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

Exchange of views with the Gender Equality Commission (GEC)

Speech by Síofra O'Leary

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Chair/President Kass,
Members of the Gender Equality Commission,
Colleagues,

It is a real pleasure to have been invited to your 24th Plenary meeting today and I am delighted to be joined by Judges Andreas Zünd, Kateřina Šimáčková and Diana Sârcu who I thank for their precious time, and by Rachael Kondak and a trainee, Valérie Albus, from the private office.

That the Court must maintain dynamic and regular relations with other non-judicial institutions and bodies within the Council of Europe is self-evident. It is a point which the Court underlined in its memorandum for the 4th Summit and a point, reiterated by me in my regular exchange with the Committee of Ministers two weeks ago.

The Court does not operate in an institutional vacuum, detached from the other areas of work and activity of the Council of Europe. During the last six months, for example, I have participated with other judges in exchanges of views with GRECO and the CPT, and one of the two Vice-Presidents, Marko Bošnjak, represented the Court in an exchange of views with ECRI.

Regarding gender issues more specifically, in February this year I participated in an exchange GREVIO and took part in a judicial forum on gender equality in the Western Balkans in June, also accompanied by several serving and former Judges.

Through today's exchange I hope that the Court's case-law can inform your work in elaborating the next Gender Equality Strategy (2024-2029). I also believe that your reflections and questions can inspire our own approach when preparing relevant cases.

Let me begin by paying tribute to the GEC's intergovernmental work, which is vital in ensuring that gender equality principles find their rightful place in all Council of Europe policies.

Indeed, your work bridges the gap between policy on the one hand and social and legal reality on the other.

We know that gender equality is an important policy goal of the Council of Europe, as evidenced by the historic 4th Summit, in the Reykjavik Declaration and in Principle 10 of the Reykjavik Principles for Democracy.

The Committee of Ministers is currently looking into how to follow-up in concrete terms on the priority themes of the Declaration.

My intervention today will focus on two themes which you have indicated would be useful for your own work and reflections.

Firstly, I will discuss gender equality and violence against women and, secondly, the impact of artificial intelligence and technology-facilitated violence.

I. Gender equality and violence against women

Let me begin by outlining the general principles from the Court's case law on gender equality itself, before considering the specific issue of jurisprudential responses to violence against women.

The Court has repeatedly stated that very weighty reasons have to be put forward before a difference in treatment on grounds of sex can be regarded as compatible with the Convention.[1]

References to traditions, general assumptions, prevailing social attitudes, or stereotypical understandings are insufficient justifications for a difference in treatment on grounds of sex.[2] In a Grand Chamber judgment – decided by 17 Judges - handed down in a Swiss case in 2022, the Court emphasised that the presumption of a "male breadwinner" was not a sufficient ground to justify providing similarly situated widowers with less financial support than widows.[3]

Similarly, the stereotypical understanding of families as being composed of two parents was not sufficient to deny a surviving parent's allowance to a single mother.[4] A point we see in a Bulgarian case called *Yocheva and Ganeva* from 2021.

A difference of treatment based on sex may, in certain circumstances, be justified where it constitutes a form of positive action aimed at correcting factual gender inequalities.[5]

When it comes to differential treatment on grounds of pregnancy, the Court considers that it amounts to direct discrimination in violation of Article 14 unless justified (with the latter dependent on the provision of very weighty reasons as highlighted earlier).[6]

In *Jurčić v. Croatia*,[7] for example, the applicant had undergone in-vitro fertilisation ten days before entering into an employment contract and subsequently was put on sick-leave due to pregnancy-related complications. The authorities refused her application to be registered as an insured employee along with her request for salary compensation due to the sick leave, considering her employment contract to have been fraudulent because of her knowledge of her pregnancy.

The Court found a violation of Article 1 of Protocol No. 1 combined with Article 14 in this case, acknowledging that a refusal to employ or grant an employment-related benefit to a pregnant woman because of her pregnancy amounts to direct discrimination on grounds of sex, which cannot be justified with reference to the financial interests of the State (qua employer or insurer).

[1] See, for example, *J.D. and A v. the United Kingdom*, nos. 32949/17 and 34614/17, § 89, 24 October 2019.; *Napotnik v. Romania*, no. 33139/13, § 75, 20 October 2020.
[2] *Ünal Tekeli v. Turkey*, no. 29865/96, ECHR 2004-X (extracts).; *León Madrid v. Spain*, no. 30306/13, § 66, 26 October 2021.
[3] *Beeler v. Switzerland* [GC], no. 78630/12, § 115, 11 October 2022.
[4] *Yocheva and Ganeva v. Bulgaria*, nos. 18592/15 and 43863/15, § 116, 11 May 2021.
[5] *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, § 61, ECHR 2006-VI.; *Andrle v. the Czech Republic*, no. 6268/08, § 60, 17 February 2011.
[6] *Napotnik v. Romania*, no. 33139/13, 20 October 2020 provides an example where this was deemed justified.
[7] *Jurčić v. Croatia*, no. 54711/15, § 63, 4 February 2021.

I turn now to consider gender-based violence. As we know, the Convention does not expressly mention domestic and gender-based violence. However, the Court has been true to its characterisation of the Convention as "a living instrument to be interpreted in the light of present-day conditions",[8] setting out a number of principles applicable in cases concerning domestic and gender-based violence.

From the 2009 landmark ruling in *Opuz v. Türkiye* onwards,[9] a succession of domestic violence cases has seen the Court approach the issue from the angle of several different substantive provisions of the Convention –the right to life (Article 2), the prohibition of inhuman and degrading treatment (Article 3), the right to protection of one's physical and psychological integrity as part of the right to respect for private life (Article 8), and the prohibition of discrimination, framed in *Opuz* as the right of domestic violence victims to the equal protection of the law (Article 14).

In 2021, in *Kurt v. Austria*, the Grand Chamber's judgment marked another qualitative step forward in terms of the perception of and required response to domestic violence from the standpoint of the Convention.[10] A pattern of escalating violence, directed first at the applicant mother, culminated in a murder-suicide, with the applicant's 8-year-old child fatally injured at school by his father.

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

What also marks this case out is the degree to which the Court drew upon specialised international instruments – at the European level the Istanbul Convention – and the expertise made available to it by intervening parties in the proceedings, and in particular, GREVIO.

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

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

These are very difficult cases because the violence builds up and manifests itself in the private sphere and the legal burden placed on States cannot be such that it is unworkable.[11] In these types of horizontal situations, the State's responsibility is engaged where it has failed to implement reasonable

[8] *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26 and, more recently, in relation to Article 4 and human trafficking, *S.M. v. Croatia* [GC], no. 60561/14, 25 June 2021, § 292.
[9] *Opuz v. Turkey*, no. 33401/02, ECHR 2009.
[10] *Kurt v. Austria* [GC], no. 62903/15, 15 June 2021.
[11] This difficulty is reflected in the fact that, while the Grand Chamber was unanimous on the legal principles applicable, it split 10:7 on their application to the facts of this case.

measures, to be assessed in relation to the circumstances of a given case, that might realistically have changed the course of events or mitigated the damage caused.[12]

Where domestic violence is alleged to have occurred, national legal frameworks must be sufficient to respond adequately to complaints, as illustrated in the judgment in *A.E. v. Bulgaria*[13] delivered in May of this year.

In this case, the applicant, who was fifteen years old at the time, claimed that she had been beaten, kicked and strangled by the 23-year-old man with whom she was living. The district prosecutor found that the legal conditions had not been met to open criminal proceedings and that only civil proceedings could be pursued.

The applicable Bulgarian legal framework required that to initiate a public prosecution in the context of domestic violence, the violence had to be repetitive and both victim and offender had to be adults who had lived together more than two years.

The Court held that there had been a violation of Article 3 and of Article 14 in conjunction with Article 3. Given the propensity for domestic violence to worsen over time, the Bulgarian legislative requirement that there be repeated violence before criminal proceedings could be opened did not meet the authorities' obligation to respond immediately to allegations of domestic violence. Where authorities fail to act promptly, this may deprive complaints of their effectiveness, create a situation of impunity conducive to the recurrence of violence, and even lead to fatal consequences.[14]

When evaluating the Article 14 complaint, the Court noted that this was the third such case against Bulgaria and that women are the predominant victims of domestic violence in that State. The latter had failed to show what policies they had pursued to protect domestic-violence victims and to punish offenders and had failed to disprove the allegation of institutional inaction on the part of the authorities.

Even where the Court does recognise the existence of an adequate legal framework, it may still find violations, as was the case in *Landi v. Italy*.[15] Here the Court found a violation of Article 2 based on the passive attitude of the public prosecutors in the face of the serious risk of ill-treatment faced by the applicant, which had led to the murder of her one-year old son and her own attempted murder in 2018. The Court came to this conclusion despite recognising the existence of an adequate legal framework in the respondent State.

Finally, the Court has found violations of Article 8 in instances of repeat[16] or secondary victimisation[17] of victims of sexual violence and in a recent Moldovan case – *Luca* – it looked at the domestic abuse context in a case relating to the mothers contact rights with her children; the blocking of contact having been used as a continued form of abuse.

A point which I made to GREVIO and which I think is worth repeating is that courts and national authorities have to keep in mind that complainants in these cases have to navigate a criminal justice system designed by and for police and professional lawyers at what is probably the most vulnerable point in their lives while at the same time not losing sight of the Articles 5 and 6 rights of any accused.

[12] *Talpis v. Italy*, no. 41237/14, § 121, 2 March 2017.
[13] *A.E. v. Bulgaria*, no. 53891/20, 23 May 2023
[14] *A.E. v. Bulgaria*, no. 53891/20, § 87, 23 May 2023.
[15] *Landi v. Italy*, no. 10929/19, 7 April 2022.
[16] *J.I. v. Croatia*, no. 35898/16, 8 September 2022.
[17] *J.L. v. Italy*, no. 5671/16, 27 May 2021.

This has by no means been an exhaustive overview of the Court's unfortunately extensive case law on domestic and gender-based violence. I do hope, however, that the selection of cases has demonstrated to you that the European Convention requires States to prevent harm to the extent possible and to adequately respond to allegations of harm when presented. The Court is extremely attentive in these cases; conscious of the fact that the occupation by women of more equal and prominent roles in our societies has not been accompanied by a decrease in gender violence. On the contrary, one could argue that the societal shifts which have finally worked in women's favour have contributed, in certain societies and across the social strata, to exacerbating domestic violence.

II. Artificial intelligence

The possibilities offered today by digital technology and artificial intelligence have made it possible to achieve real progress in a large number of areas, including in the field of justice.

However, as a recent report from UN Women[18] warned, the digital revolution is creating new forms of gender inequalities, including technology-facilitated violence against women.

In a very helpful report published by you in August this year[19], GEC provided a thorough and detailed examination of the impact of technology and artificial intelligence on equality and the risks it poses for non-discrimination. The report cited revenge porn as a fast-emerging form of digital gender-based violence and noted that the dominance of social media platforms has also given rise to new and increased forms of online hate speech and sexism.

The Court has some experience with dealing with these types of issues but not much when it comes to artificial intelligence. The reason for this is simple. Applicants coming to the Court must have already exhausted domestic remedies in their own State. This naturally takes some time and what we realise is that there is a time lag between very new legal issues which are ripe for litigation being dealt with nationally and those arriving on our desks in Strasbourg.

But our existing case-law is not devoid of usefulness.

In *Volodina v. Russia (No 2)*[20] the applicant complained that the Russian authorities had failed to protect her from repeated acts of cyberviolence from her former partner. This included the publication of intimate photographs without consent, impersonation through the creation of fake social-media profiles and tracking her with the use of a GPS device.

The Court unanimously held that the respondent State had failed to put in place an adequate legal framework providing her with protection against such acts of cyberviolence, and it had failed to conduct an effective investigation, particularly due to the delay in opening an investigation and its failure to make a global assessment of the situation complained of.

Buturugă v. Romania[21] provides another example of a case shedding light on to different forms of cyberviolence and control. In this case, the applicant had reported her former husband's violent behaviour to the authorities. She requested that an electronic search of the family computer to be used in evidence for the criminal proceedings, alleging that her former husband had improperly

[18] UN Women (2023), *Technology-facilitated violence against women: Taking stock of evidence and data collection. Available at:* https://www.unwomen.org/en/digital-library/publications/2023/04/technology-facilitated-violence-against-women-taking-stock-of-evidence-and-data-collection (Accessed 6 Nov 2023).

[19] Council of Europe (2023), *Study on the impact of artificial intelligence systems, their potential for promoting equality, including gender equality, and the risks they may cause in relation to non-discrimination*. Available at: https://rm.coe.int/prems-112923-gbr-2530-etude-sur-l-impact-de-ai-web-a5-1-2788-3289-7544/1680ac7936 (Accessed 6 Nov 2023).

[20] *Volodina v. Russia (No 2)*, no. 40419/19, 14 September 2021.

[21] *Buturugă v. Romania*, no. 56867/15, 11 February 2020.

consulted her electronic accounts, including her Facebook account, and that he had made copies of her private conversations, documents and photographs.

Her request was dismissed by the domestic courts on the grounds that any evidence likely to be gathered in this way would be unconnected with the alleged threats and violent acts committed by her former husband. The Court found a violation of Articles 3 and 8 in this case. It accepted the applicant's argument that actions such as illicitly monitoring, accessing or saving one's partner's correspondence can be taken into account by the domestic authorities when investigating cases of domestic violence. According to the Court, the national authorities' refusal to do so in this case constituted a failure to take into consideration the many forms that domestic violence may take.

These cases again exemplify how the Court interprets the Convention in a dynamic way. Of course, our case-law in this area remains in its infancy and needs to be developed carefully.

In developing its case law on cyberviolence, the Court consults relevant international instruments. For example, in the case I just discussed, the Court referred to the Istanbul Convention in addition to reports from the Council of Europe, the United Nations, and the European Union. Here I note that the European Union is considering a proposed directive that would criminalise specific forms of cyber-violence, namely, cyber-stalking, cyber-harassment, non-consensual sharing of intimate images and cyber incitement to hatred and violence.[22] We can therefore see that while the Court builds its case law regarding cyberviolence, so too is legislation being developed within the Convention legal space.

On the other hand, artificial intelligence and its impact on gender equality is a topic that the Court's caselaw has not yet dealt with directly.

No doubt artificial intelligence may facilitate new forms of cyberviolence against women and generate new legal challenges for the Court. Commissioner Mijatović has warned of the challenges of bias and disinformation in AI systems.

While the Court's case law on artificial intelligence remains to be developed, we certainly do see recent case-law concerned with technological advancements and the human rights questions to which new technologies give rise. The example I will give you does not concern gender equality issues but the general principles may be of value for future cases and your work.

In *Glukhin v. Russia*,[23] a judgment delivered in July of this year, the respondent State had used highly intrusive facial recognition technology to identify, locate and arrest the applicant for an administrative offence linked to a peaceful solo demonstration.

In addition to evaluating this case from the perspective of the applicant's freedom of expression, the Court examined how the use of these technologies affected his right to private life. Here the Court stressed that when implementing facial recognition technology, it is essential that States have detailed rules governing the scope and application of this technology, as well as strong safeguards against the risk of abuse and arbitrariness.

This is particularly necessary as regards live facial recognition technology, which had been used in this case to determine the applicant's current location in order to arrest him.

[22] European Parliament, "Combating gender-based violence: cyber violence", 20 October 2023, https://www.europarl.europa.eu/legislative-train/theme-promoting-our-european-way-of-life/file-combating-gender-based-cyber-violence#:~:text=The%20proposed%20directive%20would%20criminalise,incitement%20to%20hatred%20and%20violence.
[23] *Glukhin v. Russia*, no. 11519/20, 4 July 2023.

As we move forward in the digital age, it is important that institutions across Europe adopt a rights-sensitive approach, ensuring that the protection of Convention rights and freedoms is built into these new systems.

CONCLUSION

I hope that the cases I have mentioned today illustrate the Court's willingness to promote and protect the values of the Convention as a living instrument that seeks to effectively combat gender inequality, gender-based violence and bias.

While supranational organisations such as the EU are in the process of adopting a uniform regulatory framework on AI, I agree with the GEC's recommendation that regulatory action by the Council of Europe could foster a distinct human-rights-based approach. The work of the CEPEJ may be of interest to you in this regard.

It is for this reason, as well as others, that the work of the GEC is so important. It advances the cause of gender equality and non-discrimination in a practical and tangible way by ensuring that the lived experiences of women are fed into concrete policies not just in the Council of Europe but also across the 46 member States.

I and my three colleagues are very much looking forward to today's exchange of views and, beyond today, to our continuing dialogue and concrete follow-up.

Thank you.