. These factors point to the husband's general dangerousness and were therefore relevant in assessing the risks he posed not only to the applicant, but also to their common children.

19. As regards the applicant's allegations that her husband had raped her, the authorities appear to have minimised to some extent the severity of these claims, citing the absence of gynaecological injuries. The public prosecutor wrote, in a note added to the applicant's file, that the applicant's husband "did not hold her down and did not use violence during the act, and she did not scream" (see paragraph 28 of the judgment). This reaction to the applicant's report suggests an outdated conception of rape (see *M.C. v. Bulgaria*, no. 39272/98, §§ 130-47 and 166, ECHR 2003-XII), and it calls into question the seriousness with which the authorities approached the domestic violence suffered by the applicant.

20. The authorities also appear to have missed or underplayed the significance of the applicant being strangled by her husband. There is strong empirical evidence that attempted strangulation is a significant red flag. In some jurisdictions it has been found that the risks of homicide increase seven-fold among individuals who have experienced strangulation at the hands of their intimate partner, and 43 per cent of women who are murdered in domestic assaults had been strangled by their partner within the previous year (see Nancy Glass et al., "Non-fatal Strangulation Is an Important Risk Factor for Homicide of Women", 35(3) *Journal of Emergency Medicine* 329-35 (2008)).

21. In addition, aside from citing the pattern of escalating violence in general terms, the domestic authorities placed relatively little emphasis on the various triggers, including the divorce request and the possibility that the applicant's husband might lose custody of his children, factors known to increase the risk of lethal domestic violence. In fact, they did the opposite: by underscoring the fact that the applicant's husband had complied with the first barring order issued in July 2010 (see paragraph 41 of the judgment), they ignored the significance of the applicant's filing for divorce and the way the couple's relationship had deteriorated in the intervening years. Overall, the authorities did not carry out a risk assessment based on a sufficiently gender-sensitive approach (see *Volodina*, cited above, § 111).

22. Finally, the authorities downplayed reports by the applicant that her husband had threatened her life and the lives of the children. In fact, the authorities considered that these threats were not sufficiently serious or credible to point to a real lethality risk (see paragraph 206 of the judgment). However, research indicates that victims of domestic violence typically seek protection only after serious levels of victimisation and after abuse over a significant length of time. In other words, any complaints of domestic violence are usually filed after several episodes of violence and often following a very violent incident which renders the continuation of the relationship unsustainable, intolerable, or even potentially lethal for the victim.

2. Factors that were overemphasised

23. Conversely, the authorities overemphasised the importance of a number of other factors when conducting the risk assessment. In particular, they appear to have placed too much weight on the husband's calm demeanour in the presence of the police, the fact that most of the violence up until that point had taken place in the home, the lack of a weapon registered in the applicant's husband's name, and the applicant's failure to take prompt action against her husband.

24. The police relied in their risk assessment on the fact that the applicant's husband appeared calm during his interview, noting that he did not exhibit any signs of potential for aggression while in the presence of the

authorities (see paragraphs 33 and 41 of the judgment). The police also found it relevant that the husband was friendly and courteous to acquaintances, including the parents of his children's classmates (see paragraph 37 of the judgment). However, a lack of aggression towards the police or towards acquaintances is not a reliable indicator that an individual will not engage in domestic violence against a partner or child (see paragraph 208 of the judgment).

25. The authorities also emphasised that the applicant's husband had never harmed his wife or his children while outside their home (see paragraph 41 of the judgment). However, this fact should not have held much, if any, weight; after the applicant's husband was barred from entering the home and committing abuse there, any violent impulses would have to be satisfied in a different location. Violence is person-dependent, not place-dependent. The protection measures that were adopted were based on this significant misjudgment, as we argue below. Again, it is worth highlighting that, as of January 2020, the Austrian legislation provides for "no-contact orders" that follow the endangered person, not merely certain locations (see paragraph 53 of the judgment).

26. The authorities considered it significant that a check of the firearms registry returned a negative result (see paragraph 22 of the judgment). However, as already noted, the police did not ask the applicant about any weapons in her husband's possession (lawfully or not) or make any other attempt to ascertain whether he might obtain access to a dangerous weapon in some other way. The Court has recognised that, owing to the exceptional psychological situation in which victims of domestic violence find themselves, there is a duty on the part of the authorities examining the case to ask relevant questions in order to get all the relevant information, and not just to rely on the proactivity of the victim in giving all the relevant details (see paragraph 170 of the judgment, and *T.M. and C.M. v. the Republic of Moldova*, no. 26608/11, § 46, 28 January 2014). The authorities' failure to make a more detailed inquiry into the applicant's husband's access to a firearm is particularly relevant: research suggests that the presence of a gun in the context of domestic violence leads to a 500 per cent increase in the risk of homicide for female victims (see J.C. Campbell et al., "Risk Factors for Femicide Within Physically Abusive Intimate Relationships: Results from a Multi-Site Case Control Study," 93 *American Journal of Public Health* 1089-97 (2003)).

27. Finally, the authorities placed too much emphasis on the actions the applicant took or omitted to take. In particular, the fact that the applicant only reported the rape and strangulation by her husband three days after it had allegedly happened was considered as a factor weighing against the existence of an immediate risk (see paragraph 127 of the judgment). However, it is widely known that it can take rape victims years to turn to the police, especially in cases of marital rape. The applicant was in the middle

of making possibly the most difficult decision of her life – filing for divorce the following Monday, which was likely tied to her decision to report the rape. The fact that it took the applicant three days, over a weekend, to take that heavy step should not have been held against her, and certainly did not absolve the authorities from their duty to carefully assess all the objective risk factors.

28. The majority's central holding rests on the conclusion that "[t]here were no indications of a risk to the children at their school" (see paragraph 206 of the judgment) or "outside the areas for which a barring order had been issued" (see paragraph 209 of the judgment) and that, in any event, any assessed risks for the children were of a non-lethal nature (ibid.). For the reasons indicated in paragraph 25 of this opinion, we consider that defining serious risks to health or life *in relation to certain locations only* (such as the children's home) is misguided in a domestic violence context. We simply fail to understand why an estranged and mentally unstable husband, who might be prepared to take the life of his own children, would be deterred by the formal coordinates of a barring order. We also disagree that no lethal risks to the applicant's children were discernible.

C. Conclusion

29. In conclusion of this heading we consider that, in view of the evidence that was, or should have been, available to the domestic authorities at the material time, which included a number of significant lethality factors, a real and imminent risk to the lives of the applicant's children was sufficiently discernible. The lethality risk assessment carried out by the national authorities was not designed to be, and was not in actuality, sufficiently autonomous, proactive and comprehensive; it also did not take due account of the particular context of domestic violence. Such a conclusion begs the question whether a seriously flawed risk assessment can nevertheless lead to adequate protective measures in some factual scenarios. However, as we agree with the majority that the duty of risk assessment is "an integral part" of the States' preventive obligations under the *Osman* test (see paragraph 159 of the judgment), we must proceed to assess whether the preventive measures adopted by the authorities were adequate in the circumstances.

III. ADEQUACY OF THE PREVENTIVE MEASURES TAKEN

30. Having determined that the facts known to the authorities at the time in question were sufficient to trigger an obligation to take preventive measures to protect the lives of the applicant's children, we will next address the adequacy of the measures actually taken. In contrast to the view adopted by the majority, we are unable to conclude that the authorities were

thorough and conscientious in taking all necessary protective measures (see paragraph 209 of the judgment). In our view, the measures taken were clearly insufficient to exonerate the State from responsibility under Article 2 of the Convention.

A. Failure to take any preventive measures relating to the children's school

31. The purpose of a risk assessment is, in large part, to enable the competent authorities to manage the identified risk and to provide coordinated protection and support to the victims. To facilitate this, the relevant authorities must provide information on risks to, and coordinated support with, all other relevant stakeholders who come into regular contact with persons at risk (see paragraph 180 of the judgment). In the case of children, school personnel and teachers are obviously among these relevant stakeholders, considering the amount of time children typically spend at school and the regularity of their presence there (ibid.; see also Article 51 of the Istanbul Convention). However, there was no requirement under Austrian law at the time of the events that information regarding domestic violence be shared with the children's school (see paragraph 208 of the judgment) and no possibility for the police barring order to be extended to the school (see paragraph 105 of the judgment). As a consequence, the applicant's son's teacher was completely unaware of the domestic violence problems affecting the child, and no measures were taken to bar or monitor the husband's access to the school grounds (see paragraph 35 of the judgment). This basic lack of communication and prevention was a critical failing that allowed the tragic events of that day to unfold.

32. The respondent Government argued that, even though the barring and protection order issued by the police could not cover the children's school, it had been open to the applicant to apply for a judicial temporary restraining order that could do so (see paragraph 105 of the judgment). By failing to apply for the latter measure in due time, the applicant had not made full use of the preventive measures available under domestic law. In response to the earlier Chamber finding in this case that the temporary restraining order could not be considered an effective remedy in the circumstances, the respondent Government submitted further arguments in the proceedings before the Grand Chamber, including statistical information purporting to show that in practice such orders are often granted within a matter of days and therefore were capable of preventing the killing of the applicant's son (see paragraph 106 of the judgment).

33. We consider that the Chamber conclusion on the issue was the correct one. Firstly, despite the additional aggregate data provided by the Government, the timeframe for the issuing of a judicial restraining order in a specific case is still uncertain and subject to the discretion of the presiding

judge (see the applicant's arguments in paragraphs 107 and 123 of the judgment). Secondly and most importantly, we do not believe that, as a matter of State due diligence under the *Osman* test, a victim of domestic violence who has reason to fear an imminent attack on the lives of her children should be required to pursue judicial proceedings in order to save their lives. Averting an imminent risk to life under such circumstances requires a much more proactive approach on the part of the law-enforcement and prosecutorial authorities. It is for the authorities to seek any judicial authorisations that might be necessary in the circumstances and/or to assist the victim in doing so – for example, in order to restrict the liberty or freedom of movement of the perpetrator or person posing the threat – while taking other adequate preventive measures for as long as any judicial proceedings may be pending. We therefore find the Government's claims under this heading to be without merit.

34. As already noted, the Austrian legislation was amended in the aftermath of the events in this case to provide for the extension of police barring orders to schools as well as the immediate notification of the child protection authorities, and most recently for the prohibition or regulation of contact in any form and of attempts to approach the protected person ("no-contact orders"). While such improvements cannot strictly be held against the respondent State with the benefit of hindsight, it is at the same time difficult not to see the multiple amendments undertaken since as implicit recognition at the national level of the flaws of the protective legal framework as it existed at the relevant time.

B. Other measures taken were not adequate or sufficient

35. The only operational measure taken in this case was the issuance of a barring and protection order against the applicant's husband, which banned him from entering the family apartment, the applicant's parents' apartment and the areas surrounding both (see paragraph 25 of the judgment). As already noted, the fact that these orders were spatially limited to those two locations undermined their overall effectiveness. In addition, it is widely recognised in the domestic violence context that barring orders, in and of themselves, are not sufficient to prevent an attack on life, even if they mitigate the risk to some extent and should certainly be used as appropriate (see R. Logar and J. Niemi, *Emergency Barring Orders in Situations of Domestic Violence: Article 52 of the Istanbul Convention* (Council of Europe, 2017), p. 10). In view of the discernible level of risk posed by the applicant's husband in the specific circumstances of the case, the barring order was clearly not sufficient or proportionate to the risk.

36. Furthermore, it appears clear to us that there were additional reasonable measures that the domestic authorities could and should have taken to protect the applicant and her children. Even setting aside the

question of pre-trial detention (see paragraph 37 below), the authorities had a number of other options available to them. At a minimum, the experienced police officers involved in the case, following a proper risk assessment, could have advised the applicant of the level of risk which her husband posed to her and her children, in their considered professional judgment. Other possible measures might have included advising the applicant to move to a shelter with her children for a period of time (see Article 18 § 2 and Article 22 of the Istanbul Convention); closer police protection of the family; the implementation of a victim notification system which would alert the applicant and her children if the husband were nearby; or any immediate protective measures applied at the level of the children's school. The authorities could have also offered immediate counselling to the perpetrator, given his prior mental stability issues and the general distress caused by the situation. In this connection we note that, as of January 2020, section 38a of the Austrian Security Police Act requires that a person against whom a barring order has been issued must attend mandatory counselling sessions. To the extent that any such measures, or combination of measures, were not available to the authorities under domestic law, questions can be raised as to the overall adequacy of the national legal framework to protect the right to life in this context.

37. Turning to the applicant's claims relating to the fact that the public prosecutor did not seek the pre-trial detention of her husband (see paragraphs 40, 42 and 102 of the judgment), we note that any such measure must be lawful under domestic law, based on a reasonable suspicion that the person has committed an offence, and compliant with the other requirements of Article 5 § 1 (c) of the Convention (see paragraph 186 of the judgment). For these motives, an international court ought to require strong reasons to question the decision of national prosecutors *not* to seek pre-trial detention in a given case, absent any exceptional indications of bias, recklessness or similar factors. While we have expressed certain reservations about the handling of the applicant's rape allegations by the national authorities, we agree with the majority that there is "no reason to question the finding of the Austrian courts that the authorities had acted lawfully in not taking [the applicant's husband] into pre-trial detention" (see paragraph 210 of the judgment). At the same time it is important to note, as the judgment recognises, that "the facts and results of any risk assessment carried out" in view of the *Osman* obligations "may be taken into account in the context of the assessment of the risk of further offences" for Article 5 § 1 (c) purposes (see paragraph 188 of the judgment). In our opinion, the results of a properly carried out risk assessment should legitimately inform pre-trial detention decisions that require, *inter alia*, a consideration of the risk of reoffending. Since the risk assessment in this case fell short of the Article 2 requirements, including as carried out by the public prosecutors responsible for the applicant's case, it may have also undermined the ability

of the authorities to seek and justify any more stringent measures that involved the deprivation of liberty of the applicant's husband.

38. In this connection we recognise that while high risk scores may trigger more intensive pre-trial supervision of the person posing a threat, they cannot provide the sole basis for making detention decisions. At the same time, as we have already emphasised (see paragraph 35 above), barring orders are short-term measures that cannot ensure adequate separation, and therefore protection, of the victim from the perpetrator in cases of potentially severe violence (see paragraphs 146 and 150 of the judgment). Therefore, barring orders should not be used as a default substitute for more stringent measures when there is a likely risk of repeated and severe violence, including a lethal threat.

39. It is not, in any event, the Court's task to indicate the precise measures which would have been appropriate in hindsight. In view of the shortcomings of the risk assessment, it would in fact be somewhat speculative to try to specify the exact measures that would have been sufficient to counter the threat had it been properly assessed at the relevant time. The legal system of each State party must adopt its own legal standards in that regard, provided that, seen in their entirety, they provide the authorities with an adequate range of operational tools to prevent or at least sufficiently mitigate serious attacks on life (see paragraphs 179 and 182 of the judgment). The *Osman* test does not require it to be shown that "but for" one or other specific failing or omission of the authorities the killing would not have occurred. Rather, what is important, and sufficient to engage the responsibility of the State under Article 2, is that reasonable measures that the domestic authorities failed to take could have had a real prospect of altering the outcome or mitigating the harm (see *Bljakaj and Others v. Croatia*, no. 74448/12, § 124, 18 September 2014, with further references).

40. In this case, because we consider that there were additional measures that the domestic authorities could have reasonably taken to protect the life of the applicant's son, we conclude that the respondent State failed to satisfy its obligation under Article 2 of the Convention.

C. Conclusion

41. While we recognise the efforts and goodwill on the part of the police officers involved, such elements are not sufficient to absolve the State of responsibility in this case. The risk assessment carried out fell short of what is expected under an autonomous, proactive and comprehensive risk assessment (see paragraph 169 of the judgment). The judgment therefore risks being seen as not taking sufficiently seriously the general principles laid out regarding risk assessment in cases of domestic violence.

42. In the concrete circumstances of the case, the risk to the children was underestimated in our view. We conclude that the authorities did not display the required diligence in the face of the applicant's allegations of escalating domestic violence. They did not conduct a specialised lethality risk assessment targeting specifically the context of domestic violence, and in particular the situation of the applicant's children. Had these risk assessments been adequately targeted and performed, a real and immediate risk to the life of the applicant's son should have been discernible to the authorities. Therefore, an obligation was triggered to take adequate preventive measures under Article 2 of the Convention.

43. In the circumstances, the one and only measure adopted by the Austrian authorities to protect the applicant and her children – a barring and protection order with a limited territorial scope that left them entirely unprotected outside their residences – was manifestly insufficient and inadequate to prevent further violence including a lethal attack. Even setting aside the option of pre-trial detention (see paragraph 188 of the judgment), a number of other alternative measures widely used in the domestic violence context were, or ought to have been, available to the authorities that would have had a real prospect of preventing the tragic outcome. Certain deficiencies in the domestic legal framework (see paragraph 34 above), while not necessarily entailing violations of the *Osman* obligations on their own, cumulatively undermined the ability of the authorities to respond in adequate fashion. Accordingly, we consider that there has been a violation of the substantive limb of Article 2 of the Convention.

DISSENTING OPINION OF JUDGE ELÓSEGUI

1. I thank my colleagues for this profound judgment. This was a difficult and tragic case to decide upon. It has been a good opportunity for the Grand Chamber to apply the *Osman* test taking into account the special features of domestic violence, following the cases of *Opuz v. Turkey* (no. 33401/02, ECHR 2009), *Talpis v. Italy* (no. 41237/14, 2 March 2017) and *Volodina v. Russia* (no. 41261/17, 9 July 2019) (see paragraphs 157-176 of the judgment). As a member of the composition of *Volodina*, I would say that that case was also an important one, not only for Russia but for all the Contracting Parties to the Convention.

2. The goal of this dissenting opinion is to focus on one essential element for assessing the real and immediate risk to vulnerable individuals who are victims of domestic violence, and the risk of violence against children belonging to the common household (see paragraph 163 of the judgment). This element is the relevance of cultural background in the context of the assessment of the risk of domestic violence. As is recognised in the judgment, there is a need to use standardised checklists, which indicate specific risk factors and have been developed by criminological research and codes of best practice in domestic violence cases. In so doing, the comprehensiveness of the authorities' risk assessment has to be addressed (see paragraph 171 of the judgment). The cultural background of the perpetrator is considered to be a factor potentially triggering gender-based violence. In this connection, international reports acknowledge different cultural patterns associated with the country of origin of the perpetrator.

3. In the present judgment I voted against the majority decision finding no violation, for various reasons. Some of these are explained in the joint dissenting opinion expressed by the seven judges, myself included, who considered that there had been a violation in this specific case owing to the lack of a correct and comprehensive risk assessment on the part of the Austrian authorities.

4. The judgment as it stands reflects the observations of the Austrian Government. By contrast, none of the victims' concerns have been taken into account. It may be appropriate in the future for the assessment of risks by the authorities to follow more closely the approach taken by GREVIO in its third-party comments (point 8), taking into account also the spiral of violence (see GREVIO's comments and the applicant's observations, pp. 16 and 30[1]), structural inequality, gender bias, stereotypes and the trauma of the victims (see the applicant's observations, p. 22). I understand the

[1] As regards GREVIO's report on Austria, see *Domestic violence perpetrator programmes: Article 16 of the Istanbul Convention – A collection of papers on the Council of Europe Convention on preventing and combating violence against women and domestic violence*, Council of Europe, 2014 https://rm.coe.int/168046e1f2

difficulty of asking Governments to comply with more positive obligations if the risk of a possible murder was not foreseeable, and I also agree that the task of the Court is to judge concrete situations and facts and not to take on the role of the legislature or carry out an analysis *in abstracto*.

Having said that, I think that the Austrian authorities failed to see the family as a unit, including the children, when it came to conducting an assessment of the risk of violence. In my view, it can be established that a real and immediate risk to the life of the child or the family unit was discernible to the authorities in the instant case. In consequence, the measures taken can doubtless not be considered sufficient.

5. In order to arrive at that conclusion, the assessment of risk in domestic violence cases has to take into account the concrete circumstances of the victim, including in particular his or her social and cultural background. It is very clear from our previous case-law that an analysis of the vulnerability of the victim has to be carried out (as in *Talpis* and *Volodina*, both cited above, and in *S.M. v. Croatia* ([GC], no. 60561/14, 25 June 2020)). In assessing whether a woman belongs to a vulnerable group, the authorities have to devote major efforts to understanding the possible real and immediate risk to the victim and her children, in order to properly interpret any symptoms and alarm signals.

The judgment takes a very abstract approach, lacking realism as regards the necessity for the authorities to understand women in a vulnerable position. The conclusion of the judgment of no violation in respect of the positive obligations of the Austrian authorities is not coherent in its reasoning and does not draw the necessary inferences from the facts as described. Special diligence must include an analysis of the typical factors which influence gender-based violence, as described by GREVIO, the applicant and the other third parties.

6. Unlike the majority (see paragraphs 189 and 202 of the judgment), my conclusion will be that the authorities did not carry out a correct and comprehensive risk assessment. The reason is that the checklist used by the police (see paragraph 129) was insufficient and had many gaps. Contrary to the Government's assertions (see paragraphs 128-129), there were many risk factors which they did not take into account. These included:

(i) The husband's gambling addiction.

(ii) His economic dependence on the applicant (and vice versa, her dependence on him, in an emotional sense and in relation to the traditional division of roles).

(iii) The alleged rape and the fact that the applicant said that she had been obliged for ten years to have sex without her consent.

(iv) The disadvantaged socio-economic category to which both belonged and the description of their occupations. There is not a word in the information provided by the Austrian authorities about the fact that the husband worked in a kebab shop and that the wife worked in a kitchen.

(v) The cultural background.

(vi) The interpretation of the domestic authorities regarding the quality of the risk assessment is surprising. We learn that "[a] medical examination did not detect injuries in her genital area" (see paragraph 21 of the judgment), while at the same time it is stated that her husband had choked her (see paragraph 200 of the judgment).

(vii) The husband was in the probationary period of a previous conviction for bodily harm.

7. The judgment and the observations of the Austrian authorities completely omit any reference to the applicant's specific circumstances. We learn only incidentally that she and her husband were of Turkish origin, as this is referred to just once in the whole judgment. Of course, according to the academic and scientific research, there is not necessarily any causal link between cultural factors and domestic violence. It is true that domestic violence is a phenomenon that cuts across all social classes of women, and it is not necessarily linked to the cultural background. However, the judgment and the Austrian authorities wilfully ignored the applicant's specific circumstances. The file contains concrete information which is essential to assessing the real risk to the victims.

8. In the judgment it is stated that the applicant has Austrian nationality, but no information is given about her level of studies. According to the information provided by the applicant's counsel during the hearing, the applicant was born in Turkey in 1978 and had her schooling there until she was fourteen years old. She moved from Turkey to Austria when she was fourteen. She attended school in Austria for only two years (from the age of fourteen to sixteen) in a low-level middle school (*Hauptschule*), where she started to learn German. She did not finish school and did not have any formal or professional training thereafter. She never attended a German course. She worked as a childminder and learned German from the children she was minding, as well as from her own children later on. Later she worked as a helper in a kitchen, and eventually lost her job. She was offered counselling in Turkish by a Turkish woman at the Centre for Protection from Violence because her German was not very good. When she went to the police she was accompanied by the Turkish woman from the centre, but the interview with the police was in German and she had no interpreter.

9. It should be noted that the applicant's counsel raised the issue of the applicant having been interviewed in German by the police for the first time during the oral hearing. Up to that point, this issue had never been raised. The applicant never complained about Turkish culture having been a factor in her case either. Nevertheless, we know from the information in the file that she was indeed interviewed by the police in German, without the assistance of an interpreter, and we also know that her counsellor at the Centre for Protection from Violence spoke Turkish with her. In 2010 the applicant lost her job, a fact which caused friction between her and her

husband. He was unemployed at that point too, and reacted aggressively because she could not support him anymore or repay his gambling debts as she used to. Before the time of the events in question, both the applicant and her husband had had jobs and each had an income. The applicant was employed as a helper in a kitchen and her husband was running a kebab shop.

10. It is surprising that in this judgment never a word is said about Ms Kurt's occupation or her level of studies. But this factor is very important for detecting a situation of risk to a victim of domestic violence. In fact, the police did not pay very much attention to what the applicant said about her husband's addiction and the threat to kill her son and daughter in front of her. They had information, but did not evaluate it properly (see paragraph 198 of the judgment). Although she had Austrian nationality, she was a migrant woman of Turkish origin who was not highly educated. By way of comparison, in the case of *Talpis* the applicant, who was of Romanian origin and married to a Moldovan man, also stated that at the beginning she had been unable to speak Italian, which is why she did not go to the police, despite being constantly beaten by her alcoholic husband.

11. It could be argued that the applicant herself did not rely to a great extent on her cultural background in relating the facts to the Austrian authorities or even in her application to the Court. Her lawyer actually provided some of this information during the Grand Chamber hearing, in reply to a question asked by a judge. Moreover, the alleged violation of Article 14 on the ground that the State had discriminated against her as a woman was only raised by the applicant for the first time in the Grand Chamber proceedings, on 10 January 2020, and not in her initial application to the Chamber (which was lodged on 16 December 2015) (see paragraph 214 of the judgment). Furthermore, from a formal perspective, the six-month time-limit provided for by Article 35 § 1 of the Convention was applied and the complaint concerning Article 14 was declared inadmissible because the last domestic decision had been served on the applicant on 16 June 2015 (see paragraph 215 of the judgment).

12. But my point is that these facts do not exempt the national authorities from the obligation to take into account all the above-mentioned factors when assessing violence against women from mixed cultural backgrounds. This is so because attitudes about the division of roles between men and women in the family are very much linked to cultural background and also depend on the level of integration into the new society[2]. A legal paper proving nationality does not change that. Achieving

[2] *Preventing and combating domestic violence against women – A learning resource for training law-enforcement and justice officers on the causes of violence against women and domestic violence*, Council of Europe, 2016 https://rm.coe.int/16806ee727. Page 12 "To varying degrees, patriarchal cultural and sexual norms, discriminatory divisions of power and labour and the financial dependence of women persist in society – in Europe and

more equal roles between women and men within the family depends very much on the possibility to improve the level of education and market integration. There is much academic research on that subject, and especially on the differences between first-generation migrant women and those of the second or third generation. All these elements have to be taken into account in order to evaluate the real and immediate risk of domestic violence. Sometimes women with a migrant background do not have sufficient proficiency in the language of the new country, they have a lower economic status and cultural level and do not have other relatives, or only ones who are in the same situation as themselves economically or who also have discriminatory attitudes towards women. Sometimes, women who are victims of violence cannot leave their partners because they have nowhere else to go. The assessment of risk has to include the specific cultural context, as noted by the Council of Europe in its 2016 learning resource:

> "The use of extensive risk assessments can help to identify and monitor sources of motivation and any change over time, and can be instrumental in helping other agency staff, such as health, social or children's services, to understand the dynamics of a relationship, including within a specific cultural context, and respond appropriately[3]."

13. Understanding this situation also requires special training for judges and police officers in dealing with women with this profile. The national authorities, police and social services must be trained and acquire skills to detect these special risk factors in domestic violence cases involving women from migrant backgrounds. It is insufficient for the purpose of identifying immediate risk to rely on one's own cultural attitudes. As stated in the handbook of the Council of Europe on *Preventing and combating domestic violence against women – A learning resource for training law-enforcement and justice officers*, "[p]rosecutors are better equipped to fully assess the extent of abuse and understand the risks if they situate the criminal incident in a larger socio-cultural and behavioural context[4]."

14. As mentioned before, skills in the language of the country, among other things, are essential, particularly when women have to express themselves about very private matters of sexuality which cause them

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beyond." Page 13: "Domestic violence as gender-based violence is embedded in the social and cultural values of society, which provide the breeding ground for tolerance towards this violence. Patriarchal society encourages men to believe that they are entitled to exercise power and control over their partners and/or their children."

[3] *Domestic violence perpetrator programmes: Article 16 of the Istanbul Convention – A collection of papers on the Council of Europe Convention on preventing and combating violence against women and domestic violence*, Council of Europe, 2014, p. 17 https://rm.coe.int/168046e1f2

[4] *Preventing and combating domestic violence against women – A learning resource for training law-enforcement and justice officers*, section 1.4, "Causes of violence against women and domestic violence", Council of Europe, 2016, p. 44 https://rm.coe.int/16806ee727

embarrassment when speaking to the police or forensic doctors, or in hospitals.

For instance, if we look at the question of fear: it is quite common for victims to refuse to testify against their husbands or partners (see, in this specific case, paragraph 15 of the judgment). The applicant refused to testify against E. and about her fear (see paragraph 19 – similar conduct could be observed in the case of *Talpis*). According to the facts as described in the judgment, there were sufficient reasons to be alerted to the risk, but these were not taken into account by the authorities. To take some examples: "He was nonetheless found guilty of pushing her against a wall and slapping her, and of threatening his brother and his nephew" (paragraph 15); "... she was obliged to have sex with him" (paragraph 18); "... when she had told [E.] that she did not want to have sexual relations, he had choked her" (paragraph 28). The police report stated that "a rape had been reported, that there was evidence of violence in the form of haematomas, that there had been continuous threats, and that the children had been slapped regularly" (paragraph 27). The lack of sensitivity of the authorities to women's issues is apparent in the statement that "the woman did not have injuries in her genital area, but had abrasions on her chin" (paragraph 28). Also, it is very well known that "women's ability to name and disclose acts of 'private' violence changes with awareness-raising and other cultural patterns[5]".

15. These factors for identifying real and immediate risks – the economic situation, level of education, cultural background, isolation, and skills in the language of the country – were not taken into account in the concrete assessment. According to the European Union Agency for Fundamental Rights (FRA):

> "Research has shown that respondents differ in their perception of what behaviour constitutes sexual harassment. The variation in the ascribed subjective meaning is shown to be affected not only by gender cultures at work (such as the recognition of gender equality and non-discrimination on the ground of sex at the workplace versus a culture that 'permits' or 'rewards' harassment in an organisation), but also by the prevalent social and cultural values, norms and attitudes in a society. They also vary by the respondents' overall level of awareness and information about their legal rights in general, and existing laws in particular. Women's preconceived notions of what 'sexual harassment' is and is not might also differ from country to country. To minimise such culturally determined variations in the subjective interpretations of sexual harassment, the FRA survey did not ask the respondents about 'sexual harassment' as an issue; rather, it asked about experiencing specific unwanted and offensive acts. Nevertheless, there may still be differences in the degree to which

[5] *Analytical study on the effective implementation of Recommendation Rec (2002) 5 on the protection of women against violence*, 2007, p. 42 https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805915e3.

> women in different cultural contexts find the described acts offensive or intimidating[6]."

16. This has to be the point of departure. Otherwise, how can the authorities put in place protective measures, if they do not detect a situation of risk? In the case of *Volodina* (cited above), we saw the same failure by the authorities to recognise the clear symptoms of violence. How can we discuss what kind of preventive operational measures we have to use if we do not recognise the danger?

17. In the present case, the Austrian authorities put the burden entirely on the victim to assess her own risks and take her own protective measures. According to GREVIO's third-party comments in this case, "[t]he competent authorities should not rely on the victim's own assessment of the risk, which, due to the dynamics of domestic violence, may not be objective" (see point 19 of the comments). I also agree with point 4 of those comments, which states as follows (referring also to *Volodina*, § 86, and *Talpis*, § 122, both cited above):

> "State authorities have a responsibility to take protective measures in the form of effective deterrence against serious breaches of an individual person's integrity by a member of her family or by a partner. Taking effective measures requires an assessment of whether there is a real and immediate threat, taking due account of the particular context of domestic violence."

18. Another important factor is that domestic violence should be seen as occurring within the family as a unit even if it is primarily directed against the woman (see the applicant's observations, p. 10). The authorities did not put themselves in a position to be able to discern whether a real and immediate risk to the applicant's son's life existed at the relevant time. The national authorities did not conduct a sufficient, autonomous and comprehensive risk assessment of the potentially lethal risks to the applicant and her children in the present case. With regard to the operational measures taken, these were not sufficient and not proportionate to the level of risk posed by the applicant's husband.

19. As is reflected in the judgment, as a consequence of the instant case, section 38a of the Security Police Act was amended. As of 1 September 2013, the police could also issue barring and protection orders in respect of schools and other childcare facilities attended by endangered children under the age of fourteen (see paragraph 52 of the judgment). However, according to paragraph 53 of the judgment:

> "On 1 January 2020 section 38a of the Security Police Act was again amended. Barring and protection orders were supplemented by 'no-contact orders' (*Annäherungsverbot*), which prohibit an alleged perpetrator of violence from approaching the endangered person(s) within a radius of 100 metres. Schools and

[6] *Violence Against Women: an EU-wide Survey*, FRA, p. 97 https://fra.europa.eu/sites/default/files/fra_uploads/fra-2014-vaw-survey-main-results-apr14_en.pdf

other childcare facilities are no longer specifically mentioned, since the person posing a threat is in any event obliged to stay 100 metres away from an endangered child."

Besides that, temporary restraining orders could be issued for any places, including schools and workplaces (see paragraph 54). However, the effectiveness of such restraining orders is doubtful if nobody can monitor whether the perpetrator complies with the 100 metres' distance. That is why it may be advisable to use preventive measures to separate the aggressor from the victim, such as electronic devices like bracelets worn by the perpetrator, but also by the victim to enable the latter to contact the police rapidly in the event of a threat of a breach of the restraining order. These devices record any infringement of a restraining order by the perpetrator, who may then incur criminal liability.

20. In the same vein, in my view there was a lack of special diligence in the context of the authorities' positive obligations under the *Osman* test (contrary to what is stated in the judgment). Furthermore, while recognising the lack of rapidity and the omission to inform the school, the Court concluded that these facts could not be regarded as a breach of the authorities' duty of special diligence. The possibility of issuing a barring order for the children's school was not considered. The authorities could or should have known that there was a real and immediate risk to the life of the applicant's son. They failed to recognise the children as endangered persons (see the applicant's observations, p. 22). However, in finding that the State complied with its positive obligations, the judgment relies on the fact that "even though the police report on the issuance of the barring and protection order did not explicitly list the children as endangered persons within the meaning of section 38a of the Security Police Act, the report for the criminal investigation forwarded to the prosecutor on the same day at 11.20 p.m. explicitly mentioned them as 'victims' of the indicated crimes" (see paragraph 206 of the judgment).

Conclusion

21. My conclusion is that there was a violation of Article 2 in its substantive limb in the particular circumstances of the applicant, Ms Kurt, because the State did not deploy sufficient measures to avoid or mitigate the risk. Hence:

(i) The authorities could or should have known that there was a real and immediate risk to the life of the applicant's son (see paragraph 202 of the judgment). They failed to recognise the children as endangered persons (see the applicant's observations, p. 22).

(ii) The family should be regarded as a unit, with a risk assessment conducted for each family member, including the children involved in each case of domestic violence, even if it is primarily directed against the woman (see the applicant's observations, p. 10).

(iii) The immediate risk should be interpreted in a different way in situations of domestic violence and the existence of a serious risk to life in the foreseeable future should be assessed, taking into account cultural factors.

(iv) A requirement of special diligence applies. In the instant case, the national authorities did not conduct a sufficient, autonomous and comprehensive risk assessment of the potentially lethal risks to the applicant and her children. The authorities did not put themselves in a position to be able to discern whether a real and imminent risk to the applicant's son's life existed at the relevant time.

(v) A real and immediate risk to the applicant's son's life was discernible at the time.

(vi) The applicant's husband was not taken into pre-trial detention or separated immediately from his wife and children; consideration should thus have been given to other preventive measures using electronic devices such as bracelets which are more compatible with Article 5 of the Convention.

(vii) Our judgment should have taken into account the notion of inferiority of women, referred to by GREVIO in its third-party comments (point 8), as well as the imbalance of power between men and women that is often present in domestic violence situations (see the applicant's observations, p. 30), the cycle of violence (GREVIO's comments) and the spiral of violence (ibid., p. 16) in order to evaluate the real and immediate risk.

(viii) Other factors to be considered were the possibility of issuing a barring order for the children's school and the duty incumbent on the authorities to pass on certain information to the children's schools.

(ix) The operational measures taken were neither sufficient nor proportionate to the level of risk posed by the applicant's husband.

(x) Taking into account all these factors, I cannot agree with the conclusion of the judgment in paragraph 207. On the contrary, in my view E.'s threats should have been deemed "sufficiently serious [and] credible by the authorities to point to a lethality risk that would have justified pre-trial detention or other more stringent measures than the barring and protection order".