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“GENDER VIOLENCE” IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

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Submitted by

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Introduction

“There is only one universal truth, applicable to all countries, cultures and communities: violence against women is never acceptable, never excusable, never tolerable.” These are the words of the United Nations Secretary General Ban Ki-moon on the occasion of the launch of his UNiTE campaign to end violence against women in 2008.

This assertion reveals the growing community-wide willingness to efficiently address and eradicate violence against women. With the advent of human rights as the standard of democratic societies, an increased awareness had arisen about the violence suffered by millions of women worldwide. This progress has encouraged the victims of human rights violations to resist and bring more and more cases before the Courts.

What did this evolution imply for the outcome of the cases and which was the approach adopted by the judicial authorities? Did they try to ensure more protection for the victims and if it is the case, through which methods and concepts? When one thinks about cases involving violence against women, some types of violations immediately come to mind, such as rape or domestic violence. What about more specific or unknown types of violence such as female genital mutilation or forced sterilization?

This dissertation aims at giving a review of the approach adopted by the European Court of Human Rights in its case-law dealing with gender-violence. In order to carry out a logical analysis, we will firstly define the concept of gender-violence and its main characteristics, relying on relevant figures to really clarify the extent of the issue. To complete the picture of the subject, we will also identify typical existing measures and select some solution ways.

The case-law of the European Court of Human Rights has been strongly influenced by two international systems: the Inter-American Human Rights system and the United Nations. The second part of this dissertation will describe those institutions, their instruments and the case-law they developed and that is relevant for its impact on the judgments of the European Court of Human Rights. This second part will provide understanding as to the judicial and normative background that underlies the Court’s approach to cases of gender-violence, which is the object of the third part of this dissertation.

In this last part, we will carry out a systematic analysis of two types of cases brought before the Court: those that directly deal with situations of violence against women and those that indirectly contributed to the development of the approach of the Court. At the end of this process, we will be in possession of the necessary elements and understanding to provide plausible answers to the abovementioned questions.
I. ‘Gender violence’: definition and characteristics

There can be some confusion as to the meaning of “gender-violence”, which we will frequently use in this dissertation. Actually, the term has always been subject to controversy, and because the question of the gender-influence on the international field is quite new, no real consensus has been achieved yet.

“Gender” is a socially construed term influenced by culture, the roles women and men are expected to play in the society, and the value placed by society on those roles. Therefore, this term is not supposed to concern women specifically, rather relating to “socially and culturally constructed roles, identities, statuses, and responsibilities that are attributed to men and women respectively on the basis of unequal power.” ¹

Because of the utilization of the term “gender-violence” by the UN in discourses applying to women, it has become synonyms with violence against women, though it is not technically correct. ‘Gender’ is now used to mean and to refer to sex and/or women² and sex discrimination and gender discrimination are used as synonyms. Gender-based violence is thus interpreted in this dissertation as applying to violence perpetrated solely or disproportionately against women.³

This first part is mostly introductive; it is meant to explain and describe the different sides of the concept of gender-violence. This implies the explanation of the international definitions and of the development of concept of gender-violence in the first chapter and the outlining of the relevant characteristics and some relevant figures in the second chapter. Finally, the third chapter will review some measures specifically designed to address domestic violence and solution ways towards a potential improvement.

² Ibid., 15.
³ Ibid., 19.
I.1. Legal definitions of “gender-violence” and evolution of the concept on the international field

The evolution of the international legal definition of gender-violence goes together with the interest the international community has given to the problem. The evolution started with the emergence of an interest (section 1), then a decisive contribution of the United Nations caused a crucial progress (section 2) that led towards a global awareness of the need to address the problem through binding instruments (section 3).

I.1.1. Emergence of an interest for the issue of gender-violence

On the international legal field, violence against women was not addressed until a very late period. In fact, the first time the international community formally identified violence against women as standing in the way of the United Nations’ objectives to protect and promote the rights of women was in 1985 with “The Forward-looking strategies for the Advancement of Women” adopted by the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace (1975-85). The previous relevant instruments concerning women such as the CEDAW (Convention on the Elimination of all forms of Discrimination against Women) never actually mentioned violence against women.⁴

I.1.2. The United Nations’ decisive contribution

In 1992, the United Nations delivered what is considered as “the missing link in understanding violence against women as a matter of human rights”⁵ in the general recommendation 19⁶ that gave the first holistic international law definition of gender-violence: “a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men. (…); violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.”⁷

This definition is significant because it states that all types of violence against women

⁷ Ibid., general comments 6.
constitute a form of sex-based discrimination, and that discrimination is, in itself, a major cause of violence against women. Furthermore, it stresses the fact that this type of violence “does not just happen to occur to women, but is motivated by ‘factors concerned with gender’, such as the need to assert male power and control, to enforce assigned gender roles in society, and to punish what is perceived as deviant female behaviour.”

The Committee’s assessment is that some forms of violence (such as domestic violence) can never be described in a gender-neutral language. This recommendation, though not binding, became the basis of the Committee’s work on the issue of gender-violence. In 1993, that issue was central to the discussions of the World Conference on Human Rights. The drafting of a declaration on violence against women and the appointment of a Special Rapporteur on the same subject were ardently called for by the Vienna Declaration on Human Rights that arose out of the conference.

In 1993, the first of those wishes came true when the General Assembly of the United Nations adopted a resolution establishing the first universal instrument designed for the sole purpose of combatting violence against women: the Declaration on the Elimination of Violence against Women. This Declaration is not legally binding and was adopted as a step in the future creation of a binding instrument. Nevertheless, Resolutions of the United Nations are more and more regarded as State practice and contribute to the adoption of binding rules of customary international law. The definition the Declaration states can therefore be considered of great significance:

“ARTICLE 1
For the purposes of this Declaration, the term ‘violence against women’ means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty whether occurring in public or private life.

ARTICLE 2
Violence against Women shall be understood as to encompass, but not be limited to, the following:

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(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.”

The Declaration can be regarded as a step forward since it is meant to take into account not only public violence perpetrated by the State but also private violence. Because of its broadness and the fact that it is non-exhaustive, it has been recognized for “being very different from the decontextualized, feigned neutrality of traditional human rights instruments.”

Despite its positive sides, the abovementioned definition has a number of limitations. Firstly, it defines violence against women by reference to gender-related violence, but does not provide an explanation of ‘gender’. Secondly, the definition seems to create a hierarchy of harms starting with family violence, followed by violence within the general community, and finally violence perpetrated or condoned by the State. The intent was maybe to reverse the general presumption of international law that it applies exclusively to State-sponsored violence. However, the result is the reaffirming of stereotypes about women by over-emphasising the woman as mother and her unavoidable attachment to the home. Finally, the Declaration does not recognise violence against women as a violation of human rights directly and leaves victims of gender-violence marginalized in the discourse of universality, needing special measures for their protection rather than general human rights.

The definition of gender-violence got even broader with the appointment by the UN Commission on Human Rights of Rachida Coomaraswamy as Special Rapporteur on Violence against Women, including its Causes and Consequences, during the Fourth World Conference on Women held at Beijing in 1994. Her work resulted in the inclusion of

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“sexual slavery, forced pregnancy, forced sterilization, forced abortion, coercive/forced use of contraceptives, female infanticide, and parental sex selection” in the existing definition of gender-violence. The reports and statements of the Rapporteur are considered as ‘soft’ law, but they are still characterized by a great influence internationally.

I.1.3. The first binding instrument and the global awareness of the need to intervene

The issue of a lack of a legally binding instrument concerning violence against women was resolved at the national level in 1994 by the Latin American States members of the Organization of American States. They adopted the now well-known Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (also known as the Convention of Belém do Pará). Some of its provisions go further than the UN Declaration of 1993, including the protection for women against violence by men with whom the women may have an interpersonal relationship without cohabiting with them by including such men in the definition of a family or domestic unit.

This evolution through the 1990s clearly shows the gain of awareness that gender-violence, besides constituting a direct violation of women’s human rights, must also be defined as contributing to their inability to enjoy the full range of civil, political, economic, social and cultural rights.

More recently, the European Parliament proposed a new comprehensive policy approach against gender-based violence in its resolution of 5 April 2011 on priorities and outline of a new EU policy framework to fight violence against women. This resolution further details what is considered as violence against women by giving a list of types of violence against women constituting human rights violations: “sexual abuse, rape, domestic violence, sexual assault and harassment, prostitution, trafficking of women and girls, violation of women's sexual and reproductive rights, violence against women at work, violence against women in

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18 Antigua and Barbuda, Argentina, Bahamas, The Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba (gradually being re-admitted), Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras (suspended in 2009 for coup d’état), Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, United States of America, Uruguay, Venezuela.
conflict situations, violence against women in prison or care institutions, and several harmful traditional practices.”

Later in 2011, the Council of Europe adopted the legally binding Convention on preventing and combating violence against women and domestic violence. The definition of violence against women it used was the same as the one given by the United Nations Declaration on the Elimination of Violence against Women, encompassing not only criminal justice responses, but also areas such as awareness-raising and the provision of social support measures to victims. Nevertheless, this instrument did not result in any drastic change in the definition of violence against women but rather focused on the issue of domestic violence and defined the applicable standards.

As we have seen in this chapter, the whole development of the meaning of gender-based violence results in a quite broad definition that seems difficult to rely on since there is no official agreement between the different organizations establishing the relevant standards. Furthermore, this definition does not fully reflect the reality of violence against women and needs to be completed by the study of the characteristics and relevant figures that relate to violence against women, which will be the subject of the second chapter.

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22 Convention on preventing and combating violence against women and domestic violence of the Council of Europe of 5 November 2011, Istanbul, Council of Europe Treaties Series, No. 27.
I.2. Characteristics and relevant figures

Through relevant figures (section 1), one can realize the extent of the different types of violence against women. Those result from causes often deeply rooted into the societies’ background, being structural causes or causes relating to the abuser’s life experience (section 2). Another characteristic relating to gender-violence is the obstacle that represents the widespread victims’ reluctance to collaborate due to different factors (section 3). The direct consequence of violence against women is the generation of important socio-economic costs (section 4).

I.2.1. Some relevant figures

Firstly, it seems important to point out that seriously considering any kind of data on violence against women can be hazardous since most of the data available are believed to be unreliable. The magnitude of the problem is also often under-estimated since crimes such as domestic violence are under-recorded and widely unreported.\(^{24}\) The available data are often too specific to provide a complete picture of the women’s issue. However, some sources have shown enlightening figures.

Regardless the problems concerning data-collecting, the statistics are alarming. An interesting estimate is the DALY: the calculation of disability-adjusted life-years lost, which include years lost due not only to premature mortality but also to disability or illness resulting from gender-violence. The first study about this estimate determined that women lose more than 9 million DALYs each year because of gender-violence. This is even more striking when compared to other estimates since it represents more than the life-years lost by women from all types of cancer and more than twice that lost by women in motor accidents.\(^{25}\)

Violence against women is generalized, with estimates varying from 20 to 50 per cent from country to country.\(^{26}\) A study showed that 50 to 90 % of women in some countries found it acceptable for a man to beat his wife under certain circumstances, \textit{e.g.} if she does not complete housework on time or is suspected of being unfaithful.\(^{27}\) More precisely, one out of four women can be expected to experience domestic violence in her life.\(^{28}\)

\(^{24}\) S. KAPOOR, R. COOMARASWAMY \textit{et al.}, “Domestic violence against women and girls”, \textit{Innocenti Digest} 2000, No. 6, 4.
\(^{25}\) Ibid., 32.
\(^{26}\) Ibid., 1.
In fact, no society can claim to be free from violence against women, even the most developed ones, as clearly showed by the following table concerning the situation in Europe.\textsuperscript{29}

Table 1: European reporting rates and lifetime prevalence findings on rape/sexual violence

<table>
<thead>
<tr>
<th>Country</th>
<th>Reporting rate per 100000</th>
<th>Source of information</th>
<th>Lifetime prevalence rate</th>
<th>Sample and method</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>8.41</td>
<td>UNODC (2007)</td>
<td>43.9% of women ‘sexual violence’</td>
<td>1,438, female and male Telephone survey</td>
</tr>
<tr>
<td>Belgium</td>
<td>23.57</td>
<td>UNODC (2002)</td>
<td>4.9% of women raped on at least one occasion since age 16</td>
<td>6,944 women aged 16-59 National representative sample, self-completion Module</td>
</tr>
<tr>
<td>England &amp; Wales</td>
<td>27.04</td>
<td>UNODC (2007)</td>
<td>6.8% ‘forced intercourse’</td>
<td>2683 women National representative sample</td>
</tr>
<tr>
<td>France</td>
<td>13.94</td>
<td>UNICRI (2002)</td>
<td>6% raped, 13% ‘sexual violence’ since age 16</td>
<td>10,265 women National representative sample, face to face interviews</td>
</tr>
<tr>
<td>Germany</td>
<td>9.82</td>
<td>UNODC (2007)</td>
<td>3.5% ‘sexual violence’ by partners (timescale unclear)</td>
<td>1,200 women aged 18-60,</td>
</tr>
<tr>
<td>Greece</td>
<td>2.40</td>
<td>UNODC (2007)</td>
<td>6.4% raped, 20.4% ‘sexually assaulted’ as adults</td>
<td>3118 women and men Random sample, telephone interviews</td>
</tr>
<tr>
<td>Hungary</td>
<td>5.89</td>
<td>UNODC (2002)</td>
<td>23% previous sexual violence</td>
<td>130 women in prison</td>
</tr>
<tr>
<td>Ireland</td>
<td>10.09</td>
<td>UNODC (2007)</td>
<td>34% ‘sexual violence’</td>
<td>6,926 women Random sample, self-complete questionnaire</td>
</tr>
</tbody>
</table>

\textsuperscript{29} J. LOVETT and L. KELLY, Different systems, similar outcomes? Tracking attrition in reported rape cases across Europe, London, Child and Women Abuse Studies Unit London Metropolitan University, 2009, 15.
I.2.2. Causes

Violence against women is not caused by a single factor. The different causes are inter-related. Institutionalized social and cultural factors that have kept women vulnerable to gender-violence are complex and interconnected, and always manifest the historically unequal power relations between men and women.\(^{30}\) The appropriate framework for determining and analysing the combination of factors that increase the likelihood of gender-based violence should thus be based on a model that associates considerations at the individual, relationship, community and society levels.\(^{31}\) In order to be effective, we distinguish the structural causes from the causes relating to the abuser/assaulter’s experiences.\(^{32}\)

I.2.2.1. Structural causes

Some causes of violence against women can be defined as structural because they refer to attitudes and power imbalances that are very deeply entrenched into the cultural background of all societies. This stresses the fact that violence against women is not random, accidental or a private matter.\(^{33}\) Structural factors are thus numerous and diverse: “socio-economic forces, the family institution where power relations are enforced, fear of and control over female sexuality, belief in the inherent superiority of males, legislation and cultural sanctions that have traditionally denied women and children an independent legal and social status etc.”\(^{34}\)

Moreover, even though most societies proscribe violence against women, the reality is that violations against women’s human rights are often sanctioned for the sake of cultural practices and norms, or through misinterpretation of religious tenets.\(^{35}\) The most obvious example is the killing of women suspected of “defiling honour of the family by indulging in forbidden sex, or marrying and divorcing without the consent of the family.”\(^{36}\) In the same vein, some religious leaders have claimed that overpowering women in developed Western

\(^{30}\) S. KAPOOR, R. COOMARASWAMY et al., “Domestic violence against women and girls”, *Innocenti Digest* 2000, No. 6, 7.


\(^{32}\) Ibid., 28.


\(^{34}\) S. KAPOOR, R. COOMARASWAMY et al., “Domestic violence against women and girls”, *Innocenti Digest* 2000, No. 6, 7.

\(^{35}\) Ibid., 2.

\(^{36}\) Ibid., 8.
countries has led to decay in traditional family values, undermining the harmonious traditional social fabric of their society.  

Even further away from a violence-against-women-free model are some societies within which cultural norms that support violence as an accepted way to resolve conflicts or to punish transgressions are common. In those types of societies, it is also standard to find norms that support male dominance over women and that require women’s obedience and sexual availability associated with policies and laws that discriminate against women in social, economic and political spheres.

I.2.2.2. Causes relating to the abuser/assaulter’s experience

The cause of violence against women can also be found in the abuser’s or assaulter’s (etc.) own experience. What they have lived during childhood, for instance witnessing or experiencing domestic violence, physical and sexual abuse and an absent of rejecting father often has a great impact on their future behaviour. Besides childhood trauma, excessive consumption of alcohol and other drugs are relevant factors, as well as the association with gang members, delinquent or patriarchal peers that often involves a lack of economic opportunities for men and a male control of household decision making and wealth. At the level of the relationship, other factors are a controlling behaviour by the husband, multiple partners of wives and differences in the spousal age and education.

I.2.3. Victims-related aspects

The victim’s reluctance to collaborate or participate in an arrest or prosecution in most of the cases relating to gender-violence (and even more in cases of domestic violence) may be considered as logical considering the specific social and emotional context.

The lack of knowledge about the available procedures and how use them is the primary reason for which victims might not be willing to collaborate.

For those who are aware of the existence of procedures, the reasons for the lack of collaboration include inter alia: “a fear of retaliation if they are seen to cooperate in legal

39 Ibid., 28.
40 S. KAPOOR, R. COOMARASWAMY et al., “Domestic violence against women and girls”, Innocenti Digest 2000, No. 6, 8.
proceedings, a desire that the relationship with the abuser continues; concerns about the welfare of children, difficulties in obtaining legal aid for civil proceedings; a failure from the police and others in supporting victims and a sense that none of the remedies on offer by the law is helpful.\[43\] The lack of a positive gain to a victim following a prosecution, the prejudice that redress may be long in coming and other socio-economic reasons can also be seen as a reason for the refusal to participate in legal proceedings. When the victim refuses to collaborate, there is often a tough choice for the public actors and justice representatives to protect the victim’s autonomy or letting her make her choice (for instance to withdraw the complaint even when the circumstances seem to indicate that it is a bad choice). This is most certainly not a straightforward matter, as we will see particularly in domestic violence cases.\[44\]

Certain groups of women are also particularly likely to be victims of violence and particularly those who have a low level of education\[45\], women with more than one union, and women who are isolated from their family, the community and the local organizations. On the contrary, women who participate in social networks (those can be family, neighbours, community organizations, women’s self-help groups or affiliation with political parties) and are engaged in income generation activities or have access and control over economic resources\[46\] tend to be less victims of violence.\[47\] The education factor is highly significant and its effect is quite large: women with some secondary education are only as 40 to 70\% as likely to suffer violence as their less educated peers.\[48\]

The direct consequence of this combination of factors is that the international procedures for the dof individual complaints in matter of violence against women appear to have borne relatively little fruit in terms of women rights. As a matter of fact, relatively few complaints of gender-specific violations have been brought under the procedures.

**I.2.4. Socio-economic costs of violence**

Calculating the costs of violence against women can be useful in order to estimate the effectiveness of the existing measures. The main problem relating to studies about socio-economic costs of violence is that different parameters can be used, different questions

\[44\] Ibid., 102.
\[46\] Ibid., 28.
\[47\] S. KAPOOR, R. COOMARASWAMY et al., “Domestic violence against women and girls”, *Innocenti Digest* 2000, No. 6, 8.
asked and definitions used. More precisely, when determining the different categories, the selection tends to be arbitrary and there is always a possibility to find alternative ones.\(^\text{49}\)

Moreover, a major knowledge gap exists on the cost-effectiveness of the interventions.

That being said, those costs are impressive. They do not really differ between industrialized and developing countries and they affect the same sectors. The different studies carried out\(^\text{50}\) divide the costs of violence against women in different categories but they never differ drastically; a really precise one by the Inter-American Bank has divided those costs in four categories: direct costs (expenditures on psychological counselling and medical treatment, police services costs, housing and shelters and social services), non-monetary costs (increased mortality and morbidity through homicide and suicide, increased dependence on drugs and alcohol and other depressive disorders), economic multiplier effects (decreased female labour participation, reduced productivity and lower earnings) and social multiplier effects (inter-generational impact of violence on children, erosion of the social capital, reduced quality of life, and reduced participation in democratic processes\(^\text{51}\)).\(^\text{52}\)

As stated above, the utmost caution must be taken when analysing the direct socio-economic costs especially in developing countries where the lack of services or critical underfunding will result in low direct costs despite impressive rates of violence.\(^\text{53}\)

The characteristics and the relevant figures relating to violence against women have highlighted an impressive number of problems. Different public actors have tried to find solutions to those; we will make a review of the typical measures and then try to give some useful ideas for further improvement.

\(^{49}\) Ibid., 30.
\(^{52}\) S. KAPOOR, R. COOMARASWAMY *et al.*, “Domestic violence against women and girls”, *Innocenti Digest* 2000, No. 6, 8.
I.3. Review of typical measures and potential solutions

The three main axes defined by the Council of Europe to combat violence against women are prevention, repression and protection. 54 Those three areas actually encompass the principal responses to date to gender-based violence and within them, good practice responses have to be identified. 55 Nevertheless, when studying interventions and what can be considered as good practices, one must be careful since across all countries, the number of relevant interventions studies that can be considered as methodologically sound is quite small: only 34 among several hundreds according to a study carried out by Chalk and King. 56

The three-abovementioned fields of action and their specificity are necessary to combat violence against women which is a complex problem that takes place in all types of different contexts, making it almost impossible to find a single solution that will be appropriate to every situation.

The first three sections of this chapter each develop a factor that has had an impact on the development of solutions. The fourth section identifies formal and empirical solution ways.

I.3.1. Dichotomy between public and private field

Historically, the State and the law intervened in relation to violence against women only when violence became public nuisance. The dichotomy between public and private level was at the root of many obstacles for the protection of women’s rights; since most personal violence against women occurs in the private sphere, it was excluded from the scope of public international law. 57 This resulted in a general passivity from the authorities. 58

International law has thus been less willing to prescribe State intervention in matters relating to violence against women (such as education and economic support programs) than to prohibit certain abuses. As D. Thomas and M. Beasley point out, “it is one thing for a human rights organization to address the State’s discriminatory application of law; it is quite another to direct a State to adopt a particular social program to change discriminatory attitudes (...) It is more difficult for an international human rights organization to be

56 Ibid., 33.
persuasive positively than negatively.” Nevertheless, the reluctance of international organisations to require States to intervene has been the subject of changes thanks to the doctrine of positive obligations and cannot really be considered as an obstacle anymore.

**I.3.2. Legislation: an insufficient but necessary first step**

The adoption of appropriate legislation by the States and the relevant authorities could have been the answer to violence against women but it seems that too much has been expected from the law, and some even see law as an obstacle to the finding of solutions. Multiple reasons have led to this situation.

Firstly, even though the law’s response is important both in the symbolic message sent out and in the impact legal intervention can have in particular cases, relying solely on a legal response cannot combat the patriarchal power, social forces, cultural assumptions, personal characteristics and learned behaviour that are responsible for violence against women.

Another problem relates to the way law and the related human rights have been used in the area of violence against women. Some authors have expressed their scepticism in putting too much hope in human rights through the idea of “the false promise of human rights.” They weren’t totally wrong, since some of those rights have regularly been used restrictively and not always in the interest of the victims. The most representative of those rights are the right of privacy, the right of autonomy and the property rights. In fact, the right of privacy has been interpreted as restraining public actors to intervene in domestic matters, the right of autonomy as justifying the fact that if a victim wishes to withdraw her complaint the prosecution should not take place and property rights meant that the removal of an abuser from his home could only happen in the most exceptional cases. This understanding of human rights does not fall within the logic of an effective protection of victims and should rather “provide a powerful vehicle to require, not inhibit, legal intervention”.

Moreover, until recently, the issues relating to women have been considered separately from the other legal issues, and that is particularly true in the field of human rights. Women’s

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human rights discourse has become an outsider discourse. The more women’s specific concerns of violence are raised in different institutions, the more women are marginalised. A concrete example of this marginalisation is the fact that the Convention on the Elimination of all forms of Violence against Women was drafted through the Commission on the Status of Women and not through the Human Rights Commission, as was the case with other human rights treaties. The only way to draw attention to the extent and seriousness of the women’s problem implies the inclusion of women’s related issues in the mainstream of the theory and practice of international human rights.

In direct link with this lack of interest for women’s issues is the even bigger problem of the unwillingness of very important States to observe the restraints of human rights law, especially in the context of national security concerns: the majority of those States does not take into account the commitment to the human rights of women when they seal alliances with other States which regularly violate women’s rights (for instance between the US and Saudi Arabia, Kuwait, Pakistan etc.).

That being said, it is undeniable that legislation is needed to improve the situation. Communitywide intervention prescribing norms plays a role in the determination of the overall level of violence. The main reason for this is the internalization of norms proscribing violence by the populations.

Those last years, “efforts to improve law and policies have focused on international Conventions to provide an overarching legal framework to support (or in some cases supersede) national legislation, new specialized legislation on gender-based violence, and reform of national civil and criminal codes.” An encouraging impulse has provoked States to adopt international agreements that specifically deal with violence against women such as the Convention on the Elimination of all forms of Discrimination against Women. This recently has had an impact on the domestic legislations of a lot of States with the enactment

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70 Ibid., 34.
of essential legal reforms that influenced several sectors of the different States, namely with
the adaptation of the civil and legal framework to reduce discrimination against women;
modifications of the criminal code with a strengthening of sanctions related to family,
domestic and sexual violence; the adoption of legislation and public policies regulating
criminal procedures and public and private sector responses to survivors of violence. Those
improvements showed their utility through the increase of reporting levels, the raise of the
number of convictions and progress in the quality of the police and judicial response though
there is no certainty as to whether they actually reduced the prevalence of violence.71

Following A. Morrison, M. Ellsberg and S. Bott in their critical review of interventions
addressing gender-based violence, “changing the law is only the first step in a long process.
Much legislation has poorly been implemented or not at all.” 72 The effective
implementation will thus also have to be the main focus of the Court.

I.3.3. Links with the discrimination aspect

The discrimination aspect, which is of the upmost importance, has two distinct sides: the
fact that gender-violence must always be considered as discrimination and the
understanding that most of the States’ legislation is actually influenced by some kind of
discrimination.

Firstly, legislation poses a problem when it is conceived without the understanding that
gender-based violence necessarily constitutes sex- and gender-based discrimination. The
elimination of discrimination against women is a crucial element in the prevention and
repression of violence against women, (which, as stated above, are part of the main
objectives of the Council of Europe). In fact, violence against women cannot be considered
as independent from social, economic, cultural and political structures, since it actually
shapes them.73 Therefore, the way forward in the fight against gender-based violence
necessarily implies the promotion and practical realization of equality through eliminating
sex and gender-based discrimination, and changing patriarchal structures and attitudes, and
gendered stereotypes. Those structures, attitudes and gendered stereotypes are, as we
explained above, the main factors subordinating women and creating deep-rooted
impediments to the eradication of the violence against them. They also undermine the

71 Ibid., 35.
72 Ibid., 36.
73 M. FREEMAN, C. CHINKIN and B. RUDOLF (eds.), The UN Convention on the Elimination of All Forms
effectiveness of measures addressing violence against women, including reforming legislation.\textsuperscript{74}

Secondly, lots of feminist studies have demonstrated that the law and the implementing measures were always influenced by some kind of discrimination. According to them, despite improvements towards more equality between men and women, the law is still ‘gendered’ since it reflects the existing social and cultural gender relations. Also, they consider that laws that claim to create and spread equality have it wrong. The reason for this is that when the claims relating to rights of women came to be on the agenda, they were all reduced to terms of equality and equal treatment. Because of this, the oppression of women – the actual issue – was not substantially studied. The real problems that are violence against women, domination, oppression and subordination of women were thus concealed by the general terms of “neutrality” and “generality” of rights.\textsuperscript{75} The direct consequence of this matter of fact is that instead of prohibiting oppression of women, the legislators preferred banning unequal treatment.

Feminist studies advocate another consideration of law that would take into account the material differences between men and women and try to find solutions to achieve equality. That means stopping to take formal equality as a starting point and analysing and describe the social-cultural, political and economical situation of women.\textsuperscript{76} Feminists regret that the analysis of women’s lives has been largely ‘rhetorical’ rather than structural.\textsuperscript{77} They plea for the creation of alternatives which would dismantle the gender influence and would \textit{de facto} allow women to live their lives in conformity with human dignity.\textsuperscript{78} In order to achieve this goal, the legal actors have to unmask the structural and systematic causes of women oppression (which we have analysed earlier) and adopt legislation on that basis.\textsuperscript{79} That legislation would support both men and women in the way to achieve human dignity and a fulfilling human identity (instead of a specific “man or woman identity”).\textsuperscript{80} R. Holtmaat suggests the utilisation of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) as the starting point for this alternative legislation.\textsuperscript{81} We will

\textsuperscript{74} Ibid., 460.
\textsuperscript{76} Ibid., 260.
\textsuperscript{79} Ibid., 249.
\textsuperscript{80} Ibid., 259.
\textsuperscript{81} Ibid., 251.
analyse this instrument further in the dissertation.

I.3.4. Formal and empirical solution ways

In the search for a path towards a society free of violence against women, it is possible to identify different series of elements that can help. Some of them are general and in direct link with the issues discussed above (the law, awareness of discrimination etc.). Others are really concrete and can directly be applied by the relevant actors of that field.

I.3.4.1. General process

In order to obtain a change in the long run, the utilization of a step-by-step process composed of five stages of change can be advised: knowledge, approval, intention, practice and advocacy. This process clearly shows that nowadays, even though there is a consensus — approval — concerning the need to eradicate violence, work is still needed on the path towards a behavioural — practice — change.82

I.3.4.2. Key partners

The planning of strategies requires the identification of different key partners such as the family, the local community (composed of traditional elders, religious leaders, community-based groups, neighbourhood-associations, local councils and village level bodies), the civil society (professional groups, women’s and men’s groups, NGO’s, the private sector, the media, academia and trade unions) and the State level (the criminal justice system, the health care system, parliament and provincial legislative bodies and the education sector).83

Within the civil society, the role of mass media has recently been emphasised; it currently as one of the most significant (f)actors.84

I.3.4.3. Education

When it comes to implementing useful measures, preventive actions have to be taken and include the education of populations. The actors of this education have to be aware of the necessity to eliminate the traditional patterns of thinking that allow violence against women to exist in our societies in impunity.85 Several researches demonstrated that the education of

young girls through prevention programs did not result in significant change and that the programs could not focus on victims. The targets of those programs have to be young boys and men. The results of those programs have shown encouraging results in changing male attitudes and behaviour.  

I.3.4.4. Access to justice

Even though legislation and the authorities’ measures can be criticized and have to be used with a lot of caution, the system can only operate through an effective access to justice. This implies three dimensions.

Firstly, women have to be given protection from current and potential aggressors through the improvement of law and policies, the mobilization of communities in defence of women’s rights to a life free of violence, and the increase of the knowledge of women’s rights. This has been developed in the section concerning the legislation with a focus on the need to be aware of the intrinsic unbalance of power between men and women through ages and legislation.

Secondly, stronger institutional responses to gender-based violence have to be given to women.

Finally, higher costs have to be imposed to men engaging in gender-based violence through the establishment or increase of criminal sanctions and the mandatory prosecution in treatment programs in the context of criminal prosecution of assaulters and abusers.

I.3.4.5. Nomination and election of more women

A very controversial idea advocated by many feminist studies is the nomination and election of more women in international bodies and human rights treaty bodies. However, this is a first and insufficient step that must be considered carefully and for which guidance must be provided. A potential parity membership is still far from reach and should be foregone by some sort of gender-balance. Another step could consist of filing the names of qualified female candidates easily available to governments for utilization at national level. At the very least, and following A. Edwards, “treaty body members should (…) be offered on-going briefing (training) sessions and seminars on women’s rights, gender, and feminist

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87 Ibid., 33.
theory, as well as specialist areas such as reproductive rights, violence against women, the rights of displaced and stateless women, and issues of sexuality, disability, and age.”

1.3.4.6. Institutional responses

Up to now, improvements in relation to the institutional responses to gender-based violence include the training of professionals, the reorganization of police or courts and the possibility for victims of gender-based violence to obtain a more comprehensive and supportive response. Nevertheless, in order to be truly effective, the improvements should go way further. The justice sector has to be reformed and strengthened as a whole and partnerships have to be built between the justice system and other sectors. This necessarily implies addressing structural problems related to justice, namely the procedural delays, corruption and lack of transparency. Such an approach has shown its success in the United States through the number of arrests, percentage of cases resulting in prosecution and the percentage of men ordered to attend batterer treatment programs as part of sentencing.

In developing countries, this model seems more difficult to implement even though its potential is undeniable. Appropriate and specific responses are needed even though developing countries have created for instance specialized women’s police stations. There is still need for a whole reform of the system focusing on communication and reciprocal help from the different public services.

1.3.4.7. Batterer treatment programs

The existence of batterer treatment programs is quite new and the analysis on their effectiveness is limited by the lack of reviews until now. The attendance to those programs can be voluntary or – more rarely – ordered by the courts. In any case, those programs are beneficial, firstly because they represent an alternative sanction between no action and jail time and secondly because they do not get in the way of the perpetrator’s ability to earn an income.

1.3.4.8. Improvement of social services for survivors of gender-violence

The social services usually provide telephone hotlines, emergency shelters, legal assistance, counselling services, psychological care, support groups, income generation programs and

90 Ibid., 37.
91 Ibid., 38.
child welfare services. Together with the health service responses, they represent the most concrete tools victims of gender-violence can use in their everyday life. In the short-term, those services only provide women emergency help and a slightly better quality of life. However, in the long run, the women helped by social services actually begin experiencing less violence and fewer difficulties in accessing community resources.

A drastic improvement of social services for survivors of gender-violence is needed especially in developing countries where the support services are often inadequate.92

The quite clear conclusion of this chapter is the lack of totally adequate current solutions regarding violence against women. Moreover, it appears that any satisfying objective cannot be reached on the short term despite the significant progress that has been made in the sixty years following the founding of the United Nations.93

The first part of this dissertation can be striking when we realize that despite a growing interest for the problem of gender-violence from important and influent actors, the problems described in the second chapter still have not been resolved or totally well addressed. Nevertheless, there is some consensus – even if it is not truly official – concerning the general scope of the problem, the areas where actions must be undertaken and the fact that there is a serious need for improvement. Now that we understand and are aware of the different sides of the problem, we will review the way the relevant international institutions have reacted to it. The following chapter does not focus yet on the European Court of Human Rights [hereinafter “ECtHR”] but on the international organizations that have had an impact on the European system.

92 Ibid., 38.
II. Relevant international organizations and international instruments

The analysis of the ECtHR’s case-law in the field of gender-violence cannot be complete without taking into account the other international organizations and their corresponding instruments and judgments. As a matter of fact, those institutions showed an interest for violence against women before the ECtHR and have been prolific in the creation of instruments designed for this purpose. Besides the adoption of guidelines, they rendered some landmark judgments that helped defining the leading objectives in this field. They also contributed to the development and articulation of the due diligence standard, which is crucial in the fight against gender-violence, as it will appear through the analysis of the judgments. Most importantly for this dissertation, those institutions have had a noteworthy influence on the case-law of the ECtHR. We will describe the role and development of those organizations, the relevant judgments and the links with the ECtHR.
II.1. The Inter-American system for the promotion and protection of Human Rights

The organizations analysed in this chapter are two of the independent organs of the Organization of American States [hereinafter “OAS”] founded in 1948 and composed of members drawn from the independent states of the Americas. Its mission is to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence. In 1948, the OAS Charter was adopted. The OAS gave birth to the two institutions we will focus on in this chapter: the Inter-American Commission on Human Rights [hereinafter “IACHR” or “The Commission”] and the Inter-American Court of Human Rights [hereinafter “IACtHR” or “the Court”]. The IACHR was established as an autonomous entity of the OAS in 1959 and the IACtHR was instituted in 1969 by the American Convention of Human Rights. In 1978, that Convention entered into force and the Inter-American system for the promotion and protection of human rights de facto became a twofold system.

The first part of the system is composed of the mechanisms articulated by the Charter of the OAS, which authorize the IACHR to supervise human rights in the territories of OAS member States. The second part consists in the mechanisms created by the Convention, which “authorizes the Commission and the Inter-American Court of Human Rights to handle complaints of human rights violations allegedly committed by any State party to the Convention, and further provides for the Court to exercise advisory jurisdiction.”

Those two organizations have participated to the global movement towards the development of human rights and within it they established principles and rendered decisions for the improvement of women’s rights and the global empowerment and emancipation of women. Furthermore, their influence has been felt in the case-law of the ECtHR.

II.1.1. The Inter-American Commission on Human Rights (IACHR)

The importance of the IACHR in the field of women’s rights is a result of its general evolution. In 1960, the Council of the OAS adopted the Statute of the IACHR, which gave an idea of its functions and power within the Inter-American Human Rights system. The Statute describes the functions and powers of the Commission. Those consist in developing
awareness of human rights among the population, making recommendations to the Governments of the member States in favour of human rights, preparing studies or reports, urging the Governments of the member States to supply it with information on the measures adopted and serving the OAS as an advisory body.98

A few decades later, it would appear that when then drafted the Statute, the members of the OAS underestimated the role the IACHR would play.99 Following the humanitarian work carried out by the Commission in the civil war in Dominican Republic in 1965 that went further than studying and reporting, the Commission was explicitly authorized by the OAS to examine specific cases of human rights violations through the American Convention on Human Rights. The Convention defined the functions devoted to the Commission. Those include responding to inquiries made by the member States on matters related to human rights and to provide those States with advisory services, to take action on petitions and other communications and to submit an annual report to the General Assembly of the Organization of American States.100

The explicit authorization for the IACHR to examine petitions and communications was a major step in the development of the system. Its success was immediate and since its adoption the IACHR has received thousands of petitions and has processed more than 12,000 individual cases.101 The amount of cases is revealing of the appeal this organ has for the individual victims of human rights violations; it is thus particularly relevant for the cases of violence against women who need those kind of systems with the possibility to file complaints individually.

The Commission interpreted its power as making it able of “examining communications concerning individual violations of certain rights specified in the resolution without diminishing its power to ‘take cognizance’ of communications concerning the rest of the human rights protected by the American Declaration.”102 This was unfortunately not the best way for the Commission to efficiently use the additional power the Convention had granted it to examine specific cases of human rights violations.103 As a matter of fact, the Commission somehow considered the examination of the individual cases as an excuse for

101 Ibid.
103 Ibid., 443.
the condemnation of more severe breaches and did not grant them the attention they deserved.

Even though the criticisms concerning the general attitude of the IACHR when addressing individual complaints are worrying, the Commission still has a crucial role because of its influence; its opinions are respected and its intervention are efficient. Even if its recommendations are nonbinding, they are influential in building international consensus on the issue of domestic violence as a human rights issue. Moreover, the Commission managed to deliver significant cases in the field of violence against women. Those have articulated different concepts, inter alia due diligence and its scope; sexual violence as torture and the response of the administration of justice and access to judicial mechanisms of protection.¹⁰⁴

We chose to analyse two cases that we thought represented the case-law of the Commission. The landmark case Maria Da Penha Fernandes v. Brazil¹⁰⁵ develops many interesting findings and the case Jessica Lenahan (Gonzales) v. The United States¹⁰⁶ shows a recent application of the developed concepts and the growing influence of the Commission on the States.

II.1.1.1. Case: Maria Da Penha Maia Fernandes v. Brazil

The main characteristics of the Maria Da Penha case is the application for the first time by the IACHR of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women – mostly cited as the Convention of Belém do Pará¹⁰⁷ and the complete and well-documented analysis it went through to reach interesting findings on different aspects. The length of the analysis of this judgement might surprise the reader but the findings of the Court about violence against women are worth mentioning.

a) Legal basis

The Convention of Belém do Pará was in 1994. It is a binding treaty inspired by the United Nations Convention on the Elimination of all Forms of Discrimination against Women¹⁰⁸ (which we will analyse in the second chapter of this part); as a matter of fact, they share the

¹⁰⁵ IACHR, Maria Da Penha Maia Fernandes v. Brazil, 16 April 2001.
¹⁰⁶ IACHR, Jessica Lenahan (Gonzales) v United States, 21 July 2011.
same definition of violence against women. The rest of the provisions also remind of the United Nations Convention on the Elimination of all Forms of Discrimination against Women, namely concrete measures that States Parties agree to carry out with all appropriate means and without delay, programmes and to implement progressively, and the need to take into account the issue of particularly vulnerable groups of women and specific reporting and redress mechanisms. As we will see when we analyse the decisions of the United Nations instruments, the similarities go further than the legal basis of the cases; they are also present in the reasoning and the recommendations of the different judicial authorities.

b) Facts and reasoning

The case-law of the IACHR includes several cases of rape or disappearances of women. Nevertheless, those violations always occur in the broader context of violence against groups of people. The *Maria Da Penha* case is different in the sense that the issue at stake is specifically domestic violence against women.

Mrs Maria Da Penha Maia Fernandes alleged that the State had condoned acts of domestic violence committed by her husband at time, Mr Viveiros. The abuses lasted during the whole marital cohabitation of the spouses and reached their climax with an attempted murder in 1993. As a result of regular aggressions since 1983, Mrs Da Penha suffered irreversible paraplegia and other infirmities and diseases. Even if the local public prosecutor had filed attempted murder charges against Viveiros, it took eight years to the Court to find a guilty verdict. After appeals and a second trial, Mrs Da Penha filed a complaint with the IACHR in 1998, more than 15 years after the attack complained of. The petition stated that the State had continuously failed to take the effective measures required to prosecute and punish the aggressor despite repeated complaints. In fact, Viveiros remained free the entire time. The petition alleged violations of *inter alia* the American Convention on Human Rights of the OAS and the Convention of *Belém do Pará*.

The Commission started its reasoning by a review of worrying facts it found in various reports and documents. First, it reminded the high number of domestic attacks of women in Brazil and that compared to men, women are the victims of domestic violence in disproportionate numbers. Furthermore, in a special report on Brazil in 1997 carried by the Commission itself, it was found that there is clear discrimination against women who were

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attacked, resulting from the inefficiency of the judicial system and inadequate application of national and international rules. That was exemplified *inter alia* by complaints not being fully investigated or prosecuted or that in some areas the conduct of the victim continues to be a focal point within the judicial process to prosecute a sexual crime.\textsuperscript{112} The Commission regularly used statistical data in its analysis to stress the severity of the situation.

Even though the Commission noted that positive measures had been taken in the legislative, judicial, and administrative spheres, it deplored the limited implementation of those initiatives and concluded that in this case, which stands as a symbol, they had not had any effect whatsoever.\textsuperscript{113}

The Commission then delivered the crucial part of its reasoning, declaring that “tolerance by the State organs is not limited to this case; rather, it is a pattern. The condoning of this situation by the entire system only serves to perpetuate the psychological, social, and historical roots and factors that sustain and encourage violence against women.”\textsuperscript{114} From the existence of a general pattern of negligence and lack of effective action by the State, the Commission deduced an obligation to prevent the violations by the State since “that general and discriminatory judicial ineffectiveness also creates a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts.”\textsuperscript{115}

Finally, the Court prescribed a series of recommendations to the State. Those are very precise and denote the will of the Commission to really show the way towards efficiently implemented measures.\textsuperscript{116}

c) Relevance of the case

The conclusion of the Commission, besides the violation of the Convention of *Belém do Pará*, is that a systematic failure from a State to meet a due diligence standard in ensuring the right of women to be free from violence is equivalent to gender-based discrimination.\textsuperscript{117} This concept of “due diligence” will be analysed further in the dissertation, the main idea being that the State can be held responsible for a situation concerning a private matter. The decision of the IACHR includes several positive points in the progress against gender-

\textsuperscript{112} IACHR, *Maria Da Penha Maia Fernandes v. Brazil*, 16 April 2001, § 47.
\textsuperscript{113} Ibid., § 50.
\textsuperscript{114} Ibid., § 55.
\textsuperscript{115} Ibid., § 56.
\textsuperscript{116} Ibid., § 61.
violence. Firstly, the analysis is really precise and the reasoning of the Commission is clear and logical; the opinion the Court adopts in relation to gender-violence is based on a logical series of well-chosen and explained arguments. Secondly, in its reasoning, the Commission explicitly refers to relevant reports and documents emanating from itself and other organizations, which is a constructive collaboration. Thirdly, the Commission goes beyond a mere description of the facts by also linking them with the underpinning structural causes, namely the gender-based discrimination and the widespread impunity condoned by the State in the context of violence against women.

The following case is rather recent and involves the responsibility of the United States; we will analyse its main findings.

II.1.1.2. Case: Jessica Lenahan (Gonzales) v. The United States

The Lenahan case is noticeable because of the scarcity of the case-law of the Commission concerning violence against women but also because it marks the first time the Commission has been asked to consider the nature and extent of the United State's positive obligations to protect individuals from private acts of violence. It represents an undeniable step forward in the fight against gender-violence.

a) Facts and reasoning

Mrs Lenahan is an American national whose husband Simon Gonzales showed an abusive behaviour towards her and their three daughters. In 1999, Mrs Lenahan filed for divorce and started living separately from him. Mr Gonzales continued displaying erratic and unpredictable behaviour. Mrs Lenahan requested and was granted a restraining order for her and her daughters. The same year, Mr Gonzales violated that restraining order and abducted the three children. Over the next ten hours, Mrs Lenahan repeatedly contacted the police to report the children missing, and to request the enforcement of her restraining order. Her calls were firstly unheeded, and when the police finally came to her home they did not act for different reasons including an alleged lack of jurisdiction. Simon Gonzales eventually arrived at the police station later that night and opened fire at police officers. The police returned fire and he was killed. The children were later found fatally shot in the back of their father’s truck. No subsequent investigation into the girls' deaths took place. Mrs Lenahan brought a case against the police before the domestic Courts, which all rejected her claims and appeals. She went before the IACHR claiming that the State had not duly investigated the circumstances of the deaths of the children, and had not provided her with a sufficient remedy for the failures of the police.
The reasoning first examined the claim of the violation of the right to equality. The Commission considered that the State had failed to respond adequately to Mrs Lenahan’s telephone calls, to conduct an investigation into the children’s deaths, and to offer Mrs Lenahan an appropriate remedy as regards the lack of enforcement of the restraining order, which constituted acts of discrimination. The Commission emphasized the importance of the non-discrimination principle and its application to the field of violence against women, declaring: “gender-based violence is one of the most extreme and pervasive forms of discrimination, severely impairing and nullifying the enforcement of women’s rights.”

It confirmed the existence of a duty of protection of the States, which resulted in responsibility for failures to protect women from domestic violence perpetrated by private actors in certain circumstances. The Commission reached the same conclusion in relation to the failure of the State to take reasonable measures to protect the right to life of Ms Lenahan’s daughters, since “the protection of the right to life is a critical component of a State’s due diligence obligation to protect women from acts of violence.”

The Commission concluded its decision by making a number of wide-ranging recommendations to the State. Those included inter alia duties of investigation, reparation, adoption and reforms of legislation and more importantly to “continue adopting public policies and institutional programs aimed at restructuring the stereotypes of domestic violence victims, and to promote the eradication of discriminatory socio-cultural patterns that impede women and children’s full protection from domestic violence.”

b) Relevance of the case

This case was the occasion for the Commission to articulate its standards in relation to the positive obligations of States. It is really important to mention that this decision was rendered ten years after the Maria Da Penha case. Those ten years have witnessed the international development of well-defined concepts and practices that have become usual. In this case, the Commission abundantly referred to the case-law of the ECtHR. The Commission followed the approach adopted by that Court when it stated that the right to life entailed positive obligations for the State and in the considerations relating to the discrimination aspect. We will not develop the analysis of the impact of the European Court in this case any further since, as we mentioned, the concepts that have been used by the Commission to reach its conclusions took decades to be established. Since this evolution is

118 Ibid., § 110.
119 Ibid., § 128.
120 Ibid., § 201.
easily observable in the case-law of the IACtHR, we will describe it in the following section.

That being said, we can conclude that the present case was also useful because of the political pressure it placed on the United States. The Court put them in an uncomfortable position by confronting them with their defective response to the widespread practice that is domestic violence. The case influenced the public opinion and made clear that an alarming number of women experience severe harm and loss of life due to domestic violence. Moreover, it attested the revolutionary change in the field of violence against women taking place in the home, which used to not be considered as part of the traditional interpretation of human rights law. This has evolved in such a way that United States, the most powerful nation in the world, has been held in violation of human rights standards for its failure to protect a victim of domestic violence. This is already a remarkable step in itself.

As we mentioned, the analysis of the Court falls within international trends in relation to the protection of women from different kinds of violence, as we will see in the judgments of the IACtHR (analysed in the next section), the United Nations institutions and the case-law of the ECtHR. Those institutions influence each other and each of them brings welcome contributions to the fight against gender-violence.

II.1.2. The Inter-American Court of Human Rights (IACtHR)

Similarly to the IACHR, the IACtHR has an important role in the field of women’s rights. Its evolution, its functions and the criticism relating to those will be outlined in the general part, followed by its judgments on violence against women.

II.1.2.1. General characteristics of the IACtHR

The IACtHR is the second organ of the Inter-American Human Rights system and was established by the American Convention on Human Rights, which entered into force in 1978. The norms governing the exercise of the Court's functions are set out in the American Convention on Human Rights, the Statute of the Court, and the Rules of Procedure.

122 Ibid., 195.
125 Statute of the Inter-American Court of Human Rights as Approved by Resolution Nº 447 taken by the General Assembly of the OAS on 19 October 1979, 19 ILM 635 (1980).
Similarly to the Commission, the IACtHR has two main functions. The first one is an adjudicatory or contentious jurisdiction, i.e. the competence to decide in disputes involving charges that a State party has violated the human rights guaranteed by the Convention. The judicial competence of the Court has been subject to criticism because the States have to accept the jurisdiction of the Court (in a separate declaration or a special agreement) and only the States parties and the Commission can submit a case to the Court, unlike individuals.\textsuperscript{127} The Commission will systematically examine the potential case and decide if it is meant to go before the Court. Moreover, States are reluctant to bring cases before the Court for a number of political reasons.\textsuperscript{128} The relationship between the Court and the Commission went through a phase of non-cooperation, then a period of requests for advisory opinions and finally, it is only in 1986 that the Commission submitted the first cases to the Court.\textsuperscript{129}

The judicial function of the Court cannot be underestimated since the State parties to the Convention have the obligation to comply with the judgments. Concerning the enforcement of judgments, the Convention provides a system of annual reports through which the Court has the possibility to specify the cases in which a State has not complied with its judgments and to make recommendations.\textsuperscript{130}

The second function of the Court is advisory; it is competent to interpret the Convention and other human rights instruments at the request of OAS member States and various OAS organs.\textsuperscript{131} The Commission waited three years after the creation of this option before requesting an opinion from the Court.\textsuperscript{132}

This procedure shows an undeniable advantage that the perception that governments have about the political costs of compliance with judgements is an important factor for the execution of judgments. Their compliance will depend on the impact of the opinion of the Court as a force capable of adding to or detracting from the legitimacy of specific governmental conduct. Since the advisory opinions of the Court do not stigmatize the States as violators of human rights as a judgment would, there is a diminution of the domestic

\textsuperscript{129} Ibid., 453.
political cost of compliance with the judgments and the States comply more easily.  

II.1.2.2. Main cases

The case-law of the IACtHR in relation to violence against women very often relates to the concept of due diligence that was first developed in the landmark case Velásquez-Rodríguez v. Honduras. We will also analyse the other cases of the Court. Through this subsection and the analysis of the cases, a clear evolution appears towards stronger standards of protection for women.

a) The Velásquez case: the first application of the due diligence concept and its usefulness for women’s rights

As we just mentioned, the Velásquez case is at the root of the application and articulation of the concept of due diligence. It is part of a global impetus in the 1980s, during which both the IACtHR and the ECtHR developed their doctrines of positive obligations. Therefore, we will mainly focus on the part of the reasoning that relates to the articulation of the concept of due diligence.

i. Facts and decision

Angel Manfredo Velasquez Rodriguez, a student, was allegedly detained and tortured by the armed forces of Honduras. The government denied that fact. The Velasquez case was just one instance of more than a hundred disappearances in Honduras. The Commission received the complaint in 1981. Two years later, after several unsuccessful attempts at obtaining information on the case from the State, the Commission decided to apply the article 42 of the American Convention on Human Rights and presume the facts of the complaint to be true. The Commission issued a first report concluding that Honduras had seriously violated the articles of the Convention protecting the rights to life and personal liberty. It recommended several measures to the government, namely to investigate, punish and carry out the recommendations. In 1983, the government submitted a petition for reconsideration and also claimed that it had not ceased making efforts to establish the whereabouts of Mr. Velasquez. The Commission agreed to reconsider the case. It received

additional information from the complaining party and sent it to the government, which did not provide any additional information. In 1986, the Commission submitted the case to the Court and asked the Court to determine whether Honduras had violated the Convention. Circumstantial evidence and presumptions showed a pattern of similar disappearances tied to government suppression of dissidents.137 The Court consequently found that Velasquez’s disappearance was “carried out by agents who acted under cover of public authority” and held the State responsible for the alleged violations of the Convention.138

ii. Reasoning on the due diligence and relevance of the case

The Court held that it was irrelevant whether the human rights violations at issue were perpetrated by State agents or private individuals.139 The State would still have been held responsible for having abstained from acting to prevent, investigate, and sanction the commission of these actions.140 As a matter of fact, the Court made clear that “an illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.”141

The Court then explained what it meant by “due diligence”, stating: “this duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. It is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party. (...) subjecting a person to official, repressive bodies that practice torture and assassination with impunity is itself a breach of the duty to prevent violations of the rights to life and physical integrity of the person, even if that particular person is not tortured or assassinated, or if those facts cannot be proven in a concrete case.”142

One might think that this judgment did not bring much clarification because of the lack of any clear-cut definition of the concept of due diligence. Nevertheless, the Court clearly

137 IACtHR, Velásquez-Rodríguez v. Honduras, 1988, § 130.
138 Ibid., § 182.
139 Ibid., § 183.
141 IACtHR, Velásquez-Rodríguez v. Honduras, 1988, § 172.
142 Ibid., § 175.
condemned the State for a lack of appropriate intervention and stated that "this obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights." Consequently, it is not sufficient for the States to provide a legal system criminalizing and providing sanctions; the government has to perform its functions effectively to ensure that the diverse violations are being investigated and punished.

This case is of the upmost importance in the field of gender-violence. The Court stated that there is a violation when the State allows private persons to act freely and with impunity in violation of the rights of the Convention. From this statement, we can deduce that if the State allows men to beat their wives or girlfriends with impunity, the State has failed to meet its due diligence obligation and can be held responsible. The due diligence obligation is not limited to the adoption of a legal framework, the States also have to make sure they undertake the appropriate actions and exercise their functions in order to effectively ensure that incidents of violence against women are actually investigated and punished.

The standard of due diligence – together with other concepts – will be further articulated in the other judgments of the IACtHR. The second part of this subsection gives a review of those cases.

b) Other relevant cases and further articulations in the field of violence against women

The IACtHR is used to dealing with cases involving a lot of violence in countries deeply affected by conflicts and facing complex civil situations. In the cases concerning violence against women, the Court frequently uses the concepts of due diligence and positive obligations of the States. Even though the facts of the cases vary, the obligations defined by the Courts are often quite similar. There has been evolution in the case-law of the Court, building on the decision in the Velásquez case. The first case that addressed gender-violence

143 Ibid., § 166.
144 S. KAPOOR, R. COOMARASWAMY et al., “Domestic violence against women and girls”, Innocenti Digest 2000, No. 6, 10.
146 S. KAPOOR, R. COOMARASWAMY et al., “Domestic violence against women and girls”, Innocenti Digest 2000, No. 6, 10.
was *Miguel Castro-Castro Prison v. Peru*.

The Court then issued a landmark judgment specifically dealing with violence against women in *González et al. v. Mexico*.

The line of reasoning of the Court was confirmed with the case “*Las Dos Erres*” *Massacre v. Guatemala*.

Finally, the Court rendered two very similar decisions with an emphasis on rape as torture in *Fernández Ortega et al. v. Mexico* and *Rosendo Cantú et al. v. Mexico*.

We will make a global analysis of these five cases mainly focusing on the part of the judgments dealing with positive obligations and striking facts in relation to violence against women.


The facts occurred in 1992 during the execution of the “Operative Transfer 1” from the Miguel Castro-Castro Prison to the maximum-security prison for women in Chorillos of female inmates accused of being members of subversive organizations or convicted for crimes of terrorism or treason.

The transfer was actually a cover-up for a premeditated assault designed to attack the life and integrity of the prisoners during and after which the State caused the death, injured and submitted inmates to intense physical and psychological suffering.

The events were “carried out directly by State agents whose actions were protected by their authority.”

The Court first pointed out that the acts of violence specifically affected women and affected them in a different manner and in greater proportion than men. The Court recognized and condemned the widespread practice of breaching the human rights of women, which in many cases is used as “a symbolic means to humiliate the other party” and “as a means of punishment and repression (…) to send a message or give a lesson.”

The Court gave a review of the different acts that occurred and concluded that they could be qualified as gender-violence under the General Recommendation 19 of the United Nations.

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155 Ibid., § 197.13.
156 Ibid., § 221.
157 Ibid., § 223.
158 Ibid., § 224.
Those were *inter alia* vaginal inspection carried on against the will of the women, separating the mothers from their children, obligation to remain naked for long periods in presence of men, etc.

The failure of the State to act with due diligence was emphasized in relation to the investigation of the facts, the punishment and imposition of penalties, the preservation of the evidence and clarification of the massacre and the general prevention of violence. Finally, the Court gave an extensive list of measures to be taken by the State.

The interesting findings in relation to women are the emphasis by the Court on the fact that the acts of violence were specifically directed at them and designed to hurt them because they were women and the confirmation of the concept of positive obligations since the State has to act with due diligence in the exercise of its different functions in order to combat violence against women. This is the first application of the principles developed in the *Velásquez* case to the field of violence against women.

The Court will then go further in the case *González et al. v. Mexico* in 2009.

ii. Case 2: Focus on violence against women, *González et al. v. Mexico*

This case is the first case of the IACtHR with violence against women as main topic. The applicants were the mothers of three victims who complained of the failure of Mexico to fulfil its obligations to provide for protection and effective investigation of the abduction, mistreatment and subsequent murder of their daughters whose bodies were found in a cotton field in Ciudad Juárez. There are three aspects in the Court’s reasoning that make this case a landmark one: the link between gender-violence and discrimination, the opinion the Court about positive obligations and the scope of the recommendations to the State.

From the beginning of the case, the Court clearly wished to go further than the individual facts of the case and to tackle the underpinning problems of this situation. It did so by describing the global situation in Ciudad Juárez. “The Court considered topics such as the phenomenon of the increased rate of women’s murders in Ciudad Juárez, gender-based violence, the common characteristics of the victims, the alleged femicide, the irregularities during the investigations of the crimes against women, the general discriminatory attitude of the authorities and the lack of clarification of the crimes.” Similarly to the *Castro-Castro Prison* case, the Court highlighted the fact that the acts of violence were specifically

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159 Ibid., § 343 and §369.
directed at women.

The Court then declared that “the crimes perpetrated in Ciudad Juárez from 1993 onwards have been influenced by a culture of discrimination against women, as accepted by Mexico itself. This eventually has generated a climate of impunity for the perpetrators.” The reasons that led the Court to this conclusion are the deficient and ineffective responses of the authorities. The Court condemned the general situation of violence and violence in a discriminatory context that is directed against a historically marginalized group. This is the hearth of the decision and goes beyond the simple argument that violence affects women disproportionately or that laws against such violence are not imposed in the same manner as on men. The Court states that gender-based violence is discrimination *per se* and requires the adoption of positive measures regardless how violence against men is handled.

This leads directly to the second aspect of this case: the positive obligations of a State in case of violence against women committed by a private actor. The Court built up and further articulated the due diligence principle developed in the *Velásquez* case. In order to further articulate this principle, the Court declared that the duty of the State in this case consisted in guaranteeing the full enjoyment of the rights, which implies the obligations to prevent human rights violations, investigate them, punish those responsible and compensate the victims.

The Court then specified what those duties encompassed and highlighted the fact that the obligation to guarantee is an obligation of means, not of result. Therefore, a State can only be held responsible in case of non-compliance with three conditions: the awareness of a situation of real and imminent danger; for a specific individual or group of individuals; and the reasonable possibility of preventing or avoiding that danger. The Court examined the measures taken by the State and concluded that they were not sufficient, therefore condoning a widespread impunity.

What is also noteworthy in the context of positive obligation is that the Court – on the basis of the case-law of the ECtHR, the landmark case on gender-violence *Opuz* having been rendered the same year – insisted on the necessity to define a wider scope of standards and to be stricter when dealing with violence against women.

The conclusion and relevance of this positive obligations aspect lies in the standard the

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162 Ibid., 385.
163 Ibid., 401.
164 Ibid., 393.
165 Ibid., §9.
Court sets for future cases. The door became opened for further progress.  

The final crucial aspect of the case is the reasoning of the Court concerning the reparations prescribed. For the first time, the Court gave a gender discrimination dimension to the reparations.  

It explicitly stated that the measures were “adopted from a gender perspective, bearing in mind the different impact that violence has on men and on women.”

The Court gave a very interesting analysis. It affirmed that the aim of reparations is to restore the victim to his or her previous situation. However, in this case, the original situation implies a context of discrimination and violence. As a consequence, the Court couldn’t simply prescribe restoring the victim to the previous situation and stated: “the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification.”

For instance, the Court recommended the continuation and extension of training programs with a gender perspective for public officials. Such an analysis is welcome for its attempt to tackle the root of the problem.

This landmark judgment has thus articulated three interesting findings that can be seen as three steps forward. This case can be considered as the most progressive of the IACtHR in the field of women’s rights and even though the following cases are also seen as landmark cases, they will not bring a similar breakthrough. Consequently, their analysis will be briefer.

The same month as González et al. v. Mexico, the Court delivered the case “Las Dos Erres” Massacre v. Guatemala. Though this case does not mainly deal with gender-violence, the Court still devotes an important part of its analysis to the violence suffered by the female victims.

iii. Case 3: Confirmation of the Court’s line of reasoning, “Las Dos Erres” Massacre v. Guatemala

The application alleged a lack of due diligence from the State to investigate, prosecute and punish those responsible for the massacre of 251 inhabitants of the community of Las Dos Erres by a specialized group within the armed forces of Guatemala in 1982. The victims had previously suffered diverse types of mistreatment including severe battering and rapes.

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169 Ibid., 406.
170 IACtHR, González et al. v. Mexico, 16 November 2009, § 451.
171 Ibid., § 450.
172 Ibid., § 538.
More precisely, the application alleged a failure by the State because of an unjustified delay to act and to provide complete and true information about the massacre by the judicial authorities, the unfinished exhumation and identification of the victims of the massacre and the lack of an exhaustive investigation, prosecution, and punishment of those responsible since these procedures were still pending on the day of the judgement.\textsuperscript{173}

As is often the case in the judgments of the IACtHR, the Court recalled the particular context of the case, which is an armed conflict.\textsuperscript{174} Similarly to the situation in Castro-Castro Prison v. Peru, this type of situation has a great influence on the occurrence of violence against women. The Court highlighted this fact further in the judgment, stating that women were particularly chosen as victims of sexual violence during armed conflicts and that “the rape of women was a State practice, executed in the context of massacres, directed to destroying the dignity of women at a cultural, social, family, and individual level.”\textsuperscript{175}

The Court also emphasized the severe consequences of condoning impunity, which is conducive to the chronic repetition of the related human rights violations.\textsuperscript{176} The Court had already used this argument in the case González et al. v. Mexico where it had established that this impunity had led to a culture of discrimination towards women.

The reparations and measures prescribed by the Court are very similar to the González case, \textit{i.e.} taking into account the differentiated impact on women and the need to adopt structural measures.

As it appears from its analysis, the “Las Dos Erres” Massacre v. Guatemala case is noticeable for the confirmation of the findings of the Court in the previous cases.

In August 2010, the Court rendered two very similar judgments in the cases Fernández Ortega et al. v. Mexico and Rosendo Cantú et al. v. Mexico.

iv. Cases 4 and 5: Emphasis on rape as a form of torture, Fernández Ortega et al. v. Mexico and Rosendo Cantú et al. v. Mexico

The facts of the cases are almost exactly the same: both victims are indigenous women, members of the Me’phaa indigenous community, originally from the Caxitepec community of the State of Guerrero. Both of them are married and suffered acts of violence and rape by soldiers during an informal interrogation, one of them when she was alone and the other in presence of her children. During the days following those facts, the victims and their

\textsuperscript{173} Ibid., § 2.
\textsuperscript{174} Ibid., § 70.
\textsuperscript{175} Ibid., § 390.
\textsuperscript{176} Ibid., § 201.
husbands undertook different actions to file complaints and obtain reparation and were confronted to reluctance and indifference from the authorities. The petitions alleged international responsibility for the State for “the rape and torture of the victims, and for the lack of due diligence in the investigation and punishment of the perpetrators of these facts, the consequence caused by the facts in the case to next of kin of the victims, the failure to make adequate reparation to the victims and their next of kin, the use of the military justice system to investigate and prosecute human rights violations, and the difficulties encountered by indigenous people, particularly indigenous women, to obtain access to justice and health care.”

Similarly to the previous cases, the Court recalled the context of an armed conflict in the State of Guerrero at the time of the facts. It also confirmed the existence of the resulting violations of human rights and stressed the fact that the victims belonged to the marginalized and vulnerable group of an indigenous community.

The crucial point in those cases is the juridical classification of rape as torture by the Court in the circumstances of the case. To reach this conclusion, the Court used the Convention of Belém do Pará to remind the definition of gender-violence and the case-law of the Commission. In fact, the Commission had established that rape could rise to the level of torture if certain conditions were fulfilled in Raquel Martí de Mejía v. Perú, issued in 1996 and had confirmed that by holding that acts of rape committed by soldiers on three sisters in the case Ana, Beatriz, and Cecilia González Pérez v. Mexico also constituted torture. The Court referred to Raquel Martí de Mejía v. Perú for the conditions that had to be fulfilled to establish torture, declaring the mistreatment has to be “i) intentional; ii) causes severe physical or mental suffering, and iii) is committed with any objective or purpose.” The Court proceeded to the examination of those conditions and considered them fulfilled (the purpose being to “punish the victim because she failed to provide the required information.”) Consequently, the Court concluded that the rape in the present case entailed a violation of the personal integrity of the victims and constituted an act of torture.

The Court devoted quite an important part of its analysis to the articulation of the concept of

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179 IACtHR, Ana, Beatriz, and Cecilia González Pérez v. Mexico, 2 April 2001, § 47-49.
180 IACtHR, Fernández Ortega et al. v. Mexico, 30 August 2010 and IACtHR, Rosendo Cantú et al. v. Mexico, 31 August 2010, respectively § 120 and § 109.
181 Ibid., respectively § 127 and 117.
182 Ibid., respectively § 128 and 118.
due diligence and the corresponding failure of the State. In a concern to not be repetitive, and since the findings in this case are similar to the usual line of reasoning of the Court in its case-law, we will not bring the development of the Court forward.

The range of measures prescribed by the State is once again impressive, and includes both individual measures of reparation and structural measures amongst which “the obligation to investigate the facts and to identify, prosecute, and eventually punish those responsible, the adaptation of domestic law to the international standards of justice, a public act of acknowledgement of responsibility, the publication of the judgment, multidisciplinary health services and participatory programs for women victims of sexual abuse, and training and educational programs for officials.”

Despite the appreciable scope of the recommendations, they do not actually represent any breakthrough in the field of gender-violence but rather confirm the already established line of reasoning of the Court. The core of this judgment lies in the qualification of rape as torture, as a confirmation of the case-law of the Commission.

II.1.2.3. Conclusion on the Court’s work and functioning

It is undeniable: the Court has brought positive change. Its binding decisions provide authoritative interpretations of the rights of the Convention and have an enormous political importance because they make it more difficult for governments to persistently disregard human rights.

Moreover, the different judgments of the Court articulate very important concepts in the field of gender-violence: the end of the relevance of the public-private dichotomy, the application of the doctrine of positive obligations and of due diligence to cases of violence against women, the statement that gender-violence constitutes discrimination, the judicial qualification of rape as torture, and the (now usual) prescription of a large number of recommendations that take into account a gender-dimension.

Despite those positive findings, the execution of the judgments of the Court by the States is very problematic due to the lack of an enforcement mechanism and a general lack of resources.

After having examined the case-law of the IACHR and the IACtHR, we now understand its relevance in relation to gender-violence and women’s rights. The authority of the Inter-

183 Ibid., part XI.
185 Ibid., 461.
American Human Rights system is recognized on an international level. As a matter of fact, the E CtHR has been influenced by this system and used those instruments on several occasions. This will be the subject of our next section.

**II.1.3. Influence of the Inter-American Human Rights system on the case-law of the European Court of Human Rights**

The influence of the Inter-American Human Rights system on the case-law of the E CtHR is examined before the actual analysis of the judgments that takes place in the third part of this dissertation. This is a deliberate choice, because we consider that only a global analysis of the impact can truly reflect its scope. In the third part of this dissertation, we will highlight the influence of the system in each case.

It is necessary to make clear that the influence between the Courts is mutual. The Inter-American Human Rights system also took into account decisions of the E CtHR to develop the concepts used in its cases. Some authors even advocated that the E CtHR had a ‘leading role’ confirmed by the fact that half of the judgments of the IACHR refer to it.\(^{186}\) However, this dissertation focuses on the judgments of the E CtHR and we will emphasise the influence on that system from the Inter-American Human Rights system rather than the opposite.

As we will see in the analysis of the cases of the E CtHR, the mutual influence between the Courts is firstly noticeable through the methods they use to reach a decision; both the institutions of the Inter-American Human Rights system and the E CtHR do not hesitate to refer to other relevant international instruments and studies from independent organizations.

More specifically, the influence of the Inter-American Human Rights system on the development and articulation of the doctrine of positive obligations and the due diligence concept is explicitly stated by the E CtHR in its decisions. This started with the Velásquez case, which established the basis of the theory of positive obligations in the Inter-American Human Rights system. That case influenced the E CtHR since the decision in Osman v. The United Kingdom\(^{187}\) developed the same principle for the E CtHR ten years later.\(^{188}\) Subsequently, in the Opuz case, the E CtHR referred to the IACtHR’s decision in Velásquez-
Rodríguez for the attribution of responsibility to a State for private acts because of a lack of due diligence. The Court stated: “the Inter-American Court’s case-law reflects this principle by repeatedly holding States internationally responsible on account of their lack of due diligence to prevent human rights violations, to investigate and sanction perpetrators or to provide appropriate reparations to their families.”

The decision of the Commission in the Maria da Penha case was also used as an example of this theory. The ECtHR also referred to the instruments of the Inter-American Human Rights system, such as the American Convention on Human Rights and the Convention of Belém do Pará.

As we just outlined, the Opuz case is noteworthy for its reliance on other instruments. As a matter of fact, in this case, the Court referred to the decision Maria da Penha to explain that violence against women was a form of discrimination per se since the violence suffered by the victim was viewed as “part of a general pattern of negligence and lack of effective action by the State”, that condones and encourages violence against women. The words the ECtHR used in its conclusion of the Opuz case are quite similar to those of the Commission.

Two other cases also explicitly referenced to the Inter-American Human Rights system. Firstly, Bevacqua and S. v. Bulgaria where the Court cited the IACtHR’s case Velásquez and the IACHR’s case Maria da Penha as parts of the basis of the due diligence and positive obligations concepts. Secondly, in Aydin v. Turkey, the reference did not stem from the Court itself but from a third party intervener: the Court mentioned the submissions of Amnesty International which referred to the case-law of the IACHR establishing that rape constitutes torture.

Finally, there is also an influence that is not explicit but can be noticed through the structural changes and the parallel evolution of the same concepts in those systems (e.g.

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189 ECtHR, Opuz v. Turkey, 9 June 2009, § 190.
191 ECtHR, Opuz v. Turkey, 9 June 2009, § 84.
192 P. VANDEN HEDEE, “Europees Hof neemt huiselijk geweld serieus”, (comment on ECtHR, Opuz v. Turkey, App. No. 33401/02), TjvMr 2009, No. 3, 16.
196 Ibid., § 53.
focus on the women’s issue on the same period).

This chapter on the Inter-American Human Rights system reveals trends of mutual recognition, cross-fertilization and the establishment of common principles of international adjudication in the field of violence against women. We observe the emergence of a global network or community of courts.\textsuperscript{197} The following chapter on the United Nations will confirm this trend.

II.2. The United Nations

The United Nations has also brought its contribution to the field of gender-violence. This chapter will analyse the evolution of the instruments and actors of the United Nations relating to gender-violence and women’s rights (section 1), the gender-policy of the United Nations (section 2), the recent developments (section 3) and the contribution of the United Nations Convention on the Elimination of all Forms of Discrimination against Women and the United Nations Committee on the Elimination of Discrimination against Women that includes important judgments (section 4).

II.2.1. The principal steps and the World Conferences on Women

The United Nations has been working on bringing changes to the women’s issue through the adoption or drafting of international instruments and various documents (Conventions, Resolutions, Declarations, reports etc.), the creation and management of committees, the appointment of key-actors to work on the subject and the many conferences it organized through the years.198

The interest for violence against women within the United Nations started in parallel with the peak of the feminist movement in the 1970s. 1975 was declared “International Women’s Year” by the General Assembly and the first World Conference on Women took place that same year in Mexico City. After the Conference, the participants declared the years 1976 to 1985 “the United Nations decade for Women”.

The following decisive year was 1979 with the adoption of the Convention on the Elimination of All Forms of Discrimination against Women [hereinafter “CEDAW”] often described as the International Bill of Rights for Women. We will analyse this instrument in the fourth section of this chapter.

The Second World Conference took place in Copenhagen in 1980 and concluded that however progress had been made, special measures needed to be taken (e.g. employment opportunities, adequate health care services and education).

At the end of the United Nations decade for Women in 1985, the Third World Conference on women took place in Nairobi. A parallel forum was held by the non-governmental organisations and highlighted their role in the gender-violence issue. The disappointing conclusion of this Conference was the non-achievement of the objectives of Mexico City and of the Decade for Women. The participants thus adopted the “Nairobi Forward-looking Strategies to the Year 2000”.

The Fourth World Conference on Women was held in Beijing in 1995. Its “Platform for Action” asserted women’s rights as human rights and committed to specific actions to ensure respect for those rights. The United Nations Division for women issued a review stressing the positive outcome of the Conference and stated that: "the fundamental transformation that took place in Beijing was the recognition of the need to shift the focus from women to the concept of gender, recognizing that the entire structure of society, and all relations between men and women within it, had to be re-evaluated. Only by such a fundamental restructuring of society and its institutions could women be fully empowered to take their rightful place as equal partners with men in all aspects of life. This change represented a strong reaffirmation that women's rights were human rights and that gender equality was an issue of universal concern, benefiting all."\textsuperscript{199} Despite this enthusiasm, the Secretary-General of the United Nations declared that much more remained to be done.

The impact of the United Nations Decade for Women and the decade that followed is undeniable. They drastically reshaped the international women’s movement and its relationship to the United Nations system and to the international community. The contributions are manifold and operate at different levels: the emergence of new players on the global stage who have of new skills and competencies, who have forged alliances and coalitions and who can claim to be part of the decision-makers. These United Nations Conferences proved very beneficial and brought a lot of progress in the field of women’s empowerment and in the elimination of gender-violence. As a matter of fact, they provided visibility to the international women’s movement and, as stated above, attracted the attention of non-governmental organisations and movements as the human rights and environmental groups.\textsuperscript{200}

\section*{II.2.2. The “gender mainstreaming” policy}

The United Nations also plays an essential role in the fight against gender-violence in an indirect way, \textit{i.e.} through the promotion of the empowerment of women and the efforts to be made to take them into account in international law. This appears clearly through the United Nations’ “gender-mainstreaming” policy.


II.2.2.1. Adoption and definition

Before the actual adoption of the “gender-mainstreaming” policy, the United Nations human rights treaty bodies have each endorsed an agenda that sought to provide useful guidelines for an effective implementation. Therefore, in 1995, they adopted a set of six recommendations to integrate gender perspectives into their working methods. 201

In 1997, the United Nations officially adopted a “gender-mainstreaming” policy defined as “the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women’s as well as men’s concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is achieve gender equality.” 202

This new approach was representative of the shift desired by many feminists from formal to substantive equality or from a model based on equality of opportunity to one of equality of result, which we outlined in the first chapter of this dissertation. 203

II.2.2.2. Criticism

After the burst of enthusiasm of the feminist movement, some authors manifested concerns relating to the implementation of this policy. They feared (and still do) that we only witnessed a rhetorical change that formally obliged international civil servants, humanitarian field workers and other decision-makers to take women into consideration when establishing the international norms and policies that would not change anything de facto.

Some authors also argue that this policy actually “forced the feminist paradox, namely that the more that women’s specific concerns of violence are raised in human rights institutions, the more women become reduced to essences and are marginalised.” 204 A further consequence of this is that other – equally serious – harms perpetrated against women that do not fit into the categories established by the United Nations within the “gender-mainstreaming” policy will not give rise to very developed inquiry or concern. 205
Finally, some reckon that the equality goal of the strategy in international discourse will be lost in the policy formulation and practical implementation. The reason for this is the language that deals both with men and women, rather than more directly on sexual equality or on women.

Too much might have been expected from the “gender-mainstreaming” policy of the United Nations. Although this policy is now well established, has permitted some significant theoretical breakthroughs (such as the issue of women-specific General Comments) and is generally positive, addressing the gender inequality issue while providing some sort of amelioration in terms of women’s rights remains hard. In other words, dealing with the fact that men too are concerned with the questions of gender-prescribed roles, responsibilities and behaviour seems incompatible with a policy adopted to promote women’s rights. Regretfully, it thus appears that the strategy did not improve the situation of women and did not really contribute to any concrete type of mainstreaming.206

II.2.3. Recent developments

Since the 2000s, the United Nations reform proposals recommended uniting the bodies relating to women’s rights together.207 This has been done in 2010 with the creation of a single United Nations body assigned with the task of leading, coordinating, promoting and more generally accelerating progress in achieving gender equality and women’s empowerment. This new United Nations Entity for Gender Equality and the Empowerment of Women – commonly named UN Women – benefited from the appointment of Michelle Bachelet as executive director and merged four of the world body’s agencies and offices: the UN Development Fund for Women, the Division for the Advancement of Women, the Office of the Special Adviser on Gender Issues, and the United Nations International Research and Training Institute for the Advancement of Women. UN Women became operational on the 1st January 2011.208 On 11 March 2011, Mrs Lakshmi Puri got appointed as Executive Director. In 2012, the European Union and UN Women signed a Memorandum of Understanding; they will now work together on the policy dialogue and advocacy as well as joint programming.

206 Ibid., 26.
207 Ibid., 49.

The CEDAW has to be analysed in a separate section because it is the most relevant instrument provided by the United Nations in relation to the subject of this dissertation. It has had a considerable impact on the case-law of the ECtHR. More generally, in connexion with the previous chapter, it has proved essential in the development of the concepts of positive obligations imposed and due diligence. Besides, the United Nations Committee on the Elimination of Discrimination against Women [hereinafter “The Committee”] – the corresponding body treaty – has also brought a considerable contribution to this area. This section will firstly describe the evolution and functions of the CEDAW and the Committee, secondly their contribution to the positive obligations theory, thirdly the weight of the Optional protocol to the CEDAW and finally the main judgments delivered by the Committee.

II.2.4.1. General evolution and functions

The CEDAW was adopted in 1979 by the General Assembly of the United Nations. It came into force on 3 September 1981 and is described as an international bill of rights for women.\(^{209}\) Over fifty countries have ratified it. The CEDAW is a worldwide-recognized tool in the field of violence against women because it condemns the issue of discrimination against them. A particularity of the CEDAW, which makes it singularly relevant and attractive to some feminists, is the fact that it uses the feminine pronoun.\(^{210}\)

The Committee plays an important part in the elimination of discrimination and violence against women since it watches over the progress for women made in the participating countries to the CEDAW and is the treaty body qualified for hearing complaints on the basis of the Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women.\(^{211}\) Moreover, in 1992, the Committee adopted the Recommendation n°19 on violence against women\(^{212}\) that enacted the concept of due diligence.


\(^{212}\) General recommendations n°19: Violence Against Women made by the Committee on the Elimination of
II.2.4.2. Impact on the evolution of the concept of positive obligations imposed upon States

The international organizations are the actors responsible for the articulation of the basic ideas of positive obligations and due diligence; therefore, the CEDAW and the Committee have also played a part in this process.

The CEDAW defined the concept of positive obligations in its article 3 that requires governments to take positive measures to end legal, social and economic gender inequality.\(^{213}\)

As for the Committee, its recommendations and observations let transpire its conception of positive obligations. The commentary on the CEDAW carried out by C. Chinkin, M. Freeman and B. Rudolf\(^ {214}\) gives an interesting review of the obligations the Committee wishes to impose on States. Those are divided into three categories, the first one being the obligation to respect, the second to protect, and the third to promote and fulfil.

a) The obligation to respect

The obligation to respect includes the duty to ensure that criminal, civil, administrative, and labour laws are not discriminatory and that they provide an effective legal framework for combatting violence against women. The Committee also insists on the need to sensitize the State officials and public authorities.\(^ {215}\)

b) The obligation to protect

The obligation to protect – or the obligation to ensure respect – seeks to combat the widespread immunity legitimizing violence and the lack of accountability of the perpetrators. To achieve this, the Committee advises to use criminal law alongside other high quality and effective protective measures. The Committee urges the States to ensure the access to justice, to create and manage specialized bodies and to increase the number of women in judicial and law-enforcement roles. Finally, this second obligation includes the provision of adequate and effective remedies and reparation for victims of violence.\(^ {216}\)

c) The obligation to promote and fulfil

The last obligation, namely to promote and fulfil, “requires States parties to be forward-
looking and to adopt short-, medium- and long-term policies to combat violence against women in all its forms and manifestations, aiming at eventually fulfilling the goal of its elimination. Strategies must vary according to the nature of violence, its incidence, and the social and economic context.”

This obligation might be the most difficult to achieve since it requires collaboration between the different levels of power and a great deal of public awareness.

The recommendations of the Committee are considerable and might seem unrealistic. But they clearly correspond to those established by the Inter-American Human Rights system. They attest an impetus amongst international organizations to try to obtain a consensus through their instruments. The concept is currently evolving in the way of more responsibility, even though we still have not reached the stage where it will be commonly accepted that international organizations can adopt binding and effectively implemented measures on States that fail to counter the social, economic an attitudinal biases that underpin and perpetuate violence against women.

II.2.4.3. Impact and contribution of the Optional Protocol to the CEDAW

We just analysed the meaning of the notion of positive obligations for the CEDAW. This theory is decisive but has to be effectively implemented. As a matter of fact, before the adoption of the Optional Protocol to the CEDAW, the CEDAW underwent 20 years of an almost purposeless existence. The instrument was flawed because of the lack of procedural mechanisms against official acts and failures to act which resulted in the survival of discriminating laws in multiple countries.

The adoption of the Optional Protocol to the CEDAW in 1999 changed the situation. It became possible for the Committee to receive complaints, communications from individuals and groups and undertake inquiries on alleged violations by State Parties of rights established in the Convention. Another positive element for the amelioration of the effectiveness of the CEDAW is the fact that the Optional Protocol does not allow reservations.

Another asset of this Optional Protocol relates to the participation of non-governmental

217 Ibid., 472.
218 Ibidem.
organisations. Those obtain a legitimate role in the complaint process through the
communication procedure of the article 2, which allows either individuals or groups of
individuals to submit individual complaints to the Committee.\textsuperscript{222} This provision combined
with the prohibition of anonymous complaints\textsuperscript{223} manages to balance legitimacy with
practicality and realism. Indeed, it expands the possibility of bringing claims while at the
same time ensuring that those claims will emanate from real people who have suffered real
human rights violations.\textsuperscript{224}

The Optional Protocol is a valuable instrument in the fight against gender-discrimination
and more broadly against gender-violence. Nevertheless, in the absence of any kind of
enforcement mechanism – except for the public pressure it can put on States and the
potential action of the non-governmental organizations – the effective enforcement of this
Optional Protocol will mainly depend on the goodwill of the Member States.\textsuperscript{225}

\textbf{II.2.4.4. Main judgments}

The Committee has delivered a number of judgments in the field of gender-violence. Since
the subject of this dissertation is not the analysis of the case-law of this institution, we
decided to analyse only the decisions that explicitly influenced the case-law of the ECtHR.
By explicitly, we mean the judgments the ECtHR referred to in its own case-law on
violence against women. The rest of the judgments can be useful for understanding the
development of the concepts within the Committee, \textit{i.e} V.K. v. Bulgaria and N.S.F. v. The
United Kingdom on domestic violence, Vertido v. The Philippines and S.V.P. v. Bulgaria on
rape and A.S. v. Hungary on forced sterilization.

The three cases that have explicitly influenced the ECtHR are A.T. v. Hungary\textsuperscript{226}, Fatma
Yildirim v. Austria\textsuperscript{227} and Sahide Goekce v. Austria\textsuperscript{228}. They all deal with domestic violence
and two of them resulted in death. These demonstrate the usefulness of the system of
individual communications created by the Optional Protocol to the CEDAW to articulate
State parties’ obligations in respect to violence against women\textsuperscript{229} and the flexible
admissibility approach adopted by the Committee that really shows its will to eradicate

\textsuperscript{222} Ibid., article 2.
\textsuperscript{223} Ibid., article 3.
\textsuperscript{224} C. CHINKIN, P. ANDREWS et al., “Women’s Rights in the 21\textsuperscript{st} Century”, \textit{I. Bull.} 2004, Vol. 14, No. 4,
173.
\textsuperscript{225} Ibidem.
\textsuperscript{227} CEDAW, Fatma Yildirim v. Austria, 6 August 2007.
\textsuperscript{228} CEDAW, Sahide Goekce v. Austria, 6 April 2007.
\textsuperscript{229} M. FREEMAN, C. CHINKIN and B. RUDOLF (eds.), \textit{The UN Convention on the Elimination of All Forms of
violence against women.

a) Case A.T. v. Hungary

Mrs A.T. alleged that she had been subjected to severe domestic violence and treatment by her husband and the father of her two children (L.F.) from 1998 onwards, even after he left the family home. Although L.F. had allegedly threatened to kill the applicant and rape the children, the applicant did not go to a shelter because those available were not equipped to take in one of her children, fully disabled. In proceedings regarding L.F.’s access to the family home, following the author’s decision to change the locks to prevent him from gaining access, the District Court found in his favour, and the decision was upheld in appeal. She filed for division of the jointly owned property and instituted criminal proceedings against L.F. but these were still pending by the date of her initial submission to the Commission in 2003. L. F. had not been detained at any time and no action had been taken by the Hungarian authorities to protect his wife from him.230

i. Admissibility

The Court firstly analysed the admissibility of the case. It mentioned the fourth article of the Optional Protocol to the CEDAW that conditions the admissibility of a case to the exhaustion of domestic remedies.231 Despite the fact that there were still pending proceedings, the Committee declared that the case was admissible because “the pending domestic civil proceedings were unlikely to bring the complainant effective relief and that a delay of over three years in criminal proceedings was an ‘unreasonably prolonged delay’.”232 This decision also resulted from a context-specific approach and took into account the particular circumstances that Ms A.T had been at risk of irreparable harm and received threats to her life, that she had no possibility of obtaining temporary protection while criminal proceedings were in progress and that the defendant had at no time been detained.233

ii. Reasoning

In its reasoning, the Committee identified the definition of gender-violence of the general recommendation No. 19 on violence against women (which we analysed in the first part of the dissertation) as the provision that would be the basis of its analysis.

The Committee then pointed out the problematic legal framework concerning domestic violence in Hungary that did not “ensure the internationally expected, coordinated, comprehensive and effective protection and support for the victims of domestic violence.” Even if the Committee appreciated the State’s efforts at instituting some measures, it believed that these have to de facto benefit the author and address her situation of insecurity. There was also a consensus between the Committee and the State that domestic violence cases do not enjoy high priority in court proceedings and the existence of alternative options that would provide sufficient protection or security from the danger of continued violence for the victims was dubious.

The Committee then shared a decisive opinion: “women’s human rights to life and to physical and mental integrity cannot be superseded by other rights, including the right to property and the right to privacy.” This balance of rights is of the upmost importance because it is consistent with the – quite new – general tendency to privilege victims’ rights to other rights.

Further in the decision, the Committee proceeded to a more general analysis of violence against women and confirmed that “traditional attitudes by which women are subordinate to men contribute to violence against them.”

Knowing that concentrating on the isolated case of Mrs A.T. might conceal the structural dimensions of violence, the Committee emphasized the problems related to the traditional attitudes by which women are regarded as subordinate to men. Those consist namely in violence against women, persistence of entrenched traditional stereotypes regarding the role and responsibilities of women and men in the family and attitudes towards women in the country as a whole. The Committee linked the unavailability of appropriate shelters and civil protection orders with the aforementioned traditional attitudes. It concluded that the rights of Mrs A.T. had been violated. Ms A.T. also alleged that those violations affect many women, and she called for the Committee to recommend changes in the legal system to protect and support victims of domestic violence.

The decision is also crucial in its positive obligations’ dimension. The Committee referred

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234 Ibid., § 9.3.
235 Ibid., § 9.3.
236 Ibid., § 9.4.
to the system of communications in the beginning of the judgment. That system allows the Committee to contact the State to require it to take steps to protect the alleged victim from irreparable harm.\footnote{Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women of the United Nations of 6 October 1999, New York, \textit{United Nations Treaty Series}, Vol. 2131, 83, article 5.} In this case, the Committee had previously sent a note to Hungary requesting them to take measures to “avoid irreparable damage.”\footnote{CEDAW, \textit{A.T. v. Hungary}, 26 January 2005, § 4.2.} In the operative part of the decision, the Committee further recommended that Hungary take “immediate and effective measures to guarantee the physical and mental integrity of A.T. and her family (…) as well as reparation proportionate to the physical and mental harm undergone and to the gravity of the violations of her rights.”\footnote{Ibid., I (a).} There are two thus noticeable aspects on positive obligations: the insistence of the Committee on the fact that the State had already been urged to take measures and did not and the precision of the recommendations.\footnote{T. DECAIGNY, “Positieve mensenrechtenverplichtingen met betrekking tot politie en justitie. Verduidelijking aan de hand van de Europese rechtspraak over intrafamiliaal geweld en seksueel misbruik”, \textit{T. Straf}. 2012, Vol. 1, 12.}

b) Cases Fatma Yildirim v. Austria and Sahide Goekce v. Austria

Those cases can be analysed together because they are really similar. The link with the \textit{A.T.} case is also obvious.

i. Facts

The first case concerns Mrs Yildirim. From July 2003, Fatma Yildirim was subject to repeated death threats from her husband Irfan Yildirim, who also threatened to kill her children. The police issued an expulsion and prohibition to return order against him, reported to the Public Prosecutor that he had made a dangerous criminal threat against Fatma Yildirim and requested that he be detained. The request was rejected. A few days later, Fatma Yildirim gave a formal statement about the threats made to her life to the police, who in turn reported to the Public Prosecutor, again requesting that Irfan Yildirim be detained. This second request was also rejected. In September, Irfan Yildirim fatally stabbed Fatma Yildirim. He was arrested and convicted of killing her. At the time of the application to the Committee he was serving a sentence of life imprisonment.\footnote{CEDAW, \textit{Fatma Yildirim v. Austria}, 6 August 2007.}

The second case concerns Sahide Goekce, an Austrian national of Turkish origin who was a victim of continued domestic violence, and was eventually shot by her husband, Mustafa Goekce, in front of her children. Prior to her death, it was known to the police that her husband owned a gun and had threatened to kill her on several occasions. The police denied
two requests that he be detained. The Public Prosecutor had stopped the prosecution of Mustafa Goekce on grounds that there were insufficient reasons to prosecute him. At the time of the judgment, Mustafa Goekce was serving a sentence of life imprisonment in an institution for mentally disturbed offenders.\(^{245}\)

ii. Admissibility

Concerning the admissibility, both cases are dealt with almost identically, in the same flexible way than in the A.T. case. The analysis also began with the mention of the basic rule of the article four of the Optional Protocol to the CEDAW, which prescribes the exhaustion of national remedies. But the Committee directly showed its will to balance this principle with the principle of due diligence in the State’s practice.\(^{246}\) It is plain to see that an approach based on a real assessment of the facts was preferred to a formal one.

The Committee acknowledged that the claimants did not use all the possible remedies available at national level but then pointed out the “flaws in law as well as the alleged misconduct or negligence of the authorities in applying the measures that the law provided.”\(^{247}\) The State claimed that a procedure was set out and “would have been available to the deceased and remained available to her descendants”\(^{248}\) but the Committee countered the argument by stating that the procedure “could not be regarded as a remedy, which was likely to bring effective relief to a woman whose life was under a criminal dangerous threat”\(^{249}\) and declared the case admissible.

iii. Reasoning

The Court went through several well-defined steps to establish its reasoning and reached what appears as a fair conclusion, though its inclination toward protecting women is unambiguous.

Firstly, the Court recalled its general recommendation 19 on violence against women and the direct consequence of the due diligence principle: obligations imposed on States are not limited to acting when violations occur from State officials.

The Committee then welcomed the different measures adopted by the State in order to counter domestic violence.\(^{250}\) This is substantially different than in the A.T. case where the

\(^{245}\) CEDAW, Sahide Goekce v. Austria, 6 April 2007.

\(^{246}\) CEDAW, Fatma Yildirim v. Austria, 6 August 2007 and CEDAW, Sahide Goekce v. Austria, 6 April 2007, § 7.4.

\(^{247}\) Ibid., § 7.4.

\(^{248}\) Ibid., § 7.4.

\(^{249}\) Ibid., § 7.5.

\(^{250}\) Ibid., § 12.1.2.
State was not ready yet to ensure the minimum international standards for the protection and support of victims of domestic violence. Despite those efforts, the standard of due diligence required by the Committee is high: having a system in place to address the problem is insufficient; it must be put into effect by State actors who understand and adhere to the obligation of due diligence.\(^{251}\) “in order for the individual woman victim of domestic violence to enjoy the practical realization of the principle of equality of men and women and of her human rights and fundamental freedoms.”\(^{252}\)

Once more, the Committee adopted a context-specific approach when determining whether the authorities knew or should have known of the danger of violence.\(^{253}\) It highlighted the aggravating circumstances in both cases (in *Sahide Goekce* case the perpetrator had the potential to be a very dangerous and violent criminal and there was a long record of earlier disturbances and battering; in *Fatma Yildirim* the perpetrator had a lot to lose if his marriage ended in divorce since his residence permit in Austria was dependent on his staying married).\(^{254}\) In response to those allegations, the State argued that measures beyond what was undertaken seemed disproportionate at the time. The Committee then made a decisive point already shared in the A.T. case: the perpetrator’s rights cannot supersede women’s human rights to life and to physical and mental integrity.\(^{255}\)

Because of those factors taken together, the Committee concluded to a violation of life and physical and mental integrity of the victims, even if the perpetrators were prosecuted to the full extent of the law for the killings.

Finally, the Committee recommended quite important measures to the State party, namely to strengthen the implementation and monitoring of the legislation, prosecute perpetrators of domestic violence, ensure enhanced coordination at all levels of the criminal justice system and strengthen training programmes and education on domestic violence.\(^{256}\) The recommendations in the A.T. case were precise, but the Committee went even further here with recommendations on several levels including collaboration.

Those three cases from the case-law of the Committee are revealing. As we repeatedly
pointed out, they clearly establish a chosen line of reasoning strongly advocating and privileging the protection of women from violence with the imposition of high standards of due diligence to the States. This line of reasoning is part of an international impetus of the international instruments towards more intervention in the private sphere and a stricter consideration of the action of States. It has also considerably influenced the case-law of the ECtHR.

II.2.4.5. Influence of the United Nations system on the case-law of the ECtHR

Similarly to the part of this dissertation that examined the influence of the Inter-American Human Rights system, we chose to analyse the influence of the United Nations system before the actually focussing on the judgments of the ECtHR. This is a deliberate choice, because we consider that only a global analysis can truly reflect the scope of the impact. In the third part of this dissertation, we will highlight the influence of the system in each case. The ECtHR has been influenced by the text of the CEDAW and the work of the Committee: in the case *MC v. Bulgaria*, the Court mentions the CEDAW as part of the related international instruments and the actual impact can only be felt in the inclination of the Court to privilege victims’ rights and to achieve progress in the field of women’s rights and protection. The following point analyses the influence in two other decisive cases: *Bevacqua and S. v. Bulgaria*\(^{257}\) and *Opuz v. Turkey*\(^{258}\).

a) Case Bevacqua and S. v. Bulgaria

One of the significant aspects of the *Bevacqua* case is the reliance by the ECtHR on different international instruments.\(^{259}\) The reference to the CEDAW is rather succinct. The Court only brings it up in the end of the “other materials” part of the section concerning the relevant international material. The analysis of the case-law of the Committee (more precisely *A.T. v. Hungary*) is regarded as one of the elements that formed the basis for the conclusion of the UN Economic and Social Council and the Special Rapporteur on violence against women that there is a rule of customary international law that “obliges States to prevent and respond to acts of violence against women with due diligence.”\(^{260}\)

Even though the reference might seem short, it cannot be considered as irrelevant since the positive obligations contained in the provisions of the United Nations treaty bodies have been further elaborated under the reporting procedure and the individual complaints

\(^{258}\) ECtHR, *Opuz v. Turkey*, 9 June 2009.
procedure. The ECtHR is interested in the principles enacted in the United Nations instruments but also by their concrete application in the case-law of the Committee. As a matter of fact, some types of violence are dealt with in a different way following the different instruments (for instance, domestic violence is considered as a form of ill-treatment under the United Nations instruments but under the European Convention on Human Rights it is also an issue under the right to respect for private and family life). Despite those formal differences, those instruments all go in the way of the creation of positive obligations imposed on States. The reference to the CEDAW is thus essential since the decision reached by the ECtHR in the Bevacqua case is decisive in the development of the theory of positive obligations and violence against women within the European Convention system.

b) Case Opuz v. Turkey

As we will clearly see when analysing the case-law of the ECtHR in the third part of this dissertation, the Court rendered what is regarded as a landmark decision in the Opuz case. The decision is considered as being of the upmost importance because the Court explicitly stated that domestic violence “may be regarded as gender-based violence which is a form of discrimination against women.” When taking this decision, the Court relied heavily on statistical information, specialized international organisations and their instruments, inter alia the Committee and the CEDAW. The principles those advocate undoubtedly helped the ECtHR in developing its reasoning. In order to fully understand this influence, we will give a review of the references the Court made to the different aspects of the work of the CEDAW and the Committee through the case.

The Court found the basic ideas for its reasoning in the text of the CEDAW since it used the definition of discrimination against women given by its first article. The Court also mentioned the obligations prescribed to States by the second article of the CEDAW “to take

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263 ECtHR, Opuz v. Turkey, 9 June 2009, § 200.
all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.  

The Court then referred to different writings of the Committee, namely its usual reasoning, General Comments and explanations of general recommendation n°19, Comments on specific articles of the Convention and judgments.

The opinion of the ECtHR on positive obligations in the Opuz case duplicates the usual line of reasoning of the Committee and goes as follows: “within the general category of gender-based violence, the Committee includes violence by “private act” and ‘family violence’. Consequently, gender-based violence triggers duties in States.”

Concerning the General Comments, the Court recalled the Committee’s opinion that “violence against women, including domestic violence, is a form of discrimination.” The Court also mentioned the explanations 6 and 7 of general recommendation no. 19 of the CEDAW Committee, which respectively condemn gender-based violence and its harmful consequences on women.

The Comments of the Committee on the articles 2 (f), 5 and 10 (c) of the Convention explain further the reasons underlying why violence against women amounts to gender-discrimination. Those specify that “traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms. While this comment addresses mainly actual or threatened violence, the underlying consequences of these forms of gender-based violence help to maintain women in subordinate roles and contribute to the low level of political participation and to their lower level of education, skills and work opportunities.” Those Comments have been genuinely helpful for the ECtHR to reach a decision in the Opuz case.

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267 ECtHR, Opuz v. Turkey, 9 June 2009, § 74.
268 Ibid., § 74.
271 Comments on the articles 2(f), 5 and 10(c) of the General recommendations n°19: Violence Against Women made by the Committee on the Elimination of Discrimination against Women of the eleventh session of the UN Committee on the Elimination of discrimination against women 1992, Doc. A/47/38.
by highlighting the concrete reasons why violence against women amounts to discrimination.

Finally, two relevant judgments of the Committee were outlined: A.T. v. Hungary and Fatma Yıldırım v. Austria. As we have seen in the analysis of the main judgments of the Committee, those cases come together with the case-law of the ECtHR in the condemnation of States for the failure to take measures to protect victims of violence against women.

This chapter has explained the relevance of the United Nations system and its influence on the ECtHR. Together with the Inter-American Human Rights system, they developed a series of instruments and decisions that, as we stressed out several times, has had a crucial impact on the case-law of the ECtHR in the field of violence against women. After having understood what the concept of gender-violence encompasses in the first part and the way that problem is addressed by the relevant international institutions in the second part, we now have the necessary tools to focus on the core of this dissertation with an analysis of the case-law of the ECtHR in the field of violence against women.
III. The European Convention on Human Rights

On the basis of the European Convention on Human Rights [hereinafter “The Convention”], the ECtHR has rendered a series of decisions that cover almost every type of gender-violence. The occurrence of certain types of gender-violence varies depending on the national situations in the States that are under the jurisdiction of the Court. The background of the cases before the ECtHR will therefore be closer to what we saw in the decisions of the United Nations – with mostly individual cases of violence – than to cases before the Inter-American Human Rights system’s institutions, which often involved gross violations of the rights of groups of people condoned by the State. Nevertheless, given the mutual influence between those institutions that we highlighted in the second part of this dissertation, the development of the concepts related to gender-violence before the ECtHR is very similar to those of the other international institutions. The “plus-value” of the ECtHR lies within the clear and logical articulation of its concepts through the whole case-law, and the fact that the Court explicitly shows an inclination towards and a strong advocacy of the protection of women.

This third part will enumerate the relevant provisions in relation to gender-violence within the Convention in the first chapter and, on that basis, analyse the evolution of the case-law of the Court in the second chapter.
III.1. The relevant provisions of the Convention

The Convention does not include any specific provision dealing with violence against women. Nonetheless, the actors of the judicial system, including the Court, have identified a number of provisions within the Convention that are relevant in the field of violence against women. Over time, practice has shown a repeated use of the same provisions that resulted in an evolution in their interpretation and application. This chapter will outline the relevant provisions and some general observations relating to them that are useful for our analysis of the case-law. It is worth mentioning that the development of the concept of positive obligations has strongly influenced the interpretation of those articles. This influence will appear through the analysis of the case-law in the second part of this point.

III.1.1. Article 2, right to life

The second article of the Convention states: “everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary (…).”

This article is considered as fundamental amongst the provisions of the Convention. It only applies in cases involving the most severe types of violence, namely when the violence is life-threatening.

The threshold of severity for an act or practice to be life-threatening seems out of reach in some cases; for instance, domestic violence is regularly discussed as an issue of inequality, violence per se, or degrading treatment, but not necessarily as a threat to life.

This article is not absolute. Its negative obligation is limited by the exceptions of the second paragraph and the positive obligations by competing rights also protected by the Convention such as the right to private life or the right to a fair trial. The Court often has to strike a balance in its decisions between this right to life invoked by the victim and the competing rights used by the perpetrators of the acts of violence.

III.1.2. Article 3, prohibition of torture and of inhuman and degrading treatment

The third article of the Convention states: “no one shall be subjected to torture or to inhuman or degrading treatment or punishment.”\(^{276}\)

This article is also considered as a fundamental provision of the Convention but it differs from the provision establishing the right to life in the sense that the identification of the prohibitions is absolute. Even if it is not explicitly stated by the Convention, it implies that this article cannot be subject to any exception or derogation, regardless of the circumstances.

This provision can only be applied to cases involving a minimum severity threshold that varies with a series of data including the length of the ill-treatment, the physical and psychological effects, and the sex, age and health of the victim.\(^{277}\)

III.1.3. Article 6, right to a fair trial

The sixth article of the Convention states: “in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (…) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and the facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”\(^{278}\)

The relevance of this article in the field of violence against women is more indirect than the other provisions we mentioned,\(^{279}\) but it has been invoked in several cases both by alleged victims and perpetrators of acts of violence. The victims used the “access to justice”


dimension, in some cases because time limitations in the national law prevented their case to go before the Court and in other cases because of the lack of effective criminal investigations that de facto resulted in the absence of access to justice. The perpetrators mostly used the last part of the article for the examination of witnesses.\(^{280}\)

**III.1.4. Article 8, right to respect for private and family life**

The eighth article of the Convention states: “everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”\(^{281}\)

This article is very similar to the article two that establishes the right to life since it is not absolute and prescribes itself a number of exceptions to the basic rule. The interferences are only accepted if they are prescribed by the law, necessary in the interests of one of the listed legitimate aims and necessary in a democratic society. The interpretation of this article has evolved and the right to private life now also encompasses the right to psychological and bodily integrity, a right to personal development, and the right to establish and develop relationships with other human beings and the outside world. This includes all the attacks of a person’s emotional wellbeing to such extend that one’s personal development is hindered, which is particularly relevant for incidents of domestic violence.\(^{282}\)

It is worth mentioning that the article eight is often invoked in cases where the victim also alleges a violation of the article three, if the severity threshold is satisfied. The case-law that is concerned with the combination of those two provisions has led to the development of the theory of positive obligations in cases of lack of intervention of the State before the ECtHR.\(^{283}\)

**III.1.5. Article 14, prohibition of discrimination**

The fourteenth article of the Convention states: “the enjoyment of the rights and freedoms

\(^{280}\) P. LONDONO, “Positive Obligations, criminal procedure and rape cases”, *EHRLR* 2007, 166.


set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

This article has no independent existence and can only be invoked in conjunction with one or more other provisions. There is discrimination when a State treats differently, without an objective and reasonable justification, persons in analogous, or relevantly similar, situations. The State can justify the distinction of treatment by showing that it pursues a legitimate aim and that there is proportionality between the means employed and the aim sought to be realised. In cases of gender-violence, the article 14 will mostly be invoked together with the articles 2 and 3. The link between prohibition of discrimination and violence against women has recently been at the heart of the landmark decision of the Court Opuz v. Turkey and has brought the fight against gender-discrimination a step further. We will analyse the scope of this progress in the first section of the second chapter of this dissertation.

III.1.6. Article 4 and 13, prohibition of slavery and forced labour and right to an effective remedy

We will be less much confronted to the articles four and thirteenth than to the abovementioned articles.

The article 4 has only been used in two cases before the Court and states: “no one shall be held in slavery or servitude. No one shall be required to perform forced or compulsory labour. (…)”. We will subsequently describe its use in the two cases.

The thirteenth article of the Convention, which states: “everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”, it often used by the victims. It has been considered as self-explanatory but the most important findings of the Court never lie in the examination of the complaint under that article.

This first chapter has described the legal basis of the decisions of the ECtHR. The application of those few provisions in the case-law of the Court will now be analysed.

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287 Ibid., article 13.
III.2. The approach of the ECHR to the different types of gender-violence

When considering the case-law of the Court, we chose to divide the types of violence in three categories. Those have nothing to do with an assumption concerning the degree of severity or any value judgment whatsoever. The determining factor was the number of cases the Court dealt with in respect of each type of violence and also the possibility to identify an evolution in the approach of the Court. The two main categories were thus domestic violence and rape, which will be analysed respectively in the first and second section of this chapter. The other types of gender-violence will then be examined together in the third section. Before starting this systematic work, we want to make clear we willingly focused on the parts of the decisions that are relevant to this dissertation. The parts of the decision dealing with aspects that do not bring further findings to the precise subject of this dissertation will thus not be examined.

III.2.1. Domestic violence cases

The examination of the case-law of the Court highlights a consistent form of reasoning through the repeated use of some concepts, that led to an evolution towards a greater protection of victims.

**III.2.1.1. Premises: Airey v. Ireland** on the access to justice and Osman v. the United Kingdom on the establishment of the test of positive obligations for States

None of both cases of this subsection directly deal with violence against women. But they have laid the foundations of the concepts subsequently used by the Court in this area. As we already understood in the analysis of the judgments of the international institutions, domestic violence is a particularly tricky subject because the Court has to deal with a private matter only involving private actors. This was traditionally considered as beyond the purview of the State and the article 8 had always hindered – or strongly conditioned – the intervention of the State. At some point, the Court began to define when the State should be held responsible for intervening in cases of violence or abuse within the private sphere. This started in an indirect way with the Airey case in relation to access to justice.

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288 ECHR, Airey v. Ireland, 9 October 1979.
289 ECHR, Osman v. The United Kingdom, 28 October 1998, § 115.
a) Case: *Airey v. Ireland*

The case of Mrs Airey involves violence against women since she sought to separate from her husband who frequently threatened her with, and occasionally subjected her to physical violence. Because of a lack of financial resources and in the absence of legal aid provided by the State, she had been unable to find a solicitor to represent her before the Court. She alleged a violation of *inter alia* articles 6 and 8.

The Court noted the general assumption towards article 8 (the private sphere is beyond reach of the State). In this case, the heart of the matter was not an interference with the victim’s private or family life but the failure to act of the State. The core of this judgment lies in the affirmation that this article, besides its primarily negative undertaking, also prescribes positive obligations inherent in an effective respect for private or family life. This had already been stated a few months sooner in the judgment *Marckx v. Belgium*, which the Court mentioned. Mrs. Airey’s personal right to enjoy respect for her private life thus required the ability to divorce her abusive husband. The State’s failure to make legal services available to her violated article 8.

This case is considered as one of the founders of the concept the positive obligations for States under the Convention. It is worth recalling that it the decision dates from the beginning of the period characterized by the international development of the concept of positive obligations. In 1998, with the *Osman* case, the Court further articulated State responsibility for private acts.

b) Case: *Osman v. the United Kingdom*

The case concerned the former obsessive teacher of a 15-year-old pupil who had formed an unhealthy attachment to him. This resulted in a series of incidents and the teacher eventually wounded his pupil and killed the boy’s father. The pupil and his mother brought the case before the Court arguing *inter alia* a failure from the police to take sufficient measures to prevent breaches of their right to life under article 2 and their right to private and family life under article 8. They blamed the police for not taking into account a series of clear warning signs and increasingly serious incidents involving the teacher, who had been

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293 Ibid., § 32.
suspended following a psychiatric evaluation and had a history of such infatuations. Despite such information, the police had not taken any special measures to protect the family. The Court firstly noted that the right to life implied the negative obligation of a State to refrain from the intentional and unlawful taking of life but also involved taking appropriate steps to safeguard the lives of those within its jurisdiction. The Court declared that this obligation went further than putting in place effective criminal-law provisions and law-enforcement machinery, and encompassed “taking preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.” Nevertheless, being aware of “the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources”, the Court made clear that this obligation should not impose an impossible or disproportionate burden on the authorities. Consequently, the authorities cannot be required to take operational measures for preventing each and every allegation of the existence of a risk to life. The most significant aspect of this case is the criteria to establish that the authorities have violated their positive obligation to protect the right to life: “it must be established … that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.” Those criteria will subsequently be used on many occasions by the Court and have been defined as the “Osman test”.

In this case, the Court found that the applicants failed to prove that the police knew or ought to have known of a real and immediate risk for the lives of the Osman family. One of the consequences of this absence of violation is that the Court did not enumerate the potential measures to be taken by States in situations where positive duties arise. Nonetheless, as we just outlined, the Court delivered three important findings: the affirmation of the existence and the beginning of an explanation concerning the scope of positive obligations.

299 ECtHR, Osman v. The United Kingdom, 28 October 1998, § 115.
300 Ibid. § 116.
302 ECtHR, Osman v. The United Kingdom, 28 October 1998, § 116.
in relation to the right to life, the fact that this obligation could not impose an unreasonable burden on States and the criteria for holding a State responsible.

There is a striking similarity in reasoning of this decision and those of the Inter-American Human Rights system and the CEDAW Committee in finding that a State can be found complicit in human rights abuses perpetuated by non-State actors.\footnote{L. HASSELBACHER, “State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, And International Legal Minimums of Protection”, Nw. U. J. Int’l Hum. Rts. 2010, Vol. 8, No. 2, 200.} Moreover, even thought the Court does not use the term ‘due diligence’, the concept clearly transpires from the reasoning of the Court.

This judgment generated a lot of reactions that pointed out its potential for the victims of domestic violence\footnote{S. CHOUDRY and J. HERRING, “ Domestic violence – The extent and the recognition and use of a human rights discourse” in European Human Rights and Family Law, Halt Publishing, Oxford, 2010, 395.} since the Court officially adopted a dynamic approach and made obsolete the public/private dichotomy. Even though some criticized the decision and considered that the Court had reached beyond its mandate, it certainly adopted a very courageous course of action that will be confirmed in the following judgments in cases directly dealing with domestic violence.\footnote{MCQUIGG, R., International Human Rights Law and Domestic Violence. The effectiveness of international human rights law, Oxford, Routledge, 2011, 42.}

### III.2.1.2. Confirmation and articulation of the Osman test and its application to cases of domestic violence: Kontrová v. Slovakia and Branko Tomašić and Others v. Croatia

In Kontrová v. Slovakia,\footnote{ECtHR, Kontrová v. Slovakia, 31 May 2007.} the Court demonstrated its will to extend the positive obligations inherent in article 2 to the domestic context.\footnote{S. CHOUDRY and J. HERRING, “ Domestic violence – The extent and the recognition and use of a human rights discourse” in European Human Rights and Family Law, Halt Publishing, Oxford, 2010, 353.} It should be noted that the breach was found in relation to the rights of the children and the Court did not directly address the abuse suffered by the applicant. Nevertheless, the findings explicitly apply to a situation of domestic violence and have contributed to the development of the case-law of the Court.\footnote{MCQUIGG, R., International Human Rights Law and Domestic Violence. The effectiveness of international human rights law, Oxford, Routledge, 2011, 50.}

The decision in Branko Tomašić, which was rendered two years later, the Court confirmed the findings of Kontrová.
a) Kontrová v. Slovakia

i. Facts

The applicant went to the police station to file a criminal complaint against her husband, alleging he had beaten her with an electric cable. She submitted a medical report confirming that her injuries would incapacitate her from work up to seven days. She also alleged that she had been suffering physical and psychological abuse from her husband for a long time. Two weeks later, she returned to the same police station with her husband and withdrew her complaint. On the advice of the police officer, in order to avoid a prosecution, she produced another medical report confirming she had not been incapacitated from work for more than six days. On the basis of that report, the same officer decided to take no further action. A month later, the applicant called the police to report that her husband had a shotgun and was threatening to kill himself and the children. As the husband had left the scene before the arrival of the police, the policemen asked the applicant to come to the police station to draw up a formal record of the incident. Although that was done, no criminal complaint was registered. A few days later, the applicant went to the police, enquiring about her two criminal complaints. Later that night, the applicant's husband shot dead their two children and himself. Though the domestic Courts convicted the police officers of negligent dereliction of their duties, the applicant's complaints seeking compensation for non-pecuniary damage were unsuccessful. She brought the case before the Court, alleging a violation of *inter alia* the articles 2, 6 and 8.

ii. Reasoning

The Court started its reasoning with the alleged violation of the right to life, and recalled the different steps of its analysis in the *Osman* case, starting with the positive obligation upon the authorities in certain circumstances to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual and the need for criminal-law provisions backed up by law-enforcement machinery and concluding with the findings that this obligation could not impose an impossible or disproportionate burden on the States and the criteria of the "Osman test." As we pointed out before, the outcome of the *Osman* test depends on the analysis of the facts. In this case, the Court considered that the situation in the applicant's family was known to the police on the basis of complaints that "concerned such serious allegations as

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311 Ibid., § 50.
long-lasting physical and psychological abuse, severe beating with an electric cable and threats with a shotgun.”  

For the first time in a case involving domestic violence, the Court enumerated the specific obligations of the State entailed by the right to life. In this case, these included “inter alia, accepting and duly registering the applicant's criminal complaint; launching a criminal investigation and commencing criminal proceedings against the applicant's husband immediately; keeping a proper record of the emergency calls and advising the next shift of the situation; and taking action in respect of the allegation that the applicant's husband had a shotgun and had made violent threats with it.”  

The Court confirmed that the police had failed to ensure compliance with those obligations and even pointed out that “on the contrary, one of the officers involved assisted the applicant and her husband in modifying her criminal complaint of 2 November 2002 so that it could be treated as a minor offence calling for no further action.”  

The Court concluded that those failures had caused the death of the applicant's children and that there had been a violation of article 2. The applicant also alleged a violation of the right to respect for private and family life under the article 8. The Court considered that since this complaint had the same factual background as the complaint under article 2, it was not necessary to examine the facts of the case separately.  

iii. Comments, criticism and relevance  

The lack of examination of an alleged violation of article 8 by the Court has been analysed as supporting the evidence that the concept of positive obligations exceeded the boundaries of the provisions. In other words, the complaint under the article 8 corresponds with the one under article 2 and the reasoning that has been applied to the complaint under article 2 can be extrapolated to other provisions, such as article 8. This would open the door to the potential development of positive obligations for other articles of the Convention, and we will see if that actually happened in the following cases.  

Even though the Kontrová case was welcomed for the application of the concept of positive obligations to the area of domestic violence, it has been subject to criticism.

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312 Ibid., § 53.
313 Ibid., § 53.
314 Ibid., § 54.
315 Ibid., § 58.
Firstly, the language of reasonableness included in the analysis is considered as an obstacle to the protection of women. When the Court declares that the applicant only has 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 have or ought to have knowledge, it results in the fact that a woman’s right to life is protected not absolutely but only reasonably.\(^{317}\)

Secondly, since “not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising”\(^{318}\) and that the Osman test has to be applied to the particular circumstances of each case, the question remains as to which risks to life require direct measures. The actors who have to address the complaints and testimonies of people in alleged risk-situations are confronted with a lot of uncertainty and might adopt a method of the systematic registering of complaints and prosecution that would lead to a painful and counterproductive inflation of the criminal caseload.\(^{319}\)

Despite those two aspects subject to criticism, the contribution of the Kontrová case is undeniable. The concept of positive obligations has been applied to the field of domestic violence and the Court has explicitly enumerated the obligations entailed by the right to life in the circumstances of the case.

b) Branko Tomašic and Others v. Croatia

This case is merely a confirmation of Kontrová and in order to avoid useless repetitions, we will only briefly outline the facts and findings.

The applicants are the relatives of a deceased baby and her mother who both lived in the home of the father/husband. The mother moved out with the baby after disputes and lodged a criminal complaint against her husband for death threats he had allegedly made. He was found guilty, sentenced to five months' imprisonment and ordered to have compulsory psychiatric treatment during his imprisonment and afterwards. That sentence was later reduced and he was released four months after. One month after his release, he shot dead his wife and their daughter before committing suicide. The applicants complained, under *inter alia* article 2 and article 13 that the State had failed to take adequate measures to protect the mother and her baby and had not conducted an effective investigation into the possible responsibility of the State for their deaths.

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The State had recognized a violation of the article 3. In its reasoning, the Court reiterated the findings in Kontrová as to the state’s positive obligation to take measures to protect the right to life and the procedural duty to investigate under article 2. It held that the authorities had been aware that the threats made against the lives of the victims had been serious and that all reasonable steps should have been taken quickly to protect them. Nevertheless, the only effective measure that could have been requested by the victim would have been available after a two-year-wait. Furthermore, the authorities had not followed the order for continued psychiatric treatment, and they had failed to show that the husband had even received psychiatric treatment in prison and that he had been examined before his release from prison in order to assess whether he had posed a risk of carrying out his death threat. The Court therefore confirmed the findings of the Kontrová case, with a violation of article 2.

The reason we analysed the Branko Tomašic case after the Kontrová case is because their similarity led us to consider it would be more relevant to analyse them together. Nevertheless, Branko Tomašic has been rendered after the judgment we will analyse in the next point and cannot have influenced it; its interest is thus limited to the confirmation of the Kontrová case.

The inclination of the Court in the Kontrová case will be confirmed and the concept of positive obligations further articulated in the case Bevacqua and S. v. Bulgaria. It is worth mentioning that in the Kontrová case, the Court had not addressed the problem whether the authorities should prosecute or not when the victims choose not to proceed in the criminal courts or to withdraw their complaint at national level. This is a recurrent issue in matters of domestic violence and the Court will give its opinion about it in the Bevacqua case.

III.2.1.3. Further articulation of the concept of positive obligations in Bevacqua and S. v. Bulgaria

Bevacqua and S. v. Bulgaria is considered a landmark case because it was the first time that the Court held there was a breach of the Convention in respect of the actual abuse suffered by the applicant herself who was a victim of domestic violence.

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320 ECtHR, Branko Tomašic and Others v. Croatia, 15 January 2009, § 44.
a) Facts

The applicant filed for divorce from her husband, Mr. N., alleging that he had abused her and filed a request for a custody order for her young son. A year later, she was able to finalize her divorce and obtain a court determination of custody issues. In the meantime, she experienced multiple incidents of physical abuse from her husband who often removed their son from her home. When she tried to move to a hostel for victims of domestic violence with her son, she was threatened by the authorities to be prosecuted for abduction of the child and she agreed to an alternative custody to avoid prosecution. Subsequently, the divorce proceedings resulted in the applicant being granted custody of the child, the domestic courts having accepted that witnessing violent behaviour was a bad example for the child. Nevertheless, Mr N. was not prosecuted for any of the violence used against the applicant. Following this decision, the applicant still suffered violence by Mr. N. The prosecutors refused to initiate criminal proceedings against him since the Bulgarian Penal Code declared that in case of “medium bodily harm” or “light bodily harm” inflicted by a spouse or other family member, criminal proceedings had to be initiated by the victim rather than a public prosecutor and that the applicant did not pursue private prosecution of Mr. N. beyond her initial complaints.

The applicant lodged a complaint under inter alia articles 3, 8, 13 and 14, arguing firstly that the authorities had failed to intervene and assist her and her son and secondly that the Bulgarian code was incompatible with the Convention.

b) Reasoning

The Court started its reasoning with the analysis of the article 8, though it also emphasised that a State’s positive obligations in this context could arise in some cases under article 2 or 3 and in other instances under article 8 taken alone or in combination with those articles. The Court pointed out that the right to respect for private and family life “includes a parent’s right to the taking of measures with a view to his or her being reunited with his or her child” and “includes a person’s physical and psychological integrity”. The findings of the Osman case were also mentioned, i.e. the positive obligations for the State to “maintain

326 Ibid., § 65.
and apply in practice an adequate legal framework affording protection against acts of violence by private individuals.”\(^{327}\)

After detailed examination of the facts, the Court held that “the authorities’ duty under article 8 to secure respect for the right to private and family life of both applicants required the examination of the interim measures application with due diligence and without delay”\(^ {328}\) and that the attitude of the authorities, characterized by indifference and delays, was “difficult to reconcile with the authorities’ duty to secure respect for the applicants’ private and family life.”\(^ {329}\)

Finally, the Court addressed the argument of the applicant that in all cases of domestic violence, the Convention required State-assisted prosecution, as opposed to prosecution by the victim. It recognized that “the relevant Bulgarian law, according to which many acts of serious violence between family members cannot be prosecuted without the active involvement of the victim, may be found, in certain circumstances, to raise an issue of compatibility with the Convention”\(^ {330}\) but did not examine this argument further. The Court held that the choice of the measures that suffice to secure respect for the applicants’ private and family life in compliance with the Convention in the sphere of the relations of individuals between themselves falls within the domestic authorities’ margin of appreciation.\(^ {331}\)

The Court concluded that the authorities’ behaviour in this case amounted to a failure to assist the applicants contrary to the State positive obligations under the article 8.\(^ {332}\)

c) Comments and relevance

This judgment distinguishes itself through several significant aspects. Firstly, it confirmed once again the application of the concept of positive obligations to cases of domestic violence by stressing out that the right to privacy is not only about the insulation of one’s life from State scrutiny but also about the richness and wellbeing of an individual’s life. Similarly to our conclusion from the Kontrová and Branko Tomašić cases, this interpretation of privacy is crucial in situations of domestic violence, where the violence occurs in the private world.\(^ {333}\) It also stated that positive obligations could also arise under the article 3 and 8.

\(^{327}\) Ibid., § 65.
\(^{328}\) Ibid., § 73.
\(^{329}\) Ibid., § 76.
\(^{330}\) Ibid., § 82.
\(^{331}\) Ibid., § 82.
\(^{332}\) Ibid., § 84.
Secondly, the Court relied on several international instruments\textsuperscript{334} to develop its analysis, particularly in relation to positive obligations. We have described the way the Court made references to those instruments in the second part of this dissertation. When analysing the whole case, we find a confirmation of their influence through the utilization of the term “due diligence”. We refer the reader to the second part of this dissertation for further findings on the relevant international institutions in the second part of this dissertation.

The Court also gave its opinion concerning situations where victims choose not to proceed in the criminal court.\textsuperscript{335} One of the characteristics of the domestic violence cases is that the victims are still in close contact with the aggressors after they filed their initial complaint. If the prosecution depends on the initiating of the complaint by the alleged victim, the perpetrators will inevitably be tempted to pressure them to withdraw their complaint. The Court therefore expressed its doubts as to the compatibility with the Convention of a system where the effectiveness of the prosecution can be hindered by limitations linked with the initiative of filing a criminal complaint. Nevertheless, it considered that the choice of the legal measures protecting the citizens fell within the margin of appreciation of the State.\textsuperscript{336}

Finally, it should be mentioned that the Court did not address the applicant’s claim under article 14 concerning the discriminatory effect of the Bulgarian criminal code for women who are victims of domestic violence. This raised concerns since a woman who suffers violence from a stranger will not receive the same treatment as a woman who suffers violence within her home. Even thought the Court put forward the argument of the margin of appreciation of the State and found a violation on different grounds, the lack of condemnation of that law is not totally understandable.\textsuperscript{337}

The Court achieved a further improvement in the Bevacqua case by condemning the State for its failure to fulfil its positive obligations directly towards a victim of domestic violence. The following judgment we will analyse is completely in the same vein as Bevacqua, and is considered a landmark case of the upmost importance in the field of domestic violence but also more generally, in the field of violence against women.

\textsuperscript{334} Bevacqua, part III: the Recommendation 5 of the Committee of Ministers of the Council of Europe, the United Nations General Assembly Declaration on the Elimination of Violence against Women (1993), the third report of the Special Rapporteur on violence against women of the Commission on Human Rights of the United Nations, and judgments from the Inter-American Human Rights system and the CEDAW.


III.2.1.4. Violence against women as discrimination in Opuz v. Turkey

The Bevacqua case was disappointing for the lack of focus on the discrimination aspect. The Court somehow got a second chance to rule on the matter with Opuz and rendered a judgment that has been considered as a landmark case. The reason for this also lies in the analysis of the domestic violence aspect under the article 3 of the Convention. Finally, there was a clear application of positive obligations to domestic violence. This case might be considered as the most revolutionary in the case-law of the Court concerning domestic violence, and maybe even violence against women. Therefore, the analysis of its different aspects is significantly longer than for the previously analysed cases, but is necessary to fully understand the extent of the breakthrough.

a) Facts

The applicant’s mother was married to A.O., and the applicant began a relationship with A.O.’s son, H.O., in 1990. However, in 1995, both the applicant and her mother had filed complaints claiming that H.O. and A.O. had been beating them and threatening to kill them. This was the first assault. Medical evidence established that both the applicant and her mother had suffered bruising and swelling and were rendered unfit for work for five days. Nevertheless, the women withdrew their complaints so that the assault case could not proceed under the Turkish Criminal Code and the defendants were acquitted.

The second assault took place the following year. The applicant was badly beaten by H.O., and medical evidence established that she had suffered life-threatening injuries. H.O. was remanded in custody and indicted for aggravated bodily harm. However, he was subsequently released on the request of the prosecutor because of the ‘the nature of the offence and the fact that the applicant had regained full health’. The applicant once again withdrew her complaint and the prosecution was terminated.

The third assault occurred in 1998. The applicant, her mother and H.O. had a fight during which H.O. inflicted severe injuries to both women with a knife. However, the prosecuting authorities decided not to prosecute on the ground of insufficient evidence.

The fourth assault happened one month later when H.O. ran his car into the applicant and her mother who suffered life-threatening injuries. H.O. was remanded in custody and criminal proceedings were initiated. A few months later, the applicant and her mother withdrew their complaints. The domestic Court concluded that the case should be discontinued in respect of the offence against the applicant, as she had withdrawn her

339 ECtHR, Opuz v. Turkey, 9 June 2009, § 17.
complaint. However, it decided that, although the applicant’s mother had also withdrawn her complaint, H.O. should still be convicted of that offence because of the severity the injuries. He was sentenced to three months’ imprisonment and a fine; the sentence of imprisonment was later commuted to a fine.

The fifth assault attested an escalating violence. In 2001, H.O. stabbed the applicant. He was convicted of assault and fined. The applicant then went to live with her mother. Later in the same year, the applicant and her mother complained that H.O. had been making increasing threats against them (that constituted the sixth incident), but the prosecuting authorities decided that there was insufficient evidence to proceed. The applicant’s mother believed that her life was in immediate danger and had asked that the police take action by filing a complaint.

The last incident took place when the applicant’s mother arranged for her furniture to be moved to take up residence in another location. While she was travelling with the removal truck, H.O. shot her dead. He was charged with murder and said that he had done it for the sake of his honour and children because the applicant’s mother was trying to persuade the applicant to lead an immoral life.\(^{340}\) The Court considered that he had committed the offence as a result of provocation by the deceased and mitigated the original sentence, changing it to 15 years and 10 months’ imprisonment and a fine. Despite this conviction, he was released pending appeal and continued to threaten the applicant. Only when the application was made to the ECtHR did the authorities put measures in place to protect the applicant by issuing H.O.’s picture and fingerprints to police stations in the locality so that he could be arrested if he was found near the applicant’s home.

Before the Court, the applicant alleged *inter alia* a violation of her mother’s right to life under article 2 in combination with the article 14, and of her rights under article 3 in combination with the article 14.

b) Reasoning

As we mentioned in the introduction of the case, we will focus on the part of the reasoning concerning the three relevant aspects of this case.

i. Article 2: exercising due diligence in protecting the right to life and focus on the indicated follow-up in case of withdrawal of the complaint by the victims

Similarly to the reasoning in *Kontrová* and *Bevacqua*, the analysis of the claim under article 2 started with the Court recalling the principles developed in *Osman*, which led to the

\(^{340}\) Ibid., § 56.
examination of the facts of the case and having to ascertain “whether the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of the applicant’s mother from criminal acts by H.O. As it appears from the parties’ submissions, a crucial question in the instant case is whether the local authorities displayed due diligence to prevent violence against the applicant and her mother, in particular by pursuing criminal or other appropriate preventive measures against H.O. despite the withdrawal of complaints by the victims.” In short, the Osman test requires answering two questions in this case. Firstly, were the authorities supposed to know about the immediate and real risk to life and secondly, did they act with due diligence to prevent the death of the applicant’s mother.

The Court answered the first question considering the information that was available to the authorities on the escalating acts of violence suffered by the victim and the record of domestic violence of her husband. It concluded that the local authorities could have foreseen a lethal attack by H.O.

The Court then analysed whether the authorities displayed due diligence to prevent the killing of the applicant’s mother and the effectiveness of the related criminal investigation. The State claimed that the authorities had taken the necessary steps in response to the complaint but that they had been prevented from acting because the domestic law prescribed that withdrawal of the complaint by the victims had the consequence that the authorities had to terminate the proceedings, else they would breach the private life of the victims. The Court really examined the issue of the victim withdrawal and noted that there was no consensus between the States concerning “the pursuance of the criminal prosecution against perpetrators of domestic violence when the victim withdraws her complaints”. It considered that this issue necessitated a balancing of the victim’s rights under article 2, 3 and 8 and enumerated a number of factors that the State ought to take into account when considering the potential follow-up of a complaint. Those included inter alia the characteristics of the offence, the past and present situation of the relationship between the spouses and the effects of the act of violence on the victim and on other people (such as children). In short, the greater the severity of the offence or the risk of reoffending, the greater the onus on the national authorities to prosecute even if the alleged victim withdraws

341 Ibid., 131.
343 ECtHR, Opuz v. Turkey, 9 June 2009, § 136.
344 Ibid., § 137.
345 Ibid., § 138.
the complaint.\textsuperscript{346} The Court thus examined all the factors and concluded that the authorities had not given them the appropriate attention, preferring giving “exclusive weight to the need to refrain from interfering in what they perceived to be a ‘family matter’.”\textsuperscript{347} The general conclusion drawn from this analysis is that the legislative provisions were inadequate to protect potential victims of domestic violence, that the judicial response to the killing was too slow and that the criminal law, as applied in this case, had an insufficient deterrent effect. The violation of the article 2 was thus established.\textsuperscript{348}

ii. Article 3: exercising due diligence in preventing torture and ill-treatment

The Court moved on to the alleged violation of the article 3 and first recalled the principles applicable for establishing a breach of this article, \textit{i.e.} the minimum level of severity that the ill-treatment must attain in order to fall within the scope of that article. This depends on all the circumstances of the case. The Court recalled the fact that the article 3 requires States to take measures to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals.

When analysing the facts, the Court directly confirmed two principles; firstly that the applicant belonged to a group of particularly vulnerable individuals, and was therefore even more entitled to protection from the State and secondly that “the violence suffered by the applicant, in the form of physical injuries and psychological pressure, were sufficiently serious to amount to ill-treatment within the meaning of Article 3 of the Convention.”\textsuperscript{349}

That being established, the analysis of the Court dealt with assessing whether the national authorities had taken all reasonable measures to prevent the recurrence of violent attacks against the applicant’s physical integrity. Comparatively to the analysis of the article 2, there was a clear will to try to identify any potential consensus or common values from the practices of the States and the international instruments such as the CEDAW and the Convention of \textit{Belém do Pará} in relation to States’ duties relating to the eradication of gender-based violence.\textsuperscript{350}

The Court acknowledged that the local authorities did not remain totally passive\textsuperscript{351} but that none of the measures taken were sufficient to stop H.O. from perpetrating further

\textsuperscript{347} ECHR, \textit{Opuz v. Turkey}, 9 June 2009, § 143.
\textsuperscript{350} Ibid., § 164.
\textsuperscript{351} Ibid., § 166.
violence. The authorities did not display the required diligence to prevent the recurrence of violent attacks against the applicant, since he perpetrated them without hindrance and with impunity. The response of the authorities to that conduct were considered manifestly inadequate compared to the gravity of the offences in question since they were characterized by a lack of efficacy and a certain degree of tolerance, and had no noticeable preventive or deterrent effect on the conduct of H.O.

The State tried to rely on two arguments relating to the conduct of the victim: her repeated withdrawals of the complaints and the fact that she could have sought shelter in one of the guest houses set up to protect women. The first argument was rejected on the same basis than for the article 2 and the second because it would only have been a temporary solution and did not relieve the authorities to take other protective measures.

Quite logically, the Court concluded that there had been a violation of Article 3 of the Convention.

iii. Article 14 read in conjunction with articles 2 and 3: violence against women amounts to gender-discrimination

The applicant complained that she and her mother had been discriminated against on the basis of their gender because the domestic law of the respondent State was discriminatory and insufficient to protect women.

In the examination of the alleged violation, the Court firstly outlined the applicable principles before examining the facts. The method to apply in order to establish a violation of the article 14 has been described in the first chapter of this part.

For the third time in this judgment, the Court referred to the international-law background of the issue that includes the provisions of specialised legal instruments and the decisions of international legal bodies on the question of violence against women. It reminded the CEDAW definition on violence against women and the opinion of the CEDAW Committee that “violence against women, including domestic violence, is a form of discrimination.” Other institutions and instruments where also cited, such as the United Nations Commission on Human Rights, the Convention of Belém do Pará and the Inter-American Commission (Maria da Penha case) to conclude that the State’s failure to protect women against domestic violence breaches their right to equal protection of the law and that this failure

352 Ibid., § 167.
353 Ibid., § 169.
354 Ibid., § 171.
355 Ibid., § 187.
does not need to be intentional.\textsuperscript{356}

The Court then analysed the approach to domestic violence in Turkey and noted that the alleged discrimination was not based on the legislation \textit{per se} but rather resulted from the general attitude of the local authorities.\textsuperscript{357} It examined several reports and found the highest number of reported victims of domestic violence where the applicant lived at the relevant time. Moreover, the great majority of these victims were women of Kurdish origin, illiterate or with of a low level of education and generally without any independent source of income.\textsuperscript{358} This confirmed the belonging of the victim to a vulnerable group. The reports also indicated that police officers often did not investigate the complaints of domestic violence but on the contrary sought to convince the victims to return home and drop their complaint since they considered the problem as a “family matter with which they cannot interfere.”\textsuperscript{359} Consequently, the Court concluded that domestic violence affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence.\textsuperscript{360}

Finally, the Court examined whether the applicant and her mother had been discriminated against on account of the authorities’ failure to provide equal protection of law. It recalled the findings already made in the examination of the violation under article 14, namely the inefficiency of the criminal- law system for ensuring the effective prevention of unlawful acts by H.O. against the personal integrity of the applicant and her mother\textsuperscript{361} and the general and discriminatory judicial passivity in Turkey mainly affecting women.

On that basis, the Court delivered the core of this decision: that the violence suffered by the applicant and her mother may be regarded as gender-based violence which is a form of discrimination against women. The Court concluded to a violation of article 14, in conjunction with Articles 2 and 3 of the Convention.\textsuperscript{362}

c) Comments

The judgment, as can already be felt through the reasoning of the Court, is considered as a landmark judgment for different reasons. For more clarity, we will firstly give the general reasons and then divide them in accordance with the three main aspects of the case: the positive obligations and due diligence entailed by the right to life, the exercising of due

\textsuperscript{356} Ibid., § 191.
\textsuperscript{357} Ibid., § 192.
\textsuperscript{358} Ibid., § 194.
\textsuperscript{359} Ibid., § 195.
\textsuperscript{360} Ibid., § 198.
\textsuperscript{361} Ibid., § 199.
\textsuperscript{362} Ibid., § 202.
diligence in relation to the article 3 of the Convention and the opinion of the Court concerning violence against women and gender-discrimination.

On the whole, the Opuz case is remarkable because it is the first time that a successful application has been brought under articles 2 and 3 and of article 14 in combination with those rights by a victim of domestic violence.

One of the most often encountered comments relating to this case is that the Court did not hesitate to refer on multiple occasions to other international instruments and heavily relied on them to reach its conclusion on different aspects of the case. Their influence is sometimes explicit, but can also be implicit when the Court, as in the Bevacqua case, uses the concept of due diligence. The global influence of the different institutions has been analysed in the second part of this dissertation.

The Court also really strongly took sides with the protection of women by proclaiming that domestic violence is a matter of public interest and therefore has to be proactively fought by the State.363

i. Article 2: exercising due diligence in protecting the right to life and focus on the indicated follow-up in case of withdrawal of the complaint by the victims

The Court’s reasoning on the right to life is not what makes it revolutionary since it only reiterates and applies the Osman test.364 It is worth noting that questions have been raised concerning the threshold to satisfy in relation to the knowledge part of the Osman test. Given all the incidents that occurred in this case, the victims of domestic violence might have to bring a lot of information to the attention of the authorities before it can be said that those had knowledge of a real and immediate risk to life. If this is the case, the authorities will really have to be responsible of a severe lack of due diligence before being required to take reasonable steps to protect.365

Nevertheless, this case is interesting in the articulation of the due diligence standard since it confirms that the positive obligations imposed on States now clearly imply providing individuals with a legal framework of protection but also (and very importantly) giving them the means to obtain some form of enforceable protective measures. Clear standards had already been established in Bevacqua and are now confirmed in Opuz. The States can now begin to measure their success in exercising due diligence to prevent domestic

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365 Ibid., 135.
violence, protect victims, and investigate and prosecute perpetrators since they are required to adopt a proactive approach when facing situations where the violence is serious. They will have to provide assistance and support, regardless of whether the victim gave its consent or withdrew her complaint. There is also clearly an obligation to eradicate the tendency of authorities to regard domestic violence as something of a ‘lesser’ form of violence.

ii. Article 3: exercising due diligence in preventing torture and ill-treatment

The question whether domestic violence is sufficiently intense to fall within the meaning of the article 3 was directly addressed for the first time in *Opuz*. The Court did not specify whether the violence amounted to torture. Normally, three elements have to be satisfied to establish torture: the practice must be inhuman, deliberately inflicted and cause physical or mental suffering that is very serious or cruel. The Court did not review each of the criteria and simply declared that the violence suffered by the applicant was sufficiently serious to amount to ill-treatment within the meaning of the article 3 of the Convention. This conclusion seemed quite easy for the Court to reach since the violence involved both physical injuries and psychological pressure.

But questions remain as to the scope of this decision with regards to article 3. Firstly, what would it take for the Court to simply analyse each criteria to be fulfilled to establish domestic violence as torture and once and for all settle the question? There might be a step towards this theory in the *Opuz* case. Secondly, it has been advocated that even non-physical domestic abuse can come within the prohibition when it is recalled that creating feelings of inferiority or lack of respect of dignity are included in the factors to take into account when classifying a violent conduct as torture. Even though the Court included “psychological pressure” in the factors that contributed to making the acts of violence in this case amounting to torture, the analysis of the Court is still very contextual, and we would advise caution before reaching that conclusion.

The Court also adopted a courageous stance in relation to due diligence. The due diligence question is always a difficult one for the Court to answer because it has to keep in mind the

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369 Ibid., 4.
existence of the margin of appreciation of States that allows them to choose their method of protecting rights. The application of the *Osman* test in individual cases always involves a large amount of discretion and for that reason, it is doubtful whether the States will really reconsider their response to domestic violence after a decision of the Court that condemns one of them because of a lack of due diligence. Nevertheless, the Court adopted a strict approach, noting that despite the existence of the margin of appreciation, its role was to ensure that the Convention rights are not theoretical or illusory but practical and effective and therefore held that there had been a violation. This definitely leaves the door open for improvement.

iii. Article 14 read in conjunction with articles 2 and 3: violence against women amounts to gender-discrimination

The decision of the Court on the discrimination aspect marked the first time it recognized that the failure of States to address gender-based domestic violence can amount to a form of discrimination under the Convention. The judgment went further than many expected by clearly making prevention of that type of violence against women a positive obligation of the State, and the systematic failure to act on this obligation a violation of the Convention’s prohibition of discrimination.

Besides this decisive statement, the opinion adopted by the Court was also noticeable because it concluded to discrimination notwithstanding the existence of a formal set of protection rules. This can be considered as a substantial signal sent by the Court to the member States that requires them to act in a proactive way against that particular form of violence against women and against the practices that enable it. This can be linked to the growing international and European concern over the protection of human rights, giving rise to higher safeguards and standards. The Court reaffirms the true function of the Convention: the promotion of minorities’ rights against the rule of the majority.

Even though reaction to the Court’s judgment has been overwhelmingly positive, the case involved particularly blatant judicial and police passivity. There is thus some uncertainty as

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374 Ibid., 30.
to the responsibility of a State for situations of domestic violence where less extreme facts occur. For proving a violation under article 14, the victims will have to prove that the omission of the State is systematic and that the failure to protect is a manifestation of gender-based violence, which is a form of discrimination against women. The threshold to satisfy might seem quite high and might only apply to a limited number of cases compared to all the situations of domestic violence that should be tackled.\footnote{B. MEYERSFELD, “Opuz v Turkey: confirming the state obligation to combat violence against women”, \textit{EHRLR} 2009, Vol. 5, 690.}

The \textit{Opuz} decision has clear social implications. Violations of the Convention because of a lack of due diligence can arise from indirect discrimination embedded in social institutions and practices. This judgment shows the need for States to consider and implement wider reforms across law enforcement generally. But caution is advised for those who would be too optimistic in relation to \textit{Opuz}. Even thought the Court has taken the theory a great step further, the key challenge remains the on-the-ground enforcement by local authorities. This represents a huge problem, since the sensitization to the importance of eradicating violence against women in some countries conflicts with deeply entrenched traditions.\footnote{T. ABDEL-MONEM, “Opuz v. Turkey: Europe's Landmark Judgment on Violence against Women”, \textit{Human Rights Brief} 2009, Vol. 17, No. 1, 32.}

After this groundbreaking decision, there was hope that the following judgments of the Court might clarify the remaining uncertainties. The cases \textit{E.S. and Others v. Slovakia}\footnote{ECtHR, \textit{E.S. and Others v. Slovakia}, 15 September 2009.} and \textit{A. v. Croatia}\footnote{ECtHR, \textit{A v. Croatia}, 14 October 2010.} confirmed the findings of \textit{Opuz} but were somehow disappointing for different reasons.

\textbf{III.2.1.5. Semi-success following Opuz: E.S. and Others v. Slovakia and A. v. Croatia}

The Court was presented with further opportunities to examine domestic violence in the context of article 3 in \textit{E.S. and Others v. Slovakia} and \textit{A. v Croatia} but chose to analyse the circumstances of the cases under the article 8. As we will see, both decisions were logical, but did not bring the findings of \textit{Opuz} further.

a) E.S. and Others v. Slovakia

In 2001 the applicant left her husband and lodged a criminal complaint against him for ill-treating her and her children and sexually abusing one of their daughters. He was convicted of violence and sexual abuse two years later. At the same time, she had requested for her husband to be ordered to leave their home but this request was dismissed, however, the
court finding that it did not have the power to restrict her husband’s access to the property. On appeal, the courts upheld that decision noting that she would be entitled to bring proceedings for obtaining that order after a final decision in the divorce proceedings and, in the meantime, she could apply for an order requiring her husband to refrain from inappropriate behaviour. The constitutional Court then held that there had been no violation of her rights, as she had not applied for such an order. However, it held that the lower courts had failed to take appropriate action to protect her children from ill-treatment but did not award compensation as it considered that the finding of a violation provided just satisfaction. Following the introduction of new legislation, the applicant made further applications and obtained the restricting orders. In the meantime, the applicants had had to move away from their home, family and friends. The applicant alleged a violation of their rights under the articles 3, 8 and 41.

The Court found that the alternative measure proposed by the Government would not have provided the applicants with adequate protection and therefore did not amount to an effective remedy. The applicant had not been in a position to apply to sever the tenancy until approximately a year after the allegations against her ex-husband had been brought. Given the nature and severity of the allegations, the applicant and her children had required immediate protection. During that period there had therefore been no effective remedy open to them. The Court concluded that Slovakia had failed to fulfil its obligation to protect all of the applicants from ill-treatment, in violation of articles 3 and 8.

The judgment rendered by the Court is worth mentioning for its consistency with the rest of the case-law but the Court did not really clarify any new aspect in relation to domestic violence. It did not focus on the article 3, only stating that the treatment fell within the scope of this article, and the application of the article 8 is quite obvious. The case A. v. Croatia is in the same vein.

b) A. v. Croatia

i. Facts

The applicant is a Croatian national who has a daughter with her ex-husband B. According to psychiatric reports, he suffered from severe mental disorders. The reports recommended compulsory psychiatric treatment. The applicant’s ex-husband subjected her to repeated physical and verbal violent behaviour that often took place in front of their daughter who was also battered sometimes. The marriage was dissolved. Because of further severe acts of violence, the victim moved to a women’s shelter. Consequently, the national courts and the
applicant brought a series of separate proceedings against B. in the context of which they ordered certain protective measures such as periods of pre-trial detention, psychiatric or psycho-social treatment, restraining and similar orders and a prison term. Amongst those measures, some were implemented but others were not. At some point, the applicant informed the Courts that her ex-husband, in violation of a restraining order against him, had hired a private detective who had come to her secret address where she had been living after leaving the shelter. Because of this, she requested for an additional protective measure prohibiting him from harassing and stalking her. Her request was dismissed on the ground that she had not shown an immediate risk to her life.381

The applicant went before the ECtHR to complain about the authorities' failure to adequately protect her against domestic violence. She relied inter alia on articles 2, 3, 8 and 13. She also alleged that the relevant laws in Croatia regarding domestic violence were discriminatory, in breach of article 14.

ii. Reasoning

The Court started its reasoning by confirming the existence of positive obligations for the State to protect the applicant under the article 8 and explained that the case would be examined under that provision even though the obligation might also arise under articles 2 and 3, “in order to avoid further analysis as to whether the death threats against the applicant engaged the State's positive obligation under article 2 of the Convention, as well as issues pertinent to the threshold for the purposes of article 3 of the Convention.”382

It then recalled that the meaning of ‘respect for private life’ under the article 8 included protection of the physical and moral integrity of an individual.383

Following this explanation of the principles, the Court reviewed the measures that had been ordered and implemented, i.e. pre-trial detention and restraining orders. It then reminded its traditional approach that leaves an appreciable margin of appreciation to the national courts in the choice of appropriate measures. But it also recalled its power to review and intervene in cases of manifest disproportion between the gravity of the act and the results obtained at domestic level.384 Furthermore, the Court stressed out that it must show greater firmness in assessing breaches of the fundamental values of democratic societies since increasingly high standards are being required in the area of the protection of human rights and fundamental

381 Ibid., § 4-40.
382 Ibid., § 57.
383 Ibid., § 58.
384 Ibid., § 66.
liberties.\textsuperscript{385} This was the introduction to the measures that had been ordered but not followed or complied with: imprisonment, psychiatric treatment and fines. The Court recognized that the national courts had instituted several sets of proceedings against B.\textsuperscript{386} but that many of these measures had not been enforced, which had prevented the realization of the main purpose of criminal sanctions, \textit{i.e.} to restrain and deter the offender from causing further harm.\textsuperscript{387} As a consequence, the applicant stayed for a prolonged period in a position in which the authorities failed to satisfy their positive obligations to ensure her right to respect for her private life,\textsuperscript{388} and the Court concluded to the violation of article 8.\textsuperscript{389}

Finally, the Court examined the alleged violation of the article 14, by firstly recalling the elements of the \textit{Opuz} case that had led the Court to declare a violation of the Convention. Those elements were compared to the allegations of the victim and the evidence she had brought in the present case. The Court noted that applicant has not submitted any reports in respect of Croatia and that she did not allege that there were any attempts from the officials to hamper her efforts to seek protection against B's violence.\textsuperscript{390} Moreover, the Court held that the non-compliance with a number of sanctions and measures did not in itself disclose an appearance of gender-discrimination.\textsuperscript{391} The information submitted by the victim was considered as incomplete and unsupported by relevant analysis and not capable of leading the Court to draw any conclusions.\textsuperscript{392} The complaint was thus manifestly ill-founded and rejected.

iii. Comments

On the positive side, this case was the occasion for the Court to remind that the protection of private life under the article 8 also encompasses the physical and moral integrity of the individuals.\textsuperscript{393} The Court also explicitly emphasized the fact that increasingly high standards were being required in the area of the protection of human rights and fundamental liberties.\textsuperscript{394}

We have noticed two disappointing aspects in \textit{A v. Croatia}. Firstly, the Court missed an
opportunity to build on the Opuz precedent of treating domestic violence as a violation of article 3 and to clarify the circumstances in which this article is expected to apply. It chose to examine the compliance of the State with its positive obligations under article 8 and deliberately avoided any ‘further analysis’ in relation to article 3. This is problematic for the issue of the victim’s withdrawal: since Opuz, when domestic violence fell under article 3, the state’s duty to investigate and prosecute did not depend on a complaint by the victim. That might not be the case under article 8 where the issue might fall within the state’s margin of appreciation. The Court’s reluctance to examine and apply article 3 is also particularly regrettable since the severe nature of the applicant’s abuse would easily have met the article 3 threshold.395

Secondly, the Court did not really give any interesting or original opinion in relation to the discrimination aspect, which was the main finding in Opuz.

Those two cases have somehow disappointed because they represented an opportunity for the Court to keep on developing higher standards of protection but it did not. The following cases and admissibility decisions also somehow show this period of confirmation with no further developments by the Court.

III.2.1.6. Consistency of the more recent decisions with Kalucza v. Hungary and Hajduova v. Slovakia and admissibility decisions, with M.T. and S.T. v. Slovakia, Kowal v. Poland and Irene Wilson v. The United Kingdom

The domestic violence cases that are the object of this point are quite recent and are worth mentioning because they attest the application of the Court of its usual principles in the field of domestic violence. The Kalucza case396 does not really develop anything new, but the Hajduova case397 shows two interesting aspects. The three admissibility decisions are also a good illustration of the usual line of reasoning of the Court, with the particularity that they have been declared inadmissible. Because their interest is somehow limited, we will briefly outline the facts and the findings of the Court in those decisions.

a) Kalucza v. Hungary:

The applicant is a Hungarian national who unwillingly shared her flat with her violent partner, Gy.B., pending numerous civil disputes concerning the ownership of the flat. The

396 ECtHR, Kalucza v. Hungary, 24 April 2012.
397 ECtHR, Hajduová v. Slovakia, 30 November 2010.
couple’s relationship involved regular mutual verbal and physical assaults. The applicant requested the help of the authorities on numerous occasions, lodging criminal complaints for rape, assault and harassment. The outcome of the proceedings were variable. Ms Kalucza also made two requests for a restraining order to be brought against Gy.B. They were both dismissed though a series of medical reports were drawn up which recorded evidence of battering.

Relying on *inter alia* articles 2, 3, 8 and 13, Mrs Kalucza alleged that the Hungarian authorities had failed to protect her from constant physical and psychological abuse in her home.

The *Kalucza* case is a mere application of the concept of positive obligations by the Court, which will find a violation of the article 8 because the domestic courts had taken a long time to decide on the request for a restraining order, and had failed to give sufficient reasons for refusing it and because there was a lacuna in the law on restraining orders due to violence among relatives. There is nothing noticeable about this case except for the confirmation of the previous case-law of the Court.

b) *Hajduova v. Slovakia*:

The applicant is a Slovak national. Her husband was remanded in custody after he attacked her. She moved to a shelter with her children. The court ordered, as recommended by experts, that her husband be detained for psychiatric treatment as he was suffering from a serious personality disorder. That treatment was not carried out. On being released, he renewed his threats against Mrs Hajduová and her lawyer, who filed new criminal complaints. He was arrested by the police and charged with a criminal offence and the District Court arranged for psychiatric treatment.

Relying on *inter alia* articles 5 and 8, the applicant complained that the domestic authorities had failed to comply with their statutory obligation to order that her former husband be detained in an institution for psychiatric treatment, following his criminal conviction for having abused and threatened her.

The Court considered that the threats made by the former husband of the applicant were enough to affect the psychological integrity and well-being of the applicant so as to give rise to an assessment as to compliance by the State with its positive obligations under article 8. It was the authorities’ inactivity and inaction that enabled those threats to occur and they failed in their duty to take reasonable preventative measures, violating the article 8.

Even thought this case is also a very step-to-step application of the previous findings of the Court, there are two interesting aspects to it: firstly, the Court emphasized that the
applicant’s particular vulnerability as a woman victim of domestic violence necessitated “an even greater degree of vigilance.” Secondly, it pointed out the real risk of future physical violence, extending the protection available under article 8 to persons at risk of domestic violence where that violence has not yet materialized.

We will now analyse the three decisions on admissibility that have been dealt the same way, with slight variations depending on the facts. All of them have been examined by the Court under the article 8 of the Convention and declared inadmissible. In every decision, the Court reminds the four basic principles that are the basis of an analysis under article 8: that right entails positive obligations for the States, the concept of private life includes a person’s physical and psychological integrity, that victims of domestic violence are of a particular vulnerability and their protection requires an active State involvement, and the importance of the margin of appreciation of States.

c) M.T. and S.T. v. Slovakia

There had been a history of violence between the first applicant and her former husband, A., but only one incident was prosecuted and resulted in A.’s acquittal. The Court considered that, rather than imposing a strict requirement of a criminal conviction of A., the crucial issue raised by article 8 was the overall effectiveness of the protection rendered by the State to the Convention rights of the applicant and her child. The Court noted that the criminal proceedings had been conducted with due expedition and the evidence had been thoroughly examined. The Court also considered that the criminal proceedings against A. must have had a general as well as individual deterrent effect and, in combination with the other interim measures taken by the authorities, resulted in no further violence by A. The authorities could not, therefore be reproached for any lack of diligence.

d) Kowal v. Poland

The applicant’s father was convicted of domestic violence directed towards him, his brother and their mother. The father was sentenced to imprisonment, with a suspension. When he continued to be violent, he was ordered to leave the family home. The Court found that, in light of the sentence, of the assignation of a probation officer to supervise the father’s conduct, and of the order to leave the family home after the continuation of the violence, the

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398 Ibid., § 50.
401 ECHR, Kowal v. Poland, 18 September 2012.
allegations made by applicant had been examined speedily, and the substantive outcome of the proceedings had been intended to protect him and his family against domestic violence. It could not therefore be said that the authorities’ response was manifestly inadequate with respect to the gravity of the offences in question and that the decisions did not have a preventive or deterrent effect on the father’s conduct.

e) Irene Wilson v. The United Kingdom:402

Here, there was no continuing situation of violence against the applicant. Her husband assaulted her once at their house, after they had been out drinking. She suffered multiple injuries. The prosecutor took the decision to proceed with the prosecution at a time when the applicant wished to withdraw her complaint, convicted the husband to imprisonment with suspension and kept the applicant informed about the proceedings. Therefore, the Court concluded that the authorities did not fail in their positive obligation to secure the applicant her rights under article 8.

Those recent judgments and decisions can seem somehow disappointing for their lack of innovation. Nevertheless, they do confirm the will of the Court to continuously apply the principles it developed in the field of domestic violence. Moreover, in March 2013, the Court rendered a judgment that seemed to clarify the application of the article 3 to the field of domestic violence.

III.2.1.7. Partial clarification of the application of the article 3 to cases of domestic violence: Valiuliene v. Lithuania

The applicant, Loreta Valiulienė, filed a complaint in 2001 before the District Court for several battering in a short period of time by her partner, J.H.L. In 2002, that court forwarded her complaint to the public prosecutor, ordering him to start his own pre-trial criminal investigation. J.H.L. was charged with having injured her. The investigation was subsequently suspended several times for different reasons, and reopened on appeal by a higher prosecutor on the ground that the investigation had not been sufficiently thorough. In 2005, the prosecution was discontinued because following a legislative reform, the prosecution should have been brought by the victim in private capacity. This decision was upheld by the district court. There was no information in the case file to indicate that the case was of public interest or that the victim could not protect her rights by means of a private prosecution. She lodged another request to bring a private prosecution, which was

402 ECHR, Irene Wilson v. The United Kingdom, 23 October 2012.
eventually refused without examination in 2007, as the prosecution had become time-barred.\footnote{ECtHR, Valiuliene v. Lithuania, 26 March 2013, § 6-32.} She went before the ECtHR complaining of a violation of her rights under \textit{inter alia} the articles 3 and 8.

The Court chose to examine the case under the article 3 and firstly examined whether the ill-treatment attained the required minimum threshold of severity. The Court pointed out that this depended on “all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim.”\footnote{Ibid., § 65.} It then clarified the circumstances in which a treatment can be considered as inhuman, namely when “it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering”.\footnote{Ibid., § 66 and § 67.} Since the physical violence suffered by the applicant was quite severe and occurred within a time frame of one month, this meant that it stretched over a period of time and should be examined as a continuing situation, meeting the criteria of the “inhuman” aspect.

The ‘degrading’ aspect, according to the Court, was met namely “when it was such as to arouse in its victims feelings of fear, anguish and inferiority, capable of humiliating and debasing them and possibly breaking their physical or moral resistance.”\footnote{Ibid., § 66 and § 67.} The Court underlined the psychological aspect of the alleged ill-treatment and acknowledged that psychological impact is an important aspect of the domestic violence.\footnote{Ibid., § 67-69.} The Court thus considered that the ill-treatment of the applicant, which on five occasions caused her physical injuries, combined with her feelings of fear and helplessness, was sufficiently serious to reach the level of severity under of article 3 and thus raised the State’s positive obligation under this provision.\footnote{Ibid., § 70.}

The Court thus examined whether there was effective implementation of adequate criminal-law mechanisms. It firstly recalled the margin of appreciation of the States but also the fact that one of the purposes of imposing criminal sanctions is to restrain and deter the offender from causing further harm. That was not the case here, since the circumstances of the case were never established by a competent court of law, for a series of reasons imputable to the State. The Court could not accept that “the purpose of effective protection against acts of ill-treatment is achieved where the criminal proceedings are discontinued owing to the fact that the prosecution has become time-barred and where this has occurred, as is shown above, as
a result of the flaws in the actions of the relevant State authorities” and found a violation of the article 3.

As we mentioned, this case clarified the circumstances in which the article 3 applies to cases of domestic violence, as it appears quite clearly from the reasoning. Four years after the *Opuz* case, it is very likely that this decision will be welcome by the actors fighting against domestic violence.

This chapter highlighted the evolution of the reasoning of the Court in cases of domestic violence. The beginnings did not concern domestic violence specifically, but rather developed the closely-related concept of positive obligations in *Airey* and *Osman*. The application of that theory to actual domestic violence cases started with the *Kontrová* and *Branko Tomašic* cases and was further articulated in *Bevacqua*. The Court then rendered the landmark case *Opuz*, stating for the first time that domestic violence amounts to gender-discrimination. The following judgments, such as of *A v. Croatia* and *E.S. and Others* were somehow limited to the confirmation of *Opuz* until 2013, when the *Valiuliene* case brought a new finding with the clarification of the application of the article 3. The following chapter will make a similar analysis of the judgments of the Court on rape cases.

### III.2.2. Rape cases

The issues raised in rape cases are comparable to those in domestic violence cases: the existence and scope of the positive obligations of the State, under which article the Court should examine the violation complained of and the means to effectively achieve the protection of victims. The number of rape cases that have come before the ECtHR is greater than the domestic violence cases. For that reason, we will only analyse a selected number of rape cases, *i.e.* those that have defined the standards of the Court. The rest of rape cases only demonstrate a limited interest for this dissertation: the Court applies a well-defined line of reasoning but does not give original findings.

#### III.2.2.1. First case of rape before the Court and articulation of the related positive obligations: *X and Y v The Netherlands*

The case *X and Y* was the first rape case before the Court, where it developed the fundamental theory of positive obligations in relation to rape cases, which made it a landmark judgment.

The applicants were Miss Y and her father Mr X. It was alleged that Y, who was living in a

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409 Ibid., § 85.
home for mentally handicapped children, was raped when she was sixteen by the son-in-law of the home’s directress. The father of Miss Y filed a complaint on her behalf since she was unable to sign the complaint because of her mental condition. However, the criminal proceedings were discontinued because the criminal code required the complaint to be made by the actual victim. There was thus a gap in the law on this point. Even though the national Court recognized this problem, it did not permit those criminal proceedings.

The applicants brought a complaint under *inter alia*, articles 3 and 8 alone and in combination with article 14.

The Court analysed the case under article 8 and recalled the findings of the *Airey* case, namely that although the object of that article is that of protecting the individual against arbitrary interference by the public authorities, it also entails positive obligations for them, even in the sphere of the relations of individuals between themselves.\(^{410}\)

The Court mentioned the importance of the margin of appreciation of States in the choice of the measures to secure compliance with that article, but still found that criminal law provisions were required, since civil redress was not sufficient in a situation where fundamental values and essential aspects of private life were at stake.\(^{411}\) Since no provision of the criminal code provided Miss Y with practical and effective protection, the Court found she was the victim of a violation of Article 8.\(^{412}\) The Court found no violation of the article 14 in combination with article 8 because there was no clear inequality of treatment in the enjoyment of the right in question and decided to not consider the claim under the article 3.

The reactions to this case were clear-cut: very positive in relation to the article 8 and the positive obligations aspect and very disappointed in relation to the absence of consideration of article 3 by the Court. Two questions arise in relation to the application of this article to rape cases and have not been answered: can rape be classified as inhuman and degrading treatment or torture? And if so, which type(s) of positive obligations are entailed by that right? The disappointment also came from the fact that a condemnation of the State under article 3 might have more weight than the article 8 considering the terms employed in that article.\(^{413}\) Nevertheless, *X and Y* represents the first time that the ECtHR has declared that a State can be held responsible for the violation of an individual’s human rights based on

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harm perpetrated by a non-state individual if it has failed to fulfil its positive obligations to protect human rights. 414 This is a huge step that will influence the subsequent development of the Court’s case-law.

The next case that is analysed here did not focus on that issue. The evolution of further findings concerning positive obligations and the application of the article 3 in rape cases will only occur 15 years later with Aydin v. Turkey, 415 which we will analyse after the following two cases (analysed together).

III.2.2.2. Rape must always be punished – end of the ‘marital rape exemption’: CR v. UK and SW v. UK

Even though the two cases that are the object of this section 416 might be considered as domestic violence cases, they mainly focus on the rape aspect. It is striking to see that they haven’t been brought before the Court by women alleging to be victims of domestic violence but by two men convicted of rape and attempted rape. They claimed that forcing their wives to engage in sexual intercourse could not be considered as rape since it was an established rule of common law that in getting married a woman was deemed to have consented once and for all to intercourse with her husband. 417 They contended that the removal of the marital rape exemption by the domestic courts constituted a violation of their rights under article 7 if the Convention, the right against retrospective criminal liability. 418

The Court considered that the national decisions continued “a perceptible line of case-law development dismantling the immunity of a husband from prosecution for rape upon his wife. (...) This evolution had reached a stage where judicial recognition of the absence of immunity had become a reasonably foreseeable development of the law.” 419 The core of the reasoning of the Court lies in a single paragraph, and establishes that “the essentially debasing character of rape is so manifest” that the result of the decisions of national Courts were consistent with the object and purpose of article 7 and was “in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human

414 Ibid., 201.
416 ECtHR, C.R. v The United Kingdom, 22 November 1995 and ECtHR, S.W. v. The United Kingdom, 22 November 1995.
419 ECtHR, C.R. v The United Kingdom, 22 November 1995 and ECtHR, S.W. v. The United Kingdom, 22 November 1995, respectively § 41 and § 43.
freedom".  

The decision of the Court was coloured by a complete and understandable lack of sympathy for the applicants,\textsuperscript{421} which once again showed the will of the judicial institutions (amongst which the ECtHR) to give priority to the rights of the victim on those of the perpetrator. It confirmed the hope that had emerged in the case \textit{X and Y} that gender issues can be decisive in the case-law of the Court.\textsuperscript{422} It also represented a further shift in the boundary between the public and private spheres: sexual offenses committed within the marital home can no longer be considered as automatically falling outside the protection of the law.\textsuperscript{423} This decision was highly welcomed as a positive development, since “the law represents the formal expression of the values and aspirations of a society.”\textsuperscript{424}

Those two cases are special because they were not brought before the Court by a victim of violence against women. That influenced the whole development of the reasoning. As a matter of fact, they are different from the rest of the case-law of the Court on rape, which focuses on the questions we mentioned earlier: the qualification of rape under article 3 and the scope of the positive obligations of the State. The Court will achieve a great improvement on that aspect in the following case, \textit{Aydin v. Turkey}.

\textbf{III.2.2.3. First consideration of rape under the article 3: Aydin v. Turkey}

\textit{Aydin v. Turkey} is an important judgment because it is the first time that rape has been considered under article 3 and labelled as torture.

The applicant, Mrs Aydin, is a Turkish citizen of Kurdish origin who was 17 years old at the time of the events. She was arrested in her village together with her father and her sister-in-law. They were questioned about supposed terrorist activities or sympathies and taken to the gendarmerie headquarters. The applicant was blindfolded, beaten, stripped naked, placed in a tyre and hosed with pressurised water. She was then taken to another room where she was stripped and raped by a member of the security forces. After three days, she was released with her family. They went to the Public Prosecutor to complain about their treatment in custody. He took their statements and sent them to the State hospital where they were examined. The doctor noted the wounds of the applicant but could not infer anything from

\textsuperscript{420} Ibid., respectively § 42 and § 44.
\textsuperscript{423} Ibid., 96.
\textsuperscript{424} Ibid., 97.
them since he had not previously dealt with rape cases.

On the level of investigatory measures, reports were issued, stating that the applicant and her family had never been in custody. Thereupon, the Public Prosecutor reported that there was no evidence to support the applicant's complaints but that the investigation was continuing. Following the communication by the Commission of her application to the Government, the applicant her family were subjected to intimidation and harassment.\footnote{ECtHR, \textit{Aydin v. Turkey}, 25 September 1997, § 35.} The applicant alleged a violation of \textit{inter alia} articles 3, 6, and 13.

The interesting part of the reasoning lies in the examination of the violation under article 3, where the Court recalled the distinction between torture and inhuman and degrading treatment and insisted that the term “torture” attached only to “deliberate inhuman treatment causing very serious and cruel suffering.”\footnote{Ibid., § 83.} It then focused on the particular circumstances of the case, and stressed out that “rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence.”\footnote{Ibid., § 84.} Other aggravating circumstances were also taken into account, namely the sex and youth of the victim. The Court clarified that the violence suffered by the victim served a purpose: the security situation of the region. Finally, and most importantly, the Court considered that “the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of article 3 of the Convention. Indeed the Court would have reached this conclusion on either of these grounds taken separately.”\footnote{Ibid., § 86.} The Court also held a violation of the article 13 for the failures of the State in the inquiry and medical examination. The complaint under article 6 was not considered.

This judgment has been qualified as a “remarkable and progressive decision”. It has confirmed that rape can satisfy the minimum threshold of the article 3 in given circumstances. Nevertheless, elements of the judgment gave rise to some concerns as to the scope of the decision. The circumstances of the case, namely the sex and youth of the victim as well as the fact that the violence was perpetrated by a State agent threaten to hinder the usefulness of the case since most rapes are perpetrated by private individuals against other
private individuals. The Court also did not clarify which rapes constituted torture. In Aydin, the determination of the torture threshold was dependent on a large number of features and that might indicate that the Court has taken the approach that rape per se does not constitute the severity of harm for torture.

This case is also interesting in its positive obligations dimension. Singularly, it has been examined under article 13. The Court linked that article with the article 3 in that “the nature of the right safeguarded under article 3 of the Convention has implications for article 13.” As we saw in the previous case-law of the Court, the article 3 can impose duties of investigation and legislative initiatives. In Aydin, it was said that article 13 was violated where state authorities failed to conduct an adequate investigation of an allegation that someone has been a victim of inhuman or degrading treatment.

Finally, it is noticeable that in the Aydin case, there is a sign of influence by the Inter-American system since the Court mentioned the reference of Amnesty International to the case-law of the Inter-American system that related to the conditions for establishing rape.

The Court has somehow confirmed the Aydin case by rendering a similar decision in the case Maslova and Nalbandov v. Russia in 2008. Since the facts and findings are almost totally similar, we will not make an analysis of that case but it is worth mentioning that the Court confirmed that rape amounts to torture in certain circumstances. Even if this case fortunately validated the line of reasoning of the Court, it once again illustrated the rape perpetrated by State officials on detainees.

Despite the fears concerning the limited scope of the Aydin case, the following years would see the development of the doctrine of positive obligations to bring to account State failures regarding the investigation and prosecution of previously marginalised forms of rape, particularly acquaintance rape. This is illustrated by the following case.

III.2.2.4. Application of the article 3 to rape cases involving non-state actors and importance of the effective application of measures of protection: MC v. Bulgaria

The MC case as developed a number of interesting findings on different levels including

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433 ECHR, Maslova and Nalbandov v. Russia, 24 January 2008.
inter alia the definition of rape, the application of the article 3 to rape cases and the scope and content of the positive obligations of the States.

a) Facts

The applicant, M.C., alleged that she was raped by two men, A. and P. when she was 14 years old. She claimed that, on 31 July 1995, on the way back from a disco, A. suggested stopping at a reservoir for a swim. M.C. remained in the car. P. came back before the others, and allegedly forced her to have sexual intercourse with him. In the early hours of the following morning, she was taken to a private home where A. forced her to have sex with him at the house. She said she cried continually both during and after the rape. She was later found by her mother and taken to a hospital where a medical examination found that her hymen had been torn. A. and P. both denied raping her. On March 1997, the District Prosecutor ordered closure of the criminal investigation because the use of force or threats had not been established beyond reasonable doubt. In particular, no resistance on the applicant's part or attempts to seek help from others had been established. The applicant appealed unsuccessfully.

She complained before the ECtHR that Bulgarian law and practice did not provide effective protection against rape and sexual abuse, as only cases where the victim resists actively are prosecuted. She claimed violation of her rights under inter alia articles 3, 8, 13 and 14 of the Convention.

b) Reasoning

The Court considered the claim both under articles 3 and 8 and reiterated that, under those articles, the States had a “positive obligation both to enact criminal legislation to effectively punish rape and to apply this legislation through effective investigation and prosecution.”

The margin of appreciation of the State for the choice of those measures was once again stressed out by the Court but balanced with the need to effectively secure the protection of the individuals under the Convention.

The Court then reviewed the conception of rape through the practice of the different Member States and concluded that in most of them, “any reference to physical force had been removed from legislation and/or case-law. (…) in case-law and legal theory, it was lack of consent, not force, that was critical in defining rape.” This “trend” was also encouraged by the Council of Europe. The Court insisted on the fact that the development

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437 Ibid., § 158-159.
438 Ibid., § 162.
of law and practice in that area reflected the evolution of societies towards effective equality and respect for each individual's sexual autonomy.\footnote{Ibid., § 165.} It thus concluded that “the member States' positive obligations under articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim.”\footnote{Ibid., § 166.}

The Court then turned to the Bulgarian law and practice, and observed that the authorities applied a restrictive approach to the prosecution of rape. Moreover, it noted that the circumstances of the case would have necessitated a context-sensitive approach but that the authorities failed to explore the available possibilities for establishing all the surrounding circumstances and did not assess the credibility of the conflicting statements made. The Court considered that the authorities had failed to consider the possibility that the applicant might not have consented or that, despite the absence of force or resistance, a serious probing of the relevant circumstances might have revealed sufficient evidence of an intention on the part of the perpetrators to disregard the victim’s will.\footnote{J. CONAGHAN, “Extending the reach of human rights to encompass victims of rape: M.C. v. Bulgaria”, \textit{Fem. LS.} 2005, Vol. 13, 152.} The Court therefore concluded that “the investigation of the applicant's case and, in particular, the approach taken by the investigator and the prosecutors in the case fell short of the requirements inherent in the States' positive obligations – viewed in the light of the relevant modern standards in comparative and international law – to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse.”\footnote{ECtHR, \textit{M.C. v. Bulgaria}, 4 December 1998, § 185.}

The Court held that there was a violation of articles 3 and 8. It considered that no separate issues arose under the articles 13 and 14.

c) Comments

The analysis of the \textit{MC} case highlights an impressive number of important findings.

It is worth mentioning that the alleged rapists were not State actors, and that the victim therefore relied on the horizontal effect of the Convention.

i. Examination of the complaint under both articles 3 and 8

The Court chose for the first time to consider the complaint both under the articles 3 and 8 in contrast to \textit{X and Y v. the Netherlands} or \textit{Aydin} where only one article was considered. The judge Tulkens found this so important and significant that she discussed it in her concurring opinion, stating that it was now established that “rape infringes not only the right
to personal integrity (both physical and psychological) as guaranteed by article 3 but also the right to autonomy as a component of the right to respect for private life as guaranteed by article 8.

Secondly, it seemed to be taken for granted by the Court that the situation of rape in this case satisfied the severity threshold of the article 3. It is surprising that the Court did not explain its findings in more details since the question of the qualification of rape and the severity threshold are sensitive matters.

ii. Consent rather than force to define rape

One of the most appreciable findings of the MC case is the emphasis on consent rather than force in relation to definitions of rape. There is now an obligation on States to prosecute all forms of rape, regardless of whether the victim actively resisted, and that is a landmark development from the perspective of protection of women’s dignity. The court achieved this improvement by a gender-sensitive methodological approach holding that rape law must reflect changing social attitudes requiring respect for the individual’s sexual autonomy and for equality.

iii. Guidelines for the States

The MC case also gave precisions for the States in the exercise of their powers. Firstly, the Court balanced the margin of appreciation of States with the evolving convergence in standards in Members States of the Council of Europe and the importance to secure the rights under the Convention. Secondly, the Court clarified the scope of the positive duties of States, which are not limited to putting in place the necessary measures, in the form of criminal laws proscribing rape, but extend to the effective implementation of those measures to secure the relevant rights.

This is similar to the reasoning of the CEDAW Committee in the cases Sahide Goekce and Fatma Yildirim, analysed earlier. The law must go beyond mere deterrence and act both as an effective deterrent and a punishment.

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444 Ibid., 155.
The ruling also indicated that positive obligations might involve employing more gender-sensitive methods in the ways that rape cases are processed.\footnote{P. LONDONO, “Positive Obligations, criminal procedure and rape cases”, \textit{EHRLR} 2007, 167.} This illustrates the influence between the Courts of the different systems, since the IACtHR would advocate the same idea in 2009 in \textit{Gonzales et. al. v. Mexico}. The Court gave an example of what needed to be done, for instance in this case the State should have considered in its legislation the “frozen-fright” syndrome, i.e. the lack of violent opposition and resistance by victims of rape. If it had considered that syndrome, the State would not have required the use of physical force for establishing rape.\footnote{E. BREMS, “Straatsburg beschermt tegen verkrachting”, \textit{Juristenkrant} 2004, 13.}

\textbf{iv. Rape as torture?}

We can be considered as a problematic aspect of the case is that the Court did not clarify whether the acts of violence of the present case amounted to torture.\footnote{M. WESTMARLAND, “Rape and Human Rights: a feminist perspective”, uned. Phd. thesis Philosophy University of York, 2005, 155.} As a consequence, all the positive findings on torture in the case-law of the Court till now involve state actors.

As we mentioned, the number of important aspects in this case is impressive. It can be considered as the last landmark case on rapes, even though other significant cases were also rendered after it, but they often were limited to a mere application of the principles developed by the Court in the cases we analysed in this section. Even if the majority of the judgments rendered by the Court demonstrate its inclination to privilege the victims’ rights, there is one particular case rendered in 1996 where the Court balanced those rights with other interests and decided in favour of the State. In order to have a complete picture of the case-law of the Court, we will analyse this decision in the next point.

\textit{III.2.2.5. The particular case} Stubbings and Others v. The United Kingdom

The four applicants, in completely unrelated cases, alleged they were raped and sexually abused while they were children. When the applicants were older they all attempted to use civil law to claim compensation from the alleged perpetrators for the different abuses but all of the civil proceedings were dismissed as ‘time-barred’. The four applicant thus alleged under the ECHR \textit{inter alia} that they had been denied access to a court to have their claims heard, in breach of article 6. They claimed that this had caused a violation of their right to private and family life under article 8 and also alleged a violation of the article 14 in combination with those two articles.

The relevant part of the reasoning of the Court lies in the examination of the article 6. The
Court recalled that States enjoy a certain margin of appreciation to decide how their citizens have the right to access to a Court, as long as it pursues a legitimate aim and that there is proportionality between the means employed and the aim sought to be achieved. The Court accepted the argument of the State that the limitation period of six years to commence proceedings provided finality and legal certainty and therefore served a legitimate aim. Moreover, the Court agreed with the government that the applicants still had access to a criminal court with no time limitations if there was enough evidence to proceed with the case. Finally, the Court acknowledged that the rules applied in the State may not be the most appropriate for victims but that the essence of the right was not breached and the restrictions in question pursued a legitimate aim and were proportionate and therefore felt into the scope of the margin of appreciation of States and that there was no violation.

This case thus shows that the Court proceeds to a real assessment of the facts when taking a decision, and can also be sensitive to arguments that are not presented by women victim of violence. Nevertheless, it is a very particular case and the rest of the case-law of the Court shows a clear inclination towards privileging the rights of the victims.

The case-law of the Court on rape has rapidly showed the way towards more protection of women, with the case X and Y that overcame the public/private distinction and established the principle of positive obligations under the article 8 in cases of rape by private individuals. Then Court then went a step further with CR and SW and the abolition of the marital rape exemption, giving priority to the victims over the perpetrators of violence. The focus was then on rapes perpetrated by State actors in the Aydin case, where the Court managed once again to render a landmark judgment establishing for the first time that rape satisfied the severity threshold of the article 3 and could amount to torture under certain circumstances. Finally, in M.C., the Court insisted on the effective implementation of measures of protection entailed by the positive obligations of States and confirmed that rape can also fall under the scope of the article 3 in situations that only involve private parties. All the cases we examined have been won by the victims of rape, except for the particular case of Stubbings, and this trend is also observable in the rest of the case-law of the Court on rape that, as we mentioned, is consistent with the examined cases. What could be disappointing is that even though the Court seems to understand rape and other forms of

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452 ECtHR, Stubbings and others v. The United Kingdom, 22 October 1996, § 50.
453 Ibid., § 52.
454 Ibid., § 57.
sexual violence as being part of an overall picture of discrimination against women, rape has never been formally conceptualized as a gender-based discrimination.\textsuperscript{455}

After having examined what we consider as the two main fields of violence against women, we will give a review of the approach of the Court to the other types of violence.

III.2.3. Other types of gender-violence

The other types of violence against women have been put together in a section because the Court delivered fewer cases for each type in comparison with the two main sections on domestic violence and rape. Because of this, it is harder to spot an evolution and we will rather identify the general approach and the principles developed by the Court for each type of violence.

\textit{III.2.3.1. Applicants at risk of being subjected to inhuman or degrading treatment in their countries of origin:} Collins and Akaziebie v. Sweden, Izevbekhai v. Ireland, Omeredo v Austria, N. v. Sweden and A.A. and Others v. Sweden

Contrary to the rest of the case-law, the applicants in those cases did not come before the Court because they were victims of violations of the article 3 but rather because their feared to be subjected to different types of inhuman or degrading treatment or punishment and used that threat as an argument for their claims for asylum. The Court has developed a recurring line of reasoning when addressing those situations: the review of the general human rights situation in the country of origin with a focus on the subject-matter that applies to the applicants, the examination of a possibility of internal relocation alternative in the country, and a very important emphasis on the personal situation of the applicants.

a) Female genital mutilation

The three cases that have been brought before the Court present similar facts: the applicants are women of Nigerian origin who came before the ECtHR because their claims for asylum for themselves alone (in \textit{Collins}) or together with their daughter(s) (in \textit{Izvebkhai} and \textit{Omeredo}) had been rejected respectively in Sweden, Ireland and Austria. They complained under \textit{inter alia} article 3 that, if expelled to Nigeria, there was a real risk that they would be subjected to female genital mutilation [hereinafter “FGM”].

The Court thus firstly reviewed the human rights relevant background information in Nigeria. It did this in order to assess whether there is risk from non-state actors to practice

\textsuperscript{455}I. RAĐACIC, “Rape cases in the jurisprudence of the European Court of Human Rights: defining rape and determining the scope of the state's obligations”, \textit{European human rights law review} 2008, Vol. 13, No. 3, 131.
FGM in the State and if the State is able and willing to respond effectively to that risk. It examined the legislative framework and the *de facto* protection. The outcome of this analysis will be mentioned in the reasoning.

The Court then started with the assessment that expulsion from a State can be considered as a violation of the Convention “where substantial grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country.”\(^{456}\) The fact that FGM amounts to a violation of the article 3 was then confirmed. Consequently, the Court made an assessment of the risk that the applicants would suffer FGM in their country of origin. If the risk is confirmed, the State can be held responsible for violation of the Convention. It is important to mention that the burden of proof rests on the applicant who has to adduce sufficient, plausible evidence of the risk.

The Court reminded the relevant facts it had met in the examination of the human rights relevant background information on FGM and its practice in Nigeria. The general conclusion was that even though there is no federal law against FGM, 12 of the 36 States in Nigeria have adopted laws specifically prohibiting FGM.\(^ {457}\) It then used statistical data from a number of reports from the State and different organizations. Though the results varied depending on the organizations, the Court concluded that FGM was much more prevalent in the south part of the country, which was not the region of origin of the applicants.\(^ {458}\) Because of that, the Court considered that the applicants could have chosen to relocate to that part of the country, relying on the “internal flight alternative”.\(^ {459}\)

The Court then focused on the applicants’ personal situation in Nigeria. It took into account namely the lack of pressure from the family and the community at large, the level of education of the applicants and their professional experience, the not-so-young age of the applicants, their financially and socially privileged position,\(^ {460}\) and personal characteristics such as “a considerable amount of strength and independence”.\(^ {461}\) This led to the conclusion that the applicants had failed to substantiate that they would face a real and concrete risk of being subjected to female genital mutilation upon returning to Nigeria and that the applications were inadmissible.

\(^{457}\) Ibid., § 38.  
\(^{458}\) ECtHR, *Collins and Akaziebie v. Sweden*, 8 March 2007, point C.  
The first thing that comes to mind when examining the outcome of the three cases is the paradox between the Court’s definition of FGM as ill-treatment in violation of the article 3, and that its case-law eventually does not provide protection from expulsion to the applicants. The question arises whether the Court chose a formalistic interpretation of the internal flight alternative risks, not taking into account the actual (lack of) possibilities for the victims and the situation in the country. Fears have been expressed that there might be an actual lack of access to justice for those exiled women and that the approach of the Court is actually different in comparison with the rest of the case-law where there was a clear inclination to protect women. The practical challenges relating to FGM should call for a particularly flexible approach to assessment of risk. We will examine the answer to this critic in the general comments on all the cases of this section.

The Court reached a different conclusion using the same criteria in the case N. v. Sweden.

b) Violence and social exclusion

N. is an Afghan national. She applied for asylum in Sweden, together with her husband X. in 2004. They claimed that they had been persecuted in Afghanistan because X. had been a politically active member of the communist party. The asylum application was rejected in 2005. N. appealed claiming that, as she had in the meantime separated from her husband, she would risk social exclusion and possibly death if she returned to Afghanistan. Her appeal was also rejected. She applied for a residence permit three times, as well as for divorce from X., submitting that since she had started an extra-marital relationship with a man in Sweden, she was at very high risk of persecution in Afghanistan, namely long imprisonment or even death. All her applications were rejected. She went before the ECtHR complaining of the violation of her rights under inter alia the article 3.

Once again, the Court firstly reviewed the relevant information on the State, which we will mention subsequently in the reasoning.

The Court then turned to the analysis of the complaint under article 3 and, similarly to the FGM cases, stated that a State can be held responsible where the applicant shows substantial grounds for believing that if deported, he or she will face a real risk of being subjected to treatment contrary to article 3.

The Court referred to the information on the State and considered that, even being aware of reports of serious human rights violations in Afghanistan, it did not find that they showed,

464 Ibid., § 51.
on their own, that there would be a violation of the Convention if N. were to return to that country.\textsuperscript{465} Nevertheless, the Court examined the personal situation of the applicant and noted that women were at a particularly heightened risk of ill-treatment in Afghanistan if they were perceived as not conforming to the gender roles ascribed to them by society, tradition or the legal system there.\textsuperscript{466} The fact that N. had lived in Sweden and wanted to divorce her husband might result in serious life-threatening repercussions in Afghanistan. Moreover, because of her lack of contacts in the country, an internal flight or relocation alternative was not available to the victim. Reports had also shown that around 80\% of Afghani women were affected by domestic violence, which the authorities saw as legitimate and therefore did not prosecute. Unaccompanied women, or women without a male "tutor" were doomed to social rejection and discrimination. The Court considered it could not ignore the general risk indicated by statistic and international reports and found that there were substantial grounds for believing that if deported to Afghanistan, the applicant would face various cumulative risks of reprisals falling under article 3 from her husband, his family, her own family and the society. Accordingly, the Court held that the implementation of the deportation order against the applicant would give rise to a violation of the article 3.\textsuperscript{467}

Since this case has been rendered before two of the three judgments of FGM, we cannot conclude any evolution or change in the approach of the Court. There is no particularly original finding in comparison with the abovementioned cases. What we can point out is that the Court, using the same criteria than in the FGM cases, reached a different conclusion and accepted the claim of the applicant. This confirms the accuracy of the approach of the Court and denies the hypothesis of a restrictive approach when facing asylum claims.

c) Honour crime and forced marriage

The applicants, Mrs A.A. and her five children, are Yemeni nationals currently living in Sweden pending enforcement of a deportation order to send them back to Yemen. They arrived in Sweden in 2006 and immediately applied for asylum and residence permits. Before the Migration Board, Mrs A.A. claimed that she had suffered from years of abuse by her husband but that her main reason for leaving Yemen had been to protect her minor daughters, who were either being threatened with or had already been forced into an arranged marriage. The Swedish migration courts ultimately rejected their applications in 2009, considering that the applicant’s problems mainly concerned the personal sphere,

\textsuperscript{465} Ibid., § 52.
\textsuperscript{466} Ibid., § 55.
\textsuperscript{467} Ibid., § 64.
caused among other things by the country’s traditions, and had been related to financial matters, rather than to honour.

Relying on *inter alia* articles 2 and 3, the applicants alleged before the ECtHR that, if deported to Yemen, they would face a real risk of being the victims of an honour crime as they had disobeyed their husband/father and had left their country without his permission.\(^{468}\)

The Court used its usual method when addressing a situation where applicants allege to be at risk of being subjected to inhuman or degrading treatment in their countries of origin: a review of the relevant information on the country, the confirmation of the existence of the positive obligations entailed by the article 3 in those circumstances and the assessment of whether the applicants showed there were substantial grounds for believing that their would face a real risk to be subjected to practices contrary to the article 3 if expelled to their country.

The Court found *inter alia* that it was not proved the clan the applicants belonged to together with their father would pose a threat to them or had “blacklisted” them. It also mentioned the possibility of an internal relocation for the two male applicants, the fact that the applicants often referred to unverified or incomplete information and most importantly that the applicants would return as a family unit and would have a male network.\(^{469}\)

The Court concluded that substantial grounds for believing that the applicants would be exposed to a real risk of being killed or subjected to treatment contrary to article 3 if deported to Yemen had not been shown in the present case and that the implementation of the deportation order against the applicants would not give rise to a violation of articles 2 or 3.\(^{470}\)

This case deals with several types of violence against women and it is striking to see that, because we are in an asylum case concerning the whole family, the Court decided to deal with the situation of the applicants altogether and therefore rather succinctly addressed the different types of gender-violence the women were facing. Similarly to the cases of FGM, one might wonder if the Court does not show less zeal in protecting women who seek asylum compared to other victims of gender-violence.

d) Comments applicable to all the cases

The Court has recognised the issue of the burden of proof resting on the applicant in those cases. Obtaining and securing persuasive evidence from another State is terribly difficult,


\(^{469}\) Ibid., § 85.

\(^{470}\) Ibid., § 96.
especially in case of acts occurring within the private sphere and in the context of violence against women. Non-governmental organizations have advocated that these standards of proof might amount to a “probation diabolica”.\textsuperscript{471}

A common characteristic to all those cases is that a general situation of violence never entailed in itself a violation of article 3 in the event of an expulsion. Those cases are really emblematic of the Court wanting to base its decision on the particular situation of the victims.

To the criticism that the Court somehow shows less inclination to protect women in asylum-related cases, we would answer that the Court articulated the applicable criteria in a fair and human way, dealing with each situation individually. We also have to keep in mind that the Court also takes into account the margin of appreciation of States and the competing rights at stake. The Court is well aware of the gender-violence problems but that does not mean it is not sensitive to the other arguments. It is even appreciable that the Court keeps an approach based on the balancing of the rights at stake and stays impartial and objective.

We will now examine cases of forced sterilization before the Court.


Those cases\textsuperscript{472} are similar (with slight variations) in their facts and in the reasoning of the Court. All complaints were filed against Slovakia and emanate from women of Roma origin who allege that they have been sterilized without their full and informed consent after giving birth in a hospital, and that the authorities’ investigation that followed has not been thorough, fair or effective since they received limited compensation and that their subsequent appeals were rejected. They also claimed that their ethnic origin had played a decisive role in their sterilisation. They brought their cases before the ECtHR relying on \textit{inter alia} articles 3, 8, 13 and 14.

The Court firstly explained that the sterilization of those women constituted a major interference with their reproductive health status and integrity and bore on different aspects of their personal integrity including their physical and mental well-being and emotional, spiritual and family life. The Court rejected the argument of the State that the procedure was necessary from a medical point of view and concluded that the treatment attained the


threshold of severity required to bring it within the scope of article 3 and violated the rights of the victims under that article.

On the contrary, the Court considered that the State had acted in conformity with its positive obligations under article 3 regarding the investigation. Concerning the article 8, the Court recalled the existence of positive obligations for the States and the fact that private life includes a person’s physical and psychological integrity. It also insisted on particular situation of the applicants, all belonging to the minority of Roma women. It held that the failure to respect the statutory provisions combined with the absence at the relevant time of safeguards giving special consideration to the reproductive health of the applicants as Roma women resulted in a failure by the respondent State to comply with its positive obligation to secure to them a sufficient measure of protection enabling them to effectively enjoy their right to respect for their private and family life and violated article 8. The Court did not find it necessary to examine the complaint under the article 14.

Through the whole analysis, the Court referred to various reports and international instruments, namely the CEDAW.

The approach of the Court in cases of forced sterilization is quite classical compared to its analysis of gender-violence in general. We find the usual benchmarks used by the Court, namely references to international instruments, reliance on reports from organizations, context-specific approach of the situations of the applicants and emphasis on the effective implementation of the measures entailed by the positive obligations.

The next case shows that the Court, when addressing a “less severe” violation than those it usually deals with, really gives the adequate importance to the particular situation and characteristics of the victim to qualify the treatment at stake and deciding on the violation.

III.2.3.3. Inhuman treatment in detention: Yazgul Yılmaz v. Turkey

The applicant is a Turkish national. In 2002, aged sixteen years old, she was taken into police custody for lending assistance to an illegal organisation. A medical and gynaecological examination was carried out to establish that no assault was committed during custody. The examination request was not signed by the applicant. After her release in October 2002, she went for a medical examination that concluded that she was suffering from post-traumatic stress and depression. Another report indicated that the medical reports drawn up during her custody did not meet the lawful requirements because they had not shown whether the applicant had sustained any physical or psychological violence. In 2004

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Mrs. Yilmaz filed a complaint for abuse of authority against the doctors who had examined her in custody. The prosecutor considered that, because of a two-year limitation period, no disciplinary proceedings for the non-compliance of the medical reports should be opened against the doctors. That proposal was accepted by the provincial governor's office and in March 2005 the public prosecutor terminated the proceedings. A challenge by the applicant was dismissed. Mrs. Yilmaz went before the ECtHR alleging a violation of her rights under *inter alia* the articles 3, 8, 6 and 13.\(^{474}\)

The Court firstly analysed the gynaecological examination of Mrs. Yilmaz. It recalled the absolute character of the article 3 and the need to satisfy its severity threshold, taking into account all the circumstances of the case. Mrs. Yilmaz was underage at that time and detained, consequently belonging to a vulnerable group likely to be particularly traumatised by a gynaecological examination carried out in those circumstances. For that reason, the State should have taken special care to secure her protection.\(^ {475}\) On the contrary, no precautions at all were taken for obtaining her consent and there was even a gap in the law on gynaecological examination of detained women.\(^ {476}\) Therefore, the lack of fundamental safeguards during the applicant's custody had placed her in a state of deep distress and extreme anxiety that enabled the Court to characterise the examination as degrading treatment.\(^ {477}\)

The Court then turned to the examination of the investigation and noted the failure of the State to provide a legislative framework and to implement it. It expressed serious doubts as to the capacity of the prosecutor to conduct an independent investigation since he reported to the same hierarchy as the persons whom he was investigating. The Court concluded that “the shortcomings in the investigation had had the result of granting virtual impunity to the presumed perpetrators of the offending acts and had rendered the criminal action - and also any civil action for compensation - ineffective.”\(^ {478}\) The violation of the article 3 was thus established both for the gynaecological examination and for the failure to conduct an effective investigation.

Once again we are confronted with a decision that confirms the usual line of reasoning of the Court in the field of violence against women. The Court really insisted on the fact that the victim belonged to a particularly vulnerable group and her young age was a decisive factor for deciding on a violation. The Court also stressed the two aspects of the positive

\(^{474}\) ECtHR, *Yazgül Yılmaz v. Turkey*, 1 February 2011, § 4-21.
\(^{475}\) ECtHR, *Yazgül Yılmaz v. Turkey*, 1 February 2011, § 42.
\(^{476}\) Ibid., § 46.
\(^{477}\) Ibid., § 53.
\(^{478}\) Ibid., § 63.
obligation concept: the need for a framework protecting women but also its effective implementation.

With this case, the Court confirmed its will to protect women in all fields. One could have wondered whether the Court would show more leniency when addressing the situation of Mrs Yilmaz, since she had not suffered an extremely severe violation compared to most of the cases brought before the Court. But the Court went beyond the act per se, and examined its impact on the victim and the particular circumstances of the case and that was the basis of the finding of the violation. This represents yet another positive step for the protection of women.

The Court will also adopt a rather protective approach when addressing cases that involved trafficking in human beings, as we will see in the following point.

III.2.3.4. Trafficking in human beings: Siliadin v. France and Rantsev v. Cyprus and Russia

The two cases concerning trafficking in human beings are landmark judgments. In Siliadin\textsuperscript{479}, the Court declared for the first time the existence of positive obligations under the article 4 and Rantsev\textsuperscript{480} is the first judgment concerning cross border human trafficking in Europe, also dealing with the application of the article 4 to the field of gender-violence.

a) Domestic servitude and forced labour

The applicant is a Togolese national. In 1994, at the age of fifteen, she was brought in France by Mrs D. The latter had promised to regularise her immigration status and to arrange for her education. The applicant actually became an unpaid servant to Mr and Mrs D. and her passport was confiscated. Mrs D. "lent" the applicant to a couple of friends, Mr and Mrs B. She became a "maid of all work" to the couple, who made her work every day with no days off. She slept in the children's bedroom on a mattress on the floor, wore old clothes and was never paid. In 1998 Mrs Siliadin confided in a neighbour who brought the matter before the prosecuting authorities. Criminal proceedings were brought against Mr and Mrs B. who were convicted but were acquitted on appeal in 2000. In 2003 they were ordered to pay damages.

The applicant went before the ECtHR relying on \textit{inter alia} the article 4. She submitted that criminal law did not afford her sufficient and effective protection against the "servitude" in which she had been held, or at the very least against the "forced and compulsory" labour she

\textsuperscript{479} ECtHR, \textit{Siliadin v. France}, 26 July 2005.
\textsuperscript{480} ECtHR, \textit{Rantsev v. Cyprus and Russia}, 7 January 2010.
had been required to perform, which in practice had made her a domestic slave.\textsuperscript{481}

The Court recalled its previous case-law on the principle of positive obligations entailed by the articles 3 and 8. It linked the article 4 with those, stating that it enshrined one of the fundamental values of the democratic societies and that its prohibition was absolute.\textsuperscript{482} It declared that that article also gave rise to positive obligations on States, consisting in the adoption and effective implementation of criminal-law provisions making the practices its set out a punishable offence.\textsuperscript{483}

The Court then examined whether the situation of the applicant fell under the article 4. It noted that "domestic slavery" persisted in Europe and concerned thousands of people, the majority of whom were women.\textsuperscript{484} Because she carried out forced labour for years for the couple against her will, received no remuneration and was deprived of her liberty and personal autonomy, the Court concluded that Mrs Siliadin had been held in servitude within the meaning of article 4. Accordingly, it fell to the Court to determine whether French legislation had afforded the applicant sufficient protection in the light of the positive obligations entailed by article 4. In that connection, it noted that slavery and servitude were not as such classified as criminal offences in the French criminal-law legislation.\textsuperscript{485} The Court recalled the particular way the State has to take care of vulnerable individuals, in the form of effective deterrence, against serious breaches of personal integrity.\textsuperscript{486} In light of the life conditions of Mrs Siliadin who was not paid, was not provided education, had no freedom of movement and was forced to work, the Court concluded that the criminal-law legislation had not afforded the applicant specific and effective protection. It emphasised that the increasingly high standard required in the area of the protection of human rights and fundamental liberties required greater firmness in assessing breaches of the fundamental values of democratic societies and held there had been a violation of the article 4.\textsuperscript{487}

This case is particular because it is not a situation of “pure” violence. Nevertheless, it falls within the case-law that articulates the scope and content of the concept of positive obligations for the protection of women. This decision marks the first recognition by the Court that the article 4 imposes positive obligations on states.\textsuperscript{488}
The case also presents a disappointing aspect. The Court did not find that the applicant was subjected to slavery, but rather to forced labour and to servitude. The Court used a strict definition of slavery, identifying its key element as legal ownership over the person, reducing her to the status of an “object”, rather than simply a deprivation of personal autonomy. The qualification of the situation of the applicant as amounting to slavery might have been more striking and have a deterrent effect on the potential perpetrators.

The Court got a second occasion to address trafficking in human beings but this time in a situation of alleged sexual exploitation in Rantsev v. Cyprus and Russia.

b) Sexual exploitation

The applicant is the father of Ms Rantseva, a Russian national. She went to Cyprus in 2001 on an ”artiste" visa and started work in a cabaret in Cyprus only to abandon her place of work three days later leaving a note that she was going back to Russia. After finding her in a discotheque ten days later, the manager of the cabaret took her to the police asking them to declare her illegal in the country and to detain her, apparently with a view to expelling her so that he could replace her in his cabaret. The police noted that she was not illegal and refused to detain her. They asked the cabaret manager to collect her from the police station and to return with her later to make further inquiries into her immigration status. The cabaret manager collected her and took her to an apartment. The following day at about 6.30 a.m. she was found dead in the street below the apartment. A bedspread was found looped through the railing of the apartment's balcony.

Following Ms Rantseva's death, an autopsy was carried out which concluded that her injuries were the result of her fall and that the fall was the cause of her death. The Cypriot Court decided that she died in strange circumstances but that there was no evidence to suggest criminal liability for her death. After the body was repatriated to Russia, the applicant requested an autopsy. The authorities concluded that Mrs Rantseva’s death required additional investigation, and forwarded a request for assistance, further investigation and institution of criminal proceedings to the Cypriot authorities. In 2006, Cyprus confirmed that the verdict delivered by the court was final.

Relying on inter alia articles 2, 3, 4, 5, 6 and 8, Mr Rantsev complained of the attitude of the Cypriot and Russian authorities for the failure to effectively investigate into the circumstances of his daughter’s death, to take measures to protect her while she was still alive and to take steps to punish those responsible for her death and ill-treatment, to


investigate his daughter's alleged trafficking and to take steps to protect her from the risk of trafficking. 490

The analysis of the Court is rather long and our analysis has to be limited to the most important findings.

On the article 2, the Court considered that the Cypriot authorities could not have foreseen Mrs Rantseva’s death and they had therefore no obligation to take measures to prevent a risk to her life. Nevertheless, the investigation was not effectively carried out and the Court held there had been a violation of article 2. Concerning Russia, Mrs Rantseva's death had occurred outside their jurisdiction. On the investigation, the Court emphasised that the Russian authorities had cooperated with the Cypriot authorities and requested their active involvement several times.

On the article 3, the Court held that any ill-treatment which Mrs Rantseva may have suffered before her death had been inherently linked to her alleged trafficking and exploitation and that it would consider this complaint under article 4.

The complaint under article 4 focused on the trafficking. The Court reiterated its considerations from Siliadin and considered that, like slavery, trafficking in human beings must be defined by the right of ownership implying close surveillance of the activities of victims, whose movements were often circumscribed and involving the use of violence and threats. 492 The Court decided that even though there was no express mention of trafficking in the Convention, it fell within the scope of the article 4. The Court considered there was no need to assess which of the three types of proscribed conduct (slavery, servitude or forced labour) are engaged by the particular treatment in the case in question. 493 It also confirmed that the article 4 entailed positive obligations for the State. Singularly, it also recalled the idea developed in Osman that the positive obligations cannot place a disproportionate burden on the State. 494 It concluded that there had been a violation by Cyprus of its positive obligations arising under that article on two counts: first, its failure to put in place an appropriate legal and administrative framework to combat trafficking as a result of the existing regime of artiste visas, and second, the failure of the police to take measures to protect Mrs Rantseva from trafficking, despite circumstances which had given rise to a credible suspicion that she might have been a victim of trafficking. Russia had also breached that article for its failure to investigate how and where Mrs Rantseva had been

490 ECtHR, Rantsev v. Cyprus and Russia, 7 January 2010, 13-79.
491 Ibid., § 276.
492 Ibid., § 281.
493 Ibid., § 271.
494 Ibid., § 287.
recruited and, in particular, to take steps to identify those involved in her recruitment to Cyprus or the methods of recruitment used.495

The results of the Rantsev case are mixed. The Court did not seize the opportunity of the complaint under the article 4 to qualify the situation as amounting to slavery, when (as advocated by the third parties submissions to this case) “the modern day definition of slavery included situations such as the one arising in the present case, in which the victim was subjected to violence and coercion giving the perpetrator total control over the victim.”496

Furthermore, even though through the whole reasoning the Court points out that women are particularly affected by human trafficking for sexual exploitation,497 there is no emphasis on that discriminatory aspect. That is even more striking when we know that the case has been rendered a year after the Opuz judgment that was a landmark case on discrimination. Nevertheless, the Court prescribed a appreciable series of measures required by the positive obligations entailed by namely the article 4, going so far as the identifying of those involved in the recruitment of women for becoming “artists”. The decision especially should be greatly welcomed given the prevalence of trafficking in Europe. Trafficking can now be regarded as a human rights issue – not simply a criminal justice matter.498

The last case we will analyse gave the occasion to the Court to reiterate that discrimination relating to women could no longer be tolerated and condoned by the State, in the spirit of the Opuz case.

III.2.3.5. Violence involving a discriminatory attitude: B.S. v. Spain

The applicant, B.S., is a woman of Nigerian origin who lawfully resides in Spain. She alleges that on the 15th and 21st July 2005, when she was working on the street as a prostitute, two police officers (the same on each occasion) hit her with a truncheon and racially abused her. She lodged a complaint and went to the hospital. The chief of police produced a report contesting the officers had used humiliating language or physical force. The identities of the police officers on patrol at the time of the incidents also differed from those indicated by B.S. In a decision of 17 October 2005 the investigating judge made a
provisional discharge order and discontinued the proceedings on the ground that there was insufficient evidence of a criminal offence. B.S. applied for a review of that decision that was refused. She lodged an appeal, which resulted in a judgment of the investigating judge acquitting the police officers.

B.S. was again stopped for questioning and hit by the officers on 23 July 2005. She reported to the casualty department where the doctor observed light injuries and lodged a criminal complaint alleging that she had been beaten with a truncheon. She complained that she had been targeted in particular because of her race. She stated that she had been forcibly taken to the police station for the purpose of signing a statement acknowledging that she had resisted the authorities. The investigating judge began a judicial investigation characterized by the same problems as the previous one for the identification of the police officers. On 22 February 2006, the investigating judge discontinued the proceedings on the ground that there was insufficient evidence of a criminal offence. B.S. applied for a review of that decision. That and her subsequent appeal were unsuccessful.

She went before the ECtHR relying on inter alia the article 3, complaining that the national police officers had verbally and physically abused her when stopping her for questioning. She also alleged that she had been discriminated against under the article 14 in combination with the article 3 because of her profession as a prostitute, her skin colour and her gender and that the courts' investigation of the events had been inadequate and also characterized by a discriminatory attitude.499

The Court firstly examined the effectiveness of the investigations carried out by the national authorities. It reminded that where an individual makes a credible assertion that he has suffered treatment infringing article 3, an effective investigation is required.500 It then declared that the injuries the applicant suffered combined with the racist and degrading remarks fell within the scope of article 3. Even though her complaints had been investigated, the investigating judges only requested reports from the police and relied solely on those in discontinuing the proceedings. Furthermore, the reports had been produced by the official superior of the accused police officers.501 The Court also noted that the applicant never had the chance to formally identify the defendants and that the medical reports had been disregarded for being undated or not conclusive whereas they called for investigative measures to be carried out.502 The Court thus concluded that the investigations

499 ECtHR, B.S. v. Spain, 24 July 2012.
500 Ibid., § 39.
501 Ibid., § 42.
502 Ibid., § 44.
carried out were not sufficiently thorough and effective and violated the article 3.\textsuperscript{503}

The Court examined separately the complaint that there was a failure to investigate a possible causal link between the alleged racist attitudes and the violent acts allegedly perpetrated by the police against the applicant. It considered that, when investigating violent incidents, State authorities had a duty to take all possible steps to unmask any racist motive and to establish whether ethnic hatred or prejudice might have played a role.\textsuperscript{504}

The Court noted that in her complaints of 2005 the applicant mentioned the racist remarks allegedly made to her, and submitted that the officers had not stopped and questioned other women carrying on the same activity but having a “European phenotype”. Those submissions were not examined.\textsuperscript{505}

The Court thus considered that the domestic courts had failed to take account of the applicant’s particular vulnerability inherent in her position as an African woman working as a prostitute.\textsuperscript{506} There was thus a failure to carry out the duty to take all possible steps to ascertain whether or not a discriminatory attitude might have played a role in the events, in violation of the article 14 combined with the article 3.\textsuperscript{507}

This decision does not really bring any original finding to the case-law of the Court but has been considered as really important because it drew attention to the precarious situation of migrant sex workers, in the vein of the \textit{Rantsev} case.\textsuperscript{508} The finding of the violation was foreseeable when we know that the victim combined different characteristics that made her belong to a particularly vulnerable group and that for that reason the authorities should have showed extra-vigilance. On the contrary, they chose to take the discrimination a step further in the judicial process. The Court seized the occasion to hold there had been a violation of the article 14 combined with the article 3, confirming in the spirit of the \textit{Opuz} case that discrimination must be condemned and eradicated in any circumstances.

This review of the “other” types of gender-violence confirms what we already saw in the two sections on domestic violence and rape with an emphasis on the importance to protect women belonging to particularly vulnerable groups or the concept of positive obligations encompassed by the articles 2, 3, 8 and now 4 with the cases \textit{Siliadin} and \textit{Rantsev}. Those two cases also illustrated the difficulty of the Court to qualify the situation as slavery, which

\textsuperscript{503} Ibid., § 47.
\textsuperscript{504} Ibid., § 58.
\textsuperscript{505} Ibid., § 61.
\textsuperscript{506} Ibid., § 62.
\textsuperscript{507} Ibid., § 63.
\textsuperscript{508} K. YOSHIDA, “ECHR condemns Spain for failing to investigate racist and sexist acts of violence by police”, \url{http://www.intlawgrrls.com/2012/07/echr-condemns-spain-for-failing-to.html}.  

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reminded us of the hesitation it showed before qualifying rape as torture.

On the field of novelties and differences, we encountered new aspects of the concept of positive obligations such as the need to investigate the recruitment process that might be linked to trafficking in human beings in Rantsev. Contrary to domestic violence and rape, we noted that more cases were lost by the applicants and that the Court showed some restraint for the sake of securing competing rights in case of asylum that represents an area of power that is very sensitive for the States (in the FGM cases, and the case A.A. v. Sweden). We also came across subtler types of violence such as domestic servitude, forced sterilization and forced gynaecological examination. The Court clearly showed through its case-law that it would not condone any type of violence.

This third part focused on the analysis of the judgments of the Court in relation to gender-violence. We tried to give a complete picture of the different types of violence and the landmark judgments that were brought before the Court. Whether it be in cases of domestic violence, rape cases or any other type of violence against women, the reasoning of the Court stayed really consistent and logical through the years. We can only admire the steady approach it had in the choice of the articles that were the basis of its imposition of positive obligations, its context-specific analysis, the reliance on other instruments and reports, the balancing of the different interests at stake and its capacity to spot failures in the legislation or practice of the States and to prescribe a remedy to those. The main concern that arises in relation to the approach of the Court is the emphasis on the need to provide criminal law responses that might place too much faith in criminal law as the principal remedy for human rights violations. This might result in States ignoring their other obligations towards victims and the existence of alternatives but also in an undesirable inflation of the criminal caseload. Nevertheless, the conclusion of this part is the clear evolution towards more protection of women in general and the imposition of higher standards of responsibility on States. This evolution goes beyond the categories we established and had an impact on the whole case-law of the Court.

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Conclusion

This dissertation sought to analyse the approach of the ECtHR to cases of gender-violence. At the end of this journey, we became used to the notion of gender-violence as applying to violence perpetrated solely or disproportionately against women. Nevertheless, the first part of this dissertation made us aware of the lack of formal consensus on a commonly-shared definition. That being said, we noticed that the growing interest for women’s rights and the will to eradicate violence against them has led to the emergence of a common notion encompassing a broad range of types of violence on the international field, making its way to binding instruments.

When we compared this notion with the reality through the outlining of the main characteristics of the concept and some relevant figures, the impressive extent of the problem fully appeared. We thus sought to identify the causes of gender-violence and chose to divide them in two inter-related categories: the structural causes and those relating to the perpetrators’ own experience. We finally identified another relevant factor that lies within the victim’s reluctance to participate to the prosecution process. Because of those different factors, gender-violence persists and generates socio-economic costs on various levels.

Measures have been undertaken to try to put an end to this issue. They often consisted in adopting legislation, which can be considered as an insufficient but necessary first step. As a matter of fact, all of the measures, including legislation, show two problematic features. Firstly, their development has been slowed down by the traditional dichotomy between the public and private field and secondly, they are tainted (even unwillingly) by a discriminatory aspect. Therefore, we tried to select a series of solutions ways we thought could actually make a difference. Those involve having recourse to key partners, education, access to justice, nomination and election of more women, institutional improvements, batterer treatment programs and the improvement of social services for survivors of gender-violence.

The second part of this dissertation drew attention to the Inter-American Human Rights system and the United Nations. They both brought monumental contributions to the field of gender-violence through their instruments and case-law and, more importantly for this work, they had an essential influence on the case-law of the ECtHR. They helped taking the protection of women several steps further. This transpires on the normative level, since those two systems each rely on crucial instruments: the Convention of Belém do Pará and the CEDAW, which both allow the filing of individual complaints. As for the case-law, the

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Inter-American system mostly dealt with cases involving large-scale violence. Its most prolific institution, the IACtHR, was the first to use the concept of due diligence in the Velásquez case. Through the rest of its binding case-law, it further articulated the scope and content of that concept, and also managed to deliver important findings: the need to protect women who belong to particularly vulnerable groups, the existence of a culture of discrimination against women in several States, the fact that gender-violence is discrimination per se and, building on the case-law of the IACHR, the fact that rape amounts to torture in certain circumstances.

Even if the findings are less numerous on its side, the IACHR helped develop the same concepts as the IACtHR and was the first institution to use the Convention of Belém do Pará in its landmark case Maria Da Penha to condemn the impunity of the State in relation to domestic violence. It also impressed by condemning a leading world power, the United States, in the Lenahan case.

As for the United Nations, they addressed the problem through programming different Conferences on women, adopting a gender-mainstreaming policy and important legal instruments and the Committee applying the CEDAW to cases that were brought before the Committee. The Committee dealt with cases more similar in their facts to those of the ECtHR than the cases of the Inter-American system since it mostly ruled on individual situations of violence. It adopted a flexible approach namely in relation to the admissibility of the cases through which its will to protect women’s rights transpired. The concepts that were developed are similar to those of the Inter-American system. Both systems also have in common the issuing of wide-ranging recommendations.

The relevancy of the examination of those institutions appears when we realize the importance of their influence on the case-law of the ECtHR, whether it be explicit in a number of judgments such as Bevacqua and Opuz or implicit through the utilization of the same concepts and the application of the same methods. Since the developments of those concepts are part of an international impetus towards the protection of women’s rights, the influence between the Courts is mutual, as it is plain to see in the different cases.

The last part of this dissertation systematically analysed the case-law of the ECtHR on gender-violence. The Court repeatedly applied the articles 2, 3, 4, 6, 8, 13 and 14 to the different situations it was required to examine. It mostly dealt with cases of what could be considered as ‘classical’ types of violence against women such as rape and domestic violence but also addressed other situations: female genital mutilation, social exclusion, forced marriage and honour crimes, inhuman treatment in detention and trafficking in
human beings. The approach of the Court followed a similar path in those different categories. Starting from the theory of positive obligations and due diligence that it developed in the *Osman* case, the Court then further articulated this concept together with other developments. This led to an impressive number of crucial conclusions: that the articles 2, 3, 4 and 8 entail both negative and positive obligations for the State (first steps respectively in the cases *Osman, Aydin, Siliadin* and *X and Y*), requiring them to act also in situations occurring only in the private sphere (in the case *X and Y*), that gender-violence amounts to discrimination (in the *Opuz* case), that rape constitutes torture under certain circumstances (in the *Aydin* case) and satisfies the severity threshold of the article 3 even in situations only involving private actors (in the *M.C.* case). When looking at the outcome of the cases before the Court, one can only conclude that there is a strong inclination towards the protection of the victims’ rights. In some cases, however, the Court seemed to show some restraint in a concern of securing competing rights (all of the asylum cases) and not imposing a disproportionate burden on the State (in the *Stubbings* case). Each time, the Court managed to logically expose its findings on the basis of a context-specific approach and to balance the interests at stake, with a growing reliance on other international instruments, reports and various documents. It identified the failures of the States both in the adoption of an effective legal framework and on the lack of due diligence in its implementation.

The problematic of gender-violence has been integrated to the broader thematic of human rights and tackled by the ECtHR. This represents a major improvement. Through the case-law of the ECtHR, there is recognition of the prejudice suffered by the victims, harmed not only by the act of violence *per se* but also by the lack of satisfaction at national level. Moreover, reparation and protection are now required by an influential institution.

In the beginning of this dissertation, questions have been raised as to the outcome of the cases, the approach of the Court and its potential inclination towards more protection of women, the methods it uses and the scope of the cases it deals with. Improvement seems to be the answer to all of those questions. However, this progress will remain dead letter if it is not enforced by effective implementation. This definitely leaves room for further research.

“They can give us all the tools, but we have go to be able to embrace and put them to use.”
- Jessica Lenahan, domestic violence survivor

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Dutch summary

Deze masterproef strekt ertoe de rechtspraak van het Europese Hof voor de Rechten van de Mens in verband met gender-gebaseerd geweld te analyseren.

In het eerste deel proberen we een totaalbeeld te geven van het onderwerp. Daarvoor zullen we starten met de evolutie van de definitie van het concept “gender-gebaseerd geweld”. We zullen de hoofdkenmerken van dit concept analyseren. Daarna zullen we een aantal relevante cijfers in verband ermee bestuderen. De oorzaken van het geweld tegen vrouwen zullen ook geïdentificeerd worden. Deze kunnen worden onderverdeeld in twee categorieën: de structurele oorzaken en de oorzaken in verband met de eigen ervaring van de daders. Een ander relevant factor voor onze studie is de terughoudendheid van de slachtoffers om aan de strafvervolging te participeren. Al deze elementen leiden tot het voortduren van het gender-gebaseerd geweld en dit veroorzaakt socio-economische kosten. Dit probleem werd aangepakt door de publieke overheden en deze hebben geprobeerd een aantal oplossingen te vinden. Dit resulteerde meestal in wettelijke oplossingen die soms te laat werden bedacht omwille van de traditionele publiek/privaat dichotomie. De meerderheid van de wetteksten worden ook beïnvloed door impliciete discriminatie. We hebben getracht een paar oplossingen te selecteren die effectief verandering in de zaak kunnen brengen. Deze oplossingen zijn o.a. het gebruik van key-partners, de verkiezing van meer vrouwen, het opleiden van bevolkingen en het en vormen van de betrokken actoren en institutionele hervormingen.

Het tweede deel van deze masterproef is gericht op de beschrijving van twee systemen die een belangrijke invloed hebben gehad op de rechtspraak van het EHRM: het Inter-Amerikaanse mensenrechten systeem dat bestaat uit de Inter-Amerikaanse Commissie- en het Inter-Amerikaanse Hof voor de Rechten van de Mens en de Verenigde Naties. Door hun wetgeving (het Belém do Pará Verdrag en de CEDAW) en hun rechtspraak hebben deze instellingen een aantal concepten ontwikkeld die behoren tot een globale beweging voor vrouwenbescherming. Het meest belangrijke concept is dat van de ‘due diligence’, dat voor het eerst toegepast werd in de zaak Velásquez voor het Inter-Amerikaanse Hof. Andere concepten zijn inter alia de positieve verplichtingen, de noodzaak om kwetsbare groepen te beschermen, het feit dat geweld tegen vrouwen gelijkstaat met discriminatie, en dat verkrachting kan worden beschouwd als foltering in bepaalde omstandigheden. Ten slotte, zullen we de wederzijdse (expliciete en impliciete) invloed tussen de verschillende instellingen benadrukken.
In het derde, meest omvangrijke deel hebben we het over de rechtspraak van het EHRM. We hebben hierbij opgemerkt dat dezelfde artikelen systematisch gebruikt werden, met name de artikelen 2, 3, 4, 6, 8, 13 en 14. Het Hof past deze artikelen toe in ‘klassieke’ zaken van geweld zoals verkrachting en huiselijk geweld maar ook in zaken die andere types geweld aanpakken, inter alia vrouwelijke genitale verminking, gedwongen huwelijk, eerwraak, onmenselijk behandeling in hechtenis en mensenhandel. Het Hof geeft telkens een logische en afgewogen beslissing met een focus op de positieve verplichtingen, een aspect dat voor het eerst werd ontwikkeld in de zaak Osman. De andere conclusies van het Hof zijn de volgende: de artikels 2, 3, 4 en 8 brengen positieve verplichtingen met zich mee voor de Staten (resp. in de zaken Osman, Aydin, Siliadin en X en Y), de Staten moeten ook tussenkomen in situaties die zich in het privé-domein voordoen (zaak X en Y), verkrachting kan beschouwd worden als foltering in bepaalde omstandigheden (zaak Aydin) en vervult de ernstdrempel van het artikel 3 zelfs in situaties die private-actoren betrekken (zaak M.C.).

Na de analyse van de verschillende zaken, kan men concluderen dat het Hof geneigd is om de slachtoffers te beschermen. Niettemin toont het Hof in bepaalde zaken enige terughoudendheid met het oog op de bescherming van concurrerende rechten (alle zaken omtrent asielzoekers) of om te vermijden dat een onredelijk last op de Staten wordt gelegd (zaak Stubbings). We hebben dus telkens te maken met een ‘context-specific approach’ van het Hof die de tekortkomingen van de Staten aanduidt, zowel op het wettelijke vlak als op het vlak van de uitvoering van de wetten.

Deze masterproef stelt een indrukwekkend aantal verbeteringen vast voor de bescherming van de vrouwelijke slachtoffers van geweld en benadrukt de noodzaak voor een effectieve uitvoering.
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