

**Combating domestic violence against women at the international level:**

**The role of human rights treaties and instruments under the scope of the Council of Europe  
and the United Nations**

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Human Rights LL.M. LONG THESIS

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## Executive Summary

*“... [T]he issue of domestic violence, which can take various forms ranging from physical to psychological violence or verbal abuse ... is a general problem which concerns all member States and which does not always surface since it often takes place within personal relationships or closed circuits and it is not only women who are affected.”*<sup>1</sup> The sentence is quoted from the decision of the European Court of Human Rights (hereinafter referred to as: ECtHR) in the *Opus v. Turkey*<sup>2</sup> case and effectively demonstrates the complexity of the issue the States and organizations face when combating domestic violence.

The main root of this difficulty lays in the clash between the obligations of the State concerning the private and public sphere: on the one hand States - not merely under their national constitutions, but under the ratified international human rights conventions as well - are obliged to protect the life and human dignity of the people within their jurisdiction, while on the other hand governments need to respect the right to private and family life. Striking the balance between the State's positive obligation to protect, and negative obligation not to interfere cannot be considered as an easy task.

The protection mechanisms provided by the institutions operating under the Council of Europe (hereinafter referred to as: CoE) and the United Nations (hereinafter referred to as: UN) on combating domestic violence against women are in the mid-point of this thesis. Considering the regional level, this work will examine the legal instruments on domestic violence under the scope of the CoE and the case law, ruling and standard setting role of the ECtHR under Article 2, 3 and 8 of the European Convention of Human Rights (hereinafter referred to as: ECHR)<sup>3</sup>. Additionally, by examining the provisions of the new Istanbul Convention on Preventing and Combating

<sup>1</sup> *Opus v Turkey* (application no. 33401/02) judgment of 9 June 2009, at para 132  
See: [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92945#{"itemid":\["001-92945"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92945#{)

<sup>2</sup> *Ibid*

<sup>3</sup> The Convention (213 UNTS 222) was signed by the Member States of the Council of Europe on 4 November 1950 and entered into force on 3 September 1953 after 10 countries had ratified it

violence against women and domestic violence (hereinafter referred to as: Istanbul Convention)<sup>4</sup> I will answer the question, whether it might bring any actual change in the applicable standards concerning the State responsibilities and the protection system in force on regional or national level.

As to the international level, the role of the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter referred to as: CEDAW)<sup>5</sup>, the complaint procedure established by the Optional Protocol to the CEDAW (hereinafter referred to as: Optional Protocol to CEDAW)<sup>6</sup> and the work of the Committee on the Elimination of Discrimination against Women (hereinafter referred to as: CEDAW Committee) will be reviewed, with particular reference to General Recommendation 19<sup>7</sup>.

The methodology to address the main question of this thesis is the comparison and synergy of the CoE protection system and the system operating under the CEDAW, thus comparing the potential substantial differences in the rights they protect, the obligations of the State they impose, the possibility of the individual complaint procedures, the variety of the decisions they hold. The standard setting, monitoring, fact-finding and awareness raising functions of the UN and the CoE by their legal instruments, furthermore their possible impact on the protection from domestic violence will also be in the scope of this work. As a short outlook, the thesis will furthermore introduce how the European Union attempts to address and respond to the issue of domestic violence in its legislature. Finally, as a result of the comparison, the assets and weaknesses of the protection mechanisms offered by the systems will be assessed, a conclusion about their effectiveness and the possible solutions to their deficiencies will be concluded in the light of the

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<sup>4</sup> Council of Europe Convention on preventing and combating violence against women and domestic violence CETS No.: 210

<sup>5</sup> The Convention on the Elimination of All Forms of Discrimination against Women was adopted by the United Nations General Assembly on 18 December 1979

<sup>6</sup> Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women was adopted by the United Nations General Assembly on 6 October 1999

<sup>7</sup> General Recommendation 19 of the CEDAW Committee

See: <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>

possibilities offered by the Istanbul Convention.

## **1. Introduction**

### **1.1. The historical process of the recognition of violence against women as a violation of fundamental rights**

High percentage of women is subject to domestic and/or sexual violence during their life<sup>8</sup>. Women and girls are the main subject of sexual violence during armed conflicts<sup>9</sup>. Despite these findings the right of women to be protected from violence appeared quite late in the field of international human rights law, consequently it is justified to ask the questions: Can violence against women be considered as a human rights issue? What is the reason for the belated regulations on protection?

One might rightfully argue that this default is attributable to the traditional historical roles of women in the society and family, which prevented them from taking part in the international and regional treaty-making process and in the domestic legislature. This underrepresentation of women resulted in the development of legal systems and human rights treaties generally representing the male perspective of the life, the rights deriving from the experience of women were ignored<sup>10</sup>. This finding is easily underpinned when examining the early treaties on human rights protection<sup>11</sup>, namely that they focused on the rights related to the public sphere, such as the civil, political, economic or social rights.

In order to understand the protection granted by the international and regional human rights systems against violence against women today, it is necessary to have a brief historical overlook on their development. The Universal Declaration of Human Rights (hereinafter referred to as:

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<sup>8</sup> World Health Organization: Multi-country Study on Women's Health and Domestic Violence against Women (2005). The study was carried out a study in 10 states and on 24.000 women between the age of 15-49. It found that between 15% (Japan) to 71% (Ethiopia) of the women were affected and reported physical an/or sexual violence by an intimate-partner in their life.

<sup>9</sup> European Council: European Union's European Security Strategy, Belgium (2003) at page 2

<sup>10</sup> Carin Benninger-Budel Leiden Boston, Due diligence and its application to protect women from violence, Martinus Nijhoff Publishers (2008) at page 1 in the Introduction

<sup>11</sup> The International Bill of Rights: Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966) with its two Optional Protocols and the International Covenant on Economic, Social and Cultural Rights

UDHR)<sup>12</sup> came to life in 1948 under the auspice of the UN and does not contain any specific provision on the protection of women from violence, hence in its preamble the equal rights of men and women are stressed, which is strengthened by the principle laid down in Article 2 of the Declaration, granting the protection of the UDHR to everyone without any discrimination, based amongst others on sex.

Staying at the UN level, the Convention on the Elimination of All Forms of Discrimination against Women was adopted in 1979<sup>13</sup> and it represented a huge step forwards in protecting and enhancing women's human rights by imposing obligations on the contracting states to establish a legal order, which serves the equality of woman and man, and prohibits any discrimination against them. To reflect the developing process the CEDAW brought in protecting women against violence, it must be pointed out that besides the political and social rights, the private sphere is listed<sup>14</sup> amongst the areas where further protection of women is needed. The shortcoming of the protection system provided by the CEDAW was it being silent in general on violence against women, and in particular on domestic violence, thus the States failed to incorporate the area of violence against women into their reporting obligation under the Convention.

These defects were to be remedied in 1992 by General Recommendation 19 on violence against women<sup>15</sup>. The Recommendation introduced the notion of gender-based violence, as the

*“violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations*

<sup>12</sup> Universal Declaration of Human Rights was adopted by the UN General Assembly on 10 December 1948  
See: <http://www.un.org/en/documents/udhr/>

<sup>13</sup> Convention on the Elimination of All Forms of Discrimination against Women was adopted by the General Assembly In resolution 34/180 in 1979 by votes of 130 to none, with 10 abstentions.

<sup>14</sup> Ibid at article 16

<sup>15</sup> Committee on the Elimination of Discrimination against Women: General Recommendation 19 on violence against woman, 11<sup>th</sup> Session, 1992, UN Doc. A/47/38

*of liberty*”<sup>16</sup>.

The obligations of the State under the Recommendation to take appropriate and effective measures to combat violence against women are twofold; they do not only cover the acts of the public authorities, but the actions committed in the private sphere’s as well<sup>17</sup>.

In 1992 the Vienna Declaration and Program of Action<sup>18</sup> pointed out the lack of the women’s rights approach in the work of human right protection bodies, claiming that “*(t)he equal status of women and the human rights of women should be integrated into the mainstream of United Nations system-wide activity*”<sup>19</sup>. As a reflection, a Special Rapporteur on Violence Against Women including its causes and consequences (hereinafter referred to as: Special Rapporteur on violence) was appointed<sup>20</sup> to represent the need for protection of women from violence in the human rights protection system. Additionally, in 1995 the Beijing Platform for Action<sup>21</sup> was adopted, which aimed to emphasize the need for the empowerment of women in combating violence against women, and it defined 12 critical areas of concern where the States - together with the civil society and private sphere - need to take action<sup>22</sup>.

The UN Declaration on the Elimination of Violence Against Women from 1993<sup>23</sup> (hereinafter referred to as: DEVAW) defined violence against women in a quite broad manner<sup>24</sup> and named the main reason of this kind of violence, as deriving from the historically unequal distribution of powers between man and woman. The DEVAW stressed that the use of violence

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<sup>16</sup> Ibid at section 6

<sup>17</sup> Ibid at section 9: “*(d)iscrimination under the Convention is not restricted to action by or on behalf of Governments (see articles 2 (e), 2 (f) and 5). For example, under article 2 (e) the Convention calls on States parties to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.*”

<sup>18</sup> Vienna Declaration and Program of Action: UN Doc. A/conf.157/23

<sup>19</sup> Ibid at para 37

<sup>20</sup> United Nations Commission on Human Rights in resolution 1994/45

<sup>21</sup> 4th World Conference on Women in Beijing (1995)

<sup>22</sup> Ibid at para 44

<sup>23</sup> Declaration on the Elimination of Violence against Women: UN Doc. A/RES/48/104

<sup>24</sup> Ibid at article 1: “*For the purposes of this Declaration, the term violence against women means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.*”



against women results in the subordinate position of females<sup>25</sup>, and the recognition of the roots of the phenomenon of violence against women is of vital importance in combating it. In addition, the DEVAW raised attention to the groups especially prone to become victims of violence, such as minority groups, indigenous, refugee or migrant women<sup>26</sup>.

The Optional Protocol to CEDAW<sup>27</sup> from 2000 further strengthened the protection mechanism established by the CEDAW and General Recommendation 19 by introducing the instrument of individual complaint and establishing the procedure of the CEDAW Committee dealing with submitted communications. It must be pointed out here – as we will see in latter part of this thesis – that the case law of the CEDAW Committee substantially contributed to the crystallization of the State obligations under the CEDAW when combating violence against women and in providing protection from non-state actors.

Additionally, the role of the Rome Statute of the International Criminal Court<sup>28</sup> must be emphasized, as a significant step towards protecting women from violence. The Statute established the jurisdiction of the Court in cases of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity, as crimes against humanity<sup>29</sup>.

In the process of recognition of violence against women as a violation of fundamental rights, the Istanbul Convention<sup>30</sup> was of predominant importance. The Convention defines violence against women

*“ (..) as a violation of human rights and a form of discrimination against women and (...) mean all acts of gender-based violence that result in, or are*

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<sup>25</sup> Ibid at para 6 in Preamble

<sup>26</sup> Ibid at para 7 in Preamble

<sup>27</sup> See supra note 6

<sup>28</sup> The Rome Statute of the International Criminal Court, A/Conf.183/9, 17<sup>th</sup> July 1998

<sup>29</sup> Ibid at article 7 (1) g.

<sup>30</sup> Istanbul Convention, see supra note 4

*likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life*”<sup>31</sup>.

Violence against women might take several forms, the Istanbul Convention explicitly lists domestic violence, sexual harassment, rape, forced marriage, crimes committed in the name of so-called “honor” and genital mutilation, rape and sexual assault during armed conflicts<sup>32</sup>, as forms of violence against women.

The more detailed examination of the abovementioned human rights instruments will be presented in Chapter 2 and 3 of the thesis.

## **1.2. Domestic violence, as a peculiar form of violence against women**

The issue of domestic violence is a widespread problem; it happens in every society and each country regardless of the different social or economic background<sup>33</sup>. It does not only affect women's physical and mental well-being, but produces effects on women's financial independence and the economy in general by influencing women's opportunities in employment<sup>34</sup>. The fact that domestic violence occurs in the most intimate sphere of a person and is committed by the former or current spouse or partner<sup>35</sup> limits the scope and nature of possible State action on the issue.

It is a well-known fact that not all of our interests are protected under international human rights law, only the fundamental and essential ones, consequently the question might rightfully arise: what makes the issue of domestic violence a human rights concern? According to Bonita

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<sup>31</sup> Ibid at article 3 (a)

<sup>32</sup> Istanbul Convention supra note 4 at para 11 in Preamble

<sup>33</sup> European Commission on Zero Tolerance of Violence against Women: Ending gender-based violence  
See: [http://ec.europa.eu/justice/gender-equality/gender-violence/index\\_en.htm](http://ec.europa.eu/justice/gender-equality/gender-violence/index_en.htm)

<sup>34</sup> Ibid.

<sup>35</sup> Istanbul Convention see supra note 4, at article 3 (b)

Meyersfeld<sup>36</sup> there are three main characteristics, which elevate the problem of domestic violence into the scope of protection of international human rights law. The first and most important is the widespread nature of the phenomenon: relying on the data provided by the World Bank in its World Development Report from 1993<sup>37</sup>, women between the age of 15 and 44 are imposed to a greater risk from rape and domestic violence than to car accidents, malaria, cancer or even war<sup>38</sup>. The remaining factors to be listed are the systemic occurrence of domestic violence and that it affects women disproportionately.

In international human rights instruments the notion of domestic violence first appeared in Paragraph 23 of General Recommendation 19, where the phenomenon of family violence is defined as *“one of the most insidious forms of violence against women. It is prevalent in all societies”*<sup>39</sup>. The Recommendation enumerates battering, rape, other forms of sexual assault, and mental and other forms of violence on women as the acts, which constitute family violence<sup>40</sup>.

Ms. Radhika Coomaraswamy, the first UN Special Rapporteur on violence against women in her 1996 report on violence in the family<sup>41</sup> approached the notion of domestic violence by trying to define the term ‘domestic’, referring to violence taking place in the private sphere, in a relationship between individuals, who are bound by blood, law or intimacy<sup>42</sup>. For defining the sphere where domestic violence occurs more specifically, the Special Rapporteur pointed out the close link between domestic violence and the family, claiming that when considering family, a flexible and broadest approach should be applied<sup>43</sup>. In addition, the report takes the same position

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<sup>36</sup> Bonita Meyersfeld, *Domestic Violence and International Law*, Hart Publishing (2010) at pages 108-109

<sup>37</sup> World Bank, *World Development Report* (1993) at page 50

See: <https://openknowledge.worldbank.org/handle/10986/5976>

<sup>38</sup> Ibid. at page 50

<sup>39</sup> General Recommendation 19 at para 23

<sup>40</sup> Ibid

<sup>41</sup> Special Rapporteur on Violence Against Women, ‘Report on violence in the family’ (1996) UN Doc/E/Cn.4/1996/53

<sup>42</sup> Ibid at para 23

<sup>43</sup> Ibid at para 25

considering the purpose of using domestic violence as the CEDAW Committee in General Recommendation 19, identifying it as a efficient tool for the oppression of woman<sup>44</sup>.

The Istanbul Convention applies a more comprehensive definition, under which 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<sup>45</sup>”.*

The definition – without incorporating a specific list of acts – basically covers two types of violence, the one occurring between current or former intimate-partners or spouses and the one, which occurs between parents and children<sup>46</sup>. The definition is neutral on gender, however as explained in the commentary to the Convention, women are disproportionately overrepresented amongst the victims of domestic violence<sup>47</sup>.

### **1.3. Domestic violence and the responsibility of the State**

#### **1.3.1. The source of the State obligations**

What is the legal source of the State obligations on domestic violence, from where these obligations to act derive from? At the UN level there is no convention specifically stating the prohibition of domestic violence. This obligation is only defined in secondary sources of international law, such as Recommendation 19., DEVAW, the reports of the Special Rapporteur on violence, Declarations and Statements of the Secretary General, furthermore the jurisprudence

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<sup>44</sup> Ibid at para 27

<sup>45</sup> Istanbul Convention see supra note 4, at article 3 (b)

<sup>46</sup> Explanatory report to the Istanbul Convention at para 41

<sup>47</sup> Ibid at para 42, 44

of the CEDAW Committee, which also clearly underpins the prohibition of domestic violence, as a general principle.

Yakin Ertürk, the second Special Rapporteur on violence in the report from 2006<sup>48</sup> claimed that *“it can be concluded that there is a rule of customary international law that obliges States to prevent and respond to acts of violence against women with due diligence”*<sup>49</sup>. What follows from his statement is that States are obliged to act in combating domestic violence as a part of their obligation deriving from international customary law and not only from conventions. Bonita Meyersfeld however examines the existence of State responsibility under international customary law on domestic violence from different perspective<sup>50</sup> by stating that under the contemporary approach on customary international law – which enumerates the rules and norms of UN bodies as sources of customary international law – States could be held accountable for the actions of private individuals if the domestic violence is systemic by its nature<sup>51</sup>.

Given the recent enactment of the Istanbul Convention the source of the obligation of the Member States of the CoE is easily definable, with regards to the fact that it clearly and expressly defines the responsibility of the ratifying Member States in general as follows: *“(p)arties shall take the necessary legislative and other measures to promote and protect the right for everyone, particularly women, to live free from violence in both the public and the private sphere”*<sup>52</sup>.

### 1.3.2. The nature of the State obligations

When considering the obligations of the State under human rights law, these obligations can be twofold: on the one hand, there is a negative obligation not to interfere with the enjoyment of the right, but on the other hand there could be a positive obligation of the State as well, to provide

<sup>48</sup> The 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 (E/CN.4/2006/61)

<sup>49</sup> Ibid at page 8 para 29

<sup>50</sup> Meyersfeld see supra note 36 at page 2

<sup>51</sup> Ibid at pp. 11-12, 111

<sup>52</sup> Istanbul Convention see supra note 4, at article 4 (1)

all the necessary means for the full enjoyment of the right. By examining the State obligations under the issue of domestic violence, its private nature puts boundaries to the measures the States can apply in the course of tackling it, however it must be pointed out that the lack of State action to stop violence happening in the private sphere might be interpreted as a tacit acceptance of it, which omission can be considered as a human rights violation, and the State might be held responsible for it<sup>53</sup>.

As to the nature of the State responsibility in course of providing protection from domestic violence, both in the UN and the CoE systems the standard of ‘due diligence’ is applied, the exact and practical obligations deriving from this principle have been developed by the jurisprudence of the ECtHR and the CEDAW Committee. The DEVAW referred to the State obligation acting under the rule of due diligence as follows:

*“(s)tates should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should: 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>54</sup>.*

The case law of both the CEDAW Committee in the case of A.T. v Hungary<sup>55</sup> and the ECtHR amongst others in the of Opuz v. Turkey case<sup>56</sup> underpinned that the State obligations deriving from the due diligence standard do not only cover the obligation to ensure a legal framework on prevention and protection of victims of domestic violence, to provide the victims a

<sup>53</sup> Beate Rudolf & Andrea Eriksson, Women’s Rights Under International Human Rights Treaties: Issues of Rape, Domestic Slavery, Abortion, and Domestic Violence, 5 INT’L J. CONST. L. 507, (2007) at page 523

<sup>54</sup> DEVAW see at supra note 23, at article 4 (c)

<sup>55</sup> A. T. v. Hungary (Communication No.: 2/2003)

See: <http://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/CEDAW%20Decision%20on%20AT%20vs%20Hungary%20English.pdf>

<sup>56</sup> See supra note 1

maximum practical support (e.g. access to shelter, legal assistance, specialist support, potential reparation) and to secure that those protection measures are implemented in practice, but the States are furthermore obliged – as a part of deterrence - to bring perpetrators to justice and punish them accordingly.

## **2. The International system of protection and the UN legal framework**

This subchapter introduces a more in-depth overview on the historical process of the recognition and regulation of the issue of domestic violence under the scope of the UN, departing from as early as the work of the Commission of the Status of Women (hereinafter referred to as: CSW) through the adoption of the CEDAW and its protocol, and the Recommendations made by the CEDAW Committee, the implementation of the DEVAW, arriving to the work of the Special Rapporteur on violence. Furthermore the jurisprudence of the CEDAW Committee will be introduced through the cases decided on domestic violence.

### **2.1. Main legal instruments**

#### **2.1.1. The CEDAW**

The first body to be named dealing with the promotion of women's rights was the CSW, which was founded as a sub-commission of the Economic and Social Council (hereinafter referred to as: ECOSOC Council). The general aim of the CSW was to provide the ECOSOC Council with reports and recommendations on the promotion of women's rights in the political, economic, civil, social and educational sphere<sup>57</sup>. Regardless of the possibility granted to the CSW to hear communications on the alleged violations of women's human rights from the members of the private sphere<sup>58</sup>, the body used the information deriving from this procedure mostly to identify

<sup>57</sup> ECOSOC Resolution establishing the Commission on the Status of Women. E/RES/2/11, 21 June 1946

<sup>58</sup> See in more detail: <http://www.unwomen.org/en/csw/communications-procedure>

ongoing trends and patterns of injustice on women worldwide and to incorporate them into its policy-making work<sup>59</sup> but failed to provide any remedy in the case of violations.

On 18 December 1979 the CEDAW was adopted by the United Nations General Assembly and up until today it counts as much as 189 parties<sup>60</sup>. The purpose of the Convention is defined in Article 2 by stating “*States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women (...)*”<sup>61</sup>. For this aim to be reached the States undertake the obligation to include the principle of equality of men and women into their constitutions, legislature and to provide for the means for this principle to be enforced in practice not only by public authorities but by private entities as well<sup>62</sup>.

The CEDAW does not solely prescribe steps to be taken in the field of law-making or law-amending, it states that for the equality to be reached a comprehensive change needs to be made in the economic, social, political and cultural sphere<sup>63</sup>. As it is highlighted in Article 5 of the CEDAW, the States are obliged to implement measures aiming to bring change to the social and cultural patterns claiming the inferiority of women and echoing the traditional role of the women as nurturer and the father as breadwinner<sup>64</sup>. As it will be discussed in the later part of the thesis, the CEDAW Committee consequently referred to the measures to be taken under Article 5 when deciding on the breach of state obligations in domestic violence cases.

Apart from the undisputable role the CEDAW plays in combating gender based discrimination against women and promoting gender equality by its standard-setting work, there are several shortcomings when considering the issue of violence against women. The first to be

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<sup>59</sup> Ibid

<sup>60</sup> See: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en)

<sup>61</sup> CEDAW at article 2

<sup>62</sup> CEDAW at article 2 a)-g)

<sup>63</sup> CEDAW article 3-16

<sup>64</sup> CEDAW article 5 and Dubrovka Simonovic, Global and Regional Standards on violence against women: the evolution and synergy of the CEDAW and Istanbul conventions, in Human Rights Quarterly, 2014 at page 594



mentioned is the total omission<sup>65</sup> in identifying the prohibition of violence on its agenda, which fault was to be later remedied with Recommendation 19. The other weakness of the Convention is the huge number of reservations made by the parties<sup>66</sup>, which undoubtedly limits the scope of the obligations the States need to provide towards their citizens under the Convention.

The CEDAW established its own monitoring body, the CEDAW Committee, to receive and evaluate the regular State reports on the legislative, administrative, judicial or any other measures adopted by the Member States in course of the implementation of the provisions of the Convention<sup>67</sup> and to propose recommendations to the states based on these reports. Despite the power granted to the CEDAW Committee to influence the State practices, it has some significant deficiencies: the limited timeframe of its meetings and the lack of enforcements mechanisms<sup>68</sup> both impair its efficiency. However it must be pointed out that the work carried out by the CEDAW Committee does contribute to a positive social and cultural change<sup>69</sup> and the method of naming and shaming the States not complying with their obligations under the Convention, which might result in more law-abiding State practices.

### **2.1.2. General Recommendation No. 19**

Regardless of the fact that the CEDAW did not list the obligations concerning domestic violence amongst its provisions, the UN General Assembly enacted two resolutions on the issue in the aftermath of the Convention, one in 1985 and one in 1990. Both of these Resolutions aim to raise awareness of the phenomenon of domestic violence, provide standards on the State

<sup>65</sup> However Article 6 of the CEDAW mentions prohibition of trafficking and prostitution

<sup>66</sup> For the list of reservations see: <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>

<sup>67</sup> CEDAW at article 18

<sup>68</sup> Sally Engle Merry, *Constructing a Global Law – Violence against women and the Human Rights System*, 28 *Law and Social Inquiry* (2003) at page 942

<sup>69</sup> Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Social Justice*, University of Chicago Press (2005) at page 72

obligations and highlight the broader social effects of this type of violence<sup>70</sup>. The first Resolution passed was 40/36 on domestic violence<sup>71</sup>, which calls the States to provide not only criminal and civil measures<sup>72</sup>, but to apply alternative methods in combating domestic violence; furthermore it recommends that preventative measures – e.g. special support and counseling to establish a non-violent environment<sup>73</sup> – are necessary for a more efficient result to be reached.

As to the latter one, the significance of the 1990 UN Resolution lays in the fact that it expressly states the existence of an international consensus on the need to combat domestic violence<sup>74</sup>, emphasizes the psychological aspects of domestic violence<sup>75</sup> and expresses the need for cooperation between States, the State authorities and the private sector in order to establish more adequate legal and social policies<sup>76</sup>. It must be pointed out that both of these Resolutions share the same deficiency: the provisions are too vague thus the steps of implementation are to be decided by the States themselves and there is no mechanism incorporated to enforce its findings<sup>77</sup>.

The adoption of the abovementioned Resolutions clearly represented the growing concern at international decision-making level when considering domestic violence, which process was further reinforced by the CEDAW Committee with General Recommendation No. 12 and 19. The Committee was granted the power to deliver recommendations based on the State reports and to interpret the provisions of the CEDAW accordingly<sup>78</sup>. General Recommendation No. 12<sup>79</sup> declares that the issue of violence against women belongs to the scope of the CEDAW and urges

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<sup>70</sup> UNGA Res 40/36 (29 November 1985) UN Doc A/RES/40/36 (hereinafter referred to as: 1985 UN Resolution) paragraph 4-8, 10 and UNGA Res 45/114 (14 December 1990) UN Doc A/RES/45/114 (hereinafter referred to as: 1990 UN Resolution) at Article 1

<sup>71</sup> Ibid

<sup>72</sup> Ibid at article 7 (a)

<sup>73</sup> Ibid at article 7 (c)

<sup>74</sup> 1990 UN Resolution at Preamble

<sup>75</sup> Ibid at article 1

<sup>76</sup> Ibid at article 3

<sup>77</sup> Meyersfeld see supra note 36 at page 31

<sup>78</sup> CEDAW at article 21

<sup>79</sup> UN Committee on the Elimination of Discrimination against Women: General Recommendation 12: Violence against women (1990) UN Doc A/44/38 (hereinafter: Recommendation 12)

States to collect data on violence against women and to include those into their reports<sup>80</sup>.

This progressive approach was further refined by General Recommendation No. 19, which stated that there is a general ban on gender based discrimination under the CEDAW<sup>81</sup> and “(g)ender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence<sup>82</sup>”. What follows from the above is that General Recommendation No. 19 expressly extends the scope of the Convention for the phenomenon of violence against women. Violence within the family is listed in paragraph 23, claiming that this kind of violence has a global existence<sup>83</sup>. In considering the roots of domestic violence the CEDAW Committee contributes by naming economic dependency, traditions and practices by which women are subordinated and placed under the control of men, resulting in the deprivation of the enjoyment of women’s human rights and their participation in family and public life<sup>84</sup>.

General Recommendation No. 19 not only decides on the existence of the State responsibility for the acts of public authorities, but it additionally claims that the States have the obligation to terminate discrimination against women by any person, thus establishes the general obligation to prevent, investigate, punish and compensate in cases of violence against women.<sup>85</sup> The special recommendations towards the States on combating violence against women under General Recommendation No. 19 cover the following areas: to provide adequate legal protection from gender based violence<sup>86</sup>; to combat the prejudices via media campaigns<sup>87</sup> and educational programs<sup>88</sup>; to provide an effective system for remedies, compensation, complaint procedures<sup>89</sup>; to establish protective and special support services, which are accessible<sup>90</sup>; to provide gender

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<sup>80</sup> Ibid

<sup>81</sup> Recommendation 19 see at supra note 7 at article 6

<sup>82</sup> Ibid.

<sup>83</sup> Ibid at para 23

<sup>84</sup> Ibid

<sup>85</sup> Ibid at article 8-9

<sup>86</sup> Ibid at para 24 (b)

<sup>87</sup> Ibid at para 24 (d)

<sup>88</sup> Ibid at para 24 (f)

<sup>89</sup> Ibid at para 24 (i)

<sup>90</sup> Ibid at para 24 (k)

sensitive training for the members of the judiciary and law enforcement bodies<sup>91</sup> and to identify and report on the main obstacles of the effective fulfillment of their obligations under the Convention, and the measures applied<sup>92</sup>.

Given the above it can be concluded that the main achievement of General Recommendation No. 19 is that it brought the issue of domestic violence into the framework of the CEDAW by establishing the State obligation in tackling violence against women, as a part of their general duty to combat gender based discrimination. However it is to be pointed out that by linking the phenomenon of violence and discrimination together, it simultaneously limits the scope of protection the victims of violence are entitled from the States under the CEDAW<sup>93</sup>.

### **2.1.3. The role of the DEVAW**

When considering the development of the protection for women from domestic violence under international law, the General Assembly made a considerable step by adopting the Declaration on the Elimination of Violence against Women<sup>94</sup>, thus by incorporating the findings of General Recommendation No. 19 into the provisions of the UN Declaration. The DEVAW classifies violence against women as a violation to international human rights, regardless that the violence is committed within the family<sup>95</sup>, or within the general community<sup>96</sup> or perpetrated or condoned by the State<sup>97</sup>; consequently similarly to General Recommendation No. 19, DEVAW recognizes the responsibility of the State for violence occurring in private and public sphere as well<sup>98</sup>. The suggestions on State obligations under the DEVAW cover the ones listed in General Recommendation No. 19, but additionally the Declaration invites the States to develop a national

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<sup>91</sup> Ibid at para 24 (b)

<sup>92</sup> Ibid at para 24 (e), (h), (j)

<sup>93</sup> Meyersfeld see supra note 36 at page 37

<sup>94</sup> See supra note 23

<sup>95</sup> DEVAW at article 2 (a)

<sup>96</sup> DEVAW at article 2 (b)

<sup>97</sup> DEVAW at article 2 (c)

<sup>98</sup> DEVAW at article 1

plan on the protection of women from violence<sup>99</sup> and calls for protection measures for women, who are especially vulnerable to violence<sup>100</sup>.

The undisputable benefit of the adoption of the DEVAW lays in its characteristic as a General Assembly Declaration, consequently that it represents an international consensus that there is a need for the State to be involved in cases of violence against women, and serves as a solid starting point when one considers State multi level obligations on combating violence against women.

## 2.2. Other Legal Instruments

This subchapter list and examines further legal instruments having significance in the process of refining State obligations on domestic violence, by introducing the findings of the Beijing Platform for Action and the 2004 General Assembly Resolution on the Elimination of Domestic Violence against Women<sup>101</sup> and providing a summary on the most important elements of the Reports of the Special Rapporteur on violence against women, its causes and consequences.

### 2.2.1. Beijing Platform for Action

The 4<sup>th</sup> World Conference on Women (1995) held in Beijing attracted as much as 17.000 State representatives, thus it is considered as one of the most attended international conferences<sup>102</sup>, with the aim to speed up the implementation of the Nairobi Forward Looking Strategy for the Advancement of Women (1985)<sup>103</sup> by adopting its special Platform for Action<sup>104</sup>.

The Platform for Action focused on different areas where the advancement of women's rights is needed, such as the field of education and training, healthcare, the role of women in

<sup>99</sup> DEVAW at article 4 (e)

<sup>100</sup> DEVAW at article 4 (l)

<sup>101</sup> General Assembly Resolution on the Elimination of Domestic Violence against Women (A/RES/58/147) (hereinafter referred to as: 2004 UN General Assembly Resolution)

<sup>102</sup> Meyersfeld see supra note 36 at page 39

<sup>103</sup> See: <http://www.un.org/womenwatch/confer/nfls/Nairobi1985report.txt>

<sup>104</sup> Beijing Platform for Action, see: <http://www.un.org/womenwatch/daw/beijing/platform/>

power and decision-making, additionally the issue of violence against women, and the situation of women in armed conflict was also covered with the Platform<sup>105</sup>. The method followed in the Plan was to identify the major factors and problems when considering the advancement of women's rights and to recommend possible solutions and measures for these problems to be solved.

The issue of domestic violence is addressed primary as a health concern in the Platform for Action<sup>106</sup>, and it claims that the *“low social and economic status of women can be both a cause and a consequence of violence against women”*<sup>107</sup>. It follows a system to list the tasks to be taken by their recipient, thus in case of combating inter-family violence a multi-level approach is established requiring the governments, the members of private sphere (NGO's, enterprises, mass media, etc.), employers and trade unions to perform the prescribed tasks<sup>108</sup>. Regardless of the comprehensive and global approach on the main problems when considering the advancement of women's rights, the major critique towards the Platform for Action is that it lacks a State specific follow up mechanisms.

### 2.2.2. The 2004 UN General Assembly Resolution

General Comment No. 28 adopted in 2000 by the UN Human Right Committee on the Equality of Rights between Men and Women<sup>109</sup> represented a significant step on the States' reporting obligations under the International Covenant on Civil and Political Rights<sup>110</sup> when considering domestic violence, for two reasons. First, it prescribed that States should collect data and report on the national practices on domestic violence<sup>111</sup> and on the existing legal measures,

<sup>105</sup> Beijing Platform for Action, for the main areas see ibid at Chapter IV (a)-(k)

<sup>106</sup> Beijing Platform for Action at para 100 and 106 (q)

<sup>107</sup> Beijing Platform for Action at para 112

<sup>108</sup> Beijing Platform for Action at para 124-126

<sup>109</sup> General Comment 28 on the Equality of Rights between Men and Women, CCPR/C/21/Rev.1/Add.10, see:

[http://ccprcentre.org/doc/ICCPR/General%20Comments/HRI.GEN.1.Rev.9%28Vol.I%29\\_%28GC28%29\\_en.pdf](http://ccprcentre.org/doc/ICCPR/General%20Comments/HRI.GEN.1.Rev.9%28Vol.I%29_%28GC28%29_en.pdf)

<sup>110</sup> International Covenant on Civil and Political Rights was adopted by General Assembly resolution 2200A (XXI) of 16 December 1966

<sup>111</sup> General Comment No. 28 at para 11

which result in women being confined to home<sup>112</sup>; consequently draws a parallel between the detention of women subject to domestic violence in their homes and in State custody. Furthermore it provides for the States to report on the women's rights in the case of access to justice, and whether the principle of equality between man and woman is followed during the criminal process<sup>113</sup> (e.g. giving evidence as witnesses<sup>114</sup>), which provision might have upmost importance when the credibility of the testimony of a victim of domestic violence is weighted against the perpetrator's.

In 2004 the General Assembly enacted a Resolution on the Elimination of Domestic Violence Against Women<sup>115</sup>, which furthered the development of moving the issue of domestic violence into a more realistic direction. First of all, the Resolution widens the scope of domestic violence by stating that it can be committed by a person who is related to the victim via blood or intimacy<sup>116</sup>, thus it does not only cover violence occurring within the marriage. Additionally, as to the acts constituting domestic violence, it is approached in a quite broad manner stating that, *“domestic violence can include economic deprivation and isolation and that such conduct may cause imminent harm to the safety, health or well-being of women”*<sup>117</sup>.

The Resolution prescribes State obligations not only in the field of law-making - thus to provide criminal measures on marital rape and sexual abuse of women and to secure that the perpetrators are tried and convicted<sup>118</sup> - but on the adoption of preventative measures when necessary (e.g. restraining orders<sup>119</sup>), and calls on the States to take steps to help women achieve greater independence to reduce their vulnerability (e.g. by applying the principle of equal pay for equal work<sup>120</sup>). Furthermore the Resolution targets the causes and consequences of domestic

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<sup>112</sup> Ibid at para 14

<sup>113</sup> Ibid at para 18

<sup>114</sup> Ibid

<sup>115</sup> Resolution on the Elimination of Domestic Violence Against Women see supra note 101

<sup>116</sup> Ibid at para 1 (a)

<sup>117</sup> Ibid at para 1 (e)

<sup>118</sup> Ibid at para 6, 7 (b)

<sup>119</sup> Ibid at para 7 (e)

<sup>120</sup> Ibid at para 7 (m)

violence from a rather practical approach when lists the existence of gender insensitive laws, ineffective police response and lack of public awareness on the problem amongst those<sup>121</sup>.

### **2.2.3. The work of the Special Rapporteur on violence against women, its causes and consequences**

The general aim of the UN Commission of Human Rights when deciding on the establishment of the position of the Special Rapporteur on violence against women, its causes and consequences<sup>122</sup> was to found an institution dealing solely with the issue of violence against women and reporting on its findings. The Special Rapporteur on violence was mandated to collect information on the issue of violence against women from governmental and non-governmental institutions<sup>123</sup>, to provide recommendations on the measures to be taken at international, regional, national and local level on combating violence<sup>124</sup> and to cooperate with other UN bodies in order to include the issue of gender based violence into their work<sup>125</sup>.

The tasks of the Special Rapporteur on violence are extensive, amongst others she carries out State visits either individually or as a part of an investigating group of other human rights bodies<sup>126</sup>, transmits urgent appeals and communications on the alleged violations of women's rights based on the individual complaints received<sup>127</sup>, or issues annual thematic reports<sup>128</sup> (e.g. on gender-related killings of women<sup>129</sup>, on violence against women perpetrated and/or condoned by

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<sup>121</sup> Ibid at para 7 (g)-(h) and (k)

<sup>122</sup> Special Rapporteur on violence against women, its causes and consequences was appointed by the Commission on Human Rights in resolution 1994/45, adopted on 4 March 1994

<sup>123</sup> Ibid at para 7 (a)

<sup>124</sup> Ibid at para 7 (b)

<sup>125</sup> Ibid at para 7 (c)

<sup>126</sup> Ibid at para 11

<sup>127</sup> <http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/Complaints.aspx>

<sup>128</sup> Resolution 1994/45, supra note 122 at para 6

<sup>129</sup> Annual report on gender-related killings of women A/HRC/20/16



the State during times of armed conflict<sup>130</sup> and on trafficking in women, women's migration and violence against women<sup>131</sup>).

The phenomenon of domestic violence and the responsibility of the States in course of combating it appeared early on the agenda of the Special Rapporteur on violence; in her 1994 report<sup>132</sup> Ms. Radhika Coomaraswamy explicitly stated that the State's inaction is the main cause of the violence happening against women<sup>133</sup>. After processing the information gathered on the different standards, laws and practices of the States, in her 1998 Report<sup>134</sup> it was clearly stated that regardless of their existing obligations under international law, States are failing to prevent, investigate and prosecute domestic violence cases<sup>135</sup>. It was later clarified that not only wives but *"live-in partners, former wives or partners, girl-friends (including girl-friends not living in the same house), female relatives (including but not restricted to sisters, daughters, mothers) and female household workers"*<sup>136</sup> are entitled for protection.

Further significant step was the recognition of domestic violence as a form of torture<sup>137</sup> by stating that it is inflicted intentionally and with a special purpose, it results in severe physical and/or mental pain, and is carried out with some form of official involvement (either active or passive)<sup>138</sup>. What follows from the categorization of domestic violence, as a form of torture is that international human right bodies specialized on the alleged violations of ill treatment and torture might expand their investigations to the cases of domestic violence as well.

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<sup>130</sup> Annual report on violence against women perpetrated and/or condoned by the State during times of armed conflict E/CN.4/2001/73

<sup>131</sup> Annual report on trafficking in women, women's migration and violence against women E/CN.4/2000/68

<sup>132</sup> Preliminary report submitted by the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, E/CN.4/1995/42

<sup>133</sup> Ibid at para 51, 72

<sup>134</sup> Report on violence against women in the family, E/CN.4/1999/68

<sup>135</sup> Ibid at para 82

<sup>136</sup> 15 years of the United Nations SR on violence against women, its causes and consequences (1994-2009): A critical review, A/HRC/11/6/Add.5 at para 31

<sup>137</sup> Violence within the family, E/CN.4/1996/53

<sup>138</sup> Ibid at para 43

## 2.3. Bodies and mechanisms of protection

### 2.3.1. The CEDAW Committee and its complaint procedure

The CEDAW Committee was vested with the power to receive individual complaints under the Optional Protocol to CEDAW on the alleged violations of the State obligations under the Convention<sup>139</sup>. Given the nature of the instrument of an optional protocol as such, only those States are subject to the jurisdiction of the Committee's procedure, which previously ratified the protocol. Now it has 106 parties and 80 signatories<sup>140</sup>. The peculiarity of the Optional Protocol to CEDAW is that it does not allow the possibility of making reservations<sup>141</sup>.

The powers of the Committee do not only include receiving and deciding on communications, but it is entitled to carry out on the spot investigations as well<sup>142</sup>, as it happened in the case of mass disappearances in Ciudad Juárez, Mexico<sup>143</sup>. However it must be pointed out that Article 10 of the Optional Protocol significantly weakens this power of the Committee, given that it grants the States the possibility to decline the competence of the Committee in carrying out investigations<sup>144</sup>. To avoid irreparable damage, the possibility of application of interim measures is granted under Article 5 of the Optional Protocol.

As to the question of admissibility, for a communication to be admissible there are numerous requirements to be fulfilled, such as the exhaustion of the local remedies<sup>145</sup>, the written form of the communication furthermore it shall not be anonymous<sup>146</sup>. Additionally there are several reasons for which the communication could be considered inadmissible: if the case is already a *res iudicata* under the Committee's or under other international dispute settling forum's

<sup>139</sup> Optional Protocol to CEDAW at article 1 and 2

<sup>140</sup> See: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8-b&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en)

<sup>141</sup> Optional Protocol to CEDAW at article 17

<sup>142</sup> Ibid at article 8

<sup>143</sup> Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention, and reply from the Government of Mexico

See: <http://www.un.org/womenwatch/daw/cedaw/cedaw32/CEDAW-C-2005-OP.8-MEXICO-E.pdf>

<sup>144</sup> Optional Protocol to CEDAW at article 10

<sup>145</sup> Ibid at article 4

<sup>146</sup> Ibid at article 3

jurisprudence<sup>147</sup>, if it is manifestly ill founded<sup>148</sup> or if it is incompatible with the provisions of the CEDAW<sup>149</sup>.

The procedural rules under the Optional Protocol establish strict deadlines for the parties in order to avoid the continuance of the proceedings; the State concerned has 6 months to provide its arguments in the case after being informed about the proceeding<sup>150</sup>, after which the Committee decides on the merit of the case and provides its recommendations to the parties<sup>151</sup>. The State then has further six months to submit a report on the measures taken based on the decision and the recommendations received from the Committee<sup>152</sup>.

### **2.3.2. Case law of the CEDAW Committee on domestic violence**

This sub-chapter will discuss the communications made to the Committee concerning inter-family violence: the case of *A.T. v. Hungary*<sup>153</sup>, *Goekce v. Austria*<sup>154</sup> and *Fatma Yildirim v. Austria*<sup>155</sup> by focusing on the similarities with the cases of the ECtHR jurisdiction in defining the State obligations.

#### **A.T. v. Hungary (2003)**

In the case concerning Hungary the author claimed that she had been subject to severe domestic violence and serious life threats by her husband L.F. for a four years period and the State Party failed to provide her with effective protection<sup>156</sup>. She stated that she was battered on several occasions and she obtained ten medical certificates for the physical violence suffered. She argued that the Hungarian authorities had failed to perform their obligations arising from the Convention,

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<sup>147</sup> Ibid at article 4

<sup>148</sup> Ibid

<sup>149</sup> Ibid

<sup>150</sup> Ibid at article 6

<sup>151</sup> Ibid at article 7

<sup>152</sup> Ibid at article 7

<sup>153</sup> See supra note 55

<sup>154</sup> Şahide Goekce (deceased) v. Austria (Communication No. 5/2005)

<sup>155</sup> Fatma Yildirim (deceased) v. Austria (Communication No. 6/2005)

<sup>156</sup> See supra note 55 at para 2.1

given that neither a protection order was issued against L.F., nor was he detained by the police at any point of the criminal proceedings, additionally the protection system in Hungary provided no shelter to accommodate the family: the author, her fully disabled son and her daughter<sup>157</sup>.

The author initiated civil proceedings against L.F. concerning his access to the family flat - on which the author and her husband had joint ownership -, but under the final decision of the Budapest Regional Court, L.F. was allowed to go back to the apartment based on the lack of substantial evidence on the domestic violence<sup>158</sup>. The proceedings regarding the division of the property or granting the author the exclusive right over the property were also unsuccessful due to the lack of legal provisions to remedy the situation and the unwillingness to cooperate on L.F.'s side. As to the ongoing criminal proceedings, the author stated that two sets of proceedings were initiated against L.F. concerning two incidents of battery causing her bodily harm, but her husband was not detained at any time during the proceedings thus the authorities had failed to protect her from further violence<sup>159</sup>.

The author claimed that Hungary violated its positive obligations under Article 2 (a), (b) and (e)<sup>160</sup>, 5 (a)<sup>161</sup> and 16<sup>162</sup> of the CEDAW - which include the right to equality before the law, equality in marriage and the duty of the States to adopt measures to eliminate discrimination – by failing to issue protections orders against L.F., not detaining him and by the lengthy criminal

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<sup>157</sup> Ibid

<sup>158</sup> Ibid at para 2.4

<sup>159</sup> Ibid at para 2.6

<sup>160</sup> Article 2 (a) (b), (e) of CEDAW: “States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle; (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise”

<sup>161</sup> Article 5 (a) of the CEDAW “States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;”

<sup>162</sup> Article 16 of the CEDAW “States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women.”

proceedings she was subject to. One of the major achievements of the case was that the Committee issued a request to Hungary under Article 5 (1) of the Optional Protocol asking the State Party to provide immediate, concrete and appropriate protection to the author against the ongoing violence.

In its consideration on the merits the Committee stated that regardless of the fact that the CEDAW does not explicitly list the issue of violence against women in its text, under the provisions of the General Recommendation No. 19 on violence against women “*the definition of discrimination includes gender-based violence*”<sup>163</sup>. As to the existence of the State responsibility the Committee also referred back to the wording of General Recommendation No. 19 by stressing that “*(u)nder general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation*”<sup>164</sup>.

The Committee found the violation of Article 2 (a), (b) and (e) and argued that despite the legal reforms envisioned in Hungary, these were not able to address the insecurity the author faced as a consequence of the domestic violence in her family. Furthermore the Committee pointed out that the author’s right to life and physical and mental integrity is superior to the right to property and the right to privacy<sup>165</sup>. Given the above, in the Committee’s interpretation on Article 2 (a), (b) and (e) the State party is obliged to provide protection and prevention from domestic violence, which obligation was not fulfilled in the author’s case, thus her right to security of a person was violated.

The Committee considered Article 5 and 16 together, by pointing out that the stereotypes in Hungary on the role and powers of the man and women within the family rise concerns<sup>166</sup>, and listed the facts of the case to underpin the existence of gender-based discrimination, such as the

<sup>163</sup> General Recommendation No. 19 see supra note 7 at para 6

<sup>164</sup> Ibid at para 9

<sup>165</sup> A.T. v Hungary see supra note 55 at para 9.3

<sup>166</sup> Ibid at para 9.4

unsuccessful criminal and civil proceedings on prohibiting L.F. to enter the apartment, the lack of legal instruments on issuing protection or restraint orders and the absence of access to shelters equipped to accommodate the son with special needs.

**Şahide Goekce (deceased) v. Austria (2005)**

The Committee dealt with the phenomenon of domestic violence in Şahide Goekce (deceased) v. Austria case in 2005. The authors were the representatives of the descendants of the deceased Şahide Goekce, the Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice<sup>167</sup>. The authors claim that Şahide Goekce was a victim of repeated and severe physical violence and continuous death threats from her husband Mustafa Goekce, which violence ended with her death.

The authors argued that Austria was in breach of its obligations under the CEDAW, especially its Article 1<sup>168</sup>, 2<sup>169</sup>, 3<sup>170</sup> and 5<sup>171</sup> in the reading of the provisions of General Recommendation No. 19<sup>172</sup>. It was argued that the existing legal framework in Austria did not provide Sahide Goekce with effective and appropriate measures to protect her personal security and regardless of the fact that the Austrian authorities were aware of Mustafa Goekce's extremely violent behavior; they gave his right to liberty a priority over Sahide Goekce's right to personal security.

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<sup>167</sup> See supra note 154 at page 2

<sup>168</sup> Article 1 of the CEDAW: "For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

<sup>169</sup> See supra note 160

<sup>170</sup> Article 3 of the CEDAW: "States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men"

<sup>171</sup> See supra note 161

<sup>172</sup> Şahide Goekce (deceased) v. Austria, see supra note 154 at para 3.1

As to the alleged violation to Article 1 of the Convention the authors claimed that women are disproportionately affected by the failures of the authorities when acting in course of domestic violence cases, given that public prosecutors rarely decide on the detention of violent offenders, furthermore the inappropriate and ineffective prosecution and punishment of the ones committing the violence are deemed to be the general rule<sup>173</sup>. It was added that as a result of the failure of the public prosecutors to take domestic violence cases seriously, women face a higher risk compared to men to have their right to life and personal security violated<sup>174</sup>.

The Committee found Austria in violation of its obligations arising from Article 2 (a), (c), (f) and 3 of the CEDAW and refused to accept the arguments presented by the State Party, thus that the authorities acted in accordance with their CEDAW obligations and they issued expulsion and prohibition to return orders against Mustafa Goekce in order to provide protection for Şahide Goekce<sup>175</sup>. The Committee stated that despite the fact there was sufficient substantial information available to the authorities to oversee the situation and the severity of the domestic violence happening in the family of Şahide Goekce they failed to act with due diligence, additionally it was stressed that despite the holistic system for protection measures in force in Austria – e.g. prohibition orders, psychological advice, toll-free hotline on multiple languages, awareness raising campaign, etc.<sup>176</sup> – the State actors failed to contribute to the effective implementation of those. As a general rule – as in the case of *A.T. v. Hungary* - the Committee stated that the offender's rights couldn't exceed the right of women to personal security and fear-free life<sup>177</sup>.

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<sup>173</sup> Ibid at para 3.3

<sup>174</sup> Ibid

<sup>175</sup> Ibid at para 8.10-8.11

<sup>176</sup> Ibid at para 8.15, 12.1.2.

<sup>177</sup> Ibid at para 12.1.4

***Fatma Yildirim (deceased) v. Austria (2005)***<sup>178</sup>

The *Fatma Yildirim (deceased) v. Austria* case shares several common features with the *Şahide Goekce* case, given that the victim also deceased as a result of domestic violence suffered from her husband; the case was initiated against the State Party Austria and the authors were the Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice acting in the representation of the descendants of the victim<sup>179</sup>.

As to the facts of the case, the victim was married to Irfan Yildirim in 2001 and had no children from this - but three from her previous - marriage. It was in 2003 when their relationship deteriorated and the husband started to pose death threats to her<sup>180</sup>. After Fatma Yildirim notified him on her intent to divorce, he threatened to kill her and her children. Despite a series of death threats and assaults against the victim, the public prosecutor rejected the repeated requests for the perpetrator to be detained and only expulsion and prohibition to return orders were issued against Irfan Yildirim<sup>181</sup>. Notwithstanding the interim injunction against the perpetrator – issued by the Vienna District Court of Hernals valid till the end of the divorce proceedings – on 11 September 2003 he killed Fatma Yildirim<sup>182</sup>.

The authors claimed that the State Party breached its obligations arising from the Convention, particularly Article 1, 2, 3 and 5<sup>183</sup> and the provisions of General Recommendation No. 19 by using essentially the same arguments as in the *Şahide Goekce* case. The authors argued that given the lack of effective communication between the police authorities and the public prosecutor, the latter could not assess the danger the victim faced and for this reason the offender remained at large and continued to pose serious danger to the life of the victim. It was additionally

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<sup>178</sup> See supra note 155

<sup>179</sup> Ibid at page 2

<sup>180</sup> Ibid at para 2.2

<sup>181</sup> Ibid at para 2.3

<sup>182</sup> Ibid at para 2.13

<sup>183</sup> See supra note 160, 161, 168, 170



stated that the lack of seriousness in the approach of the public authorities and thus the negligence in fulfilling their due diligence obligations in domestic violence cases resulted in the violation of Şahide Goekce's human rights<sup>184</sup>. Additionally the authors recommended that a change in the approach of the national authorities would be necessary for a pro-arrest/detention and pro-prosecution policy to provide more effective protection to the victims of domestic violence and have deterrence on future offenders<sup>185</sup>.

The Committee considered the issue of admissibility and the question of effective remedies in lengthy paragraphs by stating that the flaws in the law (the victim had no legal option to appeal against the decision rejecting her request for Irfan Yildirim's detention)<sup>186</sup> together with the negligence of the authorities (the lack of information on the available and effective actions) contributed to find the communication admissible<sup>187</sup>.

The Committee decided on the violation of Article 1, 2, 3 of the CEDAW and rejected the State Party's arguments that the detention of the offender could only serve as an *ultima ratio* solution to the problem, given that without sufficient substantial evidence on the immediate and severe threat the offender poses to the victim – as to the State Party it was absent in the present case given that the offender was socially integrated without a criminal record –, the perpetrator's detention would easily lead to the violation to his personal freedom and fair trial rights<sup>188</sup>.

The Committee pointed out that the Austrian authorities were aware or should have been aware of the dangerous situation the victim faced due to the threats of Irfan Yildirim and the seriousness of the consequences the perpetrator would have encounter in the case of divorcing the victim (namely loosing his residence permit in Austria), consequently Austria failed to fulfill its due diligence obligations arising from the CEDAW<sup>189</sup>. Finally the Committee noted once again

<sup>184</sup> Fatma Yildirim (deceased) v. Austria at para 3.4-3.6

<sup>185</sup> Ibid at para 3.8

<sup>186</sup> Ibid at para 7.4

<sup>187</sup> Ibid at para 7.5

<sup>188</sup> Ibid at para 8.13

<sup>189</sup> Ibid at para 12.1.4

that the rights of the offender could not come before the women's right to life and mental and physical integrity<sup>190</sup>.

## 2.4. Assessment

As we see from the above there are several legal instruments born under the auspice of the UN aiming to provide a holistic guidance to the Member States how to act effectively in cases of domestic violence. The major shortcoming of the CEDAW is the lack of express provisions on prohibiting violence against women as such, thus one could rightfully pose the question, would the existence of a legally binding instrument on the issue, the amendment of the CEDAW or the adoption of an Optional Protocol contribute to a more adequate protection?

In order to answer the question the role of General Recommendation No. 19 must be mentioned, consequently that it provides a link between the issue of violence against women and gender based discrimination banned by the CEDAW. Furthermore, the jurisprudence of the CEDAW Committee undoubtedly represents the tendency to deal with the State obligations on inter-family violence under the obligations arising from tackling gender-based discrimination under the CEDAW.

I agree with Dubrovka Simonovic when suggesting that the DEVAW, the first international legal instrument concentrating solely on the phenomenon of violence against women could be updated and amended with a proper action plan on the enforcement of its provisions, in order to strengthen the system in force to eliminate domestic violence against women.<sup>191</sup>

## 3. The regional system of protection - the Council of Europe

The present chapter will focus on the regional legal instruments developed by the Council of Europe and the enforcing mechanisms and bodies guarding and monitoring the implementation of

<sup>190</sup> Ibid at para 12.1.5

<sup>191</sup> Dubrovka Simonovic, Global and Regional Standards on violence against women: the evolution and synergy of the CEDAW and Istanbul conventions, in Human Rights Quarterly, 2014, at page 602

these provisions. Additionally the practice of the ECtHR on domestic violence cases and the possible role the Istanbul Convention and the Group of Experts on Action against Violence against Women and Domestic Violence (hereinafter referred to as: GREVIO) might play in providing more effective protection will also be under my examination.

### 3.1. Legal instruments

#### 3.1.1 Before the Istanbul Convention

The first legal instrument aiming to provide protection for human rights adopted by the Council of Europe Member States was the ECHR. The Convention did not list the prohibition of violence against women or domestic violence amongst its provisions, however there are several articles of the Convention, which could be related to the phenomenon: the right to life (*„Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”*<sup>192</sup>), prohibition of torture (*„No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”*<sup>193</sup>), right to respect for private and family life (*“1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”*<sup>194</sup>) and prohibition of discrimination on the basis of sex (*“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other*

<sup>192</sup> Article 2 (1) of the ECHR

<sup>193</sup> Article 3 of the ECHR

<sup>194</sup> Article 8 of the ECHR

*status.*”<sup>195</sup>). Further protection is granted under Protocol 7 of the ECHR, in virtue of which both spouses are entitled for the same civil rights and obligations deriving from the marriage under the laws of the Member State<sup>196</sup>.

In numerous recommendations and resolutions both the Committee of Ministers (Recommendation No R (85) 4 on violence in the family<sup>197</sup> and Recommendation No R (90) 2 on social measures concerning violence in the family<sup>198</sup>) and the Parliamentary Assembly of the Council of Europe (Recommendation 1582 (2000) on domestic violence against women<sup>199</sup>) raised awareness on the issue of inter-family violence and proposed measures on protection, prevention on punishment. In 2002 the Committee of Ministers of the Council of Europe issued a detailed report on protection of women against violence<sup>200</sup>, which concretely prescribed the steps, which need to be taken in the field of criminal law, civil law and the procedural issues in the scope of the general and special prevention measures envisaged. The Recommendation also listed several proposals targeting especially the issue of domestic violence<sup>201</sup>, such as to define all forms of inter-family violence as criminal offence under the national legislature; adopt a compulsory protocol for law enforcement and medical bodies, which is to be followed in cases of domestic violence; allow the judiciary to adopt interim measures for the more effective protection of the victims and ensure smoother cooperation between the police, judiciary and social services.

<sup>195</sup> Article 14 of the ECHR

<sup>196</sup> Protocol 7 to the ECHR, Article 5: „*Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children.*”

<sup>197</sup> Recommendation No R (85) 4 on violence in the family adopted on 26 March 1985 by the Committee of Ministers  
See: [http://www.coe.int/t/dghl/standardsetting/victims/recR\\_85\\_4e.pdf](http://www.coe.int/t/dghl/standardsetting/victims/recR_85_4e.pdf)

<sup>198</sup> Recommendation No R (90) 2 on social measures concerning violence in the family adopted on 15 January 1990 by the Committee of Ministers  
See: [http://niebieska.linia.info/pliki/dokumenty/Wazne%20dokumenty/Rekomendacja%20Komitetu%20Ministrów%20R\(90\)%202%20w%20sprawie%20reakcji%20społecznych%20na%20przemoc%20w%20rodzinie%20z%20dnia%2015%20stycznia%201990%20roku.pdf](http://niebieska.linia.info/pliki/dokumenty/Wazne%20dokumenty/Rekomendacja%20Komitetu%20Ministrów%20R(90)%202%20w%20sprawie%20reakcji%20społecznych%20na%20przemoc%20w%20rodzinie%20z%20dnia%2015%20stycznia%201990%20roku.pdf)

<sup>199</sup> Recommendation 1582 (2000) on domestic violence against women adopted on 27 September 2002 by the Parliamentary Assembly

See: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17055&lang=EN>

<sup>200</sup> Recommendation Rec (2002)5 of the Committee of Ministers to member states on the protection of women against violence, adopted by the Committee of Ministers on 30 April 2002

See: <https://wcd.coe.int/ViewDoc.jsp?id=280915>

<sup>201</sup> Ibid at para 55-59

In 2005 with its Recommendation No 1681 the Parliamentary Assembly launched a Europe wide campaign aiming to combat domestic violence against women<sup>202</sup>. The campaign set the goal to promote the implementation of the steps proposed in Recommendation 1582 (2000) on domestic violence against women<sup>203</sup> and advised the launching of a national campaign, which focused on three main topics: prevention of domestic violence, providing assistance for victims and disseminating information to the public<sup>204</sup>. Recommendation No 1681 furthermore raised the idea of setting up an ad-hoc group<sup>205</sup> helping the realization of the tasks envisaged in course of the campaign at national level and issuing proposals to the Member States, which group was established in 2005 as a Council of Europe Task Force to Combat Violence against Women, including Domestic Violence (hereinafter referred to as: EG-TFV)<sup>206</sup>.

Realizing the need for an inter-state cooperation, the Parliamentary Assembly called on the European parliaments to unite in combating domestic violence with its Resolution 1512 (2006)<sup>207</sup> and explicitly denied any objection based on religious or cultural relativism when complying with the prescribed obligations<sup>208</sup>. The Final Report of the EG-TFV on domestic violence from 2008<sup>209</sup> not only measured the characteristics of national practices in course of combating domestic violence but tried to identify the theoretical and practical components of the States' due diligence obligations and issued a publication on the minimum standards for support services<sup>210</sup>.

<sup>202</sup> Recommendation 1681 (2004) of the Parliamentary Assembly on campaign to combat domestic violence against women in Europe

See: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17273&lang=EN>

<sup>203</sup> See supra note 199

<sup>204</sup> Recommendation 1582 (2000) on domestic violence against women, supra note 199 at para 5

<sup>205</sup> Ibid at para 7.3

<sup>206</sup> It was set up following a decision taken at the Third Summit of Heads of State and Government of the Council of Europe (Warsaw 16-17 May 2005)

See: [http://www.coe.int/t/dg2/equality/domesticviolencecampaign/Intro\\_Task\\_Force\\_EN.asp](http://www.coe.int/t/dg2/equality/domesticviolencecampaign/Intro_Task_Force_EN.asp)

<sup>207</sup> Adopted on 28 June 2006

See: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17464&lang=EN>

<sup>208</sup> Ibid at para 2

<sup>209</sup> Council of Europe Task Force to Combat Violence against Women, including Domestic Violence: Final Activity Report (2008)

See: [http://www.coe.int/t/dg2/equality/domesticviolencecampaign/Source/Final\\_Activity\\_Report.pdf](http://www.coe.int/t/dg2/equality/domesticviolencecampaign/Source/Final_Activity_Report.pdf)

<sup>210</sup> Prof. Liz Kelly, Combating violence against women: minimum standards for support services, London Metropolitan University and Lorna Dubois (2008)

The final report in question concluded that the responses to the issue of domestic violence vary significantly in the 47 states and identified the most important areas where change has to be made at domestic level, as follows:

*“any and every act of violence against women is considered a criminal offence; violence perpetrated by a partner or former partner is punished more severely than violence among strangers (e.g. gender- based violence as such or the abuse of power is considered an aggravating circumstance); victims are enabled to seek justice in a humane manner (e.g. through specialized courts dealing with domestic violence, specialized units within the police, the public prosecutor's office or the judiciary); there is a national emergency helpline available round the clock, free of charge, for victims of domestic violence; sufficient numbers of safe shelters for victims of domestic violence have been set up; administrative data on victims of domestic violence are collected; it is recognized that domestic violence is not a private matter but a human rights violation to be addressed by all state organs and every individual”<sup>211</sup>.*

### **3.1.2. The Istanbul Convention<sup>212</sup>**

Based on the abovementioned development we can easily conclude that the issue of tackling domestic violence, identifying the roots of the problem and proposing comprehensive measures to provide more effective support and protection to the victims were all on the agenda of the Council of Europe for a long time, furthermore the proposal for a legally binding regional convention on violence against women and domestic violence appeared in the final report of the EG-TFV as well<sup>213</sup>. In 2008 the Committee of Ministers mandated a group of experts, the Ad Hoc Committee on Preventing and Combating Violence against Women and Domestic Violence to carry out

<sup>211</sup> Final Activity Report see at supra note 209 at page 17

<sup>212</sup> See supra note 4

<sup>213</sup> Final Activity Report see at supra note 209 at page 79

research and prepare a draft convention on combating violence against women, with special attention to the phenomenon of domestic violence<sup>214</sup>. The final version of the text was adopted by the Committee of Ministers on 7 April 2011 and has 19 ratifications until now<sup>215</sup>.

The Convention stands out in its scope and approach on violence against women for several reasons, first it applies and furthers the concept described in the CEDAW and General Recommendation No. 19 and identifies the problem as both a human rights violation and a gender based discrimination<sup>216</sup>. Second, that it provides us with detailed definitions on concepts not defined in a legally binding form before, such as violence against women, gender based violence against women, domestic violence or due diligence<sup>217</sup>. Finally, in order to reach a harmonized approach in the area, the Convention names the steps the Member States need to take in order to provide more active protection, prevention and prosecution by adopting or modifying substantive criminal or civil law and in reaching the actual realization of those in the practice.

As to the question of prevention the State obligations are defined in the field of awareness raising, media and private sector contribution, preventative treatment and intervention, education and training for professionals<sup>218</sup>. By signing the Convention the Member States undertake the obligation to establish special and general support services; disseminate information to the victims on the help available to them; provide shelters/hotlines and assistance in lodging a complaint or report the violence; furthermore to take special care and support on child witnesses and victims of sexual violence<sup>219</sup>. In respect of protective measures the Convention obliges the national authorities to take immediate response when facing ongoing violence, thus to carry out risk

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<sup>214</sup> Council of Europe website

[http://www.coe.int/t/dghl/standardsetting/convention-violence/background\\_en.asp](http://www.coe.int/t/dghl/standardsetting/convention-violence/background_en.asp)

<sup>215</sup> <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=210&CM=1&DF=&CL=ENG>

<sup>216</sup> Istanbul Convention see supra note 3 at Article 3 (a)

<sup>217</sup> Ibid at article 3 (a)-(f)

<sup>218</sup> Ibid at article 3-17

<sup>219</sup> Ibid at article 19-28

assessment, issue protection or restrain orders and to adopt a legislative framework which enables the prosecutor to initiate proceedings without the full involvement/approval of the victim<sup>220</sup>.

Applying the model of the CEDAW Committee the Convention established its own monitoring body, the Group of experts on action against violence against women and domestic violence (hereinafter referred to as “GREVIO”)<sup>221</sup>, which membership is gender and geographically balanced. The main task of the GREVIO is to receive and evaluate the State reports submitted under the questionnaire prepared by the GREVIO, but the body is entitled to carry out country visits<sup>222</sup> or issue general recommendations as well<sup>223</sup>. Based on the information provided by the State, the GREVIO adopts its report and conclusion under which the Committee of the Parties might issue its recommendations to the State in question on the more effective implementation of the provisions of the Convention. The major shortcoming of the GREVIO to be mentioned – in comparison to the powers of the CEDAW Committee – is the lack of individual complaint procedure.

### 3.2. The ECtHR case law

Under Article 19 of the European Convention of Human Rights the Member States of the Council of Europe decided on the establishment of a permanent court in order to guarantee the observance of the State obligations arising from the Convention. One of the main tasks of the ECtHR is to hear complaints submitted by individuals claiming the violation of their rights arising from the ECHR<sup>224</sup>, which – in the majority of the cases concerning domestic violence – are the alleged violation of the right to respect for private and family life and the right to life but the prohibition of torture and discrimination were also frequently claimed.

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<sup>220</sup> Ibid at article 50-55

<sup>221</sup> Ibid at article 66

<sup>222</sup> Ibid at article 68

<sup>223</sup> Ibid at article 69

<sup>224</sup> ECHR at article 34



### 3.2.1. Domestic violence and positive obligations of the State under Article 8 of ECHR

#### *M.C. v. Bulgaria*

One of the early cases in which the ECtHR decided on the violation of Article 8 of the Convention by referring to the breach of positive obligations of the State<sup>225</sup> was the *M.C. v. Bulgaria*<sup>226</sup> in 2004, which case concerned the alleged multiple rape of the 14 years old applicant<sup>227</sup>. The applicant claimed that two guys, with whom she went out to a disco with, had sexual intercourse with her without her consent<sup>228</sup>. The two suspects however denied that the rape happened and insisted that the applicant consented to the sexual intercourses<sup>229</sup>.

After investigating the case the public prosecutor decided on closing the criminal proceedings given the lack of evidence on the rape, especially concerning the applicant's physical resistance against it. The prosecutor's decision was based on the regulation in the Criminal Code in force at the time in Bulgaria, under which in order to initiate criminal proceedings there was a need to demonstrate that the person was forced into sexual intercourse with using threat or physical force<sup>230</sup>.

The ECtHR examined the international and regional trends on the law and practice regarding the regulation of the crime of rape and highlighted that there is a shift in the application of the elements of crime. The Court stressed that in the vast majority of the European jurisdictions it was no longer needed to prove that physical force was used during the intercourse<sup>231</sup>, which finding was underpinned by making reference to the Recommendation Rec(2002)5 of the Committee of Ministers of the Council of Europe on the protection of women against violence, under which

<sup>225</sup> See for more detail the cases of *JOHNSTON AND OTHERS v. IRELAND* (application no. 9697/82), *X AND Y v. THE NETHERLANDS* (application no. 8978/80)

<sup>226</sup> *M.C. v. Bulgaria* (application no. 39272/98)

See: [http://hudoc.echr.coe.int/eng?i=001-61521#{"itemid":\["001-61521"\]}](http://hudoc.echr.coe.int/eng?i=001-61521#{)

<sup>227</sup> *Ibid* at section 2-3

<sup>228</sup> *Ibid*

<sup>229</sup> *Ibid* at para 19 and 31

<sup>230</sup> *Ibid* at para 64

<sup>231</sup> *Ibid* at 154-166

“penalizing non-consensual sexual acts, including in cases where the victim does not show signs of resistance”<sup>232</sup>, is a requisite for the protection of women against violence<sup>233</sup>.

The Court furthermore stressed that the States are obliged to take positive steps and apply all the necessary measures in order to fully comply with their obligations arising under Article 8 of the ECHR<sup>234</sup>, which measures must provide for proper criminal law provisions having deterrent effect and effective criminal prosecution in cases of rape<sup>235</sup>. In finding a violation to the applicant’s right under Article 8 the Court pointed to the lack of effective investigation on the side of the Bulgarian authorities by not properly examining the witnesses, the failure to take into consideration the special psychological factors contributing to the rape and the automatic application of the presumption on “date-rape”<sup>236</sup> was also a significant aggravating factor<sup>237</sup>.

### ***Bevacqua and S. v. Bulgaria***<sup>238</sup>

The first applicant, Mrs Valentina Nikolaeva Bevacqua<sup>239</sup> claimed that she was subject to regular battering by her husband Mr. N., which violence continued despite the fact that she filed a divorce and left her husband taking their son with her<sup>240</sup>. She added that her request for interim custody order was not dealt with in a proper and timely manner by the Bulgarian authorities, which failure resulted in shared custody over the child for more than a year period, thus contributed to the continuation of the violent situation<sup>241</sup>. The first applicant made a complaint to the prosecutor regarding the injuries suffered as a result of the battering, however the prosecutor rejected to initiate criminal proceedings against the husband, given that the nature of the injuries

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<sup>232</sup> Ibid at 101

<sup>233</sup> Ibid

<sup>234</sup> Ibid at 105

<sup>235</sup> Ibid at 153

<sup>236</sup> Ibid at 177-179

<sup>237</sup> Ibid at 177-179 and 185

<sup>238</sup> Bevacqua and S. v. Bulgaria (application no 71127/01)

See: [http://hudoc.echr.coe.int/eng?i=001-86875#{"itemid":\["001-86875"\]}](http://hudoc.echr.coe.int/eng?i=001-86875#{)

<sup>239</sup> The second applicant S. was the son of Mrs Valentina Nikolaeva Bevacqua

<sup>240</sup> Ibid at para 5-7

<sup>241</sup> Ibid at para 13-28

was only light, consequently under the Bulgarian law it was up to the first applicant herself to bring private prosecution proceedings<sup>242</sup>.

In course of its investigation on the merits, the Court in the present case also referred back to Recommendation Rec(2002)5 of the Committee of Ministers of the Council of Europe on the protection of women against violence, by listing the envisaged State obligations concerning domestic violence cases, thus to “*ensure where necessary that measures are taken to protect victims effectively against threats*”<sup>243</sup> and “*classify all forms of violence within the family as criminal offences and envisage the possibility of taking measures in order, inter alia, to enable the judiciary to adopt interim measures aimed at protecting victims, to ban the perpetrator from contacting, communicating with or approaching the victim*”<sup>244</sup>.

As a relevant principle to the case the Court went on stating that the positive obligations of the State deriving from Article 8 of the ECHR incorporate the duty to establish and secure the proper application of a legal framework providing protection against the violence by private individuals<sup>245</sup>. The Court stressed that the delay in deciding on the interim measure was attributable to an unjustified practice of the Bulgarian courts by giving priority to the possible reconciliation of the couple instead of taking seriously the violence happening in the family and providing protection not only to the first but to the second, minor applicant as well<sup>246</sup>. As to the effectiveness of the measures applied against Mr. N., the Court stated that the Member States are not obliged to maintain a legal system in which the State is solely responsible for the prosecution of offenders of domestic violence, however the enactment of other policing and/or administrative measures, which are capable to tackle the ongoing situation is clearly the role of the State<sup>247</sup>.

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<sup>242</sup> Ibid at para 38

<sup>243</sup> Ibid at para 50

<sup>244</sup> Ibid at para 51

<sup>245</sup> Ibid at para 65

<sup>246</sup> Ibid at para 71

<sup>247</sup> Ibid at para 83

The Court furthermore pointed out that the excuse used by the authorities on their failure to provide the victim with timely and adequate assistance by treating the issue as a private matter, was unambiguously incompatible with the obligations arising from Article 8 of the Convention, thus must be rejected<sup>248</sup>.

### *A. v. Croatia*

In the case of *A. v. Croatia*<sup>249</sup> the applicant claimed that the Croatian authorities had failed to protect her from her mentally disturbed husband B.<sup>250</sup>, by not applying the substantive and procedural rules in force at the time and failing to enforce the measures imposed against him<sup>251</sup>. The applicant argued that as a consequence of the ongoing life threats and psychical violence against her and their common daughter<sup>252</sup>, a criminal proceeding was initiated against B. but the measures imposed on him were not properly enforced, which negligence resulted in the violation of her right to a private and family life.

The Court found a violation to Article 8 by holding that the Croatian authorities failed to provide the applicant with the protection they were obliged to under the Convention, regardless of the existence of the wide range of protection measures available in Croatia, such as the criminal law provisions on the prohibition of causing bodily injury, threats and violent behavior within the family<sup>253</sup>, and the positive adjudication of the enactment of a separate act to combat the issue of domestic violence (Protection Against Domestic Violence Act<sup>254</sup>). The Court emphasized that under its positive obligations the State is not only obliged to enact a legal framework to provide protection - amongst others through criminal-law provisions - but must safeguard that these legal

<sup>248</sup> Ibid

<sup>249</sup> *A. v. Croatia* (application no: 55164/08)

See:

[http://hudoc.echr.coe.int/eng#{\"fulltext\":\[\"a%20v%20croatia\"\],\"documentcollectionid2\":\[\"GRANDCHAMBER\", \"CHAMBER\"\],\"itemid\":\[\"001-101152\"\]}](http://hudoc.echr.coe.int/eng#{\)

<sup>250</sup> Ibid at para 48

<sup>251</sup> Ibid at para 50

<sup>252</sup> Ibid at para 7-10

<sup>253</sup> Ibid at para 41

<sup>254</sup> Ibid at para 42

provisions are properly implemented and enforced in practice by the authorities<sup>255</sup>.

In finding a violation the Court furthermore stated that the authorities were not taking into consideration with due diligence the findings of the psychiatric report on B.'s mental condition in their decision-making and failed to take the necessary steps in order to enforce the recommendation on his compulsory psychiatric treatment. Additionally, the Court emphasized that the fact that the prison sentence and the fine imposed on B. was not enforced on him and the psychiatric treatment was not served by him either, demonstrates that the criminal law provisions were not consistently followed in practice, they could not fulfill their deterrent effect and consequently were not able to protect the applicant from further violence<sup>256</sup>. In this regard the Court rejected to accept the excuse presented by the Government claiming that the failure is the result of the lack of prison capacity in Croatia<sup>257</sup>.

### **3.2.2. Positive obligations decided under Article 2, 3 and 14 of the ECHR**

#### ***Branko Tomašić and Others v. Croatia***<sup>258</sup>

The applicants, as indirect victims in the case claimed that the failure of the Croatian authorities to protect the life of their family members resulted in the violation of Article 2 of the Convention. As to the facts of the case, M.M. and M.T. – the latter was the daughter of the first two applicants - were partners from 2004 and had a daughter together, V.T. The family – M.M., M.T. and V.T. - lived in the house of M.T.'s parents, but due to the ongoing disputes in the family M.M. left the household in 2005<sup>259</sup>. From then on M.T. was subject to ongoing threats from M.M., stating that he will kill her and their daughter. The seriousness of the situation was well known by the authorities, M.M. disclosed his intention on killing his family before the Welfare Services of Čakovec and the police officers

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<sup>255</sup> Ibid at para 59-60

<sup>256</sup> Ibid at para 66-74

<sup>257</sup> Ibid at para 53

<sup>258</sup> Branko Tomašić and Others v. Croatia (application no. 46598/06)

See: [http://hudoc.echr.coe.int/eng?i=001-90625#{\"itemid\":\[\"001-90625\"\]}](http://hudoc.echr.coe.int/eng?i=001-90625#{\)

<sup>259</sup> Ibid at para 5

investigating in the criminal proceeding lodged by M.T.<sup>260</sup>. As a result of the criminal proceedings M.M. was sentenced to imprisonment for the threats he made to M.T. and their daughter, and based on the psychiatric report conducted in the proceedings the national court additionally decided that he need to be subject to compulsory psychiatric treatment<sup>261</sup>. After his release from the Varaždin Prison, before killing himself M.M. shot V.T. and M.T. dead<sup>262</sup>.

In its examination of the case the Court laid down the general principles concerning the State obligations deriving from Article 2 of the ECHR and stated that the State is not only obliged to safeguard the life of its citizens but there is the duty to provide criminal sanctions in order to deter any act, which might result in the violation to the right to life<sup>263</sup>. As to the operational aspect of the positive obligation of the State on prevention measures, the Court pointed out that for determining the existence of the positive obligations of the State it must be proven that the authorities knew/or should have known from the facts and circumstances of the case that the person's life was at real and immediate risk from the criminal act of a third party, but they did not to take measures within their power<sup>264</sup>.

Applying these guidelines the Court stated that the Croatian authorities were not only aware of the threats M.M. posed to M.T. and their daughter, but even criminal proceedings were initiated in course of which the Municipal Court took the opportunity to emphasize in its judgment that *“there is no doubt that frequent murder threats by ... a bomb should by any objective test have been understood as meant seriously”*<sup>265</sup>. Furthermore the Court stressed that the Croatian authorities failed to perform their obligations, given that regardless of the findings in the psychiatric report on M.M. having a mixed personality disorder<sup>266</sup> and the fact that the sentence on imprisonment prescribed a compulsory

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<sup>260</sup> Ibid at para 5-7

<sup>261</sup> Ibid at para 8

<sup>262</sup> Ibid at para 10

<sup>263</sup> Ibid at para 49

<sup>264</sup> Ibid para 51

<sup>265</sup> Ibid at para 9

<sup>266</sup> Ibid at para 13

psychiatric treatment<sup>267</sup>, the treatment carried out on him - limited number of conversations with the prison doctor and with the prison staff - could not be by any means considered as adequate.

As to the preventive steps taken by the authorities the Court held that Croatia had failed to carry out all the reasonable and necessary measures to prevent the death of M.T. and V.T.<sup>268</sup>, which resulted in the violation to Article 2 of the Convention. In reaching this decision the Court on the one hand emphasized that no adequate measures were taken upon M.M. during his imprisonment and after his release to cure his mental illness, notwithstanding that even the national courts had pointed out that the threats M.M. made were serious<sup>269</sup>. Furthermore the fact that M.M. did not show any sign on regretting his previous behavior could have also served as a significant warning for the authorities<sup>270</sup>. Finally the Court stressed that the fact that the authorities failed to conduct a search on M.M.'s premises - regardless that they were aware that using a bomb was always mentioned in his threats - must be considered as an aggravating factor<sup>271</sup>, furthermore the lack of precise legal regulations on the proper enforcement of the compulsory psychiatric treatment was also taken into account in finding a the violation in the case.

### ***Opuz v. Turkey***<sup>272</sup>

The *Opuz v. Turkey* case is considered as a landmark case when speaking about the jurisprudence of the ECtHR in domestic violence cases, given that it was the first case in which the Court found a violation to Article 14 of the Convention by deciding that the failure of the authorities to protect the applicant and her mother from domestic violence resulted in discrimination based on their gender.

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<sup>267</sup> Ibid

<sup>268</sup> Ibid at para 61

<sup>269</sup> Ibid at para 58-59

<sup>270</sup> Ibid

<sup>271</sup> Ibid at para 55

<sup>272</sup> *Opuz v. Turkey* see supra note 1

The applicant claimed that she and her mother were subject to continuous life threats, physical violence and life-threatening injuries<sup>273</sup> by her husband H.O. This circle of violence resulted in a dramatic end, H.O. killed the mother of the applicant. H.O. was later convicted and sentenced to life imprisonment for manslaughter, but was later released pending appeal and continued to threaten the applicant<sup>274</sup>. For the seven years of the ongoing violence<sup>275</sup> the applicant and her mother made numerous criminal complaints concerning their injuries, but given that except one case the husband always forced them to withdraw their complains, only one actual prosecution was brought against H.O., which resulted in a small fine to be paid in installments<sup>276</sup>.

By stressing the failure of the State to protect her and her mother from the violent behavior of H.O., the applicant claimed the violation of Article 2 of the Convention regarding the death of her mother and the breach of Article 3 of the Convention concerning the violence, threats and injuries she was subject to; furthermore the violation of Article 14, the prohibition of discrimination in conjunction with Article 2 and 3 was also evoked. The Court found a violation in all three cases and argued that under Article 2 and 3 of the ECHR, States are not merely obliged to respect these freedoms, but they need to fulfill their positive obligations according to Article 1 of the ECHR, thus “*(t)he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention*”<sup>277</sup>.

The Court stressed that for determining the existence of the positive obligations of the State it must be proven that the authorities knew/or should have known that the person’s life was at real and immediate risk from the criminal act of a third party but they did not to take the actions within their power<sup>278</sup>. The evidence presented by the applicant underpinned that the police and the public prosecutor were undoubtedly aware of the existence of ongoing threats and violence happening

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<sup>273</sup> Ibid at para 37-38

<sup>274</sup> Ibid at para 67-68

<sup>275</sup> Ibid at para 9 and 54

<sup>276</sup> Ibid at para 44

<sup>277</sup> Article 1 of the ECHR

<sup>278</sup> Opuz v. Turkey see supra note 1 at para 129



within the family, given that several criminal procedures were initiated before them, but were later terminated due to the pressure on the victims by the applicant's husband.

The Court added that there is no consensus amongst the Council of Europe Member States on the power of the State in cases when the victim of domestic violence withdraws the petition, however the Court listed several factors that should be taken into account when deciding on the need for public prosecution, such as the seriousness of the offence, the nature of injuries of the victim, the history of the relationship, etc.<sup>279</sup>. Despite the fact that under this set of criterion the prosecution should have been granted the opportunity to continue with the proceedings they were unable to do so, due to the lack of legal basis entitling them to act, and the fact that the local authorities considered the issue as a private one not needing public interference, also played an important factor in the decision-making process of the authorities<sup>280</sup>.

As to the violation of Article 14 of the Convention the Court referred to the background on the prohibition of discrimination on the ground of sex under international law by examining the definitions of the CEDAW, the practice of the CEDAW Committee and the United Nations Commission on Human Rights and the Court made reference to the provisions of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (known as: Convention of Belém do Pará)<sup>281</sup>, finally the Court concluded that “*the 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>282</sup>.

The Court went on stating that the traditional attitude in Turkey towards the women's role in the society and the assumption on domestic violence being an issue belonging to the private sphere is the general barrier of the effective domestic implementation of international standards on

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<sup>279</sup> Ibid at para 89

<sup>280</sup> Ibid at para 143

<sup>281</sup> Ibid at para 184-191

<sup>282</sup> Ibid at para 191

prohibiting gender based discrimination<sup>283</sup>. The systematic and discriminatory unresponsiveness of the Turkish authorities in domestic violence cases – possibly not intentionally, but – has its impact mainly on the women population, which leads to gender based discrimination and the violation of the applicant's right under Article 14 of the ECHR<sup>284</sup>.

***Kontrová v. Slovakia***<sup>285</sup>

The applicant was subject to serious physical and psychological violence by her husband, with whom she had a daughter and a son. Amongst others she was beaten with an electric cable, after which event she made a criminal complaint, however under the pressure of her husband and with the help of a police officer she later changed it in a way not to be able to serve as a basis for a criminal prosecution<sup>286</sup>. Not long later after the first criminal complaint, the applicant called the emergency line of the police station and made a report that her husband threatened to kill their children and himself. As a reaction to the phone call, only a police patron to the house was ordered but the authorities took no actual step<sup>287</sup>. Two days later, according to his previous death threats, the applicant's husband killed himself and their kids<sup>288</sup>.

The applicant stated that the lack of adequate responses on the side of the Slovakian authorities led to the death of her two children, thus it resulted – besides the alleged Article 8, Article 13 and Article 6 violation – in the violation of the right to life under Article 2 guaranteed by the Convention<sup>289</sup>. The Court unanimously found a violation to Article 2 and stated that the obligation of the State to protect the life does not simply mean to refrain from taking it intentionally and unlawfully, but to establish a legal system, which is capable to provide effective

<sup>283</sup> Ibid at para 191-195

<sup>284</sup> Ibid at para 200

<sup>285</sup> *Kontrová v. Slovakia* (application no. 7510/04)

See:

[http://hudoc.echr.coe.int/eng#{\"fulltext\":\[\"kontrov%E1\"\],\"documentcollectionid2\":\[\"GRANDCHAMBER\",\"CHAMBER\"\],\"itemid\":\[\"001-80696\"\]}](http://hudoc.echr.coe.int/eng#{\)

<sup>286</sup> Ibid at para 9

<sup>287</sup> Ibid at para 11

<sup>288</sup> Ibid at para 14

<sup>289</sup> Ibid at para 46

deterrence and to ensure that the law-enforcement bodies employ all the necessary measures to protect the ones whose life is in danger<sup>290</sup>.

The Court stressed the importance of balancing when deciding on the possibility or scope of police intervention into domestic affairs and referred back to the finding in the Opuz case by stressing that there is a positive obligation of the State to act if “*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>291</sup>.

In this regard the Court stated that due to the criminal complaint made by the applicant and the emergency phone calls received by the police officials, the authorities were aware of the seriousness of the situation, the ongoing violence and death threats in the applicant’s family, however they did not follow their obligations prescribed by law (to register the criminal complaint; to initiate a criminal investigation against the alleged perpetrator immediately and to inform the colleagues of the situation), even one police officer effectively assisted in the modification of the applicant’s criminal complaint in order to avoid criminal proceedings<sup>292</sup>.

### ***E.S. and Others v. Slovakia***<sup>293</sup>

The Court examined the petitions concerning the alleged violations to Article 3 of the Convention under three different headings when dealing with domestic violence cases: the alleged failure by authorities to provide adequate protection against inter-family violence, the alleged inadequacy of investigations into the complaints of domestic violence and the risk of being subject to domestic violence in case of deportation.

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<sup>290</sup> Ibid at para 49

<sup>291</sup> Ibid at para 50

<sup>292</sup> Ibid at para 53-55

<sup>293</sup> E.S. and Others v. Slovakia (application no. 82227/04)

See: <https://www.coe.int/t/dghl/standardsetting/convention-violence/caselaw/CASE%20OF%20E.S.%20AND%20OTHERS%20v.%20SLOVAKIA.pdf>

In the case of *E.S. and Others v. Slovakia* the first applicant argued that her husband ill-treated her and their children, the second, third and fourth applicants. She filed a divorce and initiated criminal proceedings against the husband for the physical and psychological violence suffered by her and their three children and for the sexual abuse committed on one of their daughters<sup>294</sup>. She claimed that Slovakia violated its obligation under Article 3 of the Convention given that the Slovakian authorities failed to act in a timely and effective manner: her husband was convicted for the violence and the sexual abuse only 2 years after the crimes happened<sup>295</sup> and her request for interim measure to be issued against the husband to leave the flat on which they had common tenancy was rejected, which resulted in them moving out and changing school for the children<sup>296</sup>.

The Court examined the question of admissibility through lengthy paragraphs and arrived to some important conclusions as to the issue of providing effective remedy in cases of domestic violence. It was held that for the remedy to be effective it must be “*available in theory and in practice at the relevant time which was accessible, capable of providing redress in respect of the applicant’s complaints and offering reasonable prospects of success*”<sup>297</sup>. By rejecting the argument of the State the Court stated that an interim order banning the husband from entering the common flat would provide more effective protection to the applicant and the children than the interim measure ordering the offender to refrain from a behavior already forbidden by criminal law provision<sup>298</sup>.

As to the merits of the case the Government admitted that there was a violation to Article 3 and 8 of the Convention in cases of the children, by failing to provide protection to them against the ill treatment suffered and not performing their positive obligations arising from the right to

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<sup>294</sup> Ibid at para 8

<sup>295</sup> Ibid at para 13

<sup>296</sup> Ibid at para 9-10

<sup>297</sup> Ibid at para 33

<sup>298</sup> Ibid at para 33

private and family life.<sup>299</sup> As to the first applicant the Government however stated that no violation happened given that all of her subsequent applications were decided in her favor by the Slovakian authorities<sup>300</sup>. By a way of example the husband was found guilty and convicted for the sexual assault and the psychical and psychological violence caused to the members of the family, furthermore the national courts decided to grant sole tenancy to the first applicant over the flat.

The ECtHR held that both the husband's conviction in the criminal proceedings and the decision on serving the tenancy to the first applicant happened only years after the actual problem was brought to the attention of the authorities and the proceedings were started with unreasonable delay. The Court furthermore added that the applicants needed immediate and adequate protection from the ongoing violence given its nature and seriousness, but no effective remedy was open and offered to them, which resulted in the violation not only the children's but to the first applicant's rights under Article 3 and 8 of the Convention<sup>301</sup>.

### 3.3. Assessment

Based on the above mentioned summaries it can be concluded that the applications concerning the issue of domestic violence, even if are founded on similar facts can be examined and decided by the ECtHR under different Articles of the Convention, based on the differences in the approach of the national authorities when dealing with the cases of violence, the remedies accessible under the legal system, the gravity of the harm the violence resulted in and the severity of the violence experienced.

However as the decisions of the Court underpin, the main obligation of the States is to act with due diligence in providing protection to the victims of domestic violence by taking their claims seriously, by dealing with their complaints in a timely manner and by considering the case as a whole when deciding on the measures to be applied.

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<sup>299</sup> Ibid at para 40

<sup>300</sup> Ibid at para 42

<sup>301</sup> Ibid at para 43 and 44

## **4. A short outlook – How can the EU contribute? Tackling domestic violence against women under the scope of the European Union**

### **4.1. The legal instruments**

The EU-wide survey (hereinafter referred to as: the Survey)<sup>302</sup> published in 2014 by the European Union Agency for Fundamental Rights (hereinafter referred to as: FRA) was conducted with 42.000 women in the 28 Member States to underpin that gender-based violence is a widespread problem, which is present in all of the Member States<sup>303</sup>. The survey showed that in the past 12 months before the survey interview 8% of women experienced physical and/or sexual violence and every third women had some form of physical and/or sexual assault since the age of 15<sup>304</sup>.

Given the above, the European Union could not avoid placing the issue of violence against women and domestic violence into its agenda. The concept of equality between women and men was already present in the founding treaties of the European Community by the principle of equal pay for equal work<sup>305</sup>, however the aim of providing this kind of equality served solely economic purposes. Directive 2002/73/EC on the sexual harassment at work<sup>306</sup> put emphasis on the gender specific nature of harassment and highlighted the need to provide measures to combat gender based discrimination in course of employment<sup>307</sup>.

Recently, the EU Member States in their Declaration 19 accompanying the Treaty of Lisbon emphasized that combating inequalities between men and women, with special regards to fight

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<sup>302</sup> European Union Agency for Fundamental Rights: Violence against women: an EU-wide Survey (results at glance) Luxembourg: Publications Office of the European Union 2014

See: [http://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-at-a-glance-oct14\\_en.pdf](http://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-at-a-glance-oct14_en.pdf)

<sup>303</sup> European Commission on Zero Tolerance of Violence against Women

See: [http://ec.europa.eu/justice/gender-equality/gender-violence/index\\_en.htm](http://ec.europa.eu/justice/gender-equality/gender-violence/index_en.htm)

<sup>304</sup> See supra note 302 at page 9

<sup>305</sup> Article 119 in Treaty of Rome adopted on 25 March 1957

<sup>306</sup> Directive 2002/73/EC on the sexual harassment at work

See: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32002L0073>

<sup>307</sup> Ibid at para 9

violence against women, is a high priority for the EU<sup>308</sup>. As defined by the 2010–2015 strategy of the European Commission's on equality between women and men<sup>309</sup>, the key action in order to reach equality is to adopt an EU-wide strategy on combating violence against women in accordance with the general EU principle of conferral, which strategy is supported by an European-wide awareness-raising campaign<sup>310</sup>.

However there are several limits to the action of the European Union, which needs to be taken into consideration when measuring the scope and effectiveness of its steps. First of all, under the principle of conferral, the institutions of the European Union might only act in the areas and only in the extent, which were conferred upon the EU in the Treaties by the Member States. Furthermore, given the criminal nature of the problem of domestic violence, the issue belongs to the former third pillar - now the policy framework of the Area of Freedom, Security and Justice - in which the main aim of the EU is to help the cooperation between the Member States with prescribing only little harmonization measures. Additional limitation in this field is the restriction deriving from the requirement that a cross-border element should be present in the issue for the EU to act<sup>311</sup>.

Taking into consideration the further obstacles contributing to the effectiveness of the EU measures on domestic violence, on the one hand the private nature of phenomenon must be pointed out, given that it is an intimate problem occurring within the family structure; and on the other hand the fact that the EU is a supranational entity, acting distant from the individual effected, is also an important factor<sup>312</sup>.

<sup>308</sup> Declaration 19 on Article 8 of the Treaty of the Functioning of the European Union

See: <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:12012E/TXT>

<sup>309</sup> European Commission: Strategy for equality between women and men 2010-2015

See: [http://ec.europa.eu/justice/gender-equality/files/strategy\\_equality\\_women\\_men\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/strategy_equality_women_men_en.pdf)

<sup>310</sup> Ibid at page 24

<sup>311</sup> R. Lamont, "Beating Domestic Violence? Assessing the EU's Contribution to Tackling Violence Against Women", *Common Market Law Review*, 2013, vol. 50, at page 1788

<sup>312</sup> Ibid at page 1801

#### 4.1.1. The Daphne Program

The first measure having relevance in tackling violence against women to be examined is the Daphne program(s). The first out of the three programs was introduced for the 2000-2003 period by Decision 293/2000/EC<sup>313</sup> on preventive measures to fight violence against children, young persons and women, which was followed by the Daphne II under Decision 803/2004/EC<sup>314</sup> for the 2004-2008 period and Decision 779/2007/EC<sup>315</sup> for the years between 2007-2013.

The program still continues to provide support under the ambit of the Rights, Equality and Citizenship Programme for the period of 2014-2020<sup>316</sup>. The purpose of the initiative is to provide financial grants to local actors dealing with violence against children, young people and women, and to *“bring added value to the actions predominantly to be undertaken by Member States by the following means: the dissemination and exchange of information, experience and good practices; the promotion of an innovative approach; the joint establishment of priorities; the development of networking as appropriate; the selection of Community-wide projects (...)”*<sup>317</sup>.

As to the assessment of the program, it is to be mentioned that it was not designed to combat domestic violence against woman as such, it rather concentrates on violence as a health related, gender neutral issue. Further shortcoming of the initiative is that the national institutions working in the program are not legally bound to cooperate with their governments by forwarding the information gained, consequently it might only contribute to development of national policies in an indirect way<sup>318</sup>.

<sup>313</sup> Decision No 293/2000/EC of the European Parliament and of the Council of 24 January 2000 adopting a programme of Community action (the Daphne programme) (2000 to 2003) on preventive measures to fight violence against children, young persons and women

<sup>314</sup> Decision No 803/2004/EC of the European Parliament and of the Council of 21 April 2004 adopting a programme of Community action (2004 to 2008) to prevent and combat violence against children, young people and women and to protect victims and groups at risk (the Daphne II programme)

<sup>315</sup> Decision No 779/2007/EC of the European Parliament and of the Council of 20 June 2007 establishing for the period 2007-2013 a specific programme to prevent and combat violence against children, young people and women and to protect victims and groups at risk (Daphne III programme)

<sup>316</sup> See: [http://ec.europa.eu/justice/grants1/programmes-2014-2020/rec/index\\_en.htm](http://ec.europa.eu/justice/grants1/programmes-2014-2020/rec/index_en.htm)

<sup>317</sup> Decision No 779/2007/EC see supra note 315 at Recital 14

<sup>318</sup> R. Lamont see supra note 311 at page 1791



#### 4.1.2. Directive 2011/99/EU of the European Parliament and of the Council of 13

##### December 2011 on the European protection order

The second measure having significance in combating domestic violence adopted under the former third pillar is the EU Protection Order<sup>319</sup>, which aims *“to protect a person against a criminal act of another person which may, in any way, endanger that person’s life or physical, psychological and sexual integrity, for example by preventing any form of harassment, as well as that person’s dignity or personal liberty, for example by preventing abductions, stalking and other forms of indirect coercion (...)”*<sup>320</sup>.

In case the national authorities of a Member State issued a protection order under the Directive it is transferable to other EU Member States, which might provide a corresponding civil, criminal or administrative measure to ensure the same protection<sup>321</sup>. Regardless of the benefits of the cross-border recognition of protection orders, it must be pointed out, that the Directive was designed to tackle all forms of violence, and not only to provide protection to the victims of gender-based violence<sup>322</sup>.

#### 4.1.3. Regulation 606/2013 on mutual recognition of protective measures in civil matters

Regulation 606/2013 on mutual recognition of protective measures in civil matters<sup>323</sup> - in effect from January 2015 - aims to complete the framework established by Regulation 2201/2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in

<sup>319</sup> Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order

See: [http://ec.europa.eu/justice/criminal/files/directive\\_2011\\_99\\_on\\_epo\\_en.pdf](http://ec.europa.eu/justice/criminal/files/directive_2011_99_on_epo_en.pdf)

<sup>320</sup> Ibid at Recital 9

<sup>321</sup> Directive 2011/99/EU see supra note 319 at Article 9 (1)

<sup>322</sup> Ibid at Recital 9

<sup>323</sup> Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters

See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:181:0004:0012:en:PDF>

matters of parental responsibility<sup>324</sup> by opening the door for the acceptance of certified protection measures with civil nature<sup>325</sup> in other EU Member States. Likewise in Directive on the EU Protection Order<sup>326</sup>, Recital 6 of Regulation highlights that its aim is to provide a legal basis for mutual recognition of protection orders for victims regardless of their gender, and the importance of the measures in the scope of prevention in cases of violence against women is emphasized<sup>327</sup>.

#### **4.1.4. Directive 2012/29 on establishing minimum standards on the rights, support and protection of victims of crime**

Finally Directive 2012/29 on establishing minimum standards on the rights, support and protection of victims of crime<sup>328</sup> should be mentioned, which is the first measure aiming to reach the harmonization of standards on the protection of all – not only domestic violence related – victims involved in criminal proceedings across the Member States. The Directive establishes rights for victims in general, such as the recognition of the victim status of the deceased person's family members<sup>329</sup>, the right to understand and to be understood<sup>330</sup>, or the right to be heard<sup>331</sup> but at the same time it introduces special rights, which aim to provide a more effective protection for the women being subject to domestic violence.

<sup>324</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000

See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R2201:EN:HTML>

<sup>325</sup> Directive on mutual recognition of protection measures in civil matters, supra note 323 at Article 5

<sup>326</sup> See supra note 319

<sup>327</sup> Directive on mutual recognition of protection measures in civil matters supra note 323 at Recital 6 “*This Regulation should apply to protection measures ordered with a view to protecting a person (...) to prevent any form of gender-based violence or violence in close relationships such as physical violence, harassment, sexual aggression, stalking, intimidation or other forms of indirect coercion*”

<sup>328</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA

See: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32012L0029>

<sup>329</sup> Ibid at article 2 (1) a.) ii.

<sup>330</sup> Ibid at article 3

<sup>331</sup> Ibid at article 10

Concerning the rights having special influence on the victims of domestic violence, under the right to access to victim support services<sup>332</sup> the Member States must provide the victims and their family members not only with general victim support but with specialist support as well, which corresponds to their needs based on the harm suffered<sup>333</sup>. It is important to mention that the victims are entitled for the support irrespectively of making an official complaint or not<sup>334</sup>. As to the right to specialist support services<sup>335</sup>, Member States need to provide shelters and maintain targeted support services – e.g. trauma support and counseling – for the victims with specific needs<sup>336</sup>.

In order to identify the specific protection needs corresponding to the right to individual assessment of victims<sup>337</sup>, the vulnerability and special needs of the victims need to be taken into consideration for determining whether they are subject to secondary or repeat victimization during criminal proceedings and providing them with special protection measures under Article 23<sup>338</sup> and 24<sup>339</sup> of the Directive.

## 4.2. Assessment

Finally, I consider it important to emphasize the role of the EU in raising awareness of the issue of domestic violence by the activity of the FRA on the one hand, and the findings of the European Added Value Assessment on Combating Violence against Women<sup>340</sup> on the other. The FRA carried out a significant work in combating domestic violence by preparing a comprehensive

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<sup>332</sup> Ibid at Article 8

<sup>333</sup> Ibid

<sup>334</sup> Ibid at Article 8 (5)

<sup>335</sup> Ibid at Article 9 (3)

<sup>336</sup> Ibid

<sup>337</sup> Ibid at Article 22

<sup>338</sup> Ibid at Article 23, Right to protection of victims with specific protection needs during criminal proceedings

<sup>339</sup> Ibid at Article 24, Right to protection of child victims during criminal proceedings

<sup>340</sup> European Added Value Assessment on Combating Violence against Women (EAVA 3/2013) by Monika Nogaj, European Added Value Unit, European Parliament

See: [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/femm/dv/eav\\_violence-against-women-eav\\_violence-against-women-en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/femm/dv/eav_violence-against-women-eav_violence-against-women-en.pdf)

Survey<sup>341</sup> on women's experiences, and providing actual statistics on the widespread nature of the phenomenon in order to overcome the problem of under-reporting and hidden criminality. The FRA emphasizes that the phenomenon of domestic violence can only be tackled with a comprehensive action, incorporating not only the enactment of criminal law provisions but covering the areas of health and employment<sup>342</sup> as well. As to the findings of the European Added Value Assessment, they place the problem of violence against women in a wider, economic founded, society-based perspective, claiming that the phenomenon costs the EU 228 billion Euros annually by affecting the health, security and productivity of women, consequently producing a significant expenditure to the budgets of the Member States<sup>343</sup>.

I believe that regardless of the lack of legally binding instrument on protecting women from domestic violence under the EU and the existing limits to the EU action in the field, the measures available under the EU jurisdiction could supplement the procedures operating under the CoE and UN, especially by providing opportunity to the civil sphere to gain financial contribution by the Daphne and the Rights, Equality and Citizenship Programme.

## 5. Conclusion

The most important components of the protection system operated by the UN are the legally binding provisions of the CEDAW and the authoritative interpretation of the General Recommendation No. 19 by the jurisprudence of the CEDAW Committee. These instruments provide protection against violence against women and domestic violence, however this protection is limited to the cases in which violence meets the requirements to be considered as discrimination against women. Further shortcoming of the UN system is the lack of legally binding instrument dealing solely with the issue of violence against women, which would declare explicitly the prohibition of violence against women and would establish a proper action plan for the

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<sup>341</sup> See supra note at 302

<sup>342</sup> See supra note at 302, Foreword at page 3

<sup>343</sup> See supra note 340, at page 5

enforcement of its provisions, in order to strengthen the system in force to tackle domestic violence against women.

Considering the mechanism providing protection in the Member States of the Council of Europe, first the role of the ECHR must be mentioned. Regardless of the lack of explicit prohibition on violence against women in the Convention, the decisions of the ECtHR examined for this thesis clearly demonstrate that the victims of domestic violence are entitled for active protection from the State under Article 2, 3, 8 and 14 of the Convention. This silence of the ECHR could be remedied with the proper and detailed norms of the Istanbul Convention, which applies and improves the findings of the UN and Council of Europe systems by clearly declaring domestic violence, as a human rights violation and a gender-based discrimination against women.

The pure fact that the provisions of the Istanbul Convention have a legally binding form, and that their implementation is strengthened with the monitoring activity of the GREVIO and the Committee of the Parties, can also be regarded promising. However there are several shortcomings of the Convention, on the one hand the limited number of ratifications, and on the other, the total absence of complaint procedure. As to the former one, I believe that the EU and the CEDAW Committee could contribute to the advancement of the signing process by urging its member states to ratify the Istanbul Convention, given that it intensifies the protection provided by the already existing legal norms. Concerning the individual complaint procedure, I suggest to modify the Istanbul Convention or to enact an optional protocol to it, which would establish a separate forum for women being subject to violence, thus would bring a real meaning into the protection granted by the Convention.

Finally, as we saw in the last chapter of the thesis, the role of the EU could only be considered as a complementary one, but it might play an important role in intensifying the level of protection at national level. This contribution is mainly covered by the financial contribution granted to the actors of the civil society under the Daphne Programs, which contributes to a cross-

border communication and exchange of good practices between the actors of the civil society of the Member States, but is further strengthened by the adoption of regulations and directives aiming to reach mutual recognition in cases of protective measures in civil and criminal cases and providing an EU-wide harmonized support for the victims of domestic violence.

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