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State Responsibility Regarding
Domestic Violence Against
Women With A Focus On
Turkey

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Summary

Domestic violence is one of the biggest human rights violations that affect women all over the world regardless of their color, nationality, or age. This problem has reached such a degree that women appear to be more at risk of facing violence inside of the home by a husband or partner, than outside by strangers. However, the traditional view that the State cannot be held responsible for acts of violence inflicted by private actors has been the major impediment to the implementation of legislation that seeks to protect women from such violence. This thesis aims to challenge this view and examines the legal reasoning which demonstrates that the responsibility to protect women from domestic violence lies with the State itself.

For that purpose, domestic violence is first defined in order to show that its scope is not limited to acts of physical and sexual violence only, and that it also encompasses economic and emotional violence acts. Even women themselves often ignore the real meaning of domestic violence, believing that they are being subjected to "normal behavior".

After defining its limits, domestic violence is interpreted in the context of the right to be free from discrimination and the prohibition of torture. The association of domestic violence with concrete human rights is crucial since it helps to challenge the misunderstanding that such acts are private matters that have no consequences for State responsibility.

The different international and regional human rights instruments that constitute a legal basis for State responsibility regarding acts of domestic violence are analysed in detail. This work uses Turkey as an example in order to give concrete insight into the size of the problem and to analyse the different legislative efforts aiming the implementation of international human rights provisions. Different challenges that preclude an efficient State protection are also presented. The case study of Turkey reveals some realities that are also valid to a certain extent for other countries facing the same problem as well.

In addition, the thesis explores the due diligence standard used to establish the responsibility of the state arising from acts of domestic violence committed by private actors. The purpose of this standard is to show that the State can be responsible even in the case of intimate partner assault. The emerging case-law reveals that courts tend to develop and push the limits of their reasoning on the due diligence obligation of the state regarding the protection of women from domestic violence.

Finally, it seems that this whole theoretical demonstration of State responsibility is not enough to bring sustainable solutions to the problem. States need to focus their work on the economic, social and cultural rights in order to eradicate the root causes of domestic violence. They must give priority to the issue of development of women's rights in general with the aim of strengthening women and make them less vulnerable and less at risk of facing such problems.

Abbreviations

| | |
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| CAT | Convention Against Torture |
| CRC | Convention on the Rights of the Child |
| CEDAW | Convention on the Elimination of All Forms of Discrimination Against Women |
| DEVAW | Declaration on the Elimination of Violence Against Women |
| ECHR | European Convention of Human Rights |
| ECtHR | European Court of Human Rights |
| HRC | Human Rights Committee |
| IACHR | Inter-American Court of Human Rights |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social, and Cultural Rights |
| ICJ | International Court of Justice |
| NGO | Non-Governmental Organisation |
| OECD | Organisation for Economic Co-operation and Development |
| OHCHR | Office of the High Commissioner for Human Rights |
| UDHR | Universal Declaration of Human Rights |
| UN | United Nations |
| UN CESCR | United Nations Committee on Economic, Social, and Cultural Rights |
| UNIFEM | United Nations Development Fund for Women |
| WHO | World Health Organisation |

1 Introduction

- When? Every day
- Who? Women throughout the world
- What? Face violence
- Where? In the home
- Why? Generally, because governments and the community ignore their responsibility to prevent this violence.¹

This briefly gives a simple description of the worldwide problem² of domestic violence faced by women from all nationalities, cultures and races. Violence against women is not only restricted to violence inflicted by strangers.³ Indeed, women are more often at risk of facing violence perpetrated by those with whom they live.⁴ In fact, women are frequently battered, sexually abused and psychologically injured by persons with whom they should enjoy the closest trust.⁵ A detailed definition of domestic violence will be given in a subsequent section, but it is necessary to generally define it in order to get initiated to the topic. Domestic violence is a pattern of behavior that may include physical, emotional, economic and sexual violence; its purpose is to establish power and control over an intimate partner, such as the wife or girlfriend,⁶ through fear and intimidation.⁷ Unfortunately, as it has been noted in the article of Andrew Byrnes, “this maltreatment has gone largely unpunished, unremarked and has even been tacitly, if not explicitly, condoned.”⁸ The failure to investigate and expose the true extent of violence allows governments and the community more generally to ignore their responsibilities.⁹

Domestic violence poses a dilemma not only in law but in the human psyche as well: inherent in domestic violence is the dichotomy between love and hate.¹⁰ It is within the boundaries of an ostensibly loving relationship that violence manifests itself.¹¹ Moreover, home is often associated to security, comfort, protection and love. It is the belief that home is automatically a safe place that is invoked as a common justification to deny

¹ I. Vledder, ‘It’s in Our Hands: Stop Violence Against Women’ in I. Westendorp, Ria Wolleswinkel (eds), *Violence in the Domestic Sphere* (Intersentia, Antwerpen, 2005) p. 8.

² *Ibid.*, p. 7.

³ A. Byrnes, ‘Women, Feminism and International Human Rights- Methodological Myopia, Fundamental Flaws or Meaningful Marginalisation?: Some Current Issues’, 12 *Australian Year Book of International Law* (1992), p. 235.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ UNIFEM, Stop Violence Against Women, *What is Domestic Violence?*, 1 February 2006, <www.stopvaw.org/What_Is_Domestic_Violence2.html>, visited on 30 April 2009.

⁷ Amnesty International USA, *Domestic Violence*, <www.amnestyusa.org/violence-against-women/stop-violence-against-women-svaw/domestic-violence/page.do?id=1108220>, visited on 30 April 2009.

⁸ Byrnes, *supra* note 3, p. 235.

⁹ Vledder, *supra* note 1, p. 8.

¹⁰ B. C. Meyersfeld, ‘Reconceptualizing Domestic Violence in International Law’, 67 *Albany Law Review* (2003) p. 383.

¹¹ *Ibid.*

the huge domestic violence problem that women are facing.¹² The ‘cynical’ side of domestic violence is the fact that it usually takes place in secret and the sufferings of the victims happen in silence.¹³ The psychological consequences of domestic violence can even be more harmful than the physical pain itself: it can really destroy a woman’s self-esteem, confidence and the capacity for resistance,¹⁴ because domestic violence is degrading and humiliating.¹⁵ It can push the battered woman to live under the black cloud of constant terror and shame.¹⁶ It can obliterate the personality in such a way that it becomes a serious assault on human dignity which is a core concept of human rights law.¹⁷ Domestic violence dehumanises women, it can reduce them to passivity and submission.¹⁸ In this context, it is at home that the application of human rights should begin.¹⁹

General Recommendation No. 12 of the CEDAW Committee²⁰ requires States to give statistical information on violence against women. Not all acts of violence against women are reported, and this makes it hard to get clear statistics regarding the number of women subject to violence.²¹ However, statistical work reveals that the number of gender-based violence victims exceeds victims of war.²² It is only very recently that Turkey had official statistics regarding domestic violence against women. Official information of violence against women in Turkey was made available only in January 2009. The lack of data at the national level has been a big obstacle for the development of policies, strategies and programs in this field. The numbers are shocking and reveal the grim reality of violence against women happening behind closed doors. The results are as follows:

- 39 percent of Turkish women reported to have experienced physical violence.²³ In other words, nearly four out of ten women have been exposed to physical violence by their husbands or partners at least once in their life.

¹² Meyersfeld, *supra* note 10, p. 383.

¹³ *Ibid.*, p. 384.

¹⁴ R. Copelon, ‘Recognising The Eggregious in The Everyday: Domestic Violence as Torture’, *25 Columbia Human Rights Law Review* (1994) p.341.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ C. Romany, ‘State Responsibility goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law’ in R. Cook (ed.), *Human Rights of Women: National and International Perspectives*, (University of Pennsylvania Press, Philadelphia, 1994) p. 85.

¹⁸ Copelon, *supra* note 14.

¹⁹ Copelon, *supra* note 14, p. 367.

²⁰ Committee on the Elimination of Discrimination Against Women, *General Recommendation No.12* (eighth session, 1989) on Violence Against Women, <www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom12>, visited on 23 April 2009.

²¹ Vledder, *supra* note 1, p. 8.

²² Copelon, *supra* note 14, p. 292.

²³ Turkish Republic Prime Ministry Directorate General on the Status of Women, *National Research on Domestic Violence Against Women in Turkey-Summary report*, Ankara, January 2009, p.7, <www.ksgm.gov.tr/tdvaw/doc/tdvaw_summary.pdf>, visited on 16 March 2009.

- 15 percent of women have been exposed to sexual violence.²⁴ The reliability of the sexual violence rate is questionable, taken into account the difficulty for women to disclose experiences of sexual violence compared to those of physical violence.
- 44 percent of women have been exposed to emotional violence or abuse.²⁵

On the general basis, it can be noticed that violence by husbands is the most common form of violence in the lives of married women, much more than assault by strangers and acquaintances. The research also reveals that women who have been exposed to physical violence often have experienced this violence in severe levels. Furthermore, the research shows that violence against women is mostly a hidden problem, because half of the women experiencing violence had not talked about it with anybody before being interviewed in the context of the statistical research. This shows that domestic violence is one of the most common crimes, but it is also one of the most hidden ones. Besides, women very rarely seek help from health institutions, police or other support services.²⁶

Moreover, there are not always clear indicators for who is likely to suffer from domestic violence. There is no significant difference between urban and rural areas. However, the variation between regions is considerable. In Turkey, for example, half of the women living in the rural areas of Northeast Anatolia and Central Anatolia have been exposed to physical violence by their husbands or partners.²⁷ Education is also not a concrete indicator. Three out of ten women who have a high school or higher education have been exposed to physical violence by their husbands or partners.²⁸ This shows that domestic violence is a problem for women regardless of their level of education.

Regardless of location or women's education, violence against women remains a worldwide problem²⁹, but it is difficult to assess a global statistical data. The WHO website indicates that between 15 percent and 71 percent of women reported physical or sexual abuse.³⁰ This number does not seem to be very meaningful, because the margin between the percentage numbers is quite wide. However, the universality of the problem of domestic violence can be proved by the fact that it is also a problem in developed countries, such as Sweden, which is one of the human rights champions. The National Survey conducted by the Swedish Government (published in 2001) reveals a shockingly high prevalence of violence against women.³¹ 46 percent of all responding women had experienced physical

²⁴ *Ibid.*, p. 8.

²⁵ *Ibid.*, p. 12.

²⁶ *Ibid.*, p. 27.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Vledder, *supra* note 1, p. 7.

³⁰ WHO, *Violence Against Women*,

<www.who.int/mediacentre/factsheets/fs239/en/index.html>, visited on 20 April 2009.

³¹ UN Human Rights Council, Y. Ertürk, *Report of the Special Rapporteur on violence against women, its causes and consequences*, A/HRC/4/34/Add.3, 6 February 2007, p.8, <daccessdds.un.org/doc/UNDOC/GEN/G07/106/53/PDF/G0710653.pdf?OpenElement>, visited on 16th March 2009.

and/or sexual violence committed by a man since their fifteenth birthday.³² One in every eight women (12 percent) had been subjected to physical or sexual violence, including threatening behaviour, in the last year prior to answering the survey questionnaire.

This thesis limits its scope to domestic violence perpetrated against women because it is overwhelmingly initiated by men and inflicted upon women.³³ This does not mean that men are not subjected to domestic violence, but women are in reality more affected by the problem. Also, Turkey is not the main center of analysis for the thesis, it will just be a country used as an example in order to concretise all the theoretic explanations. After demonstrating that the State has a duty to protect women from domestic violence, this thesis aims to answer the question of how the State can be held responsible for such acts of violence.

The first part (2) of the thesis will explore the meaning of domestic violence. The delimitation of the borders of domestic violence appears important in terms of determining which acts might trigger State responsibility. In order to emphasise the importance of State intervention, the other aim of this part will be to affirm that domestic violence is a real human rights violation that should be interpreted in the context of two particular human rights; the right to be free from discrimination and the right to be free from torture.

The subsequent part (3) will analyse international and regional human rights instruments in order to determine the different legal provisions which can constitute a ground for advocating against domestic violence and engaging State responsibility. The relevant national Turkish legislations, including the recent legal reforms on women's status, will be mentioned in order to give some concreteness to the State efforts regarding the compatibility of domestic norms with international instruments.

The next part (4) will look into the different challenges that preclude an efficient State action regarding the eradication of the problem of domestic violence.

Finally, the last section (5) will explain the due diligence standard used to establish the responsibility of the state arising from acts of domestic violence. The relevant case-law on due diligence will be presented, and some recommendations aiming to increase the State efficiency will also be suggested.

³² *Ibid.*

³³ Copelon, *supra* note 14, p. 303.

2 Analysis of the Subject of State Responsibility: Meaning and Legal Nature of Domestic Violence Against Women

It is crucial to first clearly define domestic violence against women in order to determine the scope of acts that might trigger a State's responsibility. Furthermore, it is necessary to interpret domestic violence as an act that constitutes a human rights abuse in order to prove that it is the State's duty, and not the victim's, to take measures aiming the eradication of domestic violence.

2.1 A Broad Definition of Domestic Violence Generating A Broad State Responsibility

The explanations below demonstrate that domestic violence has a quite broad meaning. The broad interpretation of domestic violence influences the extent of State responsibility. The broader the domestic violence definition is, the more extensive State responsibility is.

The United Nations Declaration on the Elimination of Violence Against Women³⁴ ("DEVAW") is the first international human rights instrument that explicitly and directly addressed the issue of violence against women at large. Article 1 of DEVAW defines violence against women as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life."³⁵ In the light of this provision, it can be stated that violence against women becomes "domestic" when it occurs in the private sphere between individuals who are related through intimacy, blood or law.³⁶ Knowing that, domestic violence can be defined more precisely as the physical, sexual, and psychological abuses perpetrated by male partners against their female companions in the privacy of the home.³⁷

³⁴ UN General Assembly, *Declaration on the Elimination of Violence against Women* (DEVAW), 20 December 1993, A/RES/48/104, <www.unhcr.org/refworld/docid/3b00f25d2c.html>, visited on 12 June 2009.

³⁵ *Ibid.*

³⁶ G. Paglione, 'Domestic violence and Housing Rights: A reinterpretation of the Right to Housing' 28 *Human Rights Quarterly* (2006), p. 121.

³⁷ *Ibid.*

Defining domestic violence is very important since women in general ignore that they are subject to domestic violence because of their lack of knowledge regarding the matter.

As suggested in the definitions given above, domestic violence does not have to be physical or sexual, but it can also take the form of an emotional abuse such as insulting, humiliating, name calling or threatening the victim or her loved ones with violence.³⁸ Economic abuse is also a form of domestic violence. Preventing her from working, withholding money for household expenses or depriving her of her income constitute examples of economic violence acts.

Article 2(a) DEVAW actually enumerates a non-exhaustive list of domestic violence acts. According to the said provision, violence against women shall be understood to encompass, but not be limited to acts of physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation.³⁹

In addition to the definition, the legal nature of domestic violence also needs to be clarified.

2.2 Legal Nature of Domestic Violence Against Women and its Implications for the State Responsibility

Accepting domestic violence as a human rights abuse and considering it in the context of two particular human rights have implications in terms of opening the road to the State responsibility.

2.2.1 Acceptance of Domestic Violence as a Human Rights Violation: a Major Argument in Favour of the State Involvement Into the Problem

Considering domestic violence as a human rights abuse triggers State responsibility, because it is the State's duty to take all the appropriate steps to guarantee the protection of human rights and fundamental freedoms to all individuals living on its territory.

In fact, domestic violence is a tremendously serious problem in the whole world. Statistics are self-talkative in this regard; NGOs continuously emphasize that States must eradicate the problem. For their part, the Committee on the Elimination of Violence against Women addresses States on the said problem in their respective reports.

³⁸ Turkish Republic Prime Ministry, *supra* note 23, p. 5.

³⁹ DEVAW, *supra* note 34.

However, at the international level, none of the binding international instruments directly and explicitly address the issue of violence against women in general. It is extensively discussed in country reports but the Convention on the Elimination of Discrimination Against Women⁴⁰ (“CEDAW”) does not mention it. Consequently, domestic violence seems to be excluded from the area of international human rights law.

The fact that domestic violence is not expressly mentioned in international human rights law should not constitute a challenge to defining it as a human rights violation due to the principle of inalienability of human rights. According to this principle, legal norms (human rights law) do not establish human rights, they only guarantee them.⁴¹ In other words, human rights must be understood as “rights which belong to any individual as a consequence of being human, independently of acts of law”.⁴²

Furthermore, domestic violence is a human rights violation simply because it constitutes an attack on the human dignity of a woman. The Universal Declaration of Human Rights⁴³ (“UDHR”) does not define, but refers to dignity as the foundation of human rights by stating in its Preamble that “[...] recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”⁴⁴. Moreover, Article 1 UDHR states that “[a]ll human beings are born free and equal in dignity and rights.” In fact, the concept of human dignity can be found in the preamble of almost all human rights conventions. Human dignity implies that all human beings are to be treated with profound moral respect.⁴⁵ Domestic violence contradicts this requirement since it evokes emotions of humiliation, disgust, anger and powerlessness.⁴⁶ In such a context, it should be undisputed that domestic abuse constitutes a violation of women’s human rights⁴⁷, which charges the State with the duty of remedying to the problem.

In order to make a more concrete analysis, the next sub-section will consider domestic violence in the context of two specific human rights: the right to be free from gender discrimination and the right to be free from torture.

⁴⁰ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted on 18 December 1979, entered into force on 3 September 1981, ratified by Turkey on 20 December 1985,

<www.un.org/womenwatch/daw/cedaw/text/econvention.htm>, visited on 12 June 2009.

⁴¹ M. Piechowiak, ‘What Are Human Rights? The Concept of Human Rights and Their Extra-Legal Justification’, in R. Hanski, M. Suksi (eds.), *An Introduction to the International Protection of Human Rights*, (Institute for Human Rights, Abo Akademi University, Turku, 1999) p.6.

⁴² *Ibid.*, p.3.

⁴³ *Universal Declaration of Human Rights* (UDHR), 10 December 1948, <www.unhcr.org/refworld/docid/3ae6b3712c.html>, visited on 12 June 2009.

⁴⁴ K. Dicke, ‘The Founding Function of Human Dignity in the Universal Declaration of Human Rights’, in D. Kretzmer, E. Klein (eds.), *The Concept of Human Dignity in Human Rights Discourse*, (Kluwer Law International, The Hague, 2002) p. 112.

⁴⁵ J. Mahoney, *The Challenge of Human Rights: Origin, Development, and Significance* (Blackwell pub., Malden, 2007) p. 146.

⁴⁶ *Ibid.*

⁴⁷ I. Boerefijn, ‘Domestic Violence Against Women in International Human Rights Law’ in I. Westendorp, Ria Wolleswinkel (eds), *Violence in the Domestic Sphere* (Intersentia, Antwerpen, 2005), p. 35.

2.2.2 Domestic Violence As a Form of Gender-Based Discrimination

Some questions need to be answered before going into the details of the analysis: why should domestic violence be classified as a form of discrimination? What is the relevance of such an assessment? What would be the benefit? Violence against women can only be eliminated if the problem is treated not in isolation, but as an issue that is part and parcel of the overall equality problem between men and women.⁴⁸ Taken alone, domestic violence does not receive the necessary attention and concern from the State. But the mere fact of classifying it as a form of discrimination gives value to the importance of treating the matter and stresses the role of the State with regard to its responsibility to undertake positive steps.

Article 1 CEDAW makes no reference to gender-based violence when defining the term 'discrimination against women'. According to the said provision, discrimination against women means:

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.⁴⁹

In other words, gender-based discrimination means any difference in treatment based on sex that disadvantages women by preventing them from exercising their human rights and fundamental freedoms.⁵⁰

As the CRC does not specifically include violence in its definition of discrimination, women are left at the mercy of non-binding documents, such as the DEVAW or the Recommendation No.19 from the CEDAW Committee⁵¹ for the recognition of gender-based violence as a form of discrimination. These documents establish that violence is used as a way of sustaining gender inequality.

The DEVAW sees violence as being a historically rooted issue linked to gender inequality. It is provided in its Preamble that:

violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over

⁴⁸ Interview with Yakin Ertürk, UN Special Rapporteur on Violence Against Women, Foreign Affairs and International Trade Canada, <www.international.gc.ca/cip-pic/video/rights-droits/erturk.aspx?lang=eng>, visited on 10 April 2009.

⁴⁹ CEDAW, *supra* note 40.

⁵⁰ OHCHR, Fact Sheet No. 22, Discrimination against Women: The Convention and the Committee, p. 5, <www.ohchr.org/Documents/Publications/FactSheet22en.pdf> visited on 10 April 2009.

⁵¹ Committee on the Elimination of Discrimination Against Women, *General Recommendation No.19 on Violence Against Women*, para.7, <www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19>, visited on 23 April 2009.

and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.⁵²

On the other hand, General Recommendation No.19 states that the definition of discrimination, as expressed in Article 1 CEDAW, includes gender-based violence.⁵³ It also provides that “gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.”⁵⁴ This is also stressed in the 2002 report of the Parliamentary Assembly of the Council of Europe which states that “the meaning of this violence is clear: it is an attempt to maintain the unequal relationship between men and women and to perpetuate the subordination of women.”⁵⁵ Concretely, this seems to suggest that a woman subject to violence cannot enjoy her fundamental rights. This is also emphasised in paragraph 11 of Recommendation No.19, which states that gender-based violence deprives women from “the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms” and that it maintains them in subordinate roles and contributes to the low level of education, skills, work opportunities and political participation.⁵⁶ The opposite is also true: it is because women do not have access to their fundamental rights and freedoms on an equal basis with men that they are subject to discrimination. This is a vicious circle.

Here is a concrete example: a woman beaten by her husband who forbids her from working. Because she is subject to domestic violence, she cannot enjoy her right to work. But the opposite is also true: because she is not working, she does not have her economic independence, and therefore she keeps staying home under the same roof as her husband who physically abuses her.

While it is true that some women subject to domestic violence have successful professional careers, constant violence tends to undermine their capacity to function effectively⁵⁷ and degrades their self-esteem⁵⁸. Generally, women cannot work efficiently and be creative “when they are burdened with the physical and psychological scars of violence.”⁵⁹

In such a context, discrimination appears to be both the origin and the consequence of the problem of domestic violence. Additionally, domestic violence appears to be a form of discrimination in itself because it denies women equality with men in terms of control over their own body and their physical, psychological and sexual well-being.⁶⁰

⁵² DEVAW, *supra* note 34.

⁵³ *General Recommendation No.19 on Violence Against Women*, *supra* note 51, para. 6.

⁵⁴ *Ibid.*, para. 1.

⁵⁵ O. Keltosova, Council of Europe, Parliamentary Assembly, 17 July 2002, Report on Domestic Violence of the Committee on Equal Opportunities for Women and Men, <assembly.coe.int/Mainf.asp?link=/Documents/WorkingDocs/Doc02/EDOC9525.htm>, visited on 10 April 2009.

⁵⁶ *General Recommendation No.19 on Violence Against Women*, *supra* note 51, para. 11.

⁵⁷ Copelon, *supra* note 14, p. 339.

⁵⁸ *Ibid.*, p. 338.

⁵⁹ Romany, *supra* note 17, p. 108.

⁶⁰ Vledder, *supra* note 1, p. 18.

A few criticisms can be directed at the Declaration and the Recommendation No.19. First of all as non-binding documents, their purpose is to offer guidance to State Parties and elaborate on issues that have not been mentioned or sufficiently explained in the Convention.⁶¹ In this regard, domestic violence could have been included in an additional protocol to the CEDAW which would have had a binding effect.

Second, the recommendation should have started by stating clearly and explicitly that domestic violence is a form of human rights abuse before exploring with the question of whether or not it forms discrimination. There is a need to express clearly and explicitly that domestic violence is a form of human rights violation.

Finally, Recommendation No. 19 states in its paragraph 4 that the Committee concluded that not all the reports of State parties adequately reflected the close connection between discrimination against women, gender-based violence, and violations of human rights and fundamental freedoms.⁶² The Committee should question the Convention before questioning the State reports. Some of the Member States are developing countries in which the topic of domestic violence is still a taboo, because it is a behaviour accepted according to the traditions. In this context, it appears a little unrealistic to expect States to make that link between discrimination and gender based-violence, especially if this link is not that obvious to establish.

2.2.3 Domestic Violence As a Form of Torture

Torture is another right under which domestic violence can be considered. First, it is necessary to define torture. Even though the definition of torture differs from one human rights treaty to another⁶³, the one given by the Convention Against Torture (CAT)⁶⁴ will be taken into account because it constitutes the key to the analysis presented below. It should be noted that the CAT considers only torture and not inhuman and degrading treatment. This is why the following analysis will consider the similarities between domestic violence and torture only. Article 1 of CAT defines the term 'torture' as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any

⁶¹ S. Engle Merry, 'Constructing a Global Law-Violence Against Women and the Human', *Law and Social Inquiry* (2003), p. 952.

⁶² General Recommendation No. 19, *supra* note 51, para. 4.

⁶³ Amnesty International USA, *Torture and the Law*, < www.amnestyusa.org/war-on-terror/reports-statements-and-issue-briefs/torture-and-the-law/page.do?id=1107981>, visited on 30 April 2009.

⁶⁴ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), adopted on 10 December 1984, entered into force on 26 June 1987, ratified by Turkey on 1 September 1988, <www.unhcr.org/refworld/docid/3ae6b3a94.html>, visited on 12 June 2009.

reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.⁶⁵

There is a need to challenge the idea that domestic violence is less severe and less deserving of international sanction than violence inflicted or condoned by officials.⁶⁶ If torture is broadly interpreted, extreme forms of domestic violence may be considered as a sub-category of torture. Torture would then encompass not only acts of violence inflicted by the State officials to individuals, but also those perpetrated by private parties to individuals.

The debate regarding the question of whether domestic violence is torture or not has no definitive conclusion. In order to address the problem, one should start by asking: what would be the relevance of classifying domestic violence as torture?

Insisting that domestic violence be recognized as torture, regardless of where violent acts occur or who commits them, can be a powerful tool in eliminating violence against women.⁶⁷ First of all, such a classification would be influential in terms of attracting the State's attention on the atrocity and gravity of the domestic violence problem⁶⁸ and the enormity of suffering that it has tolerated and must confront.⁶⁹ This would probably increase the degree of seriousness with which the State responds to the problem of domestic violence. Also, knowing that the prohibition of torture has a '*jus cogens*' nature, elevating domestic violence to the same level as torture suggests that domestic violence acts would be condemned in the context of a norm from which no derogation is permitted and which can be amended only by an international law norm of the same character.⁷⁰ Consequently, the qualification of torture helps to invalidate any State attempts to justify such abuses on the ground of culture or traditions because under international law torture can never be justified in any circumstances.⁷¹ Besides, another implication in terms of state responsibility is that the prohibition of domestic violence would create '*erga omnes*' obligations which are obligations owed to the international community as a whole.⁷²

⁶⁵ *Ibid.*, Article 1.

⁶⁶ R. Copelon, 'Intimate Terror: Understanding Domestic Violence As Torture', in R. J. Cook (ed.), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, Philadelphia, 1994), p. 116.

⁶⁷ A. Kozma and S. Dauer, *Domestic Violence as Torture: Integrating a Human Rights framework Into The Domestic Violence Movement*, December 2001, <findArticle s.com/p/Article s/mi_qa3693/is_200112/ai_n9017819/>, visited on 20 April 2009.

⁶⁸ Copelon, *supra* note 14, p. 297.

⁶⁹ *Ibid.*, p. 351.

⁷⁰ See Article 53 of the Vienna Convention on the Law of Treaties, adopted on 23 May 1969, entered into force on 27 January 1980, <www.unhcr.org/refworld/docid/3ae6b3a10.html>, visited on 12 June 2009.

⁷¹ Amnesty International, *Combating Torture: A Manual For Action*, 25 June 2003, p. 129, <www.amnesty.org/en/library/asset/ACT40/001/2003/en/1b2dee39-d760-11dd-b024-21932cd2170d/act400012003en.pdf>, visited on 12 June 2009.

⁷² D. Shelton, 'International Law and 'Relative Normativity'' in M. D. Evans (ed.), *International Law* (Oxford University Press, Oxford, 2006), p. 163.

Also, such a classification would be a powerful tool for women rights activists because they would be able to formulate more convincing arguments against gender-based violence.⁷³

In order to rationalise the idea that severe forms/certain forms of domestic violence constitute torture, R. Copelon made an analysis assessing step by step that all the constitutive elements of the act of torture are also present in domestic violence.⁷⁴ This work, described more in detail below, is a good initiative in terms of demonstrating on the academic or theoretic basis that domestic violence is a form of torture. But once again, a criticism can be stated: taking into consideration the degree of importance of violence against women, there is a need for a binding international document that states such a finding, because academic articles that defend the idea that domestic violence is torture have not the same effect as binding instruments.

Also there is a need to understand that the extent of the problem was not that obvious at the time when different human rights conventions were drafted, but those are living instruments that should be adapted to the needs of today.

As mentioned above, Rhonda Copelon determines in her article⁷⁵ the similarities between domestic violence and torture. Copelon demonstrates that each of the four constitutive elements of torture, as defined in Article 1 CAT⁷⁶, is present in domestic violence acts. A brief description of Copelon's reasoning can be made as follows:

- First element: *severe physical and/or mental pain and suffering.*

Domestic violence acts are very similar to common methods of torture: those are beating, biting, spitting, punching, stabbing, strangling, burning or attempted burning.⁷⁷ Other sexual abuse acts, such as rape and the forced penetration of instruments or animals into the vagina are also among brutal forms of torture.⁷⁸ Domestic violence can also take the form of isolation from family or friends, and this is a form of "house arrest".⁷⁹

The psychological effect is often associated with the physical pain: the feeling of humiliation, debilitation and fear caused by the physical

⁷³ Kozma and Dauer, *supra* note 67.

⁷⁴ See Article of Copelon, *supra* note 14.

⁷⁵ See *Ibid.*

⁷⁶ See Article 1 CAT which states that:

For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

⁷⁷ Copelon, *supra* note 14, p. 311.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*, p. 315.

brutalities.⁸⁰ The emotional consequence of domestic battering is a lot harsher than the one perpetrated by official torture. The betrayal and shock of being beaten by a partner can be even more numbing and destructive/shattering than being beaten by a state official⁸¹ because such violence usually continues for years and may escalate over time. Moreover, the most important factor is that it comes from a family member.⁸² Even if domestic violence acts are not extreme, they tend to be repetitive which might increase the severity of the suffering.

Therefore, it seems that the degree of harm reached in some extreme cases of domestic violence is frighteningly similar to the degree of harm generated in cases of torture inflicted by public officials.⁸³

- Second element: *intentional infliction*.

“To constitute torture, pain must be intentionally inflicted against the will of the victim.”⁸⁴ The intent simply refers to the general intent to commit the act which clearly or foreseeably causes terrible suffering.⁸⁵ This element is also present in both torture and domestic violence acts.

- Third element: *acts inflicted for specified purposes*.

Some scholars even argue that the element of specific purposes does not really matter as a component of torture.⁸⁶ According to such a view, what seems to be important is the use of torture which is an abuse of power⁸⁷, constitutive of a human rights violation independently of the nature of the purpose. The acceptance of such an argument can be debatable and open to a discussion that will not be analysed here.

The specific purposes mentioned in Article 1 CAT do not correspond entirely to the purpose of domestic violence acts, since the perpetrator is a private party who tries to reassess his power over his partner.⁸⁸ However, “torture in custody is often used not only to extract confessions but also to instil profound dread into victims, to break their will, to punish them and to demonstrate the power of the perpetrators. Similar purposes characterize acts of torture in the family or the community.”⁸⁹ Acts of torture and domestic violence have the same purpose in the sense that they both aim at degrading, humiliating, terrorising, shaming, intimidating or more generally exercising total control.⁹⁰

⁸⁰ *Ibid.*, p. 313.

⁸¹ *Ibid.*, p. 349.

⁸² Kozma and Dauer, *supra* note 67.

⁸³ Meyersfeld, *supra* note 10, p. 405.

⁸⁴ Copelon, *supra* note 14, p. 325.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*, p.329.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*, p. 333.

⁸⁹ A. Vesa, ‘International and Regional Standards For Protecting Victims of Domestic Violence’, Vol 12:2 *Journal of Gender, Social Policy and the Law* (2004), p. 334.

⁹⁰ Copelon, *supra* note 14, p. 341.

- Fourth element: *some degree of official or quasi-official involvement, whether active or passive.*⁹¹

Copelon argues that the concept of consent or acquiescence are broad enough to embrace the failure of governments to redress domestic violence, even if the drafters did not take it into consideration.⁹² When domestic violence is a matter of common knowledge, law enforcement and affirmative prevention measures might be inadequate; or when complaints are made and not properly responded to, the state should be held to have “acquiesced” in the continued infliction of violence.⁹³

It is true that drafters of CAT established the responsibility of the State for acts of torture inflicted by or involving state officials, and they did not take into account, in the text of the convention, private acts of violence perpetrated by individuals. This might be due to the fact that, as mentioned above, violence against women was not recognised as a huge universal problem at the time when it was drafted. But this does not exonerate the State from all responsibilities: even though state officials may not be directly involved in the infliction of domestic violence acts, they should still be under the positive obligation of preventing and protecting women from domestic violence acts.

Furthermore, as mentioned above, the convention is a living instrument that may be interpreted in the light of today’s conditions and needs as long as such an interpretation is consistent with the object and purpose of the treaty. The original definition of torture needs to be extended so as to include private acts of torture inflicted by private parties.

The idea that CAT is also applicable to domestic violence acts can be supported by the fact that the Committee Against Torture refers in some concluding observations to domestic violence. This was the case, for instance, in the concluding observations addressed to Greece in 2004.⁹⁴ Another example is the 2008 concluding observations for Costa Rica in which there is a whole part reserved to ‘domestic violence and violence against women and children’⁹⁵ where it is stated that “the Committee takes note of the efforts made by the State party to eradicate domestic violence.”⁹⁶

Moreover, in its General Comment No.2, the Committee pinpoints to the core of the problem and gives a final answer by making clear that:

where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent,

⁹¹ Copelon, *supra* note 14, p. 308.

⁹² *Ibid.*, p. 355.

⁹³ *Ibid.*, p. 356.

⁹⁴ CAT, *Conclusions and Recommendations: Greece*, 10 December 2004, CAT/C/CR/33/2, para.6(1), <[www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.CR.33.2.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CAT.C.CR.33.2.En?Opendocument)>, visited on 21 April 2009.

⁹⁵ CAT, *Conclusions and recommendations of the Committee against Torture : Costa Rica*, 7 July 2008, CAT/C/CRI/CO/2, p.7, <www.unhcr.org/refworld/country,,,CRI,4562d94e2,48c632a22,0.html>, visited on 21 April 2009.

⁹⁶ *Ibid.*, p.7, para. 24.

investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.⁹⁷

However, that there seems to be a hesitation, a reticence, a fear when it comes to involving domestic violence as a form of torture. There is a counter-argument which asserts that using the term 'torture' to refer to individual rather than official cruelty threatens to dissolve the boundaries of human rights law and dilutes the meaning of torture.⁹⁸ Also, one could argue that the original meaning of torture as stated in the Convention text should not be strictly interpreted and that it should not be dismantled. The torture expert Nigel Rodley states that domestic battering falls outside this circle of government responsibility.⁹⁹

The justification of such an argument is not very clear, but notwithstanding the validity or relevance of his motivation, there is a need to understand that government-conferred impunity encourages this form of violence.¹⁰⁰ There is a need to be realistic: the justifications invoked against the idea that domestic violence is not torture are not pointless, but they are not relevant and useful in any sense. "The absence of effective state response is a form of impunity that both encourages the conduct and denies relief to the victims."¹⁰¹ A higher authority has to take the burden of responsibility on its shoulders. If this is not done, then battered women will constantly face their terrible destiny.

Therefore, extreme acts of domestic violence should be punishable like torture, notwithstanding the fact that the perpetrator is a state official or a private party. If the international community refuses to accept such a reasoning, then the problem cannot be solved. This view is also supported by NGOs, such as the World Organisation Against Torture, which associates private forms of torture, like domestic violence, with public forms of torture.¹⁰² Also Amnesty International indicates that "[t]he severity of harm inflicted upon women by private individuals can be just as damaging as that inflicted on women who are tortured by agents of the state," and that, in both cases, abuses are intentionally inflicted.¹⁰³

⁹⁷ UN Committee Against Torture (CAT), *General Comment No. 2: Implementation of Article 2 by States Parties*, 24 January 2008. CAT/C/GC/2., p.5, <www.unhcr.org/refworld/docid/47ac78ce2.html>, visited on 30 April 2009.

⁹⁸ Copelon, *supra* note 14, p. 343.

⁹⁹ *Ibid.*, p. 351.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*, p. 355.

¹⁰² Vesa, *supra* note 89, p. 334.

¹⁰³ Amnesty International, *Broken Bodies, Shattered Minds: Torture and Ill-Treatment of Women*, p.5,

The 1994 Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women¹⁰⁴ (“Convention of Belem Do Para”) applies to violence “that is perpetrated or condoned by the state or its agents regardless of where it occurs”.¹⁰⁵ Also, Article 4(d) mentions the right to be free from torture among the rights that women are entitled to in the context of violence.¹⁰⁶ This appears to be a sign that the Inter-American Convention has tacitly accepted extreme forms of violence against women as a form of torture.

2.2.4 Outcome

The recognition of domestic violence as a human rights abuse, and more specifically as a form of discrimination and torture, has the effect of extracting domestic violence from its familial context where it was sheltered from State intervention and integrating it into the category of international human right law.¹⁰⁷ The next chapter will explore the different international human rights provisions that might constitute a basis for engaging the State responsibility regarding domestic violence.

<[ara.controlarms.org/aidoc/ai.nsf/b8977c306ef6ff0380256ef400540ac5/39cb2f2a6c51b8d8802569ed0062a274/\\$FILE/ATT855AM/ACT400012001.pdf](http://ara.controlarms.org/aidoc/ai.nsf/b8977c306ef6ff0380256ef400540ac5/39cb2f2a6c51b8d8802569ed0062a274/$FILE/ATT855AM/ACT400012001.pdf)>, visited on 20 April 2009.

¹⁰⁴ Inter-American Commission on Human Rights, Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, <www.cidh.oas.org/Basicos/English/basic13.Conv%20of%20Belem%20Do%20Para.htm>, visited on 20 April 2009.

¹⁰⁵ See *Ibid.*, Article 2(c).

¹⁰⁶ *Ibid.*, Article 4(d).

¹⁰⁷ Meyersfeld, *supra* note 10, p. 401.

3 Domestic Violence Against Women in International Human Rights Instruments and its Reflection in the Turkish National Legislations

Both international and regional human rights instruments include provisions that advocates against domestic violence use as a base for their claims. Depending on the binding character of the legal instrument, violations of these provisions can have consequences regarding State responsibility. Even if there are no concrete violations, signatory States are supposed to incorporate the international norms into their national legal system. The Turkish national legislations on domestic violence against women will be analysed as an example regarding the question of compatibility with international standards.

3.1 Universal Declaration of Human Rights (“UDHR”)

The UDHR does not have any provision directly related to violence against women in general. However, it sets the tone for principles that might constitute a possible basis for the protection against domestic violence. Taking into consideration the explanation provided in the previous chapter, provisions on equality, non-discrimination and the fundamental rights to be free from torture can be invoked to combat domestic violence.

In this regard, Article 1 of UDHR stipulates that “[a]ll human beings are born free and equal in dignity and rights.”¹⁰⁸ Article 2 of UDHR states that “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹⁰⁹ Furthermore, the UDHR states in its Article 7 that “all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”¹¹⁰

In addition to that, Article 5 sets the premise for the prohibition of torture, and cruel, inhuman or degrading treatment¹¹¹ and states that “[n]o

¹⁰⁸ UDHR, *supra* note 43, Article 1.

¹⁰⁹ *Ibid.*, Article 2.

¹¹⁰ *Ibid.*, Article 7.

¹¹¹ Vesa, *supra* note 89, p. 320.

one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” The right to life, liberty and security of person can also be the basis for regarding acts of violence against women in general as human rights violations.¹¹² To this end, Article 3 of UDHR states that “everyone has the right to life, liberty and security of person.”¹¹³

Being a declaration, the UDHR is initially only recommendatory and non-binding, except for the provisions that form a part of customary international law.¹¹⁴ In fact, other human rights declarations repeatedly refer to the UDHR. The same reasoning goes for the International Court of Justice: even though the Court does not refer to it as custom, it relies on the declaration in its cases. Though few States voted in favour of the declaration and it was not adopted by consensus, other states have subsequently agreed to it. But some of the rights, such as the right to life or the right to be free from torture, have become so firmly established in international law that they are now treated as ‘*jus cogens*’ norms and they developed into custom. They consequently bind the States party to the declaration.¹¹⁵ Therefore, it seems that the mentioned legal provisions can constitute a type of binding basis in terms of advocating against domestic violence and enhancing the role of the State with respect of its obligations.

3.2 International Covenant on Civil and Political Rights (“ICCPR”)¹¹⁶

The ICCPR has a binding effect upon the states that have signed it.¹¹⁷ The States Parties must submit to the Committee regular reports informing on how the rights are being implemented.¹¹⁸ The Committee refers to domestic violence in its concluding observations. For example, it is stated in the concluding observations of Greece that the State party should “take measures to raise awareness of the problem of domestic violence and to protect the victims and include specific provisions on domestic violence in its penal legislation.”¹¹⁹

¹¹² *Ibid.*, p. 320.

¹¹³ UDHR, *supra* note 43, Article 3.

¹¹⁴ Vesa, *supra* note 89, p. 320.

¹¹⁵ J. Rehman, *International Human Rights Law: a Practical Approach*, (Harlow : Longman, 2003), p. 61.

¹¹⁶ *International Covenant on Civil and Political Rights* (ICCPR), adopted on 16 December 1966, entered into force 23 March 1976, ratified by Turkey on 23 December 2003, <www.unhcr.ch/html/menu3/b/a_ccpr.htm>, visited on 12 June 2009.

¹¹⁷ Vesa, *supra* note 89, p. 322.

¹¹⁸ UNHRC, *Human Rights Committee: Monitoring Civil and Political Rights*, <www2.ohchr.org/english/bodies/hrc/>, visited on 20 April 2009.

¹¹⁹ UNHRC, *UN Human Rights Committee: Concluding Observations: Greece*, 25 April 2005, CCPR/CO/83/GRC, <www.unhcr.org/refworld/docid/42d16c9d4.html>, visited on 22 April 2009.

Additionally, the First Optional Protocol to the ICCPR (1966)¹²⁰ allows individuals to address complaints to the Human Rights Committee (“HRC”), which monitors the implementation of the ICCPR by its States parties.¹²¹ Taking into account the fact that Turkey has signed and ratified the ICCPR but not the Optional Protocol, it is not possible to file a claim against Turkey in front of the Committee. However, the State is still under the obligation of incorporating these norms into its national laws.

Article 7 of ICCPR¹²² prohibits torture, and cruel, inhuman or degrading treatment. The problem of domestic violence has brought a new perspective regarding States’ obligations with respect of acts of torture and cruel, inhuman or degrading treatment perpetrated by private parties, such as husbands, partners and parents.¹²³ Even though this issue will be considered more in detail in the subsequent chapter, it seems necessary to touch upon the problematic at this stage already.

Domestic violence was considered for a long time as a private matter protected by the right to respect for private and family life.¹²⁴ The public authorities were usually hesitant to interfere in this sphere in order to protect women subjected to violence. Fortunately, the growing awareness regarding the huge problem of domestic violence has changed this passive approach.¹²⁵

In its General Comment of 1982¹²⁶ on Article 7 of ICCPR, the HRC of the UN stated that: “[...] The scope of protection required goes far beyond torture as normally understood. [...] Finally, it is also the duty of public authorities to ensure protection by the law against such treatment even when committed by persons acting outside or without any official authority.”¹²⁷ Also, in General Comment No.20, it is formulated that “[i]t is the duty of the State party to afford everyone protection [...] against the acts prohibited by Article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.”¹²⁸

Consequently, the provision on the prohibition of torture also applies to acts of violence perpetrated by individuals. Acts of torture do not have to

¹²⁰ *Optional Protocol to the International Covenant on Civil and Political Rights*, adopted on 16 December 1966, entered into force 23 March 1976, <www.unhcr.ch/html/menu3/b/a_opt.htm>, visited on 12 June 2009.

¹²¹ UNHRC, *supra* note 117.

¹²² *Supra* note 116, Article 7 ICCPR: “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. [...]”

¹²³ M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, (Engel, cop. 2005), p. 184.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ OHCHR, General Comment No. 7: Torture or Cruel, Inhuman or Degrading Treatment or Punishment (Article 7), 30 May 1982, <training.itcilo.org/ils/CD_Use_Int_Law_web/additional/Library/English/UN_S_B/GC_human-rights/gc7_1982.pdf>, visited on 21 April 2009.

¹²⁷ *Ibid.*, p. 2.

¹²⁸ OHCHR, General Comment No. 20: Replaces General Comment 7 Concerning Prohibition of Torture, and Cruel Treatment or Punishment (Article 7), 10 March 1992, para. 2, <www.unhcr.ch/tbs/doc.nsf/0/6924291970754969c12563ed004c8ae5?Opendocument>, visited on 21 April 2009.

be committed by a public official in order to fall under the application of Article 7 ICCPR.

Furthermore, as explained in the previous chapter, the provisions on the prohibition of discrimination (Art 2(1) ICCPR) and on gender equality (Article 3) can also serve as legal bases to advocate against domestic violence. In this regard, Art 2(1) states that:

[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹²⁹

Besides, Article 3 provides that “[t]he States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.”

Moreover, Article 26 ICCPR¹³⁰ guarantees the right to effective legal protections and remedies for all persons. It can be argued that States Parties violate this right by impeding domestic violence victims’ access to judicial remedies.¹³¹ High standards of proof, strict evidentiary requirements and unresponsiveness on the part of police are obstacles that discourage women victims from pressing charges.¹³²

These provisions are the main ones under which domestic violence can fall. However, this list is not exhaustive and it can be extended to other human rights, such as the right to life (Article 6).¹³³

3.3 International Covenant on Economic, Social and Cultural Rights (“ICESCR”)¹³⁴

The ICESCR is an international instrument that can be used to protect women’s economic, social and cultural rights. The link of domestic violence to economic, social and cultural rights might not seem to be very clear or obvious. The ICESCR may appear to be a secondary or subsidiary human rights instrument regarding the protection of women against violence. Therefore it does not receive the attention that it deserves. It is true that ICESCR cannot be directly invoked in situations involving violence against women,¹³⁵ but its role in terms of both preventing and remedying

¹²⁹ ICCPR, *supra* note 116, Article 2(1).

¹³⁰ *See Ibid.*, Article 26 ICCPR: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such [...]sex [...]”

¹³¹ Vesa, *supra* note 89, p. 321.

¹³² *Ibid.*

¹³³ *Ibid.*, p. 320.

¹³⁴ *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, adopted on 16 December 1966, ratified on 3 January 1976, ratified by Turkey on 23 Decembre 2003, <www.unhcr.org/refworld/docid/3ae6b36c0.html>, visited on 12 June 2009.

¹³⁵ Vesa, *supra* note 89, p. 324.

domestic violence is crucial. This should not be neglected. There are a number of rights that victim women should be able to invoke.

One of those rights is the right to housing stated in Article 11(1) ICESCR which is formulated as follows:

[t]he States Parties [...] recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, [...].¹³⁶

Very often due to a lack of shelters, women subject to violence have absolutely nowhere to go. Family members or friends offer accommodation but some of the victims are absolutely alone since their husband or partner isolates them from the rest of the world. In this regard, the State is under the obligation to protect and fulfil the right to housing of any individual that might be violated by any other individual or non-state actor.¹³⁷ Therefore, women victim of domestic violence should be given proper housing when needed. Also, in its concluding observations for Lithuania in 2004, the UN Committee on Economic, Social and Cultural Rights “urges the State party to ensure the availability and accessibility of crisis centres where victims of domestic violence can find safe lodging and counselling.”¹³⁸ Furthermore, the Committee “notes the absence of specific regulations on [...]the lack of shelters for the women and children who are victims of family [...], and the apparent lack of counselling facilities for such victims.”¹³⁹

The right to food (Article 11) may also be invoked, since battered women and their children (if they have any) sometimes do not eat for several days when they are subject to acts of violence.

The right to health is another right that may be invoked in the context of domestic violence.¹⁴⁰ The definition of health as a human right is not very clear since there is still confusion and controversy about its meaning.¹⁴¹ In the Preamble to the Constitution of WHO, health is defined as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.”¹⁴² General Comment No.12 of the CESCR notes that this WHO definition was not the one adopted in the

¹³⁶ ICESCR, *supra* note 136, Article 11(1).

¹³⁷ S. Leckie, ‘The Human Right to Adequate Housing’, in A. Eide, *et al.* (eds.), *Economic, Social and Cultural Rights: A Textbook* (Dordrecht ; M. Nijhoff, 2001), p. 157.

¹³⁸ UN Committee on Economic, Social and Cultural Rights (CESCR), *UN Committee on Economic, Social and Cultural Rights: Concluding Observations: Lithuania*, 4 June 2004. E/C.12/1/Add.96., para. 43, <www.unhcr.org/refworld/docid/42d26afd4.html>, visited on 22 April 2009.

¹³⁹ UN Committee on Economic, Social and Cultural Rights (CESCR), *UN Committee on Economic, Social and Cultural Rights: Concluding Observations, Poland*, 16 June 1998. E/C.12/1/Add.26., para.13, <www.unhcr.org/refworld/docid/3ae6ae61c.html>, visited on 22 April 2009.

¹⁴⁰ Vesa, *supra* note 89, p. 324.

¹⁴¹ B. Toebes, ‘The Right to Health’ in A. Eide, *et al.* (eds.), *Economic, Social and Cultural Rights: A Textbook* (Dordrecht ; M. Nijhoff, 2001), p.169.

¹⁴² Constitution of the World Health Organization, adopted on 22 July 1946, entered into force on 7 April 1948, <www.who.int/governance/eb/who_constitution_en.pdf>, visited on 12 June 2009.

drafting of Article 12 ICESCR, but that the reference in Article 12 ICESCR to the “highest attainable standard of physical and mental health” is not restricted to the right to health care.¹⁴³ It further states, “[o]n the contrary, [...] the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, [...]”¹⁴⁴ Therefore, it can be said that the consequences of domestic violence affect victims in such a way that they cannot lead a healthy life. This also has a negative impact on the right to housing and the right to food. Furthermore, the General Comment contains a whole paragraph in which the Committee relates the right to health to women and it provides that “[a] major goal should be reducing women’s health risks, particularly [...] protecting women from domestic violence.”¹⁴⁵ This also reinforces the argument that the right to health constitutes a legal basis for victims. Also, there are other signs that demonstrate that the right to health of battered women has to be taken in charge by the State.

In this regard, even though it is not a binding instrument, the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) applies to victims of domestic violence regarding the obligations of the state as to the right to health.¹⁴⁶ According to paragraph 12(a), States should provide financial compensation to victims subjected to “sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes; [...]”¹⁴⁷ Overall, this picture shows that it is the right to an adequate standard of living¹⁴⁸ of victims that is generally affected.

Another right that could constitute a basis for protection is the right to human rights education based on ICESCR Article 13(1). This targets all women, not only victims, in order to inform them about their human rights in general. In this regard, it is disappointing that the Committee does not elaborate on the human rights education aspect of the right to education in its General Comment No. 13¹⁴⁹. In the context of domestic violence, women victims are generally unaware of the legal proceedings and opportunities that are available to them. The State should undertake the obligation to

¹⁴³ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12 of the Covenant)*, 11 August 2000. E/C.12/2000/4. , para.4, <www.unhcr.org/refworld/docid/4538838d0.html>, visited on 22 April 2009.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*, para. 21.

¹⁴⁶ UN Office for Drug Control and Crime Prevention, *Guide for Policy Makers on the Implementation of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, (New York, 1999), p.16, <www.uncjin.org/Standards/policy.pdf>, visited on 22 April 2009.

¹⁴⁷ *Ibid.*, para. 12(a).

¹⁴⁸ See Article 11 ICESCR.

¹⁴⁹ UN CESCR, *General Comment No. 13: The Right to Education (Article 13 of the Covenant)*, 8 December 1999. E/C.12/1999/10., <www.unhcr.org/refworld/docid/4538838c22.html>, visited on 23 April 2009.

provide them with the necessary legal information¹⁵⁰ through rights awareness programs, trainings and free legal aid.¹⁵¹

Typically, women subject to violence cannot enjoy their economic, social and cultural rights¹⁵² because domestic violence constitutes an impediment to these rights. On the other hand, the ‘*a contrario*’ reasoning shows that because women are deprived of their economic, social and cultural rights, they may not be able to obtain redress for abuses.¹⁵³ Thus, “economic dependence and inadequate welfare provision force women to bear continued abuse.”¹⁵⁴ Battered women are often desperate in the sense that they have no place to find refuge, no money to look after their children and themselves and no funding to seek legal aid for a possible redress.¹⁵⁵ Therefore, social and economic deprivation accompany ignorance of their legal rights by women.¹⁵⁶ This problem will be analysed more in detail below in the subsequent chapter.

3.4 Convention on the Elimination of Discrimination Against Women (“CEDAW”) and its Optional Protocol

The CEDAW has already been mentioned above in the context of the link between domestic violence and gender-based discrimination. However, some further legal aspects need to be clarified. The CEDAW does not contain any provision prohibiting directly violence against women in general. However, the Recommendation No.12¹⁵⁷ of the Committee specifies that States should include in their reports information on violence and on measures introduced to deal with it.

Recommendation No.19 addresses violence against women and gives a non-exhaustive list of human rights involved in the context of gender-based violence. Those relevant for domestic violence are as follows: the right to life; the prohibition of torture or cruel, inhuman or degrading treatment; the right to liberty and security; the right to equal protection under the law; the right to equality in the family; the right to the highest standard of physical and mental health; the right to just and favourable conditions of work.¹⁵⁸

Besides, Recommendation No.19 relates specific Articles of CEDAW to gender-based violence. Only the ones that are relevant in the context of domestic violence will be mentioned hereafter:

¹⁵⁰ G. Alfredsson, ‘The Right to Human Rights Education’, in A. Eide, *et al.* (eds.), *Economic, Social and Cultural Rights: A Textbook* (Dordrecht ; M. Nijhoff, 2001), p. 282.

¹⁵¹ Amnesty International, *supra* note 103, p. 36.

¹⁵² S. Leckie and A. Gallagher (eds.), *Economic, Social, and Cultural Rights: a Legal Resource* (University of Pennsylvania Press, Philadelphia, 2006), p. 570.

¹⁵³ Amnesty International, *supra* note 103, p. 37.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

¹⁵⁷ General Recommendation No.12, *supra* note 20.

¹⁵⁸ General Recommendation No.19, *supra* note 51, para. 7.

- Traditional attitudes, customs and practices, mentioned in Article 2(f), 5 and 10(c) of CEDAW, aggravates gender-based violence.¹⁵⁹
- Article 12 of CEDAW requires States to take measures to ensure equal access to health care. Recommendation No.19 links this provision to violence against women by noting that it “puts their health and lives at risk.”¹⁶⁰ It also mentions traditional practices, such as female genital mutilation, that are harmful to women and childrens’ health.
- Recommendation No.19 notes that rural women, mentioned in Article 14 CEDAW, are more vulnerable in terms of facing gender-based violence because of traditional attitudes of rural communities regarding the subordinate role of women.¹⁶¹
- Recommendation No.19 relates gender-based violence to Article 16 CEDAW (in connection with Article 5) which addresses the problem of discrimination against women within their family.¹⁶² The connection is not very clear and lacks coherence, but the main idea appears to be that the exclusion of women from their family responsibilities by men constitutes a form of violence and coercion, which impedes women’s ability to participate to family life and public life on an equal basis with men.

The provisions in CEDAW are not restricted to acts perpetrated by public official; they also apply when actions are inflicted by private persons. Article 2(e) refers to acts of discrimination against women committed by “[...] any person, organization or enterprise”.¹⁶³ Recommendation No.19 also stresses that discrimination under CEDAW is not confined to “action by or on behalf of Governments”.¹⁶⁴ The state responsibility aspect will be examined more in detail in the last chapter.

As to the Optional Protocol to CEDAW, which entered into force in 2000, it offers women the possibility to address individual complaints to the Committee for violations of their rights under CEDAW.¹⁶⁵ The Protocol also creates an inquiry procedure enabling the Committee to initiate inquiries into situations of grave or systematic violations of women’s rights. Turkey has ratified both the CEDAW and its Optional Protocol, but the Committee has not yet issued any case-law against Turkey.

¹⁵⁹ *Ibid.*, para. 11.

¹⁶⁰ *Ibid.*, para. 19.

¹⁶¹ *Ibid.*, para. 21.

¹⁶² *See Ibid.*, para. 23.

¹⁶³ CEDAW, *supra* note 40, Article 2(e).

¹⁶⁴ General Recommendation No.19, *supra* note 51, para. 9.

¹⁶⁵ *See* Article 2 of the Optional Protocol to CEDAW, <www.un.org/womenwatch/daw/cedaw/protocol/text.htm>, visited on 13 June 2009.

3.5 Declaration on the Elimination of Violence Against Women (“DEVAW”)

Some provisions of this declaration have already been mentioned above. In addition to that, the Preamble of the Declaration enumerates groups of women especially vulnerable to violence including: women belonging to minority groups, migrant women, women living in rural or remote communities, female children, women with disabilities or elderly women.

Article 3 of the declaration reiterates that women are entitled to the equal enjoyment and protection of all human rights and fundamental freedoms, enumerated in a similar way to the list given in the context of Recommendation No.19. The rest of the provisions, which are basically related to state responsibility, will be analysed in detail in the last chapter on the obligation of the State to exercise due diligence regarding acts of domestic violence.

The said declaration has no binding effect. However, some of the rights enunciated above, such as the right to life or the right not to be subjected to torture, are firmly established in international law and they are part of binding ‘*jus cogens*’ norms.¹⁶⁶ Therefore, it might be argued that domestic violence standards start to become part of customary international law, which is binding in nature.¹⁶⁷

3.6 The European Convention of Human Rights (“ECHR”)

Since Turkey is a State Party to the ECHR, it seems necessary to mention the legal provisions on which a possible domestic violence complaint could be based. The prohibition of torture, inhuman or degrading treatment (Article 3 ECHR) could be invoked if the state does not fulfill its positive obligation to undertake measures preventing and protecting the victim from constant domestic violence. Another provision that could be alleged is Article 14, on the basis of gender-based discrimination. However, Article 14 is an accessory provision, and it applies only in respect of ‘the enjoyment of the rights and freedoms as set forth’ in the Convention.¹⁶⁸ Therefore, the complaint of discrimination has to fall within the sphere of another protected right: this could be Article 3, or Article 2 (the right to life). There is currently an ongoing case related to domestic violence against a Turkish woman. This case-law will be analysed in detail in the last chapter.

¹⁶⁶ Rehman, *supra* note 115.

¹⁶⁷ Vesa, *supra* note 89, p. 338.

¹⁶⁸ C. Ovey and R. C. A. White, *Jacobs and White, the European Convention on Human Rights*, (Oxford Univ. Press, cop. 2006), p. 419.

3.7 Turkish Legislations Related to Domestic Violence in the Light of Recent National Reforms

Despite Turkey's poor human rights record, the Turkish Government has signed and ratified all the above mentioned human rights instruments (except the First Optional Protocol to the ICCPR). Significant legal changes on the national basis were initiated only in the late 1990s.¹⁶⁹ It is in a context of grave challenges, such as terror, devastating earthquake and the 2000 financial crisis¹⁷⁰ that legal reforms were undertaken in Turkey. These legal developments were related partly to the efforts of women's movements¹⁷¹ and partly to Turkey's status as a country candidate for the access to the European Union.¹⁷² These amendments are very positive in terms of the accomplishment by the State of its obligation to enact legislations compatible with international standards but some shortcomings still exist.

3.7.1 An Incomplete Gender Equality Clause in the Constitution

Knowing that domestic violence is strongly linked to the issue of gender-based discrimination¹⁷³, it is necessary to mention one of the amendments of the Turkish Constitution in 2004 regarding its gender equality clause. An additional provision stating that "[m]en and women have equal rights. The State shall have the obligation to ensure that this equality exists in practice" has been added to Article 10 of the Turkish Constitution.¹⁷⁴ This amendment is very positive since the responsibility

¹⁶⁹ Z. F. Kabasakal Arat(ed.), R. Falk (foreword), *Human Rights in Turkey*, (Philadelphia : University of Pennsylvania Press, 2007), p. 203, <books.google.com/books?id=ubjCDGcZ1Z4C&printsec=frontcover&dq=human+rights+i+n+turkey>, visited on 28 April 2009.

¹⁷⁰ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *UN Committee on the Elimination of Discrimination against Women: State Party Report, Turkey*, 8 August 2003. CEDAW/C/TUR/4-5., p. 2-3, <www.unhcr.org/refworld/docid/3fdd8cd62.html>, visited on 28 April 2009.

¹⁷¹ *Ibid.*

¹⁷² Kabasakal Arat, *supra* note 169, p. 200.

¹⁷³ See Chapter 1.

¹⁷⁴ See Article 10 of the Turkish Constitution:

All individuals are equal without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such considerations.
Men and women have equal rights. The State shall have the obligation to ensure that this equality exists in practice.
No privilege shall be granted to any individual, family, group or class.
State organs and administrative authorities shall act in compliance with the principle of equality before the law in all their proceedings.

sphere of the State regarding gender equality has been expanded. The State is not only under the obligation of preventing gender-based discrimination, it also has the duty to undertake necessary measures.

However, this improvement has been criticised by shadow reports for not including special temporary measures such as quotas.¹⁷⁵ This has also been criticised by the state report of CEDAW.¹⁷⁶ Furthermore, the presence of the phrase “[n]o privilege shall be granted to any individual, family, group or class” in paragraph 4 seems to reject the idea of undertaking affirmative action measures in order to provide equal opportunities to women in the fields of education, employment and political participation.¹⁷⁷

3.7.2 A Better Gender Equality in the New 2001 Civil Code

The Turkish Civil Code was also subject to recent legal reforms (2002) among which one has some relevance regarding domestic violence, “the concept of the male head of the conjugal union is replaced by equal partnership where the spouses manage the matrimonial union with equal decision making authority; spouses have equal rights over the family domicile and they have equal representational powers.”¹⁷⁸ Even though this legal provision has no direct effect on the protection of women from domestic violence, every single step that develops women’s rights empowers them and decreases their vulnerability to problems such as domestic violence.

3.7.3 The 1998 Law on the Protection of the Family: a Law Against Domestic Violence

Before the adoption of the law on the Protection of the Family in 1998, domestic violence cases were treated under the general provisions of the Penal Code.¹⁷⁹ As emphasized in the State Report, this was problematic because the private sphere of the family life remained largely outside of the regulatory mechanisms of the existing legislative framework.¹⁸⁰ The State was not offering specific protection to women subject to domestic violence.¹⁸¹

<www.byegm.gov.tr/mevzuat/anayasa/anayasa-ing.htm>, visited on 25 April 2009.

¹⁷⁵ Women for Women’s Human Rights, *Shadow NGO Report on Turkey’s Fourth and Fifth combined Periodic Report to the Committee on the Elimination of Discrimination against Women*, January 2005, p.3, <www.wwhr.org/images/shadowreport.pdf>, visited on 28 April 2009.

¹⁷⁶ CEDAW, *supra* note 170, p. 45.

¹⁷⁷ Women for Women’s Human Rights, *supra* note 175, p. 13.

¹⁷⁸ CEDAW, *supra* note 170, p. 4.

¹⁷⁹ *Ibid.*, p. 7.

¹⁸⁰ *Ibid.*

¹⁸¹ N. Kardam, *Turkey’s Engagement with Global Women’s Human Rights*, (Aldershot ; Ashgate, 2005), p. 121.

The new law on the Protection of the Family has turned domestic violence from being a ‘private matter’ into a public one.¹⁸² In the context of this development, the perpetrator can be subject to various punitive measures such as, forcing the offender to abandon the house, confiscation of arms owned by the offender, payment of temporary alimony, ban on disturbing the family through the means of communication devices and prohibiting the destruction of the possessions of other family members.¹⁸³ The violation of these measures are penalized from three to six months of imprisonment. Also the complaint can be filed not only by the victim herself but also by any other person.¹⁸⁴ Since the Law on the Protection of the Family has gone into force, the number of reported cases has increased.¹⁸⁵ This new law represents an important milestone in terms of protecting women subject to domestic violence.¹⁸⁶

The Law on the Protection of the Family was subject to an amendment in 2007. Violence is interpreted more broadly: family members that may be living apart or that are legally separated are also accorded legal protection.¹⁸⁷ Furthermore, the new law enables courts to award an a protection order against the batterer for all family members living under the same roof, i.e. not only spouses. Before this change, the law was only applying to officially married couples, and it failed to protect women living in religious nuptials, especially in rural areas. The judge can also take the decision to award the perpetrator an order to “apply to a healthcare institution for examination or treatment”.¹⁸⁸ Also, the applications made to the court by the defender in the context of this law are free of charges.¹⁸⁹ The aim is to prevent the judiciary proceedings from being an economic burden for the victim.

3.7.4 Reforms Brought by the New Penal Code

The new Penal Code, adopted in 2004, includes huge changes regarding women’s rights. Some of the amendments related to domestic violence can be listed as follows:

- Criminalisation of marital rape. This was not acknowledged in the old Penal Code, because there was a belief that marriage gives the

¹⁸² CEDAW, *supra* note 170, p. 7.

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ Turkish Republic Prime Ministry General Directorate on the Status of Women, *National Action Plan: Gender Equality (2008-2013)*, September 2008, p. 13, <www.ksgm.gov.tr/Pdf/NAP_GE.pdf>, visited on 28 April 2009.

¹⁸⁷ CEDAW, *Consideration of reports submitted by States parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women : 6th periodic report of States parties : Turkey*, 24 November 2008. CEDAW/C/TUR/6., p. 7, <www.unhcr.org/refworld/docid/49a7e7d22.html>, visited on 28 April 2009.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

husband unlimited sexual access to his wife.¹⁹⁰ This peculiar reasoning made it difficult to recognise marital rape as a crime.¹⁹¹

The first court case on marital rape was decided in April 2008 and the perpetrator was sentenced to ten years.¹⁹²

- Provisions legitimizing rape and abduction in case the perpetrator marries the victim have been abolished. Under the previous Penal Code, the charges against the rapist were dropped if he married the victim because the marriage was considered as saving her honor.¹⁹³
- Provisions on honour killings have also been improved. Under the old Penal Code, courts granted reduced sentences for honour killings because the perpetrator was considered to be unjustly provoked by the victim's 'inappropriate behaviour'.¹⁹⁴ The new Penal Code provides that custom killings, a sub-category of honour killings, are considered as cases of aggravated homicide and the perpetrators must be sentenced to death.¹⁹⁵ This provision has been criticised for using the term 'custom killing' instead of 'honour killing'. The scope of custom killings is more restricted than honour killings: honour killings can occur outside a customary context.¹⁹⁶
- Sexual offences are classified as being crimes against women rather than crime against public decency.¹⁹⁷ The old classification reflected the patriarchal idea that a woman's body and sexuality did not belong to herself, but rather to her family or society.¹⁹⁸

This new Penal Code is a very positive step but it also has shortcomings. However, as it was said on the website of one of the Women's NGOs: "women know by experience that much is made of little. Moreover, this time we achieved the 'much'. There is 'little' left and we will continue to walk."¹⁹⁹

¹⁹⁰ R. Coomaraswamy and L. M. Kois, 'Violence Against Women' in K. D. Askin, D. M. Koenig, *Women and International Human Rights Law, Vol. 1: Introduction to Women's Human Rights Issues* (Transnational Publishers, New York, 1999) p. 186.

¹⁹¹ *Ibid.*

¹⁹² UN Office on Drugs and Crime, UN Division for the Advancement of Women, Expert Group Meeting on Good Practices in Legislation on Violence Against Women, 23 May 2008, p.13,

<www.un.org/womenwatch/daw/egm/vaw_legislation_2008/expertpapers/EGMGPLVAW%20Paper%20_Pinar%20Ilkcaracan%20and%20Liz%20Ercevik%20Amado_.pdf>, visited on 28 April 2009.

¹⁹³ Women for Women's Human Rights, <www.wwhr.org/turkish_penalcode.php>, visited on 28 April 2009.

¹⁹⁴ UN Human Rights Council, *UN Human Rights Council: Addendum to the Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Mission to Turkey* ('Report of the Special Rapporteur on Turkey'), 5 January 2007. A/HRC/4/34/Add.2., p.16, <www.unhcr.org/refworld/docid/45fea1812.html>, visited on 28 April 2009.

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ CEDAW, *supra* note 187, p. 9.

¹⁹⁸ Women for Women's Human Rights, *supra* note 193.

¹⁹⁹ Flying Broom,

<en.ucansupurge.org/index.php?option=com_content&task=view&id=86&Itemid=40>, visited on 28 April 2009.

4 Challenges Impeding an Effective State Responsibility

The challenges that States have to overcome range from legislative obstacles to unefficient criminal justice systems that refrain from interfering in the private sphere. In some countries, such as Turkey, socio-economic disadvantages and archaic cultural beliefs are additional factors that have considerable negative impact regarding the eradication of domestic violence against women.

4.1 Legislative Obstacles

4.1.1 The Dichotomy Between the Private and Public Spheres

One of the main obstacles to the protection of women from domestic violence is the distinction made by human rights law between the public and private spheres.²⁰⁰ Human rights law only offers protection from abuse in the public realm.²⁰¹ This means that the public sphere is subject to state interference, whereas the private area is void of such intrusion.²⁰² This leads to the non-sense reasoning that the use of gender-based violence is normal and acceptable as long as it takes place at home. In this context, one chance for women to attract public attention would be to get beaten on the balcony, which is a semi-private and semi-public area. In order to put an end to such an absurd reasoning, progress should be made in establishing that all forms of gender-based violence, wherever they occur, constitute a human rights violation and the State should be held accountable for that.²⁰³

It is true that international human rights law fundamentally guarantees freedoms in relation to the State as the holder of public power.²⁰⁴ However, this does not imply that the State is not under the positive duty to protect individuals through appropriate measures taken against some forms of interference by other individuals.²⁰⁵ The issue of State responsibility regarding human rights violations by private persons will be explored in the next chapter. But it is necessary to briefly mention that while the State cannot be held directly responsible for any such acts which are in breach of a convention, it might still be responsible for them under certain circumstances.²⁰⁶ In this regard, the due diligence standard has helped to

²⁰⁰ UN Commission on Human Rights, *supra* note 194, p. 14.

²⁰¹ Vledder, *supra* note 1, p. 21.

²⁰² C. Moore, 'Women and Domestic Violence: The Public/Private Dichotomy in International Law', 7 *The International Journal of Human Rights* (2003) p.93.

²⁰³ Vledder, *supra* note 1.

²⁰⁴ Byrnes, *supra* note 3, p. 229.

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*

challenge the traditional view that the State cannot be held responsible regarding violations in the “private sphere”.²⁰⁷

Another argument against such a reluctance to interfere can be found in the field of refugee law. In fact, if refugee law protects victims of domestic violence by providing them asylum in a safe country, this means that the state of origin is actually under the responsibility towards women in that regard.²⁰⁸

Furthermore, it should be understood that domestic violence is a private issue that has public consequences. Eradicating domestic violence is not only beneficial to women, it is also very important in terms of economic development of the State. Domestic violence not only inhibits women’s active participation into the workforce, it does also affect the country’s outside image in terms of foreign investment.²⁰⁹ It is crucial for a State to ensure and promote human rights of women, because this marks the nations as modern and suitable for foreign partnership.²¹⁰

The public/private dichotomy is not only a problem at the theoretic level. The biggest challenge is in practice. The right to private and family life tend to be used as an argument to reinforce this division between the private and public spheres.²¹¹ Perceptions of domestic violence as a private or a family issue are strong and resilient among professionals dealing directly with the phenomenon.²¹² The approach of the police and prosecutors will be analysed more in details in the sections below.

4.1.2 The Right to Respect for Private and Family Life: an Obstacle to the State Intervention in the Private Sphere

Generally speaking, the right to respect for private and family life is sometimes used as a legal basis to explain the reluctance to interfere in a dispute taking place at home.²¹³ This means that once the doors are closed, family members can commit all kind of atrocities against each other; atrocities that would normally not be tolerated in public. Such an argument

²⁰⁷ UN Commission on Human Rights, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences on the Due Diligence Standard as a Tool for the Elimination of Violence against Women*, 20 January 2006. E/CN.4/2006/61. UNHCR Refworld, p.14, <www.unhcr.org/refworld/docid/45377afb0.html>, visited on 5 May 2009.

²⁰⁸ Moore, *supra* note 202, p. 94.

²⁰⁹ S. E. Merry, *Human Rights And Gender Violence: Translating International Law Into Local Justice* (The University of Chicago Press, Chicago, 2006) p. 95.

²¹⁰ *Ibid.*

²¹¹ Vledder, *supra* note 1, p. 21.

²¹² UNIFEM, *Ending Domestic Violence in Southeast Europe and Turkey: Towards a Regional Strategy for Action*, 10 July 2007, p. 24, <www.stopvaw.org/sites/3f6d15f4-c12d-4515-8544-26b7a3a5a41e/uploads/Ending_DV_in_SEE_and_Turkey__UNIFEM_.pdf>, visited on 4 May 2009.

²¹³ S. Choudhry and J. Herring, ‘Righting Domestic Violence’, 20 *International Journal of Law, Policy and the Family* (2006) p. 96.

constitutes a clear abuse of rights, since it seems to be nothing but a justification for the destruction of other human rights.

International human rights instruments prohibit such a misuse: Article 30 UDHR stipulates that “[n]othing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”²¹⁴ The same principle is also formulated in Article 5(1) ICCPR, and Article 17 ECHR which is designed to avoid any abuse of rights contained in the Convention.

Moreover, the right to privacy argument does not appear valid,, simply because of the way the rights balance against one another. Some human rights that the victim can invoke (the right to be free from torture, for example) seem to be more important and have a higher value than the right to privacy, which is generally invoked by the perpetrator. In a domestic violence case, there are two parties: the wife/girlfriend/partner victim and the offender partner. When put on a scale, certain human rights of the victim, such as the right to life or the prohibition of torture, have a ‘jus cogens’ nature and belong to the group of norms that cannot be restricted or derogated under any circumstances. Whereas the right to private life, which is supposed to protect the offender, is a relative right and its supremacy over the said human rights of the victim cannot be accepted.

Furthermore, it must be remembered that there is often a third group of victims: children. The legal reasoning should be made by bearing in mind that the final decision must be made in their best interests. This is particularly important since children living in violent households are also at risk of domestic abuse.²¹⁵ This risk for children begins even before birth since violence during pregnancy is also quite widespread.²¹⁶ After birth, domestic violence can affect children’s health since they might develop sleeping and eating disorders.²¹⁷ Furthermore, they have an increased potential of developing aggressive behaviours when they become adults.²¹⁸ For instance, boys who observe their father battering their mother have an extremely increased risk of abusing their future spouses.²¹⁹ Also, research reveals that battered mothers may be less available to their children because they are trying to stay safe from violence or because they experience psychological disturbances such as depression.²²⁰ They are also more likely to physically or emotionally abuse their children than are mothers that are

²¹⁴ UDHR, *supra* note 43, Article 30.

²¹⁵ G. Hornor, ‘Domestic Violence and Children’ 19 *Journal of Pediatric Health* (2005) p. 207.

²¹⁶ Turkish Republic Prime Ministry, *supra* note 23, p. 18: “[i]n Turkey, one out of ten women who have been pregnant at least once has experienced physical violence during pregnancy from her husband or partner.”

²¹⁷ Hornor, *supra* note 215, p. 207.

²¹⁸ *Ibid.*, p. 208.

²¹⁹ *Ibid.*

²²⁰ L. S. Carter, *et al.*, ‘Domestic Violence and Children: Analysis and Recommendations’ 9 *The Future of Children* (1999) p. 6.

not subject to violence.²²¹ On the other hand, violent fathers tend to be less affectionate towards their children.²²²

Therefore, the State is also responsible towards children living in violent homes. In this respect, the CRC²²³ states in its Article 19(1) that:

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

In such a context, it is obvious that the non-interference of State authorities on the basis of the right to privacy does not seem to be what is in the best interests of the children.

Also, it should be remembered that the right to privacy and family life is not just a negative right inhibiting state intrusion into someone's private life.²²⁴ On the contrary, cases of domestic violence require the intervention of the State in order to protect women from interferences by their husband or partners who prevent the effective enjoyment of their rights.²²⁵ An *a contrario* reasoning might lead to an illogical result allowing the State to be completely passive while women are facing constant violence under the pretext that their right to privacy and family life should be respected. As mentioned above, the right to privacy is a relative right that can be subject to limitations under certain circumstances.

4.1.3 Incomplete and Ineffective Legislations

4.1.3.1 The Necessity to Eradicate Flaws in the Law

Complete legislations constitute the first step in addressing domestic violence. International law plays a very important role because it informs and leads national law.²²⁶ Legislations are very important because of their ability to send a message to the general society that domestic violence is a serious crime that cannot be tolerated.²²⁷

In Turkey, violations against women were not always considered as deserving urgent attention.²²⁸ It is with the effort and work of women NGOs that state institutions got sensitised to the general problem of violence against women. This ensured the adoption of more effective policies and

²²¹ Hornor, *supra* note 215, p. 207.

²²² Carter, *et al.*, *supra* note 220, pp. 6-7.

²²³ Convention on the Rights of the Child, entered into force on 2 September 1990, ratified by Turkey on 4 May 1995, <www.unhchr.ch/html/menu3/b/k2crc.htm>, visited on 25 May 2009.

²²⁴ Choudhry and Herring, *supra* note 213, p. 96.

²²⁵ *Ibid.*, p. 97.

²²⁶ M. L. Mcconnell, 'Violence Against Women: Beyond The Limits Of The Law' 21 *Brooklyn Journal of International Law*, p. 903.

²²⁷ Coomaraswamy and Kois, *supra* note 190, p.189.

²²⁸ Byrnes, *supra* note 3, p. 221.

measures aiming to protect women from violence and assisting them in seeking redress. The role of women's NGOs was crucial since they have substantial knowledge and experience in working with violence victims.²²⁹

However, legislation alone will not eradicate violence against women nor can it fully meet the needs of victims. While legislation is a necessary component in the fight to eliminate gender-based violence,²³⁰ an effective implementation is the key to resolving the problem.

4.1.3.2 Implementing Existing Legislations

There is legislation related to domestic violence, in all countries, but they are not always properly used. In some States, the implementation becomes such a big challenge that one might think that it may not be worthwhile to have a particular legislation to protect women. As for the case of Turkey, the national legislation has been adequately developed, but there are still major difficulties regarding the functioning and coordination of responsible institutions.²³¹ The capacity to effectively implement domestic violence policies is diminished by the lack of national and local action plans to address domestic violence.²³² Most importantly, professionals do not seem to have firm attitudes against gender-based violence; both men and women in general seem to tolerate the phenomenon of domestic violence.²³³

4.2 Inefficiency of the Criminal Justice System

It is crucial to note here that the efficiency of the criminal justice system varies from one country to another. Therefore, it is not possible to make general statements for all the countries of the world. The subsequent remarks regarding the negative attitudes of the Police and the judicial staff seem to be valid in the case of Turkey. It is also probably valid for countries in which domestic violence against women is still a problem. It might be valid to a certain extent for other countries the judicial system has already developed to respond to domestic violence as a crime.

4.2.1 Ineffective Police Attitude

The police play a critical role in the implementation of domestic violence policies, "since the police come into contact with family violence more than any other government agency, they have the potential for making

²²⁹ Coomaraswamy and Kois, *supra* note 190, p. 217.

²³⁰ *Ibid.*

²³¹ UNIFEM, *supra* note 212, p. 22.

²³² *Ibid.*, p. 20.

²³³ *Ibid.*, p. 22.

the greatest impact on detection and cessation of future violence.”²³⁴ However, advocates for battered women perceive the police as a major impediment to implementation.²³⁵ It should be remembered that the efficiency of the Police in responding to domestic violence differs from one country to another, and even in a particular country, some policemen are more effective than others. It would not be fair to affirm a statement blaming the police in general. However, it should be recognised that in some countries such as Turkey, the police do not seem to be able to address cases of domestic violence. Therefore, the police might end up acting in complicity with perpetrators. It is unfortunate that in some extreme cases when a battered woman goes to the police to seek help, the response that she might get is “[g]o home!”. The police might turn away from the victim of domestic violence, instead of helping her.²³⁶ This wrong attitude has many reasons that will be addressed in the next subsection.

4.2.1.1 The Reluctance to Interfere in the Private Sphere

The first reason that the “go home” attitude is inappropriate is that it reinforces institutionalised acceptance of domestic violence acts as private practices beyond the regulation and control of the state.²³⁷ The police seem to consider domestic violence as a private matter that does not require state interference. The reports of Amnesty International reveal that even in a relatively progressive society like Sweden, where there is seemingly a high level of gender equality, domestic violence continues to be considered “as a matter undeserving of public policy attention”.²³⁸ Consequently, the private/public dichotomy explained above is also an impediment in practice.

As for the case of Turkey, domestic violence is considered to be a private matter that involves notions such as honour.²³⁹ The police are also reluctant to intervene in domestic disputes and frequently advise women to return to their husbands.²⁴⁰ Therefore, it is not uncommon even for women themselves to perceive violence in the private sphere as normal.²⁴¹ The official research does not give any statistical data regarding the number of reported cases and the number of investigations. Therefore, it is difficult to assess how many of reported cases are investigated. However, the research reveals that 92 percent of women who have experienced physical or sexual partner violence have never applied to official institutions such as police, gendarmerie, hospital, lawyer, social services or other official institutions or NGOs.²⁴² This can be considered as a sign that the State has not been able to

²³⁴ S. A. MacManus and N. R. Van Hightower, ‘Limits of State Constitutional Guarantees: Lessons from Efforts To implement Domestic Violence Policies’ 49 *Public Administration Review* (1989), p.271.

²³⁵ *Ibid.*

²³⁶ Meyersfeld, *supra* note 10, p. 383.

²³⁷ Moore, *supra* note 202, p.98.

²³⁸ UN Commission on Human Rights, *supra* note 207, p. 14.

²³⁹ Moore, *supra* note 202, p. 98.

²⁴⁰ *Ibid.*

²⁴¹ UN Commission on Human Rights, *supra* note 207, p. 14.

²⁴² Turkish Republic Prime Ministry, *supra* note 23, p. 23.

create a platform of effective institutionalised security system to which battered women can turn.

4.2.1.2 Lack of Training Regarding Domestic Violence

Although the police are well positioned to effectively address domestic violence, they generally do not seem to receive a specific training for that purpose.²⁴³ In fact, “studies have shown that, when called for domestic violence cases, police throughout the world often try to mediate or counsel the couple rather than treating the incident like a criminal matter.”²⁴⁴ This means that the police may be more inclined to reconcile the couple rather than taking necessary measures in order to protect victims and prevent further abuse. The behaviour of the police varies from one country to another. However in some countries, the intervention of the police in general seem to be weak, with officers appearing ignorant and even indifferent. This inadequate behaviour accentuates the isolation of such victims and transforms domestic violence into a hidden problem.²⁴⁵

Turkey has plans for institutionalising training for professionals in the field of violence against women generally and domestic violence more specifically.²⁴⁶ Also following the Penal Code reform, the Minister of Interior published a newsletter calling on the police to register and follow up on all complaints related to violence against women.²⁴⁷ In accordance with this publication, several police commanders started to respond to all reports of violence against women, even if initial evidence seems insufficient to refer the case to the public prosecutor.²⁴⁸

In other countries, special police stations that work exclusively with victims of violence against women have been effective in implementing legislations and combating traditional police failings in addressing domestic violence.²⁴⁹ These police departments approach domestic violence in a multidisciplinary way, providing comprehensive support to women including social, legal, psychological, housing, health, and day care services.²⁵⁰ An efficient way for dealing with domestic violence victims will be presented and suggested in the subsequent section.

4.2.1.3 Increasing the Efficiency of the Criminal Justice Through a Concrete Project

In Turkey, the practical difficulty comes from the fact that the battered woman has to accomplish some ‘pre-conditions’ in order to finally file a judicial complaint against her husband. This means that she has to go to the police station to press charges first. Then she needs to consult the

²⁴³ Coomaraswamy and Kois, *supra* note 190, p. 187.

²⁴⁴ *Ibid.*

²⁴⁵ Meyersfeld, *supra* note 10, p. 386.

²⁴⁶ UNIFEM, *supra* note 212, p. 31.

²⁴⁷ Ertürk, *supra* note 31, p. 17.

²⁴⁸ *Ibid.*

²⁴⁹ Coomaraswamy and Kois, *supra* note 190, p. 189.

²⁵⁰ *Ibid.* p. 190.

forensic doctor to document her injuries (if she has any) with a medical report. Sometimes, she has to go to the public hospital if her injuries cannot be evaluated by the forensic doctor because of a lack of facilities. After that, she has to file her complaint at the judicial court sometimes without the assistance of a lawyer.

This is a big and tiring travel for a woman who has just been subjected to acts of violence. The bureaucratic obstacles constitute an other source of waste of energy for the victim. Therefore, it is important to ease the conditions of a woman who wishes to have recourse to justice.²⁵¹ In such a context, the project Karin presented below should be used as a model because it facilitates the judicial procedure that battered women have to go through.

The Project Karin²⁵² in Malmö is the name of a Swedish cooperation project against domestic violence. Women exposed to violence (and their children if they have any) can have recourse to Karin (which is the name of the building where the project is implemented). Here, they have access to all the services that they need in one place without having to travel from place to another. In other words, they can meet the police, social workers, gynecologists and forensic experts under one and the same roof. All of these authorities have different tasks but they are inter-dependent. If, for example, a woman reports a crime and obtains a legal adviser but does not receive a good psycho-social support, then there might be a great risk that she will not manage to fulfill the legal process. Cooperation between authorities is therefore the key element of this project.

Another particularity of Project Karin is that it strives to offer a very warm and welcoming environment that is adapted to the needs of victims. This is especially important since women who go there have suffered traumatic experiences and are scared. The buildings have been designed in such a way that victims feel like at home. There is a living room with TV, a kitchen, a playing corner for children and other 'guest' rooms where victims can tell their story in front of a camera. The colours and furnitures have been carefully chosen: orange, green and purple are used to give a calming feeling to the victims; the couches and seats are soft. Everything has been designed to aid the victims in gaining confidence.²⁵³

It can not be ignored that this kind of project is costly and requires a lot of funding. In the case of Turkey, this can be implemented maybe only in a small city or a county. Then this small project can be a model for the rest of the country if it reaches success, because success seems to be the key for further funding.

²⁵¹ *Project Karin*,
<www.projektkarin.se/projectkarin/abouttheproject.4.7f968fc211eec933de80001041.html>, visited on the 22 May 2009.

²⁵² *Project Karin*,
<www.projektkarin.se/projectkarin.4.7f968fc211eec933de80001023.html>, visited on the 22 May 2009.

²⁵³ *See for pictures on*
<www.projektkarin.se/images/18.17792ce111d8a41dd37800012896/Karin_panorama.jpg>, visited on 22 May 2009.

4.2.2 The Problem of Impunity Regarding Acts of Domestic Violence

The police are not the only responsible party regarding the inefficient implementation of existing legislations. Prosecutors and judges also appear to be key actors in the criminal justice system for implementation difficulties.²⁵⁴ It is difficult to make a generalisation in that regard because each judge's attitude can be different. It cannot be denied that judges and prosecutors might also view domestic violence as a personal matter requiring neither arrest nor judicial response.²⁵⁵ At the same time, it might be thought that the same acts of domestic violence would be prosecuted more vigorously and punished more severely if they were committed against strangers.²⁵⁶

In this context, an institutionalised acceptance of domestic violence may appear to allow the perpetrators to act with impunity²⁵⁷ which means exemption from punishment.²⁵⁸ Impunity refers to the failure of the State to bring perpetrators of human rights violations to justice.²⁵⁹ Therefore, in some countries where the judicial response to domestic violence is very weak, acts of domestic violence might not be subject to any investigation and perpetrators continue committing their crimes because they know that there is no risk of facing arrest, prosecution or punishment.²⁶⁰ As it has been pointed out in Ingrid Vledder's Article :

[t]his contributes to a climate, where such acts are considered as being normal and acceptable rather than criminal, where women do not seek justice because they know they will not gain it, where the original pain and suffering are prolonged and aggravated by the denial that a serious violation of human rights has been committed.²⁶¹

As a consequence of negative attitudes, women tend to lose their confidence in justice²⁶² and accept to face their destiny rather than trying to solve the problem. In such a context, domestic violence victims, or families of murdered victims, should be given the possibility to file an action against the abusive partner and also against law enforcement officials that fail to fulfil their responsibility of investigation and prosecution.²⁶³

²⁵⁴ MacManus and Van Hightower, *supra* note 234, p. 271.

²⁵⁵ *Ibid.*

²⁵⁶ Human Rights Watch, *The Human Rights Watch Global Report on Women's Human Rights*, (Human Rights Watch, New York, 1995), p. 342.

²⁵⁷ Moore, *supra* note 202, p. 98.

²⁵⁸ Vledder, *supra* note 1, p. 26.

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

²⁶² Kardam, *supra* note 181, p.130.

²⁶³ Coomaraswamy and Kois, *supra* note 190, p. 188.

4.3 Socio-Economic Obstacles

In the case of Turkey, socio-economic obstacles constitute a real impediment to the State responsibility regarding its duty to eradicate domestic violence. Therefore, the different socio-economic challenges that are analysed below focus on Turkey. However, it should be noted that these problems are not only limited to Turkey and they should be taken into account (to a certain extent) in any other country that faces the problem of gender-based violence.

4.3.1 The Importance of Improving the Socio-Economic Status of Women

Very often, women remain in violent relationships because they are economically dependent on their husband.²⁶⁴ The lack of economic independence accentuates women's vulnerability. A battered woman who has her economic independence can solve her problem on her own; she has the freedom to walk away from situations of acute crisis.²⁶⁵ Whereas a 'subordinate' woman has no resources to plan an escape. She would refuse to file a complaint with the police just because she is worried that when her husband is in jail, she will be left without a source of income.²⁶⁶ This is even more important if she has children.²⁶⁷

Recommendation No.19 states in its paragraph 11 that gender-based violence "maintain women in subordinate roles and contribute to their low level of political participation and to their lower level of education, skills and work opportunities." Similarly, R. Copelon affirms that "violence perpetuates the economic, social and psychological dependency which, in turn, contributes to women's vulnerability to violence."²⁶⁸

As indicated by the CEDAW Committee, improving women's legal and socio-economic status is likely to be, in the long term, a key intervention in reducing women's vulnerability to violence.²⁶⁹ However, States often hide behind financial shortfalls and other difficulties as excuses to avoid initiating reforms.²⁷⁰ While the lack of financial resources is just an explanation, it should not be used as a pretext not to undertake measures.

²⁶⁴ Moore, *supra* note 202, p. 111.

²⁶⁵ Coomaraswamy and Kois, *supra* note 190, p. 179.

²⁶⁶ Kardam, *supra* note 181, p. 116.

²⁶⁷ *Ibid.*

²⁶⁸ Copelon, *supra* note 14, p. 339.

²⁶⁹ WHO, Summary Report, *WHO Multi-country Study on Women's Health and Domestic Violence Against Women: Initial Results on Prevalence, Health Outcomes and Women's Responses*, p. 22, 2005, < www.who.int/gender/violence/who_multicountry_study/en/>, visited on 5 May 2009.

²⁷⁰ Merry, *supra* note 209, p.80.

4.3.2 Low Education Level of Women: an Alarming High Illiteracy Level

First of all, before starting an in-depth analysis, it should be noted that Turkey's population is over 70 million. Turkish women and men are equal at least in terms of numbers; both male and female populations are around 35 million each.²⁷¹ This information is quite important in terms of evaluating the different statistical numbers given below.

It is in the context of the overall anti-violence efforts that women's access to education should be strongly supported.²⁷² Turkish women's education is particularly important since the 2001 statistics indicate that 21 percent of Turkish women, as opposed to six percent of men, over 15 years of age are illiterate.²⁷³ This huge gap between men and women is particularly striking and quite alarming because a basic eight year education is free of charge and compulsory for all citizens of both sexes.²⁷⁴ These statistics are even higher in rural zones of Turkey, where almost half of women are illiterate.²⁷⁵ It is also disappointing to observe that the State spends a meagre 3.46 per cent of its gross domestic product (GDP) on educational institutions.²⁷⁶ Additionally, it should be understood that educational discrimination begins in families themselves where male children are given priority due to conventional and economic reasons.²⁷⁷

It appears necessary to emphasise that if a woman cannot read, she will not know that she has rights unless she is informed by a third person. The lack of knowledge of existing laws remains a serious problem²⁷⁸, since women do not know that they can press charges because they are unaware that there is a possibility to obtain judicial redress for domestic violence acts.

Under these circumstances, education seems to be a key to the problem. Yet, many women are denied an education because there is a belief that a woman's place is home and her role is primarily about caring for the family.²⁷⁹ A women's role is often viewed as unimportant and unworthy of an education.²⁸⁰ Women are isolated, they are kept in a 'bubble' since they are being restricted to their homes or to their close neighborhoods.²⁸¹

However, various activities, projects and national campaigns are being conducted in order to promote educational and training programs for

²⁷¹ Turkish Statistical Institute of the Prime Ministry of the Rep. of Turkey, Press Release, 26 January 2009, <www.turkstat.gov.tr/PreHaberBultenleri.do?id=3992>, visited on 12 May 2009.

²⁷² WHO, *supra* note 269, p. 22.

²⁷³ CEDAW, *supra* note 170, p. 21.

²⁷⁴ See Article 42 of the Turkish Constitution which states that "[p]rimary education is compulsory for all citizens of both sexes and is free of charge in state schools [...]"

²⁷⁵ UN Human Rights Council, *supra* note 194, p. 7.

²⁷⁶ Ertürk, *supra* note 31, p. 7.

²⁷⁷ CEDAW, *supra* note 187, p. 42.

²⁷⁸ Kardam, *supra* note 181, p. 130.

²⁷⁹ OHCHR, *supra* note 50, p. 7.

²⁸⁰ *Ibid.*

²⁸¹ Kardam, *supra* note 181, p. 114.

girls and women who have left school prematurely.²⁸² Considerable efforts are being made, but the value and importance of education has not been fully realised neither by individuals, nor by state authorities. Education seems to be a key to the eradication of many human rights violations and domestic violence is only one of them.

4.3.3 Low Level of Women Participation to the Worklife

Women's access to gainful employment should also be strongly supported in the context of the fight against domestic violence.²⁸³ In 2006, Turkish women's participation to labour force was only 25 percent (which is the lowest rate among OECD countries²⁸⁴); this rate was 71 percent for men.²⁸⁵ This low rate of women can be explained by many factors:

- A large portion of Turkish women are unpaid family workers (the majority work in the agricultural field).²⁸⁶
- Women have very low level of education.²⁸⁷
- Marriage is another factor that has a negative impact on women's labour force²⁸⁸ because they are expected to accomplish domestic tasks. The presence of children is also another obstacle since there are no quality childcare facilities that are affordable.²⁸⁹
- Cultural and customary restrictions on women's freedom of movement outside the home are also problematic since male family members prevent women from working.

This whole picture shows that Turkish women are economically dependent on their husband. They do not have the possibility to have recourse to divorce or walk away if they are subject to violence. They do not have the possibility to solve their problems by themselves and they have to rely on the State to help them. Women are actually trapped in a vicious circle: the absence of education fosters the unemployment, which increases their vulnerability to domestic violence.

4.3.4 Low Level of Representation in the Parliament

It is very important to have female members in the Parliament, because the Parliament is the institution that adopts legislations. Women's perspectives have a crucial importance, since they can express views that are

²⁸² CEDAW, *supra* note 187, p.42.

²⁸³ WHO, *supra* note 269, p. 22.

²⁸⁴ Women for Women's Human Rights, *supra* note 175, p. 16.

²⁸⁵ CEDAW, *supra* note 187, p. 45.

²⁸⁶ *Ibid.*, p. 47.

²⁸⁷ *Ibid.*

²⁸⁸ *Ibid.*

²⁸⁹ Women for Women's Human Rights, *supra* note 175, p. 16.

in the best interests of women. It is true that Parliament members are highly lobbied by women NGOs, but the main decision is taken by deputies in the end. Therefore, women need to be involved in the process of adoption of legislations in order to share opinions and make suggestions that male members would not necessarily think of at first. As to violence against women, obstacles in law and in practice can be overcome more easily if there are more female voices.

The Parliament in Turkey has 550 members. In 2002, the percentage of female members of the Parliament was 4,4 percent, which means that there were only 24 women sitting at the Parliament.²⁹⁰ This number increased of 100 percent in 2007: 50 women entered the Parliament. This means that women represent 9 percent of the Parliament.²⁹¹ The following table explains it clearly:

| Percentage of Female Members of Parliament ²⁹² | | | | |
|---|-----------------------|-------|-----|------------------------------|
| Election year | Total number of seats | Women | Men | Percentage of female members |
| 2002 | 550 | 24 | 526 | 4,4 percent |
| 2007 | 550 | 50 | 500 | 9 percent |

Even though the number of women representation has increased of 100 percent, there is still a huge gap between women and men. Moreover, there are no legal provisions in favour of quotas or other special temporary measures.²⁹³ Of course, one should not sit in the Parliament because of his or her gender, but simply because he or she deserves it. However, taking into account the very poor socio-economic status of women, they are not on an equal status with men. Therefore, there is a need for some sort of privilege allowing the increase of the number of women deputies on a temporary basis in order to fully promote their rights during the decision-making process.

4.3.5 The Problem of Lack of Shelters

Turkey is in serious lack of shelters that are able to provide refuge to women escaping from domestic violence.²⁹⁴ There is an inconsistency regarding the information provided by various state and NGO reports on the number of shelters. In a country of over 70 million people, it is estimated that there are around 40 institutions with limited number of places.²⁹⁵

According to a new legislation from 2004, all municipalities with more than 50 000 inhabitants are under the obligation to provide a shelter

²⁹⁰ CEDAW, *supra* note 187, p. 25.

²⁹¹ *Ibid.*

²⁹² *Ibid.*, p. 26.

²⁹³ *Ibid.*, p. 25.

²⁹⁴ Ertürk, *supra* note 31, p. 18.

²⁹⁵ 'New Women Shelters to be Built in Turkey', *Turks.us, Daily World EU News*, 9 June 2008, < www.turks.us/Article .php?story=20080609080831937>, visited on 12 May 2009.

for women victims of violence.²⁹⁶ This law is not implemented because of the lack of funding provided by the Government and also local municipalities are not given any operational guidelines regarding the management of these institutions.²⁹⁷ This means that they do not have the knowledge on methods of handling any potential shelter, and they are not trained to recruit a qualified staff.²⁹⁸ There are also some problems in practice since some NGOs claim that shelters are turning away women who fall into particular categories such as prostitutes, women with health problems and women who are pregnant.²⁹⁹

Work is under way to enhance and expand the capacity of shelters³⁰⁰, but also to increase the standards and train the personnel.³⁰¹ It should be recognised that the lack of shelters is also a problem in very developed countries, such as Sweden, where the shelters are often full.

4.4 Cultural Obstacles

In Turkey, cultural beliefs and practices constitute another major challenge in the fight against domestic violence. The remarks below are valid for Turkey, but they should also be taken into account for other States since the presence of stereotypes seems to be a problem everywhere in the world.

4.4.1 Culture: an Explanation, Not an Excuse

Traditional views that women are subordinate to men fuel violence against women. Paragraph 11 of Recommendation No. 19 attracts the attention to the fact that one of the causes of gender-based violence is the traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles that perpetuate widespread practices involving violence or coercion.

Local culture and traditions constitute an obstacle to the development of women's rights, since they are being used as an argument to justify violence against women.³⁰² In many countries, cultural relativism impedes the effective implementation of international human rights instruments.³⁰³ Claims based on custom and traditions are being used by States to excuse acts of violence against women.³⁰⁴ During hearings at the Committee, some State representatives respond that they are unable to make

²⁹⁶ CEDAW, *supra* note 187, p. 6.

²⁹⁷ *Ibid.*, p. 10.

²⁹⁸ Women for Women's Human Rights, *supra* note 175, p. 10.

²⁹⁹ Amnesty International, *Turkey: Shelters Not Cemeteries*, 5 July 2004, p.2, <www.amnesty.org/es/library/asset/EUR44/012/2004/en/dom-EUR440122004en.pdf>, visited on 12 May 2009.

³⁰⁰ CEDAW, *supra* note 170, p. 14.

³⁰¹ *Daily World EU News*, *supra* note 295.

³⁰² Vledder, *supra* note 1, p.20.

³⁰³ UN Commission on Human Rights, *supra* note 207, p. 15.

³⁰⁴ *Ibid.*

progress regarding women's rights because of the persistence of patriarchal culture, tradition, and customs.

Culture can be used as an explanation but not as an excuse or pretext. In other words, culture is a factor that fosters violence against women, but it is not an argument that justifies its use. This distinction is crucial, since citing the mere fact of a tradition or custom cannot function as a valid justification.³⁰⁵ Some States might advance peculiar arguments such as "that's a part of our culture!" or "we are used to that problem!" to legitimate their lack of positive action regarding the oppression faced by women in their families. This kind of answers is probably highly irritating for the Committee.

Also, the approach to the obstacle of culture is different and more constructive when States talk about their efforts to overcome gender stereotypes and prejudices that affect women's access to education, work, political position, and increase their vulnerability to violence.³⁰⁶

4.4.2 Social Norms Supporting Violence Against Women

It is intriguing and disturbing to comprehend the social norms that govern some societies in which violence against women is tolerated. In some societies where domestic violence is really developed, it is quite ironic that the act of domestic violence does not seem to create any shame. Yet, the mere fact of saying that it is accepted in the society might be considered as crossing the borders of respect. In other words, the act in itself is accepted, but it is sometimes a taboo to talk about it and uncover the real attitudes that favor gender-based violence.

Originally, violence against women was linked to the belief that men are superior to women.³⁰⁷ In extreme cases, men consider women they live with as their possessions that they can treat as they wish and as they consider appropriate.³⁰⁸ As it has been expressed in a newspaper article related to domestic violence in Turkey: "[m]en believe that when they marry a woman, they possess her. They see a woman just like a car."³⁰⁹ This remark is mostly valid for traditional rural areas of Turkey, where men think that they have full control over women's behavior, and violence is a manifestation of this control, of this power to impose their will.³¹⁰ Moreover, in some societies, there seems to be an accepted custom of 'disciplining' a woman through violence for something she did wrong as

³⁰⁵ B. Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Polity, Cambridge, 2001) p. 253.

³⁰⁶ Merry, *supra* note 209, p. 98.

³⁰⁷ Meyersfeld, *supra* note 10, p. 414.

³⁰⁸ *Ibid.*

³⁰⁹ N. Sobecki, 'Domestic Violence in Turkey Out of Control', *The Huffington Post*, 20 February 2009, <www.huffingtonpost.com/2009/02/20/domestic-violence-in-turk_n_168661.html>, visited on 11 May 2009.

³¹⁰ Kardam, *supra* note 181, p. 115.

part of her family duties.³¹¹ This conviction also exists in the minds of some individuals composing the Turkish society. There are even proverbs that suggest that violence against women is normal. One of those can be translated as “he is your husband, he loves you and he beats you”. This translation is not very accurate but it suggests that the mere fact of having the status of husband gives the right to love, but also ‘the right to beat’ his wife. This belief is radical because beating is even considered to be a sign of love.

In extreme cases, even women themselves think that violence is normal.³¹² This may be due to the fact that they have internalised the idea that they are inferior, that their service and obedience is their husband’s natural right.³¹³ This hierarchical structure cannot even be questioned, because this an ‘inescapable’ or ‘unchangeable’ fact of life.³¹⁴

It has been claimed that underneath gender-based violence lies a much horrific truth, which is misogyny in the subconscious of the society.³¹⁵ As a result, women are pushed aside, violently treated, pressured to remain dependent and silent.³¹⁶ Misogyny might be a trigger for violence against women, but there are also other factors such as the lack of confidence of men who fear women’s power. They seem to reflect their frustration through violence against those who live with them under the same roof. Home appears to be the only space that they can control, because they feel powerless and very weak once they have crossed the doors.

4.4.3 A Good Example of “Cultural Practice”: Honour Crimes

In some societies where women’s rights are underdeveloped, male superiority suggests the male right to control female behavior and perhaps most importantly her sexual behavior.³¹⁷ Men are supposed to be the protector and controller of women’s sexuality.³¹⁸ The sexual freedom of a woman is considered to be a big threat to manhood.³¹⁹ This means that men lose their masculine identity or their ‘honour’ if a female family member is judged by the community as having misbehaved.³²⁰ If she engages in a sexual activity before marriage or outside marriage, or that there is even a gossip that this might be the case, violence against her may be considered ‘unavoidable’ by male family members to protect the man’s honor.³²¹ And

³¹¹ Meyersfeld, *supra* note 10, p. 414.

³¹² UN Human Rights Council, *supra* note 194, p. 9.

³¹³ Kardam, *supra* note 181, p. 115.

³¹⁴ *Ibid.*

³¹⁵ *Ibid.*, p. 133.

³¹⁶ *Ibid.*

³¹⁷ *Ibid.*, p. 114.

³¹⁸ *Ibid.*, p. 132.

³¹⁹ *Ibid.*

³²⁰ *Ibid.*, p. 114.

³²¹ *Ibid.*

to reclaim their manhood in the eyes of the society, men cleanse their honor by killing their own daughter or sister or wife.³²²

In some parts of Turkey, the concept of honour is defined within the sexuality of women.³²³ Here again, underneath honour killings seems to lie a fear of women,³²⁴ “women in the male psyche is someone who presents a constant threat to a man’s honour because her chastity is open to constant defilement.”³²⁵

It must be acknowledged that crimes committed in the name of ‘honour’ are very serious human rights violations which particularly target women living in Eastern and South Eastern regions of Turkey.³²⁶ Some ‘honour crimes’ cases have also been reported in major Turkish cities such as Istanbul.³²⁷ Groundbreaking reforms of the Penal Code in 2004 strengthened the penal provisions on honour crimes. Before the amendment, the perpetrators of honour crimes were receiving reduced sentences on the ground that there was an ‘unjust provocation’ by the victim’s ‘inappropriate behaviour’.³²⁸ Whereas now the Penal Code considers honour killings as cases of aggravated homicide and the perpetrators must be sentenced to life imprisonment.³²⁹

In the context of the penal reforms, the virginity testing, which is a practice often used by families to “determine” a girl’s chastity, has also partially been criminalized. But this has a shortcoming since virginity testing can still be done with the authorisation of a judge or prosecutor even if the woman refuses to consent to it.³³⁰ This is a clearly intrusive practice³³¹ that violates a woman’s body integrity and puts an incredible psychological pressure on her shoulders.

As a result of this partial improvement of penal provisions, there is a rising rate of suicides among women in South Eastern and Eastern Turkey.³³² There are allegations that the deaths of these women were in fact either instances of murder or the victims were forced to commit suicide.³³³ Also, in the absence of adequate state protection, suicide may be the only option for women to escape extreme violence and oppression.³³⁴

However, it should be noted that the changes in the Penal Code have also resulted in several successful prosecutions.³³⁵ Most recently, on January 13, 2009, a Turkish Court sentenced five members of the same

³²² *Ibid.*

³²³ *Ibid.*, p. 129.

³²⁴ *Ibid.*, p. 133.

³²⁵ *Ibid.*

³²⁶ World Organisation Against Torture (OMCT), *Violence Against Women in Turkey: A Report to the Committee Against Torture*, September 2003, p. 349, <www.omct.org/pdf/VAW/Publications/2003/Eng_2003_09_Turkey.pdf>, visited on 11 May 2009.

³²⁷ *Ibid.*

³²⁸ Ertürk, *supra* note 31, p. 16.

³²⁹ *Ibid.*

³³⁰ *Ibid.*

³³¹ *Ibid.*

³³² *Ibid.*, p. 4.

³³³ *Ibid.*

³³⁴ *Ibid.*, p. 14

³³⁵ N. Sobecki, *supra* note 309.

Kurdish family to life imprisonment for the honour killing of a sixteen year-old girl who got pregnant as a result of rape.³³⁶ Therefore there are recent positive examples that show that attitudes, which put women at risk and ensure continued impunity for the perpetrators, are gradually changing.³³⁷

It should be noted that honour killings also occur in other moslem countries such as Egypt or Lebanon.

4.4.4 Community Complicity: “This is a Private Matter” Justification

The community’s ignorance regarding domestic violence is another obstacle. This passive attitude of the society is the consequence of all the social norms that have been mentioned in the above section. Additionally, individuals that are living in a society may not always be willing to interfere in a private dispute between a husband and wife because they consider it to be a private matter.³³⁸ This reality is quite ironic, because the Turkish society for instance, is very much an ‘interventionist’ society where neighbors are very curious about what is happening in the next apartment.³³⁹ They even deal with each others most private aspects of life,³⁴⁰ but they consider domestic violence as a private issue. It is also interesting to see how the society can be reactive when it comes to other private issues such as a homosexual couple willing to live together, or a heterosexual couple living together without being married.

The silence of the community needs to be confronted and overcome.³⁴¹ The reason why men are violent against their wife seems to be partly due to the fact that the society allows them to be.³⁴² There should be ‘zero tolerance to domestic violence’ in the society among both men and women.³⁴³

4.4.5 The Resistance of Law to Traditional Customs in Favour of Violence Against Women

Cultural differences should be respected, but only within decent limits. The human rights approach resists seeing claims to cultural difference as a valid justification for violence against women.³⁴⁴

Human rights are universal, this means that they belong to all people, women and men, equally.³⁴⁵ However, as stated above, the principle of

³³⁶ *Ibid.*

³³⁷ Ertürk, *supra* note 31, p. 17.

³³⁸ UNIFEM, *supra* note 212, p.23.

³³⁹ Kadam, *supra* note 181, p.115.

³⁴⁰ *Ibid.*

³⁴¹ Vledder, *supra* note 1, p. 29.

³⁴² Mcconnell, *supra* note 226, p. 901.

³⁴³ UNIFEM, *Ending Domestic Violence in Southeast Europe and Turkey: Towards a Regional Strategy for Action*, *supra* note 212, p. 22.

³⁴⁴ Merry, *supra* note 209, p. 91.

universality of human rights is being challenged on the grounds that local culture and traditions should prevail.³⁴⁶ States try to revive cultural relativist arguments to defend traditional practices, but the CEDAW, the Recommendation No.19, and the DEVAW all direct states to refrain from invoking custom, tradition, culture, or religious considerations to obviate their international human rights obligations with respect to the elimination of all forms of violence against women.³⁴⁷

The Convention on the Elimination of Discrimination against Women is extremely clear. Article 2(f) CEDAW requires States Parties “[t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.” Furthermore, Article 5(a) compels states

[t]o modify the social and cultural patterns of conduct of men and women, with a view of achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women.

States should eliminate the social, cultural and traditional practices which perpetuate gender stereotypes, and they should create an overall framework in society that promotes women’s rights.³⁴⁸

Also, Article 10(c) indicates that States Parties are under the obligation to ensure that such gender stereotypes are eliminated from the education system. Article 14 of CEDAW focuses on empowering women in rural areas and ensuring their equal access to various social services including adequate health care.³⁴⁹

Recommendation Nr.19 states in paragraph 11 that traditional prejudices and practices “may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them of the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms.”³⁵⁰ Moreover, the situation of rural women is even worse since “[r]ural women are at risk of gender-based violence because traditional attitudes regarding the subordinate role of women [...]persist in many rural communities [...]”³⁵¹

The Declaration on the Elimination of Violence Against Women also states clearly, in Article 4 that “[s]tates should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination”.³⁵² State measures are crucial to eradicate the cultural practices of violence against women.³⁵³

³⁴⁵ Vledder, *supra* note 1, p. 19.

³⁴⁶ *Ibid.*

³⁴⁷ Coomaraswamy and Kois, *supra* note 190, p. 190.

³⁴⁸ OHCHR, *supra* note 50, p. 6.

³⁴⁹ Vesa, *supra* note 89, p. 329.

³⁵⁰ *Ibid.*, p. 328.

³⁵¹ General Recommendation No.19, *supra* note 51, para. 21.

³⁵² DEVAW, *supra* note 34.

³⁵³ Coomaraswamy and Kois, *supra* note 190, p. 180.

Even though law prohibits violence against women, cultural norms and traditions can maintain it, making the law a dead letter.³⁵⁴ In some countries, such as Turkey, there is in general an inadequate implementation of the law, acts of violence against women seem to remain unpunished.³⁵⁵ In these circumstances, a victim of domestic violence can file a complaint at the CEDAW Committee on the ground that the State has failed to undertake measures aiming the eradication of traditional views and customs fuelling violence against women in general, as well as violence within the home.³⁵⁶ States must understand that domestic violence, no matter what the cultural context, is not a legitimate practice.³⁵⁷

³⁵⁴ Vledder, *supra* note 1, p. 27.

³⁵⁵ *Ibid.*

³⁵⁶ Vesa, *supra* note 89, p. 329.

³⁵⁷ Vledder, *supra* note 1, p. 20.

5 State Obligation to Act with Due Diligence in Domestic Violence Cases

The due diligence standard has been very helpful in challenging the misconception that the State can get rid of its responsibilities simply because the perpetrator of the violence is a private actor.³⁵⁸

5.1 The Standard of ‘Due Diligence’

5.1.1 The Meaning

The standard of due diligence imposes a responsibility on the State to take necessary measures to prevent, protect against and provide remedies for acts of violence whether such acts are committed by state agents or private parties, and whether they occur in the public or private sphere.³⁵⁹ The due diligence standard has been used to extend State responsibility to all acts of violence wherever they occur and whoever commits them. It has not been invented specifically for domestic violence since it was already used in international law to assess whether the State has fulfilled its responsibilities for acts of human rights violations committed by its agents.³⁶⁰ Later, it was incorporated into Recommendation No.19 and DEVAW to develop State responsibility so as to include violence perpetrated by private parties in addition to acts of violence committed by State agents.³⁶¹

However, the due diligence has been criticised in the Special Rapporteur’s report for being restrictive because States seem to act with due diligence once the act of violence has occurred and they neglect their obligation regarding the prevention and compensation of acts of violence.³⁶²

5.1.2 Legal Basis

Article 2(e) CEDAW emphasizes that the State Parties must “take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise”. The choice of the word ‘any’ highlights the fact that this provision establishes State responsibility regarding acts of

³⁵⁸ Vesa, *supra* note 89, p. 331.

³⁵⁹ OHCHR, *15 Years of the United Nations Special Rapporteur on Violence Against Women: its Causes and Consequences*, p. 25, <www2.ohchr.org/english/issues/women/rapporteur/docs/15YearReviewofVAWMandate.pdf>, visited on 22 May 2009.

³⁶⁰ *Ibid.*

³⁶¹ *Ibid.*

³⁶² UN Commission on Human Rights, *supra* note 207, p. 2.

discrimination committed both by public officials and private parties. Even if the Convention does not specifically address violence against women, it sends the signal that the State responsibility is not restricted to illegal acts perpetrated by public agents. This reasoning is emphasized in the Fact Sheet No.22 on the discrimination against women, according to which “[i]t is not enough to strive for "vertical" gender equality of the individual woman *vis-à-vis* public authorities; States must also work to secure non-discrimination at the "horizontal" level, even within the family.”³⁶³

Furthermore, Recommendation No.19 emphasizes that even though the CEDAW applies to violence perpetrated by public officials³⁶⁴, discrimination under the Convention is not restricted to action by or on behalf of Governments. It then states 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.”³⁶⁵ In addition to that, it provides that “[s]tates parties should take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act[...].”³⁶⁶

Moreover, DEVAW is clearer and formulates in its Article 4(c) the responsibility of the State to act with due diligence. It stipulates that States should “[e]xercise 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.”³⁶⁷

At the regional level, this principle has been incorporated in Article 7(b) of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (1994) (“Convention of Belém do Para”) which requires that States “apply due diligence to prevent, investigate and impose penalties for violence against women”.³⁶⁸

5.1.3 *Velásquez Rodríguez v. Honduras* Case (IACHR)

The standard of due diligence was formulated by the Inter-American Court of Human Rights in the 1988 *Velásquez Rodríguez v. Honduras* case³⁶⁹. Even though the case is not related to domestic violence, the reasoning of the Court offers a precious input regarding the establishment of State responsibility for acts perpetrated by private parties.

The case concerns the disappearance of Manfredo Velásquez, a Honduran university student who was kidnapped by armed men in civilian

³⁶³ OHCHR, *supra* note 50, p. 5.

³⁶⁴ General Recommendation No.19, *supra* note 51, para. 8.

³⁶⁵ *Ibid.*, para. 9.

³⁶⁶ *Ibid.*, para. 24(a).

³⁶⁷ DEVAW, *supra* note 34, Article 4(c).

³⁶⁸ Inter-American Commission on Human Rights, *supra* note 104, Article 7(b).

³⁶⁹ *Velásquez Rodríguez v. Honduras* case, 10 September 1996, IACHR, <www.unhcr.org/refworld/docid/3ae6b66d18.html>, visited on 22 May 2009.

clothes because they believed he belonged to a group of people who were dangerous to state security. Despite his family's complaints, the authorities denied any knowledge of the Velásquez's whereabouts. It should also be noted that this disappearance occurred during a particular period when Honduran officials engaged in a practice of forced disappearances of people who were considered to be dangerous to state security. A petition was filed to the Inter-American Commission which referred the case to the Court on the ground that the State of Honduras had violated the right to life, the right to humane treatment and the right to personal liberty of the victim.

The Court announced the famous due diligence principle by stating that:

An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.³⁷⁰

The Court further emphasized that:

What is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible.³⁷¹

In the present case, the Court held the State of Honduras responsible for failing to take reasonable steps to prevent a situation harmful to the victim's protected rights by failing to carry out an investigation into his disappearance, failing to punish those responsible and to pay compensation to the relatives.

The reasoning of this case can be applied to domestic violence cases, because this judgement established that the State is under the obligation to protect individuals from the harmful acts perpetrated by private parties.³⁷² This means that states are not only responsible for the conduct of their own agents³⁷³, but they are also responsible for failing to take reasonable steps to prevent, investigate, and punish acts of violence committed by men against women.³⁷⁴ More concretely, the State must be held responsible if the police or members of the judicial system fail to effectively prevent, investigate and punish domestic violence acts, thereby allowing them to act with impunity.³⁷⁵ Such a failure is framed as a failure to act with due diligence.

This judgement from the IACHR does not have any authoritative character for States that are not members of the Court. Knowing that the ECHR jurisprudence with regard to due diligence is not as developed as the IACHR case-law, the *Velásquez Rodríguez* case can be used as a model for

³⁷⁰ *Ibid.*, para. 172.

³⁷¹ *Ibid.*, para. 173.

³⁷² Vesa, *supra* note 89, p. 327.

³⁷³ Leckie and Gallagher, *supra* note 152, p. 574.

³⁷⁴ Vesa, *supra* note 89, p. 327.

³⁷⁵ Moore, *supra* note 202, p. 113.

ECHR judgements. If the ECHR refers to the *Velásquez Rodríguez* case, this might constitute a cornerstone in terms of establishing the responsibility of its Member States under international law for failing to investigate reported incidences of domestic abuse.

5.1.4 *Maria da Penha Maia Fernandes v. Brasil* Case

The previous *Velásquez Rodríguez v. Honduras* case was not related to domestic violence. But this next case stresses the importance for the State to act with due diligence regarding acts of domestic violence. The case of *Maria da Penha Maia Fernandes v. Brazil* was decided by the Inter-American Commission on Human Rights in 2001.³⁷⁶ Maria da Penha Maia Fernandes is a Brazilian woman whose husband subjected her to domestic violence for many years. He shot her while she was slept and as result of this attack, she had serious injuries which made her wheelchair dependent. After her return from the hospital, her husband threatened to electrocute her while she was bathing.

The internal judicial proceedings were tragically long. A court decision was given eight years after charges were filed against the victim's husband. He was found guilty and sentenced to the reduced ten years in prison since he had no prior conviction. Since the husband appealed the decision, another four years elapsed until 1996 when he was again convicted and sentenced to ten years in prison. The husband re-appealed that decision. Almost 20 years after the attack, the Brazilian courts have not issued a final judgment which means that the offender is still free.

The victim filed a petition in front of the Inter-American Commission of Human Rights. The Commission held that the State of Brasil was responsible for its failure to prosecute and convict the perpetrator despite clear evidence for concluding the trial. Brasil was also faulted for failing to prevent the acts of violence the victim was subjected to. The Commission referred to and followed the reasoning of the *Velásquez Rodríguez v. Honduras* case in order to assess that the State had not acted with due diligence. The Commission added that: "the domestic judicial decisions in this case reveal inefficiency, negligence, and failure to act on the part of the Brazilian judicial authorities and unjustified delay in the prosecution of the accused."³⁷⁷

Five years after this decision in 2006, a new law named after the victim, Maria da Penha, was established. Its purpose is to reduce domestic violence by increasing the punishment.³⁷⁸

In practice, these cases do not seem to have any direct relevance for non-member States of the IACHR. However, they contribute to foundation

³⁷⁶ *Maria da Penha Maia Fernandes v. Brazil* case, 16 April 2001, Inter-American Commission of Human Rights, Case 12.051, Report No. 54/01, <www1.umn.edu/humanrts/cases/54-01.html>, visited on 17 May 2009.

³⁷⁷ *Ibid.* para. 44.

³⁷⁸ UNIFEM, *Brazil Enacts Law on Violence Against Women*, 9 August 2006, <www.unifem.org/news_events/story_detail.php?StoryID=503>, visited on 18 May 2009.

of how State responsibility should be implemented. They have an illustrative/instructive value for other regional and national courts. The ECHR could refer to it and follow the reasoning in one of its future judgment on domestic violence.

5.2 Some Basic Principles Governing the Application of the Due Diligence Standard

In 2006, the current Special Rapporteur on violence against women issued a very enlightening report on the due diligence standard. This document constitutes a guiding tool regarding the principles that should govern the application of such standard. These principles are worth mentioning in order to explain the manner in which States should fulfill their obligations regarding domestic violence.

The report of the former Special Rapporteur from 2000 indicates that due diligence is more than “the mere enactment of formal legal provisions”. It stresses that States should act in good faith to ensure an effective prevention, and investigation resulting in the prosecution of offenders and compensation for the victim.³⁷⁹

The due diligence standard should be applied in a non-discriminatory manner which means that the State should use the same degree of commitment regarding the prevention, prosecution and punishment of violence against women as the level of commitment used regarding other forms of violence.³⁸⁰ This is particularly important because it is a well-known fact that, generally, violence inflicted by strangers is often treated with more value and importance than violence perpetrated by a family member.

In addition, the due diligence standard can better evaluated if it is based on reliable statistics and indicators regarding violence against women.³⁸¹ Statistical data is necessary in order to first assess the extent of the problem and then to determine the necessary interventions required to eliminate domestic violence.³⁸² However, it should be noted that statistical research constitutes hard work especially in large States such as Turkey where official numbers were finally published in February 2009. This research still has some shortcomings because it does not give any indication of the comparison between the number of reported cases, the number of investigated cases and the number of convictions. This is particularly important because the number of convicted persons is generally lower than the number of reported cases. There is always a discrepancy between those

³⁷⁹ UN Commission on Human Rights, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Ms. Radhika Coomaraswamy, on Trafficking in Women, Women's Migration and Violence Against Women*, 29 February 2000, E/CN.4/2000/68, para. 53,

[www.unhcr.ch/huridocda/huridoca.nsf/AllSymbols/E29D45A105CD8143802568BE0051FCFB/\\$File/G0011334.pdf?OpenElement](http://www.unhcr.ch/huridocda/huridoca.nsf/AllSymbols/E29D45A105CD8143802568BE0051FCFB/$File/G0011334.pdf?OpenElement), visited on 13 May 2009.

³⁸⁰ UN Commission on Human Rights, *supra* note 207, para. 35.

³⁸¹ *Ibid.*, para. 37.

³⁸² *Ibid.*

two numbers and States can prove that they are being more efficient if there is evidence that this difference between the numbers decreases.

5.3 Content of the Due Diligence Standard

The State can decide on the form of such measures, but international practice requires these measures to be effective and to be immediate in character.³⁸³ More specifically, they must be capable of removing the ongoing risk of domestic violence, they must be quick, simple and accessible.³⁸⁴ The most important is that they must be enforced. The problem generally comes from the fact that these measures are enshrined in law, but they are very often ignored in practice.

The following explanation lays down the content of the different stages of the State obligation to act with due diligence.

5.3.1 Prevention

The fulfilment of the due diligence obligation regarding the prevention of domestic violence presupposes the adoption of specific legislation.³⁸⁵ Even though the implementation of the law constitutes the most difficult challenge, the mere existence of laws constitutes an important first step in terms of sending to the community the message that such acts are wrong and cannot be tolerated.

Legal arrangements are not enough; it is necessary to focus on other preventative measures aiming to combat traditional ideologies used to justify gender-based violence. For this purpose, the State should develop public awareness through education.³⁸⁶ Specified professional groups, such as the police and the judiciary, should also be given appropriate trainings in order to learn how to address domestic violence cases in a gender-sensitive manner.³⁸⁷

Also, public information should not only focus on the immortality and unacceptability of gender-based violence but also on the elimination of cultural patterns that perpetuate discrimination which results in the idea that the female sex is inferior.³⁸⁸ Sex stereotypes should be eradicated, and the taboos and silence around violence should be broken through different means.³⁸⁹ Public statements made by Government leaders have a positive impact in that regard.³⁹⁰ In addition, media reporting and educational

³⁸³ ECHR, Hearing of the *Opuz v. Turkey* case on 7 October 2009, <www.echr.coe.int/ECHR/EN/Header/Press/Multimedia/Webcasts+of+public+hearings/webcastEN_media?&p_url=20081007-1/en/>, visited on 22 May 2009.

³⁸⁴ *Ibid.*

³⁸⁵ UN Commission on Human Rights, *supra* note 207, para. 38.

³⁸⁶ OHCHR, *supra* note 50, p. 23.

³⁸⁷ UN Commission on Human Rights, *supra* note 207, para. 92

³⁸⁸ *Ibid.*, para. 87.

³⁸⁹ *Ibid.*

³⁹⁰ *Ibid.*, para. 91.

programs or campaigns constitute effective tools in terms of fighting customs and traditions that justify violations of women's rights.³⁹¹

As to the case of Turkey, the amendments of the national legislation constituted the first step in fulfilling the State's due diligence obligation regarding the prevention of domestic violence acts. In addition to the legislative efforts, different awareness and sensitivity raising activities on violence against women were organised.³⁹² The 'Stop Violence Against Women' campaign, co-run by the Turkish Prime Ministry and the United Nations Population Fund has been applied since 2004 can be given as an example in that regard.³⁹³ Also, the State started a project aiming to provide in-service trainings to more than 40,000 police officers³⁹⁴ but also to judges and prosecutors that cover issues of violence against women.³⁹⁵ The 2007-2010 'National Action Plan for Combating Domestic Violence Against Women' is a project financed by the European Union. It sets up objectives and defines the responsibilities of all the institutions that are involved and address the issue of domestic violence against women.

As it can be noticed, Turkey is making considerable efforts to create an environment favourable for the prevention of domestic violence against women. However, the efficiency of such measures are questionable when it concerns their practical application. For instance, knowing that there are more than 180,000 police officers in Turkey, the above mentioned in-service training aims to educate 40.000 of them and only 270 participants have been educated thus far.³⁹⁶

5.3.2 Protection

States are under the obligation to act with due diligence in order to protect women from domestic violence.³⁹⁷ First, they must ensure that all women victims of violence have access to justice.³⁹⁸ In that regard, States are required to develop appropriate legislations and judicial procedures in order to provide effective and appropriate protection for all women.³⁹⁹ This means that they should create an appropriate environment where women can freely report acts of violence and ask for protective measures such as restraining orders to prevent further harm from occurring.⁴⁰⁰

In addition to that, the State should provide protective services, such as telephone hotlines, counselling centers, physical and psychological health care, legal assistance, shelters or financial aid to victims of violence.⁴⁰¹

³⁹¹ *Ibid.*, para. 87

³⁹² Office of the Prime Ministry, *supra* note 186, p. 15.

³⁹³ *Ibid.*, p. 14.

³⁹⁴ *Ibid.*, p. 15.

³⁹⁵ *Ibid.*

³⁹⁶ CEDAW, *supra* note 187, p. 13.

³⁹⁷ UN Commission on Human Rights, *supra* note 207, para. 47.

³⁹⁸ *Ibid.*, para. 82.

³⁹⁹ *Ibid.*

⁴⁰⁰ *Ibid.*

⁴⁰¹ *Ibid.*, para. 47.

The Special Rapporteur's report criticises States for focusing on short-term emergency assistance that only responds to the immediate needs of the victim,⁴⁰² rather than long-term measures that would be able to ensure a more secure future to women.

In Turkey's case, the major gaps in the enforcement of protective obligations is due to an inadequate provision of shelters; this means that women often have no choice but to continue living with their abusers.⁴⁰³ However, the last state report indicates that considerable efforts are being made to develop: an emergency line that provides psychological, legal and economic support to women and children subject to violence⁴⁰⁴; family counselling centres provide guidance and counselling services⁴⁰⁵; and cooperation with NGOs actively involved with women's rights.⁴⁰⁶

5.3.3 Punishment

Cases of domestic violence must be investigated and appropriately punished with due diligence.⁴⁰⁷ A number of States, such as Turkey, have made recent amendments to their internal legislation in order to modify discriminatory provisions and ensure that acts of violence are met with appropriate punishments.⁴⁰⁸ For instance, before the amendment, the criminal code was providing a suspended sentence in cases of rape if the victim agreed to marry the perpetrator.⁴⁰⁹

Another gap is due to the lack of adequate enforcement by the police and the judiciary staff of sanctions regarding domestic violence.⁴¹⁰ The Special Rapporteur's report reveal that women are often discouraged and intimidated by the authorities from filing a complaint.⁴¹¹ Indeed/In fact/It has been reported, "when a complaint is filed, in many instances, the law enforcement authorities and social services privilege mediation or 'social solutions' over the application of sanctions under criminal or civil law."⁴¹² This is also often the case in Turkey where a woman is often/may be sent back home after being 'reconciled' with the husband.

Generally speaking, failures by law enforcement authorities to seriously investigate and punish domestic violence crimes appears to be quite common.⁴¹³ Even when cases of violence against women do reach the judicial system, there are still alarming number of instances where judges give reduced or inappropriate sentences for these crimes.⁴¹⁴ This is

⁴⁰² *Ibid.*, para. 49.

⁴⁰³ *Ibid.*

⁴⁰⁴ Office of the Prime Ministry, *supra* note 186, p. 16.

⁴⁰⁵ CEDAW, *supra* note 187, p. 14.

⁴⁰⁶ *Ibid.* p. 15.

⁴⁰⁷ UN Commission on Human Rights, *supra* note 207, para. 50.

⁴⁰⁸ *Ibid.*

⁴⁰⁹ *Ibid.*, para. 54.

⁴¹⁰ *Ibid.*, para. 49.

⁴¹¹ *Ibid.*, para. 53.

⁴¹² *Ibid.*

⁴¹³ *Ibid.*, para. 54.

⁴¹⁴ *Ibid.*

particularly important because prosecutors and judges are the ‘mouthpieces’ of society⁴¹⁵, and appropriately strong sentences condemning domestic violence might make the society less patriarchal.⁴¹⁶ For instance, two courts in Turkey gave the highest sentence in ‘honour crimes’ cases in 2004, even before the new penal code went into effect.⁴¹⁷ This demonstrated that judicial authorities might take a strong stance to disempower patriarchal practices.⁴¹⁸

5.3.4 Reparation

The line between the obligation to provide adequate reparations and the obligation to protect is quite difficult to draw because the measures are quite similar. The obligation to provide adequate reparations involves the establishment of effective rehabilitation and support services for women survivors of violence.⁴¹⁹ This establishment is not enough, States must ensure that those services are accessible to all the victims.

In addition, the Special Rapporteur’s report on due diligence mentions the obligation to provide compensation for acts of violence against women.⁴²⁰ This would involve:

the award of financial damages for any physical and psychological injuries suffered, for loss of employment and educational opportunities, for loss of social benefits, for harm to reputation and dignity as well as any legal, medical or social costs incurred as a consequence of the violence.⁴²¹

This obligation seems to be a little unclear. It appears from the text of the report that this compensation must come from the State. In other words, it suggests that the State should have some kind of financial resource to compensate women who are subjected to domestic violence. The report emphasises that this aspect of due diligence remains very under-developed.⁴²² This is not very surprising because States already have difficult time fulfilling the major obligations. In such a context, the compensation duty appears to be a little utopic in practice.

⁴¹⁵ *Ibid.*, para. 90.

⁴¹⁶ *Ibid.*

⁴¹⁷ *Ibid.*

⁴¹⁸ *Ibid.*

⁴¹⁹ *Ibid.*, para. 84.

⁴²⁰ *Ibid.*

⁴²¹ *Ibid.*

⁴²² *Ibid.*, para. 55.

5.4 Recognition of the Importance of Economic, Social and Cultural Rights: a Long-Term Due Diligence Obligation

As explained above, prevention of domestic violence constitutes one aspect of the due diligence obligation. However, it seems that this obligation should take the form of a long-term measure in order to effectively prevent violence against women. For this end, States should recognise the crucial importance of economic, social and cultural rights. These second generation rights appear to be considered as having less value than civil and political rights in some developing countries.

As it has been suggested by feminists, the human rights framework should stop giving priority to civil and political rights to the detriment of economic and social rights.⁴²³ The development of the economic, social and cultural aspect of the State will contribute to women's ability to exercise civil and political rights.⁴²⁴ Therefore, the dichotomisation of political and civil, and economic, social and cultural rights should be eradicated⁴²⁵ because these two groups of human rights that are indivisible and interdependent.⁴²⁶

In this context, part of the State's due diligence duty should be to eradicate women's disadvantageous social and economic conditions that perpetuate and maintain subordination to men.⁴²⁷ The State should take measures preventing domestic violence at a very early stage without waiting for a general imminent risk of domestic violence in the society. All of the factors that trigger the danger of domestic violence should be eliminated in advance. The point is to diminish the risks of violence in an anticipatory way. This can only be done by promoting and supporting women's empowerment through the recognition of the high value of economic, social and cultural rights.

Empowerment begins by giving education and employment to women: this enhances women's self-awareness, self-esteem and self-confidence.⁴²⁸ In the end, women would realise that subordination and violence are not a fate; they would stop internalising oppression; they would develop their capabilities as autonomous human beings.⁴²⁹ As a long-term result, the State's responsibility would be implemented in a more efficient way.

It is true that financial resources constitute a crucial element in the empowerment approach. But the State should make sacrifices by allowing a bigger part of its budget for this purpose by encouraging action plans and by

⁴²³ E. Brems, 'Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse', 19 *Human Rights Quarterly Reader* (1997) pp. 104-105.

⁴²⁴ OHCHR, Committee on Economic, Social and Cultural Rights, Fact Sheet No.16 (Rev.1), <www.unhcr.ch/html/menu6/2/fs16.htm>, visited on 19 May 2009.

⁴²⁵ Romany, *supra* note 17, p.108.

⁴²⁶ OHCHR, *supra* note 50.

⁴²⁷ Romany, *supra* note 17, p.108.

⁴²⁸ UN Commission on Human Rights, *supra* note 207, para. 80.

⁴²⁹ *Ibid.*

inviting the society to participate to this process through different means. Also, the State should understand that women are not the only beneficiaries, the whole country would profit from such a governmental initiative.

5.5 The Position of ECHR and CEDAW Committee Regarding the Application of the Due Diligence Standard

5.5.1 The Ongoing *Opuz v. Turkey* Case: Will the ECHR Recognise the Due Diligence Standard?

The judgement of this case⁴³⁰ has not been published yet but the application has already attracted a lot of public attention since it concerns the issue of domestic violence against women and its consequences regarding the state responsibility.

The press release of the *Opuz* case indicates that the applicant is a Turkish woman who was subject for several years to constant and extreme acts of violence perpetrated by her husband.⁴³¹ The mother of the applicant was also victim of these acts of violence. Both women were subjected to beatings and stabbings; they were also hit by a car driven by the husband. The violence culminated when he murdered his mother in law by shooting her while she was travelling to another city. Medical reports attested several times that the injuries of the women were life-threatening.

Criminal proceedings were initiated against the husband for death threats, bodily harm and attempted murder. However, the public prosecutor decided not to prosecute him because of a lack of concrete evidence. He was also taken into custody twice but he was released pending trial. Also, the victims withdrew their complaints several times and the national courts had to discontinue the cases. However, the offender was sentenced to three months of imprisonment for the car incident. This was commuted to a fine. The criminal proceedings for murder of the applicant's mother are currently still pending before the national court.

The application addressed to the ECHR is based on the failure of the State to take the necessary actions against the applicant's husband on the ground of the violation of the right to life (Article 2), the right to be free from torture, inhuman and degrading treatment (Article 3), the right to an effective remedy (Article 13) and the right to be free from discrimination on the ground of gender (Article 14).⁴³²

The judgement is curiously awaited but an anticipatory evaluation of a possible outcome can be assessed on the basis of the previous ECHR

⁴³⁰ Press Release of *Opuz v. Turkey* case, 7 October 2009, Application No. 33401/02, <cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=23959096&skin=hudoc-pr-en&action=request>, visited on 22 May 2009.

⁴³¹ *See Ibid.*

⁴³² *Ibid.*

judgements on State responsibility regarding illegal acts that occur between private parties.

In the *Osman v. UK* case, the ECHR decided that the State can be held responsible if it is established that:

the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.⁴³³

In other words, the State is under the positive obligation to take the necessary measures to prevent serious human rights violations and to investigate, prosecute and punish perpetrators.⁴³⁴ It has also been established in the *M. C. v. Bulgaria* case⁴³⁵ that the State's positive obligation arises whether the violation is committed by State agents or non-State actors.⁴³⁶

In the present *Opuz* case, the applicant and her mother claimed several times that their lives were in immediate danger and requested that the authorities take immediate action such as detaining the husband.⁴³⁷ Although State authorities were made aware of the situation, they apparently failed to take any adequate action.⁴³⁸ Under these circumstances and in the light of its previous case-law, the Court will probably decide that there have been violations of articles 2 and 3 because the State did not effectively investigate and protect the victims against acts of violence that were reported several times.⁴³⁹

Overall, the *Opuz* case is very important because it is an opportunity for the Court to recognise clearly the State obligation to act with due diligence in the particular case of domestic violence.⁴⁴⁰ As it was mentioned by the Interights representative who participated to the hearing of *Opuz* case as a third party, "the '*jus cogens*' nature of the right to life and the right to be free from torture requires exemplary diligence on the part of the States with respect to prosecution and investigation of these kind of acts."⁴⁴¹

⁴³³ *Osman v. UK* case, 28 October 1998, ECHR, No. 23452/94, para. 116, <cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=osman&sessionid=23959473&skin=hudoc-en>, visited on 22 May 2009.

⁴³⁴ Interights, *Opuz v. Turkey* Brief, 21 June 2007, para.8, <www.interights.org/view-document/index.htm?id=237>, visited on 22 May 2009.

⁴³⁵ *M.C. v. Bulgaria* case, 4 December 2003, No. 39272/98, para. 151, <www.coe.int/t/e/legal_affairs/legal_cooperation/fight_against_sexual_exploitation_of_children/1_pces/CASE%20OF%20MC%20v.%20BULGARIA.pdf>, visited on 22 May 2009.

⁴³⁶ Interights, *supra* note 434.

⁴³⁷ Press Release of *Opuz v. Turkey* case, *supra* note 430.

⁴³⁸ ECHR Blog, *Hearing in Domestic Violence Case*, 7 October 2008, <echrblog.blogspot.com/2008/10/hearing-in-domestic-violence-case.html>, visited on 20 May 2009.

⁴³⁹ Intlawgrrls, *European Court of Human Rights Considers Domestic Violence*, 30 October 2008, <intlawgrrls.blogspot.com/2008/10/european-court-of-human-righits.html>, visited on 20 May 2009.

⁴⁴⁰ *Ibid.*

⁴⁴¹ ECHR, *supra* note 383.

Moreover, if the Court decides that there is a violation of Article 3, this might be another positive step made in the struggle for the recognition of domestic violence as a form of torture or inhuman and degrading treatment.

Another interesting aspect of the judgement will be the rationale/justification of the Court regarding the relationship between domestic violence and discrimination. The applicant seems to allege that there is discrimination in the sense that there is no adequate legal protection for women who are victims of domestic violence.⁴⁴² This might suggest that the State does not award (enough) protection to battered women because of their gender. Also, it should be noted that Article 14 ECHR is an 'accessory' right in the sense that it can only be invoked if the applicant's complaint falls within the sphere of another right protected by the Convention.⁴⁴³ In this case, Article 14 is probably alleged with articles 2 and 3 ECHR.

During the hearing of the case⁴⁴⁴, the Interights representative elaborated on the relationship between discrimination and domestic violence. She mentioned the fact that women are disproportionately affected by laws and practice with respect to domestic violence. She refers to the *D.H. and Others v. Czech Republic* case (ECHR) in which the Court held that an apparently neutral state practice or policy that negatively impacts a particular class of protected person (Roma people in that case, women in *Opuz* case) can be discriminatory in violation of Article 14 of the Convention⁴⁴⁵. Also, it was emphasized during the hearing that discriminatory intent is not a necessary element of a violation of Article 14 ECHR.

Taking into account the explanations provided during the hearing, the Court might decide that there has been a violation of Article 14 on the ground of two different justifications:

- First in terms of legislation because the State failed to enact laws that protect against and respond to domestic violence. In other words, the State failed to provide women who are disproportionately vulnerable to this violence equal protection of the law. As noted above, this failure is not necessarily intentional and it is enough that women are discriminated against in practice.

⁴⁴² ECHR Blog, *supra* note 438.

⁴⁴³ Ovey and White, *supra* note 168, p. 319.

⁴⁴⁴ ECHR, *supra* note 383.

⁴⁴⁵ See *D.H. and Others v. Czech Rep.* Case (Grand Chamber), 13 November 2007, ECHR, No. 57325/00, para. 184:

"[...]a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group."

on

<cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=in%20%7C%20treatment%20%7C%20may%20%7C%20take%20%7C%20the%20%7C%20form%20%7C%20of%20%7C%20disproportionately%20%7C%20prejudicial%20%7C%20effects%20%7C%20a%20%7C%20general%20%7C%20policy%20%7C%20measure%20%7C%20which%2C%20%7C%20though%20%7C%20couched%20%7C%20neutral%20%7C%20terms%2C%20%7C%20discriminates%20%7C%20against&sessionid=23960888&skin=hudoc-en> , visited on 22 May 2009.

- Second, it might be claimed that discrimination occurred at the operational level because authorities seemed to have an attitude governed by negative gender stereotypes which resulted in an inadequate response to the victims of domestic violence. The police and prosecutors seemed to have treated the case of these women as a private matter and therefore of low priority. It might even be claimed that the authorities have ‘invited’ the abuse, regardless of whether or not it was intentional.

In order for the Court to decide that there has been a violation of Article 14, the applicant party has to prove that there has been a differential treatment.⁴⁴⁶ Then the Court might decide that there has been discrimination, unless the Government manages to show an objective and reasonable justification for such treatment.⁴⁴⁷ The Court has to analyse the practice to determine if there is really discrimination on the basis of sex. If statistics, country reports and NGO reports indicate that there is, in fact, such a preferential treatment, the Government will have to bring counter arguments showing that the discrimination in question can be justified. The outcome of the judgement depends on how parties will argue their positions.

The judgement is expected on the 8th of June 2009.

5.5.2 Establishment of the Due Diligence Standard in CEDAW Committee Decisions

5.5.2.1 A. T. v. Hungary Case: an Example of a State Failing to Act Diligently Both in Laws and Practice

In the *A.T. v. Hungary* case⁴⁴⁸, the Committee decided that there was a violation of the CEDAW with respect to the following Articles:

- Article 2(a), (b) and (e) on the State obligation regarding the elimination of discrimination against women.
- Article 5 (a) on the elimination of prejudices and practices which perpetuate gender-stereotypes.
- Article 16 on the elimination of discrimination in the area of family law regarding the family decisions.

The case concerns a Hungarian woman, Mrs. A.T., who was subjected for several years to domestic violence acts that resulted in ten medical reports. The victim and her children were refused shelter accommodation because one of the children was fully disabled. Mrs. A. T. could not ask for any protection or restraining orders because such measures

⁴⁴⁶ Ovey and White, *supra* note 168, p. 425.

⁴⁴⁷ *Ibid.*

⁴⁴⁸ *A. T. v. Hungary* case, 26 January 2005, CEDAW, No. 2/2003, <www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/CEDAW%20Decision%20on%20AT%20vs%20Hungary%20English.pdf>, visited on 22 May 2009.

were not available under Hungarian law. Even though she was separated from her husband, the civil and criminal proceedings were unsuccessful in terms of prohibiting the husband from coming to the apartment where she and her children were residing. Mrs. A.T. brought a claim in front of the CEDAW Committee in 2003.

The Committee held in 2005 that the State failed to prevent and provide an immediate effective protection to the applicant against the ill-treatment perpetrated by her husband. The Committee also found that the national laws were unable to ensure an effective protection for victims of violence. In its recommendations, the Committee states that the State should “assure victims of domestic violence the maximum protection of the law by acting with due diligence to prevent and respond to such violence against women.” Furthermore, the Committee recommended that the State pay compensation and give a safe home to the victim. However, the recommendations of the Committee have not been followed because of a lack of political will on the justification that the Committee’s views are not binding.⁴⁴⁹

The outcome of this decision has benefited to the theoretical reasoning on the due diligence obligation of the State, rather than to the victim of the case or victims of domestic violence in general. The efficiency of CEDAW decisions are therefore questionable, since they do not seem to be enforced in practice by the State.

5.5.2.2 F. *Yıldırım v. Austria* Case: an Example of a State Failing to Act Diligently in Practice

This case illustrates the cry for help of a woman, Mrs. Yıldırım, who is now deceased after being stabbed by her husband following constant death threats that were reported to the police. The victim was an Austrian citizen who had Turkish origins and the facts take place in Austria. Despite Mrs. Yıldırım reports, the public prosecutor twice rejected her request that the perpetrator be detained. The police repeatedly intervened and the victim was granted many restraining orders but this was not enough to protect Mrs. Yıldırım. Upon her death, her husband was immediately arrested, convicted and sentenced to life in prison.

The application was filed by NGOs on behalf of the descendants of the deceased victim on the basis of a violation of the CEDAW with respect to:

- Article 1 on the definition of sex discrimination which also includes gender-based violence.
- Article 2 on the obligations of States regarding the elimination of discrimination against women.
- Article 3 which is on the obligation of the State to take appropriate measures for the political, social, economic and cultural development of women.

⁴⁴⁹ E. Pap, Regional Conference on Domestic Violence legal Reform, *The Case A.T. v. Hungary*, p. 16, February 2008, www.stopvaw.org/sites/3f6d15f4-c12d-4515-8544-26b7a3a5a41e/uploads/CEDAW_and_DV__Pap_.ppt#261,10, The civil initiative in 2002, visited 21 May 2009.

- Article 5 on the elimination of prejudices and customs that perpetuate gender-stereotypes.

In its analysis, the Committee notes that the State of Austria has a comprehensive legislation to address domestic violence. In addition to that, criminal and civil law remedies, awareness raising activities, education and training programmes, shelters, counselling for victims of violence and work with perpetrators were measures that were made available. However, this system failed in practice to protect the applicant. More specifically, the Committee considered that the State's failure regarding the detention of the husband constituted a breach of its due diligence obligation to protect the applicant. The State advanced the argument that it is difficult to evaluate the degree of 'dangerousness' of an offender and it is necessary to determine whether the imposition of detention would constitute a massive interference with a person's fundamental freedoms. The Committee held that "the perpetrator's rights cannot supersede women's human rights to life and to physical and mental integrity"⁴⁵⁰ and finally concluded that the above mentioned CEDAW provisions were violated since the State failed to fulfil its due diligence obligation to protect the applicant.

Both decisions from the CEDAW Committee constitute cornerstones in terms of establishing the State responsibility to act with due diligence, but they did draw enough attention in the media and they did not receive the necessary attention from the public opinion.

There seems to be some kind of omission when it comes to the use and evaluation of reports, concluding observations, views and recommendations elaborated by the CEDAW Committee.

5.6 Increasing the Efficiency of the CEDAW Process For a More Effective State Responsibility

The CEDAW Committee is the UN body in charge of monitoring the compliance of States with the CEDAW Convention. In order to make the system effective, States should collaborate since decisions and recommendations issued by the Committee are not binding. The lack of State cooperation seems to result in a situation where the "CEDAW is law without sanctions."⁴⁵¹ If States do not want to follow the Committee's recommendations, the Committee can obviously not force them to comply.⁴⁵² In other words, the State is the real 'actor' in this process, since it can choose to comply with or disrespect the Convention norms. The will and motivation to change should come from the State itself.

During the reporting process, governments should be open about the reality of women's rights in their country. Covering the actual situation

⁴⁵⁰ *F. Yıldırım (deceased) v. Austria* case, 1 October 2007, CEDAW, No. 6/2005, para. 12.1.5., <www.un.org/womenwatch/daw/cedaw/protocol/dec-views.htm>, visited on 22 May 2009.

⁴⁵¹ Merry, *supra* note 209, p. 72.

⁴⁵² *Ibid.*

remains pointless, since NGO shadow reports tend to give accurate information though some may exaggerate. Giving the exact information remains crucial for a better collaboration between the Committee and the State. In fact, the real purpose of the CEDAW process is to be constructive rather than simply critical.⁴⁵³ More concretely, if a country acknowledges that it has had difficulty in implementing CEDAW, the experts tend to be more supportive than if a country tries to cover up its failures.⁴⁵⁴

More concretely, Turkey has signed and ratified all of the conventions and documents related to women's rights and there are currently no reservations in that regard. This seems to be a sign that there is a real willingness to solve the problem. For instance, despite its bad torture record, Turkey was the first State to sign the Convention Against Torture. This enthusiastic initiative might be interpreted as Turkey attempting to present a good outside image to the rest of the world. But it really seemed at that time that the State recognised its responsibility regarding torture and was ready to undertake the necessary measures. However, reaching the police stations to ensure that officers complied with Turkey's obligations under CAT was not an easy task.

The same reasoning goes for domestic violence against women: despite a real desire coming from the Government, it is difficult to transmit the message to each level of the public authorities. In that regard, the Special Rapporteur on violence against women stated in her report that "[t]he different layers of the State need to be addressed separately to ensure that the rights of women are protected, respected and fulfilled by all apparatuses and agents of the State at all levels of government."⁴⁵⁵ It is only through education of these different layers that negative attitudes can be eradicated. This suggests that:

- First of all, the parliamentarians should understand the problem since they are the ones who adopt legislation. The concluding remarks of the Committee should be distributed to every parliamentarian. Actually, the concluding observations seem to be forgotten documents even in very developed countries. They are not always being used domestically in the way they should be. Their use will probably not solve the problem fully, but it will help it.
- High ranking police officials must be convinced of their responsibility regarding gender-based violence. This might be influential if the head of the police influences the various station commanders.
- Prosecutors, judges and the whole judiciary administration should be educated regarding the prosecution and judgement of domestic violence cases.
- Both men and women should be educated as well, since both of them are affected by a lack of knowledge.⁴⁵⁶ Men are an important group because they are the ones that are generally responsible for battering

⁴⁵³ *Ibid.* p. 85.

⁴⁵⁴ *Ibid.*

⁴⁵⁵ UN Commission on Human Rights, *supra* note 207, para. 89.

⁴⁵⁶ Kardam, *supra* note 181, p. 130.

women. The education received by men should not only be related to domestic violence, but women's rights in general.

- The mass media is also a very important group that contributes to the situation in terms of reporting the case-laws and concluding observations. But in reality, the mass media does not always appear to be interested in reporting about the outcome of a particular case-law or concluding observations, and this seems to be valid almost in all countries because of a fear of attracting more critics from the international public.
- Therefore NGOs are essential, because they are generally more willing to disseminate concluding observations that are being hidden. They have the possibility to disseminate as much as possible in order to inform people. It is often recognised that the NGO support for CEDAW activities is of critical importance for the success of the process.⁴⁵⁷

⁴⁵⁷ Merry, *supra* note 209, p. 87.

6 Conclusion

- Who? States
- Where? Throughout the world
- What? Should remedy to domestic violence
- Why? Because it is urgent
- When? Now!

This simplistic way of questioning emphasises that the responsibility to ensure accountability and to guard against impunity lies with the State, not with the victim. For Turkey, as for many other countries, women's rights are not given priority. It is with the pressure of different human rights instruments, the CEDAW monitoring process and women's rights organisations that national legislative changes have been realised. The accession to the EU also fuels government initiatives in that regard.

The advocacy against domestic violence can be based on numerous human rights treaties, both general and specific to women's rights. However, the lack of a special convention on violence against women remains a problem. In the Inter-American system, the Convention 'Belem do Para' on the eradication of violence against women specifically details state obligations in respect of domestic violence. The Council of Europe has not yet adopted any human rights instrument affirming and elaborating on the human rights of women.

The issue of domestic violence needs to be taken seriously and treated in its context rather than as an isolated problem detached from its causes and consequences for human rights of women. It should be analysed and evaluated in the context of gender inequality and also torture or inhuman and degrading treatment in order to underscore its gravity.

Furthermore, domestic violence is a time consuming issue and it cannot be solved in one day due to the various deeply rooted challenges that impede the development of women's rights. The economic and social disparities between men and women constitute a major obstacle that should be overcome in the light of the understanding that without the full implementation of economic and social rights, the civil and political rights will keep being an illusion.

At the national level, cultural myths have a negative impact regarding the eradication of the problem. In that regard, the CEDAW process does important cultural work since it encourages States to adopt the international women rights standards and to undertake effective measures aiming the effective implementation of the norms.

Also, there is no question that the crimes of domestic violence are often more complex and more difficult than other crimes, because they happen in silence behind closed doors. This should demand greater diligence by the authorities, rather than less. The traditional dichotomisation between the private and public spheres should be eradicated both regarding the legislation and the attitudes of the police and judges.

It should finally be accepted that the state inaction regarding domestic violence, its refusal to deal with the problem seriously and its reluctance to prosecute and punish male perpetrators fosters the victimisation of women.⁴⁵⁸ States should therefore act with exemplary due diligence with respect to the prevention, protection, punishment and reparation of such acts.

For the case of Turkey, the recent legislative changes and the different campaigns that have been initiated prove that the State is willing to make efforts with the purpose of eliminating domestic violence from the quotidian life of women in general. But the major difficulty comes from the fact that domestic violence is one of the numerous human rights violations that Turkey has to solve.

⁴⁵⁸ Coomaraswamy and Kois, *supra* note 190, pp. 178-179.

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