



**States Positive Obligations to Protect Victims against Domestic  
Violence: Comparative Analysis of Austria, Hungary and  
Croatia's Take on the Due Diligence Standard**

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## Executive Summary

This thesis examines the scope of general compliance of the states' legal and justice systems' with their positive obligations to act in accordance with the 'due diligence' standard in protecting the human rights of victims of domestic violence, in the aftermath of the decisions of the Committee on the Elimination of Discrimination against Women and the European Court of Human Rights, which determined states' failures to provide effective protection to victims against domestic violence.

The author firstly discusses the decisions of the Committee and the Court in order to reveal how the states' justice systems are failing to act in accordance with due diligence in combating domestic violence. This is followed by examination of responses of the three case studies - Austria, Hungary and Croatia (i.e. national jurisdictions that have been found by above mentioned human rights mechanisms to be in breach of their positive obligations to act with due diligence in cases of domestic violence) - which are presented and comparatively examined with the aim to determine the scope of general compliance of the case studies' legal and justice systems' with their positive obligations.

Based on the conducted research it is concluded that analyzed national jurisdictions are complying with their obligation to act with due diligence to a limited extent. In cases of Austria and Croatia, general compliance was constrained within the legislative sphere of action, while the justice systems' response was curtailed with difficulties. On the other hand, overall legal system in Hungary showed problematic absence of general compliance with positive obligations to act with due diligence.

## **List of Abbreviations**

CEDAW – Convention on the Elimination of All Forms of Discrimination against Women

CEDAW Committee – Committee on the Elimination of Discrimination against Women

DV – Domestic violence

ECHR – European Convention for the Protection of Human Rights and Fundamental  
Freedoms

ECtHR – European Court of Human Rights

NGO - Non-Governmental Organization

UN - United Nations

UNDP - United Nations Development Programme

VAW – Violence against women

## Introduction

The United Nations studies reveal that physical violence inflicted by an intimate partner is globally the most common form of violence experienced by women.<sup>1</sup> The Council of Europe reports suggest that one-fifth of all women experience physical violence, which is most often inflicted by their partners and ex-partners.<sup>2</sup> Global surveys indicate that half of the women who are victims of femicide are killed by their current or former intimate partner.<sup>3</sup> These records indicate that domestic violence is a universal phenomenon; moreover, one which affects women disproportionately<sup>4</sup>

Two - rather self-evident - claims are omnipresent in the literature that addresses normative issues related to domestic violence: 1) legislative framework on domestic violence must be in place and 2) key institutional actors need to enforce legislative solutions in ways which provide effective protection of victims and punishment of perpetrators of domestic violence. But, as opposed to the legislative progress of states, in general, in the field of combating domestic violence, as Epstein notices, implementation and enforcement of the law have lagged behind.<sup>5</sup> This widely acknowledged unresponsiveness of the justice/judicial

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<sup>1</sup> In describing how widespread violence against women is, the study reports that “at least one in three women is beaten, coerced into sex or otherwise abused by an intimate partner in the course of her lifetime”. See United Nations Secretary-General 2008, *UNITE TO END VIOLENCE AGAINST WOMEN Factsheet*, DPI/2498, United Nations Department of Public Information, at 1, viewed 30 September 2011, <<http://www.un.org/en/women/endviolence/pdf/VAW.pdf>>.

<sup>2</sup> Hagemann-White, Dr. Carol et al. 2006, *Combating violence against women: Stocktaking study on the measures and actions taken in Council of Europe member States*, Directorate General of Human Rights, Council of Europe, at 7-8, viewed 10 October 2011, <[http://www.coe.int/t/dghl/standardsetting/equality/03themes/violence-against-women/CDEG\(2006\)3\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/equality/03themes/violence-against-women/CDEG(2006)3_en.pdf)>.

<sup>3</sup> Supra note 1, at 1.

<sup>4</sup> See the Preamble of the Council of Europe’s Convention on preventing and combating violence against women and domestic violence, CETS No.:210, 11 May 2011. Available at <<http://conventions.coe.int/Treaty/EN/Treaties/Html/210.htm>>.

<sup>5</sup> Epstein, Deborah 1999, ‘Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges and the Court System’, *Yale Journal of Law and Feminism* No. 11, pp. 3-50, at 4, viewed 05 September 2011, <<http://www.lexisnexis.com>>.

system - embodied in the work of prosecutors and judges - has made detrimental effects on efforts to systematically combat domestic violence.<sup>6</sup> Moreover, on account of the failures to effectively tackle domestic violence, states have been found responsible for breaches of their positive obligations to protect the human rights of victims of domestic violence by international or regional human rights monitoring bodies and courts. As McQuigg correctly points out, this practice acknowledges the recognition of domestic violence as a human rights issue.<sup>7</sup>

The primary focus of this thesis is twofold and extensive. In the first part of the thesis, the aim is to reveal how the states' justice systems are failing to act in accordance with due diligence, i.e. their obligation to provide effective protection of human rights of victims of domestic violence. In order to achieve this I will critically analyze the decisions of the Committee on the Elimination of Discrimination against Women (hereinafter: CEDAW Committee) and the European Court of Human Rights (hereinafter: ECtHR) that - as a consequence of the states' ineffective actions in domestic violence cases - determined the existence of violations of victims' multiple human rights.

The research in its second part takes a more practical turn; I critically evaluate - through a comparative exposure - the subsequent case studies (Austria, Hungary and Croatia) legislative and justice systems' responses to their determined failures to act with due diligence in protecting victims against domestic violence. The investigation allows me to determine the scope of general compliance of the states' legal and justice systems' with their positive obligations following the decisions of the ECtHR and the CEDAW Committee, which - in connection - have been analysed in the first part of the thesis. By approaching the

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<sup>6</sup> Id.

<sup>7</sup> McQuigg, Ronagh J.A. 2010, 'How could human rights law be used by the courts to assist victims of domestic violence? A comparative study', *The International Journal of Human Rights*, Vol. 14, No. 3, pp. 343-363, at 343, viewed 02 September 2011, <[www.ebscohost.com](http://www.ebscohost.com)>.

topic in this way I am in a position to comparatively determine complementarities and differences among Austria, Hungary and Croatia, as the three case studies that depict the national legal approaches on domestic violence.

Ultimately, the main purpose of this paper is to show that analyzed national justice systems are not treating systematic acts of domestic violence as cases of violations of human rights of women, and thus are failing to provide full and effective protection to women victims of domestic violence. It will be shown that in order to provide effective protection, national legal and justice systems must start to conceptualise and address systematic acts of domestic violence in accordance with the standard of due diligence (as indicated by decisions of the ECtHR and the CEDAW Committee in this regard).

Although majority of decisions of the CEDAW Committee and the ECtHR, covered by this research, have been the object of productive scholarly reflection, previous work has failed to examine their follow-up by the national systems - beyond the enforcement of individual measures of redress to victims - in order to determine the scope of the states' general compliance with their positive obligations deriving from these decisions. Likewise, the role of the national legislative and justice systems' in applying the due diligence standard on protection against domestic violence has escaped multi-level comparative scrutiny, which covers both international or regional and national levels of inquiry. It is therefore vital to address this literature gap. This will be achieved through synthesising previously developed lines of enquiry and taking them as a starting point in scrutinizing the responses of the case studies legislative and justice systems' to domestic violence.

In terms of methodology, qualitative legal research is selected, of a comparative model, consisting of a combination of doctrinal and problem-based oriented research, given that the paper describes the body of laws on domestic violence and their implementation



followed by the consideration of the problem of the states' compliance with their 'due diligence' obligations.<sup>8</sup> In order to elaborate the problems of the states' failure to exercise due diligence in domestic violence cases and the states' compliance with their positive obligations I apply the collective case studies method, focusing on case-law of the ECtHR, the CEDAW Committee and national (Austria, Hungary and Croatia) legislative and justice practices in the sphere of domestic violence.<sup>9</sup>

In order to conduct the analysis, a body of case-law, together with relevant international, regional and national legislation is used as a primary source; while authoritative books and journal articles, governmental documents, publications by non-governmental organizations (hereinafter: NGO) and international organizations, expert reports and official internet web-sites are utilized as secondary sources. The official governmental documents in connection with the subject of the fifth chapter were scarce, or in the example of Hungary were not found, and scarcity of accessible data covering case study jurisdictions justice practices on domestic violence was present, as well. This directed the researcher to rely heavily on the content of national or international NGO's publications and reports, which complements to the limitations of the present research, but likewise adds to the challenge of the overall evaluation.

With respect to structure, the main body of the thesis has five chapters. The first chapter gives the basic theoretical outline of the most pressing conceptual issues related to domestic violence, situating the debate within the legal perspective. This is followed by an elaboration on the nature and the scope of the positive international obligations of the states to tackle domestic violence by protecting human rights, with an in depth study on the due

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<sup>8</sup> Dobinson, Ian and Johns, Francis 2007, 'Qualitative Legal Research' in McConville, Mike and Chui, Wing Hong (eds), *Research Methods for Law*, Edinburgh University Press, pp. 16-45, at 18-20.

<sup>9</sup> Berg, Bruce L. 2001, *Qualitative Research Methods for the Social Sciences*, 4<sup>th</sup> edition, Allyn & Bacon, at 229.

diligence standard which serves as an indicator for evaluating states actions in this regard. Basically, the first two chapters clarify the key concepts and issues which a reader should understand for the purpose of appropriate comprehension of the overall research. The third chapter scrutinizes the approach of the CEDAW Committee in determining failures of Austria and Hungary to exercise due diligence in protecting human rights of women in domestic violence cases. The next chapter follows this line of inquiry by presenting the regional jurisprudential narrative, embodied in the rulings of the ECtHR, focusing on Croatia. It is here that I move beyond the elaborations of judgments concerning merely three case study jurisdictions, by covering in detail other important ECtHR rulings, in order to dissect the constant evolution of application of the ‘due diligence’ standard by the ECtHR and underline the plethora of human rights that can be breached, if states fail to respond diligently to domestic violence. The fifth chapter describes the legislative and enforcement practices on domestic violence of Austria, Hungary and Croatia (jurisdictions chosen for the case study), in order to determine the scope of general compliance of States’ legislative and justice systems with their due diligence obligations deriving from the views of the CEDAW Committee and the judgments of the ECtHR, concerning these States. The final section concludes.

## Chapter 1 - Domestic violence against women: theoretical and legal rudiments

The conceptual, normative and enforcement problems and challenges regarding the efficient approaches to domestic violence (hereinafter: DV) by the legal and justice systems are wide and perplexing and the debate accompanying them looks almost self-generating. Indeed, investigating this field of enormous interest for both scholars and practitioners reveals that its focus is spread throughout the international, regional and national normative and enforcement levels. This paper incorporates such a perspective in total.

The first section of the present chapter elaborates in brief the main conceptual approach to DV that is assumed throughout the research and depicts the gist of the debate on the victims of DV. The subsequent section covers the international and regional normative take on 'DV narrative', which is presented by juxtaposing definitions originating from human rights documents with scholars' argumentation. The discussion is followed by a debate on national legal systems' approach, embodied in the criminal and civil law measures on DV. Finally, I address the conceptual obstacles that influence the response of the justice system through presenting two important aspects: the concept of public/private dichotomy and gender stereotyping.

### ***1.1. Differentiating domestic violence and the issue of victims***

Domestic violence as already indicated, is a global phenomenon which affects women across continents and different cultures.<sup>10</sup> But, DV is also a specific act that needs to be

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<sup>10</sup> Edwards, Alice 2008, 'Violence against Women as Sex Discrimination: Judging the Jurisprudence of the United Nations', *Texas Journal of Women and the Law*, Vol. 18, No. 1, pp. 1-59, at 2, viewed: 02 March 2011, <<http://www.lexisnexus.com>>.

distinguished from other types of individual crimes, because the parties are involved in an intimate relationship that typically involves family ties or a shared household.<sup>11</sup> It is this component of intimacy among parties involved in DV, as the following analysis will show in more details, which creates a conceptual, but more importantly a practical obstacle as well, for justice system actors to effectively engage in resolutions of DV cases.

Dempsey conceptualizes DV alongside three elements: violence, domesticity and structural inequality (i.e. power and control), which are accompanied with the concept of illegitimacy of the act(s) of DV.<sup>12</sup> Depending on the interaction of these elements she distinguishes DV in its “strong sense” where all three elements intersect and DV in its “weak sense”, where only violence and domesticity are combined.<sup>13</sup> This conceptual differentiation shall be applied in the present research, since it solely investigates cases of DV in the ‘strong sense’, in which presence of structural inequality in the relationship between the victim and the perpetrator stems from the decisions of authoritative judicial (the ECtHR) and human rights treaty bodies (the CEDAW Committee) that undertook case deliberations.

Before venturing to fully explain this structural inequality, I must remind the reader that the present research addresses DV through a limited exposure, focusing solely on cases of women victims of DV in heterosexual relationships that have been scrutinized by the CEDAW Committee and the ECtHR, and its subsequent (case study) national regulatory approach. Accordingly, DV perpetrated against men, children or elderly persons is excluded from the scope of the present research. Although DV affects both sexes and should be positioned within a broader family conflict schematic, this research - in accordance with

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<sup>11</sup> Dempsey, Michelle Madden 2006, ‘What Counts as Domestic Violence? A Conceptual Analysis’, *William & Mary Journal of Women & the Law*, Vol. 12, Issue 2, pp. 301-333, at 313, viewed 17 March 2011, <<http://scholarship.law.wm.edu/wmjowl/vol12/iss2/3>>.

<sup>12</sup> Id. at 306.

<sup>13</sup> Id. at 332.

prevailing international and regional human rights framework - focuses solely on instances of DV in which women are victims.

Women victims of DV are in a unique position. Unlike victims of other crimes, they are likely to be subjected - because of the perpetual cycle of violence which accompanies DV - to revictimization<sup>14</sup>; furthermore, they are not random victims, since they are living in intimate relationships with abusers, and are in many cases dependant, both financially and through their children, on abusers.<sup>15</sup> Throughout the research meaning of the term ‘victim’ corresponds with the individuals who endure and have confronted with DV, i.e. violence in their intimate relationships. There is a lively debate in the community of scholars and practitioners working on DV over the usage of the term ‘victim’, as opposed to the term ‘survivor’. Although both terms carry their own specificities and discursive problematic<sup>16</sup>, this paper uses the ‘victim’ rhetoric, given that that term is used by international legal documents and jurisprudence.

Even though various reports and studies, when compared, are showing discrepancies in results and estimates of gender ratios of victims of DV, majority indicates asymmetry which falls onto women’s side. On the other hand, some researchers dispute this position following the gender-inclusive perspective of domestic (or inter-personal) violence. This perspective – which puts aside the feminist paradigm of power and inequality as the main explanation for DV - includes an examination of additional types of violence, beyond just the

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<sup>14</sup> Fernandez, Marilyn, 2010, *Restorative Justice for Domestic Violence Victims: An Integrated Approach to Their Hunger for Healing*, Lexington Books, at 13.

<sup>15</sup> Id.

<sup>16</sup> E.g. concise differentiation between the two terms can be found in the United Nations Secretary General’s study, under which the term ‘victim’ “implies passivity, weakness [...] inherent vulnerability and fails to recognize the reality of women’s resilience and agency” while the term ‘survivor’ perhaps carries more positive connotations but “denies the sense of victimization experienced by women”. See United Nations 2006, Study of the Secretary General *Ending violence against women: from words to action*, United Nations Publication, at 6, viewed 04 September 2011, < [http://www.un.org/womenwatch/daw/public/VAW\\_Study/VAWstudyE.pdf](http://www.un.org/womenwatch/daw/public/VAW_Study/VAWstudyE.pdf)>.

physical one. It indicates that symmetry does exist between men and women in initiating systemic and mutual violent behaviour, especially in the sphere of emotional, verbal or psychological violence<sup>17</sup>. Hearn indicates that studies which dispute the ‘gender asymmetry’ and claim symmetrical relations among men and women victims of DV are susceptible to criticism for their failure to incorporate power dimensions of various social divisions (based on gender<sup>18</sup>, sexual orientation, class, etc.) which influence violent behaviour, to fully contextualise violence and to appropriately quantify it.<sup>19</sup> Dobash and Dobash argue that women’s violence against men differs in relation to context, which is often self-defence and consequences, which are less frequent and severe for men.<sup>20</sup> Moreover, in their influential study on DV court cases in North-America, they determined that “men are disproportionately the perpetrators and women [are] the victims”.<sup>21</sup>

This relationship emphasizes a structural inequality between women and men or a gender-based dimension of DV, where “conflicts that give rise to domestic violence are rooted in broader power relations and social norms”<sup>22</sup> that support and sustain male supremacy and domination over women<sup>23</sup>. In line with these assertions feminist scholars

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<sup>17</sup> McClennen, Joan C 2010, *Social Work and Family Violence: Theories, Assessment and Intervention*, Springer Publishing Company, at 127.

<sup>18</sup> “[G]ender shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men”. See the *Council of Europe Convention on preventing and combating violence against women and domestic violence*, article 3c, CETS No.:210, 11 May 2011. Available at <<http://conventions.coe.int/Treaty/EN/Treaties/Html/210.htm>>.

<sup>19</sup> Hearn, Jeff 2009, ‘Men as Perpetrators of Violence: Perspectives, Policies, Practices’ in Antic Gaber, Milica (ed.), *Violence in the EU examined: policies on violence against women, children and youth in 2004 EU accession countries*, University of Ljubljana, Faculty of Arts, pp. 125-135, at 129.

<sup>20</sup> Dobash, R. Emerson and Dobash, Russell P. 1992, *Women, Violence and Social Change*, Routledge, at 256-278.

<sup>21</sup> Id. 257. Dobash and Dobash quote police and court records (from US and Canada sources) which indicate that around 90% of DV victims are women (See at 257.)

<sup>22</sup> Rhode, Deborah L 1991, *Justice and Gender: Sex Discrimination and the Law*, Harvard University Press, at 237.

<sup>23</sup> Dobash Rebecca and Dobash Russell 2000, ‘Violence against Women in the Family’ in Katz, Sanford N., Eekelaar, John and MacClean, Mavis (eds), *Cross Currents: Family Law and Policy in the United States and England*, Oxford University Press, pp. 495-512, at 497.

position domestic<sup>24</sup> violence as a gender-inequality problem and further conceptualise it through the patriarchal paradigm, i.e. “as an aspect of patriarchy within the [partner] relationship”<sup>25</sup>. These conclusions are seminal; *inter alia*, because they have implications on formulating policy decisions and legal responses to DV<sup>26</sup>, as the next section shall reveal.

## **1.2. International and regional normative take on violence against women in the private domain**

Interpretations like the ones presented above - that embody the ‘structural inequality’ narrative on DV as part of violence against women (hereinafter: VAW) - have been accepted by international legal documents. The Preamble of the United Nations (hereinafter: UN) Declaration on the Elimination of Violence against Women states the following:

[V]iolence against women is a manifestation of historically unequal power relations between men and women, which have led to

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<sup>24</sup> It is worth mentioning - as a side note - that a stream of feminist literature argues that using the prefix ‘domestic’ serves as an undermining factor which diminishes the extent and seriousness of this type of violence and which subsequently carries a negative influence in shaping the justice system’s response towards this ‘type’ of violence. See Edwards, Susan S.M. 1996, *Sex and Gender in the Legal Process*, Blackstone Press Limited, at 180-191. Moreover, a radical feminist approach on the subject is present, which denies the role and capability of the overall justice system in addressing the problematic of DV, since it views law as a patriarchal construction and thus incapable of alteration for reasons of better protection of women victims of DV. For a brief elaboration see Katz, Sanford N. et al (eds) 2000, *Cross Currents: Family Law and Policy in the United States and England*, Oxford University Press, at 499-500. Further on, relational feminists have argued that female sense of justice differs from male and thus it is not achievable within the prevailing legal practice which although presents itself as being gender neutral is centred on men’s principles and reasoning. See Dobash, R. Emerson and Dobash, Russell P. 1992, *Women, Violence and Social Change*, Routledge, at 144. Although present research does not go in line with these theoretical conceptualisations, it is nevertheless important to signal these approaches, so the reader may get the sense of the variety of different standpoints on the subject and, to likewise, position the research field more fully within the body of existing literature.

<sup>25</sup> Schneider, Elizabeth M. 2000, ‘The Law and Violence Against Women in the Family at Century’s End: The US experience’ in Katz, Sanford N., Eekelaar, John and MacClean, Mavis (eds), *Cross Currents: Family Law and Policy in the United States and England*, Oxford University Press, pp. 471-494, at 475.

<sup>26</sup> Burton, Mandy 2008, *Legal Responses to Domestic Violence*, Routledge-Cavendish, at 6.

domination over and discrimination against women by men and to the prevention of the full advancement of women [...].<sup>27</sup>

In order to fully understand the nature of DV cases that this paper investigates, we need to define what VAW is and for this to achieve the best way is to utilize the international legal discourse, which by now enjoys worldwide consensus, given that the overwhelming number of countries has ratified the most important treaty in this area<sup>28</sup>. According to the UN Declaration on the Elimination of Violence against Women, VAW will be understood to encompass, but not limited to, acts of physical, sexual and psychological violence that are perpetrated against women.<sup>29</sup> According to this Declaration:

“[V]iolence against women” means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or *in private life* (emphasis added).<sup>30</sup>

It derives that gender-based violence taking place in private life is within the remits of the definition of VAW, which subsequently - as will be elaborated later on in the paper - creates obligations for states to take actions and combat gender-based violence in the ‘private life’. This entails the conclusion that DV when directed against women can form a part of a broader VAW unity. The factual information worth emphasising, as Edwards notices, is that “[t]here is no single treaty provision explicitly prohibiting violence against women within any of the eight “core” human rights treaties, or a binding international treaty specifically on the

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<sup>27</sup>United Nations General Assembly, *Declaration on the Elimination of Violence against Women*, UN Doc. A/RES/48/104, 23. Feb. 1994, viewed 14 March 2011, <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N94/095/05/PDF/N9409505.pdf?OpenElement>>.

<sup>28</sup> Concluding with November 5<sup>th</sup> 2011, 187 states in total are State parties to CEDAW. *Source*: United Nations Division for the Advancement of Women, Department of Economic and Social Affairs, *Convention on the Elimination of All Forms of Discrimination against Women*, viewed 5 November 2011, <<http://www.un.org/womenwatch/daw/cedaw/states.htm>>.

<sup>29</sup> Supra note 27, article 2.

<sup>30</sup> Id. article 1.



issue”<sup>31</sup>. But, there are regional human rights treaties on the subject that are providing regional systems of protection for women against violence<sup>32</sup>, as will be presented in a couple of paragraphs below.

The most important international treaty though, which regulates human rights of women, is the UN Convention on the Elimination of all Forms of Discrimination against Women<sup>33</sup> (hereinafter: CEDAW), which, as stated, contains no explicit provision dealing with VAW. However, the CEDAW Committee – expert human rights treaty body established to monitor the implementation of CEDAW – in its General Recommendation No. 19: Violence against Women<sup>34</sup>, established that prohibition of discrimination by the Convention includes:

[G]ender-based violence, that is violence directed against women because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering threats of such acts, coercion and other deprivations of liberty.<sup>35</sup>

Therefore, it asserted that VAW represents discrimination against women, which was a huge development in regard to the expansion of legal comprehension of VAW<sup>36</sup>. I agree with Edwards, who claims that characterisation of “violence against women as sex discrimination has filled an important gap in international human rights law, namely the absence of an

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<sup>31</sup> Supra note 10, at 3.

<sup>32</sup> There are Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women “Convention of Belem do Para” and the Council of Europe’s Convention on Preventing and Combating Violence against Women and Domestic Violence.

<sup>33</sup> *Convention on the Elimination of all Forms of Discrimination against Women - CEDAW*, UN General Assembly Resolution 34/180, 18 December 1979.

<sup>34</sup> UN Committee on the Elimination of Discrimination against Women, *General Recommendation No. 19: Violence against Women*, U.N. Doc. A/47/38, 29 January 1992.

<sup>35</sup> Id. para 6.

<sup>36</sup> Interesting concept was introduced by Alice Edwards who claims that this developed a formula in which violence against women equals sex discrimination, which modifies the nature of CEDAW and transforms it from an anti-discrimination treaty into a gender-based violence treaty, thus postulating gender-based violence as a basic principle of the Convention. Real downside with this formula is that it only includes gender-related forms of violence (that are based on sex discrimination), thus excluding all other forms of violence against women from the sphere of international protection that is provided under CEDAW. See supra note 10, at 45 & 56.

explicit binding prohibition on violence against women”<sup>37</sup>. Through this conceptualisation by the CEDAW Committee VAW is acknowledged as a “group-based harm, a practice of social inequality carried out on an individual level”<sup>38</sup>.

One of the most crucial notions that CEDAW introduced was the obligation for state parties “[t]o *modify the social and cultural patterns* (emphasis added) of conduct of men and women, with a view to achieving the *elimination of prejudices* (emphasis added) and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women”<sup>39</sup>. This obligation particularly refers to changing the justice system’s approach in treating VAW; an approach which is constantly under legislative enactment and judicial adjustment, as will be demonstrated in the following chapters.

A broader definition can be found under the Council of Europe’s system of human rights protection. An interesting regulatory pattern of expanding the protection against DV is emerging through Council of Europe’s institutions work: from a non-binding (though enforceable) recommendation, through the ECtHR rulings in individual cases of human rights violations related to DV, and finally to a human rights treaty on the matter. The Council of Europe has continually indicated how DV undermines the fundamental values upon which

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<sup>37</sup> Supra note 10, at 46.

<sup>38</sup> Supra note 10, at 50; also see Goldfarb, Sally F. 2003, ‘Applying the Discrimination Model to Violence against Women: Some Reflections on Theory and Practice’, *Journal of Gender, Social Policy and the Law*, Vol. 11, No. 2, pp. 251-270, at 254, viewed 02 March 2011, <<http://www.lexisnexis.com>>.

<sup>39</sup> Supra note 33, art. 5(a).

the organization is based<sup>40</sup>, which are respect for justice, democracy, rule of law and human rights<sup>41</sup>.

In the Committee of Ministers General Recommendation (2002)<sup>542</sup>, violence against women - which represents a human rights violation - is comprehended as:

[A]ny act of gender-based violence, which results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or private life. This includes, but is not limited to, the following: *a.* violence occurring in the family or domestic unit, including, *inter alia*, physical and mental aggression, emotional and psychological abuse, rape and sexual abuse, incest, rape between spouses, regular or occasional partners and cohabitants, crimes committed in the name of honour, female genital and sexual mutilation and other traditional practices harmful to women, such as forced marriages.<sup>43</sup>

The next important development in expanding the human rights concept of DV within the Council of Europe's system of human rights protection happened with one seminal decision (*Opuz v. Turkey*<sup>44</sup>) of the ECtHR where the Court found, for the first time ever, that DV can represent discrimination against women. In doing so the ECtHR expressed a legal reasoning whose foundation was first postulated by MacKinnon who stated that "sex

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<sup>40</sup> See Council of Europe Convention on preventing and combating violence against women and domestic violence Explanatory Report, 12 April 2011, at 2, viewed 10 September 2011, <<http://conventions.coe.int/Treaty/EN/Reports/Html/210.htm>>.

<sup>41</sup> See the Preamble of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS No. 005, Council of Europe, 4 November 1950, viewed 5 September 2011, <[http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG\\_CONV.pdf](http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf)>.

<sup>42</sup> Although recommendation is not a legally binding document, it nevertheless requires Council of Europe member states to regularly report on their domestic implementation measures, thus contributing to legal unification of domestic violence regulation among the Council of Europe's member states. Likewise the Recommendation has shaped the way towards adopting a legally binding regional convention regulating the prohibition of violence against women and domestic violence.

<sup>43</sup> Council of Europe, *Recommendation Rec(2002)5 of the Committee of Ministers to the Member States on the protection of women against violence*, 30 April 2002, viewed 14 March 2011, <<https://wcd.coe.int/wcd/ViewDoc.jsp?id=280915>>.

<sup>44</sup> The case of *Opuz v. Turkey* will be reviewed in chapter IV.

discrimination stops being a question of morality and starts being a question of politics”<sup>45</sup>; meaning that the structural inequality that women suffer, indicated by DV, can be changed only when the political agenda that is responsible for addressing the problem changes as well. Political agenda has changed when it no longer perceives VAW as an isolated incident but rather as part of a bigger picture, i.e. “a systemic and political problem, requiring a systemic, political solution”<sup>46</sup>. And the real change comes with the appropriate resolution of DV cases; in holding perpetrators accountable and protecting the human rights of victims.

The latest major development within the regional system of human rights protection occurred with the adoption of the Council of Europe Convention on preventing and combating violence against women and domestic violence<sup>47</sup>. The treaty uses the equality discourse as the foundation of the national legal system’s fight against laws and practices which discriminate against women. Furthermore, the Convention frames VAW as a violation of human rights and a form of discrimination against women.<sup>48</sup> For DV - which is understood as intimate-partner violence - the Convention encompasses a gender neutral definition<sup>49</sup>, acknowledging that victims and perpetrators can be persons of both sexes. The explanatory memorandum accompanying the Convention clarifies that DV “constitutes a form of violence

<sup>45</sup> MacKinnon, Catharine A 1993, ‘Difference and Dominance: On Sex Discrimination’ in Weisberg, D. Kelly (ed.), *Feminist Legal Theory Foundations*, Temple University Press, pp. 276-287, at 285.

<sup>46</sup> Supra note 10, at 51; also see Kohn, Laurie S 2008, ‘The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim’, *N.Y.U. Review of Law & Social Change*, Vol. 32, pp.191-252, at 195-211, viewed 10 March 2011, <<http://www.lexisnexis.com>>.

<sup>47</sup> *Council of Europe Convention on preventing and combating violence against women and domestic violence*, CETS No.:210, 11 May 2011, viewed 05 November 2011, <<http://conventions.coe.int/Treaty/EN/Treaties/Html/210.htm>>.

<sup>48</sup> Council of Europe Convention on preventing and combating violence against women and domestic violence, *op. cit.*, in art. 3(a) defines VAW as “violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in *private* (emphasis added) life”.

<sup>49</sup> Council of Europe Convention on preventing and combating violence against women and domestic violence, *op. cit.*, art. 3(b): ““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 has shared the same residence with the victim”.

which affects women disproportionately and which is therefore distinctly gendered”<sup>50</sup>. Hence, it regards DV as gender-based VAW, i.e. “violence that is directed against a woman because she is a woman or that affects women disproportionately”<sup>51</sup>.

We may conclude that “domestic violence is culturally constructed in its definition and in its causes”<sup>52</sup> and that legal documents, as demonstrated above, accept DV against women as gender-based violence which is embedded in societal relations that perpetuate and tolerate its occurrence. Furthermore, through the rulings of the ECtHR and the views of the CEDAW Committee – which subsequent chapters will reveal in full detail - VAW in the private domain is recognized as a form of discrimination and, finally and most importantly, as a human rights violation. Although international and regional human rights documents set the trends and general states’ obligations to tackle DV, how this is conducted depends on the legislation, policies and enforcement practices of every single state.

### ***1.3. National criminal and civil law measures of intervention on domestic violence***

A harsh criticism revealing prevalent practices related to domestic violence, that encircles the common sentiment among scholars and practitioners about the national justice system’s treatment of DV problematic, is contained in the Human Rights Watch Global Report on “Women’s Human Rights”:

At every step of the process to obtain legal protection from domestic assault, women face barriers that prevent them from prosecuting their batterers and make a mockery of the justice system. Legislatures pass laws that exempt marital rape from criminal sanction; police refuse to arrest men who beat their wives, and in some cases even intimidate

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<sup>50</sup> Supra note 40, para 42.

<sup>51</sup> Supra note 47, art. 3(d).

<sup>52</sup> Supra note 22, at 237.

women into withdrawing complaints of spousal abuse; prosecutors fail to charge men with domestic assault; court clerks turn away women who seek restraining or protection orders; and judges accept "honour" and "heat of passion" defences that allow wife-murder based upon "legitimate provocation" usually adultery.<sup>53</sup>

Although these statements date 15 years ago, their conclusions and prevailing sentiment about the justice system's treatment of DV stands valid even today. Judgments of the ECtHR and views of the CEDAW Committee, as will be demonstrated in next chapters, witness to reoccurrence and truthfulness of these lines.

Three important strategies of national legal responses to DV can be distinguished between. First is criminal by nature, which focuses on punishment of perpetrators, the second focuses on protecting the victim through designing appropriate criminal and civil measures, while the third regulates the activities of different institutional elements of protection (i.e. social, health, educational sector, etc.).<sup>54</sup> Various other solutions are advocated for and applied in practice as well. There is an ever growing advocacy for introduction of alternative, non-formal systems of DV intervention, most prominently within the sphere of restorative justice which aims at restoration and healing, with mediation being the most dominant form.<sup>55</sup> I mention these approaches only as a sideways reflection, in order to signal the

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<sup>53</sup> Human Rights Watch 1995, *The Human Rights Watch Global Report on Women's Human Rights*, Human Rights Watch, at 335, viewed 07 October 2011, <<http://www.wvda.org.au/hrwgolbalrept1.pdf>>.

<sup>54</sup> Filipcic, Katja 2009, 'Legal Responses to Domestic Violence: Promises and Limits' in Antic Gaber, Milica (ed.), *Violence in the EU examined: policies on violence against women, children and youth in 2004 EU accession countries*, University of Ljubljana, Faculty of Arts, pp. 115-123, at 115.

<sup>55</sup> Approaches on the basis of 'restorative justice' are just as much heavily criticised as they are vigorously proposed in the academic community. The basic rationale for their criticism is that they are reducing the formality of DV interventions, taking them out of the courtroom and placing them within the more informal community. This subsequently leads to DV being treated as less dangerous by the state and as morally doubtful towards victims since it treats victims and perpetrators of violence on the basis of equality. The proponents argue that restorative procedures are not necessarily non-complementary to criminal and civil procedures, which simply do not work in all the instances of DV. They carry potential for engaging specially educated and sensitized close community members, which could adequately support victims and regulate the behaviour of perpetrators of violence. For further elaborations of DV interventions on 'restorative justice models' and their benefits and setbacks see Kohn, Laurie S 2010, 'What's So Funny About Peace, Love and Understanding?

multitude of responses in addressing DV; they are not going to be covered by this research, as they are falling outside of the legal framework which is subjected to my review. In relation to the framework which this section addresses, as De Cruz rightfully recognizes:

The ongoing dilemma which bedevils domestic violence is: How should the law best deal with the problem? [I]s the civil law or criminal law best able to deal with domestic violence as far as the victim and perpetrator is concerned? Both branches of the law bring difficulties and it has proved very difficult to strike a balance between civil and criminal solutions.<sup>56</sup>

The main point of differentiation between two solutions - in majority of cases - is that the criminal law approach characterises violence as an individual wrongdoing, while civil law approach characterises VAW as a group based harm.<sup>57</sup> The criminal system, in its entirety is framed towards protecting the general public from criminal acts of individuals, which in majority of cases is provided *ex officio*, i.e. it is the primary responsibility of the public prosecutor to institute criminal proceedings and bring charges against individuals who are suspected of committing criminal acts. The focus here is on punishing the perpetrator for past crime(s) in order to 'reinstall justice', to protect the general public and to provide general deterrence. The aim of protecting the victim has generally surpassed the equation, since crime has materialized in a consequence of victim's individual or group harm. But with DV, the difference is that predominantly DV is not an isolated incident but an ongoing and systematic occurrence, with victims who are in a continuing need for protection.

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Restorative Justice as a New Paradigm for Domestic Violence intervention', *Seton Hall Law Review* Vol. 40, pp. 517 -595; Fernandez, Marilyn, 2010, *Restorative Justice for Domestic Violence Victims: An Integrated Approach to Their Hunger for Healing*, Lexington Books; Gardner, Emily 2009, 'Addressing violence against women: alternatives to state-based law and punishment' in Amster, Randall et al. (eds), *Contemporary Anarchist Studies: An introductory anthology of anarchy in the academy*, Routledge, pp. 46-56.

<sup>56</sup> De Cruz, Peter 2010, *Family Law, Sex and Society: a Comparative Study of Family Law*, Routledge, at 288.

<sup>57</sup> Goldfarb, Sally 2003, 'Applying the discrimination model to violence against women: some reflections on theory and practice', *Journal of Gender, Social Policy & the Law*, Vol. 11, No. 2, pp. 251-270, at 254, viewed 02 March 2011, <<http://www.lexisnexis.com>>.

The criminal law response is, therefore, limited in its scope, since it usually does not deal with victims, but solely engages with perpetrators of DV. The role of prosecutors has been heavily criticised by the researchers, since they act as gate keepers, having the power to terminate cases by not prosecuting the perpetrators of violence.<sup>58</sup> Further on, the criminal response may vary depending on the prosecutorial authorizations; on whether the criminal procedures are initiated *ex officio* and *ex parte* or they require victim's consent or even private prosecution. The Council of Europe's documents, including the Convention on combating and preventing VAW and DV are proposing a standard of mandatory prosecution in DV cases.<sup>59</sup> But, some researchers claim that these solutions, although in line with zero-tolerance policies towards DV, are in fact contrary with respecting the victims' autonomy to make their own 'independent' decisions.<sup>60</sup> Others point out that prosecutions for the crime of DV are instituted under mandatory policies usually on account of the justice system's bad experience with victims and their unreliable cooperation in conducting criminal proceedings.<sup>61</sup> This perspective stresses the ambiguous and inconsistent role of victims in seeking the intervention from the criminal system, which as a consequence should end the violent relationship.<sup>62</sup> According to Filipcic, the most important condition for successful imposition of criminal sanctions is that victims believe in the effectiveness of the criminal procedures and that they are prepared, due to that belief, to actively engage in those criminal procedures, which goes beyond submitting the reports of violence.<sup>63</sup>

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<sup>58</sup> Edwards, Susan S. M, 1996, *Sex and Gender in the Legal Process*, Blackstone Press Limited, at 200.

<sup>59</sup> See article 55 of the Council of Europe Convention on preventing and combating violence against women and domestic violence, *op. cit.*

<sup>60</sup> Supra note 54, at 118.

<sup>61</sup> Kohn, Laurie S 2008, "The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim", *N.Y.U. Review of Law and Social Change*, Vol. 32, pp. 191-252, at 194, viewed 10 March 2011, <<http://www.lexisnexus.com>>.

<sup>62</sup> Id. at 193.

<sup>63</sup> Supra note 54, at 117.



So, although the regional criminal justice standard in this regard is quite clear - as indicated by the Convention's above standard - different domestic legal solutions and scholarly opinions on the subject of mandatory prosecution policies contribute to diversified justice systems practices in this regard. The problem here appears once these practices become contrary to the justice systems obligations of human rights protection, as the analysis in subsequent chapters shall reveal.

Moreover, feminist scholars have posed the question of the legal system's efficiency in combating DV by engaging the equality paradigm – as a general standard of international human rights law – which prescribes that everybody should enjoy equal protection by the law. The principal of equal protection would be curtailed if legal system would treat DV differently or less seriously than violence by strangers.<sup>64</sup> That failure could be discriminatory against women, since - as asserted - DV affects them disproportionately. But, as oppose to stranger assaults where the crimes are identical to the crimes in DV cases, in the later cases “the victim and perpetrator dynamic complicate [...] the state's response”<sup>65</sup>. Edwards notices that “[f]or those victims who successfully negotiate the trial process, at the point of sentencing the law once again demonstrates a differential treatment of the domestic violence offender as compared with the non-domestic violence offender. Sentences in the domestic context compared with the non-domestic context have tended to be derisory”<sup>66</sup>. This standpoint is confirmed by the UN Secretary General's study on VAW which reports existence of curtailment along the lines of criminal procedures: reduction occurs along the

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<sup>64</sup> Supra note 10, at 52.

<sup>65</sup> Supra note 61, at 197.

<sup>66</sup> Supra note 58, at 180; also see supra note 22, at 207.

way from reporting DV to prosecuting it, from prosecution to conviction, up to sentencing DV that does not correspond with the severity of crimes.<sup>67</sup>

Since criminal systems operate with many flaws - the length of the criminal procedure being the major cause for concern - system actors needed to provide more expeditious measures that would complement the criminal measures and imminently provide protection to victim of DV. This happened with introducing the civil measures of redress, i.e. protective measures – whose main function is to protect the victims from immediate (threats of) violence, through instituting eviction or barring orders on perpetrators of DV for specific time periods. The aim of eviction orders is to remove the perpetrators from home and of barring/restraining orders to restrain perpetrators from contacting the victims.<sup>68</sup> These protective measures are designed to be the most expeditious tools for women who try to end ongoing intimate partner violence, since they can usually be prescribed under urgent civil judicial hearings.<sup>69</sup>

A generally accepted common problem with these civil remedies, in line with the research, is that enforcement procedures are regarded to be ineffective.<sup>70</sup> Mostly this is due for lack of official supervision of their enforcement or non-existence of follow up procedures and subsequently their massive breach<sup>71</sup>. It is desirable, as some scholars recommend, that

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<sup>67</sup> United Nations General Assembly 2006, *In depth study on all forms of violence against women: Report of the Secretary General*, UN Doc. A/61/122/Add. 1, at 86, viewed 17 September 2011, < <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/419/74/PDF/N0641974.pdf?OpenElement>>.

<sup>68</sup> Id. at 87.

<sup>69</sup> Logan, TK et al 2008, 'Factors Associated with Separation and Ongoing Violence among Women with Civil Protective Orders', *Journal of Family Violence*, No. 23, pp. 377-385, at 382, viewed 11 March 2011, <<http://online.sagepub.com/>>.

<sup>70</sup> Supra note 58, at 220.

<sup>71</sup> A research carried out in the United States indicated that protective measures are violated in more than 50% of their ordering with two out of five cases where there is no violation. See supra note 69.

legal regulation aiming to address this system malfunction, should be framed in a way that breach of a civil order carries criminal consequences with it.<sup>72</sup>

This discussion indicates that difficulties do exist in striking a workable balance between the criminal and civil law solutions on DV. Dobash and Dobash rightfully point out that in order to be fully effective, both criminal and/or civil law approaches need to respond to both victims and perpetrators, not excluding one on expense of another.<sup>73</sup> This balancing relationship between the protection of victims and punishment for perpetrators should be the leading narrative of legal solutions in the field of combating DV. So far, we have asserted what are the typical regulatory approaches on DV and we touched upon the issue of their enforcement. The next section elaborates - through postulating main theoretical conceptions – major obstacles that stand in the way of establishing appropriate and thus effective legal enforcement in DV cases.

#### ***1.4. Conceptualizing obstacles to effective protection against domestic violence***

Among the plethora of claims on influences that shape and determine the outcome of legal proceedings and the overall justice system's response in providing protection to women victims of DV two, within the literature most widely acknowledged, stand out. These claims refer to the notions of public/private dichotomy and gender stereotyping.

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<sup>72</sup> Supra note 58, at 300.

<sup>73</sup> Supra note 23, at 510.

### 1.4.1. The concept of public/private dichotomy

Feminist scholars have thoroughly elaborated the role of ‘public/private dichotomy’<sup>74</sup> as a conceptualisation that influences the justice system’s response to DV, as it “masks the extent of the problem”<sup>75</sup>. It is important to underline that historically family has been viewed as a place of privacy where the state should refrain from interfering; a place where, as Rhode had framed it, the “force of law meddled little with the law of force”<sup>76</sup>. What feminist scholars have offered is a shift of perspective in advocating that DV cannot be considered as just a ‘private’ issue, but as, how Charlesworth has framed it, in rather absolute terms, a “part of the structure of the universal subordination of women”<sup>77</sup>, thus viewing DV as a political issue, and hence a public one, as well. When states enact legislation on DV it should alter the perspective, since legal system addresses DV as a problem of public concern.<sup>78</sup> But, even with the laws in place, the dichotomy still remains present in the enforcement sphere, within the limits of police and judicial ineffective actions. By following this division, Edwards claims, the law has positioned non-interference in private life above protection of women victims of DV and further on reserved intervention as the last solution.<sup>79</sup> Schneider stresses

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<sup>74</sup> Most concise summary of this conceptual relationship can be found in the United Nations, Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, *Integration of the human rights of women and the gender perspective: violence against women. The due diligence standard as a tool for the elimination of violence against women*, UN Doc. E/CN.4/2006/61, 20 January 2006. In paragraph 59 of the Report it is stated that: “[o]ne of the main obstacles to the protection of women’s rights has been attributed to the role of public/private dichotomy in international human rights law, which was conventionally premised on the liberal, minimalistic conception of the State. This reflected the hierarchical relations experienced by men in the “public” sphere, leaving the hierarchical associations in the “private” sphere off limits to State intervention. This normalized the use of violence in the privacy of the home.” Thus, the feminist criticism of state’s comprehension of such a division of spheres is directed towards acknowledging that private-domestic sphere is likewise a political concept, in which state reserves the right whether or not to intervene, *op.aut.*

<sup>75</sup> De Cruz, Peter 2010, *Family Law, Sex and Society: a Comparative Study of Family Law*, Routledge, at 287.

<sup>76</sup> Supra note 22, at 237.

<sup>77</sup> Charlesworth, Hilary 1994, ‘What are “Women’s International Human Rights”?’ in Cook, Rebecca J (ed.), *Human Rights of Women: National and International Perspectives*, University of Pennsylvania Press, pp. 58-84, at 73.

<sup>78</sup> See supra note 11, at 311-313.

<sup>79</sup> Supra note 58, at 191.

that “by refusing to intervene under a rationale that domestic violence is a private family matter, the state not only condones battering, but in fact promotes it”<sup>80</sup>. So, the underlying argument is that the existence of public/private dichotomy represents a major difficulty for states effective intervention in DV cases and effective application of the human rights law.

### 1.4.2. Gender stereotyping

One of the practices that are contributing to reaffirming and maintaining this ‘public/private’ divide is judicial decision making, which - according to Rhode - is strongly influenced by gender biased reasoning<sup>81</sup>. One of the most notorious myths is the “idea that women are responsible for male violence”<sup>82</sup>, which contributes in forming gender biased decision making<sup>83</sup>. Other myths include seeking causes for explaining DV through alcoholism, unemployment and poverty.<sup>84</sup> Existence of gender bias in judicial decision making is dangerous to claim and difficult to prove and it is not the aim of this research to explore such bold assertions. Nevertheless, because of the topic in question, it is necessary to point to instances where such a bias was detected in order to establish a broader pattern of conditions that affect the overall decision making process of the judiciary, as well as other institutional representatives of the overall justice system.

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<sup>80</sup> Supra note 25, at 488-489.

<sup>81</sup> Supra note 22, at 241.

<sup>82</sup> Id.; also see supra note 58, at 180.

<sup>83</sup> Supra note 58, at 180. Edwards claims: “[D]ecisions made by practitioners in the criminal process support these myths, judges frequently rely on them in their judgments and in decisions to reduce sentence with the result that mendacity on domestic violence is institutionalised in legally refined form, reproduced by police, by counsel and by the judiciary” (see supra note 58, at 180). For further reading with extensive case examples see Loraine, Dusky 1996, *Still Unequal: The Shameful Truth About Women and Justice in America*, Crown Publishers, Inc, at 356-376.

<sup>84</sup> Supra note 58, at 179 & 209.

One of the most important ‘factors’ that can influence the decision making are gender stereotypes, which presume “that all members of a certain social group possess particular attributes or characteristics or perform specified roles”<sup>85</sup>. Therefore, stereotypes represent simplifications of ‘reality’. In this regard, claims that victims of DV are solely women and that perpetrators are exclusively male (or *vice versa* for that matter) would represent examples of faulty and dangerous interpretations based on stereotypical depictions of reality, which - with the force of their argument - could and often do lead to inadequately designed or applied institutional solutions on DV.

According to Cook and Cusack gender stereotypes represent one of the main causes of discrimination against women, most importantly because they forge identities by “prescribing attributes, roles, and behaviours to which men and women are expected to conform”.<sup>86</sup> They label these stereotypes as ‘sex role stereotypes’.<sup>87</sup> The authors claim that enforcement or perpetuation of gender stereotypes through laws, policies or practices is factually harmful for women.<sup>88</sup> By using gender stereotyping women can be harmed in three ways: by denying their benefit, by degrading their human dignity and by imposing a burden on to them.<sup>89</sup> If women victims of DV are to receive different treatment from the justice system in comparison to victims of other crimes because of gender stereotyping they would suffer degrading harm on the account of not being treated equal.

Even more so, the feminist perspective reveals that the function of gender stereotypes is to reproduce gender differences within the society and by doing so to maintain the

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<sup>85</sup> Cook, Rebecca J and Cusack, Simone 2010, *Gender Stereotyping: Transnational Legal Perspectives*, University of Pennsylvania Press, at 9.

<sup>86</sup> Id. at 18.

<sup>87</sup> Id. at 28.

<sup>88</sup> Id. at 42.

<sup>89</sup> See id. at 59-66.

‘symbolic order’; an order which is based on male dominance and female subordination.<sup>90</sup>

The CEDAW Committee’s General Recommendation No. 19 follows this perspective and stipulates that “[t]raditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence [...]”<sup>91</sup>. Furthermore, CEDAW links gender stereotyping with discrimination against women<sup>92</sup> and urges State Parties “to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women”<sup>93</sup>.

We may conclude that gender stereotyping negatively impacts the enjoyment of human rights of women and leads to women’s subordination. Further on, stereotyping may lead to gender biased decision making, as was indicated by a UN expert group meeting on VAW.<sup>94</sup> Their report acknowledges that different and inconsistent practices in imposing sentences in cases of VAW exist within countries. These practices are influenced by gender biased reasoning, or as the report indicates, they are “informed by discriminatory attitudes held by judicial officials regarding complainants/survivors of violence against women.”<sup>95</sup>

Knowing the basic normative premises on domestic violence and major conceptual obstacles that stand at the way of legal and justice system’s effective intervention, it is safe to engage in the elaboration of states positive obligations to intervene in DV in order to protect the human rights of victims and the standard through which states actions are judged in this regard by supervisory bodies and courts. This is undertaken in the following chapter.

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<sup>90</sup> Talbot, Mary 2003, ‘Gender Stereotypes: Reproduction and Challenge’ in Holmes, Janet and Meyerhoff, Miriam (eds), *The Handbook of Language and Gender*, Blackwell Publishing, pp. 468-486, at 471-472.

<sup>91</sup> Supra note 34, para 11.

<sup>92</sup> Supra note 33, art. 5(a).

<sup>93</sup> Id. art. 2(f).

<sup>94</sup> UN Division for the Advancement of Women & UN Office on Drugs and Crime 2008, *Good practices in legislation on violence against women: Report of the expert group meeting*, United Nations, at 58, viewed 25 September 2011,

<<http://www.coe.int/t/dghl/standardsetting/violence/UN%20Guidelines%20on%20legislation.pdf>>.

<sup>95</sup> Id.

## Chapter 2 - Positive obligations and the ‘due diligence’ standard

As indicated in the previous chapter, the regulatory frameworks of international and regional human rights treaties position VAW in the private domain within the realm of human rights protection. Given that state parties to human rights treaties are expected to conform to their human rights obligations and treaty standards of protection, states can be found internationally responsible if they fail to act according to their treaty-assumed obligations. The present chapter describes the nature of states obligations to protect human rights of victims of DV and the standard to evaluate the appropriateness of states actions in this regard, in order to present the normative framework that will serve as a basis for all further analysis within the chapters to come.

### *2.1. Positive obligations of states to protect human rights*

In the realm of human rights protection states do not only possess negative obligations – not to impede the enjoyment of certain human rights – but *vice versa* positive obligations “to protect a person against violations of their human rights committed by individuals or other entities”<sup>96</sup>. These positive obligations in literature are also called obligations to protect.<sup>97</sup> The most obvious example of states positive obligation not to infringe a human right would be the obligation to protect life. But, positive obligations can be linked with ‘negative duties’ such as the prohibition of torture and inhuman or degrading treatment (e.g.

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<sup>96</sup> Conforti, Benedetto 2004, ‘Exploring the Strasbourg Case-Law: Reflections on State Responsibility for the Breach of Positive Obligations’ in Fitzmaurice, Malgosia & Sarooshi, Dan (eds), *Issues of State Responsibility before International Judicial Institutions*, Hart Publishing, pp. 129-137, at 129.

<sup>97</sup> Hakimi, Monica 2010, ‘State Bystander Responsibility’, *European Journal of International Law*, No. 21, pp. 341-385, at 348, viewed 02 October 2011, <[www.westlaw.org](http://www.westlaw.org)>.



Article 2 of the ECHR) or non-interference with private and family life (e.g. Article 8 of the ECHR).<sup>98</sup>

In our example, state – through her power apparatus - would have a positive obligation to interfere in family or private life in order to provide protection to victims of domestic violence. If state organs are responsible for protection of human rights, such is protection of life or obligation to prevent torture and degrading treatment *per se*, they should be equally responsible for protecting life and prohibiting torture when violations of human rights occur within the realm of private life. These violations should be analyzed as human rights abuses, as well.<sup>99</sup> And indeed they are, given that this conceptualisation has been accepted by the international and regional human rights law in determining that domestic violence triggers a states' obligation to protect.

Incidentally, the first case where the ECtHR adjudicated in matters dealing with DV recognized that states have positive obligations to protect human rights. The case concerned with a battered woman who wanted judicial separation from her abusive husband. Because she could not afford to hire a lawyer, her access to judicial protection was denied, since no legal assistance was provided for her by the State. The case was *Airey v. Ireland*<sup>100</sup>, in which the ECtHR found a violation of ECHR's Article 6 (right to a fair trial) and Article 8 (right to a private and family life). The Court stated that "fulfilment of the duty under the Convention on occasion necessitates some positive action on the part of the State [and] the obligation to secure an effective right to access to the courts falls into this category of duty"<sup>101</sup>. Likewise the ECtHR acknowledged that, although Article 8 primarily carries a negative duty for a state

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<sup>98</sup> Supra note 96.

<sup>99</sup> Marshall, Jill 2008, 'Positive Obligations and Gender-based Violence: Judicial Developments', *International Community Law Review*, No. 10, pp. 143-169, at 154, viewed 09 September 2011, <<http://www.lexisnexis.com>>.

<sup>100</sup> ECtHR, *Airey v. Ireland*, application no. 6289/73, Judgment from 9 October 1979, Strasbourg.

<sup>101</sup> Id. para. 25.

not to interfere with the enjoyment of this right, it likewise carries a positive obligation “inherent in an effective respect for private and family life”<sup>102</sup>. Ultimately, the Court laid down its famous line of reasoning, that the rights guaranteed under the Convention must be made “practical and effective” and not “theoretical or illusory”<sup>103</sup>, as the case revolved around the issue of state’s failure to act. All in all, the State ultimately had breached its treaty obligations to protect human rights in this occasion, since it did not employ its justice system and has “denied individuals reasonable access to self-protection through resort to the civil courts”<sup>104</sup>.

In conclusion, positive obligations follow the goal of “effective application of the [human rights treaty] and the effectiveness of the rights it secures”<sup>105</sup>. But, the existence of states positive obligations to secure effective enjoyment of rights steaming from a human rights treaty is only one side of the coin; the assessment of the states response in this regard is yet another. The ECtHR and the CEDAW Committee apply a specific test for determining whether states have taken actions in accordance with their positive obligations steaming from ECHR and CEDAW, when it comes to protecting certain human rights. In another words, this test determines whether states have employed its ‘monopoly of power’ in serious and reasonable way, which would be in accordance with their positive obligations to safeguard human rights. The standard test that is used in this regard is one of ‘due diligence’.

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<sup>102</sup> Id. para. 32.

<sup>103</sup> Id. para 24.

<sup>104</sup> Cook, Rebecca J, ‘Accountability in International Law for Violations of Women’s Human Rights by Non-State Actors’ in Dallmeyer, D. A. 1993 (ed.) *Reconceiving Reality: Women’s Perspectives on International Law*, American Society of International Law, pp. 93-117, at 100.

<sup>105</sup> Akandji-Kombe, Jean-Francios 2007, *Positive obligations under the European Convention on Human Rights: a Guide to the Implementation of the European Convention on Human Rights*, Human Rights Handbooks No. 7, Council of Europe, at 9.

## 2.2. The ‘due diligence’ standard

Deliberation of the due diligence standard<sup>106</sup> for the purpose of the present research will be limited in its scope and will rely exclusively in elaborating this concept by utilizing language of international documents which prohibit VAW, international jurisprudence on the subject and scholarly reflection related to the topic of research. Any further detailed engagement with this concept would lead the reader far beyond then the topic requires.

States are internationally responsible for the wrongful acts of its organs, disregarding the level (central, federal, local) and function (legislative, executive, judicial or any other function) of the state organ which is responsible for the act.<sup>107</sup> The CEDAW Committee’s Recommendation No. 19 specifically stresses that “States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights, or to investigate or punish acts of violence and for providing compensation”<sup>108</sup>. The Declaration on the Elimination of VAW, urges states to “exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the state or by private persons”<sup>109</sup>. It follows that the concept of due diligence represents a standard for determining how states approach combating domestic

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<sup>106</sup> The ‘due diligence’ standard has an extensive historical legal background and encompasses state obligations that where first deriving from the customary law. The standard was first officially applied thou, in 1988, by the Inter-American Commission on Human Rights in the landmark *Velásquez Rodríguez v. Honduras* judgment in a case dealing with disappearance. The Commission found that “[a]n illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention”. (See Inter-American Commission on Human Rights, *Velásquez Rodríguez v. Honduras*, 29 July 1988, Series C: Decisions and Judgments, No. 04, para 172). For more extensive elaboration of the ‘due diligence’ concept in relation to states obligation to combat VAW see UN, Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, *Integration of the human rights of women and the gender perspective: violence against women. The due diligence standard as a tool for the elimination of violence against women*, UN Doc. E/CN.4/2006/61, 20 January 2006.

<sup>107</sup> See International Law Commission 2001, *Draft articles on Responsibility of States for Internationally wrongful acts*, art. 4(1), UN Doc. A/56/10.

<sup>108</sup> Supra note 34, art. 9.

<sup>109</sup> Declaration on the Elimination of Violence against Women, art. 4(c), *op.cit.*

violence, since it is a phenomenon occurring between solely private actors. And inevitably connected with applying the due diligence standard is the state actor's application of the principle of non-discrimination, i.e. treating cases of VAW in the private sphere with the same level of commitment as treating other forms of violence<sup>110</sup>. In this regard, as already stated, comprehension of DV as a human rights violation is linked with the notion that state is liable for 'private violence', which presupposes, according to Roth, a limited notion of state responsibility.<sup>111</sup> The responsibility manifests itself either as 'complicity' through state's systematic inaction that condones violence or through state's 'discriminatory' action in treating particular acts of DV against women differently from other comparable forms of violence.<sup>112</sup>

To summarise, state has an international responsibility not because of acts of private individuals *per se* which violated individual human rights, but for the lack or failure of diligently conducting an investigation, prevention or remedial action that could provide justice for the victim. And regarding the standard of "[w]hat diligence is due [it] may be determined by relevant treaties, state practice undertaken in performance of accepted legal obligations, standards proposed by international organizations and standards determined by international literature"<sup>113</sup>. More clearly and to the point, the standard has been described by some scholars in relation to two characteristics: one is the reasonableness of state's behaviour (i.e. what are reasonable expectations for a state to do) and the other is seriousness of

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<sup>110</sup> UN, Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, *Integration of the human rights of women and the gender perspective: violence against women. The due diligence standard as a tool for the elimination of violence against women*, UN Doc. E/CN.4/2006/61, 20 January 2006, para 35.

<sup>111</sup> Roth, Kenneth 1994, 'Domestic Violence as an International Human Rights Issue' in Cook, Rebecca J (ed.), *Human Rights of Women: National and International Perspectives*, University of Pennsylvania Press, pp. 326-339, at 331.

<sup>112</sup> Id. at 331-334.

<sup>113</sup> Supra note 104, at 114.

undertaken actions by a state.<sup>114</sup> When actions of non-state or private actors result in human rights violations the state may be responsible only if their official bodies fail “to take reasonable or serious measures to prevent violations or respond to them”<sup>115</sup>.

In 2006, the UN Special Rapporteur on VAW, its causes and consequences Yakin Ertürk issued a momentous report: “The Due Diligence Standard as a Tool for the Elimination of Violence against Women”, which provided guidance on the standard itself, its application by national and transnational actors and most importantly on supervising the actions of states in addressing DV. In elaborating the “punishment” aspect of the “due diligence” standard, Ertürk noticed that this “obligation to investigate and appropriately punish acts of VAW with due diligence has, in the main, been seen by states as an obligation to adopt or modify legislation while reinforcing the capacities and powers of police, prosecutors and magistrates”<sup>116</sup>. This is not enough, especially when “there are still alarming numbers of instances of judges handing down reduced or inappropriate sentences for these crimes”<sup>117</sup>, as the report indicates. Ertürk advocates for a more comprehensive solution<sup>118</sup> in applying this standard, which would provide a more effective state’s response to VAW. The Special Rapporteur ultimately links it with the need towards the engagement of state powers in changing patriarchal societal values<sup>119</sup>. This same need for transformative change of

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<sup>114</sup> Supra note 99, at 149.

<sup>115</sup> Supra note 99, at 149.

<sup>116</sup> Supra note 110, para 50.

<sup>117</sup> Supra note 110, para 54.

<sup>118</sup> Supra note 110, para 74: “*Potential for expanding the due diligence framework lies: (a) in the full implementations of generalised obligations of prevention and compensation, and in the effective realisation of existing obligations to protect and punish and (b) in the inclusion of relevant non-State actors as the bearers of duties in relation to responding to violence against women.*” What this recommendation leaves unanswered though, is how responsibility for actions is going to be shared between the key state and non-state actors and what amounts to “full implementation” if states, for example - as jurisprudence of the ECtHR has shown - enjoy a margin of appreciation regarding how they address human rights protection within their own jurisdiction when transposing international or regional human rights standards in national law.

<sup>119</sup> Supra note 110, para 90. See paragraph 90 of the Report where the Special Rapporteur mentions the potential and obligation of the judiciary and prosecutors to act in this regard, which can amount to changing the

cultural patterns likewise derives from recommendations of the CEDAW Committee, as was accentuated in the previous chapter. In concluding that inevitably “the obligations to prevent, protect, prosecute and provide compensation” are becoming somewhat of a universally recognized standard to combat VAW<sup>120</sup>, the Special Reporter has outlined how states should approach and conduct their official activities against DV on one side and gave a tool for evaluating those same actions on another.

Finally, the latest Council of Europe Convention on preventing and combating VAW and DV, specifies the duty of due diligence in setting up that “[p]arties shall take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparations for acts of violence covered by the scope of this Convention that are perpetrated by non-state actors”<sup>121</sup>. This provision undisputedly qualifies due diligence as the *ultima ratio* determinant of states positive obligations. How states are practically applying the due diligence standard in relation to protection of women victims of DV, the subsequent two chapters shall reveal, in which I critically analyze views of the CEDAW Committee and judgments of the ECtHR in this regard.

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patriarchal “balance of power”. Moreover, Ertürk recognizes the double impact this kind of actions can brought upon: “consequential” effect in changing the socio-cultural norms and “intrinsic” effect in changing the society itself, since judiciary and prosecutors act as the “mouthpieces” of society.

<sup>120</sup> See supra note 110, para 100-105.

<sup>121</sup> Council of Europe Convention on preventing and combating violence against women and domestic violence, *op. cit.*, art. 5.

### Chapter 3 - The CEDAW Committee's take on the due diligence standard in cases of domestic violence

The CEDAW Committee is a human rights treaty body established under CEDAW.<sup>122</sup> Its main function is to consider state parties periodic reports on their measures taken for the implementation of CEDAW.<sup>123</sup> It is worth emphasising that CEDAW equally applies to all three branches of the government, namely legislative, executive and judicial branch. Cases - analyzed in this chapter - have originated under the CEDAW's Optional Protocol<sup>124</sup> prerogative, which gives additional power to the CEDAW Committee to receive individual or group complaints from persons claiming to be victims of violations of their rights set forth by CEDAW (this is called the communications procedure).<sup>125</sup> Although the Committee's opinions - framed as views and recommendations - take a non-binding legal form, they carry the weight of an official interpretation of the state parties' compliance with CEDAW. Buerghenthal correctly notices that regardless of the nature of this law - as it is made by a treaty body acting as a quasi-judicial institution - the CEDAW Committee's "normative findings [...] have legal significance, as evidenced by references to them in international and domestic judicial decisions".<sup>126</sup>

By default, the state party - which has ratified the Optional Protocol and thus accepted the Committee's jurisdiction and authority (to question the claims of violations of rights under CEDAW) - is under a treaty obligation to respect the Committee's views and comply with its recommendations. The real downside with the enforcement of CEDAW in

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<sup>122</sup> CEDAW, *op. cit.*, art. 17.

<sup>123</sup> CEDAW, *op. cit.*, art. 18.

<sup>124</sup> The Optional Protocol is a separate treaty accompanying CEDAW, which must be additionally signed and ratified by states which ratified CEDAW, in order to produce binding legal effects.

<sup>125</sup> Optional Protocol to the Convention on Elimination of All Forms of Discrimination against Women, art. 2, UN Doc. A/Res/54/4, 6 October 1999.

<sup>126</sup> Buerghenthal, Thomas 2006, 'The Evolving International Human Rights System', *The American Journal of International Law*, Vol. 100, No. 4, pp. 783-807, at 789, viewed 03.11.2011, <<http://www.jstor.org>>.

general, as McQuigg correctly points out, is that it lacks ‘official teeth’<sup>127</sup>. This characterisation likewise encompasses the application of the CEDAW Committee’s views and recommendations. Hence, if states do not comply with these recommendations no international enforcement or sanction mechanisms can be employed, there is only the possibility of ‘naming and shaming’ the state concerned. In regard to the follow-up procedure, within the time-period of six months a state party must submit a report on actions taken for the implementation of the recommendations of the Committee.<sup>128</sup> The report should indicate the measures undertaken by the Government vis-à-vis the specific violation(s) and general (structural) measures to prevent further similar human rights violations.

The aim of this chapter is to demonstrate how the CEDAW Committee – as an international quasi-judicial body – interprets states positive obligations to protect human rights of women in cases of DV and determines state’s failure to act with due diligence. Overall, three cases will be analyzed in chronological order, depicting the pattern of states failure to comply with their international human rights obligations under CEDAW. First analysis is dealing with the controversy originating from Hungary, while two subsequent cases are concerning Austria justice system’s response to DV. Both Hungary and Austria have ratified the Optional Protocol to CEDAW. Factual and legal circumstances surrounding these cases shall be presented in depth in order, for the reader, to fully comprehend the scenarios under which states positive obligations have arisen and the CEDAW Committee’s interpretation of their inappropriate application contrary to the due diligence standard.

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<sup>127</sup> McQuigg, Ronagh 2007, ‘The Responses of States to the Comments of the CEDAW Committee on Domestic Violence’, *The International Journal of Human Rights*, Vol. 11, No. 4, pp. 461-479, at 474, viewed 02 September 2011, <[www.ebscohost.com](http://www.ebscohost.com)>.

<sup>128</sup> CEDAW Optional Protocol, *op. cit.*, art. 7(4).



### 3.1. *A.T. v. Hungary*

The first case in which the CEDAW Committee deliberated on states' potential violations of CEDAW in connection with domestic violence was that of *A.T. v. Hungary*<sup>129</sup>. A.T. – the author of the communication – complained to be subjected “for the past four years [...] to regular severe domestic violence and serious threats by her common law husband”<sup>130</sup>. She managed to institute civil proceedings against her husband with the aim to restrict his use of their joint home. They were unsuccessful; the local court determined that she did not substantiate her claims of battering by her husband and that husband's right to property could not be restricted.<sup>131</sup> No protective or restraining orders were available for the author's use at the time under Hungarian law.<sup>132</sup> Likewise, she could not go to a shelter, since there was no shelter in the country capable to accommodate the needs of her disabled child.<sup>133</sup> In addition, two ongoing and long lasting (over five and three years) criminal procedures were instituted against her husband for physical assaults, which have not been finished and during which he was not detained.<sup>134</sup>

The author claimed that Hungary “passively neglected its “positive” obligation under the Convention and supported the continuation of a situation of domestic violence against her”, thus failing to provide effective protection to her, in violation of CEDAW<sup>135</sup>. The

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<sup>129</sup> *A.T. v. Hungary*, CEDAW Committee's views on communication No.: 2/2003, 26 January 2005, UN Doc. CEDAW/C/32/D/2/2003.

<sup>130</sup> Id. para 2.1.

<sup>131</sup> Id. para 2.4.

<sup>132</sup> Id. para 2.1.

<sup>133</sup> Id. para 2.1.

<sup>134</sup> Id. para 2.6.

<sup>135</sup> Id. para 3.1. The applicant alleged violations of articles 2(a), (b) and (e), 5(a) and 16 of the Convention. The aforementioned articles urge State Parties to ensure the practical realisation of the principle of equality of men and women, to adopt legislation and other measures which prohibit discrimination against women, to take measures to eliminate discrimination against women by any person, to eliminate prejudices and customary practices which are based on stereotyped roles for men and women and to eliminate discrimination against women in all matters relating to marriage and family relations.

Committee acknowledged the author's claims about the irrationally lengthy criminal and civil procedures against her husband, the non-existence of protective or restraining orders in Hungarian law and the husband's criminal non-detention as evidences of her human rights violations.<sup>136</sup> The Committee particularly stressed that "women's human rights to life and to physical and mental integrity cannot be superseded by other rights, including the right to property and the right to privacy"<sup>137</sup>. By reaching this decision, the Committee acknowledged that the Hungarian authorities privileged property rights over the victim's rights to physical integrity. This rationale, found in the approach of the Hungarian judicial institutions, demonstrates and follows a long lasting tension in the law between the protection of the victim's physical integrity and the abuser's property rights.<sup>138</sup>

Further on, the CEDAW Committee recognized the link between gender stereotypes and inadequate state's response in preventing violence against A.T. in expressing concerns about the "persistence of entrenched traditional stereotypes regarding the role and responsibilities of women and men in the family [and] the traditional attitudes by which women are regarded as subordinate to men"<sup>139</sup> in Hungarian society. Cook noticed that the CEDAW Committee rightly recognized existence of gender stereotypes in influencing the decision of domestic judiciary<sup>140</sup>, but has not elaborated how they had contributed to justice system's failure to respond to domestic violence in that particular case.<sup>141</sup> By doing so, the Committee failed to move beyond the mere abstract conceptualisation (of the link between

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<sup>136</sup> Id. para 9.4.

<sup>137</sup> Id. para 9.3.

<sup>138</sup> See for example Barnett, Hilaire 1998, *Introduction to Feminist Jurisprudence*, Cavendish Publishing Limited, at 263.

<sup>139</sup> Supra note 129, para 9.4. Also quoted in Cook, Rebecca J et al, *Gender Stereotyping: Transnational Legal Perspectives*, *op.cit.*, at 157.

<sup>140</sup> Domestic courts in the case of A.T. v. Hungary afforded primacy to husband's right to property and right to privacy over women's rights to physical and mental integrity in the case of domestic violence.

<sup>141</sup> Supra note 85, at 158.

the stereotyping and judicial decision making) towards providing a guiding tool for states on how to recognize and work towards eradicating gender stereotyping in practice.

Surprisingly, Hungary - through its observations on communication - admitted that its national judiciary is not treating DV cases as priority issues and that the State's legal and institutional framework cannot ensure "internationally expected, coordinated, comprehensive and effective protection and support for the victims of domestic violence"<sup>142</sup>. The State party admitted that legal means of redress pursued by the complainant against her ill-treatment deriving from acts of DV were not able to provide her with immediate protection.<sup>143</sup> Hence forth, the State openly revealed that it cannot exercise due diligence in providing protection against DV. The Committee made two types of recommendations to Hungary; (1) concerning the undertaking of immediate and effective measures for providing protection to the complainant and (2) measures of general nature directed at improving the overall efficiency of the legal system's response to DV.<sup>144</sup> One of the general recommendations was that Government must "[a]ssure [to] victims of domestic violence the maximum protection of the law by acting with due diligence to prevent and respond to such violence against women"<sup>145</sup>.

### 3.2. *Cases of Şahide Goekce v. Austria & Fatma Yildirim v. Austria*

The two cases brought against Austria under CEDAW at the same time, have a number of mutually common features, which enables a joint analysis of their interrogation and resolution by the CEDAW Committee. I will present the main facts separately, but merge the Committees overview, conclusions and recommendations into one, since identical

<sup>142</sup> *A.T. v. Hungary, op.cit.*, para 9.3.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* para 9.6.

<sup>145</sup> *Id.* para 9.6. II(b).

breaches have been alleged over similar reasons in both cases; almost the same sets of arguments have been raised by the authors of the communications and the Government, followed by similar reasoning by the Committee. Authors of both communications were two Vienna based non-governmental organizations<sup>146</sup> (hereinafter: NGO), specialized for helping women victims of DV. They submitted the communications in the name of their deceased clients who were murdered during the course of domestic violence by their husbands.

In the case of *Şahide Goekce v. Austria*<sup>147</sup>, Şahide was subjected to physical violence and death threats by her husband during the course of three years. Throughout that period police regularly intervened issuing prohibition and restraining orders (for up to ten days) against the husband. In one account he was criminally prosecuted for light bodily injuries, and acquitted for the lack of evidence, after Şahide did not give official authorization for prosecution for death threats, which was a prerequisite under Austrian law.<sup>148</sup> On two separate accounts the Public Prosecutor refused to detain the husband after police requests following severe physical violence.<sup>149</sup> Şahide placed charges, but the proceedings for causing bodily harm and making dangerous threat were dropped because of the lack of evidence.<sup>150</sup> The local court issued a three months prohibition order against the husband to refrain from contacting Şahide, which was not properly enforced by the police.<sup>151</sup> On several occasions relatives of Şahide called the police to complain about the husband's intensified death threats,

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<sup>146</sup> I.e. the Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice.

<sup>147</sup> *The Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice on behalf of Hakan Goekce, Handan Goekce, and Guelue Goekce (descendants of the deceased Şahide Goekce) v. Austria*, CEDAW Committee's views on communication No.: 5/2005, 6 August 2007, CEDAW/C/39/D/5/2005.

<sup>148</sup> Id. para 2.3.

<sup>149</sup> Id. para 2.4. & 2.6.

<sup>150</sup> Id. para 2.10.

<sup>151</sup> Id. para 2.7. & 2.8.

to which police did not respond.<sup>152</sup> Eventually, Şahide was killed with a shotgun by her husband in front of their daughters.<sup>153</sup>

In the case of *Fatma Yildirim v. Austria*<sup>154</sup> the circumstances reveal similar pattern of events, with one major difference. Here the violence was denser, as it occurred over a time span of little over a month. This time the husband of the victim made death threats, on account of which the police issued an expulsion and prohibition to return (barring) order against the offender.<sup>155</sup> On two separate accounts of renewed death threats, Fatma gave official statements, after which the police requested detention from the Public Prosecutor, which was rejected.<sup>156</sup> The husband came to victim's workplace repeatedly on three separate occasions, where he threatened and harassed her; on account of which the police interviewed the husband.<sup>157</sup> At the end, he fatally stabbed Fatma at the street following her from work.<sup>158</sup>

The authors of the complaint, in both cases, claimed that the Austrian criminal justice have failed to act with due diligence to prosecute instances of violence and provide protection against domestic violence<sup>159</sup>, thus violating the two women's rights to protection of life and physical integrity<sup>160</sup>. They alleged that the national special law on DV (which provided protection to victims through civil-law measures of eviction and barring orders) was inadequate to deal with highly violent offenders in cases of severe violence for which

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<sup>152</sup> Id. para 2.9.

<sup>153</sup> Id. para 2.11.

<sup>154</sup> *The Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice on behalf of Banu Akban, Gülen Khan, and Melissa Özdemir (descendants of the deceased Fatma Yildirim) v. Austria*, CEDAW Committee's views on communication No.: 6/2005, 6 August 2007, CEDAW/C/39/D/6/2005.

<sup>155</sup> Id. para 2.3. & 2.4.

<sup>156</sup> Id. para 2.4. & 2.10.

<sup>157</sup> Id. para 2.6-2.8.

<sup>158</sup> Id. para 2.13.

<sup>159</sup> *Şahide Goekce v. Austria*, op.cit. & *Fatma Yildirim v. Austria*, op.cit., para 3.5.

<sup>160</sup> Id. para 3.1. The authors claimed violations of Articles 1, 2, 3 and 5 of CEDAW.

detention was necessary.<sup>161</sup> Likewise, they complained that the communication between the police and the prosecutor was inefficient.<sup>162</sup> The authors asserted the lack of seriousness on the side of official authorities' comprehension of domestic violence that is directed against women.<sup>163</sup> Furthermore, they urged the Committee to recommend pro-arrest, pro-detention and pro-prosecution policies to the State.<sup>164</sup>

The Government refused all the allegations about the inefficiency of its criminal and civil-law system in addressing DV, arguing in both times, that detention of offenders would be a disproportional interference with their personal freedom and respect for fair trial rights.<sup>165</sup> The Government, in *Goekce* case raised the victim's lack of cooperation as a determinant for the failure of criminal proceedings; while in the *Yildirim* case it raised issues of victim's lack of apparent injuries, offender's cooperation with the police, and his absence of a criminal record and non-use of a weapon as justifications of the decision not to detain the husband.<sup>166</sup> Basically, in *Goekce* case the State laid the blame onto the victim (through her lack of cooperation) while denying any omissions on its part, while in *Yildirim* case the State argued that offender's right (to freedom of the suspect) superseded the victims' rights (to life and physical integrity), since death threats did not amount to the level of severity required for placing the offender in detention.

The Committee ultimately in both cases found violations of deceased women's rights to life and physical and mental integrity. In *Goekce* the fact that the police knew about the

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<sup>161</sup> Id. para 3.1.

<sup>162</sup> Id. para 3.1.

<sup>163</sup> The authors stated that "[t]he criminal justice system, particularly public prosecutors and judges, consider the issue a social or domestic problem, a minor or petty offence that happens in certain social classes. They do not apply criminal law to such violence because they do not take the danger seriously". See the CEDAW Committee's views on *Şahide Goekce v. Austria, op.cit* & *Fatma Yildirim v. Austria, op.cit.*, para 3.6.

<sup>164</sup> *Şahide Goekce v. Austria, op. cit.*, para 3.8.

<sup>165</sup> Id. para 8.17.

<sup>166</sup> *Fatma Yildirim v. Austria, op. cit.*, para 4.5.

long history of violence and abuse and have failed to adequately respond to a phone call made prior to victim's killing was evidence of a failure of official authorities to exercise due diligence.<sup>167</sup> In *Yildirim*, the Committee stated that the husband violated the injunction and consecutively threatened his wife in her work place; which was an "extremely dangerous" situation that did not resulted with placing him into detention.<sup>168</sup> The Committee, in both cases repeated, as in *A.T. v. Hungary* "that the perpetrator's rights cannot supersede women's *human rights to life and to physical and mental integrity* (emphasis added)" and that the prosecutor - who was aware of the circumstances of the case - should have placed an offender in detention<sup>169</sup>. The CEDAW Committee acknowledged that Austria had developed a comprehensive system (criminal, civil law remedies, education, shelters, awareness-raising, etc.) to address domestic violence, but that it lacked practical realization.<sup>170</sup> It concluded by recommending that Austria needs to solidify its protective system in the sphere of criminal law enforcement, with outlining four sets of generic recommendations<sup>171</sup> in that regard.

So, the Committee determined that in both cases authorities failed to show due diligence, since they – if we would to simplify the author's claims - have failed to use criminal law measures and place the offender in detention. Everything else was consequential, including the non-responsiveness of the police in *Goekce* case. The Committee determined that civil-law measures used by the Austrian authorities could not have been regarded as reasonable in the *Yildirim* case, because the police did not effectively reacted to offender's breach of injunction and that criminal measures were lacking, since prosecutor did not take the danger emanating from the perpetrator seriously. Thus, the Committee has

<sup>167</sup> *Şahide Goekce v. Austria*, *op. cit.*, para 12.1.4.

<sup>168</sup> *Fatma Yildirim v. Austria*, *op. cit.*, para 12.1.3 & 12.1.4.

<sup>169</sup> *Şahide Goekce v. Austria*, *op.cit.* & *Fatma Yildirim v. Austria*, *op. cit.*, para 12.1.5.

<sup>170</sup> *Id.* para 12.1.2.

<sup>171</sup> I.e. to strengthen implementation and monitoring of legislation, to act with due diligence, to vigilantly prosecute perpetrators of domestic violence, to ensure coordination among enforcement and judicial officers, etc. See para 12.3. in *Şahide Goekce v. Austria & Fatma Yildirim v. Austria*, *op. cit.*

stressed the importance of applying criminal law measures in DV cases and exposed naked the problematic of their enforcement in cases when criminal and civil law measures on DV coexist, as in Austria.

On account of these conclusions, when we compare the two cases, there are important factual differences between them, based on the history, weight, length and consequences of the abuse. Certainly, on first glance, the facts from *Goekce* hold as much stronger for determining that the state failed to fulfil its positive obligations, foremost because of the long lasting violence that was not adequately dealt by both the police and public prosecutor. Some scholars have indeed pointed out that the Committee's conclusion in the *Yildirim* case seems farfetched, given that the Committee did not provide a conclusive assessment of the overall reasonableness of the measures taken by the local authorities.<sup>172</sup> Thus it can be discerned that the measures were in fact reasonable, which would relieve Austrian authorities from the international responsibility for failing to act with due diligence in protecting victims' rights. I disagree. The Committee's analysis of actions of the local authorities was well situated and tuned with the circumstances of the case, following the 'due diligence' framework; interim injunction was issued prohibiting contact between the victim and the offender, the police intervened and questioned the offender on making death threats in breach of the injunction, the police requested detention from the prosecutor, but this was refused without reasonable explanation. Thus, the diligent action has failed once the prosecutor did not respond to death threats by placing the perpetrator in detention, while knowing the circumstances surrounding the case, about which the prosecutor was fully and promptly informed by the police.

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<sup>172</sup> Hakimi, Monika 2010, 'State Bystander Responsibility', *European Journal of International Law*, No. 21, pp. 341-385., at 382, viewed 02 October 2011, <[www.westlaw.org](http://www.westlaw.org)>.



### 3.3. *General remarks*

The views of the CEDAW Committee, in three analyzed cases, have been methodically examined in order to discern a pattern of the Committee's scrutiny in addressing the State's alleged violations of human rights deriving from CEDAW. In all cases violations have been determined on account of states failure to exercise their positive obligations and provide protection to DV victims. The Committee found that national justice system (through acts of its prosecutors or the judiciary) in all three cases engaged in a balancing exercise between competing rights, namely the right to physical and mental integrity of victims, on one side, with the right to property and privacy or right to personal freedom of offenders, on another. By applying this approach the national justice systems demonstrated that their practices are not harmonised with their international human rights obligations deriving from CEDAW. This was determined by the Committee in finding that perpetrators rights cannot supersede women's human rights to life and physical and mental integrity; a finding that amounts to a potent criticism of states practices that prioritize perpetrators rights over those of victims, and moreover a finding that constitutes a powerful legal impulse for revising those practices. This can be discerned as the Committee's first paramount finding. The second major finding is that national enforcement practices and procedures must be conducted in accordance with due diligence; i.e. in a way which ensures the efficient protection of women victims of domestic violence.<sup>173</sup>

In conclusion to this chapter, it is self-evident that decisions of the CEDAW Committee urge states to tackle DV in accordance with their international human rights

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<sup>173</sup> Logar, Rosa 2009, 'CEDAW as an Instrument to Combat Violence Against Women: Two Examples from Austria', paper presented at the Conference: The Relevance for Legal Practice of the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW): Current Issues and Perspectives for Action, Bern, 5 March 2009, at 23; hardcopy with author, from the Vienna Intervention Centre against Domestic Violence where author carried out his research.

obligations steaming from CEDAW. States positive obligation to protect victims of DV is perceived and judged from the standpoint of application of the due diligence standard; although the standard itself escapes from being clearly defined by the Committee. It is crucial to connect this international scrutiny on states failure to efficiently respond to DV with its regional counterpart embodied in the judgments of the ECtHR, whose take on the subject in question is presented in the next chapter. Only then can the jurisprudential elaboration of the due diligence standard come into full focus of my analysis.

## Chapter 4 - The ECtHR's take on the due diligence standard in cases of domestic violence

With respect to the role of the ECtHR, it can be regarded as the central pillar of the human rights protection system which is designed under ECHR. National authorities are under an obligation to execute judgments of the ECtHR, which are binding on states<sup>174</sup>, since respect for the judgments of the ECtHR is conditioned as a ground for membership in the Council of Europe.<sup>175</sup> Most importantly, the effects of the judgments of the Court, as Judge Tulkens points out, are a “promise of future change, the starting point of a process which should enable rights and freedoms to be made effective”<sup>176</sup> within the national legislative and enforcement sphere of actions.

The jurisprudence of the ECtHR on DV is expanding steadily in recent years. It took a long time for cases, which address potential violations of the human rights of women within the private domain, to appear on the Courts working agenda. But once they appeared the response of the ECtHR was groundbreaking in ways of expanding its jurisprudence through finding new embodiments of discrimination and expanding the judicial test for examining states compliance with their positive obligations to protect human rights in to domain of DV.

Obviously, I want to limit my search, since my aim is not to provide an all encompassing overview of the Court's case law in this field. On the contrary, it is to cast an elaborated light on the Court's, over the last couple of years, steady but growing progress in postulating elements of states' positive obligation to efficiently combat DV, through

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<sup>174</sup> Council of Europe, Lambert Abdelgawad, Elisabeth 2008, *The execution of judgments of the European Court of Human Rights*, 2<sup>nd</sup> edn, Human rights files No. 19, Council of Europe Publishing, at 6.

<sup>175</sup> Id. at 8.

<sup>176</sup> Tulkens, Francois 2006, 'Execution and effects of judgments of the European Court of Human Rights: the role of the judiciary' in European Court of Human Rights, *Dialogue between judges*, Council of Europe, at 12 - also quoted in supra note 174, at 5.

protecting the right to life, prohibiting inhuman or degrading treatment and intervening in the sphere of private life, all in order to protect the victims of domestic violence. The analysis shall depict the most important issues in three major cases that postulated the evolving reasoning by the Court, under which states' positive obligation to tackle DV are scrutinised. It will, moreover, cover the two relevant cases concerning Croatia in more detail, given that Croatia is one of the three national jurisdictions whose legislative and justice system's response to DV is subjected to further analysis. Although all cases deal with individual violations of human rights, they likewise indicate a pattern of failure among states to diligently combat DV. In order to discern these patterns, I decided to depict in full detail the factual circumstances surrounding each case followed by the reasoning of the ECtHR.

#### **4.1. *Kontrová v. Slovakia***

The first important development in the ECtHR jurisprudence in regard to postulating its own 'due diligence' standard related with DV originated in the case of *Kontrová v. Slovakia*<sup>177</sup>. The main facts of the case are as follows.

The applicant filed a criminal complaint against her husband with the police, accusing him for repeated acts of physical violence, and substantiating the claim with medical evidence.<sup>178</sup> Upon her return to the police accompanied with her husband, a police officer assisted them in withdrawing her complaint, which resulted in the discontinuation of further actions.<sup>179</sup> Later on, the applicant and her relative called the police to report threats made by the applicant's husband that he will kill himself and their children, after which the police

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<sup>177</sup> ECtHR, *Kontrová v. Slovakia*, Application no. 7510/04, Judgment 31 May 2007, Strasbourg.

<sup>178</sup> Id. para 8.

<sup>179</sup> Id. para 9-10.

intervened, but without apprehending her husband.<sup>180</sup> On two occasions in a subsequent five day period, following the intervention, the applicant went to the police to formally complain. On the fifth day the applicant's husband shot their children and himself dead.<sup>181</sup>

Following these events domestic criminal proceedings were instituted against all the responsible police officers that were engaged in this incidence. The proceedings were either dismissed, or discontinued by the prosecutors or courts of first and second instance.<sup>182</sup> The supervisory ruling by the Supreme Court quashed these decisions, finding an existence of criminal responsibility; it remitted the case to the lower court, which obliged by the higher ruling, sentenced police officers with suspended sentence of imprisonment.<sup>183</sup> Since the applicant could not raise claims for non-pecuniary damages during any of the ongoing procedures nor as a separate civil claim, she lodged a constitutional complaint before the Constitutional Court, which was found inadmissible in two separate occasions, thus living her without just compensation for the pain suffered.<sup>184</sup>

In front of the ECtHR, the applicant complained that the State is responsible for the deaths of her children, for not protecting their lives and that she was deprived of an effective remedy, since she could not claim non-pecuniary damages suffered.<sup>185</sup>

The ECtHR reminded the State upon its positive obligation “to take appropriate steps to safeguard the lives of those within its jurisdiction”<sup>186</sup>. This involves states duties to enact “effective criminal-law provisions, to [mobilize] law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions [and] to take

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<sup>180</sup> Id. para 11.

<sup>181</sup> Id. para 12-14.

<sup>182</sup> Id. para 15-23.

<sup>183</sup> Id. para 25-26.

<sup>184</sup> Id. para 28-32.

<sup>185</sup> Id. para 3.

<sup>186</sup> Id. para 49.

preventive operational measures to protect an individual whose life is at risk”<sup>187</sup>. But, the Court has framed the scope of these positive obligations in a manner which “does not impose an impossible or disproportionate burden on the authorities”<sup>188</sup>. Ultimately, the Court provided a test under which these obligations are to be evaluated; its own ‘due diligence standard’:

For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual 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.<sup>189</sup>

Within these lines lays the key under the ECHR to determine the appropriateness of states responses in protecting the right to life in instances of DV. The Court determined that domestic violence was known to the police, that the police had a plethora of specific obligations<sup>190</sup> to conduct and that it failed to comply with them.<sup>191</sup> Subsequently, the State violated the Article 2 of the Convention by not taking positive actions to protect the lives of the applicant’s children. The Court further on, found a breach of Article 13 (right to an effective remedy), since applicant could not apply for just compensation, in front of domestic judiciary, for non-pecuniary damages suffered by her and because of her children’s death, which is a remedy that should be available in case of a breach of the right to life.<sup>192</sup>

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<sup>187</sup> Id. para 49.

<sup>188</sup> Id. para 50.

<sup>189</sup> Id. para 50.

<sup>190</sup> These obligations, in accordance with Slovakia’s internal criminal legislation, included: “inter alia, accepting and duly registering the applicant’s criminal complaint; launching a criminal investigation and commencing criminal proceedings against the applicant’s husband immediately; keeping a proper record of the emergency calls and advising the next shift of the situation; and taking action in respect of the allegation that the applicant’s husband had a shotgun and had made violent threats with it”. See para 53 of *Kontrová v. Slovakia*, *op.cit.*

<sup>191</sup> *Kontrová v. Slovakia*, *op.cit.*, para 52-54.

<sup>192</sup> Id. para 64-65.

In conclusion, the Court determined that principal facts of the case reveal a pattern of inadequate and inefficient responses by the police in addressing the violent threats and incidents towards the applicant and by the judiciary in prosecuting and punishing the responsible police officers for their misconduct and further on, for not providing avenues of redress for non-pecuniary damages that the applicant suffered.<sup>193</sup>

#### 4.2. *Bevacqua and S. v. Bulgaria*

One year after *Kontrová* judgment, the ECtHR gave its important ruling in *Bevacqua and S. v. Bulgaria*<sup>194</sup>. Again, the case revolved around the determination of whether or not the state authorities failed to act in accordance with their positive obligations and by doing so violated the rights of a DV victim.

The factual scenario and the subsequent ECtHR ruling reveals ineptitude within the prosecutors' and judiciary authority this time. The applicant was a woman (joined in application by her son), who sought a divorce and an interim custody order for their child from national courts, claiming that she was battered by her husband.<sup>195</sup> It took Bulgarian judiciary more than a year to end the proceedings and grant a divorce, without ever providing the interim measure of custody. The judicial proceedings were continuously interrupted and

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<sup>193</sup> As a side note, the Slovakian Government, in its response to the Council of Europe's Committee of Ministers, following the execution of this judgment, expressed a viewpoint that this was an isolated case (See the Council of Europe, Committee of Ministers Resolution CM/ResDH (2011)31, adopted on 10 March 2011, at 2). It is interesting to mention that two more cases (i.e. ECtHR, *E.S. and Others v. Slovakia*, Application no. 8227/04, Judgment 15 September 2009, Strasbourg and *Hajduová v. Slovakia*, Application no. 2660/03, Judgment (not final) 13 November 2010, Strasbourg) were decided by the ECtHR against Slovakia under the 'DV heading', in the aftermath of *Kontrová*. In both cases violations of victims rights were determined because of Slovakia's justice bodies failure to exercise 'due diligence' to protect the victims against DV to the fullest. These rulings serve to the detriment of the State's above listed claims of viewing their official failure to properly intervene in *Kontrová* as an 'isolated case'.

<sup>194</sup> ECtHR, *Bevacqua and S. v. Bulgaria*, Application no. 71127/01, Judgment 12 June 2008, Strasbourg.

<sup>195</sup> *Id.* para 7.

delayed by the husband with various procedural demands; attempts for official reconciliation were made, during which the battering continued. Applicant unsuccessfully complained on police actions for not providing her protection.<sup>196</sup> Finally, after more than a year elapsed the court pronounced the divorce and gave the custody to the mother.<sup>197</sup> After the separation, the applicant sustained head injuries from attack by her, now, ex-husband. The prosecuting authorities, following this last incidence of physical violence, refused to institute official criminal proceedings against the offender, since the injuries belonged to a category of ‘light bodily injuries’ that were subjected to private prosecution.<sup>198</sup>

The applicant complained that authorities have not taken all measures necessary to respect her and her son’s family life and have failed to protect her against the violence of her husband.<sup>199</sup> Likewise, she raised the issue of the discriminatory impact of national criminal law towards women, given that it prescribes for a private, instead of a public interest prosecution for DV, which disproportionately impacted women.<sup>200</sup> In another words, she complained that system actors where treating DV like a private issue.

The novelty in this case was that the Court, in addressing the claim, utilized the international documents and case law on VAW. The Court acknowledged the importance of the Committee of Ministers Recommendation 5 (2002), the UN Declaration on the Elimination of VAW, and highlighted the UN Special Rapporteur on VAW’s report on the due diligence standard, as a document which is determining an emerging rule of international customary law.<sup>201</sup> The ECtHR took these instruments as evidence of international recognition

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<sup>196</sup> Id. para 24.

<sup>197</sup> Id. para 34.

<sup>198</sup> Id. para 38.

<sup>199</sup> Id. para 54.

<sup>200</sup> Id. para 63.

<sup>201</sup> Id. para 49-53.



of the “particular vulnerability of the victims of domestic violence and the need for the active State involvement in their protection”<sup>202</sup>.

The ECtHR addressed the applicant’s claims under Article 8 (respect for private and family life), which incorporates person’s physical and psychological integrity<sup>203</sup>. It did not find that Convention rights could only be secured through public prosecution and dismissed the claims of the discriminatory effect of the Bulgarian criminal law. It applied its well known ‘margin of appreciation’ doctrine in this regard, in stating that national authorities are in a better position to choose from the range of possible measures how to best secure protection for a certain Convention right, than a supervisory European Court.<sup>204</sup> But when the Court examined domestic judiciary’s approach in applying the interim measures it found a violation of respect for the applicant’s right to private and family life. The facts that domestic judiciary “did not treat the matter with any degree of priority and [...] ignored the issue of interim measures”<sup>205</sup>, in a situation which affected the well being of both applicants<sup>206</sup>, and failure to institute measures in reaction to the husband’s behaviour<sup>207</sup>, was evidence of their lack of due diligence. Further on, their “failure to assist the applicants [was] contrary to the State positive obligation under Article 8 of the Convention to secure respect for their private and family life”<sup>208</sup>. The Court acknowledged that this positive obligation, in particular, relates to protecting vulnerable individuals<sup>209</sup>; a category under which applicants fall.

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<sup>202</sup> Id. para 63.

<sup>203</sup> Id. para 65.

<sup>204</sup> Id. para 82.

<sup>205</sup> Id. para 70.

<sup>206</sup> Id. para 84.

<sup>207</sup> Id. para 84.

<sup>208</sup> Id. para 84.

<sup>209</sup> Id. para 64.

### 4.3. *Opuz v Turkey*

The case of *Opuz v Turkey*<sup>210</sup> signifies a major turning point in the ECtHR jurisprudence on DV, as it reinforces states positive obligations to effectively tackle DV, and postulates a new approach in treating systematic failure of states to address DV as a form of discrimination under the ECHR. It is by far, the most important judgment that the ECtHR reached in resolving controversies surrounding DV; one that has already been the object of productive reflection by many scholars. Upon examining the case the Court acknowledged the general and hidden nature of DV which concerns all Council of Europe member states, that it not only affects women, but that men and children may be DV victims, as well.<sup>211</sup>

The facts of the case reveal, more brutally than in previous cases, severe abuse of the victim and inaptitude and inadequate response by the authorities. Altogether, events of this case span throughout the time period of thirteen years (from 1995-2008). The applicant - Nahide Opuz - and her mother suffered systematic and continuous physical violence with medically evidenced life-threatening injuries and death threats made by applicant's husband H.O.<sup>212</sup> They filed complaints and several criminal proceedings were instituted against H.O., which were all discontinued as victims withdrew their complaints or because of the lack of evidence.<sup>213</sup> In one later incidence H.O. ran the applicant's mother with a car and in another he stabbed the applicant seven times with a knife.<sup>214</sup> For the first attack he was convicted to three months imprisonment, which was later commuted to a fine.<sup>215</sup> For second he was fined,

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<sup>210</sup> ECtHR, *Opuz v. Turkey*, Application no. 33401/02, Judgment 9 June 2009, Strasbourg.

<sup>211</sup> Id. para 138.

<sup>212</sup> Id. para 9-22.

<sup>213</sup> Id.

<sup>214</sup> Id. para 21 & 37.

<sup>215</sup> Id. para 36.

with payments to make in eight instalments.<sup>216</sup> During these proceedings H.O. made death threats, for which the applicant and her mother unsuccessfully asked the public prosecutor for protective measures. Following these rulings, in at least three separate accounts throughout the time-period of next six months, the applicant filed criminal complaints about H.O.'s death threats and harassment; he was only questioned by the authorities.<sup>217</sup> Finally, H.O. killed the applicant's mother by shooting her with a gun.<sup>218</sup> Six years after this incidence, domestic court convicted him for murder and sentenced him first to life imprisonment, but then mitigated the sentence and finally released him, taking into account his good behaviour in detention and the fact that the judgment was subjected to appeal proceedings.<sup>219</sup> One month after his release the applicant filed another criminal complaint requesting protection from H.O on account of his renewed threats against her.<sup>220</sup> By this time, the case was already being considered by the ECtHR, which requested explanation from the Turkish Government why they are not taking protective measures, since applicant's life is in danger.<sup>221</sup> Following the ECtHR inquiry, the Turkish authorities investigated H.O., after which the threats stopped.<sup>222</sup>

In front of the ECtHR, Opuz alleged that Turkey failed to protect her and her mother from her husband's violence<sup>223</sup>, which amounted to violations of Articles 2, 3 and 14 of the Convention; the Court ultimately found violations under all three articles.

Under Article 2, the applicant complained that the authorities failed to exercise due diligence and protect the right to life of her mother.<sup>224</sup> In assessing the merits of the case, the

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<sup>216</sup> Id. para 44.

<sup>217</sup> Id. para 45-52.

<sup>218</sup> Id. para 54.

<sup>219</sup> Id. para 55-58.

<sup>220</sup> Id. para 59.

<sup>221</sup> Id. para 61.

<sup>222</sup> Id. para 64-69.

<sup>223</sup> Id. para 3.

<sup>224</sup> Id. para 118.

Court reiterated the test<sup>225</sup> from *Kontrová* and determined that national authorities displayed a lack of due diligence and breached their positive obligations to safeguard the right to life.<sup>226</sup> The Court reasoned that, in accordance with the history of the relationship and the perpetrators “obvious” long lasting record of DV<sup>227</sup>, the local authorities could have foreseen the lethal attack by H.O.<sup>228</sup> Although the victims withdraw their complaints on multiple occasions the prosecutors should have continued prosecution in the public interest on account of seriousness of offences and risks of further offences.<sup>229</sup> The Court came to this conclusion by utilizing a comparative analysis of other European states regulation of instituting criminal prosecutions in public interest when victims of DV withdraw their consent.<sup>230</sup> It is important to emphasise here that this part of judgment demonstrates evolution of Courts reasoning, when juxtaposed with the dismissal of ‘public interest prosecution’ claims in *Bevacqua*, which were - in that case - situated within states margin of appreciation.

The Court further analyzed whether or not the local authorities struck a balance between the victims right to life (Article 2) and respect for her privacy (Article 8) in order to address the Government’s argument that actions to separate the applicant and her husband would represent a breach of their right to family and private life.<sup>231</sup> Under the Court’s assessment the authorities gave “exclusive weight to the need to refrain from interfering in

<sup>225</sup> Under the test, to remind the reader, “it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk”. See para 129 in *Opuz v. Turkey, op. cit.*

<sup>226</sup> *Opuz v. Turkey, op. cit.*, para 149.

<sup>227</sup> *Id.* para 134.

<sup>228</sup> *Id.* para 136.

<sup>229</sup> *Id.* para 139.

<sup>230</sup> The Court even determined additional factors which prosecutors can take into account when deciding to prosecute perpetrators: the seriousness of the offence; nature of victim’s injuries (physical or psychological); the use of weapon; the use of threats after the attack; whether or not the attack was planned; the effect it would make to children; the history of the relationship and former violence, etc. See para 138 in *Opuz v. Turkey, op. cit.*

<sup>231</sup> *Opuz v. Turkey, op. cit.*, para 140.

what they perceive to be a “family matter”<sup>232</sup> and nothing says whether or not they “considered the motives behind the [applicants] withdrawal of complaints”<sup>233</sup>. The Court repeated the *Bevacqua* precedent where it held “that the authorities’ view that no assistance was required - as the dispute concerned a “private matter” - was incompatible with their positive obligations to secure the enjoyment of the applicants’ rights”<sup>234</sup>. The Court stated that “in domestic violence cases perpetrators’ rights cannot supersede victims’ human rights to physical and mental integrity”<sup>235</sup>, and that authorities are obliged to intervene in private life “in order to protect the health and rights of others or to prevent commission of criminal acts”<sup>236</sup>. This standpoint represents echoing of the same line of reasoning as demonstrated by the CEDAW Committee in the cases analyzed in the previous chapter.

The Court then considered the applicant’s claim under Article 3: that her husband’s abuse and local authorities’ failure to act “caused her pain and fear” which amounted to an Article 3 violation, i.e. prohibition of torture and inhuman or degrading treatment or punishment.<sup>237</sup> The Court reiterated existence of positive obligations of states to take measures against Article 3 violations, even when they are “administered by private individuals”<sup>238</sup> and determined that physical and psychological violence suffered by the applicant was serious enough to reach the threshold of ill-treatment within Article 3.<sup>239</sup> In determining whether national authorities have undertaken reasonable measures to prevent this ill-treatment, the Court acknowledged the states’ margin of appreciation in this field, but likewise looked “for any consensus and common values emerging from the practices of

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<sup>232</sup> Id. para 143.

<sup>233</sup> Id. para 143.

<sup>234</sup> Id. para 144.

<sup>235</sup> Id. para 147.

<sup>236</sup> Id. para 144.

<sup>237</sup> Id. para 154.

<sup>238</sup> Id. para 159.

<sup>239</sup> Id. para 161.

European States and specialised international instruments, such as the CEDAW<sup>240</sup>. After thoroughly examining the history<sup>241</sup> of suffered abuse by the applicant, the Court concluded that the local authorities have not displayed due diligence<sup>242</sup> and therefore are responsible for an Article 3 violation<sup>243</sup>. This ruling represents a ground-breaking determination that DV can constitute inhuman treatment.

Finally, the Court turned to examine the applicants' claims under Article 14 violation – the prohibition of discrimination – that her and her mother have been discriminated on the basis of their gender, by states' failure to protect her mother's life and her right to live free from ill-treatment.<sup>244</sup> In determining the existence of discrimination in the context of DV, the Court, once again, utilized international human rights regulation and looked, among others, at the CEDAW provisions<sup>245</sup> and the CEDAW Committees opinions in *A.T. v. Hungary* and *Fatma Yildirim v. Turkey*<sup>246</sup>, to determine the link between VAW and discrimination.

The Court examined the Government's approach in addressing DV in Turkey by analysing undisputed reports and statistics provided by NGO's. Reports revealed that remedies did not function effectively in practice and that authorities tolerated the occurrence of DV<sup>247</sup>. The Court "accepted that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group"<sup>248</sup>. The Court then determined that the applicant

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<sup>240</sup> Id. para 164-165.

<sup>241</sup> "[T]he Court was particularly struck by the [local court's] decision to impose merely a small fine, which could be paid by instalments, on H.O. as punishment for stabbing the applicant seven times." See para. 169 in *Opuz v. Turkey, op. cit.*

<sup>242</sup> *Opuz v. Turkey, op.cit.*, para 169.

<sup>243</sup> Id. para 176.

<sup>244</sup> Id. para 177.

<sup>245</sup> Id. para 186-188.

<sup>246</sup> Id. para 76-77.

<sup>247</sup> Id. para 196-197.

<sup>248</sup> Id. para 176.

showed “the existence of a prima facie indication that the domestic violence affected mainly women and [the existence of a] general and discriminatory judicial passivity in Turkey”<sup>249</sup>. The Court held that “State’s failure to protect women against domestic violence breaches their right to equal protection of the law and that this failure does not need to be intentional”<sup>250</sup>. Finally, the Court concluded that violence the applicant and her mother suffered was “gender-based violence which is a form of discrimination against women”<sup>251</sup>.

This decision created a historic precedent within the ECHR framework, in determining that states failure to intervene in DV can amount to discrimination against women, which as a consequence violates their equal protection by the law. Although many scholars awaited the judgment with open praise, signalling the beginning of the new legal down for protection of DV victims, there are more cautious voices. Some have noticed that the facts in *Opuz* do not go in favour for the future victims if they want to prove discrimination; they reveal extreme violence which was well familiar to the authorities.<sup>252</sup> Within this argument furthermore, there is a plausible concern that facts from *Opuz* are not going to contribute in reaching a desirable standard under the ECHR of effective enforcement of positive obligations in DV cases, and policies of non-intervention and non-enforcement in these cases which are not that extreme will continue to occur.<sup>253</sup> But, if nothing more, “the case distils the systemic nature of domestic violence and confirms that domestic violence is a

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<sup>249</sup> Id. para 198.

<sup>250</sup> Id. para 191.

<sup>251</sup> Id. para 200.

<sup>252</sup> Hanna, Cheryl 2011, ‘Health, Human Rights, and Violence against Women and Girls: Broadly Redefining Affirmative State Duties after *Opuz v. Turkey*’, *Hastings International and Comparative Law Review*, No. 34, pp. 127- 148, at 145, viewed 05 October 2011, <[www.westlaw.com](http://www.westlaw.com)>.

<sup>253</sup> Id.

human rights violation, a form of ill-treatment under art. 3 and a manifestation of discrimination against women”<sup>254</sup>.

#### **4.4. *Branko Tomašić and Others v. Croatia***

The first case in which the ECtHR considered the Croatia’s institutional response to DV was *Branko Tomašić and Others v. Croatia*<sup>255</sup>. The applicants were close relatives of a woman (M.T.) and her baby daughter whose unwedded partner/father (M.M.) killed both of them. M.M. made number of threats in person and over the telephone that he would kill the woman and their daughter, which were living with her parents at the time.<sup>256</sup> M.M. repeated the threats in front of police officers and employees of social care services. Following the woman’s criminal complaints, criminal proceedings were instituted against M.M. and he was placed in detention.<sup>257</sup> The local court found him guilty for making death threats and sentenced to five months imprisonment.<sup>258</sup> A security measure of compulsory psychiatric treatment was ordered during his imprisonment on the account of the psychiatric opinion which revealed his capability of repeating the same or similar offence.<sup>259</sup> He served his sentence and one month after he was released he shot his wife, their daughter and himself.<sup>260</sup>

The applicants complained - under the substantive and procedural parts of Article 2 - that the State breached its positive obligations to protect the right to life of M.T. and her

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<sup>254</sup> Meyersfeld, Bonita C. 2009, ‘Opuz v Turkey: Confirming the State Obligation to Combat Domestic Violence’, *European Human Rights Law Review*, Issue 5, pp. 684-693, at 693.

<sup>255</sup> ECtHR, *Branko Tomašić and Others v. Croatia*, Application no. 46598/06, Judgment 15 January 2009, Strasbourg.

<sup>256</sup> Id. para 5-6.

<sup>257</sup> Id. para 7.

<sup>258</sup> Id. para 8.

<sup>259</sup> Id. para 8.

<sup>260</sup> Id. para 10.



daughter and that the State failed to investigate the individual responsibility of her agents for the deaths occurred.<sup>261</sup> Interestingly, the Court offered a broader conceptualisation of the controversy in question; a reflection which was absent in its reasoning in the previous judgments. The Court framed that the main question of the case revolved around:

the alleged deficiencies of the national system for the protection of the lives of others from acts of dangerous criminals who have been identified as such by the relevant authorities and the treatment of such individuals, including the legal framework within which the competent authorities are to operate and the mechanisms provided for.<sup>262</sup>

For the ECtHR the issue thus revolved around the effectiveness of the overall justice system in providing protection to victims of DV. In assessing the complaint, the Court reiterated the ‘positive obligations framework’ from the *Kontrová* judgment; that authorities have a positive obligation to carry preventive actions in order to protect “an individual whose life is at risk from criminal acts of another individual”<sup>263</sup>; that this obligation cannot “impose impossible or disproportionate burden on the authorities”<sup>264</sup>; but that the obligation imposes a standard of due diligence, under which it is determined that the authorities knew or should have known about a “real and immediate risk to [one’s] life” from third parties criminal acts, in which case they failed to apply reasonable measures within their powers to prevent the risk<sup>265</sup>.

In applying the principle to the facts of the case the Court determined that M.M.’s threats were initially taken seriously by the authorities, which did sentenced him.<sup>266</sup> But the

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<sup>261</sup> Id. para 29.

<sup>262</sup> Id. para 42.

<sup>263</sup> Id. para 50.

<sup>264</sup> Id. para 50.

<sup>265</sup> Id. para 51.

<sup>266</sup> Id. para 52.

Court then stressed instances where the Croatian authorities have failed to conduct adequate measures. Although M.M. mentioned that he possesses weapons no search of his premises was carried out.<sup>267</sup> Obligatory psychiatric treatment during M.M.'s prison sentence was not administered at all.<sup>268</sup> Moreover, prior to his release from prison no psychiatric evaluation was conducted to determine whether or not he still represents a threat to M.T. and her daughter; which the Court found particularly striking since the psychiatric report established the danger that he might likely repeat the same offence.<sup>269</sup> The Court concluded that local authorities have not taken all the necessary and reasonable steps, thus violating the Article 2 of the Convention.<sup>270</sup> Although the Court implied that involved procedures could be regarded as being insufficient, it did not consider the claim of violations of the procedural aspect of Article 2, i.e. that the State failed to conduct a thorough investigation into determining the responsibility of its agents for the deaths occurred.<sup>271</sup>

#### 4.5. *A. v. Croatia*

*A. v. Croatia*<sup>272</sup> was the second case in which the ECtHR scrutinized the Croatia's justice and law enforcement response to DV. The consequences of domestic violence, here, were not extreme to the point of victim's death, as in the prior case, but specific patterns vis-à-vis enforcement failures, which were present in the previous judgment, emerged here in a more straightforward manner. The factual circumstances of the case reveal a complex structure of numerous consecutive and separate criminal and civil proceedings which took

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<sup>267</sup> Id. para 54.

<sup>268</sup> Id. para 56.

<sup>269</sup> Id. para 58.

<sup>270</sup> Id. para 61.

<sup>271</sup> Id. para 64-65.

<sup>272</sup> ECtHR, *A. v. Croatia*, Application no. 55164/08, Judgment 14 October 2010, Strasbourg.

part in front of local courts in relation to DV acts and DV related acts. Domestic violence spread over the time-period of six years, during which the applicant and her daughter suffered, physical, psychological and verbal violence inflicted by the husband/father B. Criminal proceedings were instituted against B on charges of violent behaviour within the family; he was detained but swiftly released.<sup>273</sup> As violence continued, the applicant moved to a women's shelter, with her daughter.<sup>274</sup> Proceedings were continuously adjourned for various procedural reasons (B would not show, witnesses would not show, etc.) over the next two years.<sup>275</sup> B was diagnosed with several mental disorders, upon psychiatric examinations ordered by the local court.<sup>276</sup> In the third year of proceedings the judge stepped down from the case on account of B's threats.<sup>277</sup> The criminal proceedings were still ongoing at the time the complaint was raised in front of the ECtHR.<sup>278</sup>

Second criminal proceedings against B were instituted for making death threats against the applicant and a policewoman. He was found guilty and sentenced to eight months' imprisonment; the proceedings lasted around 7 months.<sup>279</sup> He never went to prison, but was issued with a restraining order that prohibited his access and contact with the applicant, which was never enforced.<sup>280</sup> Third and last criminal proceedings against B revolved around his death threats directed at the judge (who run the first criminal proceedings) and her minor daughter. Within a month and a half following his arrest and accusation for this crime he was convicted to three years imprisonment.<sup>281</sup>

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<sup>273</sup> Id. para 7-8.

<sup>274</sup> Id. para 8.

<sup>275</sup> Id. para 11-15.

<sup>276</sup> Id. para 11-12.

<sup>277</sup> Id. para 16.

<sup>278</sup> Id. para 17.

<sup>279</sup> Id. para 18-20.

<sup>280</sup> Id. para 21-22.

<sup>281</sup> Id. para 23.

Beside the criminal, there were altogether four different sets of separate civil law proceedings instituted against B for separate acts of DV under the Protection against Domestic Violence Act. First proceedings were discontinued because the applicant refused to give evidence.<sup>282</sup> B was sentenced to pay a fine in the second proceedings, which was never enforced.<sup>283</sup> Third proceedings were again discontinued, having become time-barred, although B was imposed with a fine.<sup>284</sup> The fourth set of proceedings ended with impositions of fines, which were supplemented by a prison term, and two protective measures: prohibition of access to the applicant and compulsory psycho-social treatment.<sup>285</sup> B did not serve his prison term, since prison's capacity was full and he did not received compulsory psycho-social treatment, since nobody could administer the treatment.<sup>286</sup> After B has violated the restraining order, the applicant requested for additional protective order from the local court, which was denied on the basis that she failed to show "an immediate risk to her life".<sup>287</sup>

The applicant alleged that the authorities failed to exercise their positive obligations and afford her protection from violence, which breached her Article 2, 3 and 8 rights.<sup>288</sup> The Court analyzed all DV incidents as a continuous situation<sup>289</sup>, within the framework of Article 8<sup>290</sup>, under which states must protect "physical and moral integrity of an individual from other persons"<sup>291</sup>. The Court determined that national authorities should have viewed the

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<sup>282</sup> Id. para 24-25.

<sup>283</sup> Id. para 27.

<sup>284</sup> Id. para 28.

<sup>285</sup> Id. para 31 & 34.

<sup>286</sup> Id. para 34.

<sup>287</sup> Id. para 35.

<sup>288</sup> Id. para 50.

<sup>289</sup> Id. para 55.

<sup>290</sup> Id. para 57.

<sup>291</sup> Id. para 60.

situation as a whole<sup>292</sup>, instead of conducting multiple separate proceedings; that although courts ordered protective measures and sanctions (e.g. periods of detention, fines, psychological treatment and prison term) they have not been enforced, which did not deter the offender from causing more violence<sup>293</sup> and has left the applicant susceptible to violence for a prolonged time period<sup>294</sup>. The Court ultimately found the violation of applicant's right to respect for private and family life, without examining violations of Articles 2 and 3.<sup>295</sup>

#### **4.6. General remarks**

The above detailed evaluation of the ECtHR adjudication in DV cases imposes a conclusion that the Court has undisputedly placed positive obligations on states justice systems to react to DV, by applying reasonable and necessary measures to protect the human rights of victims, i.e. in accordance with due diligence. It is this vital characteristic of determining when states have applied reasonable and necessary measures in order to comply with their positive obligations, which drives the Court's reasoning in all the cases. As a result, in all the analyzed cases, the official enforcement bodies' actions were determined to be utterly ineffective, resulting in violations of victims human rights. The ECtHR, in order to substantiate its own reasoning, utilized the language of international human rights documents, and more importantly the views of the CEDAW Committee in evaluating states' compliance with their obligations and for conceptualising acts of DV as violations of human rights of women. This practice stands as an indication of an international 'jurisprudential' consensus

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<sup>292</sup> Id. para 76.

<sup>293</sup> Id. para 78.

<sup>294</sup> Id. para 79.

<sup>295</sup> Id. para 80.

on the existence of positive obligations of national justice systems to combat DV with due diligence. Moreover, this undisputedly has posed

The ECtHR found that DV, depending on the circumstances of specific cases, can violate victims' right to life, their bodily integrity within the remits of the right to respect for private and family life, that it can be regarded as an inhuman and degrading treatment and finally as a discrimination against women. Judgments in all the cases located causes for human rights violations (and states failure to effectively combat DV) within the justice systems' lack of action and/or their ineffective enforcement practices.

The ECtHR specifically repealed the possibility for states' to induce legal arguments grounded upon balancing of victims above mentioned rights with perpetrators rights to privacy, thus solidifying its practice with one of the CEDAW Committee in this regard. In determining this, the ECtHR gave a final opinion which set aside the 'privacy perspective' of DV, positioning it - once and for all - within the public flora, demanding effective response by the public actors. Ultimately, the ECtHR - as same as the CEDAW Committee - has emphasised the priority of victims' human rights in comparison with the human rights of perpetrators and stressed the obligation for states' to irreversibly enforce this perspective within their national justice system's approaches on DV.

In conclusion to this chapter, it is pertinent to notice that an element of interaction exists between the ECtHR and the CEDAW Committee, given that the former is using legal conceptualisations and elaborations which have been established by the later in justifying its own reasoning when adjudicating DV related cases. Both bodies are applying the due diligence standard of protection of human rights in the course of their own 'adjudication' procedures, and by doing so are clarifying the content of the standard itself, which in turn clarifies the scope of positive obligations of states' legal and justice system to respond to DV.

This response is epitomized through actions that aim to protect the human rights of victims of DV and punish the perpetrators. How national legislative and justice systems have reacted to such determinations, and to what extent have they practically complied with their obligations deriving from these supervisory rulings, next chapter shall reveal, by analyzing responses of the three case study jurisdictions.

## Chapter 5 - National take on domestic violence: states general compliance with their positive obligations to act with due diligence

In this chapter I will examine the role of national legislative and justice institutions as the enforcers of international human rights law in the field of combating DV. As already indicated in the introduction, the legislative and justice systems of Austria, Hungary and Croatia will be scrutinized. Selection of these jurisdictions for comparative analysis was an obvious choice, given that their enforcement practices have been subjected to international supervision by the CEDAW Committee and the ECtHR, which subsequently determined their failures to exercise due diligence in domestic violence cases. All countries are state parties to CEDAW and ECHR, which obliges them to standardize their legislation and practices in order to comply with the human rights standards that are deriving from these treaties.

Furthermore, Austria, Hungary and Croatia have important similarities, being neighbouring countries, enjoying a joint civil-law tradition, and mutual adherence to the European Union law and human rights standards<sup>296</sup>. Thus, we can assert that these states enjoy a significant level of common legal heritage, without even touching upon the shared broader historical and cultural commonalities. Moreover, Austria was the leader in introducing a comprehensive regulatory system to combat DV on the European ground, a system which has been duplicated and whose good practices influenced changes in national legislation of other European Union countries.<sup>297</sup> All this creates a fruitful basis for a layout and mutual comparison of each case study legal system's response on determined states failures to act with due diligence in providing protection to victims of DV.

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<sup>296</sup> With Austria and Hungary being member states of the European Union followed by the Croatia's successful ending of the accession negotiations in 2011 and transposition of *acquis communautaire* in its national legislation.

<sup>297</sup> Supra note 54, at 38.



The analysis will summarize case studies regulatory frameworks on domestic violence and touch upon their general enforcement practices, in order to create the basis for a brief comparison of national approaches, before venturing to the primary focus of the chapter – depictions of the States follow up to the views of the CEDAW Committee or the judgments of the ECtHR from the above discussed cases. This kind of overview will enable me to evaluate the scope of general compliance of States legal and justice systems’ with their positive obligation to act with due diligence in matters related to domestic violence.

## **5.1. Case study: Austria**

### **5.1.1. General overview of the regulatory and justice system’s practices on domestic violence in Austria**

In relation to its normative framework, Austria has designed a system of both criminal and civil law legal measures on DV. Domestic violence is not classified as a separate criminal act in the Austrian Penal Code, but it is criminalized behaviour<sup>298</sup> liable to public prosecution.<sup>299</sup> Likewise, a special legislation is enacted in 1997 which regulates DV within the civil-law sphere: the Federal Act on the Protection against Domestic Violence<sup>300</sup>;

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<sup>298</sup> It can be prosecuted under the following violent acts in the Austrian Penal Code: bodily harm, grievous bodily harm, maliciously inflicted grievous bodily harm, deprivation of liberty, coercion and grievous coercion, dangerous threats, insistent persecution (stalking), persistent perpetration of violence, rape, sexual coercion, grievous sexual abuse. *Information source*: Domestic Abuse Intervention Centre Vienna & Association of Austrian Autonomous Women’s Shelters 2009, *Victim’s rights to support and protection from violence*, at 8; hardcopy with author, from the Vienna Intervention Centre against Domestic Violence where author carried out his research.

<sup>299</sup> Webhofer, Regina et al 2008, *Country Report: A Right for Protection and Support?*, WAVE network, at 25.

<sup>300</sup> Austria, Federal Act on the Protection against Domestic Violence (“Federal Law Gazette”, No. 1996/759). The provisions of the Act are laid down in the Civil Code, the Enforcement Code and the Security Police Act, *op. aut.*

followed by amendments in 2000 and 2004. In 2009 the Second Protection against Violence Act entered into force, containing both criminal and civil-law measures of response.<sup>301</sup>

The legislation authorizes the police to impose eviction and barring orders against perpetrators, whose main aim is to provide immediate protection to victims. The validity of these protection orders is two weeks (under the new legislation, it was 10 days under the former Act) and they can be further prolonged to four weeks (20 days under the former Act) by appealing to the civil court (family court).<sup>302</sup> Victims have possibility to extend the protection beyond this period, by applying for a longer-term temporary injunction. Two types of protection can be demanded: (1) in the sphere of living (household) for the duration of six months and (2) general protection against violence up to one year, which obliges perpetrator to stay away from certain places (i.e. place of work, school).<sup>303</sup> As an example of new piercing legal solutions within the criminal-law sphere, the new Act introduces the offence “persistent perpetration of violence”, for which imprisonment up to three years is stipulated; with 10-20 years for offences committed under aggravating circumstances.<sup>304</sup>

A report by the Austrian Federal Ministry of the Interior reveals a paradigmatic change in police practices prior and after the enactment of the *lex specialis* on DV.<sup>305</sup> The report indicates that before the law the police treated DV as a one-time phenomenon, and their actions were focused on the victims. After the laws’ enactment the police approach changed in treating DV as a serious crime, for which the perpetrator must bare

<sup>301</sup> Austria, The Second Protection against Violence Act (“Federal Law Gazette”, No. 40/2009).

<sup>302</sup> Domestic Abuse Intervention Centre Vienna & Association of Austrian Autonomous Women’s Shelters 2009, *Victim’s rights to support and protection from violence*, at 1-2; hardcopy with author, from the Vienna Intervention Centre against Domestic Violence where author carried out his research.

<sup>303</sup> Id. at 5-6.

<sup>304</sup> For more information see Austria, Federal Chancellery 2004-2011, *The Second Protection Against Violence Act - an Overview*, Topics: Women and Equality: Violence against Women, viewed 05 October 2011, <[http://www.bka.gv.at/site/cob\\_37005/6845/default.aspx](http://www.bka.gv.at/site/cob_37005/6845/default.aspx)>.

<sup>305</sup> Dearing Albin, *The Austrian Act on the Protection against Domestic Violence*, Federal Ministry of the Interior, Austria, viewed 05 September 2011, <[http://www.weisser-ring.at/GeSCHG2002\\_eng.pdf](http://www.weisser-ring.at/GeSCHG2002_eng.pdf)>.

responsibility.<sup>306</sup> No national strategic document (e.g. Action Plan) addressing DV was designed by the Government<sup>307</sup>; which raised concerns of the CEDAW Committee in its concluding comments to the States sixth periodic report<sup>308</sup>.

Facts and figures surrounding DV are scarce in Austria. The only institution which systematically collects data is the police. Their records indicate, for instance, that in 2006, 61% of all murders of women and murder attempts originated within the domestic sphere (for comprehending the value of this percentage let me point that in 2007, according to the same source, there was altogether 107 murders and murder attempts directed at women by men).<sup>309</sup> More than 90% of all DV related police interventions fall to men's violence against women<sup>310</sup>, meaning that in above 90% of reported domestic violence cases to the police women are the victims. As Rosa Logar rightfully notices, this represents an "indication of gender-based violence according to the definition of the CEDAW Committee"<sup>311</sup>.

Furthermore, records show continuous rise of the numbers of issued eviction and barring orders from 1999-2009.<sup>312</sup> Number of violations of issued barring orders remains constant over the years and topped at 11%.<sup>313</sup> Unfortunately, this data is not gender disaggregated, which disables potential gender analysis of the prevalence of victim-offender

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<sup>306</sup> Id. at 5-6.

<sup>307</sup> Supra note 299, at 24.

<sup>308</sup> CEDAW, *Concluding comments of the Committee on the Elimination of Discrimination against Women: Austria*, 2 February 2007, UN Doc. CEDAW/C/AUT/CO/6, at 23.

<sup>309</sup> Supra note 299, at 22.

<sup>310</sup> Supra note 305, at 7.

<sup>311</sup> Supra note 173, at 8.

<sup>312</sup> For instance, 6347 issued in 2007, 6566 in 2008, 6731 in 2009. *Source*: Statistics of the Austrian Ministry of Interior, hardcopy with author, from the Vienna Intervention Centre against Domestic Violence where author carried out his research.

<sup>313</sup> *Source*: Statistic of the Austrian Ministry of Interior.

ratios. Although, no general prevalence studies of DV have been conducted in Austria with the aim of determining its scope<sup>314</sup>, the records laid above witness the extent of the problem.

The prosecutors' offices and courts are not keeping records on DV cases, which deprive their actions from being monitored and reviewed, especially the judicial conviction practices. What is indicative in demonstrating the justice system's response to DV - according to the CEDAW shadow report which references a study by the Vienna Institute of Conflict Research - is that the majority of criminal actions in DV cases are stayed and that "only every seventh case [is] taken to trial".<sup>315</sup> This lack of data creates serious problems to properly evaluate the overall justice system's implementation of the legal framework.

Upon this brief inspection of the countries' legislative response to DV, the most important conclusion is that DV is recognized as a problem of public concern, through the enactment of a special law which enables imposition of both civil and criminal law measures to tackle DV, and through criminal prosecution. Practitioners in Austria have raised their concerns that persistent application of eviction and barring orders (which the authorities can view as being sufficient protection measures), can hinder the possibility of detaining a perpetrator under criminal procedures, which would be a necessary requirement in cases of highly dangerous perpetrators.<sup>316</sup> If the cases of Şahide Goekce and Fatma Yildirim have showed us anything, it is that eviction and barring orders do not produce substantive protection to the victims in cases of highly dangerous perpetrators. Adequate response of the

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<sup>314</sup> Supra note 299, at 22.

<sup>315</sup> CEDAW Shadow Report Austria 2006, at 10, viewed 01 October 2011, < <http://www.iwraw-ap.org/resources/pdf/Austria%20Shadow%20Report.pdf>>.

<sup>316</sup> Supra note 173, at 9.

criminal justice in these cases is necessary, which is where the greatest shortcomings of protection against DV - as practitioners coming from Austria have noticed - lay.<sup>317</sup>

### 5.1.2. State's general compliance with the CEDAW Committee's recommendations

After elaborating Austria's general regulatory treatment of DV, it is time to reflect on the State's general compliance with the CEDAW Committee's recommendations which concern the two communications<sup>318</sup>, discussed in the third chapter. Austria submitted extensive Comments<sup>319</sup> - as part of the follow-up reporting procedure on the CEDAW Committee's views and recommendations in relation with two communications - elaborating in details changes of its legislation and enforcement practices. Amendments, in the light of *Goekce* views, have been made to enable criminal prosecution of perpetrators in cases of serious threats *ex officio*; that is without the victim's authorisation which shifts the burden of prosecution from victims onto the State. New type of crime is introduced in the Penal Code: persistent perpetration of violence. Interim injunctions were extended from three months to six months and one year. In cases when investigation procedure is discontinued by the prosecutor, the victim has a new option to file a claim with the court for the continuation of investigation. Obligation was established that prosecution of cases of violence in the family needs to be assigned to specially trained public prosecutors with built competencies.

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<sup>317</sup> Federal Chancellery - Federal Minister for Women and Civil Service 2008, 'Ten Years of Austrian Anti-Violence Legislation', International Conference: Stop Domestic Violence against Women, Vienna and St. Polten, Austria, 5-7 November 2007, at 24, viewed 10 October 2011, <<http://www.bka.gv.at/DocView.axd?CobId=34228>>.

<sup>318</sup> Cases of Şahide Goekce and Fatma Yildirim.

<sup>319</sup> *Comments by the Republic of Austria on the Recommendations made by the CEDAW Committee on August 6, 2007 concerning the Communications Sahide Goekce, No. 5/2005 and Fatma Yildirim, No. 6/2005*; hardcopy with author, from the Vienna Intervention Centre against Domestic Violence where author carried out his research.

In its reply to the State comments the two NGO's authors of the communications to the CEDAW Committee raised multiple issues of concern with the adequacy of Austria's new legal solutions. They asserted that no provisions were established which would oblige that the breach of civil protective measures was reported to prosecutors or criminal courts.<sup>320</sup> Likewise, they complained that the breach of civil law protection orders was not made into a criminal offense, given that it raises the element of imminent danger for the victim.<sup>321</sup> They cited past studies which indicated that State's criminal justice system is not acting with due diligence to prevent DV, since prosecutors are initiating prosecutions in every 7<sup>th</sup> case and third of the cases is subjected to mediation.<sup>322</sup>

All in all, above presented facts reveal that Austria's legislature has shown commitment to implement the recommendations of the CEDAW Committee and has acted accordingly by enacting amendments to the existing legislation in order to provide more efficient procedures to tackle DV. On the other hand, justice authorities' position - embodied through the action of courts - reveals a different perspective of States' compliance with the recommendations of the CEDAW Committee. The Austria's highest regular court laid its judgment - giving a national judicial opinion as well - on the 'binding' nature of the CEDAW Committee's views and recommendations and overall acceptance of the international standards on human rights of women within the Austrian justice system, in one separate case that was concerning states liability claims which were filed by children of Şahide Goekce.

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<sup>320</sup> Association for Women's Access to Justice & Vienna Intervention Centre against Domestic Violence, *Comments of the authors on the State Party's response concerning the recommendations of the CEDAW Committee regarding Communications No. 5/2005 and No. 6/2005*, 17 June 2008, at 4; hardcopy with author, from the Vienna Intervention Centre against Domestic Violence where author carried out his research.

<sup>321</sup> *Id.*

<sup>322</sup> *Id.* at 5.

The Supreme Court of Austria “stated that the CEDAW recommendations were not relevant for the proceedings and did not have to be considered by the national courts”<sup>323</sup>.

This reasoning reveals a “problematic disregard of international law”<sup>324</sup>, which prevents transposition of positive developments in the field of human rights protection from international onto national levels of enforcement. Thus, the State’s recognition and respect of the CEDAW Committee’s decision within the legislative sphere is not reflected in the same light by the Austrian courts<sup>325</sup>.

The CEDAW Committee’s ‘jurisprudence’ - if I may call it as such - triggered by submission of communications, represents interpretation of (in)compliance of states official actions with the body of CEDAW as a whole. Thus, it obliges states parties to CEDAW and its Optional Protocol - in full, including their judiciary - to adhere to the internationally determined standards of human rights. This adherence loses its ground if Austrian judiciary, without legal justification, refuses to accept interpretations of an international human rights body such is the CEDAW Committee, whose jurisdiction the country has accepted. This absence of national justice system’s appropriate comprehension of the views of the CEDAW Committee is not an isolated case and it is essential to analyse the interplay between the CEDAW Committee’s recommendations and national legal systems subsequent reaction(s) in another example - concerning Hungary - in order to discern more substantively the national practices in this regard.

<sup>323</sup> Supra note 173, at 21. (Supreme Court of Austria, Decision of 29 November 2007, Ref. No. 1 Ob 234/07d.)

<sup>324</sup> Supra note 173, at 21.

<sup>325</sup> It is reasonable to conclude that the opinion of the Supreme Court is going to colour the practice of the overall national judiciary in this regard, given that lower courts predominantly - even in countries with civil law tradition - follow the practice of their highest court.

## 5.2. Case study: Hungary

### 5.2.1. General overview of the regulatory and justice system's practices on domestic violence in Hungary

The UN study on VAW reveals that “[t]here are 102 States that [have no] specific legal provisions on domestic violence”<sup>326</sup>. Hungary is one of them. When juxtaposed with the legal solutions of Austria, Hungary’s regulatory take on DV seems much more modest and fragmented. In fact, it is striking that the Hungarian legislation does not mention the term ‘domestic violence’ nowhere in its body of laws<sup>327</sup>. Therefore, it would be hard to expect of the national justice system - in applying national legislation - to position DV ‘problematic’ within the human rights discourse. Moreover, as some have rightfully noticed, Hungarian legislation on DV is completely gender-blind.<sup>328</sup> This standpoint was confirmed in the CEDAW Committee’s concluding comments in 2007, following the examination of the countries’ sixth report, by expressing concerns about the “prevalence of violence against women in Hungary, including domestic violence [and] about the lack of a specific law on domestic violence against women which provides for effective protection to victims”<sup>329</sup>. The Committee recommended that Hungary should elaborate a specific law on domestic violence

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<sup>326</sup> Supra note 67, at 89.

<sup>327</sup> Spronz, Julia 2011, ‘Caught up in Law’ in Nane and Patent, *System Failure: Male violence against women and children as treated by the legal system in Hungary today*, Nane-Patent, at 7.

<sup>328</sup> Selišnik, Irena 2009, ‘Missing Measures against Gender-Based Violence’ in Antic Gaber, Milica (ed.) *Violence in the EU examined: Policies on Violence against Women, Children and Youth in 2004 EU Accession Countries*, University of Ljubljana, Faculty of Arts, pp. 33-50, at 48.

<sup>329</sup> CEDAW, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Hungary*, 10 August 2007, Un Doc. CEDAW/C/HUN/CO/6, para 18.



against women.<sup>330</sup> No legislation was ever enacted in that direction, although an attempt has been made unsuccessfully in the past, preceding the CEDAW comments.<sup>331</sup>

This legal reality entails that DV cases are solved under the umbrella of other specific offences (e.g. physical assault) of the Criminal Code<sup>332</sup>; a criminal-law solution conceptually similar to Austria, but without mentioning DV or taking into account the recurrent nature of violence, as is regulated in Austria. Likewise, acts of DV are not qualified as aggravating or mitigating circumstances for purpose of prosecuting or sentencing for offences under the Criminal Code<sup>333</sup>, which can be another possible legal solution, as will be described in the following section concerning the criminal regulation of Croatia.

Furthermore, under the rules of criminal procedure in Hungary, the majority of criminal acts which are usually linked with DV are to be pursued upon private motion (e.g. light bodily injury, sexual crimes, crimes against property) and furthermore are privately prosecuted (e.g. light bodily injury, breach of privacy). This practice, as Spronz rightfully notices, sends discouraging messages to victims, since it takes the decision to prosecute or the burden to prove the accused guilty from the State and lays it on victims' hands.<sup>334</sup> In doing so, legal system embraces the public/private dichotomy and does not contribute in postulating DV as a problem of public concern.

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<sup>330</sup> Id. para 19.

<sup>331</sup> The Concept Law on Protecting Human Dignity and Combating Domestic Violence and Other Forms of Violence against Women was under Governmental consideration in 2001. For more information see Krizsaan, Andrea, Paantjens, Marjolein & Lamoen, Ilse van 2005, 'Domestic Violence: Who's Problem', *The Greek Review of Social Research* 117, pp. 63-92, at 73, viewed 07 September 2011, <[http://www.grsr.gr/pdf/117\\_63-92.pdf](http://www.grsr.gr/pdf/117_63-92.pdf)>.

<sup>332</sup> Supra note 299, at 81.

<sup>333</sup> Open Society Institute 2007, *Violence Against Women: Does the Government Care in Hungary?* 2007 Country Monitoring Report and Fact Sheets, Open Society Institute, at 18.

<sup>334</sup> Supra note 327, at 16.

An NGO report reveals that in cases of battering which are privately prosecuted, an obligatory judicial practice is that the accuser and accused party are confronted and that the courts attempt to reach conciliation between them.<sup>335</sup> In this regard, according to Krizsaan et al, the Hungarian justice authorities approached the problem of DV from a cultural perspective, advancing “mediation and conflict resolution between victims and perpetrators” instead of sanctioning the violence and empowering the victims<sup>336</sup>. This practice, by the way, is in stark contrast with legal standards prescribed by the new Council of Europe Convention on preventing and combating VAW and DV, which specifically prohibit mediation and conciliation in cases of domestic violence.<sup>337</sup>

Within the criminal procedure a general restraining order can be issued by the court up to 60 days, but only if the criminal procedure against the perpetrator has commenced.<sup>338</sup> According to the Government the aim of these restraining orders is, in fact, to prevent DV, although their application is not strictly limited to DV cases.<sup>339</sup> A study conducted by a criminal judge in Hungary revealed that restraining orders - as currently stipulated in legal regulation - cannot be regarded as an effective measure to combat DV, since they are “not fast, not effective [and do] not realise the protection of the life, bodily integrity and safety of the abused family members”.<sup>340</sup> The study indicated that the restraining order can be issued in

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<sup>335</sup> Id. at 18.

<sup>336</sup> Krizsaan, Andrea, Paantjens & Marjolein, Lamoën, Ilse van 2005, ‘Domestic Violence: Who’s Problem’, *The Greek Review of Social Research* 117, pp. 63-92, at 78, viewed 07 September 2011, <[http://www.grsr.gr/pdf/117\\_63-92.pdf](http://www.grsr.gr/pdf/117_63-92.pdf)>.

<sup>337</sup> Council of Europe Convention on preventing and combating VAW and DV, *op. cit.*, art. 48 (1).

<sup>338</sup> Reference to Hungarian Criminal Procedure Code, Article 138/A-139; found in Open Society Institute 2007, *Violence Against Women: Does the Government Care in Hungary?*, *op. cit.*, at 15.

<sup>339</sup> CEDAW, *Responses to the list of issues and questions with regard to the consideration of the sixth periodic report: Hungary*, UN Doc. CEDAW/C/HUN/Q/6/Add.1, at 8.

<sup>340</sup> Kapossy, Dr. Magdolna Czene 2011, ‘Two Years of the Restraining Order in the Practice of Hungarian Courts’ in Nane and Patent, *System Failure: Male violence against women and children as treated by the legal system in Hungary today*, Nane-Patent, at 61.

30 to 40 days at best when the victim puts the motion<sup>341</sup>, which obviously diminishes the immediate and direct protection effect which should be the goal of a restraining order within the context of a DV case.

The CEDAW Committee in its concluding comments on Hungary's sixth periodic report rouse concerns that the introduction of "restraining orders has not been effective in providing protection to women victims of domestic violence"<sup>342</sup>. The change, in this regard, should have occurred under the "Act on restraining orders applicable in the case of violence between family members", which the Parliament adopted in 2008, but which was subsequently found to be unconstitutional under the Constitutional Court review.<sup>343</sup> Civil and family law in Hungary likewise remains silent on the issue of DV<sup>344</sup>. There is only one regulatory act (in this case an executive order) that mentions DV, and this is the National Police Chief's Order 32/2007 (OT 26).<sup>345</sup>

In relation to national policy measures on DV, the Hungarian Parliament in 2003 adopted the "Decision on the National Strategy for Prevention and Efficient Handling of Domestic Violence".<sup>346</sup> The document presented DV "as a human rights issue, but [...] not located in the realm of gender inequality"<sup>347</sup>. Women's NGO's have raised concerns in the field of implementation of this document, since official authorities have not fulfilled their duties and designed procedural protocols envisioned by the Resolution<sup>348</sup>. In relation to statistics on victims, according to State's 2007 CEDAW sixth periodic report, 40% of victims

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<sup>341</sup> Id. at 64.

<sup>342</sup> CEDAW, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Hungary*, 10 August 2007, Un Doc. CEDAW/C/HUN/CO/6, para 18.

<sup>343</sup> Supra note 327, at 7.

<sup>344</sup> Supra note 333, at 19.

<sup>345</sup> Supra note 327, at 7.

<sup>346</sup> Supra note 336, at 75.

<sup>347</sup> Id.

<sup>348</sup> Supra note 333, at 26.

are wives/life partners, 21% are minors and 9% are husbands/life partners, with remaining percentage falling on others.<sup>349</sup> 83% of all perpetrators committing DV are men.<sup>350</sup> Up to the researcher best knowledge judicial statistics are scarce and they are not gender disaggregated.

### 5.2.2. State's general compliance with the CEDAW Committee's recommendations

In tracking the direct results of Government actions' following the CEDAW Committee's recommendations in the case of *A.T. v. Hungary*, the researcher was unable to find direct correspondence of the complainant and the Government, which was directed to the Committee.<sup>351</sup> A report by the Open Society Institute indicates that, following the Government's written response submission to the CEDAW Committee, in regard to implementation of the Committee's recommendations, the complainant replied and disputed the Government claims.<sup>352</sup> The complainant alleged that the State, through its justice system, had not applied the individual measures from the Committee's recommendations, and provided her with immediate protection and reparations.<sup>353</sup> Further on, a couple of NGO's sent a shadow letter to the Committee revealing different and contradictory sets of views in relation to the Government claims about the fulfilment of the Committee's recommendations.<sup>354</sup>

The State provided information on the individual complainant's factual situation, in accordance with the CEDAW Committee's questions raised for the purpose of examination of Hungary's sixth periodic report on the implementation of CEDAW. The Government's

<sup>349</sup> CEDAW, *Hungary's sixth periodic report*, 15 June 2006, UN Doc. CEDAW/C/HUN/6, figure 16.1, at 62.

<sup>350</sup> *Id.* at 47.

<sup>351</sup> All information revealing the aftermath of the CEDAW Committee's views was obtained through reviewing subsequent 'question and responses' correspondence between the Hungary and the CEDAW Committee in regard to the Committee's review of the State party's sixth periodic report and through secondary resources, namely NGO reports, *op aut.*

<sup>352</sup> *Supra* note 333, at 62.

<sup>353</sup> *Id.* at 62.

<sup>354</sup> *Id.*

answer did not specify the avenues of redress (i.e. compensation and interim measures, as recommended by the Committee) provided for the complainant, it only depicted the A.T.'s then current situation; namely that she is living separated from her husband.<sup>355</sup> Thus, the Government's engagement to rectify the complainant's human rights violations was not omnipresent following the Committee's views. The subsequent reports by Hungarian civil society indicated that the Government did not follow through with the Committee's views. And from the analysis of Hungarian regulatory framework on DV - presented in the previous sub-section - it derives that the Government did not introduce substantive legal solutions on DV in its legislation, beyond the ineffective protective measures, in order to structurally comply with the CEDAW Committee's recommendations in this regard, but with State's positive obligations deriving from CEDAW, as well.

This personifies the subsidiary position that the CEDAW Committee's opinion and the overall international system of protection of human rights of women established under CEDAW savours juxtaposed with national legal practices of Hungary. In the example concerning Austria it was the national highest judicial authority that did not align with the states international obligations, while in the Hungarian case, beyond judiciary, the legislature's response remained completely absent, as well. The next section shall give a different example of state's approach in addressing failures to act with due diligence in cases of DV, by analyzing the legal system's response in Croatia.

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<sup>355</sup> CEDAW, *Responses to the list of issues and questions with regard to the consideration of the sixth periodic report: Hungary*, UN Doc. CEDAW/C/HUN/Q/6/Add.1, at 24.

### 5.3. Case study: Croatia

#### 5.3.1. State's general compliance with the ECtHR rulings

Croatian regulatory framework on DV has been subjected to substantive development during the recent years and currently is undergoing major structural changes in the sphere of criminal law. This regulatory expansion is occurring in the aftermath of two ECtHR judgments, described in the previous chapter, in concern with determined Croatia's failure to exercise due diligence in protecting the life and physical integrity of DV victims.

Domestic violence is currently prescribed both as a criminal act and as a misdemeanour. The Criminal Code - in enforcement - enlists a single crime of "Violent behaviour within the family".<sup>356</sup> But, structural changes are underway, as the final Draft text of the new Criminal Code (hereinafter: Draft) accepted by the Government, is due to be adopted by the Croatian Parliament at the end of 2011.<sup>357</sup> The Draft predicts a fundamental change: it erases the specific crime of DV from the criminal law (i.e. "Violent behaviour within the family"<sup>358</sup>), and stipulates that a violent act committed against a family member represents an aggravating circumstance within the scope of any provision of the law, which is deemed to be treated as a severe form of a basic crime<sup>359</sup> (e.g. death threat to a family member constitutes a severe form of a basic crime of death threat). Likewise, it broadens the

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<sup>356</sup> Croatia, Criminal Code ("Official gazette", no. 105/04), Article 215a.

<sup>357</sup> See Council of Europe, Committee of Ministers, Secretariat General, *Action plan/action report - Communication from Croatia concerning the case of A. against Croatia (Application No. 55164/08)*, DH-DD (2011) 613E, at 1, viewed 21 October 2011, <<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1896442&SecMode=1&DocId=1770898&Usage=2>>.

<sup>358</sup> The crime was prescribed in 2004 with a sanction of imprisonment from sixth months to five years.

<sup>359</sup> Supra note 357, at 2.

definition of a family member in order to ensure protection of a wider circle of individuals (e.g. ex-spouses or ex-partners).<sup>360</sup>

The Croatian Government stated, in its Action report related to the execution of the ECtHR judgment in the case of *A. v. Croatia*, that one of the rationales for enacting the new Criminal Code was the harmonization of national criminal law with international documents and legal standards of the ECtHR.<sup>361</sup> Moreover, the main rationale for changing the criminal regulation on DV was to solve the systematic problem, which was also identified - as the Croatian Government recognized - by the ECtHR in its judgments.<sup>362</sup> The problem was embedded in conceptual indivisibility and interference between DV as a crime and as a misdemeanour. So, the new legislation was meant to secure “a more efficient system of protecting the victims and punishing [the] perpetrators of family violence [through creating a] strict delineation between crimes and misdemeanors in the area of domestic violence”<sup>363</sup>. Furthermore, the Draft introduces new protective measures aimed at solidifying the protection of victims of violent acts: obligatory psycho-social treatment, prohibition of approaching the victim, removal from household and protective supervision upon full execution of a prison sentence.<sup>364</sup> The Law on the Execution of Imprisonment has been amended to provide better cooperation of authorities in the area of preventive work with perpetrators and assistance to victims of violence.<sup>365</sup> These legal actions signify a clear indication of the acknowledgment of importance of international human rights standards and the ECtHR jurisprudence, demonstrated by the State during the process of changing its legislative measures in order to, *inter alia*, comply with its international obligations.

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<sup>360</sup> Id.

<sup>361</sup> Id. at 1.

<sup>362</sup> Id. at 2.

<sup>363</sup> Id. at 2.

<sup>364</sup> Id. at 2-3.

<sup>365</sup> Id. at 3.

Likewise, the sphere of misdemeanour law in relation to DV has undergone certain changes in the aftermath of the ECtHR rulings against Croatia. A new *lex specialis* on DV<sup>366</sup> has been enacted in 2009 (with two amendments in 2010), substituting the previous one from 2003. The importance of *lex specialis* is that it exempts DV from the private sphere, it recognizes and treats DV as a problem of public concern and prescribes responsibilities for combating it for the judicial bodies, the police, social, health and public administration sectors. The new law introduced a significant number of changes, aimed to provide a more effective protection against violence. It broadened the definition of DV (incorporating physical, psychological, sexual and economic violence), expanded the types of sanctions against the perpetrator, extended the duration of protective measures, made their application independent from penalties, made specific protective measures' application possible before the minor offence procedure is instigated and speeded up the court proceedings.<sup>367</sup> According to the law all institutions dealing with DV are obliged to act urgently, including the courts<sup>368</sup>; although the law does not specifically stipulate what "urgency" exactly means. Legal sanctions for protection against DV - as a misdemeanour act - are fines, imprisonment and protective measures.<sup>369</sup> A disclosure of an early judicial application of this sanction regime<sup>370</sup> sprung from the Croatia 2005 Shadow Report to the CEDAW Committee, which indicated that the end result of applying these sanctions is a high percentage of financial fines and a low percentage of short term imprisonment.<sup>371</sup>

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<sup>366</sup> Croatia, Law on Domestic Violence ("Official Gazette" no. 137/09, 14/10, 60/10).

<sup>367</sup> Supra note 357, at 4.

<sup>368</sup> Croatia, Law on Domestic Violence, *op. cit.*, art. 5.

<sup>369</sup> Id. art. 10(2).

<sup>370</sup> Sanction regime was identical under the previous legislation from 2003, *op. aut.*

<sup>371</sup> B.a.B.e. 2004, *NGO Report to the Committee on Elimination of Discrimination against Women On the occasion of Second and Third Report of Republic Croatia*, at 8, viewed 01 October 2011, < [http://www.iwraw-ap.org/resources/croatia\\_Babe\(English\).pdf](http://www.iwraw-ap.org/resources/croatia_Babe(English).pdf)>.



One additional measure that the Government conducted pertaining to the ECtHR rulings is improvement of implementation of the measure of psycho-social treatment for perpetrators of DV, by supporting expert specialization for conducting the psycho-social treatment and prison staff training on the treatment of prisoners who committed DV.<sup>372</sup> As an indication of the overall improvement in this field, Croatia has enlisted that 368 protective measures of psychological treatment have been executed over year and a half, following the *A. v. Croatia* ruling.<sup>373</sup> This again represents a straightforward line of actions that the executive power is undertaking for the sake of solidifying its official bodies enforcement practices with States international obligations and standards of human rights protection that are deriving from the ECtHR decisions.

### **5.3.2. General overview of the justice system's practices on domestic violence in Croatia**

A report by the United Nations Development Programme (hereinafter: UNDP) Croatia likewise reveals the above mentioned reasons for current legislative changes in the realm of DV. It states that the distinction between DV as a crime and as a misdemeanour has not been made sufficiently clear to the practitioners, which, on account of opting practices that practitioners utilize when confronted with DV, results in a sufficiently higher number of misdemeanour proceedings than to criminal ones.<sup>374</sup> This practice sends a message by the justice system that DV does not carry the sufficient element of public danger in order to be dealt under the framework of criminal law. The UNDP report furthermore indicates that

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<sup>372</sup> Supra note 357, at 6-7.

<sup>373</sup> Id. at 7.

<sup>374</sup> Risser, Susanne and Tanay, Filp R.V., *Overview of the Domestic Violence Legal and Policy Framework in Croatia [Final Draft for Discussion]*, UNDP Croatia, at 24, viewed 07 October 2011, <[http://www.undp.hr/upload/file/256/128458/FILENAME/Overview of the Domestic Violence Legal and Policy Framework in Croatia final draft.pdf](http://www.undp.hr/upload/file/256/128458/FILENAME/Overview%20of%20the%20Domestic%20Violence%20Legal%20and%20Policy%20Framework%20in%20Croatia%20final%20draft.pdf)>.

victim's experience of judicial treatment of domestic violence is hugely diverse, and predominantly depends on the judge's knowledge of DV problematic.<sup>375</sup> Another insight into the effectiveness of judicial practices represents an observation that a lot of cases take too much time or they are never finished and therefore become obsolete, while others are not taking into account victim's rights of self-defence or past abuse, which as a consequence equalises victims with perpetrators.<sup>376</sup>

As oppose to Austria and Hungary, Croatia collects gender-disaggregated data on DV within the area of justice sector. A study of the Croatian Statistical Office on justice system's treatment of DV, covering the period preceding the ECtHR rulings, from 2001-2006, determined that there was overall 1807 convictions for the crime of "violence within the family", out of 2152 criminal prosecutions.<sup>377</sup> In over 85% of criminal cases the conviction was conditional sentence of imprisonment.<sup>378</sup> When it comes to the gender division of perpetrators of DV as a criminal offense, 97% were man and 3% were woman.<sup>379</sup> In the same time-period, for the misdemeanour of DV, there were over 90% more cases (30.169) with convictions, in comparison to criminal procedures.<sup>380</sup> Over 50% of these misdemeanour procedures ended with the imposition of fines.<sup>381</sup> Perpetrators gender-ratio was 88% male and 12% female.<sup>382</sup> On the other hand, according to the UNDP report containing the information from the Croatian Ministry of Interior Affairs, the ratio of female to male victims of DV as a crime and as a misdemeanour, covering the period from 2003-2009, was around 70/30.<sup>383</sup>

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<sup>375</sup> Id. at 26.

<sup>376</sup> Id. at 26.

<sup>377</sup> Rogic-Hadzalic, Dubravka and Kos, Jadranka 2008, *Violence in the family 2001.-2006.*, Croatian Bureau of Statistics, at 18, viewed 08 October 2011, <<http://www.dzs.hr/>>.

<sup>378</sup> Id. at 24.

<sup>379</sup> Id. at 48.

<sup>380</sup> Id. at 43.

<sup>381</sup> Id. at 44.

<sup>382</sup> Id. at 50.

<sup>383</sup> Supra note 374, at 46.

Overall in that same period around 40% of people reported for DV as misdemeanour or a crime faced misdemeanour and criminal proceedings in front of the court of law.<sup>384</sup> This information reveals that, as a practice of Croatia's justice system, in more than a half of reported DV cases alleged perpetrators have not faced judicial proceedings for determining their guilt, i.e. they enjoyed impunity. Furthermore, existence of significant curtailment in between reports and prosecutions on DV simply reflects global trends in the field of DV related criminal procedures, as indicated by the UN Secretary General's study on VAW.<sup>385</sup>

In relation to countries institutional activities within the policy framework, in 2011 Croatia adopted its third in line "National Strategy for Protection against Domestic Violence for the period of 2011-2016"<sup>386</sup>. The CEDAW, among other human rights documents, represents the basis of strategy's activities and goals.<sup>387</sup> In 2008 the Government adopted obligatory Rules of Procedure in Cases of Family Violence, regulating the activities of responsible public authorities for combating DV, including the judiciary.<sup>388</sup> Moreover, in 2010 six responsible Ministries signed a Cooperation Agreement on Prevention and Suppression of DV and VAW, establishing national and regional interdepartmental teams on monitoring and improving the work of bodies acting in specific cases.<sup>389</sup>

Everything being stated, the Croatia's legislative and policy approach on DV stands particularly strong, especially in comparison with Hungary's modest regulation and Austria's shortage of policy measures. Evident are the Croatia Government's efforts to address the numerous issues under the domestic violence heading by enacting a comprehensive and

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<sup>384</sup> Id. at 46.

<sup>385</sup> Supra note 67, at 86.

<sup>386</sup> Croatia, National Strategy for Protection against Domestic Violence for the period of 2011-2016 ("Official Gazette", no. 20/11).

<sup>387</sup> Supra note 357, at 6.

<sup>388</sup> Supra note 357, at 5.

<sup>389</sup> Id. at 5-6.

workable legal system of measures and remedies. Judicial practices, on the other hand, are revealing that more than half of reported DV cases are not being dealt by the justice system through official proceedings. This is an indication that enforcement procedures still need additional tuning to be in line with the international human rights standards and in accordance with states' due diligence obligations to provide protection to victims in cases when DV is known to the authorities.

#### ***5.4. Comparing case studies' regulatory and justice systems' practices on domestic violence and their general compliance with the due diligence standard***

According to a UN study, Austria and Croatia are among the sixty states in the world that have specific laws on DV.<sup>390</sup> Moreover, both states treat DV within the body of their criminal and misdemeanour law. In Croatia, as has been show, DV is going to be considered as an aggravating circumstance for specific criminal acts, while in Austria DV is regulated under the body of various violent acts. In contrast with these comprehensive legislative solutions, legislation in Hungary does not even specifically mention DV. In regard to legislative solutions in Hungarian criminal law, DV is covered indirectly within the framework of other criminal acts (e.g. bodily injury). Further on, in comparing policy approaches between the three jurisdictions, only Croatia has continuously been designing national policy documents, prescribing a strategic institutional approach to combat DV. Likewise, both the police and the courts in Croatia are maintaining accessible statistical information on DV, while this is only the practice of the police in Austria and Hungary.

A UN Special Rapporteur on VAW has designed a list of actions that states are expected to conduct in order to demonstrate their general compliance with the standard of due

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<sup>390</sup> Supra note 67, at 89.

diligence to safeguard the human rights of women. They include, *inter alia*, the existence of national legislation providing redress for women victims of violence, national policies on DV, the gender-sensitivity of the criminal justice system and the police and the collection of statistics on DV.<sup>391</sup> In the light of these measures, it has been demonstrated that case study jurisdictions' compliance with their due diligence obligations, in general, has not been all encompassing and was heavily constrained within the domain of their criminal justice systems.

When comparing the three jurisdictions normative and policy frameworks, it is evident that the Croatian Government is conducting the most strengthened and all-encompassing legislative and policy actions, in the aftermath of their established failure to act with due diligence in addressing issues concerning the protection of women victims of DV. Although Austria has somewhat disregarded actions on policy grounds, their response within the legislative sphere remains particularly comprehensive as well, and in respect with international human rights standards. Ultimately, both states have expanded the guarantees with regard to criminal and civil law measures of protection against domestic violence following the ECtHR and the CEDAW Committee's decisions. At last, legislative system's response to DV has been the weakest in Hungary. In fact, no significant institutional response occurred in the aftermath of the CEDAW Committee views and recommendations, given that DV is still not directly legally regulated, which should be the initial step in subduing the national actions to the international imposition of due diligence. Although an attempt was made by the legislator to enact legislation on DV - which at least demonstrates the existence of political will - that effort was stroke down by the ruling of the Hungarian Constitutional Court. This cannot - in the light of the above examples of actions enlisted by the Special

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<sup>391</sup> Supra note 110, at 39.

Rapporteur on VAW - be regarded as sufficient effort to demonstrate that state is complying with obligations of due diligence in a general and systematic manner.

When it comes to the question of enforcement, the researchers - covering the analyzed jurisdictions - agreed that the police had been at the forefront of governmental actions on DV, with the criminal judiciary strongly lagging behind.<sup>392</sup> In Austria the Supreme Court within case deliberations<sup>393</sup> which were indirectly related to Austria's internationally determined failure to exercise due diligence denied to take cognisance of the decision of the CEDAW Committee in that regard. By proceeding in this way the State's highest regular court indicated a different comprehension of states positive obligations to protect human rights by acting in general compliance with the due diligence standard than its legislative counterpart.

Further on, harmonization of Hungarian law with the international human rights standards has remained absent, since no structural adjustment of the national law has occurred in the aftermath of the CEDAW Committee's recommendations, which were made in this direction. Austria and Croatia's responses represent more positive examples; their legislation on DV reflects developments that are following the due diligence standard, while their judiciary, on the other hand, is lagging behind. This 'structural condition' corresponds with prevailing patterns of DV institutional inconsistencies that are well detected by the literature - and indicated in this paper's introduction as a starting point of the present research

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<sup>392</sup> See Krizsaan Andrea et al, 'Domestic Violence: Who's Problem', *op. cit.*, at 77; Federal Chancellery - Federal Minister for Women and Civil Service, *Ten Years of Austrian Anti-Violence Legislation*, *op. cit.*, at 22-27; Risser, Susanne and Tanay, Filp R.V., *Overview of the Domestic Violence Legal and Policy Framework in Croatia* [Final Draft for Discussion], *op. cit.*, at 3.

<sup>393</sup> The case concerned death compensation claims brought by relatives of Sahide Goekce; see current chapter, sub-section 5.1.2., *op.aut.*

- that prosecutors, judges and overall justice system are not keeping up with the legislative progress and therefore are not effectively engaging in resolution of DV controversies.<sup>394</sup>

All this reveals that analyzed national justice systems' are not yet implementing the due diligence standard sufficiently and therefore not fully complying with states positive obligations. These findings indicate that national implementation of international human rights standards is constrained with significant difficulties. Living free from violence in the private sphere is an international legal entitlement for women. Enacting national regulation in this regard is a first step for incorporating this entitlement, which - through examples of Austria and Croatia - is demonstrated to be under constant adjustment in order to enable efficient recognition of such an entitlement. In the case of Hungary, normative changes have been left out of the compliance equation, thus perpetuating the ongoing states non-compliance with their international human rights obligations under CEDAW. Change within the remits of the justice system, which is probably the most important one - as analyzed cases of human rights violations have demonstrated - must likewise follow the internationally determined standard of due diligence which demands that judiciary as well, complies with the general states' human rights obligations. In order to do so, the national justice systems of Austria, Hungary and Croatia need to acknowledge the relevance of the international human rights law, the guiding nature of the international and regional human rights jurisprudence and accept the responsibility of the judiciary to act with due diligence in applying these same standards.

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<sup>394</sup> See Epstein, Deborah 1999, 'Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges and the Court System', *Yale Journal of Law and Feminism* No. 11, pp. 3-50, at 4, viewed 05 September 2011, <[www.lexisnexus.org](http://www.lexisnexus.org)>.

## Conclusion

This paper, in its first part, aimed to investigate states' failure to exercise 'due diligence' in providing protection to women victims of domestic violence in cases ending in death fatalities, long-lasting inhuman treatment and long-lasting judicial non-response to severe and systematic violence in the family. The analysis of the views of the CEDAW Committee and the judgments of the ECtHR confirmed the initial premise that victims of domestic violence are not enjoying protection of their human rights on account of the national justice system's ineffectiveness in approaching the problematic of domestic violence. Moreover, it has been shown that national justice systems' failure to respond to domestic violence with due diligence is part of a broader pan-European problematic, which can amount, in the hardest of cases, to violations of victim's rights to life, respect for private and family life and discrimination against women.

In the second part of the research, the paper examined the scope of the national legal and justice system's actions to combat domestic violence in the aftermath of their (internationally and regionally) determined failures to act with due diligence in this regard. I analyzed the outcome in cases of Austria, Hungary and Croatia in order to determine the scope of general compliance of the States' legal and justice systems with their positive obligations deriving from the ECtHR and the CEDAW Committee's decisions. Discussion of analyzed national jurisdictions' general compliance with their positive obligations reveals serious shortcomings within their legal and justice systems' approach to act with due diligence in protecting victims of domestic violence.

The most positive approach occurred within the legislative sphere of actions, given that legislators of both Austria and Croatia have conducted modifications of their legal systems - through expanding the guarantees with regard to criminal and civil law measures of



protection against domestic violence - in the aftermath of determined States violations of positive obligations to act with due diligence in protecting victims of domestic violence. In fact, these developments were curtailed to the legislative sphere, since the analysis of Austria and Croatia justice system's responses - although constrained on account of scarce information in this regard - has indicated a different result, signalling that judiciary in Austria and Croatia has not yet fully aligned with their obligation to act with due diligence. On the other hand, non-responsiveness of the legal system in the case of Hungary, serves as an example of a problematic absence of State's general compliance with positive obligations to act with due diligence.

And while indeed valid, this paper's findings, as already indicated, should not be considered without limitations. It should be taken into consideration that the evaluation of the (case studies) national justice system's compliance with their positive obligations was to an extent constrained, since accessible official Governmental data was rather scarce, which directed the researcher to rely on the information obtained from various NGO publications and reports. Nevertheless, since all the data was pointing to the same conclusion, the present research's drawn findings should not be considered any less legitimate.

Under the circumstances, the results of this paper should be regarded as a contribution to the enhancement of a theory on domestic violence, which is dealing with the effectiveness of legal and justice system's responses and the implementation of the due diligence standard in this field. Given that explorations of follow up general compliance of national legal and justice systems' with their obligations to protect victims of domestic violence with due diligence are a matter of limited research, findings herein represent a valuable comparative point for future academic engagement in this field, which should be strongly encouraged.

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