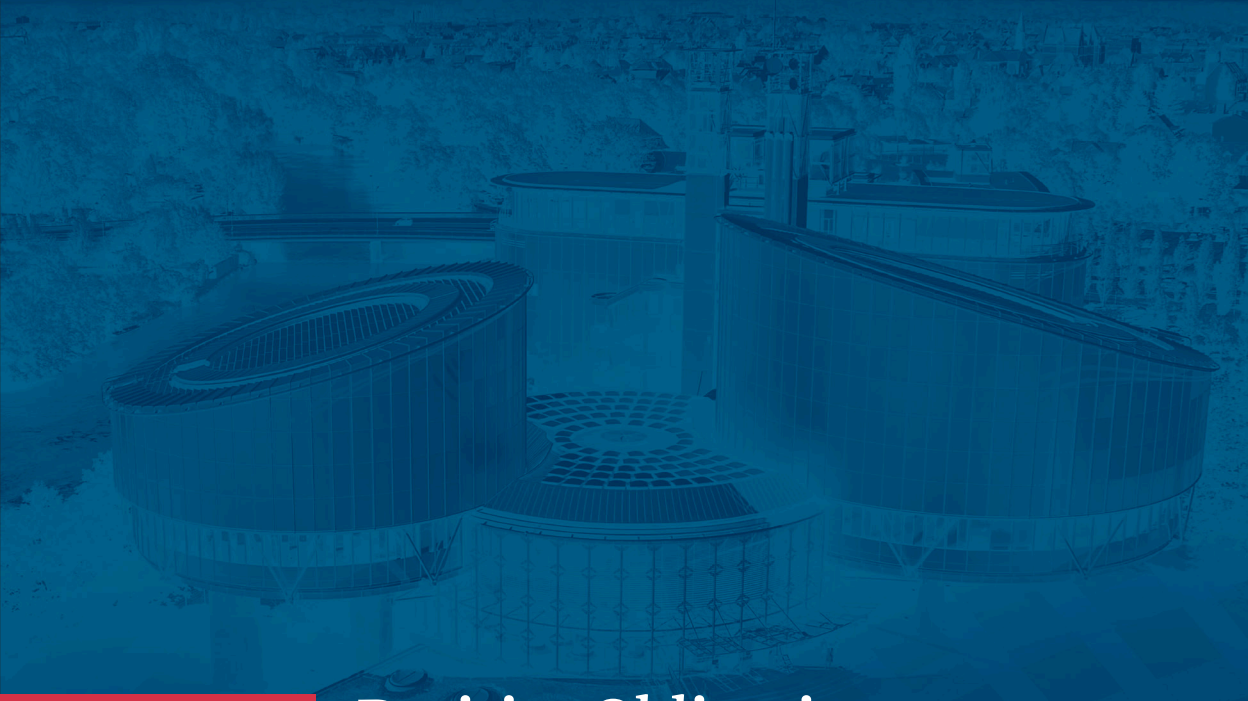

Positive Obligations of the State in the Domestic Violence Caselaw of the European Court of Human Rights

A HANDBOOK
FOR JUSTICE SECTOR PRACTITIONERS
TO ENSURE ACCESS TO JUSTICE FOR
DOMESTIC VIOLENCE VICTIMS

CENTRUL DE DREPT
AL FEMEILOR

Positive Obligations of the State in the Domestic Violence Caselaw of the European Court of Human Rights

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for Justice Sector Practitioners
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Domestic Violence Victims

CHISINAU, 2019

This Handbook has been developed by the Women's Law Center within the "Strengthening Capacities of Prosecution and Judicial Response to Domestic Violence in Moldova" project supported by the Criminal Justice and Law Enforcement Section (INL) of the U.S. Embassy in the Republic of Moldova. It has been designed to be used as a supplemental resource in the training of legal professionals in the implementation of national legislation in the field of preventing and combating domestic violence.

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Design and layout:
Mihai Sava, Bons

Descrierea CIP a Camerei Naționale a Cărții
Aalbers, Catalina.
Positive Obligations of the State in the Domestic Violence Caselaw of the European Court of Human Rights: A Handbook for Justice Sector Practitioners to Ensure Access to Justice for Domestic Violence Vicitims / Catalina Aalabers, Natalia Vilcu; Centrul de Drept al Femeilor. – Chișinău: S. n., 2019 (Tipogr. "Bons Offices"). – 72 p.
Referințe bibliogr.: p. 66-70. – 200 ex.
341.645(4):341.231.14:343.55
A 11

ISBN 978-9975-87-553-0.

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"Domestic violence remains of particular concern in today's European societies."

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Introduction

Domestic violence is a serious human rights violation. It is frequently not an isolated episode of physical, psychological or sexual abuse, but a series of systemic human rights violations committed by a family member or an intimate partner, with the aim to establish power and control over the victim.

Worldwide, almost one third (30%) of all women who have been in a relationship have experienced physical and/or sexual violence by their intimate partner.[1] Globally, as many as 38% of all murders of women are committed by intimate partners.[2] Moreover, studies have revealed the trauma that witnessing violence in the home causes in children.[3]

Thus, in *Opuz v Turkey*,[4] a landmark case in the domestic violence jurisprudence of the European Court of Human Rights (ECtHR) and central to this handbook, over a period of 12 years, the applicant's husband repeatedly threatened to kill the applicant and her mother (at times also the applicant's children), committed beatings sufficient to endanger life, attacked with a knife (including seven knife injuries on one occasion), drove a car into the applicant and her mother, and ended up shooting and killing the applicant's mother. The ECtHR found a violation of article 2 (right to life), article 3 (torture) and article 14 (discrimination). This preventable tragedy is explanatory of the seriousness of the element of the failure of the state to protect victims of domestic violence.[5]

However, domestic violence is still perceived as a private matter both by States, societies and many times by victims themselves. Intervention at the national level is frequently found wanting, leaving victims unprotected and

1 World Health Organization. *Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence*. World Health Organization, 2013, p. 2.

2 Ibid.

3 PACE Recommendation 1905 (2010) on Children who witness domestic violence [2.2].

4 *Opuz v Turkey* App no 33401/02 (ECHR, 9 June 2009).

5 Bonita Meyersfeld, *Domestic violence and international law* (Hart Publishing 2010), 136-137.

vulnerable. Due to inefficient national institutions, the ECtHR is still regarded by domestic violence practitioners, especially in developing democracies, members of the Council of Europe, as a hope of ultimate justice for victims. For example, the *Eremia*[6] case came as an awakening call for the authorities in the Republic of Moldova to improve intervention in this area. Positive obligations open the gates of State responsibility under the European Convention on Human Rights (ECHR) and are an "undertheorized" field of law.[7]

The ECtHR constantly reminds member states of the Council of Europe that under the ECHR, they have an obligation not only to pass laws, but also to effectively enforce them in order to respect the rights provided for in the Convention, because of '...the particular vulnerability of the victims of domestic violence and the need for active State involvement in their protection...'.[8]

This handbook was developed as an additional training material to be used during capacity building of justice sector practitioners. It is a joint effort of the authors to provide the practitioners with a clear view on the theoretical and practical application by the ECtHR of the positive obligations in the entire specter of domestic violence caselaw based on the results of a comprehensive research conducted for an LLM thesis, updated with new information and caselaw in 2019. The handbook also zooms in on the ECtHR cases in this area against the Republic of Moldova and culminates with a series of hands-on recommendations for practitioners aimed to improve access to justice for victims of domestic violence in Moldova. Most of the recommendations are based on findings related to violations reported during the monitoring of court proceedings in cases of domestic violence, sexual violence and trafficking in human beings,[9] but also on the Council of Europe's practical guidelines aimed to increase access to justice for victims of domestic violence.

This handbook invites the practitioners on a journey to explore how the concept of positive obligations is used by the ECtHR to positively influence the practice of states regarding the prevention of domestic violence, the prosecution of perpetrators and the protection of victims, through a binding international judicial decision.

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6 *Eremia and Others v Moldova* App no 3564/11 (ECHR, 28 May 2013).

7 Laurens Lavrysen, *Human Rights in a positive state: rethinking the relationship between positive and negative obligations under the European Convention on Human Rights*, (Cambridge, Intersentia 2016) 15.

8 *X and Y v The Netherlands*, App no 8978 (28 March 1985); *Bevacqua v Bulgaria*, App no 71127/01 (12 June 2008). To date, all citations are made according to the OSCOLA system of referencing and citation of case law.

9 Report on monitoring of court proceedings in cases of domestic violence, sexual violence and trafficking in human beings, developed by the Women's Law Center in 2018 with support from the Criminal Justice and Law Enforcement Section of the U.S. Embassy in Moldova.

The guiding questions used to explore the positive obligations in the cluster of domestic violence cases **are as follows**:

- How does the Court apply the proportionality test in balancing the interests of the victim of domestic violence with the interests of society and/or the conflicting interests of the perpetrator?
- How does the Court reason in evaluating the knowledge and proximity in domestic violence cases?
- To what degree is the Court ready to afford a wider margin of appreciation in domestic violence cases? What influences the outcome in such cases?
- How does the Court evaluate if the positive obligation in domestic violence cases imposes an impossible burden on authorities?
- How does the scope of the positive obligation vary depending on the specifics of the situation and under the specific rights of the Convention?

Chapter one of the handbook explains the definition, scope and core principles interwoven into the concept of positive obligations. The second part of the chapter touches on diverse typologies, with a focus on the working typologies and main tests and determinants of positive obligations. The readers of this manual should know that this chapter includes a brief overview of the theory of positive obligations. The following two chapters refer primarily to the practical aspects of these obligations in ECtHR caselaw and national practice.

Chapter two examines the development of positive obligations related to the right to life, the prohibition of ill-treatment, the right to private life and the prohibition of discrimination (articles 2, 3, 8, and 14 respectively) and contains the core analysis of the identified case law, by applying the identified tests and typologies.

Chapter three of the handbook focuses on some trends in the justice sector response to cases of domestic violence preventing victims of domestic violence from enjoying access to justice identified in the monitoring of court proceedings in cases of domestic violence and also by the Supreme Court of Justice in the analysis of judicial practice and by the General Prosecutor's Office. Finally, based on the overview of positive obligations, the identified hindrances in efficient handling of domestic violence cases and the Council of Europe guidelines, the handbook culminates with practical recommendations for legal practitioners on victim-centered handling of domestic violence cases.

CHAPTER 1.

Conceptualization of domestic violence and positive obligations

This chapter describes the working definitions of the concept of domestic violence and places it in a broader legal context of international law. Also, the chapter touches on some of the core concepts related to domestic violence which surface frequently in the relevant ECtHR caselaw.

The theme of positive obligations under the ECHR has been subject to limited commentary in the existing literature.[10] This chapter provides the main definitions and scope of positive obligations. Next, it zooms in on different typologies and determinants of positive obligations in the legal literature, applied further in the cross-cutting analysis of domestic violence caselaw in the next chapter.

1.1 Definition and scope of domestic violence

Domestic violence infringes the principles that lie at the heart of the moral vision of inalienable dignity and worth of all members of the human family, the inalienable right to freedom from fear and want, and the equal rights of women.[11] It is, like torture, "about injury, pain, and death",[12] yet perceived in many parts of the world as "an everyday, normal problem, not a serious violation of human rights."[13]

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[10] Alastair Mowbray, *The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004) 3.

[11] Dorothy Thomas and Michele Beasely, *'Domestic Violence as a Human Rights Issue'* 15 Hum. Rts. G. (1993) Hum. Rts. Q. 36, 37.

[12] Sally Engle Merry, *'Human rights and transnational culture: Regulating gender violence through global law'* (2006) 44 Osgoode Hall LJ 53, 56.

[13] Ibid.

In international law, domestic violence is identified as "one of the most insidious forms"[14] of gender-based violence, defined for the first time in 1993 by the United Nations Committee's Declaration on the Elimination of Violence Against Women (DEVAW).[15] The working definition used here is based on a similar, but more specialized definition of domestic violence from the recent Convention to prevent and combat violence against women and domestic violence (hereinafter the Istanbul Convention),[16] also because it is a binding international treaty.

Thus, "domestic violence" shall mean all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or used to share the same residence with the victim.[17] Although domestic violence against men also occurs, it affects women disproportionately and is a form of discrimination.[18] Inter-partner violence against women is the main form of violence reflected in the ECtHR caselaw.

1.2 Status quo as a human rights violation in international law and the European region

While domestic violence is not a novel phenomenon, the ECtHR case law on domestic violence emerged only recently, with the first case *Kontrova v Slovakia* heard in 2007.[19] Why so late? Despite a lack of express mentioning of domestic violence in the ECHR, it makes little sense that such a pervasive violation of human rights did not come into attention of this international judicial body earlier. But silence can also speak volumes about the attitude of the international law towards this problem, perceived traditionally as a "private" matter, outside the ambit of state responsibility.

As an act committed by and against private individuals, at first glance it does not attract state responsibility under the ECHR.[20] However, the Court has long since established the nexus between the state responsibility and private acts in similar "private" cases (e.g. *A v UK*),[21] where beatings of a child

14 *CEDAW General Recommendation No. 19: Violence against women (1992)* [23].

15 United Nations General Assembly, Resolution No A/RES/48/104 (20 December 1993) art 1.

16 Council of Europe Convention on preventing and combatting violence against women and domestic violence (CAHVIO), CETS No 210 (2011), in force since 1 August 2014.

17 Ibid., art 3(b).

18 Violence against women is "violence that is directed against a woman because she is a woman or that affects women disproportionately", *CEDAW General Recommendation No. 19: Violence against women (1992)* [6].

19 *Kontrova v Slovakia* App no. 7510/04 (ECHR, 31 May 2007).

20 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (4 November 1950).

21 *A v UK* App no 100/1997/884/1096 (ECHR, 23 September 1998).

by a stepfather attracted state responsibility. The Court framed such private acts under the concept of positive obligations, discussed in chapter two, where lack of due diligence of a State to intervene and protect the individual amounted to a breach of the ECHR.

A close look at the developments in the area of domestic violence in general international law provides the answer to reasons behind the afore-mentioned omission. First of all, in international law, gender-based violence qualifies as a relative newcomer. Only in the 1990's it became the centerpiece of women's human rights.[22] Thus, for decades neither the international community, nor women themselves perceived domestic violence as an international human rights issue.

However, a series of key developments in the 1990's spurred a new perception of domestic violence. A concerted effort of advocating violence as a human rights issue by the International Women's Conferences,[23] and a series of non-binding UN resolutions became the main vehicle in promoting this neglected problem on the central stage of international law.[24]

The slow emergence of any binding international norm may be partly attributed to the still existing perception of domestic violence as a private matter, but mainly to omission of an explicit prohibition on violence against women in major human rights treaties.[25]

Thus, the core human rights instruments contain no explicit mentioning of violence against women. The same holds true for the Convention to Eliminate Discrimination against Women (hereinafter CEDAW),[26] the only internationally binding instrument specifically on women's rights since 1979. Only later, General Recommendation 19 of the UN CEDAW Committee from 1992 came to clarify that "Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the CEDAW Convention."[27] It also clearly linked violence against women to specific rights, such as the right to

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22 Dorothy Thomas and Michele Beasely, *'Domestic Violence as a Human Rights Issue'* 15 Hum. Rts. G. (1993) Hum. Rts. Q. 36, 37.

23 Vienna Declaration and Programme of Action (A/CONF.157/23) adopted on 25 June 1993; Beijing Declaration and Platform of Action, A/CONF.177/20, adopted on 15 September 1995.

24 Bonita Meyersfeld, *Domestic violence and international law* (Hart Publishing 2010) 15-67.

25 Kirsten Anderson, *'Violence against women: State responsibilities in international human rights law to address Harmful 'Masculinities'*, (2008) 26.2 *Netherlands Quarterly of Human Rights* 173, 184.

26 Convention on the Elimination of All Forms of Discrimination Against Women (18 December 1979) art 2(e).

27 CEDAW General Recommendation No. 19: Violence against women, 1992 [7].

liberty and security of a person, the right to equal protection under the law, the right to equality in the family, the right to the highest standard attainable of physical and mental health.[28]

But it was, yet again, not a binding international instrument. However, once the Istanbul Convention is ratified by more and more CoE States,[29] it shall become the main binding specialized regional treaty in combating domestic violence.

Crucially, in 2017, the CEDAW Committee adopted General recommendation No. 35 on gender-based violence against women with the aim to update General recommendation No. 19. It emphasized that the interpretation of discrimination given in the former recommendation had been affirmed by all States and that the *opinio juris* and State practice suggested that the prohibition of gender-based violence against women had evolved into a principle of customary international law.[30]

1.3 Definition of positive obligations

Positive obligations serve by default as the main concept in the area of domestic violence caselaw under the ECHR, as they are an entry gate for the state responsibility. In its caselaw, the ECtHR relies on two core types of obligations: negative and positive. Although the ECHR is exclusively couched in terms of negative duty",[31] it seems that both negative and positive obligations "go hand in hand with observing the Convention."[32]

So, what are positive obligations in the Court's view? Since most legal scholarship points to the reluctance of the ECtHR to develop a theory of positive obligations,[33] or a definition for that matter, there is a diversity of attempts to deduct it. In his seminal book in this field, Alistair Mowbray points to the definition as duties "requiring member states to...take action"[34] as key, because it clearly pinpoints their function to compel states to undertake specific affirmative tasks. The handbook will rely on this definition.

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28 CEDAW General Recommendation No. 19: Violence against women, 1992 [7]

29 Currently 34 states have ratified the CAHVIO (Istanbul Convention), see https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures?p_auth=8OiEFZk1, last accessed 27 October 2019.

30 CEDAW General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19 (CEDAW/C/GC/35), 14 July 2017[1-2].

31 Benedetto Conforti, '*Exploring the Strasbourg case-law: Reflections on state responsibility for the breach of positive obligations*' in Fitzmaurice M. and Sarooshi D. (eds) *Issues of State Responsibility before International Judicial Institutions* (Oxford, Hart Publishing 2004) 129.

32 Jean-François Akandji-Kombe, '*Positive obligations under the European convention on human rights' Human rights handbook* 7 (2007) 4.

33 Clapham, Andrew, '*Human rights obligations of non-state actors'* (OUP Oxford, 2006) 349.

34 Ibid., Mowbray at *supra note* 10, 2.

To add to the palette of diverse definitions, we can see positive obligations as a "concept of affirmative duties incumbent upon the contracting States… both express and implied in the text of the Convention,"[35] as phrased by the ex-President of the Court, also as "inherent in the provisions of paragraph 1 of the substantive rights of the Convention,"[36] and alternatively as "implied judicial creations."[37] Hence, one can easily imagine that imposition of these undercover duties came as an unpleasant surprise to some States, to the point of creating a climate of "hostility towards the judicial creativity of the Court in interpreting the Convention."[38]

However, one must keep in mind that "the impetus behind the development of implied obligations has been … the dynamic interpretation of the Convention."[39] It is the "living instrument" doctrine, firmly established since 1978, by which the Court interprets facts "in the light of present-day conditions."[40] This way, the Convention cannot be seen as an inert matter, but as a living body, growing and expanding, geared to the times and to the context of each case, but however with one clear predictable genetic code – tuned to the individual human rights, ensuring that the States do "secure" these.

1.4 Scope of positive obligations

To set the scope for positive obligations in large brushstrokes, the dictum in *Siliadin v France*[41] is helpful, because the Court itself walks us through its early caselaw and Convention articles historically connected to positive obligations. Thus, in regard to article 8, the Court refers to *Marckx v Belgium*, a case concerning family ties between a mother and an illegitimate child, where the Court, already in 1979, established that: "Nevertheless it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective 'respect' for family life."[42]

Furthermore, in reference to *X and Y v the Netherlands,* a case regarding the rape of a mentally ill minor in a private institution, the Court clarifies that:

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35 Jean-Paul Costa,*'The European Court of Human Rights: Consistency of Its Case Law and Positive Obligations'* (2008) 26.3 Netherlands Quarterly of Human Rights 452.

36 Xenos Dimitris, *The positive obligations of the state under the European Convention of human rights* (Routledge, 2012) 24.

37 Ibid., Mowbray at *supra note* 10, 6.

38 George Letsas, '*The truth in autonomous concepts: How to interpret the ECHR'* (2004)15.2 *European Journal of International Law* 279. In this article, the author dispels the prejudice towards interpretation as a means of illegitimate judicial discretion.

39 Alastair Mowbray, *The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004) 5-6.

40 *Tyrer v United Kingdom* App no 5856/72 (ECHR, 25 April, 1978) [31].

41 *Siliadin v France* App no 73316/01 (ECHR, 26 July 2005).

42 Ibid., [78].

"Positive obligations on the State are inherent in the right to effective respect for private life under Article 8; these obligations may involve the adoption of measures even in the sphere of the relations of individuals between themselves."[43]

In connection to article 3, the Court refers to the seminal case of *A. v the United Kingdom,* on the failure of the state to protect a boy beaten by his stepfather. In this case that "laid the foundation for the state duty to protect vulnerable groups from violence perpetrated by non-state actors,"[44] the Court stressed: "...the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with article 3, requires States to take measures designed 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."[45]

Thus, as seen above, the articles 1, 3 and 8 are the cradle of positive obligations. However, article 2 has also been instrumental in the development of the positive obligations' concept, and, in reference to Benedetto Conforti, a former judge at ECtHR, "could be applied, *mutatis mutandis*"[46] to positive obligations pertaining to other rights in the Convention. Therefore, these articles will be mainly targeted in Chapter two.

1.5 Overview of typologies of positive obligations

If regarding the definition of positive obligations all is more or less clear, the exercise to distinguish the typologies of positive obligations resembles approaching a series of abstractionist paintings, where each artist painted the same object, with strikingly different results. This diversity is a consequence of the lack of such classification provided by the Court. Aware of this overlap between the typologies, Lavrysen sees these distinctions "as spectrums, rather than black-or-white typologies."[47]

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43 *Siliadin v France* App no 73316/01 (ECHR, 26 July 2005) [79].

44 Bonita Meyersfeld, *Domestic violence and international law* (Hart Publishing 2010) 86.

45 *A v UK* App no 100/1997/884/1096 (ECHR, 23 September 1998) [80].

46 Benedetto Conforti, '*Exploring the Strasbourg case-law: Reflections on state responsibility for the breach of positive obligations'* in Fitzmaurice M. and Sarooshi D. (eds) *Issues of State Responsibility before International Judicial Institutions* (Oxford, Hart Publishing, 2004) 129, 130.

47 Laurens Lavrysen, '*Human Rights in a positive state: rethinking the relationship between positive and negative obligations under the European Convention on Human Rights*', (Cambridge, Intersentia 2016) 47.

Firstly, there are "express" and "implied" positive obligations.[48] Secondly, in his important study, Mowbray takes an article-by-article approach, but discerns three broad groups of duties (i.e. positive obligations) of States: the duty of reasonable protection of persons from violation of their Convention rights by others, the duty of treatment of detainees and the duty to conduct effective investigations.[49] Thirdly, Xenos[50] proposes a three-tiered typology of duties required for a comprehensive protection of Convention rights, consisting of: the legislative framework, the administrative framework and practical measures of ad-hoc application. Xenos also points to the classification of positive obligations by Cordula Droge into horizontal and social dimensions.[51]

Fourthly, both Clapham[52] and Mowbray[53] point to Starmer's categorization of duties in case of positive obligations into five categories: the duty to provide legal framework, the duty to prevent a breach of Convention rights, the duty to provide information and advice relevant to breach of rights, the duty to respond to breach (i.e. by providing an investigation) and the duty to provide resources to individuals to prevent breach. Clapham concludes that the most visible type of positive obligations (also confirmed in Mowbray study), is the obligation *to protect* Convention rights of an individual from infringements by non-state actors,[54] which the authors of this handbook see as the crux of positive obligations, especially in domestic violence cases.

Main working typologies

Lavrysen[55] points to three sets of typologies of positive obligations, that will be applied further in Chapter two: substantive and procedural positive obligations, horizontal and vertical positive obligations, obligations to institute legal, administrative frameworks and ad-hoc measures. These are described further briefly.

- **Substantive and procedural positive obligations**: the first typology of obligations, also expressly mentioned by the Court, consists of substantive and procedural positive obligations. These are problematic,

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48 Rabinder Singh, '*Using Positive Obligations in Enforcing Convention Rights*' *Judicial Review* 13.2 (2008) 94, 95; see also Mowbray at *supra note* 39, 222.

49 Ibid., Mowbray at *supra note* 39, 225-227.

50 Xenos Dimitris, *The positive obligations of the state under the European Convention of human rights* (Routledge, 2012).

51 Ibid., 27.

52 Andrew Clapham, *Human rights obligations of non-state actors* (OUP Oxford, 2006) 524.

53 Ibid., Mowbray at *supra note* 39, 5.

54 Andrew Clapham, *Human rights obligations of non-state actors* (OUP Oxford, 2006) 351.

55 Laurens Lavrysen, '*Human Rights in a positive state: rethinking the relationship between positive and negative obligations under the European Convention on Human Rights*', (Cambridge, Intersentia 2016).

due to the difficulty to distinguish between the two, mainly because "the Court itself has never been explicit" on what makes these two different[56] and also because "in general, separating substance and procedure is not easily done."[57] However, Lavrysen in reference to May, defines substantive obligations as "positive obligations aimed to promote a particular human good or end",[58] and procedural obligations, in reference to Eva Brems, as "concerned with process efficacy, having the purpose and effect of improving the process in order to achieve good results." [59]

- **Horizontal and vertical positive obligations:** in a vertical scenario, violations result directly from inaction of the state, whereas in a horizontal scenario, these result from actions of third parties, thus are linked to the source of violation. Probably already unsurprisingly, the "distinction between horizontal and vertical positive obligations is not always straightforward."[60]
- **Legal, administrative framework and ad-hoc measures**: the difference between the two is that they serve different goals. While the binding legal and administrative frameworks serve for general prevention, ad-hoc positive obligations may be the needed reactive responses for specific protection.[61]

1.6. General determinants in positive obligations

Prior to getting to the analysis of selected cases for this handbook, it is necessary to also briefly assess the main tools necessary for such an exercise.

1.6.1 Margin of appreciation

The doctrine of the margin of appreciation is the first more general tool, defined as the "sliding scale model of intensity of review".[62]As Peroni and Timmer note, in reference to words of Judge Spielmann, in applying the margin of appreciation "the Court imposes self-restraint on its power of review, accepting that domestic authorities are best placed to settle a dispute."[63] In short, a

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[56] Laurens Lavrysen, '*Human Rights in a positive state: rethinking the relationship between positive and negative obligations under the European Convention on Human Rights*', (Cambridge, Intersentia 2016), 50.

[57] Ibid., 53.

[58] Ibid., 52.

[59] Ibid., 53.

[60] Ibid., 81.

[61] Ibid., 114-115.

[62] Ibid., 191.

[63] Peroni, Lourdes, and Alexandra Timmer, 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law', *International Journal of Constitutional Law* 11.4 (2013) 1056, 1084.

wide margin of appreciation corresponds to light scrutiny, whereas a narrow margin corresponds to strict scrutiny.[64]

While the Court "has repeatedly held that the applicable principles under negative and positive obligations are similar",[65] the "Court considers the margin to be wide or at least relatively wider in the area of positive obligations."[66] As seen in the Osman test, central in assessing the positive obligations under article 2, the Court specifically tempers the state responsibility by the condition of "no inappropriate burden"[67] shall be placed on the State, albeit it is a right subject to strict scrutiny.

1.6.2 Principle of proportionality

The principle of proportionality is the second general key tool used by the Court, also in delimiting positive obligations, by assessing the proportionality, in "search of fair balance"[68] between the aim sought and the means used. As with the previous test, it bears an open-ended character, even involving a "good deal of mystery."[69] The outcomes of it are not predictable, a conclusion most authors seem to agree,[70] mainly because it is closely linked to the specific circumstances of the case. Also, many authors call the principle of proportionality "the other side of the margin of appreciation."[71]

As with the margin of appreciation, what dictates the intensity of scrutiny and the importance attached to the rights at stake is the nature of the rights involved, and if it is the "periphery or the core of the right."[72] Thus, the more important the interest at stake, the stronger protection is required.[73] Also, such factors as coherence or administrative and legal practices, the extent of the burden imposed on State[74] may influence the outcome of balancing.

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64 Laurens Lavrysen, *Human Rights in a positive state: rethinking the relationship between positive and negative obligations under the European Convention on Human Rights*, (Cambridge, Intersentia 2016), 189.

65 Ibid., 200.

66 Ibid., 210.

67 *Osman v United Kingdom* App no 87/1997/871/1083 (ECHR, 28 October 1998) [115-116].

68 Laurens Lavrysen, *Human Rights in a positive state: rethinking the relationship between positive and negative obligations under the European Convention on Human Rights*, (Cambridge, Intersentia 2016) 167.

69 Ibid., 171.

70 Ibid., 170.

71 George Letsas,*'Two concepts of the margin of appreciation'*, *Oxford Journal of Legal Studies* 26.4 (2006) 711.

72 Ibid., Lavrysen *in supra note* 68, 170.

73 Ibid.,175.

74 *Osman v United Kingdom* App no 87/1997/871/1083 (ECHR, 28 October 1998) [116].

1.7 Specific determinants in positive obligations

Knowledge and **proximity** are two main specific tools used by the Court to assess positive obligations.

The mere fact of failure to protect a human right will not result in finding a violation, unless the condition of knowledge about a real and immediate risk is satisfied. This is especially important to the horizontal dimension of positive obligations, since if state agents are not aware of the risk posed to private individuals by private individuals, no obligation to avert it will exist. As noticed by Xenos, "the reactive response of the state to take practical measures of protection is dependent on the element of knowledge that conditions that response."[75]

The ECtHR uses the test of knowledge in *Osman v UK,* in assessing positive obligations under article 2. The Court notes that "it must be established to its satisfaction 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."[76]

The requirement of "ought to have known" described as the "dynamic nature of the knowledge condition"[77] is the most important feature of the knowledge condition. Its presence ensures that not in all cases the lack of knowledge about the risk will serve as a waiver of responsibility, because authorities must respond pro-actively also to imminent risks of which they ought to be aware.

Proximity between the State's omission to act and the harm caused is a crucial test in case of scrutiny of legal and administrative framework compliance and in case of investigative obligations.[78] Albeit synonymous to causality, Lavrysen argues that the term "proximity" is best used, because the former term is problematic. Specifically, in cases of omissions, "since omission (inaction) to prevent harm is more steadily described as "not preventing" and not as causing harm (action)".[79]

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[75] Xenos Dimitris, *The positive obligations of the state under the European Convention of human rights* (Routledge, 2012) 117, see more at 73-91.

[76] *Osman v United Kingdom* App no 87/1997/871/1083 (ECHR, 28 October 1998) [116], emphasis added.

[77] Laurens Lavrysen, *Human Rights in a positive state: rethinking the relationship between positive and negative obligations under the European Convention on Human Rights*, (Cambridge, Intersentia 2016), 135.

[78] Ibid., 142.

[79] Ibid., Lavrysen in *supra note* 68, 137-138.

Similarly, Conforti points to the importance of causality[80] (i.e. a causal link between the event and the omission) in *LCB case v UK*, where the Court sought to establish if "there is a causal link between the exposure of a father to radiation and leukemia in a child subsequently conceived".[81] Because the link was unsubstantiated, no state responsibility for the failure of authorities to warn parents of any possible risks resulted.

To conclude, the positive obligation concept is far from being a rigid or a well-defined concept, but rather a flexible one. A similar conclusion seems to befit its determinants, described above. Its fluidity and capacity to expand depending on the importance of the right it is attached to, on the circumstances of the case, or on the reverse – to shrink when measured towards the margin of appreciation of states, makes it not the easiest concept.

[80] Laurens Lavrysen, *Human Rights in a positive state: rethinking the relationship between positive and negative obligations under the European Convention on Human Rights*, (Cambridge, Intersentia 2016), Conforti supra note 46, 133.

[81] *L.C.B. v UK* App no 14/1997/798/1001 (ECHR, 9 June 1998) [39].

CHAPTER 2.

Analysis of domestic violence caselaw

"(...) Because I am afraid of my husband, I left the house together with my children ... Because I have seven children, I was told that there was no appropriate place for me in the shelter (...)."[82]

Halime Kilic, a murdered domestic violence victim

In the first part of this chapter the handbook focuses on the due diligence standard. The next section will examine the development of positive obligations related to the right to life, the prohibition of ill-treatment, the right to private life and non-discrimination (articles 2, 3, 8, 14 respectively). Importantly, particular attention is drawn to specific duties and the Court's use of the two-tiered typology of substantive and procedural positive obligations, with the bulk of analysis focused on the former.

2.1 Due diligence standard in domestic violence

Significantly, the standard of due diligence[83] becomes the key approach to the obligation of states to intervene in cases of domestic violence. The due diligence principle is a well-established principle of general international law.[84] As Barnidge explains in reference to Frey, "under a due diligence stan-

[82] *Halime Kilic v Turkey* App no 63034/11 (ECHR, 28 June 2016) [11].

[83] Lee Hasselbacher, '*State obligations regarding domestic violence: The European Court of Human Rights, due diligence, and international legal minimums of protection' 8* (2009) *Nw. UJ Int'l Hum. Rts.* 190, 194.

[84] Robert P Barnidge, '*The due diligence principle under international law*', (2006) 8.1 *International Community Law Review* 81, 92.

dard, it is the omission on the part of the state, not the injurious act by the private actor, for which the state may be responsible."[85] Due diligence obligations can well be categorized as obligations of conduct, or those primary obligations that require States to endeavor to reach the result set out in the obligation.[86]

This approach is further emphasized in the Declaration on the elimination of violence against women (DEVAW) in 1993, which provides that "States should condemn violence against women…exercise due diligence to prevent, investigate and…punish acts of violence against women, whether those acts are perpetrated by the State or by private persons."[87] From now on, all international instruments or human rights monitoring bodies will reiterate this standard. Thus, the UN Special Rapporteur[88] on violence against women, Yakin Erturk, reiterates: "under the due diligence obligation, States have a duty to take positive action"[89] towards victims of violence. However, as she notes, the "application of a due diligence standard…has tended to be State-centric and limited to responding to violence when it occurs, largely neglecting the obligation to prevent (violence) and compensate … victims of violence."[90] This failure is abundantly visible in the analysis of the caselaw from this Chapter. Erturk also points out that the ECtHR has "used a variant of the due diligence standard in the *Osman v United Kingdom* (1998) case."[91] Indeed, the ECtHR too relies on the due diligence standard in assessing the response of States to domestic violence, as seen in *Opuz v Turkey (2009)*.

2.2 Dynamics of determinants of positive obligations under articles 2 and 3 of the ECHR

The first and foremost issue in relation to the rights envisaged by articles 2 and 3 of the ECHR, as the Court constantly reiterates, is that these "rank as the most fundamental provisions of the Convention."[92]

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85 Robert P Barnidge, '*The due diligence principle under international law*', (2006) 8.1 *International Community Law Review* 81, 95.

86 Timo Koivurova, *'Due diligence'*, Max Planck Encyclopedia of Public International Law (2010) <http://opil.ouplaw.com.proxy.library.uu.nl/view/10.1093/law:epil/9780199231690/law-9780199231690-e1034?rskey=8rLsrV&result=1&prd=EPIL> accessed 27 April 2017.

87 UN General Assembly Resolution, A/RES/48/104 (1993) art 4(c).

88 UN Resolution, 1994/45 (4 March 1994) institutes the position of Special Rapporteur on violence against women.

89 Yakin Ertürk, *'The due diligence standard as a tool for the elimination of violence against women'*, Report of the Special Rapporteur on violence against women, its causes and consequences, UN document E/CN.4/2006/61 (20 January, 2006) 2.

90 Ibid.

91 Ibid., [22].

92 *Kontrova v Slovakia* App no 7510/04 (ECHR, 31 May 2007) [64], see also *Tomasic and Others v Croatia*, App no 46598/06 (ECHR, 15 April 2009) [44].

Thus, in relation to article 2, the Court mentions that "the first sentence of Article 2 (1) *enjoins* States not only to refrain from intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives…."[93] The use of the term "enjoin" shows that the Court adds special weight to these positive obligations, since its semantic meaning is to pressure, urge. Hence, the scrutiny by the Court of positive obligations of the States in this area is more intense. While subjected to extremely strict scrutiny by the Court, the positive obligation of the States in relation to the right to life is *merely one to use best endeavors,*[94] thus not all failures to avert the risk to life will necessarily trigger State's responsibility.

As already mentioned in chapter one, two core cases of this handbook are examined closer. The first case is *Osman v UK*, 1998,[95] where the Court elaborates its often-cited[96] Osman test on the nature and extent of positive obligations arising from article 2(1), also used in article 3. Notably, Judge Albuquerque points out that in domestic violence cases the emerging due diligence standard is stricter than the classical Osman test.[97] Recently, in *Volodina v Russia*,[98] he criticizes again the application of the Osman test by the Court, because in these cases the immediate and real threat is ever-present in the vicinity of the victim, ready to serve the first blow anytime. The possible resulting elaboration by the Court of a stricter test in domestic violence cases would be most welcome, because unless this risk is effectively averted the victim practically lives on an activated landmine, unprotected.

Importantly, the scope of positive obligations under articles 2 and 3 in domestic violence cases can also be extracted from this test, containing the following main duties: a) the duty to create effective criminal law provisions to deter the commission of offences against the person; b) the duty to back up laws by law-enforcement machinery for prevention, suppression and punishment of breaches of such provisions,[99] and c) the duty to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.[100]

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93 *Kontrova v Slovakia* App no 7510/04 (ECHR, 31 May 2007) [49], emphasis added, see also *Tomasic and Others v Croatia*, App no 46598/06 (ECHR, 15 April 2009) [49].

94 Kilic v Turkey App no 22492/93 (ECHR, 28 March 2000), partly dissenting opinion of Judge Golcuklu [1], case of murder of a journalist, emphasis added.

95 Alastair Mowbray, *Cases, materials, and commentary on the European Convention on Human Rights* (3rd ed, Oxford University Press 2012) 120.

96 In fact, in all cases related to loss of life by domestic violence victims under analysis. See also *Tomasic and Others v Croatia*, App no 46598/06 (ECHR, 15 April 2009) [50-51].

97 *Valiulienė v Lithuania*, App no 33234/07 (ECHR, 26 March 2013), Concurring opinion of Judge Albuquerque.

98 Concurring opinion of Judge Albuquerque, *Volodina v Russia* App no 41261/17 (ECHR, 9 July 2019), joined also by Judge Dedov and Judge Serghidiz.

99 *Osman v United Kingdom* App no 87/1997/871/1083 (ECHR, 28 October 1998) [115].

100 Ibid.

The second case examined closer is a landmark case in the domestic violence area, regarding the right to life and the prohibition of ill-treatment: *Opuz v Turkey*.[101] As Mowbray notes, the weight of this case is significant, also because of the unanimous finding of violation of protective obligation.[102]

2.2.1 Application by the Court of key determinants: knowledge, foreseeability of risk, proximity

Clearly, the Court's scrutiny of positive obligations is not random, but focused on preset criteria,[103] the main of which have already been examined in the previous Chapter. To date, the principle of effectiveness is at the core of the scope of positive obligations under article 2. The Court reiterates that the obligation to "secure the practical and effective protection" under article 1 "should be taken into account."[104]

The Court considers that the **knowledge** condition is satisfied the moment the victim contacts the police for help, also based on "various communications"[105] from the applicant's relatives prior to the tragedy. The second part of the test is risk foreseeability. Significantly, in *Opuz* the Court places a lighter burden of proof on the applicant, where "it is sufficient for the applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge."[106]

In *Kontrova v Slovakia*, chronologically the first ECtHR domestic violence case, the two children of the applicant were tragically shot dead by applicant's abusive husband, after which he killed himself. In this case, the risk was made known to police *a priori* to killing through various communications, including emergency calls at night concerning "long-lasting physical and psychological abuse…threats with a shotgun".[107] Similarly, in *Civek v Turkey,* the Court noted that the police had been informed of the likelihood of this murder by numerous complaints from the victim and testimonies of her children.[108] Only these were not taken seriously.

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101 *Opuz v Turkey* App no 33401/02 (ECHR, 9 June 2009).

102 Alastair Mowbray, *Cases, materials, and commentary on the European Convention on Human Rights* (3rd ed, Oxford University Press 2012) 122.

103 Xenos Dimitris, *The positive obligations of the state under the European Convention of human rights* (Routledge, 2012) 32.

104 *Kontrova v Slovakia* App no 7510/04 (ECHR, 31 May 2007) [51], see also *Tomasic and Others v Croatia*, App no 46598/06 (ECHR, 15 April 2009) [44].

105 *Kontrova v Slovakia* App no 7510/04 (ECHR, 31 May 2007) [52].

106 *Opuz v Turkey* App no 33401/02 (ECHR, 9 June 2009) [130].

107 *Kontrova v Slovakia* App no 7510/04 (ECHR, 31 May 2007) [52].

108 *Civek v Turkey* App no 55354/11 (ECHR, 23 February 2016) [52].

In *Tomasic and Others v Croatia*, a case where the applicant's daughter and her one-year old grandchild were eventually killed by the father of the child, after consistent threats of exploding a bomb, the perpetrator was known to be armed and dangerous.[109] The Court termed **foreseeability of the risk** to their lives as a "strong likelihood"[110] based on the psychiatric report of the perpetrator of domestic violence and noted the failure of the Croatian authorities to assess the risk seriously.

However, how does one measure an imminent risk in such an ambiguous area as domestic violence? The emerging practice in specialized victim intervention is the use of a standard risk assessment form.[111] The Court, similarly, proposes a basic "risk assessment" to the States, containing factors that prompt criminal prosecution (i.e. use of a weapon, use of threats, type of injuries inflicted, existence of violence in the past, psychological effect on any children living in the household).[112]

Threats of killing in *Opuz*[113] escalated throughout a period of over ten years, with at least six episodes of serious bodily harm, were known to the police, were sufficient to endanger the life of both the applicant and her mother and, consequently, have been recognized by the Court as particularly risky. Already prior to *Opuz*, in *Kontrova,*[114] escalation of violence was used by the Court as a clear indicator of foreseeable risk, to which authorities must draw attention.

Moreover, in *Opuz,* the withdrawal of the complaint by the victim did not result neither in "undoing" the knowledge, nor in minimizing the duty of the state to protect.[115] In this case, the withdrawal of complaints by the victims, allegedly due to threats and pressure from the abuser, was possible because of deficient law. However, the Court applied a scrutiny of Turkey's "due diligence to prevent violence…*despite the withdrawal* of complaints by the victims."[116] Thus, it becomes clear that if the risk is known and foreseeable, the States must act to prevent it from materializing.

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109 *Tomasic and Others v Croatia*, App no 46598/06 (ECHR, 15 April 2009) [53].

110 Ibid., [58].

111 There is clear focus on the need to apply a risk assessment in the European region <http://eucpn.org/document/standardized-tools-domestic-violence-risk-assessment-european-examples-handbook-police > accessed 26 October 2019.

112 *Opuz v Turkey* App no 33401/02 (ECHR, 9 June 2009) [138].

113 Ibid., [136].

114 *Kontrova v Slovakia* App no 7510/04 (ECHR, 31 May 2007) [52].

115 *Opuz v Turkey* App no 33401/02 (ECHR, 9 June 2009) [137].

116 Ibid., [131].

Based on *Opuz*, the Court uses the following test of **proximity** in domestic violence cases: "a failure to take reasonable measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the state."[117] Thus, albeit without saying it in each case, the Court clearly searches for a connection, a link between the State's inaction and the preventable tragedy in domestic violence cases.

And last but not least is the observation that risks to the life of a victim outweigh other considerations. Thus, the proportionality test does not normally apply to the rights under the scope of articles 2 and 3, the latter being an absolute right. However, there is some form of balancing, for example in *Opuz*, where authorities excused lack of intervention with the need to avoid interference with the right to privacy (article 8). The tension between rights appears in the subsequent analysis of cases under the scope of other articles. The Court addressed the issue by weighing the rights of the perpetrator against the background of the victim's rights, by holding that **"interference into private or family life of the individuals might be necessary ... the seriousness of the risk to the applicant's mother rendered such intervention by the authorities necessary in the present case",**[118] **thus victim's safety prevails.**

2.2.2 Application by the Court of additional criteria: vulnerability of the victim, reasonable measures and burden of positive obligations

Positive obligations in domestic violence cases are not limitless. The Court is cautious not to impose an "impossible or disproportionate burden"[119] on States, both because of the unpredictability of human behavior and due to deficient resources or priorities of the States.[120] This argument is cited frequently by the Court to define the positive obligations in this segment of cases, even though some emerge from absolute rights, which allow little space for such balancing. Since the Court does not delineate a general test for when this burden becomes "impossible", it depends also on circumstances of each case.

Within the scope of the right to be free from torture and ill-treatment, in *Mudric v Moldova*, the Court stresses its subsidiary role in assessing the sufficiency of positive obligations, by recalling that "it will not replace the national authorities in choosing a particular measure designed to protect a victim of

[117] *Opuz v Turkey* App no 33401/02 (ECHR, 9 June 2009) [134].
[118] Ibid., [144].
[119] *Kontrova v Slovakia* App no 7510/04 (ECHR, 31 May 2007) [50].
[120] *Civek v Turkey* App no 55354/11 (ECHR, 23 February 2016) [48].

domestic violence."[121] Thus, while an absolute and hence narrowly construed right, the choice of means falls into the wider margin of the appreciation of states.

Also, while states must take reasonable steps, the Court does not explain what is considered reasonable in domestic violence intervention, thus its meaning must be deduced solely from analysis of caselaw. Vagueness of the term "reasonable" begs for the question: is it a new, quasi-margin of appreciation, which instantly broadens the options for State (in)action in cases of positive obligations or a tool used by Court to allow itself enough space to maneuver?

Indeed, what may seem as reasonable for a State which tries to prove it did enough, within the legal constraints, may suffice or not for the Court, which therefore remains the final arbiter. For example, as mentioned earlier, in *Opuz* the Government argues it was prevented to act, because, once the victims withdrew their criminal complaints, in compliance with Turkish legislation, police was legally exempted from acting beyond. In other words, the national "reasonableness" threshold of what was expected of police was technically met. However, the Court used a different yardstick, of due diligence to protect, to measure when these measures are good enough or reasonable and reached an opposite conclusion.

Another observation from the cross-cutting caselaw analysis is that the Court clearly and frequently uses the concept of **vulnerability of victims** of domestic violence in its reasoning. The concept of vulnerability of victims of domestic violence is a key concept, that all the practitioners involved in the resolution of these cases must clearly understand. Whether by physical or sexual abuse, by blackmailing a victim with taking her children away in case she leaves or by controlling the sources of income or the victim's daily agenda by minute, or by succeeding to effectively cut off all her relations under the pretext of jealousy, the perpetrator seeks to establish a total regime of power and control and it is often difficult for the victim to break this vicious cycle[122] without specialised help. The resulting isolation and threats of violence may „form a barrier to liberation that can be equally as restrictive as prison walls."[123]

As Peroni and Timmer explain, the Court's use of vulnerability is not merely rhetorical, but "allows the Court to address different aspects of inequality in

[121] *Mudric v Moldova* App no 74839/10 (ECHR, 16 July 2013) [49], see also *Eremia and Others v Moldova* App no 3564/11 (ECHR, 28 May 2013) [50].

[122] Domestic Abuse Intervention Program, Power and Control Wheel <https://www.theduluthmodel.org/wheels/> accessed 11 July 2017.

[123] Bonita Meyersfeld, *Domestic violence and international law* (Hart Publishing 2010) 129.

a more substantive manner."[124] In other words, the cases are assessed against the background of substantive equality. Their conclusion was that the vulnerability discourse of the Court narrows the margin of appreciation and makes positive obligations "more pronounced."[125]

Both regarding the right to life and the right to be free from torture, the Court emphasizes expressly the vulnerability criterion it applies in domestic violence cases, by stating that "children and *other vulnerable individuals*, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity."[126] However, while children are also affected (albeit indirectly) by domestic violence, the Court only rarely refers to their vulnerability in its reasoning.[127]

In *Bevacqua*, the Court notes that "particular vulnerability of the victims of domestic violence and the need for active State involvement in their protection has been emphasized in a number of international instruments."[128] While being a case examined under article 8, it is important here as well, because this discourse on "particular vulnerability" resonates (explicitly or implicitly) throughout the entire caselaw on domestic violence.[129] Furthermore, in *Mudric,* the Court has taken into account three overlapping layers of vulnerability regarding the applicant (as victim of domestic violence, as an elderly person of 72 years old, and living as a single woman). [130] Nonetheless, vulnerability will also depend on particular circumstances of each case. Thus, in *Valiulene v Lithuania*, where a violation of article 3 was acknowledged, the Court was "unable to fully share the applicant's view that she, as a woman, by default fell into the category of vulnerable persons." [131]

Importantly, the Court clearly considers that vulnerability of victims in these cases calls for enhanced (and sometimes more onerous)[132] positive obligations on states. Thus, in *Halime Kilic*, the Court rejected the argument of the authorities regarding the reasonable limitation of resources, due to the

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[124] Lourdes Peroni and Alexandra Timmer, 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law' (2013) 11.4 *International Journal of Constitutional Law* 1056, 1057.

[125] Ibid., 1075.

[126] *Opuz v Turkey* App no 33401/02 (ECHR, 9 June 2009) [159], emphasis added, see also *Rumor v Italy* App no 72964/10 (ECHR, 27 May 2014) [60].

[127] *E.M. v Romania* App no 43994/05 (ECHR, 30 October 2012) [70].

[128] *Bevacqua and S. v Bulgaria* App no 71127/01 (ECHR, 12 June 2008) [65].

[129] See for example, *Halime Kilic v Turkey* App no 63034/11 (ECHR, 28 June 2016) [120]; *Hajduová v Slovakia* App no 2660/03 (ECHR, 30 November 2010) [46].

[130] *Mudric v Moldova* App no 74839/10 (ECHR, 16 July 2013) [51].

[131] *Valiulienė v Lithuania*, App no 33234/07 (ECHR, 26 March 2013) [69].

[132] In fact, costs of non-intervention in domestic violence are significantly higher for the State and society, compared to intervention costs <http://md.one.un.org/content/unct/moldova/en/home/presscenter/press-releases/violen_a-in-familie--cat-ne-cost-inaciunea-.html> last accessed 26 October 2019.

low number of shelters for victims in Turkey. The State's positive obligation to protect the right to life included finding another suitable solution to temporarily escape from a violent home, due to "situation of insecurity and of particular vulnerability, moral, physical and hardships"[133] of the victim with seven children. In other words, it called for some expenses, in the form of temporary living premises.

The fact that the Court uses vulnerability of victims to prioritize their needs also on the list of State expenditures, perhaps the most sensible area of state sovereignty, is a significant breakthrough for the human rights of victims. Moreover, the Istanbul Convention, discussed in chapter one, recognizes that specialized needs of victims in domestic violence cases dictate the use of specific methods of intervention, with the centrality of protection orders and temporary shelters for the victims and their children. The Court seems to prioritize these too, because it focuses its scrutiny on the efficiency of intervention on these measures, as also seen in further analysis.

Thus, the margin of appreciation of States to decide based on their "priorities and resources" significantly shrinks in the light of the vulnerability of domestic violence victims. Also, use by the Court of discourse on need to avoid a burden on States measures does not result in decreasing the States' positive obligations. On the contrary, positive obligations may call the State to prioritize its expenses (i.e. shelters) in order to ensure a real protection of victims.

2.3 Substantive positive obligations under article 2

After a glance into the dynamics of the afore-mentioned determinants, the handbook proceeds to examine the specific duties of States as the last and main level of fragmentation of concrete positive obligations, their essence, as explained above. The aforementioned Osman test plays a central role in this structure , which will be reiterated in the subsequent clusters of substantive obligations.

2.3.1 Duty to create effective criminal law measures

The duty to set up a proper legal framework is a cross-cutting duty in domestic violence cases. Importantly, setting up a legal system is only half a step, or half a duty. Indeed, a deficient legal framework may cause gaps in intervention in domestic violence. However, it is frequently not a lack of legal provisions *per se*, but failure to effectively implement these that results in violations, mainly due to the authorities' unwillingness to act.

[133] *Halime Kilic v Turkey* App no 63034/11 (ECHR, 28 June 2016), [100].

In *Tomasic*, discussed earlier, the Court considered the deficient national system to protect persons against mentally ill dangerous persons as a central issue.[134] Thus, the Court took into account that Croatian law did not allow for a possibility of extending the compulsory psychiatric treatment beyond the prison, which made the failure to properly administer it while in jail the more important.[135]

In *Kontrova v Slovakia,* authorities failed to classify, investigate and prosecute the acts of domestic violence as a criminal offence, despite existing law that made it possible. In *Halime Kilic*, the Court points that albeit the law allowed for the possibility of detention of the perpetrator of domestic violence for non-compliance with the judicial injunction to not approach the victim,[136] it was never enforced, resulting in a "context of impunity",[137] in which the aggressor was able to reiterate acts of violence without any negative consequences to himself. Clearly, this duty is intrinsically connected with the next duty, because if law exists, the inherent next step is its enforcement, done through an appropriately functioning law enforcement machinery.

2.3.2 Duty to provide policing and criminal justice systems to enforce those measures

One of the main parts of the law enforcement machinery required to be actively involved in intervention is the police. It is the police that will, hopefully, come to rescue the victim in the middle of the night from the hands of a violent partner and play a significant role in other preventive or punitive measures.

In *Kontrova*, the Court stresses the role of the police in carrying out these duties. In this case, the failure to properly discharge positive obligations consisted of the failure to merely respect an array of regular internal service regulations, such as the registration of the applicant's criminal complaint, commencing immediate criminal investigation and taking action to respond to the allegation that the applicant's husband had a shotgun.[138] Hence, no unreasonable expectations were set by the Court for police actions.

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134 *Tomasic and Others v Croatia*, App no 46598/06 (ECHR, 15 April 2009) [64].
135 Ibid.,[59].
136 *Halime Kilic v Turkey* App no 63034/11 (ECHR, 28 June 2016) [98].
137 Ibid., [99].
138 *Kontrova v Slovakia* App no 7510/04 (ECHR, 31 May 2007) [53].

2.3.3 Duty to take reasonable operational (or administrative, judicial) measures

The need to back up the purely legislative measures with real operative measures is a crucial instrument for the protection of domestic violence victims, recognized in a number of cases by the Court.[139] Thus, in *Civek*, where the applicants are the three children of a murdered victim of domestic violence,[140] the Court points to the positive obligation of states to "take preventive measures of practical nature (or operative measures) to protect…".[141] The following operative measures specific to domestic violence shall be mentioned:

i) Duty to protect from mentally-ill perpetrators

The Court established a violation of the substantive aspect of article 2 in *Tomasic,*[142] noting the failure of authorities to order and carry out a search of the perpetrator's premises and vehicle for a gun; and properly administer prescribed psychiatric treatment, measures considered potent to avert the risk to the victims' lives.[143] This case is also an example of general positive obligations under article 2 (not just regarding this individual applicant), because the Court scrutinizes deficiencies of the national system also for the protection of the lives of others (general society) from acts of dangerous criminals.[144]

Thus, in his concurring opinion in *Tomasic*, Judge Nikolaou goes deeper and criticizes the lack of "specific rules spelling out measures of mandatory psychiatric treatment"[145] which made it an empty measure of protection from start. He sharply catches the crux of the victims' need of protection in similar cases, because even when the mandatory treatment is enforced, it may still call for additional measures, for a real protection of victims. Thus, in this case, the victims remained "imperatively in need of police protection without which their lives remained in mortal danger."[146]

In *Kontrova*, positive measures expected from the police were of operational nature (to carry out a search of the firearm, launch criminal investigation). Authorities failed to do so because of the attitude, arbitrarily treating these

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139 *Tomasic and Others v Croatia*, App no 46598/06 (ECHR, 15 April 2009) [49].
140 *Civek v Turkey* App no 55354/11 (ECHR, 23 February 2016) [33].
141 Ibid., [47].
142 *Tomasic and Others v Croatia*, App no 46598/06 (ECHR, 15 April 2009) [46].
143 Ibid., [60].
144 Ibid.,[64].
145 *Tomasic and Others v Croatia*, App no 46598/06 (ECHR, 15 April 2009), concurring opinion of Judge Nicolaou, [3].
146 Ibid., [6].

threats in a private matter as a minor offence.[147] This attitude is a main root cause of many similar failures to intervene. Interestingly, although Slovakian authorities indicted several policemen for negligent dereliction of duty,[148] the Court still found a substantive violation of article 2 of the Convention. Thus, the Court is not satisfied with *ex post* discharge of positive obligations. The bottom line in these cases is if perpetrators of domestic violence are mentally ill, it results in a heightened duty of the State to protect the victims and thus an increased degree of scrutiny by the Court on positive obligations.

ii) Duty to issue and enforce protection orders speedily

It is a central duty that resonates throughout most of the examined cases here. A protection order is an often-used practical measure specifically in domestic violence cases, mostly a judicial injunction, which requires the perpetrator to break physical contact and communication with the victim for a period of time and can include other special measures. The Court performs a thorough scrutiny of how these are enforced in practice. To date, this measure may require both legal (special domestic violence law to ensure these measures exist), and policing (factual intervention) measures, but it seems to fit better into operational measures.

Thus, in *Kilic***,** a case where the applicant's daughter was killed by the latter's husband, the Court expressly points not to absence of protection orders (because three were issued), but that "they proved to be totally ineffective to ensure any protection."[149] In finding a substantive violation of article 2, the Court focused on the delays to enforce these, thus a key element of speedy protection.

Besides a speedy enforcement, the second key factor is the compliance to the protection order by the perpetrator himself, by attaching real guarantees of compliance. In *Civek*, another case of a murdered domestic violence victim, applicants alleged failure of the Turkish authorities to protect their mother from their father. The perpetrator's motives of inflicting twenty-two stab wounds to the victim were to protect his honor, since "almost any man would react the same."[150] While the Court acknowledged certain positive steps Turkey took to act with due diligence and protect Selma Civek during the initial stage of intervention, it found a violation during the final stage of the protection, because of the inaction of the police after the perpetrator's release

[147] *Kontrova v Slovakia* App no 7510/04 (ECHR, 31 May 2007) [15-18].
[148] Ibid., [25].
[149] *Halime Kilic v Turkey* App no 63034/11 (ECHR, 28 June 2016) [95].
[150] *Civek v Turkey* App no 55354/11 (ECHR, 23 February 2016) [13].

from custody. He continued to harass and threaten the victim without any practical measures taken to stop him,[151] despite the existing law which made it possible to arrest the perpetrator for a violated judicial order.

Hence, partial compliance with the positive obligations also does not satisfy the efficiency standard set by the Court. The Court clearly defines that the aim of imposing criminal sanctions on the perpetrator for not complying with the protection order is "to restrain and deter the offender from causing further harm."[152] Thus, a related positive obligation of States to ensure compliance to protection orders is to ensure the criminal liability of the perpetrator for the knowledgeable violation of the order.

2.4 Substantive positive obligations under article 3

Article 3(1) of the ECHR reads as follows: "*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*"

It is an absolute right frequently infringed in domestic violence cases. Notably, while Turkey is "leading" on cases of violation of the right to life, Moldova "leads" in the area of violation of article 3, by a series of post-Opuz cases. Despite a well-developed Moldovan legal framework,[153] in all cases the Court noticed failure to enforce it, to enforce protection orders especially. These cases will be the main focus of analysis here.

The States parties have the duty to ensure that persons in their jurisdiction "are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals."[154] In these cases, intervention into private or family life "may be necessary"[155] to ensure a proper discharge of positive obligations. In *Opuz*, we see that the main general threshold test applied regarding an allegation of ill-treatment or torture, is the minimum level of severity.[156]

Importantly, in application of the general tests to assess the minimum severity threshold of article 3, in *Eremia*, the Court took into account the subjective element of fear, not just physical beatings. It noted that "fear of further assaults was sufficiently serious to cause the first applicant to experience suf-

151 *Civek v Turkey* App no 55354/11 (ECHR, 23 February 2016) [57-64].
152 *Valiulienė v Lithuania*, App no 33234/07 (ECHR, 26 March 2013) [85].
153 See *T.M. and C.M. v Moldova* App no 26608/11 (ECHR, 28 January 2014) [44].
154 *Opuz v Turkey* App no 33401/02 (ECHR, 9 June 2009) [159].
155 *E.M. v Romania* App no 43994/05 (ECHR, 30 October 2012) [58].
156 *Opuz v Turkey* App no 33401/02 (ECHR, 9 June 2009) [158].

fering and anxiety amounting to inhuman treatment."[157] Similarly, the Court delineates in another case that "evidence of such fear can be found in the applicant's seeking refuge outside their home."[158] However, it is a relative concept, which depends on "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."[159]

Both substantive and procedural horizontal positive obligations are triggered in this cluster of cases. The types of duties under the scrutiny of ECtHR are similar to those described earlier under article 2. Thus, the Court's general test in article 3 is, on one hand, centered on positive obligations "to set a legislative framework aimed at preventing and punishing ill-treatment by private individuals",[160] and on the other hand, provided that the knowledge criterion is satisfied,[161] "to apply the relevant laws in practice, thus affording protection to the victims and punishing those responsible for ill-treatment."[162] Similarly to the previously examined cluster of cases, the duty to enforce the law and protection orders specifically is at the core of this cluster of cases.

In *Mudric,* in which the Court was unanimous in finding a violation of article 3, the applicant alleged failure of the authorities to protect her from domestic violence and to punish the aggressor, her former husband, whom she had divorced 20 years ago.[163] To date, he was diagnosed with and frequently treated for paranoid schizophrenia and recognized to be dangerous to society. In this case, both substantive and procedural positive obligations were under scrutiny. The authorities' ineffective actions to enforce protection orders by "allowing (the aggressor) to stay in the applicant's house for more than a year after her complaint was made,"[164] resulted in a violation of the Convention.

In *Eremia*, the Court found a violation of article 3 positive obligations, due to the failure to protect the applicant from recurring domestic violence, perpetrated also in front of her teenage daughters. Allegedly, the perpetrator pressured the applicant to withdraw the criminal complaint, by threats to kill her and by simulating strangling her.[165] Significantly, in this case the aggressor was himself a police officer. The Court found it especially disturbing that

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157 *Eremia and Others v Moldova* App no 3564/11 (ECHR, 28 May 2013) [54], the subjective element of fear is also taken into account in numerous article 3 cases *B. v Moldova* App no 61382/09 (ECHR, 16 July 2013) [58], *D.P. v Lithuania*, App no 27920/08 (ECHR, 22 October 2013, strike out) [21-22].

158 *T.M. and C.M. v Moldova* App no 26608/11 (ECHR, 28 January 2014) [41].

159 Ibid., [35].

160 *Mudric v Moldova* App no 74839/10 (ECHR, 16 July 2013) [47].

161 Ibid., [49].

162 Ibid.

163 Ibid., [7].

164 Ibid., [52].

165 *Eremia and Others v Moldova* App no 3564/11 (ECHR, 28 May 2013) [18].

the authorities "shielded…(a policeman) from criminal liability rather than deterring him from committing further violence".[166] The Court established that the authorities were well aware of the violence, noted presence of an "increased risk of further violence",[167] and the perpetrator's "blatant disregard of the protection order."[168] Thus, the Court uses the same main determinants of knowledge and foreseeable risk as in article 2.

The issue of speedy protection[169] was the crux of the Court's decision in *E. v Slovakia*. In this case, the domestic authorities failed to ensure protection under article 3 and 8, to the applicant and her three children, all victims of psychological, physical and also sexual domestic violence (against applicant's daughter), by not issuing on own motion an interim order to exclude the perpetrator from the jointly leased property.[170] The Court noted that the applicants "required protection *immediately*, and not a year or two after the allegations first came to light."[171] Similarly, in *Eremia*, the Court points that "the risk to the applicant's physical and psychological well-being was imminent and serious enough as to require the authorities to act swiftly."[172] Hence, speedy protection is considered paramount by the Court in domestic violence cases.

In *B. v Moldova*, the applicant had to endure systematic beatings from her ex-husband. The Court noticed that the applied fines were small and "had no deterrent effect"[173] and the protection order was meaningless, because the authorities did not evict the aggressor. This case shows another frequent pattern in the behavior of authorities in domestic violence cases. Thus, the perpetrator's property rights were considered by local authorities to outweigh the victim's right to safety. Importantly, the Court was unable to adhere to such proportionality assessment by the local authorities, and requested domestic courts "to properly balance the two competing rights … by offering real protection to the applicant, while not depriving (the aggressor) of his possessions."[174] Hence, as already noted before, the Court clearly tilts the balance of rights towards the applicant's safety.

In *T.M. v Moldova*, a case of physical and psychological abuse of the applicant and her child, the Court was ready to accept that also suffering of the

166 *Eremia and Others v Moldova* App no 3564/11 (ECHR, 28 May 2013) [65].
167 Ibid., [59].
168 Ibid., [60].
169 The Court emphasized delayed protection in a number of domestic violence cases. See also *T.M. and C.M. v Moldova* App no 26608/11 (ECHR, 28 January 2014), [49].
170 *E.S. and Others v Slovakia* App no 8227/04 (ECHR, 15 September 2009) [33].
171 Ibid., [43], emphasis added.
172 Ibid., [61].
173 *B. v Moldova* App no 61382/09 (ECHR, 16 July 2013) [53].
174 Ibid., [59].

applicant's child attained the threshold of article 3 due to "direct assault and verbal abuse, as well as having witnessed her mother being abused",[175] mainly due to her tender age of eight years old. However, the negative impact on older children, as indirect victims of violence, cannot be ruled out. As studies reveal, a high number of victims of domestic violence experience post-traumatic stress disorder (PTSD),[176] similarly to war prisoners. Thus, *D.P. v Lithuania* dramatically reveals this important angle of domestic violence, because the lack of effective protection from regular beatings and threats may lead to constant fear and tensions at home with a deep psychological impact also on older children.[177]

By contrast, *Rumor v Italy* shows that, if all reasonable protection measures are taken, the Court is satisfied that positive obligations are discharged effectively.[178] In this case, the applicant with two children was assaulted by her former partner, but the authorities reacted promptly, performed a careful assessment of the risk to the victim, properly applied the law and sentenced the perpetrator to jail. All these led the Court to the conclusion that all the necessary steps, in other words - positive obligations, were taken.

Last, but not least, in *N. v Sweden*, the Court also touches on the *non-refoulement* aspect of article 3 and found that Sweden would violate article 3 of the Convention by deporting the applicant to her country of origin, Afghanistan, where she ran the risk of being subjected to domestic violence, endemic there.[179]

2.5 Substantive positive obligations under article 8

Article 8(1) reads: *Everyone has the right to respect for his private and family life...*

In general, respect for 'private life' is a term whose broadness accounts by far for the most positive obligations claims.[180] A significant number of domestic violence cases related to the violation of non-absolute rights fall under articles 8 and 14 of the Convention.

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175 *T.M. and C.M. v Moldova* App no 26608/11 (ECHR, 28 January 2014) [41].

176 Prevalence estimates regarding battered women indicate high rates of depression, suicidality and 63.8% in 11 studies of posttraumatic stress disorder (PTSD). Jacqueline M. Golding, *'Intimate partner violence as a risk factor for mental disorders: A meta-analysis' Journal of family violence* 14.2 (1999) 99.

177 *D.P. v Lithuania* App no 27920/08 (ECHR, 22 October 2013) [21-24]. Apparently domestic violence was the cause of depression of applicant's son, who eventually took his life.

178 *Rumor v Italy* App no 72964/10 (ECHR, 27 May 2014).

179 *N. v Sweden* App no 23505/09 (ECHR, 20 July 2010), [34].

180 Xenos Dimitris, *The positive obligations of the state under the European Convention of human rights* (Routledge, 2012) 12.

Firstly, the Court reiterates that the concept of private life is not an absolute right and includes a person's physical and psychological integrity.[181] Also, positive obligations are "inherent in effective "respect" for private and family life"[182] and "may involve the adoption of measures in the sphere of the relations between individuals."[183]

2.5.1 Duty to set up a legal framework

In *Bevacqua*, a pre-*Opuz* case, the applicant alleged failure of the authorities to protect her from at least four separate violent incidents from her husband, during custody and divorce procedures. Delay in child custody procedures with due diligence resulted in failure to secure respect for private life in this case. Despite the applicant's request to examine her case under the scope of article 3, the Court decided to examine it under the scope of article 8, without stating its reasons. This reframing under the scope of a non-absolute right played a crucial role in the final outcome of the case, as seen further.

In this case, the State refused to institute public criminal proceedings against the aggressor, because Bulgarian law provided that only medium bodily injuries qualified (i.e. long-lasting difficulties to the hearing, sight or limb, disfiguring of face or broken jaw), whereas in this case the victim supported light bodily injuries. While expressly recognizing her vulnerability, at that moment, the Court implicitly agreed with the Bulgarian law that not all domestic violence cases require public prosecution, leaving it under the "choice of means ... within the domestic authorities' margin of appreciation."[184]

Such a lax position of the Court in this pre-Opuz case, which requires the victim to pay first a very high price of medium injuries, as seen above, in order to even qualify for public intervention, is unacceptable! What, if not a properly tailored law, will make intervention for police and other authorities mandatory? Such an approach not only encourages the domestic authorities' attitude of treating light injuries as trivial, seen as a normal by-product of a merely private dispute, in fact it upholds a culture of tolerance of domestic violence. As Letsas points, the idea that local authorities are "better placed" to assess local values "has been criticized as lending weight to the idea of moral relativism and compromising the universality of human rights."[185] This case is an example of such an unfortunate compromise.

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[181] *Bevacqua and S. v Bulgaria* App no 71127/01 (ECHR, 12 June 2008) [65].

[182] Ibid., [64].

[183] *Irene Wilson v United Kingdom* App no 10601/09 (ECHR, 23 October 2012) [37].

[184] *Bevacqua and S. v Bulgaria* App no 71127/01 (ECHR, 12 June 2008) [82].

[185] George Letsas,*'Two concepts of the margin of appreciation'* (2006) 26.4 *Oxford Journal of Legal Studies* 723.

However, the Court seemed to reconsider this view in its subsequent case-law. Thus, in 2010 in *A v Croatia*, the acts of violence included serious death threats, hitting and kicking the applicant in the head, face, body and physical injuries.[186] In this case, in relation to the sphere of criminal law protection, the Court evokes the Convention's living instrument principle, which "requires greater firmness in assessing breaches of the fundamental values of democratic societies."[187] Later, in *T.M. v Moldova* from 2014, the Court explains in more clear terms that: "the prosecutor's position that no criminal investigation could be initiated unless the injuries caused to the victims were of a certain degree of severity also raises questions regarding the efficiency of protective measures, given the many types of domestic violence, not all of which result in physical injury, such as psychological and economic abuse."[188] While the wording "raises questions" does not yet reveal a firm position of the Court on this matter, it is still a welcome progress in its reasoning.

2.5.2 Dignity of victims as a factor in domestic violence caselaw

Of particular interest to this context is *Valiuliene*, a post-Opuz case, albeit examined under a procedural aspect of article 3. In *Valiuliene*, the applicant had been strangled, hit and kicked by her live-in partner on five occasions, all episodes resulting in minor injuries. Despite an existing legal framework[189] to punish the perpetrator, the authorities considered the injuries to be "merely trivial"[190] and failed to do so. Unlike the domestic authorities, the Court expressly treats these five episodes of domestic violence as a continuing offence, thus an aggravating circumstance.[191] The Court acknowledged that "psychological impact is an important aspect of domestic violence"[192] and also fear and helplessness of the applicant,[193] but without a palpable substantive outcome.

Importantly, in his concurring opinion in *Valiuliene,* Judge Albuquerque pointed that it "*could have been a leading case*" and criticized the majority for not finding also a substantive violation, pointing that humiliation of dignity is "precisely this intrinsic element" that triggers the application of article 3.[194]

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[186] George Letsas,'*Two concepts of the margin of appreciation'* (2006) 26.4 *Oxford Journal of Legal Studies* 723 [56].

[187] *A. v Croatia* App no 55164/08 (ECHR, 14 October 2010) [67].

[188] *T.M. and C.M. v Moldova* App no 26608/11 (ECHR, 28 January 2014) [47].

[189] Ibid., [78].

[190] Ibid., [46].

[191] Ibid., [68].

[192] Ibid., [69].

[193] Ibid., [70].

[194] *Valiuliene v Lithuania*, App no 33234/07 (ECHR, 26 March 2013), Concurring opinion of Judge Albuquerque. Importantly, he presents a detailed incursion into the concept of domestic violence (emphasis added).

Indeed, the deepest layer of all domestic violence cases, beyond the physical vulnerability of the victims, is their trampled on human dignity. Of course, there is *Opuz*,[195] in which the Court descended full-weight on the defective Turkish legal framework, by instituting the pilot judgement procedure, where the degree of suffering reached the threshold of article 3. But hard cases make a bad law, the majority being closer to *Bevacqua* or *Valiuliene,* in both of which the Court missed an opportunity to place these under the scope of article 3, due to a lesser degree of injury.

Until now it was inexplicable why a slap on a face by the police[196] weighed heavier in the eyes of the Court than the inaction of authorities and resulting years of humiliation and injuries caused by a "loved" one? Also, do such inconsistencies show that the positive obligations weigh less than the negative ones?[197]

However, significantly and groundbreakingly for this segment of caselaw, in the recent case *Volodina v Russia* the Court has finally incorporated the discourse on **humiliation of dignity,** as a sufficient threshold to attain the level of suffering required under article 3, as follows:

"***Even in the absence of actual bodily harm or*** *intense physical or mental suffering, treatment which humiliates or debases an individual, showing a lack of respect for or* ***diminishing his or her human dignity,*** *or which arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance,* ***may be characterised as degrading and also fall within the prohibition set forth in Article 3.*** *It should also be pointed out that it may well suffice that the victim is humiliated in his or her own eyes, even if not in the eyes of others (see Bouyid v Belgium [GC], no. 23380/09, §§ 86-87, ECHR 2015)."*[198]

In this case, the Court also drew attention to a continued trampling on the victims' dignity by the perpetrator, who after a series of beatings and stalking, also vengefully published her private photographs, considered by the Court as an act that "further undermined her dignity, conveying a message of humiliation and disrespect."[199]

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195 *Opuz v Turkey* App no 33401/02 (ECHR, 9 June 2009) [198-200].

196 *Bouyid v Belgium*, App no 23380/09 (ECHR, 28 September 2015).

197 For an in-depth discussion on comparison of negative and positive obligations, also the proposal on merging these, see Laurens Lavrysen, *Human Rights in a positive state: rethinking the relationship between positive and negative obligations under the European Convention on Human Rights*, (Cambridge, Intersentia 2016).

198 *Volodina v Russia* App no 41261/17 (ECHR, 9 July 2019) [73].

199 Ibid., [75].

Thus, while the discourse on dignity was virtually absent in Court's reasoning in the entire cluster of cases, with *Volodina v Russia*[200] a new dawn may be coming and this case could be considered as a confirmation of the visible progression in the Court's view on domestic violence. Under this aspect,[201] this case from 2019 may be considered as the **landmark case affirming dignity** as a core issue, triggering the discourse on ill-treatment and application of article 3 in all forms of domestic violence.

2.5.3 Duty to provide operational, administrative and policing measures

Although the degree of criminalization of lesser injuries resulting from violence was left to the State's discretion, as discussed above, the operative or policing measures were not. The Court stated the view that "no such assistance was due as the dispute concerned a "private" matter was incompatible with their positive obligations to secure the enjoyment of the applicant's article 8 rights."[202] Thus, failure of the police to protect the applicant resulted in violation of article 8.

In *A. v Croatia*,[203] mentioned above, the failure by the State to implement a series of measures (i.e. compulsory psychiatric treatment, detention, fines) against the applicant's mentally ill violent husband resulted in a breach of positive obligations under article 8, despite the fact that other measures were taken.

In *Hajduova*, also a case regarding a mentally ill perpetrator of domestic violence, the threats of killing and verbal and physical abuse against the applicant and her lawyer did not materialize.[204] However, these were to be treated as very real and serious by the authorities due to a history of physical abuse and a "well-founded fear that they may be carried out."[205] Hence, the Court established that failure to duly ensure the psychiatric treatment of the perpetrator and order a detention led to a breach of positive obligations.[206]

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200 *Volodina v Russia* App no 41261/17 (ECHR, 9 July 2019) [75].

201 The fact that the majority declared the domestic violence supported by the victim in this case as mere ill-treatment and not as torture, was harshly criticized by Judge Albuquerque, who consequently declared this case as "another lost opportunity". See Concurring Opinion of Judge Albuquerque, *Volodina v Russia* App no 41261/17 (ECHR, 9 July 2019).

202 Ibid., [83].

203 *A. v Croatia* App no 55164/08 (ECHR, 14 October 2010) [53], [66].

204 *Hajduova v Slovakia* App no 2660/03 (ECHR, 30 November 2010) [49].

205 Ibid., [49].

206 Ibid., [50].

2.6 Prohibition of discrimination under Article 14 of the ECHR

The prohibition of discrimination is established in Article 14 of the ECHR and guarantees equal treatment in the enjoyment of the other rights set out in the Convention as follows:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

In many domestic violence cases,[207] the Court also found a violation of article 13 (right to an effective remedy) or article 14 (prohibition of discrimination) of the Convention. Due to constrictions of this handbook, the following analysis focuses solely on the article 14 segment in the ECtHR caselaw on domestic violence. The relevant part of positive obligations which amounts to a breach of article 14 of the Convention is the failure of States to put in place specific measures to combat gender-based discrimination against women.

First and foremost, the principle of non-discrimination is very important because it influences the enjoyment of all other human rights.[208] The issue of discrimination lies at the heart of the domestic violence phenomenon. The perpetrator manages to establish physical, psychological or economic control over the victim. Unless there is a well-established safety net to catch the victim outside the domestic violence circle, by speedy intervention of State authorities pursuant to their due diligence (termed as positive obligation under ECHR) to act, there is little chance the vulnerable victims will be able to manage that life-saving escape on their own.

To date, by including the term "or other status", the Convention contains an open-ended list of protected grounds, which goes beyond the regular protected characteristics (i.e. sex, age, nationality, race, colour, religion etc.).[209] However, article 14 of the ECHR is not a free-standing right under the ECHR, as an allegation of discrimination has to be examined in conjunction with a violation of a substantive right envisaged by the Convention. The additional Protocol 12 (2000) to the ECHR expands the scope of the prohibition of discrimination to equal treatment in the enjoyment of any right, including

[207] In other cases, while the applicant has alleged existence of a discriminatory treatment, the Court considered that the examination of the application was sufficient under articles 2, 3 or 8 and it was not necessary to examine the case also in conjunction with article 14.

[208] Handbook on European non-discrimination law, 2018 edition of the European Union Agency for Fundamental Rights and Council of Europe, accessible at https://www.echr.coe.int/Documents/Handbook_non_discri_law_ENG.pdf, p. 10.

[209] Ibid., p. 161.

rights under national law, which ensures a broader protection than article 14. Hence, the standards of substantial equality are an important part of the non-discrimination principle.

Secondly, the ECtHR emphasized that the Convention cannot be interpreted in a vacuum, but must be interpreted in harmony with the general principles of international law, including the main instruments in the area of international human rights.[210] As already mentioned in the beginning of this handbook, the use by the Court of the international treaties and reports indicates that once the Istanbul Convention, a specialized international treaty in the area of preventing and combating violence against women and domestic violence, is ratified by more and more member states of the CoE, it shall become a crucial yardstick for the ECtHR in assessing the positive obligations in protection of victims of gender-based crimes.

In compliance with CEDAW Article 1, discrimination against women is defined as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

The Committee on the Elimination of All Forms of Discrimination Against Women (hereinafter "the CEDAW Committee") has found that "gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on the basis of equality with men".[211] Also, the CEDAW Committee made an emphasis on stereotypes as a root cause and consequence of gender-based discrimination.[212]

The Court has heavily relied on these international instruments and decisions of international bodies in its caselaw regarding violence against women to draw the conclusion that the State's failure to protect women against domestic violence breaches their right to equal protection by the law and that this failure does not need to be intentional.[213]

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[210] Handbook on European non-discrimination law, 2018 edition of the European Union Agency for Fundamental Rights and Council of Europe, accessible at https://www.echr.coe.int/Documents/Handbook_non_discri_law_ENG.pdf, p. 27.

[211] See the CEDAW Committee Recommendation No. 19 on violence against women, (1992), par. 24 (a).

[212] UN, CEDAW (2010), Communication No. 28/2010, CEDAW/C/51/D/28/2010, 24 February 2012, para. 8.8.

[213] *Opuz v Turkey* App no 33401/02 (ECHR, 9 June 2009) [191].

2.6.1 Applicable principles to establish the existence of discrimination

In order for a violation to arise under article 14, the Court assesses if there is proof of a different treatment of persons in analogous or relevantly similar situations, where such differential treatment has no objective or reasonable justification.[214] When there is discrimination of a particular group (women in this case), discrimination may occur even where it is not specifically aimed at that group and there is no discriminatory intent.[215]

The Court will examine whether the State has adopted legislation capable of addressing the problem of domestic violence and will check if the State has offered protection to women who have been disproportionately and differently affected by violence.[216] The attitude of authorities and their passivity in handling cases of domestic violence is examined under a magnifying glass by the Court.[217]

Importantly, the Court stresses that the "advancement of gender equality is today a major goal in the member States of the Council of Europe".[218] This newly adopted gender-sensitive approach to domestic violence cases by the Court resulted in palpable outcomes in the way the cases are handled. Repeatedly, the burden of proof in difference of treatment in these cases has been shifted to the Government. In practice, if the facts as presented by the claimant appear credible and consistent with the available evidence, the ECtHR will accept them as proved, unless the state is able to offer a convincing alternative explanation.[219] Thus, pursuant to Judge Albuqueque's explanation in his concurrent opinion to *Volodina v Russia*, "the burden is shifted since the general understanding of domestic violence and relevant statistics have indicated that the persistent vulnerable position of women when experiencing gender-based violence in a domestic setting is exacerbated by inactivity on the part of a State".[220] Also, in *Opuz v Turkey*, the Court recognized the importance of undisputed official statistics as evidence to establish the *de facto* situation that can be relied upon in the claims of discriminatory treatment of groups (in the domestic violence cases, mainly of women).[221]

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214 See *Volodina v Russia* App no 41261/17 (ECHR, 9 July 2019) [109], *Opuz v Turkey* App no 33401/02 (ECHR, 9 June 2009) [175].

215 Ibid.

216 *Eremia and Others v Moldova* App no 3564/11 (ECHR, 28 May 2013) [84].

217 See for example, *T.M. and C.M. v Moldova* App no 26608/11 (ECHR, 28 January 2014) [61].

218 *Volodina v Russia* App no 41261/17 (ECHR, 9 July 2019) [112].

219 Handbook on European non-discrimination law, 2018 edition of the European Union Agency for Fundamental Rights and Council of Europe, accessible at https://www.echr.coe.int/Documents/Handbook_non_discri_law_ENG.pdf, p. 233.

220 See Concurrent opinion of Judge Albuquerque, joined by Judge Dedov (*Volodina v Russia*), footnote 3.

221 *Opuz v Turkey* App no 33401/02 (ECHR, 9 June 2009) [180].

As explained in the recent Handbook of the ECHR, where the ECtHR finds a violation of a substantive right, it will not go on to consider the complaint of discrimination when it considers that this will involve an examination of essentially the same complaint.[222] At the same time, it is not a requirement that there is a violation of a substantive right guaranteed by the Convention, but only if the facts of the case fall "within the ambit" of another substantive provision.[223]

As to the procedural aspects of discrimination claims, the Court holds the principles that there are no procedural barriers to the admissibility of evidence or predetermined formulae for its assessment.[224]

The Court shall first establish that there is a *prima facie* indication that domestic violence affects mainly women and then turns on to examine the particular context, by assessing the general attitude of the local authorities – such as the manner in which women are treated at police stations when reporting domestic violence and judicial passivity to effectively protect the victims.[225] When these traces in conduct of governmental authorities are confirmed and the Court notices the existence of a repeated pattern of condoning domestic violence, it may declare that there is a climate conducive to domestic violence.

Thus, in *Opuz v Turkey*, the Court took into account that despite the legal reform, the "general and discriminatory judicial passivity in Turkey, albeit unintentional, mainly affected women".[226] Specifically, the Court also drew attention to the vulnerable situation of women who mainly have no education and no income, but also to the fact that the police did not investigate their complaints, but instead assumed the role of mediator, in an attempt to convince the victims to drop their complaint.[227] Importantly, the Court has emphasized that "the general and discriminatory passivity in Turkey created a climate that was conducive to domestic violence."[228] This resulted in an insufficient commitment to take appropriate action to address domestic violence[229] and resulted in discrimination of women and, accordingly, a violation of article 14 of the Convention.

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222 Handbook on European non-discrimination law, 2018 edition of the European Union Agency for Fundamental Rights and Council of Europe, accessible at https://www.echr.coe.int/Documents/Handbook_non_discri_law_ENG.pdf, p. 31.

223 *Volodina v Russia* App no 41261/17 (ECHR, 9 July 2019) [180].

224 Ibid., [122].

225 Ibid., [113].

226 *Opuz v Turkey* App no 33401/02 (ECHR, 9 June 2009) [199].

227 Ibid., [194-195].

228 Ibid., [198].

229 Ibid., [200].

Clearly, the same discourse on a "climate conducive to domestic violence" runs as a red thread through several cases in the Court's caselaw on domestic violence. Thus, the *climate* of impunity that led to a loss of life of the murdered victim of domestic violence, Halime Kilic, has been also duly noted by the Court in another case against Turkey.[230] The failure of the police and prosecutor to ensure that she had access to a shelter to escape from violence, in the case of this victim, who was a mother of seven children and considered by the Court to be in a state of special moral, physical and material vulnerability, also led to a violation of article 14 of the ECHR, in conjunction with article 2. Similarly, in *M.G. v Turkey*, another case in which the recognition by the Court of the existence of systemic and permanent violence against women in Turkey, the lack of protection of a victim of domestic violence resulted in a violation of article 14.[231]

Volodina v Russia is another recent case, long-awaited by domestic violence specialists, because Russia is the only CoE country which currently has no specific legislation to prosecute domestic violence or to issue protection orders for victims of domestic violence. In this case, the applicant was subjected during a term of two years to repeated beatings, also leading to the loss of a pregnancy, abduction, publishing of her private pictures and stalking by her former partner while the police repeatedly refused to provide her with state protection.

To date, Russia is by far the largest member State of the CoE, with an attested serious problem of domestic violence. Despite the alarming situation on domestic violence brought to the attention of the authorities by UN bodies, Russia decriminalized the offence of assault within the family in 2017.[232] Any complaints of battery by spouses are examined through a general private prosecution system, where the burden of proof is high and the burden of proof of evidence lies fully on the victim.[233] As the applicant stated, private prosecution cases were "prohibitively onerous for a victim, who had to act as her own investigator, prosecutor and advocate".[234] Moreover, while 50 draft

[230] See *Halime Kilic v Turkey* App no 63034/11 (ECHR, 28 June 2016) [120], in which the alleged facts took place prior to *Opuz* and despite the reforms at that moment, the Court considered the situation at the moment the domestic violence was committed.

[231] *M.G. v Turkey* App no 646/10 (ECHR, 22 March 2016) [117].

[232] In fact, domestic violence was treated as a criminal offence in Russia only through the period of 2016-2017.

[233] *Volodina v Russia* App no 41261/17 (ECHR, 9 July 2019) [65].

[234] Ibid., [69].

laws had been elaborated to tackle domestic violence, none were adopted and no official statistics are known on the number of victims.[235]

Consequently, the Court found there was clear evidence of a climate conducive to domestic violence and a violation of article 14 of the Convention in conjunction with article 3 by stating that:

"In the Court's opinion, the continued failure to adopt legislation to combat domestic violence and the absence of any form of restraining or protection orders clearly demonstrate that the authorities' actions in the present case were not a simple failure or delay in dealing with violence against the applicant, but flowed from their reluctance to acknowledge the seriousness and extent of the problem of domestic violence in Russia and its discriminatory effect on women. By tolerating for many years a climate which was conducive to domestic violence, the Russian authorities failed to create conditions for substantive gender equality that would enable women to live free from fear of ill-treatment or attacks on their physical integrity and to benefit from the equal protection of the law."[236]

In many other cases,[237] the Court similarly declared that the actions of the authorities had gone beyond a simple failure or delay in dealing with violence against women and amounted to a repetition of acts condoning such violence and reflecting a discriminatory attitude towards victims on account of their sex.[238]

Thus, in *Eremia v the Republic of Moldova,* the Court found that the authorities were well aware that the applicant was subjected to domestic violence by her husband, a police officer, while her teenage daughters had to witness the violence, which resulted in psychological suffering. The failure to enforce a protection order and the fact that the authorities shielded the perpetrator from all responsibility resulted in the Court's decision that the actions of the authorities "were not a simple failure or delay in dealing with violence against the first applicant, but amounted to repeatedly condoning such violence and reflected a discriminatory attitude towards the first applicant as

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235 See *Volodina v Russia* App no 41261/17 (ECHR, 9 July 2019) [66], according to the Human Rights Watch report of 2018, *"I Could Kill You and No One Would Stop Me". Weak State Response to Domestic Violence in Russia,* each forth family in Russia faces the problem of domestic violence, with 40 percent of all grave violent crimes in Russia being committed within the family. To date, this case was unique in Court's domestic violence caselaw, due to absolute absence of specific legislation to address the pervasive problem of domestic violence (according to statistics, about 14 000 women die yearly at the hands of their husbands/partners). To date, Russia and Azerbaijan are also the only two states of the CoE that did not sign the Istanbul Convention.

236 Ibid., [132].

237 See *Balsan v Romania* App no 49645/09 (ECHR, 23 May 2017) [85].

238 *Volodina v Russia* App no 41261/17 (ECHR, 9 July 2019) [113].

a woman"[239] and a violation of article 14 of the Convention. Simultaneously, the Court holds the authorities responsible for the lack of a serious attitude towards the problem of domestic violence in Moldova and its discriminatory effect on women.

Crucially, in *T.M. and C.M. v Moldova*, in which the criminal investigation was not performed because the prosecutor did not regard the injuries of the applicant as severe enough, the Court has drawn the attention of the authorities to the specific nature of domestic violence "which does not always result in physical injury".[240] Consequently, the Court found a violation of article 14 of the ECHR.

[239] *Eremia and Others v Moldova* App no 3564/11 (ECHR, 28 May 2013) [89], and a similar conclusion on violation of article 14 of ECHR in *T.M. and C.M. v Moldova* App no 26608/11 (ECHR, 28 January 2014) [62], *Mudric v Moldova* App no 74839/10 (ECHR, 16 July 2013) [63].

[240] *T.M. and C.M. v Moldova* App no 26608/11 (ECHR, 28 January 2014) [59].

CHAPTER 3.

Trends in the national response to cases of domestic violence

As already mentioned earlier, the international legal framework[241] recognizes the specific nature of gender-based violence against women, including within the family, justifying the need for a distinct approach for the legal system intervention to prevent and punish this type of violence. The relevant international standards strongly recommend the adoption of particular actions to ensure efficient protection of victims at a national level.

The caselaw analysis of the ECtHR in Chapter 2 above thoroughly describes the barriers women face in their attempts to access justice. These barriers are determined among others by such factors as: discriminatory attitude towards women victims of domestic violence, treating domestic violence as a private and less serious matter not requiring an immediate response, gaps in the national domestic violence legislation, deficient application of the legislation, limited access of victims of domestic violence to services and justice etc.

As seen in previous chapters, under the ECHR, it is the States that have the duty to make the positive obligations "tick", while the Court will closely examine the efficiency of the national laws, practices and measures taken. Since this handbook was designed particularly for the Moldovan legal practitioners in the area of combatting domestic violence, this chapter reveals the common trends in the response of the Moldovan justice sector to cases of domestic violence, based on the findings of the monitoring of court proceedings in cases

[241] UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979); Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention, 2011) etc.

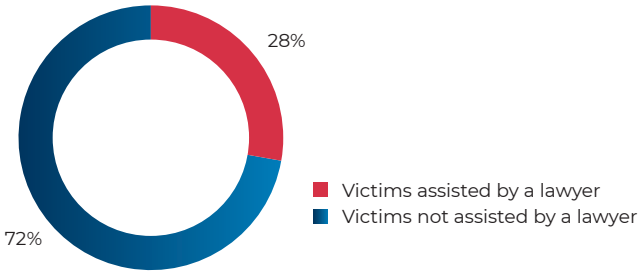
of domestic violence and sexual violence.[242] The monitoring was conducted throughout May 2017-February 2018 and revealed some practices that prevent victims of domestic and sexual violence from accessing justice.

3.1 Access to legal assistance

In line with article 60 para. (1) p. 18) of the Criminal Procedure Code,[243] the injured party has the right to be represented in the court by a private lawyer or by a lawyer who provides state-guaranteed legal aid if he/she has no means to pay for legal services. Article 11 para. (5) of Law No. 45[244] sets forth the right of a victim of domestic violence to qualified free legal aid under the legislation on state guaranteed legal aid. Article 19 para. (1^1) and Article 20 of the Law on State-Guaranteed Legal Aid[245] establish for the victims of domestic violence the right to qualified legal aid, which shall be granted regardless of the income level. Thus, a victim of domestic violence may request from the territorial office of the National Council for State Guaranteed Legal Aid or directly from the court to be provided with qualified state guaranteed legal aid.[246]

Legal aid is of utmost significance to victims of domestic and sexual violence, as they often do not understand court proceedings and have difficulties when making statements. However, the practices revealed in the monitoring of court proceedings illustrate that in 95 monitored cases (45 criminal cases on domestic and sexual violence, 25 contravention cases on domestic violence and 25 cases on the application of a protection order) only a very small number of victims were represented by a lawyer in court proceedings (Figure 1).

FIGURE 1. Legal assistance to victims



[242] Report on monitoring of court proceedings in cases of domestic violence, sexual violence and trafficking in human beings, Women's Law Center, Chisinau, 2018.

[243] Criminal Procedure Code No. 122 of 14.03.2003// M.O. No. 248-251 of 05.11.2013.

[244] Law on preventing and combating domestic violence No. 45 of 01.03.2007 // M.O. No. 55-56 of 18.03.2008.

[245] Law on state guaranteed legal aid No. 198 of 26.07.2007 // M.O. No. 157-160 of 05.10.2007.

[246] Article 26 of the Law No. 198 of 26.07.2007 on State Guaranteed Legal Aid // M.O. No. 157-160 of 05.10.2007.

Most victims availed of a lawyer's assistance in civil cases on the application of protection measures. In criminal and contravention cases the number of victims represented by a lawyer was very low (only 7 cases). No victim of domestic violence availed of state-guaranteed legal aid in contravention proceedings, although, as indicated above, the law gives victims of domestic violence the opportunity for such aid.

Accessibility and effectiveness of judicial remedies are crucial. In *Airey v Ireland,*[247] the ECtHR noted that judicial remedies allowing a victim of domestic violence to escape violence must not be illusory. They must be effective and accessible and entail the obligation of the state to provide victims of domestic violence with free legal aid considering, in particular, their vulnerability and emotional condition leading to their weak capacity to represent themselves.

3.2 Victims' safety in courts

Before the hearing, the injured parties usually wait in the hall in conditions that sometimes do not fully meet the safety requirements. Little space on hallways where participants in the proceedings have to wait, poor illumination, places difficult to find are unfavorable conditions for the safety of victims of domestic violence. The questioning of crime victims conducted during the monitoring of court proceedings revealed that 7 of 12 victims admitted that they sometimes had concerns about their personal safety in the court. The courts do not have the capacity to separate the victim and the perpetrator in the waiting area and to avoid repeated trauma caused to victims before and during the hearing.

Monitoring revealed a number of cases when perpetrators were agitated, behaving unpredictably while waiting for the hearing to start. The situation worsened in those frequent cases when hearings were delayed. Delays increased tension as the participants waited.

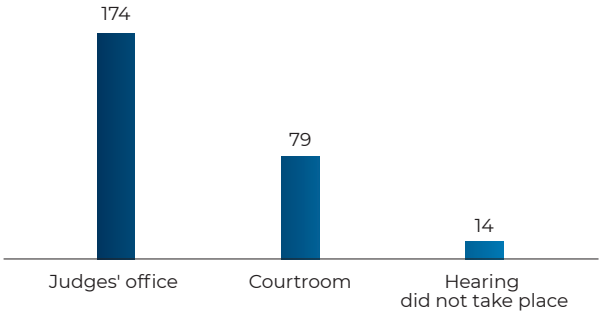
It is frequently obvious that victims are worried and look for moral support from the official examiner and the lawyer. Therefore, it is particularly difficult for them when neither the official examiners, nor the lawyers appear at the court hearings. The interviews with victims of domestic violence confirm these observations: '***...when I went to the first hearing in the court, I knew I would see my husband there. The only thought of seeing him, made me feel bad. ... ...women are afraid, they are afraid that they would not be able to say in the court what they have to say. It is because he is close to the victim***

[247] *Airey v Ireland* App no 6289/73 (ECHR, 9 October 1979) [24].

and you are indeed blocked with fear. I felt better because he was not next to me and still nothing came to my mind, I was so emotional and blocked... '.[248]

Of particular concern is the venue of the hearing. Monitoring of court proceedings revealed that most of the hearings take place in small judges' offices (Figure 2). It is a practice unacceptable from the perspective of the victims' safety. It also negatively affects the solemnity of the hearing and the image of the judiciary.

FIGURE 2. Venue of court hearings



A solution to spare the injured party from visual contact and conflicts with the perpetrator in the courtroom could be to use more often the examination of victims in special conditions at the stage of criminal investigation of domestic violence cases. It is particularly important when it is obvious that any contact with the perpetrator causes discomfort and even greater psychological suffering to the victim. It is a way to ensure psychological comfort of the victim as recommended by international standards. At the same time, necessary evidence will be collected to find the truth on the case and to apply deterrent measures to the defendant.

Throughout the entire investigation and judicial proceedings, the applicant's personal integrity has to be respected. It is recognized that women victims of any form of violence often perceive criminal proceedings as an additional trauma, especially if the woman is forced into a direct confrontation with the perpetrator, against her wish (*Y v Slovenia* (2015).[249]

[248] Victim of domestic violence, quotation from the Report on monitoring court proceedings in cases of domestic violence, sexual violence and trafficking in human beings, Women's Law Center, Chisinau, 2018.

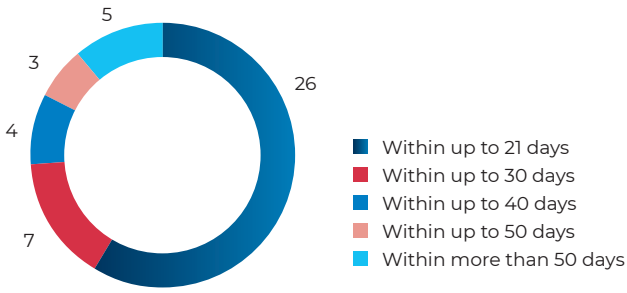
[249] *Y. v Slovenia,* App no 41107/10 (ECHR, 28 May 2015), [106].

3.3 Duration of court proceedings

During the monitoring of criminal proceedings in domestic violence cases, the estimation of the time to hear a criminal case started with assessing the observance of the rules for setting the first hearing. The date of case registration in the court was used as a basis, plus one day for the random assignment of the case. Thus, according to the law, the first hearing must be set within no more than 21 days of the date of case entry into the court.

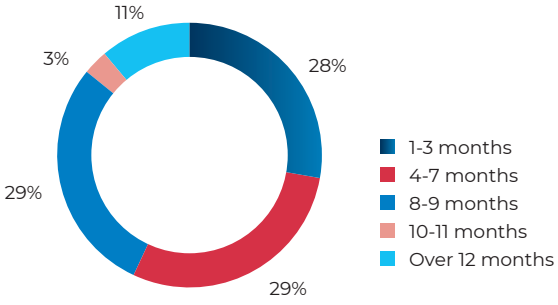
The monitoring of criminal cases of domestic violence and sexual violence revealed that in the majority of the 45 monitored criminal cases, the first hearing was set within 21 days of the case registration date (Figure 3).

FIGURE 3. Time to set the first hearing in criminal cases



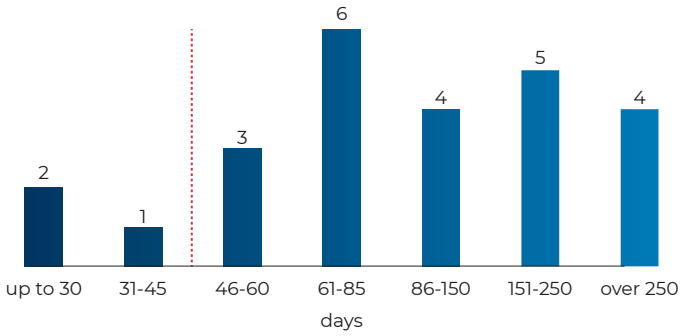
Duration of court proceedings in criminal cases in several instances exceeded one year (Figure 4). It shall be noted that the figure below does not necessary mean that a decision was issued by the time monitoring ended.

FIGURE 4. Length of court proceedings in criminal cases



The law sets 30 days to hear a contravention case. If there are reasonable grounds, the judge may issue a reasoned court resolution to extend the term of case trial by 15 days. Although the contravention law establishes a maximum time period of 45 days, the monitoring of court proceedings in domestic violence contravention cases revealed that only two cases were examined within 30 days, and only one case within 45 days (Figure 5). The other cases were examined beyond the legal framework.

FIGURE 5. Length of contravention proceedings



The issue of the length of proceedings in cases on violence against women arose in the recent case of *Y. v Slovenia*[250] concerning the criminal proceedings the applicant's mother had originally brought against a family friend, an older man, whom the applicant accused of having repeatedly sexually assaulted her at the age of 14. The proceedings had been marked by several longer periods of complete inactivity. While it was impossible for the Court to speculate whether the fact that it took more than seven years between the applicant lodging her complaint and the rendering of the first instance judgment had prejudiced the outcome of the proceedings, such a delay could not be reconciled with the requirements of promptness.

3.4 Punishments applied to perpetrators

Applying punishments proportionate to the act is an important factor for effective prevention and combating of domestic violence. As discussed in the chapters above, the ECtHR, in its jurisprudence on cases against Moldova concerning domestic violence, drew attention to the need to ensure there is a swift and serious state response to violence against women.[251]

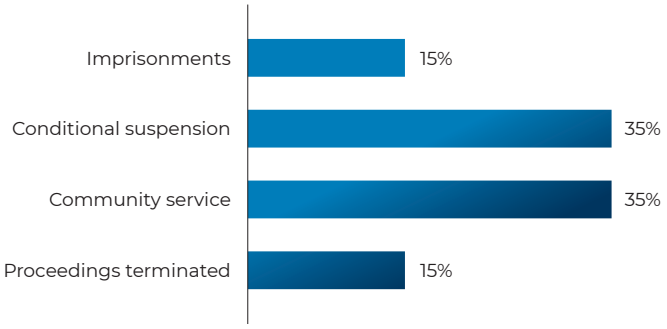
[250] *Y. v Slovenia,* App no 41107/10 (ECHR, 28 May 2015), [96, 107].

[251] *Mudric v Moldova* App no 74839/10 (ECHR, 16 July 2013); *B v Moldova* App no 61382/09 (ECHR, 16 July 2013).

Due to changes to the legislation in 2016, the number of initiated criminal cases decreased twice, while the number of contravention cases considerably increased. Although many cases of domestic violence include sufficient elements supporting the reasonable suspicion of commission of a crime, contravention proceedings are still initiated.[252] Prosecutors established that some perpetrators were subjected to contravention liability several times. This is an unacceptable practice as repeated commission of domestic violence contravention acts reveals the systematic nature of the perpetrator's behavior expressed through physical and/or psychological violence that must be examined in line with the provisions of article 201[1] of the Criminal Code.

As monitoring of court proceedings revealed, significant number of domestic violence and sexual violence criminal cases ended with the defendants' conditional suspension of the execution of punishment in line with article 90 of the Criminal Code (Figure 6). Under article 89 of the Criminal Code, conditional suspension of the punishment is a way to avoid criminal punishment. Thus, with regards to a family perpetrator who commits repeated acts of violence and who does not stop this behavior even during the criminal proceedings, when the court decides to release him from criminal punishment, the judge fails to hold the offender accountable and subjects victims to further risk.

FIGURE 6. Sentences issued in criminal cases



A justification for such mild punishments applied to perpetrators could be if, for instance, the conditional suspension of the punishment was accompanied by restrictive conditions allowed under the criminal law. According to Article 90 para. (6) of the Criminal Code, when applying conditional sus-

[252] Letter from Prosecutor General's Office to General Police Inspectorate No. 25-2d/18-183 of April 27, 2018.

pended punishment, the court may order the convict to undergo treatment of alcohol addiction, drug abuse, drug addiction or venereal disease; may require the perpetrator to attend a special treatment or counseling program to reduce violent behavior, etc. None of these measures were observed to have been applied during the monitoring of court proceedings.

Such impunity of perpetrators of domestic violence runs counter to the principles clearly set by the ECtHR caselaw and discussed at large above. Duty to investigate domestic violence cases of their own motion as a matter of public interest and to punish those responsible for such acts has been emphasized repeatedly in the ECtHR caselaw.[253] The Court reiterated that the procedural positive obligation under the ECHR to conduct an efficient official investigation includes the duty to bringing the perpetrators of violent acts to justice. This serves to ensure that such acts do not remain ignored by the competent authorities and to provide effective protection against them. Moreover, the Court has emphasized that the specific nature of domestic violence must be taken into account in the course of the domestic proceedings. The State's obligation to investigate will not be satisfied if the protection afforded by domestic law exists only in theory.[254]

Moreover, the national legislative framework, especially after adopting the amendments to improve the mechanism for preventing and combating domestic violence, places a special emphasis on the need to force the offender to participate in probation programs.[255]

During the monitoring, no case of providing counseling measures to the offender was identified. In one single case,[256] when the prosecutor requested the punishment of 60 hours of community service with the obligation to participate in a probation program for domestic perpetrators and undergo a rehabilitation course, the court ordered that the perpetrator be arrested without any counseling measures being applied to the offender.

Monitoring of contravention proceedings revealed several cases when the lightest possible form of punishment was applied — the minimum hours of community service (Figure 7). These sanctions are clearly inadequate, particularly in cases where the offender exhibited repeated violent behavior. During the monitoring, while the courts were examining contravention cases

[253] *Opuz v Turkey* App no 33401/02 (ECHR, 9 June 2009) [145, 168]; *T.M. and C.M. v the Republic of Moldova* App no 26608/11 (ECHR, 28 January 2014) [46]; and *B. v the Republic of Moldova* App no 61382/09 (ECHR, 16 July 2013) [54].

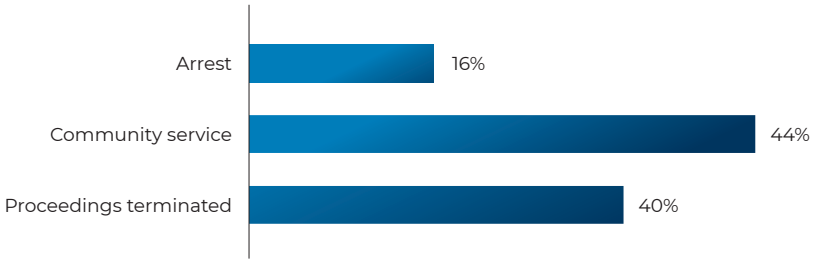
[254] *Volodina v Russia* App no 41261/17 (ECHR, 9 July 2019) [92].

[255] Article 41 of the Contravention Code No. 218 of 24.10.2008 // M.O. No. 3-6 of 16.01.2009.

[256] Case of B.N. No. 4-28534.

or had already pronounced the judgments on the case, perpetrators continued their violent behavior.[257]

FIGURE 7. Decisions issued in contravention cases



The state authorities must react with measures appropriate to each individual case and the punishment applied must be proportionate to the severity of violent acts. The mild measures revealed above do not discourage perpetrators from committing domestic violence, but rather discourage the victims from reporting violence and seeking justice and safety from the state.

3.5 Protection orders issued by courts in civil proceedings

Protection measures are applied by courts upon request in cases of domestic violence in order to ensure protection of the victim by imposing certain limitations and obligations on the perpetrator. The Istanbul Convention provides for the obligation of states to take the necessary legislative or other measures to ensure that appropriate protection orders are available to victims of all forms of violence irrespective of, or in addition to, other legal proceedings. By introducing civil protection orders in addition to protection orders issued in criminal proceedings, the Republic of Moldova aligned its practices to the best international standards.

In 2019, the Supreme Court of Justice conducted a generalization of judicial practice related to the issuance of protection orders in civil proceedings[258]. The key findings of the analysis refer to the following practices that need special attention.

[257] In Case R.A. No. 4-28490 - the acts of violence against the victim led her to request on 14.03.17 a protection order. On 04.04.17, when the case was in the court, the protection order was extended. However, on 13.09.17 the court applied in the contravention procedure the minimum punishment provided by law – 40 hours of community service.

[258] Informative Note on the judicial practice related to the application of protection measures in cases of domestic violence (Chapter XXII2 CPC), Bulletin of the Supreme Court of Justice, August-September, 2019.

On no legal grounds, courts return the applications for protection orders by invoking failure to observe the preliminary extra-judiciary case settlement procedure. However, art. 278[4] para. (2) of the Civil Procedure Code does not provide for the obligation to observe a preliminary procedure prior to applying for a protection order.

Although victims of domestic violence withdrew their applications for protection orders, courts examined the case on the merits and rejected the applications as not being supported by evidence. When a request to withdraw an application for a protection order is filed, it shall be examined before the application is considered. In addition, when examining the withdrawal request, the court shall analyze whether such a withdrawal does not violate the victims' rights and interests of the victims protected by law and whether the victim's will is free and she was not subjected to pressure from the perpetrator.

The analysis of the judicial practice revealed that in 143 of 252 analyzed cases, applications for protection orders were examined in public hearings. The court shall issue a motivated ruling to hear a case in closed hearing. Such rulings were missing in most cases on the application of protection measures. The courts raised the issue of examining only two cases in closed hearing and issued a ruling to this end.

According to art. 278[6] para. (2) CPC, the court shall request that the coordinator of the territorial office of the National Council for State Guaranteed Legal Aid shall immediately appoint a lawyer to provide the victim with state guaranteed free legal aid. In most cases, the courts filed requests for the appointment of a state guaranteed free legal aid lawyer. However, in 13% of the cases, the courts examined the application for protection orders for victims of domestic violence not represented by a lawyer.

In 87% of the 252 cases analyzed by the Supreme Court of Justice, protection order applications were accepted or partially accepted. In 12% of the cases, the applications were rejected as not being supported by evidence of domestic violence. In most cases, these were applications filed by victims without the support from the police. It is not a proper practice to partially accept the applications for protection orders as article 278[7] para. (1) of the Civil Procedure Code provides for two solutions: admission or rejection of the application. In addition, the provisions of article 278[5] of the Civil Procedure Code do not provide for the obligation for the victim to request specific measures. It is the duty of the court to decide on the type of measures appropriate for specific domestic violence cases.

The courts also cannot reject an application for a protection order for the reason that the measure requested by the victim is not set forth in law, as in line with art. 278[5] of the Civil Procedure Code, the victim does not have to specify any measures in the application.

The aforementioned practices identified by the Supreme Court of Justice represent additional barriers victims of violence face in their attempt to access justice and get effective protection from violence. In its Recommendation Rec(2002)5 of 30 April 2002 on the protection of women against violence, the Committee of Ministers of the Council of Europe stated, inter alia, that member States should introduce, develop and/or improve where necessary national policies against violence based on maximum safety and protection of victims, support and assistance, adjustment of the criminal and civil law, raising of public awareness, training for professionals confronted with violence against women, and prevention.

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

To stress even more the crucial importance of protection orders for the protection of domestic violence victims, in the recent case *Volodina v Russia*, the ECtHR refers to the report on violence against women, its causes and consequences adopted at the thirty-fifth session of the Human Rights Council on 6-23 June 2017 of the UN Special Rapporteur on violence against women, who identified **key elements of a human-rights based approach to protection measures**:[259]

"States shall make the necessary amendments to domestic legislation to ensure that protection orders are duly enforced by public officials and easily obtainable.

a) States shall ensure that competent authorities are granted the power to issue protection orders for all forms of violence against women. They must be

[259] *Volodina v Russia* App no 41261/17 (ECHR, 9 July 2019) [58].

easily available and enforced in order to protect the well-being and safety of those under its protection, including children.

b) Protection orders for immediate protection in case of immediate danger of violence (emergency orders) should be available also *ex parte* and remain in effect until the longer-term protection orders comes into effect after a court-hearing. They should be available on the statement or live evidence of the victim, as seeking further evidence may lead to delays which put the victim at more risk. They typically should order a perpetrator to vacate the residence of the victim for a sufficient period of time and prohibit the perpetrator from entering the residence or contacting the victim.

c) The availability of protection orders must be: i) irrespective of, or in addition to, other legal proceedings such as criminal or divorce proceedings against the perpetrator; ii) not be dependent on the initiation of a criminal case iii) allowed to be introduced in subsequent legal proceedings. Many forms of violence, particularly domestic violence, being courses of conduct which take place over time, strict time-limit restrictions on access to protection orders should not be imposed. The standard of proof that an applicant must discharge in order to be awarded with an order should not be the standard of criminal proof.

d) In terms of content, protection orders may order the perpetrator to vacate the family home, stay a specified distance away from the victim and her children (and other people if appropriate) and some specific places and prohibit the perpetrator from contacting the victim. Since protection orders should be issued without undue financial or administrative burdens placed on the victim, protection orders can also order the perpetrator to provide financial assistance to the victim."

Recommendations

Based on the identified hindrances in the efficient response to domestic violence cases, the following **recommendations** for practices and principles in handling domestic violence cases are of use for legal practitioners:

All legal professionals:

- Adopt a gender-sensitive approach and interpret the law according to international human rights instruments[260] with particular focus on the provisions of the ECHR, CEDAW and Istanbul Convention.
- Do not be influenced by attitudes indicating that domestic violence is of lesser importance than other crimes, that it is a 'family or private matter, or it does not present a risk to the larger society or by stereotyped notions of who is a 'real victim' or what is the 'appropriate behavior' of a victim of violence.
- Ensure justice response during proceedings focuses on the victim's needs, keeping in mind the victim/survivor's context, the physical and mental trauma she has experienced, and her medical and social needs.
- Recognize signs of anxiety and avoid secondary victimization.
- Ensure victims are not deferred or delayed, asked to wait to make a report, or be in any other way impeded in their effort to bring their case to the attention of justice authorities.
- If a victim contradicts her testimony, question her sensitively in order to establish the reasons for the change so that they can be addressed.
- Work sensitively with the victim and make sure she understands her rights during the legal proceedings.
- Be aware of social services and support organizations for victims of violence that are available in order to make the appropriate referrals.

[260] Women's access to justice: A guide for legal practitioners, Council of Europe, https://rm.coe.int/factsheet-womens-access-to-justice/16808ff44e.

- Refrain from assessing the credibility of a victim on the basis of how emotionally expressive she appears to be, on what she wore or on who initiated the violence when testifying.
- Consider the following risk factors:
  - the seriousness of the offence;
  - whether the victim's injuries are physical or psychological;
  - if the defendant used a weapon;
  - if the defendant has made any threats since the attack;
  - if the defendant planned the attack;
  - the effect (including psychological) on any children living in the household;
  - the chances of the defendant offending again;
  - the continuing threat to the health and safety of the victim or anyone else who was, or could become, involved;
  - the current state of the victim's relationship with the defendant and the effect on that relationship of continuing with the prosecution against the victim's wishes;
  - the history of the relationship, particularly if there had been any other violence in the past; and
  - the defendant's criminal history, particularly any previous violence[261].

Police officers and/or prosecutors:

- Ask if the victim has a preference about the sex of the legal professional (a female police officer, prosecutor) and if she prefers a family member, representative of an NGO or a friend to be present.
- Ensure a victim statement is taken promptly, and in a professional, non-judgmental, and victim sensitive manner; recorded accurately, read back to the victim, and the content is confirmed by the victim.
- Take the statement **once only** to minimize the impact on the victim and to prevent secondary victimization.
- Inform the victim about her right to free legal aid and make sure a lawyer assists the victim at all stages of criminal proceedings.
- Conduct a detailed and dynamic risk assessment and undertake measures corresponding to the level of risk identified; share the risk assessment results with other professionals.

[261] Factors defined by ECtHR that can be taken into account in deciding to pursue the prosecution in domestic violence cases, *Opuz v Turkey* App no 33401/02 (ECHR, 9 June 2009) [138].

- Use a common set of criteria to assess risk with other agencies.
- Refer the victim to specialized assistance centers.
- Base the decision on all the available evidence, the likelihood of conviction and the seriousness of the crime.
- Ensure that there are no delays in the investigation and evidence collection stages (especially concerning the collection and testing of forensic evidence) that would jeopardize the prosecution.
- Avoid direct confrontation of the victim with the perpetrator.
- Demonstrate an understanding of the nature of domestic violence, such as the cycle of violence, and its impact on victims; explain victims' seemingly contradictory actions when prosecuting the case and use facts, evidence and statistics to refute myths and not perpetuate stereotypes.
- Ensure that the requested sentence reflects the serious nature of the crime.

Judges:

- Ensure that there are no delays in the examination of the case and the judgment. A good practice found in a number of countries is to grant investigative power to specialized equality and quasi-judicial bodies.
- Inform the victim about the right to free legal aid and the manner to file a civil action in criminal proceedings.
- Be attentive to the possibility that a woman is being pressured to withdraw a complaint and reach a settlement.
- Be aware that the alleged perpetrator may use tactics to intimidate the victim or manipulate the legal process (such as glaring, staring, making emotional appeals etc.).
- Act decisively, by issuing warnings, rearranging the seating of parties to a proceeding or removing the perpetrator from the courtroom, if needed.
- Create and use separate waiting areas for parties to legal proceedings.
- Ask the victim's opinion about the need to examine the case in a closed hearing.
- Allow applicants for protection orders in domestic violence cases to make statements without having the alleged perpetrator present in the courtroom and exclude re-victimization of the victim resulting from the visual contact with the perpetrator.

- Undertake approaches and ways to reduce the victim's stress:
  - allow for short recess when she is too distressed to proceed
  - identify options to avoid or minimize direct examination of the victim by the defendant
  - have the examination conducted through an intermediary
  - use video-recorded interview as evidence.
- Use risk assessments to determine the content of the protection order or a sentence.
- Object to or disallow any unfair, unnecessarily repetitive, aggressive and discriminatory questioning of the victim.
- Order perpetrators to attend special programs as a condition of their sentence; such measure should not be mandated as an alternative to sentencing or other legal sanctions.
- Ensure that the applied sentence is proportionate to the serious nature of the crime.
- Objectively assess the sufferings of the victim when deciding on the amount of the moral damage.
- Focus the sentence on the protection of the victim, prevention of the reoccurrence of the violence, and holding the perpetrator accountable; primary aim of the sentence should not be rehabilitation of the perpetrator.
- Decisions about suspending a sentence, the conditions of imprisonment, and conditional release should not be made without considering the results of an assessment of the risk of future violence to the victim or to others conducted by the police at an early stage of the proceedings.
- If the perpetrator is not convicted to imprisonment, dismiss the parties with a time lag, allowing the victim to leave the court first and offering a security escort out of the building, if needed.
- Remove any identifying information such as names and addresses from the court's public record or use a pseudonym for the victim.

Concluding remarks

At the end of the journey through the ECtHR caselaw and analysis of some current national judicial practices, a sad reality emerges resulting from the failure of States to fully discharge their positive obligations. We see women and children paying a high price and some - the highest price of all, because their "private" plea was not heard when the tragedy was still preventable. Also, it becomes crystal clear that the ECtHR takes the due diligence standard set in the international law for the protection of domestic violence victims seriously. The concept of positive obligations was used by the Court during the last decade to consistently send this message to the States. Most cases resulted in unanimous majority decisions of violations of article 2, 3, 8, 13 or 14 of the Convention.

The following trends were noticed after the analysis of the ECtHR caselaw on domestic violence:

- The ECtHR uses **vulnerability** of victims as a powerful tool to shrink the margin of appreciation of States, even in terms of priority of resources. Thus, especially within the scope of absolute rights, it **results in more rigorous, and more onerous positive obligations regarding victims of domestic violence**. Moreover, the discourse on "particular vulnerability" (and sometimes multi-layered vulnerability) is used by the Court as an important undertone in this cluster of case law.
- The **principle of efficiency**, due to a high standard of due diligence applied in these cases by the ECtHR, serves as a paramount factor in the scrutiny of the level of discharging of positive obligations/duties by authorities. The efficiency standard in these cases is backed up by a series of measurable indicators. As such crucial indicators of efficiency in domestic violence cases serve: the **speed of protection rendered** and the **appropriate assessment of the foreseeable risk to the victim's security**, including through careful decisions after making a risk assessment. Authorities are expected to also take into account the factor of escalation of violence.

- **The main substantive positive obligations under article 2 and 3 are** expressed through **duties to set a proper criminal law framework, enforced through efficient operational measures.**
- The specific cross-cutting duty in domestic violence is **the duty of speedy enforcement of protection orders**. The Court perceives protection orders as a crucial positive obligation of States for deterring further harm to victims. Delays or lack of enforcement of protection orders may result in the violation of article 3 of the Convention. Also, it results in a connected duty to impose criminal liability on perpetrators who knowingly violate protection orders. Thus, the Court imposes on States the obligations to prevent and prosecute violation of this important protection measure. Neither partial compliance, nor *ex post* discharge of positive obligations are considered as attaining the standard of due diligence in this area.
- This handbook has revealed that the discourse on dignity was virtually missing in domestic violence cases. However, in *Volodina v Russia,* the Court included clearly the **discourse on dignity of the victims as potent to trigger the threshold of severity** required under article 3, "**even in the absence of actual bodily harm or intense physical or mental suffering."**[262] Hence, it may be considered to be a **landmark case**.

Additional positive obligations of states, reflecting the minimum standards already set by the Istanbul Convention in terms of holistic intervention (prevention, protection, prosecution, restitution) must still emerge under the ECtHR case law, besides the self-evident need of protection through protection orders: i.e. holistic intervention by all authorities (police, healthcare, social workers etc.), forced referral of perpetrators to behavioral programs, enforcement of training programs for authorities to better understand the dynamics of the domestic violence' phenomenon, standard risk assessments, 24/24 telephone helplines and a sufficient number of shelters.

All these are crucial for eliminating the root-causes of the phenomenon, namely the attitude of authorities, stemming from a culture of tolerance towards domestic violence. Because the ultimate discourse on dignity calls for the highest attainable standard of due diligence in this area: **Zero tolerance for domestic violence**.

[262] *Volodina v Russia* App no 41261/17 (ECHR, 9 July 2019) [73].

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A Handbook
for Justice Sector Practitioners
to Ensure Access to Justice for
Domestic Violence Victims

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Women's Law Center is a non-governmental organization established in 2009 by a group of women lawyers from the Republic of Moldova. The organization promotes equal opportunities for women and men and contributes to preventing and combating violence against women and domestic violence.

We are actively involved in alignment of national legislation with European standards and advocate for recognition, respect and protection of women's rights as human rights.

We provide direct, free of charge and confidential assistance (legal aid and representation in courts, psychological counseling and social assistance) and support women who broke the cycle of violence and started a new life.

This Handbook has been developed by the Women's Law Center within the "Strengthening Capacities of Prosecution and Judicial Response to Domestic Violence in Moldova" project supported by the Criminal Justice and Law Enforcement Section (INL) of the U.S. Embassy in the Republic of Moldova.

Opinions expressed in this handbook belong to the authors and do not reflect the position of the U.S. Embassy in the Republic of Moldova.