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Mandatory Prosecution Policies  
in Cases of Domestic Violence –  
A State Obligation under  
International Human Rights Law?

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# Summary

This thesis examines international human rights law obligations regarding domestic violence, with a focus on to what extent there is a state obligation to implement mandatory prosecution policies in domestic violence cases. Domestic violence is understood as men's violence against women in an intimate relationship and a structural perspective of domestic violence, in which the violence is seen as a problem of gender inequality, permeates the thesis and sets the tone for the analysis.

The point of departure for this thesis is a critical analysis of mandatory prosecution policies where women's realities are the focus. To this end, a debate that has emerged in the United States of America on the advantages and disadvantages of mandatory prosecution policies is presented. It is established that there is a conflict between the promises of protection and battered women's safety, and the desire to preserve women's autonomy and the promotion of women's empowerment. Furthermore, the American experience shows which limitations a predominantly criminal justice systems approach to domestic violence may have, as its ability to address the root causes of the violence is uncertain.

Domestic violence as a women's human rights issue is discussed by focusing on two approaches: (1) the 'gender-based violence is discrimination' approach under the United Nations framework, and (2) as violations of specific rights under regional human rights systems. It is established that the duty to exercise due diligence to prevent violence against women, protect women from violence, investigate and punish acts of violence and provide reparations to women victims, is the main avenue for discussing human rights obligations under both approaches. However, the analysis shows an unsatisfactorily narrow application of the due diligence standard as the analysed case law suggests an obligation to take positive post-abuse measures to prevent further harm, argued under the obligation to protect women from violence, as well as a 'limited' obligation to prevent violence against women.

Lastly, a tentative conclusion is presented on the focus issue of this thesis: *in order to comply with international human rights law, states are under an obligation to enact legislation that enables prosecution in the public interest, regardless of the victim's withdrawal of complaint.* Whereas it is recognised that international human rights law imposes a strong incentive for states to implement mandatory prosecution policies, this thesis argues that women's empowerment must be at the centre of all state policies on domestic violence. Above all, this entails interpreting the obligation to prevent domestic violence in a broad sense, where the focus is on targeting the root causes of the violence; *i.e.* structural gender inequality in society.

# Sammanfattning

Uppsatsen behandlar skyldigheter under det internationella regelverket för de mänskliga rättigheterna i området våld i hemmet, med inriktning på vilken utsträckning stater anses ha en skyldighet att införa obligatoriska åtalsregler (närmast jämställt med allmänt åtal) för våld i hemmet. Med våld i hemmet avses mäns våld mot kvinnor i nära relationer och uppsatsen genomsyras av ett strukturellt perspektiv där våldet ses som ett jämställdhetsproblem, vilket även anger tonen för analysen.

Uppsatsens utgångspunkt är en kritisk analys av obligatoriska åtalsregler där kvinnors verkligheter får stå i centrum. För detta ändamål presenteras en debatt över för- och nackdelarna med obligatoriska åtalsregler som har sitt ursprung i Amerikas Förenta Stater. Det konstateras att det finns en konflikt mellan löftena om skydd och våldsutsatta kvinnors säkerhet och önskan om att bevara kvinnors självbestämmanderätt och främjandet av kvinnors frigörelse. Vidare anses den amerikanska erfarenheten uppvisa begränsningar som ett närmande, som till övervägande del är kopplat till rättsväsendet, kan ha då dess förmåga att angripa de grundläggande orsakerna till våldet anses ovisst.

I uppsatsen diskuteras våld i hemmet som en fråga om kvinnors mänskliga rättigheter genom att fokusera på två betraktelsesätt: (1) 'könsrelaterat våld är diskriminering' under Förenta Nationernas regelverk, och (2) som kränkningar av specifika rättigheter under de regionala regelverken för de mänskliga rättigheterna. Uppsatsen konstaterar att skyldigheten att iakttä *due diligence* (vederbörlig arbetsamhet) för att förhindra och skydda kvinnor från våld, utreda och bestraffa våld mot kvinnor samt ge offer upprättelse, utgör den huvudsakliga metoden för att diskutera skyldigheter under båda betraktelsesätten. Emellertid uppvisar analysen en otillfredsställande begränsad användning av *due diligence* standarden då rättsfallen som har analyserats tyder på en skyldighet att vidta positiva eftervårds åtgärder för att förhindra ytterligare skada, hänförda till skyldigheten att skydda kvinnor från våld, samt en 'begränsad' skyldighet att förhindra våld mot kvinnor.

Avslutningsvis presenteras en försiktig slutsats angående uppsatsens huvudsakliga ämne: *för att lyda det internationella regelverket för de mänskliga rättigheterna, så har stater en skyldighet att införa lagstiftning som möjliggör åtal i det allmännas intresse, oavsett om offret tar tillbaka sin anmälan.* Medan det medges att det internationella regelverket för de mänskliga rättigheterna ålägger stater ett starkt incitament att införa obligatoriska åtalsregler, argumenterar uppsatsen att kvinnors frigörelse måste stå i centrum för alla regler och handlingsplaner stater har för våld i hemmet. Framförallt innebär detta att tolka skyldigheten att förhindra våld i hemmet i en vid bemärkelse, med fokus på att angripa de grundläggande orsakerna till våldet, dvs. den strukturella jämställdhetsproblematiken i samhället.

# Preface

*“What kind of woman allows herself to be beaten?”*

*“Why doesn’t she leave?”*

It was a rude awakening to discover how many times these questions surfaced in discussions on my thesis topic with friends and acquaintances. The fact that these questions continue to be raised in discussions on domestic violence is a sad reminder of how women are still largely held responsible for the violence they suffer at the hands of the men in their lives. These questions make me cringe, but more importantly, they make me angry and further committed to gender equality issues.

First, I would like to thank my thesis supervisor Ulrika Andersson for your support, encouragement and seemingly endless patience. My budding interest for gender issues was further developed in your lectures on sex offenses under Swedish criminal law. They were a breath of fresh air during my years at the law faculty, where gender issues and a questioning of the objectivity of the law and legal institutions were far too scarce.

A special thanks to Gunilla Ekberg, your gender and human rights course was the highlight of the master’s programme in international human rights law. You are truly an inspiring lecturer and I will always be grateful for the eye-opening experience that your course was for me. Never before had every single lecture been so interesting, and every two hours seemed too short.

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*Joanna Nilsson*

# Abbreviations

ACHR	American Convention on Human Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
DEVAW	Declaration on the Elimination of Violence against Women
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
NGO	Non-governmental organisation
SRVAW	Special Rapporteur on Violence against Women, its causes and consequences
UN	United Nations
US	United States of America
VAWA	Violence Against Women Act

# 1 Introduction

According to the United Nations (UN), the most common form of violence against women globally is physical violence inflicted by an intimate partner,<sup>1</sup> *i.e.* what is commonly referred to as domestic violence. States all over the world have been slow in recognising that domestic violence is a crime that is worthy of state attention and requires state action. In the United States of America (US), the battered women's movement questioned the discretion prosecutors had to drop cases of domestic violence and mandatory prosecution policies, under which prosecutors were required to pursue all cases where there is sufficient evidence, seemed promising to remedy the long-standing policy of non-intervention. However, a debate on these policies has emerged and many feminist legal scholars have questioned if the mandatory involvement of the state would ultimately harm rather than benefit women.<sup>2</sup>

In the 1990s, domestic violence emerged as an important women's human rights issue and since then much focus has been on defining international obligations for states to respond adequately to domestic violence. My point of departure for this thesis is as follows: *when a problem is framed as a human rights issue, obligations arise that states must consider and these obligations may affect a state's domestic legislation.*

## 1.1 Purpose and research questions

The overall purpose of this thesis is to connect the debate on mandatory prosecution policies with state obligations under international human rights law. Therefore, my main research question is:

- *To what extent does international human rights law impose an obligation on states to implement mandatory prosecution policies in cases of domestic violence?*

I have chosen to phrase it as "to what extent" because there is no clear-cut answer; my aim is to critically discuss the obligations states have under international human rights law and see what conclusions can be drawn that may affect a state's legislation regarding domestic violence. To be able to discuss this question in my analysis, I found it necessary to divide this thesis into two parts; the first part will present the debate on mandatory prosecution policies, and the second part will present international human rights law regarding domestic violence.

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<sup>1</sup> UN Secretary-General's Campaign UNiTE to End Violence against Women, Fact Sheet, *Violence against Women: The Situation*, DPI/2546A, November 2011, p. 1, <[www.un.org/en/women/endviolence/pdf/pressmaterials/unite\\_the\\_situation\\_en.pdf](http://www.un.org/en/women/endviolence/pdf/pressmaterials/unite_the_situation_en.pdf)>, accessed 2011-12-27. (hereinafter UN Fact Sheet)

<sup>2</sup> See *e.g.*, Sack E. J., 'Battered Women and the State: The Struggle for the Future of Domestic Violence Policy', *Wisconsin Law Review* (2004), p. 1676.

For the first part of this thesis, my research question is:

- *What are the advantages and disadvantages of mandatory prosecution policies, both from the state's perspective and from the woman victim's perspective?*

This research question will be discussed by presenting the debate that has emerged on mandatory prosecution policies in the US. Mandatory prosecution policies are not unique for the US; legislation that prescribes mandatory prosecution of domestic violence has been enacted in several states.<sup>3</sup> My reason for choosing the US as an example is mainly because the debate has flourished in the US in a way that does not seem to have equivalence elsewhere. Furthermore, the American battered women's movement that originated in the 1970s has been very influential for women's movements in other states; Sweden can be mentioned in this context.<sup>4</sup> Therefore, I felt it made sense to discuss mandatory prosecution policies by starting from the origins. In addition, the close connection between this debate and the feminist ideology of the battered women's movement is a factor that I wished to include.

For the second part of this thesis my research question is:

- *What are the obligations states have to respond to domestic violence under international human rights law?*

## 1.2 Theory, method and material

I do not claim to write using feminist legal theory, nor are any conclusions drawn attributable to a specific feminist theory.<sup>5</sup> I have adopted a very basic feminist perspective in that I take my point of departure from the "tradition of feminism", *i.e.* the fact that there is a difference of power between the sexes in society, where men are dominant and women are subordinate to men.<sup>6</sup> Whereas women's subordination may differ in degree and kind across

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<sup>3</sup> *E.g.*, in Sweden, the prosecution reform of 1982 placed assault in a private place under the domain of public prosecution and departed from the previous requirement that the victim report the crime for prosecution, Swedish Government Bill, Prop. 1981/82:43 *Om ändring i brottsbalken (åtalsregler vid misshandel)*.

<sup>4</sup> Eduards M., *Förbjuden handling. Om kvinnors organisering och feministisk teori* (Liber AB, Kristianstad, 2002), p. 85.

<sup>5</sup> It is outside the scope of this thesis to engage in an analysis in which different feminist theories, *e.g.* liberal feminism, cultural feminism, radical feminism, post-modern feminism and third world feminisms are compared and contrasted. For an analysis of different feminist theories in connection to international law, *see* Charlesworth H. and Chinkin C., *The Boundaries of International Law. A Feminist Analysis* (Manchester University Press, Manchester, 2000).

<sup>6</sup> This simple explanation of the "tradition of feminism" is taken from Jeffner S., *Kvinnojourkunnskap: En översikt av kvinnojourernas kunskap om sexualiserat våld, speglad mot aktuell forskning* (Riksorganisationen för kvinnojourer i Sverige (ROKS), Stockholm, 1999), p. 5.

societies and cultures, this thesis is based on the understanding that women throughout the world “are economically, socially, politically, legally and culturally disadvantaged compared with similarly situated men.”<sup>7</sup> A feminist perspective also means I have chosen a feminist analysis of domestic violence as a starting point, *i.e.* the structural perspective where men’s violence against women is considered a problem of gender inequality.<sup>8</sup>

The chapter on mandatory prosecution policies in the US is based exclusively on jurisprudence and as such does not follow a traditional legal method. This is because the purpose of that chapter is to present the debate on these policies and not to present a ‘legal-technical’ account of legislation in a particular US jurisdiction. Conversely, the chapters on international human rights law follow the traditional legal method by using the sources of international human rights law, *inter alia* conventions and other international instruments, case law, UN documents, as well as jurisprudence to answer the research question. The method in these chapters is predominantly descriptive in that in order to answer my research question, a step in the process became to go through and present the various materials in order to use them later in the analysis.

### 1.3 Terms and delimitations

The term ‘domestic violence’ will be used almost consistently throughout this thesis. It is a broad term that encompasses all family violence, including violence against children, men and persons in same-sex relationships. However, as domestic violence disproportionately affects women in heterosexual relationships<sup>9</sup> and it is the gendered nature of domestic violence that is at the centre of the thesis, the term’s understanding should be limited to ‘men’s violence against women in an intimate relationship’. Naturally, a man’s violence against a former spouse or partner falls under this understanding.

Unfortunately, in this thesis, women are often referred to as ‘victims’. This should not be understood as women are synonymous to weak or vulnerable. ‘Survivor’ is perhaps a better term;<sup>10</sup> however, ‘victim’ seems to be used most frequently in conventions, jurisprudence and other documents so to promote consistency, the term ‘victim’ will be used.

Regarding the American debate on mandatory prosecution policies, these policies are often one part of what is referred to as ‘mandatory state

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<sup>7</sup> Charlesworth and Chinkin, *supra* note 5, p. 4.

<sup>8</sup> See *e.g.*, Burman M., *Straffrätt och mäns våld mot kvinnor, Om straffrättens förmåga att reproducera jämställdhet* (Iustus Förlag AB, Uppsala, 2007), p. 41 and section 2.1.

<sup>9</sup> See *e.g.*, Sack, *supra* note 2, p. 1703, citing statistics from the US Department of Justice’s National Crime Victim Survey data, where the results show that in “an overwhelming percentage of the cases, women remain the victims of intimate partner violence.”

<sup>10</sup> ‘Survivor’ is used in the UN Handbook for Legislation on Violence against Women, *infra* note 295.

interventions'. I have chosen to limit myself to discussing only mandatory prosecution policies; however, the reader should be aware that other mandatory policies are in force in various US jurisdictions, *e.g.* mandatory arrest policies,<sup>11</sup> mandatory court issued no contact orders and mandatory reporting of domestic violence injuries by medical professionals.

I cannot emphasise enough that the purpose of this thesis is not to discuss how the US as a state complies with international human rights law. Indeed, using an American debate as a starting point to discuss obligations under international human rights law is perhaps odd given the unwillingness the US has shown in ratifying human rights instruments.<sup>12</sup> Instead, the purpose of this thesis is to use the American debate as a critical approach to state policies on the prosecution of domestic violence. This critical approach will then be connected to the state obligations under international human rights law regarding domestic violence. I am aware that the debate may have inherent limitations as there is no way to be certain that the experiences women have in the US represent the experiences women have in other parts of the world. On the one hand, women around the world may experience domestic violence similarly and many times be apprehensive about involving the criminal justice system for the same reasons. On the other hand, conceptions of gender equality in society, access to economic resources, how women perceive the criminal justice system and the role of the state in their lives may be culturally different thus affecting their willingness to involve the state. However, others have discussed women's difficulties and apprehensions in seeking state assistance on a general level,<sup>13</sup> which I think suggests at least more similarities than differences. Therefore, I find the debate to be relevant for a general discussion on prosecution policies.

As to international human rights law, I have chosen to limit my presentation of domestic violence as a human rights issue to two main approaches, as gender-based discrimination mainly under the UN framework and as violations of specific rights under regional human rights systems. Consequently, domestic violence as torture will not be discussed in the thesis<sup>14</sup> as well as other possible approaches.<sup>15</sup> Although my account cannot

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<sup>11</sup> Mandatory arrest policies will however be briefly discussed because they were the first law reform on domestic violence in the US, *see* section 3.1.

<sup>12</sup> The US has failed to ratify the Convention on the Elimination of All Forms of Discrimination Against Women, the American Convention on Human Rights, the Convention of Belém do Pará, and is for obvious reasons not subject to the European or African human rights systems.

<sup>13</sup> *See* sections 2.1, 7.8 and Gormley L., 'Violence against Women by Non-State Actors, a Responsibility for the State under Human Rights Law: Amnesty International's Work on Domestic Violence', in C. Benninger-Budel (ed.), *Due Diligence and its Application to Protect Women from Violence* (Koninklijke Brill NV, Leiden, the Netherlands, 2008).

<sup>14</sup> The reader should however be aware that interesting advances have been made recently with General Comment no. 2, in which the Committee against Torture recognised that domestic violence falls within the scope of the UN Convention against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment. Committee against Torture, General Comment no. 2, CAT/C/GC/2, 24 January 2008.

be seen as a comprehensive presentation of all the ways one can argue that domestic violence is a human rights issue and thus giving rise to state obligations, I am of the opinion that these two approaches have been the strongest so far; in addition, I also find them most relevant for this thesis. Furthermore, my selection of international human rights case law on domestic violence is not an exhaustive presentation; I have selected the cases I deemed of most relevance for this thesis. The reader should also be aware that when ‘violence against women’ is discussed under international human rights law, these lines of reasoning are applicable to domestic violence as it is a form of violence against women. The reader should bear this in mind and know that discussions pertaining exclusively to domestic violence are specified when possible.

## 1.4 Outline

This thesis will begin with an introduction chapter on domestic violence, in which *inter alia* the causes and consequences of domestic violence will be presented in order to familiarise the reader with the issue. The chapter also contains a short historical perspective of domestic violence.

In chapter 3, which represents the first part of this thesis, I will discuss my research question on mandatory prosecution policies. By presenting the American debate on these policies, I aim to shed light on the issues that may be a cause of concern and that states should consider when devising prosecution policies. In the analysis, these issues will then be discussed in a human rights context.

Chapters 4 through 7 represent the second part of this thesis, in which the object is to answer my research question on state obligations under international human rights law regarding domestic violence. I have chosen to divide this part into a chapter on the developments under the UN framework (chapter 5) and a chapter on the developments under regional human rights systems (chapter 6). However, as the concepts of equality, discrimination, positive obligations and the due diligence standard pertain to both chapters, chapter 4 will serve as an introductory chapter explaining these concepts. The feminist critique of international law, the public/private distinction, will also be presented in chapter 4. Chapter 7 will conclude the second part of this thesis by further elaborating on what has become the most important state obligation: the duty to exercise due diligence to prevent violence against women, to protect women from violence, to investigate and

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<sup>15</sup> Vesa has presented a comprehensive account and mentions, *inter alia*, the right to the enjoyment of the highest attainable standard of physical and mental health and the right to work under the International Covenant on Economic, Social and Cultural Rights, as well as the right to life, the right to be free from torture and the right to be free from discrimination on the basis of sex and the right to equal protection by the law under the International Covenant on Civil and Political Rights, Vesa A., ‘International and Regional Standards for Protecting Victims of Domestic Violence’, 12 *Journal of Gender, Social Policy & the Law* (2004), pp. 320-325.

punish acts of violence against women and to provide reparations to victims of violence against women.

Chapter 8 is the analysis part of this thesis, in which the main research question will be discussed: *To what extent does international human rights law impose an obligation on states to implement mandatory prosecution policies in cases of domestic violence?* The analysis will draw on the initial findings from parts one and two and a tentative conclusion will be presented. Chapter 8 will end with a few concluding remarks that reflect my own opinions and suggestions on the prosecution of domestic violence and the implementation of human rights obligations.

## 2 Domestic violence

### 2.1 A brief introduction to domestic violence

There are many different definitions of domestic violence, some more inclusive than others. I find the definition of the US Department of Justice is a good reference point as it includes the pattern of abuse, the element of power, various acts and threats:

“a pattern of abusive behaviour in any relationship that is used by one partner to gain or maintain power and control over another intimate partner. Domestic violence can be physical, sexual, emotional, economic, or psychological actions or threats of actions that influence another person. This includes any behaviour that intimidate, manipulate, humiliate, isolate, frighten, terrorise, coerce, threaten, blame, hurt, injure, or wound someone.”<sup>16</sup>

As already explained in the introduction, domestic violence in this thesis should be understood as men’s violence against women in an intimate relationship.

The prevalence of domestic violence around the world differs, between 10 percent of women in some countries and 69 percent in others experience domestic violence.<sup>17</sup> An estimated 25 percent of all women in western countries will be affected by domestic violence at some point during their life.<sup>18</sup> The violence women suffer is often “severe, debilitating and deadly,”<sup>19</sup> and studies from developed countries show that between 40 and 70 percent of all women murder victims are killed by their male partners/former partners.<sup>20</sup> Research studies show that most of the deadly outcomes of domestic violence occur while the victim is taking steps to

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<sup>16</sup> US Department of Justice, Office on Violence against Women website, <[www.ovw.usdoj.gov/domviolence.htm](http://www.ovw.usdoj.gov/domviolence.htm)>, accessed 2011-12-07. Note that the definition includes economic abuse, which is not always the case in international or domestic law.

<sup>17</sup> United Nations Population Fund, *State of the World Population 2005, The Promise of Equality: Gender Equity, Reproductive Health, and the Millennium Development Goals*, 2005, p. 66, <[www.unfpa.org/webdav/site/global/shared/documents/publications/2005/swp05\\_eng.pdf](http://www.unfpa.org/webdav/site/global/shared/documents/publications/2005/swp05_eng.pdf)>, accessed 2011-12-27. (hereinafter United Nations Population Fund)

<sup>18</sup> Gracia E. and Herrero J., ‘Research Report, Acceptability of Domestic Violence against Women in the European Union: A Multilevel Analysis’, 60 *Journal of Epidemiology and Community Health* (2006), p. 123.

<sup>19</sup> Meyersfeld B., ‘Domestic Violence, Health, and International Law’, 22 *Emory International Law Review* (2008), p. 62.

<sup>20</sup> United Nations Population Fund, *supra* note 17, p. 66. *See also* UN Fact Sheet, *supra* note 1, p. 1.

leave the relationship.<sup>21</sup> Domestic violence is a serious threat to the health and lives of women. Along with the physical injuries of abuse, victims are also at high risk for psychosocial problems, general medical complaints, as well as being disproportionately affected by miscarriage, rape, substance abuse and attempted suicide.<sup>22</sup> The effects of domestic violence are not limited to the victim and her family. There are various societal costs and effects as well; for example, health care expenditures, demands on courts and law enforcement, and loss of productivity due to absenteeism in the work force.<sup>23</sup>

Domestic violence is a form of violence against women<sup>24</sup> and contrary to popular belief, violence against women is not confined to a specific culture, region, or country.<sup>25</sup> There are different theories on what causes domestic violence and how it should be analysed. Some theories include an individual perspective that focuses on psychological factors of the perpetrator; others include a social perspective that focuses on the perpetrator's social circumstances such as social marginalisation, unemployment and alcohol abuse.<sup>26</sup> Arguably, it is not possible to locate a single cause of domestic violence, as there may be a multitude of factors involved in a specific case. However, it is often argued that "domestic violence can only be properly understood if seen as one aspect of a wider picture of oppression,"<sup>27</sup> which is why the structural perspective is the chosen one for this thesis. According to the structural perspective, men's violence against women does not exist in a vacuum, separated from society at large; instead, the root causes of violence against women are the unequal power relations between men and women that have existed and continue to exist in most societies around the world. Economical, political, legal and social structures in society have led to men as a group having more power than women as a group, resulting in women experiencing discrimination and subordination in society *because* they are women. Furthermore, men's control over women's sexuality and stereotypical conceptions of masculinity linked to dominance and femininity connected to submissiveness also contribute to violence against women.<sup>28</sup>

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<sup>21</sup> See e.g., Epstein D. *et al*, 'Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-term Safety in the Prosecution of Domestic Violence Cases', 11 *Journal of Gender, Social Policy & the Law* (2003), p. 476 and Meyersfeld, *supra* note 19, p. 73.

<sup>22</sup> Mordini N. M., 'Mandatory State Interventions for Domestic Abuse Cases: An Examination of the Effects on Victim Safety and Autonomy', 52 *Drake Law Review* (2004), p. 299.

<sup>23</sup> United Nations Population Fund, *supra* note 17, p. 65.

<sup>24</sup> See Article 1 of the Declaration on the Elimination of Violence against Women, further elaborated on in section 5.3.1.

<sup>25</sup> UN Fact Sheet, *supra* note 1, p.1.

<sup>26</sup> Amnesty International, *Mäns våld mot kvinnor i nära relationer – En sammanställning över situationen i Sverige*, April 2004, <[www.amnesty.se/upload/files/2011/05/04/mans-vald-mot-kvinnor-i-nara-relationer-amnesty.pdf](http://www.amnesty.se/upload/files/2011/05/04/mans-vald-mot-kvinnor-i-nara-relationer-amnesty.pdf)>, accessed 2011-12-27, p. 5. (hereinafter Amnesty International)

<sup>27</sup> Choudhry S. and Herring J., 'Righting Domestic Violence', 20 *International Journal of Law, Policy and the Family* (2006), p. 111.

<sup>28</sup> Amnesty International, *supra* note 26, pp. 5-6 and Enander V., "'A Fool to Keep Staying": Battered Women Labeling themselves Stupid as an Expression of Gendered Shame', 16 *Violence Against Women* (2010), p. 6.

The fact that domestic violence against women is widespread – it is a problem in every country in the world – strongly supports the need to adopt the structural perspective.<sup>29</sup>

Many countries in the world have a history of viewing domestic violence as a private matter and thus state intervention has been practically nonexistent or at best, inadequate. Lack of substantive criminal laws on domestic violence or unwillingness to charge under ordinary laws on assault, rape and murder contributes to impunity for perpetrators. The administration of criminal justice also contributes to impunity when women's complaints are treated with negligence, disbelief and contempt by authorities. Furthermore, procedural criminal law relating to assessment of evidence can discriminate against women<sup>30</sup> and the process of testifying in open court is often a frightening and humiliating experience where the woman's credibility is often called into question. However, in many countries the reality is that women face challenges before they can even approach the criminal justice system.<sup>31</sup>

Social attitudes are one reason why women may be unwilling to seek state assistance.<sup>32</sup> Violence against women is often considered a normal aspect of gender relations and women living in violence often experience embarrassment and shame.<sup>33</sup> Victim blaming is a social attitude present around the world. Domestic violence is often considered justified if, for example, a woman refuses to have sex, talks with other men or does not prepare food on time.<sup>34</sup> Enander has noted that society often blames and stigmatises women in a contradictory fashion. Women are made responsible for keeping the family together at all costs; therefore, if she leaves she is perceived as the home-wrecker. However, at the same time, women are also made responsible for solving the societal problem that is domestic violence by being expected to leave her abuser. The result is a situation where women cannot win in the eyes of society.<sup>35</sup>

Myths concerning domestic violence are also widespread. In Sweden for example, abusive men are believed to be either immigrants, lower educated or suffering from substance abuse problems.<sup>36</sup> The danger with myths is that they act to shift responsibility from the abuser to other problems, such as

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<sup>29</sup> Choudhry and Herring, *supra* note 27, p. 112 and Meyersfeld, *supra* note 19, p. 62.

<sup>30</sup> E.g. the 'cautionary rule' in some jurisdictions mean that judges warn jurors that women's testimony in rape and sexual assault cases should not be relied on without corroboration. Gormley, *supra* note 13, p. 180.

<sup>31</sup> Gormley, *supra* note 13, p. 180.

<sup>32</sup> *Ibid.*

<sup>33</sup> United Nations Population Fund, *supra* note 17, pp. 67-68. See also Enander, *supra* note 28, p. 8, in which embarrassment and shame are mentioned as an impediment to seeking help.

<sup>34</sup> United Nations Population Fund, *supra* note 17, p. 68.

<sup>35</sup> Enander, *supra* note 28, p. 6.

<sup>36</sup> Amnesty International, *supra* note 26, p. 28. The research in the report *Slagen Dam* repudiates these myths, Lundgren E. *et al*, *Slagen dam, Mäns våld mot kvinnor i jämställda Sverige – en omfattningsundersökning* (Brottsoffermyndigheten och Uppsala Universitet, Åströms tryckeri AB, Umeå, 2001), pp. 71-72.

alcohol abuse. Furthermore, myths make the woman jointly responsible by focusing on the questions “*what kind of a woman allows herself to be beaten?*” and “*why doesn’t she leave?*” These questions perpetuate the myth that only a certain type of woman is abused and domestic violence is relegated to an individual problem instead of a societal problem.<sup>37</sup> Furthermore, when myths are the prevalent conception of domestic violence in a society, they affect people working within the criminal justice system and they affect the way procedural and evidential rules are applied.<sup>38</sup> A research report from 2005 concluded that there are still widespread social attitudes, such as victim blaming, within the European Union that condone domestic violence and contribute to a social climate of acceptability of domestic violence. Social attitudes do not only influence the victim’s decisions, they also work to foster, condone, and perpetuate domestic violence and, as several scholars have emphasised, without a fundamental change in social attitudes regarding domestic violence we will not be able to respond effectively to the problem.<sup>39</sup>

Following are examples of other challenges women face. Women face financial dependence on the abusive man, and discriminatory laws on housing, tenure and inheritance may prevent women from seeking help for fear of becoming homeless.<sup>40</sup> Women may fear losing custody of their children due to legal codes that privilege the father’s right to custody or the practice of social services assessing women who live with violence as an unfit parent also affect women’s decisions to seek help. Women risk poverty in countries where support from social services is inadequate if they seek help that leads to a separation or if the abuser is sent to prison. Lastly, immigration laws may deny migrant women housing and social services, and they may make separation from a violent man impossible if her application is dependent on her husband’s application.<sup>41</sup>

In addition to the above-mentioned challenges that women experience, the psychological damages that domestic violence inflicts on the victim also affects her willingness and ability to seek help. Over the years, several theories have been presented on the effects of violence on women in an abusive relationship and I will briefly present one feminist theory that has gained resonance in Sweden, professor Lundgren’s *process of normalising the violence*.<sup>42</sup> According to Lundgren, the violence is seen as a process, in

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<sup>37</sup> Ruuskanen M., ‘The “Good Battered Woman”: A Silenced Defendant’, in K. Nousiainen (eds.), *Responsible selves: women in the Nordic legal culture* (Ashgate, Aldershot, 2001), pp. 314-315. See also Amnesty International, *supra* note 26, p. 28.

<sup>38</sup> Ruuskanen, *supra* note 37, p. 314.

<sup>39</sup> Gracia and Herrero, *supra* note 18, p. 123.

<sup>40</sup> In fact, a study from 1994 estimated that 50% of all homeless women in the US in the last ten years were refugees from domestic violence, Mordini, *supra* note 22, p. 298.

<sup>41</sup> Gormley, *supra* note 13, pp. 181-182.

<sup>42</sup> The theory has not been received without criticism and controversy and Lundgren consistently holds that it is a theoretical theory that does not apply to every woman’s encounter with violence in an abusive relationship, Lundgren E., *Våldets normaliseringsprocess* (Riksorganisationen för kvinnor och tjejjourer i Sverige (ROKS), Stockholm, 2004), p. 22.

which the violence is normalised by both the man and the woman. In this process, boundaries are displaced and what was once extreme begins to seem normal.<sup>43</sup> The violence is interconnected to the power differences between men and women in society. Thus, Lundgren explains the difference between a normal relationship and an abusive relationship as a difference in degree and not in kind, where the abusive relationship is the extreme form of the *culturally normal* male dominance and female subordination.<sup>44</sup>

From the man's perspective, the process of normalising the violence serves a gendered purpose as he creates masculinity for himself based on dominance. His methods include controlling the woman by using violence to set boundaries and isolating her from friends and family. According to Lundgren, the violence men use is highly controlled, and not impulsive or committed in blind rage. By controlling the woman's life, he also controls her femininity, which is a reflection of his idea of what a woman should be, *i.e.* subordinate to him. The alternation of his brutality and warmth reinforces the effects of the violence for the woman, much like the effects of the Stockholm syndrome for torture victims.<sup>45</sup>

From the woman's perspective, the process of normalising the violence is destructive and defeating. It is a process that involves a strategy of adapting to boundaries that are constantly erased and displaced. At first, the woman adapts to end the violence, and when it does not stop, she adapts to survive. The alternation of his brutality and warmth erases the division between violence and love and violence becomes an expression of love. When the violence is normalised the woman identifies with the violence and feels responsible for it. Ultimately, she internalises the man's image of her and his reality becomes her own.<sup>46</sup>

## 2.2 Domestic violence in a historical perspective

Western society has a long tradition of viewing domestic violence as a private matter between a husband and a wife.<sup>47</sup> In order to understand domestic violence in a historical context, a brief historical perspective of the legality of domestic violence in Europe and the US follows below. In this section, I will depart from using the term domestic violence. Instead, I will use the term 'wife beating', referring to a husband's use of physical violence against his wife. In a historical perspective, I feel wife beating is better suited as the laws of that time were connected to the relationship between a husband and a wife.

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<sup>43</sup> *Ibid.*, p. 10.

<sup>44</sup> *Ibid.*, pp. 15-19.

<sup>45</sup> *Ibid.*, pp. 23-48.

<sup>46</sup> *Ibid.*, pp. 49-72.

<sup>47</sup> Goodmark L., 'Law is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women', 23 *Saint Louis University Public Law Review* (2004), p. 13.

## 2.2.1 Wife beating and the patriarchal family model

“Domestic violence is not new to Western civilisations, nor is it rare.”<sup>48</sup>

Mordini writes that ideas of women’s subordination to men were inherited from societies dated as far back as Biblical times. Early Judeo-Christian religion advocated the model of the patriarchal family, in which men held positions of power and authority. Women were often denied their own identity and were considered the property of men, going from the homes of their father to those of their husband.<sup>49</sup>

The model of the patriarchal family was widespread in early European societies and the husband’s right to physically punish his wife for offenses was considered a natural part of his authority. Although the middle ages saw a decrease of the husband’s authority, his right to physically punish his wife remained in the medieval common law as he was her legal guardian and thus responsible for her offenses.<sup>50</sup> By the end of the fifteenth century, the Catholic Church’s canon law addressed wife beating by sanctioning the husband’s use of physical violence when scolding and bullying his wife was ineffective. It was considered better to “punish the body and correct the soul than to damage the soul and spare the body.”<sup>51</sup> Furthermore, a husband’s beating of his wife if she had committed an offense was considered an act of “charity and concern for her soul, so that the beating will redound to your [his] merit and her good.”<sup>52</sup>

A common factor of both medieval common law and canon law was that the legality of wife beating was dependent on both the degree and purpose of violence; moderate violence that was neither excessively violent, cruel, nor manifestly degrading, was allowed providing that the purpose was to punish the wife for an offense, *i.e.* corporal punishment. Up until the nineteenth century, legislation across Europe supported this understanding.<sup>53</sup> However, it would be misleading to claim that wife beating was practised in Europe from the sixteenth to the eighteenth centuries without criticism. For example, the priests of the reformation opposed the practice of husbands physically punishing their wives and advocated husbands exercise authority over their wives in a more loving way. Noteworthy, of course, is that the husband’s authority and the wife’s subordination were never questioned; it was the use of violence to exercise authority that was slowly becoming recognised as a problem.<sup>54</sup>

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<sup>48</sup> Mordini, *supra* note 22, p. 304.

<sup>49</sup> *Ibid.*

<sup>50</sup> Lindstedt Cronberg M., *Med våldsam hand. Hustrumisshandel i 1800-talets Sverige. En Studie av rättsliga, kyrkliga och politiska sammanhang* (Mediatryck, Lunds Universitet, 2009), p. 28.

<sup>51</sup> Mordini, *supra* note 22, p. 305, citing Friar Cherubino’s Rules of Marriage (Cherubino de Siena, *Regole della vita matrimoniale* (Bologna, Italy 1888).

<sup>52</sup> *Ibid.*

<sup>53</sup> Lindstedt Cronberg, *supra* note 50, p. 29.

<sup>54</sup> *Ibid.*

In the eighteenth century, Sir William Blackstone described England's customs concerning wife beating as a justification or rationalisation of the husband's violence. As the husband was responsible for the wife's misbehaviour he was also "entrust[ed]...[with the] power of chastisement, in the same moderation that a man is allowed to correct his apprentices or children."<sup>55</sup> The first American states' laws on wife beating followed the British common laws and allowed for some 'moderate' chastisement. Furthermore, women were often denied legal intervention as it was believed proceedings only served to bring shame to the parties involved.<sup>56</sup>

## 2.2.2 The criminalisation of wife beating

In the nineteenth century, Europe and the newly founded US saw a greater recognition of men's violence against women as a social problem, leading to reforms. In England and in the US, wife beating was viewed mainly as a problem of the working class with the stereotypical image of the wife beater as a brutal and primitive drunk emerged. One of the first reforms on wife beating in England was *The Wife Beaters Act* in 1882, in which the prescribed sentence was public pillory or imprisonment.<sup>57</sup>

The American colonies had already seen a religious reform in 1640-1680 where the early Puritans in Massachusetts had regarded all violence within the family as sin and adopted a specific law, possibly the first ever of its kind, that criminalised wife beating and unnatural harshness towards children. The second reform in the US started in the 1870s and was connected to the increasing societal concern for the welfare of children as wife beating was found to correspond with incidences of child abuse. There was also a new bourgeois male ideal emerging where men should show self-restraint and violence against women was seen as cowardly behaviour.<sup>58</sup> In 1874, North Carolina changed its laws and followed states such as Maryland, Alabama and Massachusetts by repudiating the old doctrine of permitting a husband to beat his wife as long as the switch was no bigger than his thumb. However, the law in North Carolina essentially required permanent injury or malice if it were to intervene. This policy of non-intervention became the standard policy regarding domestic violence in the US as well as most countries in the western world. It took until 1920 for all states in the US to make wife beating illegal. However, the policy of non-intervention remained, and the laws stayed very much the same until advocacy by the battered women's movement in the 1970s brought about a long awaited change.<sup>59</sup>

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<sup>55</sup> Mordini, *supra* note 22, p. 305, quoting Sir William Blackstone, 1 Commentaries on the Laws of England 444 (1765).

<sup>56</sup> Mordini, *supra* note 22, pp. 305-306.

<sup>57</sup> Lindstedt Cronberg, *supra* note 50, p. 31.

<sup>58</sup> *Ibid.*, p. 32.

<sup>59</sup> Mordini, *supra* note 22, pp. 306-307.

### 3 Mandatory prosecution policies in domestic violence cases – the case in the US

In this chapter, I will present how the US has responded to domestic violence. The response has largely been situated within the criminal justice system with the adoption of various mandatory policies. This has sparked an interesting debate on the nature of these policies, their efficacy and their impact on women as a group and on the individual victim of domestic violence. This debate will be presented and a few issues that may be a cause of concern will be highlighted. Because the debate departs from the battered women's movement, I will begin the chapter with a section depicting the battered women's movement's struggle to change the policy of non-intervention.

This thesis does not aim to discuss the US legal system; however, some basic information is needed to understand this chapter. The US is not a uniform legal system, it is a federal state and thus there is a hierarchy of laws that begins with the constitution, followed by statutes and lastly, administrative regulations. Statutes and administrative regulations can be federal, state or local; there is no uniform set of criminal laws in the US as each state jurisdiction enacts its own.<sup>60</sup> Mandatory prosecution policies can be enacted on a state level through state statutes;<sup>61</sup> however, the most common approach has been for the state legislator to encourage the use of certain prosecution policies and give individual district attorney offices the authority to decide how the policies should be implemented.<sup>62</sup> The 1994 federal *Violence Against Women Act* (VAWA) has had significance for the US as a whole, by granting funding for increased law enforcement and for the prosecution of domestic violence. Because the federal act gives grants to implement mandatory prosecution policies, it has created an incentive for the individual state to establish these policies.<sup>63</sup>

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<sup>60</sup> Neubauer D. W., *America's Courts and the Criminal Justice System*, 9<sup>th</sup> Ed. (Thomson, Belmont California, 2008), pp. 26-29.

<sup>61</sup> One example is the state of Minnesota, Corsilles A., 'No-drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?', 63 *Fordham Law Review* (1994), p. 863.

<sup>62</sup> *Ibid.*

<sup>63</sup> Sack, *supra* note 2, p. 1675. The US Congress passed the VAWA in 1994 to *inter alia* enhance the investigation and prosecution of violent crimes against women. The VAWA was last reauthorized in 2005, US Department of Justice, Office on Violence against Women website, <[www.ovw.usdoj.gov/overview.htm](http://www.ovw.usdoj.gov/overview.htm)>, accessed 2011-11-21.

### 3.1 From a policy of non-intervention to mandatory intervention

The battered women's movement in the US emerged in the 1970s, inspired by the social movements of its time where conceptions of power based on sex and race were challenged. It became an integral part of the women's liberation movement, and its importance cannot be better described than in the words of Miccio:

“...it challenged male hegemony over women's bodies in the home. The battered women's movement developed an ideology that contested appropriation of women's bodies, challenged male supremacy in the family, and analysed how the individual power of the patriarch was supported and legitimised by the state.”<sup>64</sup>

The battered women's movement focused on fixing the culture and not the survivor. They understood that male perpetrated intimate violence was about power; it was a manifestation of male privilege and a problem that was embedded predominantly in culture and social order, not in the psyche of the individual man. At the time, this understanding of domestic violence was not acknowledged by the criminal justice system or professional psychiatry.<sup>65</sup>

The non-intervention policy in place since the late nineteenth century affected numerous professionals, including law enforcement and prosecutors. Domestic violence researchers have reported on practices such as ‘stitch rules’, that is, in order for the husband to be arrested for assault and battery, the abused wife's injuries were required to reach the severity at which she needed a certain number of surgical sutures. The practice of sending women home and advising them to kiss and make-up was also common.<sup>66</sup> The American Bar Association's 1973 *Standards for the Urban Police Function* encouraged the use of conflict resolution in cases of family disputes instead of the use of criminal assault or disorderly conduct statutes. Individual officers also reported deploying a policy of responding more slowly to domestic disturbances than others in the hope of the situation resolving itself before they arrived.<sup>67</sup>

In the early 1970s, the American psychiatrist M. Faulk conducted a study where he examined the criminal justice system's response to cases of serious domestic violence. Out of the twenty-three cases examined for the study, nine of the perpetrators went to jail, and five perpetrators were placed on probation, despite the fact that two of them had murdered their wives. The manner in which Faulk described the lenient sentences of the

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<sup>64</sup> Miccio G. K., ‘A House Divided: Mandatory Arrest, Domestic Violence and the Conservatization of the Battered Women's Movement’, 42 *Houston Law Review* (2005), pp. 248-249.

<sup>65</sup> *Ibid.*, pp. 254 -255.

<sup>66</sup> Mordini, *supra* note 22, pp. 307-308.

<sup>67</sup> *Ibid.*, pp. 311-312.

perpetrators in the cases, as well as the actual sentencing, was connected to the misogynistic beliefs about domestic violence during that time. For example, since the belief was that men were only responding to marital stress or provocation from their wives, the courts showed sympathy for the perpetrators and their ‘tragic situations’, and very rarely discussed the husband’s responsibility for the violence. Miccio notes that “[w]omen were not only the source of victimisation but agent provocateurs in their own deaths” and that this understanding permeated the professionals within both the courts and the psychiatric community. Victim blaming was widespread and the psychological view of the battered woman was that of a masochistic woman, where the violence she endured filled her own need. Furthermore, battered women were defined as aggressive, masculine and sexually frigid, characteristics that, according to Miccio, “placed women outside socially prescribed roles, where they became objects deserving not only their husbands’ rage but of society’s too.”<sup>68</sup>

In 1972, the first American domestic abuse hotline was established in St. Paul Minnesota and the first American women’s shelter was opened in Pasadena, California.<sup>69</sup> The early American women’s shelters operated under four principles of feminist ideology:

“(1) intimate violence was the confluence of male hegemony in the home and women’s subordination in the public sphere; (2) the violence was political and not a consequence of women’s personalities or families of origin; (3) male intimate violence was a potential in all women’s lives; and (4) women’s right to self-determination was significant.”<sup>70</sup>

This entailed a governance model of working collectives, with no distinction between workers and residents. Since the belief was that all women were potential victims, residents could teach staff how violence shaped their lives and how they daily exercised their autonomy through various forms of resistance to keep themselves and their children safe. The early shelters also used a consensus model in order to respect and promote women’s agency. The community women who collectively organised the shelters decided upon policies and procedures for shelter life together with the residents, careful to preserve women’s self-determination and their agency.<sup>71</sup> Furthermore, the workers respected the residents’ choices. They did not consider women’s choices, *e.g.*, the choice to stay with the abuser, as abnormal or representative of a psychological disorder; nor did they treat survivors of violence as sick or in need of treatment. The principle they followed was always that of a woman’s right to self-determination.<sup>72</sup> In addition, the shelters employed a grassroots ‘bottom-up approach’ designed to empower women by raising consciousness of the political nature of the violence they endured. Women were encouraged to share their experiences

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<sup>68</sup> Miccio, *supra* note 64, pp. 254-255.

<sup>69</sup> Mordini, *supra* note 22, p. 307.

<sup>70</sup> Miccio, *supra* note 64, p. 257.

<sup>71</sup> *Ibid.*, pp. 257-261.

<sup>72</sup> *Ibid.*, p. 286.

with each other and break the isolation that many times made them personalise the violence and believe that if they could fix their own personal shortcomings, the violence would stop. This sharing of experiences enabled women to see that the problem was much larger than their own personal experiences, it was connected to the political status of men and women in general and the systematic way women were treated in society. The realisation of the political nature of their personal experiences was considered to lead the way towards action and empowerment for women.<sup>73</sup>

As noted above, the battered women's movement focused on fixing the culture that produced, created and supported male intimate violence. Advocates recognised that both social and legal changes were needed. They aligned with women's organisations that worked towards improving women's economic independence (for example, women's participation in the labour market) as they considered access to material resources to be one of the main factors that influenced women's decisions to leave or stay with an abuser. Advocates also recognised that gender inequality in law enforcement undermined women's lives and safety and thus worked towards transforming the criminal justice system and its policy of non-intervention.<sup>74</sup> They began by urging the criminal justice system to take action and treat domestic violence as a crime. They called for the state to "recognise that its perpetrators are chronic, high-risk offenders, and to acknowledge that this violence is costly in both human and social terms."<sup>75</sup> Lawsuits were instrumental in changing the policy of non-intervention and one of the earliest was *Bruno v. Codd* in 1977. This lawsuit was a class action suit filed against the New York City Police Department and the New York Family Court. The plaintiffs claimed *inter alia* that the authorities failed to take action against perpetrators, even when there was evidence of abuse. The New York Supreme Court ruled in favour of the plaintiffs and stated that which advocates had long held: Anglo-American law treated a man's physical abuse of his wife as different from other abuse and "only the written law has changed; in reality, wife beating is still condoned, if not approved, by some of those charged with protecting its victims."<sup>76</sup>

*Bruno v. Codd* prompted community agencies all over the US to change their policies regarding domestic violence to improve *inter alia* the response time and the rates of arrest. However, progress was slow and seven years later in *Thurman v. City of Torrington* the plaintiff won a \$2.9 million dollar verdict against the city of Torrington, the Connecticut Police Department and twenty-four individual officers. The court found the city's non-arrest and non-intervention policies unconstitutional on the grounds of equal

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<sup>73</sup> Bailey K. D., 'Lost in Translation: Domestic Violence, "the Personal is the Political," and the Criminal Justice System', 100 *Journal of Criminal Law and Criminology* (2010), pp. 1263-1264.

<sup>74</sup> Miccio, *supra* note 64, pp. 261-264.

<sup>75</sup> Hart B. J., 'Arrest: What's the Big Deal?', 3 *William & Mary Journal of Women and the Law* (1997), p. 207.

<sup>76</sup> Mordini, *supra* note 22, p. 309, quoting *Bruno v. Codd*, pp. 975-976.

protection; victims of domestic violence were given inferior protection than that given to victims of crimes committed by strangers.<sup>77</sup>

In the beginning of the 1980s, researchers Sherman and Berk conducted a landmark study known as the *Minneapolis Domestic Violence Experiment*. The object of the study was to observe the effects three different responses to domestic violence had concerning repeated violence by the offender. The experiment called for domestic violence suspects to be placed in three different response categories: arresting the suspect (with a minimum of one night in jail), sending the suspect away from the residence and telling him not to return for eight hours, or advising the couple in some way (which may include officer mediation). The results showed that the response category of arresting the suspect led to the lowest rate of recidivism. In 1984, following this influential study, the US Attorney General's Office decided to recommend arrest as the preferred standard for police response to domestic violence cases.<sup>78</sup>

In the late 1980s to the mid 1990s, the political strategy of some advocates in the battered women's movement was to promote mandatory arrest as a state wide public policy initiative.<sup>79</sup> The purpose of mandatory arrest policies was to remove or restrict the discretion police officers had in deciding whether to make an arrest by mandating arrest in cases where there was probable cause that a crime had occurred.<sup>80</sup> In the mid 1990s, most American states had included some form of mandatory arrest in their criminal procedure statutes. Many states were echoing the slogan 'zero-tolerance for domestic violence' and a strong stance against domestic violence was on the agenda for local and national legislators.<sup>81</sup> The mandatory arrest policies increased the number of cases that were brought to the attention of the prosecutors. Many prosecutors expressed frustration over the amount of women who withdrew their complaints or were unwilling to cooperate during the criminal process. The criminal justice systems allowed for prosecutorial discretion and prosecutors dismissed an estimated 50-80% of cases depending on the jurisdiction.<sup>82</sup> The cited causes for dismissal were the victim requested it, refused to testify, recanted or failed to appear in court.<sup>83</sup> Corsilles has noted that the relationship between victims and prosecutors was one based on mutual distrust. Victims did not believe prosecutors would take their complaint seriously nor that

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<sup>77</sup> Mordini, *supra* note 22, pp. 310-311, citing *Thurman v. City of Torrington*.

<sup>78</sup> Mordini, *supra* note 22, p. 313. The results of the study were not without controversy, and follow-up studies were done in several cities in the US. Researchers found that although some of the perpetrators were deterred from future violence following their arrest, others' use of violence increased. Arrest seemed to reduce the rates of repeated violence in White and Hispanic communities as well as in relationships where the perpetrator was employed. Arrest on the other hand was less effective in African-American communities and in relationships where the perpetrator was unemployed; these cases actually saw an increase of the use of violence following the arrest, p. 314.

<sup>79</sup> Miccio, *supra* note 64, p. 280.

<sup>80</sup> Goodmark, *supra* note 47, p. 15 and Sack, *supra* note 2, p. 1670.

<sup>81</sup> Miccio, *supra* note 64, pp. 278-279.

<sup>82</sup> Mordini, *supra* note 22, p. 317.

<sup>83</sup> Corsilles, *supra* note 61, p. 857.

involvement with the criminal justice system would help them, this led to uncooperative victims. In turn, prosecutors believed victims would drop the charges, fail to cooperate and return to their abusers, this led to their reluctance to pursue domestic violence cases from the very outset. Each side acted in accordance with their beliefs of how the other side would act, and the cycle turned into a self-fulfilling prophecy that resulted in high rates of case attrition.<sup>84</sup> In Sweden, this self-fulfilling prophecy has also been discussed. In the 1990s, a research study into the attitudes of police and prosecutors' showed that their assumption of the reluctant and uncooperative victim led to ineffective investigations from the very outset. Thus, an important point was made in that the actual problem was located predominantly within the attitudes of the judicial system, where reluctant victims were considered characteristic of domestic violence cases, and not with the individual woman. It was argued that an improved treatment of women victims by the judicial system could rectify the issue of uncooperative victims.<sup>85</sup>

Advocates of the battered women's movement had not considered mandatory arrest as a cure for the criminal justice system's inadequate response to domestic violence. Instead, they understood that a coordinated and comprehensive response by all parts of the legal system as well as human services systems was needed.<sup>86</sup> Therefore, some advocates supported mandatory prosecution policies as domestic violence had been "historically undercharged, if charged at all" and the mandatory nature would remove the discretion from prosecutors, which had enabled them to reduce charges and dismiss cases. Mandatory prosecution policies were regarded as an important part of equal justice. Furthermore, advocates hoped the policies would improve women's safety and increase offender accountability.<sup>87</sup> Lastly, many early advocates sought to give women the *option* of access to the legal system if they desired, not to have it forced upon them in every situation of domestic violence.<sup>88</sup>

As an endnote, it must be stated that many advocates were apprehensive and reluctant about promoting mandatory policies because of the distrust many feminists held for the criminal justice system. As Miccio has noted:

"Because the police are gatekeepers to the criminal justice system, they have enforced cultural prescriptions that are essentially gendered, raced and classed. Thus the anxiety associated with mandatory arrest and prosecution is emblematic of the paradox inherent in working with systems that have been the source of the problem."<sup>89</sup>

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<sup>84</sup> *Ibid.*, pp. 865-873. Case attrition is the failure of arrests to come to trial.

<sup>85</sup> Burman, *supra* note 8, p. 303 and Swedish Government Official Report, SOU 1995:60 Del A *Kvinnofrid*, p. 208.

<sup>86</sup> Hart, *supra* note 75, p. 207.

<sup>87</sup> Miccio, *supra* note 64, pp. 265-266.

<sup>88</sup> Bailey, *supra* note 73, p. 1265.

<sup>89</sup> Miccio, *supra* note 64, pp. 266-267.

## 3.2 The debate on mandatory prosecution policies

Firstly, I wish to inform the reader that the debate in the US is extensive, my account below is merely an attempt to summarise it. Secondly, there is substantial critique against these policies from the perspective of ‘under enforcement’; that is, there has been resistance from prosecutors’ offices to properly implement these policies. The criminal justice response has not been monolithic in US jurisdictions, for example, case attrition remains high, prosecutors do not always pursue charges even when the victim wants to go forward, and prosecutors sometimes undercharge cases of domestic violence.<sup>90</sup> Indeed, the Special Rapporteur on Violence against Women, its causes and consequences (SRVAW) highlighted these issues in a recent report on her 2011 mission to the US.<sup>91</sup> This critique should not be confused with what is discussed below in section 3.2.3, a critique against these policies that is largely based on ‘over enforcement’.

### 3.2.1 What are mandatory prosecution policies?

Many jurisdictions in the US have introduced mandatory prosecution policies in order to limit the prosecutor’s discretion and prevent prosecutors from dismissing charges at the victim’s request. Instead, under these policies prosecutors are required to pursue any case where there is sufficient evidence for prosecution.<sup>92</sup> The state replaces the victim as the complaining party and the victim becomes a witness in the case.<sup>93</sup> Mandatory prosecution policies are commonly referred to as ‘no-drop policies’ because under these policies, the victim cannot decide to drop her case, nor can the prosecutor drop a case due to victim nonparticipation.<sup>94</sup> Prosecutors’ offices employ either ‘hard’ no-drop policies or ‘soft’ no-drop policies.

Hard no-drop policies, or, as they are sometimes called, aggressive prosecution policies, require prosecutors to disregard a withdrawal of the complaint and any wishes the victim might have about the criminal process.<sup>95</sup> Prosecuting against the victim’s wishes is often challenging since without the victim’s testimony it may be difficult to obtain a conviction. In cases of domestic violence, it is not uncommon for there to be no other witnesses than the victim herself.<sup>96</sup> Even in cases where the victim does

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<sup>90</sup> Sack, *supra* note 2, pp. 1697-1698, and Corsilles, *supra* note 61, pp. 854-855. To ‘undercharge’ is to charge as a misdemeanour when the case should be a felony charge.

<sup>91</sup> Report of the UN Special Rapporteur on violence against women, its causes and consequences, *Mission to the United States of America*, Manjoo R., UN Doc. A/HRC/17/26/Add.5, 6 June 2011, paras. 15-16. (hereinafter Manjoo US report)

<sup>92</sup> Goodmark, *supra* note 47, p. 16.

<sup>93</sup> Mordini, *supra* note 22, p. 318.

<sup>94</sup> Corsilles, *supra* note 61, p. 858.

<sup>95</sup> Mordini, *supra* note 22, p. 318.

<sup>96</sup> Choudhry and Herring, *supra* note 27, p. 106.

cooperate, reaching the threshold of sufficient evidence for prosecution can still be difficult. Under hard no-drop policies victims are expected to participate in the pre-trial preparation by being photographed and interviewed, provide information and sign statements. In cases where the victim's testimony is deemed necessary, prosecutors may subpoena reluctant victims to testify and even arrest or request imprisonment for charges of contempt for those victims who fail to appear following a subpoena.<sup>97</sup>

In jurisdictions with soft no-drop policies,<sup>98</sup> victims are encouraged to cooperate and participate in the criminal process and prosecutorial discretion decides how much the victim must participate in the process.<sup>99</sup> Generally, victims are not forced to testify.<sup>100</sup> In some jurisdictions, the policy may require the prosecutor to consult with the victim before making decisions regarding charges in serious cases.<sup>101</sup> These policies are sometimes referred to as pro-prosecution policies, meaning that prosecution should be pursued, yet the prosecutor retains some discretion and the policy may outline when a prosecutor can make an exception and drop a case, and when it is prohibited to drop a case. For example, no case may be dropped before an initial hearing, or if the defendant has a prior conviction, or if there is a pending assault case against the same victim, or if the defendant is on probation.<sup>102</sup>

It is important to note that in many soft no-drop policy jurisdictions, victims are provided with services to increase their comfort with the criminal justice.<sup>103</sup> Prosecutors' offices have begun working with victim advocates who provide services to victims such as counselling, accompanying victims to court and acting as liaisons between victims and prosecutors, and informing them on the progress of their case.<sup>104</sup> However, some hard no-drop policy jurisdictions also provide victims with counselling and access to victims' advocates. In these jurisdictions, services tend to be forced on a reluctant victim when she refuses to testify, or mandated before a judge may sentence a victim to jail on the first contempt finding due to her refusal to testify.<sup>105</sup>

One of the more recent developments is a 'coordinated community-based response', which is a response where all parts of the justice system are integrated, and then in turn coordinated with community-based victim advocates and diverse members of the community who provide domestic violence victims with support and counselling services. Public education campaigns to raise awareness and help to change societal norms about

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<sup>97</sup> Goodmark, *supra* note 47, p. 17.

<sup>98</sup> Jurisdictions with soft no-drop policies are thought to be prevalent in the US, *ibid.*

<sup>99</sup> Mordini, *supra* note 22, p. 318.

<sup>100</sup> Goodmark, *supra* note 47, p. 17.

<sup>101</sup> Mordini, *supra* note 22, p. 318.

<sup>102</sup> Corsilles, *supra* note 61, p. 861.

<sup>103</sup> Goodmark, *supra* note 47, p. 17.

<sup>104</sup> Sack, *supra* note 2, p. 1673.

<sup>105</sup> Corsilles, *supra* note 61, pp. 862 and 864.

domestic violence are also a part of a coordinated community-based response. As of 2004, the US Department of Justice grants funds to support the creation of *Family Justice Centres* in several jurisdictions. These centres provide an array of services under one roof, e.g., independent victim advocates, civil legal assistance, prosecutors and police, in order for victims not to have to travel and navigate between different systems for help.<sup>106</sup>

### 3.2.2 What are the advantages of mandatory prosecution policies?

Many scholars have argued passionately on the advantages of mandatory prosecution policies. The concluding argument by many is that the advantages of the policies outweigh the disadvantages and that the symbolic message they send to society is of great importance. Domestic violence is a crime that will not be tolerated by the state.<sup>107</sup> The strongest and most common argument for mandatory prosecution policies is the legitimate state interest in maintaining public safety. Indisputably, domestic violence is an issue of public safety and public health, affecting not only the individual victim but also children, neighbours, extended family, the workplace and hospital emergency rooms.<sup>108</sup> The protection of children is often emphasised in this context as a justification for mandatory intervention. There is documented evidence that children who live in homes with domestic violence suffer, either from a heightened risk of direct abuse or emotionally from witnessing abuse.<sup>109</sup> Wills, who advocates aggressive prosecution policies, argues that the primary duty of the state is to protect its citizens against assault, whether it occurs in or outside the home. Therefore, it is correct to advocate legislation that codifies domestic violence as a crime against both the individual and the state. Prosecutors in turn must enforce these laws by filing charges and signalling that domestic violence is criminal conduct.<sup>110</sup>

Although Fletcher does not write in the context of domestic violence, I find his reasoning to be applicable here as there has been significant pushes by battered women's advocates towards having the state recognise domestic violence as a crime worthy of state attention.<sup>111</sup> According to the retributivist claim, "as a matter of justice, crime must always be punished", justice can be seen as "an end in itself" and justice requires accountability and punishment. A state that chooses not to prosecute a crime within its capacity becomes, by its tolerance of the crime, complicit in the crime. This cannot be tolerated as the state derives part of its legitimacy from protecting

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<sup>106</sup> Sack, *supra* note 2, pp. 1725-1730. 'One-stop' centres are also advocated by the Special Rapporteur on Violence against Women, *see* section 7.4.

<sup>107</sup> *See e.g.*, Wills D., 'Domestic Violence: The Case for Aggressive Prosecution', 7 *UCLA Women's Law Journal* (1997), Epstein *et al*, *supra* note 21, and Corsilles, *supra* note 61.

<sup>108</sup> Wills, *supra* note 107, p. 174. The costs domestic violence has on society have been referred to in section 2.1 of the thesis.

<sup>109</sup> Choudhry and Herring, *supra* note 27, pp. 104-105.

<sup>110</sup> Wills, *supra* note 107, pp. 174-175.

<sup>111</sup> *See* section 3.1.

its citizens against crime.<sup>112</sup> Epstein *et al* has noted that public interest in the prosecutorial tradition is to seek justice; since crimes are seen as violations of the social contract, they are also violations against the state and the goal is to hold the offender accountable. In this context, aggressive prosecution policies are hardly a radical approach to criminal justice.<sup>113</sup>

Proponents of mandatory prosecution policies also refer to the issue of victims routinely refusing to cooperate. Wills, a prosecutor herself, claims that despite the diversity of race, class, and professions amongst victims, “the great majority of domestic violence victims have one characteristic in common: after making the initial report, they have neither the will nor the courage to assist prosecutors in holding the abusers criminally responsible.”<sup>114</sup> Because violence often escalates and can have tragic consequences, prosecutors cannot wait around for the woman to gather her inner strength and decide to press charges, prosecutors must do everything within their discretion to protect the woman, stop the violence before it is too late and make sure that the perpetrators are held accountable for their actions.<sup>115</sup> It is argued that victims of domestic violence are sometimes unable to see the value of prosecution and their wishes to end the criminal proceedings are not considered compatible with their own safety or that of their children’s safety; thus, warranting state intervention.<sup>116</sup>

A major concern is the ability of the perpetrator to manipulate the criminal justice system when the victim is able to withdraw her complaint and end the proceedings. Perpetrators will often do anything to convince the victim to drop the charges: intimidation with violence or threats of violence, manipulation with promises of reform, or threaten to throw them and their children out of the home.<sup>117</sup> Mandatory prosecution policies render the perpetrator’s intimidation and manipulation ineffective as the victim no longer has control over the proceedings.<sup>118</sup> In fact, some prosecutors and advocates claim that the policies sometimes cause the perpetrator to stop harassing the victim when he discovers that she no longer controls the case.<sup>119</sup>

Mandatory prosecution policies have dramatically increased the prosecution rates of domestic violence and some studies indicate lower recidivism. Some jurisdictions have even seen a significant decrease in domestic violence homicide cases.<sup>120</sup> For the victims who want to proceed, these policies increase the chances that their case will be taken seriously. Some data also suggests that a greater number of victims fully cooperate in the

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<sup>112</sup> Fletcher G. P., ‘Justice and Fairness in the Protection of Crime Victims’, 9 *Lewis & Clark Law Review* (2005), p. 555.

<sup>113</sup> Epstein *et al*, *supra* note 21, pp. 466-467.

<sup>114</sup> Wills, *supra* note 107, pp. 176-177.

<sup>115</sup> *Ibid.*, pp. 178-179.

<sup>116</sup> Mordini, *supra* note 22, p. 319.

<sup>117</sup> Wills, *supra* note 107, p. 179.

<sup>118</sup> Goodmark, *supra* note 47, pp. 16-17.

<sup>119</sup> Corsilles, *supra* note 61, p. 874.

<sup>120</sup> Sack, *supra* note 2, pp. 1673-1674 and therein footnote 85.

prosecution of their cases and fewer ask for charges to be dismissed in jurisdictions with mandatory prosecution policies, particularly those in soft no-drop jurisdictions where support services are available.<sup>121</sup>

According to some victim advocates, the policies can be beneficial to victims who are initially reluctant to cooperate “resulting in feelings of empowerment for her that can alter the balance of power in the battering relationship and lower rates of future violence.”<sup>122</sup> Victims may be empowered just by experiencing a place where the abuser’s control does not extend.<sup>123</sup> However, many scholars have pointed out that the success is dependent on the way in which the policies are instituted.<sup>124</sup> Epstein *et al* have argued against aggressive policies and they advocate ‘prosecution-in-context’; a system with ample support services that is able to respond flexibly to an individual victim based on a “comprehensive understanding of the psychological, relational, and socio-cultural contexts in which she is operating.”<sup>125</sup>

Mandatory prosecution policies have also lead to other changes aimed at strengthening and making the prosecution of domestic violence more effective. Many prosecutors’ offices have developed specialised domestic violence units where prosecutors work exclusively with domestic violence cases so to increase expertise and commitment, and have employed ‘vertical prosecution’, which means that a single prosecutor follows a case from start to finish. For victims, this practice relieves them of the often difficult and painful task of explaining their case and history to several different prosecutors. In the interest of prosecution, it promotes consistency and minimises the risk of important information being lost.<sup>126</sup> An additional practice that developed from mandatory prosecution policies and the dilemma of prosecuting without the victim’s cooperation was the adoption of evidence-based prosecution. Police and prosecutors started to focus on building their case in a way that would make the victim’s testimony useful but not necessary for conviction. By collecting sufficient physical and testimonial evidence, *e.g.*, emergency call tapes, photos of injuries, statements to responding officers, and witness statements, prosecutors are able to proceed without the victim.<sup>127</sup> The success of the prosecution of domestic violence crucially rests on the initial police investigation. The San Diego Police Department has a specialised domestic violence unit and it has

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<sup>121</sup> *Ibid.*, p. 1674 and therein footnote 86.

<sup>122</sup> Goodmark, *supra* note 47, p. 18.

<sup>123</sup> Corsilles, *supra* note 61, p. 879.

<sup>124</sup> Goodmark, *supra* note 47, p. 18, and therein footnote 75.

<sup>125</sup> Epstein *et al*, *supra* note 21, p. 472. ‘Prosecution-in-context’ entails that prosecutors should connect the victim with advocacy services, preferably NGOs, which provide victims with ongoing support throughout the stages of the criminal process, and importantly acknowledge the victim’s reluctance to prosecute and listen to her desired outcomes of the process. Prosecution should also be more flexible and allow for different responses depending on the victim’s needs and consider dropping cases under certain circumstances or delay prosecution while the victim sorts through her situation with the help from advocacy services, pp. 486-495.

<sup>126</sup> Sack, *supra* note 2, p. 1673.

<sup>127</sup> Goodmark, *supra* note 47, pp. 17-18.

pioneered evidence-based prosecution through an extensive protocol on police investigation, designed to make sure that prosecution can continue without the victim's cooperation. An estimated 70 percent of domestic violence cases in San Diego involve non-cooperative or absent victims and yet convictions are obtained in 90 percent of the cases.<sup>128</sup>

Evidence-based prosecution minimises the coercive nature of mandatory prosecution policies and relieves the victim of the stress associated with testifying in court, an experience that for many victims is overwhelming and emotionally draining. An estimated 80 percent of domestic violence victims suffer from clinically diagnosable depression and almost 40 percent meet the criteria for post-traumatic stress disorder. Court proceedings are known for triggering flashbacks and other intrusive post-traumatic stress disorder symptoms.<sup>129</sup> Another positive effect of evidence-based prosecution is that it lends greater credibility to women's experiences. Victim-based prosecution, where the case is dependent on the victim's testimony in court, is more susceptible to societal myths regarding domestic violence, for example, the myth that 'genuine victims' do not delay in reporting abuse to family members or to the police. So in the case of a delay, the question becomes why now, what hidden agenda does the woman have for reporting the abuse now instead of immediately? Furthermore, the general lack of credibility for women's stories when a trial becomes a swearing contest between the woman's and the man's version is problematic. Defence lawyers routinely try to discredit the victim by asking them to account for why they have not left an alleged abusive relationship. The evidence used in evidence-based prosecution, *e.g.* physical photographs, is more objective than the subjective testimony of the victim and may rightfully shift the focus from the victim's actions to the abuser's actions.<sup>130</sup>

Although it is unclear to what extent aggressive mandatory prosecution policies actually combat the problem of domestic violence, proponents like Wills argue this to be similar for legal intervention in many sorts of crimes. Aggressive mandatory prosecution policies cannot guarantee that an abusive spouse will change his ways and deter from violence in the future, anymore than legal intervention can stop gang violence. The proponents realise that although legal intervention in this manner may not be the ultimate cure, the decision to employ aggressive policies is, and should be, based on what is best for the common good.<sup>131</sup> Epstein *et al* point to the fact that, from a historical perspective, domestic violence victims as a group cannot afford to go back to a policy where prosecutors drop charges at the victim's discretion.<sup>132</sup> Mandatory prosecution policies are argued to have counteracted "historical and organisational biases towards inaction," by

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<sup>128</sup> Ellison L., 'Prosecuting Domestic Violence without Victim Participation', 65 *Modern Law Review* (2002), pp. 840-842 and 853.

<sup>129</sup> Epstein *et al*, *supra* note 21, pp. 474-475.

<sup>130</sup> Ellison, *supra* note 128, p. 850.

<sup>131</sup> Wills, *supra* note 107, p. 175-176.

<sup>132</sup> Epstein *et al*, *supra* note 21, p. 471.

forcing prosecutors to examine each case carefully, instead of “relying on assumptions about what victims will do next.”<sup>133</sup>

Lastly, it is necessary to point out that proponents of mandatory prosecution policies do not advocate them as the single response to domestic violence. Many proponents stress the need for a coordinated community-based response,<sup>134</sup> and it is my opinion that in general, the majority of proponents advocate mandatory prosecution policies where women are provided with support services and prosecutors have a greater understanding and sensitivity for their situation.<sup>135</sup>

### **3.2.3 What are the disadvantages of mandatory prosecution policies?**

Many battered women’s advocates express concerns over the coercive nature of hard no-drop policies or aggressive prosecution policies, particularly the use of subpoenas in order to coerce victims into testifying in court. These coercive measures are argued to further disempower victims and deny victims the right of choice.<sup>136</sup> The victim’s autonomy is compromised when she loses her decision-making ability regarding the criminal proceedings once the charges are filed and analogise “the taking of power and control from the victim to the dynamic of the battering relationship itself.”<sup>137</sup> A victim forced to testify against her will is often willing to perjure herself rather than testify against her partner. Mordini argues that these effects all align the victim with her abuser and the result may be that she becomes deeper rooted in the abusive relationship.<sup>138</sup> Furthermore, the use of sanctions such as imprisonment is an example of ‘over enforcement’ that is considered problematic by many advocates. Sack refers to a case from New York where a victim was imprisoned for a week on a charge of contempt because she refused to comply with subpoenas to testify against her ex-boyfriend. There have also been reports that prosecutors have threatened to contact child protective services and that the victims are in danger of losing their children if they want to drop charges or do not cooperate.<sup>139</sup>

Apart from the over enforcement of mandatory prosecution policies, battered women’s advocates are mostly concerned with the issues of safety and autonomy for battered women. As has been noted above, the impact mandatory prosecution policies have on actually combating domestic violence remains unknown. Many advocates argue that the same argument applies to victims’ long-term safety under the policies. Epstein *et al* disagree

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<sup>133</sup> Corsilles, *supra* note 61, p. 878. *See* section 3.1 on the mutual distrust between victims and prosecutors, leading to the self-fulfilling prophecy.

<sup>134</sup> Sack, *supra* note 2, p. 1726.

<sup>135</sup> *See e.g.*, Corsilles, *supra* note 61, 1994, p. 880.

<sup>136</sup> Sack, *supra* note 2, p. 1681.

<sup>137</sup> *Ibid.*, p. 1679.

<sup>138</sup> Mordini, *supra* note 22, p. 320.

<sup>139</sup> Sack, *supra* note 2, pp. 1681-1682.

with aggressive prosecution policies mainly because they have two problematic features; first, they focus on the crime as if it was committed solely against the state and consequently do not consider the potential impact of the prosecution on the victim. Secondly, their focus is typically short-term, thus, they disregard the fact that victims of domestic violence are in need of long-term safety. The most common punishment is imprisonment and some claim that domestic violence offenders typically receive shorter sentences than do perpetrators of violence against strangers.<sup>140</sup> However, the practice of requesting that a perpetrator be ordered into a treatment program is also quite common though evidence of the positive impact these programs have is mixed.<sup>141</sup> In domestic violence cases, offender accountability and victim safety do not always correspond the way they do in 'stranger crime' because contact between the victim and the perpetrator may continue beyond the imprisonment.<sup>142</sup> Whereas some victims of domestic violence experience the prosecution and the punishment of the perpetrator to be consistent with their safety, others experience that it creates a greater long-term risk of harm. One reason often cited is the fact that many perpetrators blame the victim for their imprisonment and they retaliate by committing further violence after their release.<sup>143</sup> Prosecutors cannot guarantee a conviction, nor can they guarantee imprisonment as a sentence. Thus, for many victims prosecution does not seem safer than staying in a violent relationship.<sup>144</sup>

Researchers Ford and Regoli conducted a study on mandatory prosecution in the late 1980s in Indiana, US, and their results were similar to those of the studies done on mandatory arrest.<sup>145</sup> While some victims experienced less violence, other victims saw an increase in violence. The researchers also found that prosecution empowered the women who were able to have the charges dropped but chose not to; consequently leading to an increase in that particular victim's safety. Prosecution in that context allowed the woman to express her power in the relationship and use it as a bartering chip against the perpetrator since ultimately, it was she who decided over the proceedings.<sup>146</sup>

Many battered women's advocates argue that it is the victim who knows what her abuser is capable of. She knows what will put her in more danger, and what will keep her safe. Therefore, the authorities must reject the perception that a woman who does not want to proceed with criminal charges is unable to make rational decisions.<sup>147</sup> Furthermore, some argue

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<sup>140</sup> Epstein *et al*, *supra* note 21, pp. 466-468.

<sup>141</sup> *Ibid.*, p. 467, and therein footnote 3.

<sup>142</sup> An example is robbery, a victim of robbery will normally not be in contact with the perpetrator or the criminal courts again, and so sending the perpetrator to prison is consistent with the victim's physical safety and his or her sense of trust in the justice system, *ibid.*, p. 467.

<sup>143</sup> Epstein *et al*, *supra* note 21, pp. 467-468.

<sup>144</sup> Corsilles, *supra* note 61, pp. 872-873.

<sup>145</sup> See section 3.1, and *supra* note 78.

<sup>146</sup> Mordini, *supra* note 22, p. 321.

<sup>147</sup> *Ibid.* and Sack, *supra* note 2, p. 1679.

that regardless of if prosecution is out of the victim's hands, the perpetrator is still likely to blame the victim for any consequences he receives and retaliate.<sup>148</sup>

When women experience that the prosecution is not going to keep them safe long-term and that the authorities do not listen to their concerns or respect their wishes, many decline to cooperate with the state. Aggressive prosecution policies then coerce the victim to participate, and according to Epstein *et al*, it teaches the victim that she cannot trust the system. Victims with these experiences may be less likely to seek help from the criminal justice system in the future. Studies have shown a “strong link between a person's perceptions of fair treatment and her sense of overall legitimacy of governmental authority.”<sup>149</sup> This may result in victims being more trapped than ever in a violent home. Therefore, the ‘prosecution-in-context’ approach, advocated by Epstein *et al*, entails reconceptualising the prosecutorial goals to include victim's long-term safety, at equal importance to offender accountability.<sup>150</sup>

A noted area of concern is the impact mandatory policies may have on minority women such as immigrant women, African-American women and Hispanic women. It is argued that minority women will often want to minimise their interaction with the criminal justice system because of its history of poor interaction with minorities.<sup>151</sup> Indeed, the SRVAW noted in her report on the 2011 mission to the US, how minority women often view the authorities and courts as oppressive rather than protective institutions.<sup>152</sup> Immigrant women may be reluctant to engage with the criminal justice system if their abuser risks deportation if he is convicted of a domestic violence crime, and particularly if the abuser is the primary economic provider.<sup>153</sup> African-American women may hesitate to subject their African-American men to a criminal justice system that they perceive as racist,<sup>154</sup> and they may also want to conceal the violence to limit racial stereotyping against African-American men.<sup>155</sup>

Opponents of mandatory prosecution policies recognise the legitimate state interest of prosecuting crime and minimising manipulation of the criminal justice system by the perpetrator; however, they focus more on the individual victim and her experiences and wishes. They point to the unique characteristics of domestic violence and hold that the victim is an ‘a-typical’ victim, different from the victim of stranger crime. The goal of the domestic violence victim will often differ from the goal of a victim of stranger crime; her primary goal is often to simply stop the violence and resolution is more

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<sup>148</sup> Mordini, *supra* note 22, p. 320.

<sup>149</sup> Epstein *et al*, *supra* note 21, p. 469. See also Corsilles, *supra* note 61, p. 875 and Sack, *supra* note 2, p. 1681.

<sup>150</sup> Epstein *et al*, *supra* note 21, pp. 469-470.

<sup>151</sup> Bailey, *supra* note 73, p. 1291.

<sup>152</sup> Manjoo US report, *supra* note 91, para. 14.

<sup>153</sup> Bailey, *supra* note 73, p. 1290.

<sup>154</sup> Sack, *supra* note 2, p. 1679.

<sup>155</sup> Bailey, *supra* note 73, p. 1291.

important than restitution or retribution. Therefore, opponents propose a more flexible system that allows the prosecutor to balance the state interests of accountability and prosecuting crime with the individual victim's interests of safety and autonomy, specific for her situation. Lastly, it is important to keep in mind that no advocates propose a step back to *complete* prosecutorial discretion where the practice of dismissing a case at the victim's request was widespread, regardless of the severity of the violence.<sup>156</sup>

### **3.2.4 A few reflections on battered women's safety and autonomy**

In the process of writing this section, a common ground in the debate has emerged that seems to represent the majority of battered women's advocates: both sides are concerned with victim's safety and both sides, to varying degrees, stress the need for victim support. The way I framed the debate, with the advantages and disadvantages separately is perhaps not optimal as the debate is not meant to be seen as "a choice between mandatory policies alone or rejection of criminal justice intervention for a purely social services or community response."<sup>157</sup> In addition, there is an overlap of some of the advantages and disadvantages, which needs addressing. For example, evidence-based prosecution is advocated by some opponents as a measure to rectify the coercive nature of aggressive prosecution policies, and it is also referred to as a practice that has developed due to mandatory prosecution policies because prosecutors could no longer dismiss charges at the victim's request and had to become more creative. Other opponents reject evidence-based prosecution because ultimately, it is also prosecution against the victim's will, although sparing her the ordeal of testifying in open court.<sup>158</sup> Another example is the over enforcement of the policies, such as sanctions for charges of contempt for refusing to comply with subpoenas to testify. Many proponents do not support these practices and both proponents and opponents suggest that greater understanding and sensitivity for the abuser-victim relationship can rectify these practices.<sup>159</sup>

In terms of safety, it is difficult to reconcile the opinions of the proponents and opponents of mandatory prosecution policies, as there is no conclusive evidence of the impact they have on victim's safety, when safety is seen in both a short-term *and* a long-term perspective. Nonetheless, the state responsibility to keep victims safe remains the most powerful and legitimate reason for advocating a policy where domestic violence is understood primarily as a crime against the state and requiring state action. However, battered women's advocates have been sceptical of involving the state since

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<sup>156</sup> Mordini, *supra* note 22, pp. 319 and 321-322.

<sup>157</sup> Sack, *supra* note 2, p. 1725.

<sup>158</sup> Ellison, *supra* note 128, pp. 849 and 853.

<sup>159</sup> Sack, *supra* note 2, pp. 1722-1733.

the beginning of the battered women's movement and for many feminist legal scholars, this apprehension remains. Sack has noted,

“[t]he state was the embodiment of institutionalised male power over women, manifested in practice by the disinterest of law enforcement, prosecutors, and the courts in stopping male violence against women. The battered women's movement was a political enterprise, designed not just to provide assistance to victims of domestic violence, but to challenge the state power and patriarchy.”<sup>160</sup>

Regardless though, engaging with the state was necessary for domestic violence to become a public issue. Keeping victims safe and helping them find services and assistance (when the victim wanted them) were the two most important reasons for why battered women's advocates initially focused on law enforcement and mandatory policies. However, as pointed out by Sack, engagement with the state has allied battered women's advocates with state authorities, an alliance likely to show strain, as the priorities, skills and viewpoints of the two do not always coincide. Although state authorities are also concerned with victim safety, they approach the issue “through the traditional lens of crime control,” where law enforcement's responsibility is to make arrests that will, by the prosecutors, lead to as many convictions as possible. State authorities have not been accustomed to integrating the complexities of the abuser-victim relationship into their enforcement models.<sup>161</sup> The coordinated community-based response shows perhaps the most promise for creating a response with knowledge and sensitivity for battered women's individual situations.<sup>162</sup> This response also emphasises the need for, and the importance of victim support, which is advocated by many proponents and opponents. Studies have shown that the coordinated community-based response is the policy with the most promise of combating domestic violence and increasing victims' long-term safety.<sup>163</sup>

The area in which the opinions of the proponents and the opponents are the most divergent is the issue of battered women's *autonomy*: their right to make decisions that profoundly affect their lives. Whereas proponents of mandatory policies generally acknowledge that the individual's right of choice is sacrificed under those policies, proponents argue that the benefits the policies provide for all battered women, mainly protection, outweigh the harm done to individual women's autonomy. Furthermore, proponents often argue that women's autonomy, at the very least, must not override the rights of children when their interests are threatened.<sup>164</sup> Opponents argue that the mandatory policies disempower women by taking away their autonomy and that they replace the abuser's control for another's – the state.<sup>165</sup> Bailey has noted that the concept of victim autonomy is not translatable within the

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<sup>160</sup> Sack, *supra* note 2, pp. 1675-1676.

<sup>161</sup> *Ibid.*, p. 1675.

<sup>162</sup> *Ibid.*, p. 1676.

<sup>163</sup> *Ibid.*, pp. 1725-1727 and Bailey, *supra* note 73, p. 1295.

<sup>164</sup> Choudhry and Herring, *supra* note 27, pp. 104-105.

<sup>165</sup> Goodmark, *supra* note 47, pp. 30-31.

American context of the criminal justice system as crime is considered a violation against the state and not just the victim. Thus, preserving victim autonomy is not possible within a system that does not prioritise it nor seeks to protect it.<sup>166</sup>

Furthermore, behind ideas of autonomy, lie the perceptions one has of battered women's ability to make 'rational' decisions out of their own free will. Here, it is clear that social science and psychological research influence perceptions. For example, according to Lundgren's theory on the process of normalising violence,<sup>167</sup> the process does not allow the battered woman to keep other frames of references than those of the abusive man. Her concept of reality is no longer her own and outside intervention is needed to provide her with a different understanding of her life's worth.<sup>168</sup> Lundgren's theory is a feminist theory, and although I obviously cannot claim that she advocates mandatory policies, she does claim the need for outside intervention.<sup>169</sup> This seems to be at odds with some opponents of mandatory policies who reject the notion that battered women's decisions are irrational; for instance, women's decisions to not participate in the criminal proceedings.<sup>170</sup> However, this view by the opponents must also be understood in the context of what rational decisions are in a particular situation and that the conceptions of rationality may be flawed. The main critique from the opponents of mandatory policies is that the social conditions of gender inequality, *e.g.*, lack of housing, sex segregation and unequal pay in the labour market, lack of available and affordable childcare facilities, and victim blaming social attitudes prevalent in society, which in actuality impose severe limitations on women's options, are not taken into account. Instead, the focus is on psychological explanations that ultimately emphasise women's passivity and powerlessness, and the disturbing question "why doesn't she leave?" Thus, women's resilience is not visible even though research studies show that women subjected to domestic violence consistently demonstrate a range of creative ways in which they attempt to escape, avoid, minimise or stop the violence.<sup>171</sup> As Randall has noted, psychological passivity and resistance are a double bind for the victim:

[y]et women are expected to resist in so far as the requirement that women "leave" relationships with men in which they are battered is a widely held conviction and expectation. And at the same time, if they resist too much, or in the wrong area, for example, by exerting their will by choosing not to proceed with or facilitate a criminal domestic violence

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<sup>166</sup> Bailey, *supra* note 73, p. 1257.

<sup>167</sup> See section 2.1.

<sup>168</sup> Lundgren, *supra* note 42, p. 56.

<sup>169</sup> She refers to intervention by battered women's advocates, 'other' professionals, friends and neighbours, *ibid.*

<sup>170</sup> See *e.g.*, Miccio, *supra* note 64.

<sup>171</sup> Randall M., 'Domestic Violence and the Construction of "Ideal Victims": Assaulted Women's "Image Problems" in Law', 23 *St. Louis University Public Law Review* (2004), pp. 124-125 and Burman, *supra* note 8, p. 395.

prosecution, they are punished and viewed as “uncooperative” and/or “bad” victims.”<sup>172</sup>

Miccio has explained the proponents of mandatory policies’ tendencies to view women as incapable of making rational decisions as “rational is a proxy for good – with good ultimately defined as leaving the relationship and cooperating with police and prosecutors.”<sup>173</sup> As Goodmark has noted, “[t]he majority of our responses to domestic violence, and certainly the legal responses, are largely premised on the idea that all battered women want – or should want – to separate from their abusers.”<sup>174</sup> Many advocates have noted that this is at odds with the historic goals of the battered women’s movement: to end violence and coercion. Women have the right to be in safe and respectful relationships, but the goal was never to *force* women to leave their relationships. Women, who for various reasons do not want to leave their relationships and are looking for ways to stop the violence from within the relationship, are left with little to no help from the criminal justice system.<sup>175</sup> The effect of not wanting to leave an abusive relationship when interacting with a legal system that is premised on leaving the abuser is only one aspect of assaulted women’s image problem in the law, an issue too comprehensive to be dealt with in the thesis.<sup>176</sup>

In conclusion, the issue of autonomy and rational decisions remains unsolved. The proponents of mandatory state interventions are willing to sacrifice (their view of abused women’s) autonomy for the promise of protection and they have faith in the criminal justice system’s ability to combat domestic violence. For the opponents, the criminal justice system remains, to quote Miccio, “tainted by arcane and gendered notions about women in general and battered women in particular,” and exchanging women’s autonomy for protection is “a false promise and oftentimes dangerous option.”<sup>177</sup>

### **3.2.5 Can criminal law combat the problem of domestic violence?**

When the previously ‘private’ problem of domestic violence became a public responsibility worthy of state attention, the US approached the problem almost entirely within the criminal justice system.<sup>178</sup> Although the American VAWA of 1994 recognised domestic violence as a ‘societal

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<sup>172</sup> Randall, *supra* note 171, p. 151.

<sup>173</sup> Miccio, *supra* note 64, p. 303.

<sup>174</sup> Goodmark, *supra* note 47, p. 19.

<sup>175</sup> *Ibid.*, pp. 20-21.

<sup>176</sup> For a comprehensive account of assaulted women’s image problem in the law, see Randall, *supra* note 171.

<sup>177</sup> Miccio, *supra* note 64, p. 301.

<sup>178</sup> Niemi-Kiesiläinen J., ‘Criminal Law or Social Policy as Protection Against Violence’, in K. Nousiainen (eds.), *Responsible selves: women in the Nordic legal culture* (Ashgate, Aldershot, 2001), p. 303, Bumiller K., ‘Freedom from Violence as a Human Right: Toward a Feminist Politics of Nonviolence’, 28 *Thomas Jefferson Law Review* (2006), p. 339 and Bailey, *supra* note 73, p. 1277.

problem’, the purpose of the federal law was to categorise violence against women as a national issue, formulate a national policy to address various forms of violence against women, and specifically to promote consistent *crime control* across states.<sup>179</sup> Romkens has claimed that the shift of domestic violence from the private to the public domain has been less problematic in Western European countries because they have more of a balance between legal and social policies. She argues that in the absence of social policies, criminal law, while it breaks through the private sphere, “does less to liberate women from local custom, and more to create the circumstances for state intrusion into private lives.”<sup>180</sup> Niemi-Kiesiläinen has noted that the criminal justice approach “seems to regulate people’s lives in many ways, without knowing if it makes a difference.”<sup>181</sup> She has examined the approach of the Nordic countries and found that while the ‘welfare state approach’ with its social policies,<sup>182</sup> has supported women’s emancipation and women’s economic independence; it too has not managed to eradicate violence against women.<sup>183</sup>

It is outside the scope of this thesis to analyse which is the best approach or to advocate one over the other. As has been noted previously, no advocate argues that the use of criminal law should be rejected completely; the issue is if the mandatory nature of the policies in the US, with the intrusiveness they entail, can be justified if they do not have an impact on the occurrence of domestic violence in society. *Can criminal law combat the problem of domestic violence?* Following the structural perspective chosen for this thesis, domestic violence is a manifestation of male power and privilege. Domestic violence both reflects and perpetuates gender inequality in society. From this follows that state responses to domestic violence must also be evaluated in light of how they promote gender equality in society, *i.e. do they target the root causes of domestic violence?* Again, the purpose of posing these questions is not to answer them, but to draw attention to the issue.

These questions are frequently addressed amongst feminist legal scholars.<sup>184</sup> Bailey argues that the focus on the criminal justice system as the main solution to domestic violence is “of limited effectiveness given the social, political and economic aspects of the issue.”<sup>185</sup> Feminists have argued that criminalisation is meaningless if victims do not have access to adequate housing, jobs and social support systems. As previously noted, the criminal justice system’s response is premised on the victim leaving the abuser, yet reality may be that she simply cannot afford to do so. However, providing services such as shelters and subsidies are not enough, battered women’s

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<sup>179</sup> Bumiller, *supra* note 178, p. 336.

<sup>180</sup> *Ibid.*, p. 339, quoting Romkens.

<sup>181</sup> Niemi-Kiesiläinen, *supra* note 178, p. 304.

<sup>182</sup> She refers to how various traditional welfare policies, such as the right to education, the individual’s right to social security and the right to childcare have indirectly helped women by facilitating their possibility to leave the abuser, *ibid.*, p. 297.

<sup>183</sup> *Ibid.*, p. 304.

<sup>184</sup> See *e.g.*, Bailey, *supra* note 73 and Miccio, *supra* note 64.

<sup>185</sup> Bailey, *supra* note 73, pp. 1276-1277.

advocates have always sought to deconstruct the political and economical structures that subordinate women and keep them vulnerable to violence.<sup>186</sup> Feminists knew that without a change in the culture that produced, created and supported domestic violence, it would be impossible to alter the subordinate-dominant class structure and violence against women would continue. What was required was a “transformation of how we as a culture viewed women individually and collectively.”<sup>187</sup> To me, this seems impossible to do without social policies aimed at promoting gender equality.

In conclusion, I present a point by Goldscheid that I feel is relevant for this thesis. She has argued that the criminal justice system approach in the US has failed to explicitly define violence against women as a problem of equality and as such, the US experience “offers a cautionary tale. Absent an express focus on the impact of sex equality and other social-political factors, reform efforts and public discourse can lose sight of the importance of addressing prevention and initiatives that target root causes.”<sup>188</sup>

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<sup>186</sup> *Ibid.*, pp. 1280-1282.

<sup>187</sup> Miccio, *supra* note 64, p. 267.

<sup>188</sup> Goldscheid J., ‘Domestic and Sexual Violence as Sex Discrimination: Comparing American and International Approaches’, 28 *Thomas Jefferson Law Review* (2005), pp. 356-358.

## 4 Domestic violence as a human rights issue – introduction to the topic

The act of domestic violence, be it battery, rape, molestation, threats *etc.*, is committed by a private, non-state actor and the violence is usually committed in the private sphere. Thus, the question arises how women victims of domestic violence can hold a state responsible for the actions of a non-state actor. The international community has a long history of viewing domestic violence as a private matter.<sup>189</sup> Many feminist legal scholars attribute the historical lack of state protection of women from violence to the public/private distinction. Thus, this introductory chapter will begin by briefly presenting this feminist critique of international law. One of the first advancements in positioning domestic violence in the international arena was linking domestic violence to issues of gender inequality, a work that was pioneered under the UN framework. The concepts of positive obligations and due diligence under international human rights law have also been evoked to hold states responsible for the actions of non-state actors. Therefore, this chapter will briefly present these concepts in order to familiarise the reader for the coming chapters.

### 4.1 The public/private distinction

The public/private distinction has its roots in the formation of the European nation states that depended on a division of a public and a private sphere. While men dominated the public sphere with their involvement in politics and labour, women were expected to operate in the private, domestic sphere. The state functioned in the public sphere, it identified with men<sup>190</sup> and the legal systems that evolved were more concerned with regulating the public sphere than the private sphere.

International law is no different. Traditionally, it has been concerned with the relationship between states and for a long time states were the only subjects in international law.<sup>191</sup> Not only did international law operate in the 'public, male world'; it essentially excluded the private sphere from its domain.<sup>192</sup> As Charlesworth and Chinkin explain, excluding the private sphere does not mean that international law does not influence it. When

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<sup>189</sup> Adams R., 'Violence against Women and International Law: the Fundamental Right to State Protection from Domestic Violence', 20 *New York International Law Review* (2007), p. 57.

<sup>190</sup> Charlesworth and Chinkin, *supra* note 5, p. 56.

<sup>191</sup> Subedi S. P., 'Protection of Women against Domestic Violence: The Response of International Law', 6 *European Human Rights Law Review* (1997), p. 592.

<sup>192</sup> Charlesworth and Chinkin, *supra* note 5, p. 56. Article 2.7 of the UN Charter has been cited frequently as supporting the public/private distinction, Subedi, *supra* note 191, p. 591.

private issues such as family are left to national regulation, it makes it possible for national laws to take into account cultural and religious traditions that are detrimental to women without scrutiny by international law. Furthermore, several centres of authority in the private sphere have no concern for gender inequality and many times have interests in maintaining it, for example, family, religious institutions, business, finance and the media. Nothing prohibits states from delegating some of its powers to these centres in issues pertaining to the private sphere. The public/private distinction has a normative aspect in that the division of what is public and what is private affects political choices about whether or not to intervene legally.<sup>193</sup>

Traditionally, international human rights law has also been subjected to the public/private distinction. Although international human rights law has managed to break the barrier on who can be a subject in international law by giving individuals and groups the possibility of making international legal claims against states,<sup>194</sup> the focus has been on protecting the individual from abuse that takes place in the public sphere by state actors. Feminist legal scholars have argued that this is a consequence of the fact that women initially were underrepresented in every process of law making, from the organs of the state to the delegations and international bodies working with human rights. The norms that have shaped human rights law, the norms that essentially defined what it means to be 'human', have been based on male experiences. In the lives of men, much of the violence they suffer takes place in the public sphere in the form of state violence.<sup>195</sup> Women on the other hand, suffer violence mainly in the private sphere by non-state actors, domestic violence is the perfect example, and until recently, state failure to respond to violence against women largely escaped international condemnation.<sup>196</sup> As Benninger-Budel notes, the public/private distinction "has served to marginalise women's experiences in international human rights law."<sup>197</sup>

The women's movement has attempted to overcome the public/private distinction with *inter alia* the adoption of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) and the following recognition of violence against women as a human rights issue.<sup>198</sup> As will be discussed below, state responsibility for the actions of non-state actors has evolved in the context of positive obligations and the obligation to exercise due diligence, it is here that the public/private distinction has been

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<sup>193</sup> Charlesworth and Chinkin, *supra* note 5, pp. 56-57.

<sup>194</sup> *Ibid.*, p. 201.

<sup>195</sup> Benninger-Budel C., 'Introduction', in C. Benninger-Budel (ed.), *Due Diligence and its Application to Protect Women from Violence* (Koninklijke Brill NV, Leiden, the Netherlands, 2008), pp. 1-2.

<sup>196</sup> Adams, *supra* note 189, pp. 104-105.

<sup>197</sup> Benninger-Budel, *supra* note 195, p. 2.

<sup>198</sup> Charlesworth and Chinkin, *supra* note 5, p. 217.

transcended by linking “illegal private conduct with public policy and State structures.”<sup>199</sup>

## 4.2 Equality and non-discrimination

The principle of equality is “the cornerstone to every democratic society which aspires to social justice and human rights.”<sup>200</sup> Equality and non-discrimination are often viewed as “integrally related and mutually reinforcing.” Generally, equality is understood as “a goal, centred around social justice, freedom and dignity” and non-discrimination is a rather narrow, negative right as it merely prohibits distinctions without reasonable and objective justifications.<sup>201</sup>

Virtually all international human rights law instruments contain rights of non-discrimination on the grounds of sex and prohibit distinctions based on sex with respect to the enjoyment of rights.<sup>202</sup> One of the fundamental goals stated in the preamble of the UN Charter is the equal rights of men and women. The purposes of the UN, set out in Article 1.3, include “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.” The principle of equality in Article 2 of the Universal Declaration of Human Rights proclaims that every human being is entitled to enjoy human rights and fundamental freedoms “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.” Articles 2, 3 and 26 of the International Covenant on Civil and Political Rights all contain rights of non-discrimination on the grounds of *inter alia* sex, as do Articles 2.2, 3 and 7 of the International Covenant on Economic, Social and Cultural Rights. Likewise, in the regional context Article 1 and 24 of the American Convention on Human Rights (ACHR), Articles 2 and 18.3 of the African Charter on Human and Peoples’ Rights, and Article 14 of the European Convention on Human Rights (ECHR) all prohibit discrimination on the grounds of sex.

However, equality and non-discrimination are concepts that are not clearly defined and there has been substantial critique from feminist legal scholars on the interpretation and application of equality and non-discrimination rights in international human rights law. Edwards notes that the general approach has been the sameness/difference methodology where the object

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<sup>199</sup> Report of the UN Special Rapporteur on Violence against Women, its causes and consequences, *15 Years of the United Nations Special Rapporteur on Violence against Women, its causes and consequences (1994-2009) – A Critical Review*, Ertürk Y., UN Doc. A/HRC/11/6/Add.5, 27 May 2009, para. 30.

<sup>200</sup> Fact Sheet no. 22, *Discrimination against Women: The Convention and the Committee*, <[www.ohchr.org/Documents/Publications/FactSheet22en.pdf](http://www.ohchr.org/Documents/Publications/FactSheet22en.pdf)>, accessed 2012-05-05, introduction. (hereinafter Fact Sheet no. 22)

<sup>201</sup> Edwards A., *Violence against Women under International Human Rights Law* (Cambridge University Press, New York, 2011), p. 164.

<sup>202</sup> Benninger-Budel, *supra* note 195, p. 2.

has been to treat men and women identically, unless any differences in treatment can be justified based on ‘reasonable’ and ‘objective’ criteria. Both formal and substantive equality concepts are generally pursued under the sameness/difference methodology.<sup>203</sup>

Under formal or *de jure* equality, which has been the goal of liberal feminists, the object has been to grant women equal opportunity with men to participate in *inter alia* employment and societal institutions. The norm used for comparison is male; women should be treated the same way as men. Many feminist legal scholars ascertain that this fails to recognise that “equality is not freedom to be treated without regard to sex but freedom from systematic subordination because of sex.”<sup>204</sup> The result is that women do not receive protection against harms specific to their experiences as women. Equality of outcome, known as substantive or *de facto* equality, deviates from strict equality by permitting special measures, such as positive or affirmative action, or differences in treatment in order to raise a person to a certain standard. Substantive equality takes into account women’s structural disadvantage, however; the comparison with the male norm is still there as it seeks to put women in the same position as men, without “deconstructing institutional systems that reinforce that inequality.”<sup>205</sup>

According to Edwards, the sameness/difference methodology in international human rights law is problematic on three grounds. First, it advances a male standard, which regulates women into an indefinite position of inferiority and it does not take into account female-specific circumstances. Second, it assumes that criteria such as ‘reasonable’ and ‘objective’ are gender-neutral and that their application is not gendered. Third, it limits the concept of equality to “distinctions and differences rather than, for example, to ideas of the liberation of women from patriarchy or the right to be treated as human beings with dignity instead of as subhuman.”<sup>206</sup>

### 4.3 Positive obligations

International human rights law imposes several layers of obligations for states; the most traditional one is to ‘respect’ human rights meaning that states must refrain from directly violating human rights through their state agents and apparatus, a so-called negative obligation. Additional obligations to ‘protect’ and ‘fulfil’ human rights have been introduced in the last decades and are now generally accepted under all human rights treaties. These obligations are ‘positive’ in nature as they force states to go beyond merely refraining from violating towards taking action to ensure the human rights of everyone under their jurisdiction. The obligation to protect human rights requires states to take measures to prevent non-state actors from interfering with the human rights of individuals. In order to improve the full

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<sup>203</sup> Edwards, *supra* note 201, pp. 156 and 162-163.

<sup>204</sup> *Ibid.*, p. 143.

<sup>205</sup> *Ibid.*, pp. 142-148.

<sup>206</sup> *Ibid.*, pp. 163-164.

realisation of human rights, the obligation to fulfil human rights requires states to facilitate, provide and promote human rights, *inter alia* through adopting appropriate measures such as laws, policies and promotional measures.<sup>207</sup>

In the European context, the European Court of Human Rights (ECtHR) has elaborated on the state obligation under Article 1 of the ECHR to ‘secure’ within their jurisdiction the rights and freedoms defined in the convention. Said article contains a double obligation, the negative obligation to refrain from infringing the rights of the convention as well as the positive obligation to ensure that the rights under the convention are guaranteed. Through ECtHR case law, positive obligations are now recognised under almost every substantive provision of the ECHR and the Court tends to allow a degree of latitude to state parties concerning the limits of such obligations.<sup>208</sup>

Similarly, Article 1.1 of ACHR contains a double obligation for state parties to ‘respect’ the rights and freedoms in the convention and to ‘ensure’ to all persons under their jurisdiction the full exercise of those rights and freedoms. In the African Context, the African Commission on Human and Peoples’ Rights in its communication to Burkina Faso in 1997 also examined state responsibility for the actions of non-state actors. It noted that “... if a State Party fails to ensure respect of the rights contained in the African Charter, this constitutes a violation of the Charter. Even if the State or its agents were not the perpetrators of the violation.”<sup>209</sup>

## 4.4 The due diligence standard

In order to determine if a state has failed or fulfilled its human rights obligation to take the necessary measures in a particular situation, the due diligence standard has been introduced as a yardstick. Essentially, this standard answers the question of whether “a state has failed to take reasonable and adequate measures to prevent or address the violation.”<sup>210</sup>

In 1988, the Inter-American Court of Human Rights (IACtHR) referred to the due diligence standard in its landmark decision of *Velásquez Rodríguez v. Honduras*<sup>211</sup> which concerned the abduction and disappearance of a student, Manfredo Velásquez. The Court noted that as a consequence to the duty to ‘ensure’ the rights of the ACHR, found in Article 1.1, “states must

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<sup>207</sup> Benninger-Budel, *supra* note 195, p. 11.

<sup>208</sup> White R. and Ovey C., *The European Convention on Human Rights, 5<sup>th</sup> Ed.* (Oxford University Press, New York, 2010), pp. 86 and 100.

<sup>209</sup> Bourke-Martignoni J., ‘The History and Development of the Due Diligence Standard in International Law’, in C. Benninger-Budel (ed.), *Due Diligence and its Application to Protect Women from Violence* (Koninklijke Brill NV, Leiden, the Netherlands, 2008), p. 51, quoting Communication 204/97, *Mouvement Burkinabé de Droits de l’Homme et des Peuples v. Burkina Faso*.

<sup>210</sup> Benninger-Budel, *supra* note 195, p. 13.

<sup>211</sup> *Velásquez Rodríguez v. Honduras*, 29 July 1988, Inter-American Court of Human Rights, Series C No. 4.

prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.”<sup>212</sup> The Court’s elaboration has been widely cited; it stated that the obligation to prevent, investigate and punish human rights violations is not limited to violations attributable to the state:

“[a]n illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.”<sup>213</sup>

The reasoning of the Court has been of great importance in the area of women’s human rights,<sup>214</sup> and as Benninger-Budel notes, the due diligence standard holds specific value for women as they experience much of the violence against them in the hands of non-state actors.<sup>215</sup> The due diligence standard will be further elaborated on in chapter 7. For now, it is sufficient to note that the standard entails an obligation to prevent violence against women and an obligation to respond to violence against women, which in turn entails protecting women from violence, investigating and punishing acts of violence against women, and providing victims with adequate reparations.

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<sup>212</sup> *Ibid.*, para. 166.

<sup>213</sup> *Ibid.*, para. 172.

<sup>214</sup> Bourke-Martignoni, *supra* note 209, pp. 50-51.

<sup>215</sup> Benninger-Budel, *supra* note 195, p. 13.

# 5 Domestic violence as a human rights issue under the United Nations framework

At the international level, there is no *universal* legally binding instrument pertaining exclusively to violence against women.<sup>216</sup> As will be discussed below, this gap has been filled by classifying violence against women as gender-based violence and including gender-based violence in the definition of discrimination in CEDAW.

In this chapter, I will present how domestic violence can be considered gender-based discrimination. I will use UN conventions and soft law as well as views from the Committee on the Elimination of Discrimination against Women (the CEDAW Committee or the Committee) to exemplify how the UN framework has sought to address violence against women, specifically domestic violence, and the obligations states have under these instruments. It must be noted that the list of instruments and documents is not an exhaustive one, instead it is a selection of the ones I consider most important for the purpose of this thesis. Lastly, I will present guidelines from UN organs that are of relevance for discussing the preferred state response to domestic violence in the coming analysis in chapter 8.

## 5.1 Gender-based violence is discrimination

Already in 1989, the UN report *Violence against Women in the Family*, connected domestic violence to the subordination of women and inequality between women and men and this important linkage led to the emergence of domestic violence as a human rights issue.<sup>217</sup> It is the gendered nature of domestic violence that links it to equality and non-discrimination, which in turn effectively categorises it as a human rights issue within the UN framework and specifically connects it to CEDAW.

### 5.1.1 The Convention on the Elimination of all forms of Discrimination against Women

The UN General Assembly adopted CEDAW in 1979 and it entered into force in 1981. As of March 2012, there are 187 state parties to the convention and the US is the only developed country in the world yet to

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<sup>216</sup> Benninger-Budel, *supra* note 195, p. 3. There are *regional* legally binding instruments that will be discussed in chapter 6.

<sup>217</sup> UN Division for the Advancement of Women, *United Nations Work on Violence against Women*, <[www.un.org/womenwatch/daw/news/unwvaw.html](http://www.un.org/womenwatch/daw/news/unwvaw.html)>, accessed 2011-12-03. (hereinafter Division for the Advancement of Women)

ratify the convention.<sup>218</sup> Initially, CEDAW was only concerned with eliminating discrimination against women, nowhere does the text of the convention mention violence against women. The following presentation of articles in CEDAW is limited to the articles used by the CEDAW committee in cases involving domestic violence. Article 1 of CEDAW defines discrimination as:

“any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

The definition includes three elements: (1) any difference in treatment based on sex, (2) which intentionally or unintentionally disadvantages women (the “effect or purpose”) and (3) prevents society as a whole from recognising women’s rights in both the private and public spheres *or* which prevents women from exercising their human rights. This definition of discrimination is applicable to all provisions of the convention, and it encompasses both formal equality and substantive equality.<sup>219</sup> Despite the explicit reference to ‘sex’, which refers to the biological differences between men and women, the definition encompasses gender-based discrimination by interpreting Article 1 together with Articles 2(f) and 5(a). ‘Gender’ refers to socially constructed identities and roles for men and women, based on society’s social and cultural understanding of the biological differences. These constructions have led to “hierarchical relationships between women and men and in the distribution of power and rights favouring men and disadvantaging women.”<sup>220</sup> Furthermore, the concept of intersectionality, under which it is recognised that discrimination against women based on sex and gender is linked to other factors such as race, ethnicity, religion, health, status, age and class, falls under the Convention and obliges states to legally recognise these forms of discrimination and prohibit them.<sup>221</sup>

State parties to the convention are bound to condemn discrimination in all its forms and to follow the policy outlined in Article 2. Under this provision, omissions, *i.e.* failure to take positive measures result in a breach of a state’s obligations. The core obligations in Article 2 provide that states must:

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<sup>218</sup> Other states that have not ratified or acceded to CEDAW include Afghanistan, the Holy See, Saudi Arabia and Iran, UN treaty collection website, CEDAW ratifications, <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en)>, accessed 2012-03-30.

<sup>219</sup> Fact sheet no. 22, *supra* note 200, part I.

<sup>220</sup> Committee on the Elimination of Discrimination against Women, General Recommendation no. 28, *On the Core Obligations of State Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc. CEDAW/C/GC/28, 16 December 2010, para. 5. (hereinafter General Recommendation no. 28)

<sup>221</sup> *Ibid.*, para. 18.

- (a) embody the principle of the equality of men and women in their constitutions and legislation and ensure, through law and other means, that the principle is realised in practice,
- (b) adopt appropriate legislative and other measures that prohibit all discrimination against women,
- (c) establish effective legal protection of the rights of women on an equal basis with men,
- (d) refrain from engaging in direct discrimination against women,
- (e) take all appropriate measures to eliminate discrimination against women by non-state actors,
- (f) take all appropriate measures to modify or abolish *inter alia* existing laws, customs and practices which constitute discrimination against women, and
- (g) repeal all national penal provisions that constitute discrimination against women.

In General Recommendation no. 28, the Committee has further elaborated on Article 2(c) in CEDAW. When discrimination against women constitutes an abuse of other human rights, as is the case in domestic violence, the obligation to establish effective legal protection of the rights of women on an equal basis with men, entails an obligation to “initiate criminal proceedings, bring the perpetrator(s) to trial and impose appropriate penal sanctions.”<sup>222</sup>

Article 3 of CEDAW provides that states shall, in all fields and in particular the political, social, economic and cultural fields, take all appropriate measures to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms. Article 5(a) contains an obligation to modify the social and cultural patterns of conduct of men and women in order to eliminate prejudices and practices that are based on the inferiority or the superiority of either of the sexes, or on stereotyped roles for men and women. This article goes beyond formal equality and substantive equality as it recognises that “another level of change is necessary for women’s true equality,”<sup>223</sup> that is, one can interpret it to require the dismantling of women’s structural inequality in society.

Lastly, one of the unique contributions of CEDAW is the explicit affirmation of women’s right to equality in the private sphere of the family in Article 16. Other human rights instruments have exclusively referred to the family as the natural and fundamental group unit of society entitled to protection by both society and the state.<sup>224</sup> CEDAW recognised that the family could be the site of discrimination, which I think shifts the traditional

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<sup>222</sup> *Ibid.*, para. 34.

<sup>223</sup> Fact Sheet no. 22, *supra* note 200, part I.

<sup>224</sup> *See e.g.*, Article 16 of the Universal Declaration of Human Rights and Article 23 of the International Covenant on Civil and Political Rights, Charlesworth and Chinkin, *supra* note 5, pp. 217-218.

positive notion of family towards a more critical one in which women's rights have priority over the family's rights.

## 5.1.2 General Recommendation no. 19

As mentioned above, there is no *universal* legally binding international prohibition on violence against women. In order to fill this gap, the definition of gender-based discrimination in CEDAW has been expanded to include violence against women. In 1992, the Committee adopted General Recommendation no. 19<sup>225</sup> (the recommendation), in order to elaborate and clarify that violence against women falls under the scope of the convention.

According to paragraph 6 of the recommendation, the definition of discrimination in Article 1 of CEDAW includes gender-based violence, which is defined as “violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.” In this definition, violence is connected to the inferior status women have in society on the basis of their sex.<sup>226</sup> Paragraph 7 further clarifies the ‘gender-based violence is discrimination’ approach by stating that “[g]ender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of Article 1 of the Convention [CEDAW].” A list of human rights that may be violated is provided, these include: *inter alia*; the right to life; the right to not be subjected to torture, inhuman or degrading treatment or punishment; the right to liberty and security of person; the right to equal protection by the law; the right to the highest standard attainable of physical and mental health; and the right to equality in the family.

According to paragraph 9 of the recommendation, states may be responsible for private acts if they fail to act with due diligence to prevent, investigate, punish and provide compensation for acts of violence against women. Paragraph 11 states that “traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles” are factors that maintain pervasive practices such as family violence, as well as justify them. Articles 2(f) and 5 of CEDAW thus provide obligations for states to abolish these attitudes in order to target the root causes of violence against women. In paragraph 24, the Committee recommends actions that should be taken by states to address violence against women in light of their obligations under CEDAW, these actions include, among others:<sup>227</sup>

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<sup>225</sup> Committee on the Elimination of Discrimination against Women, General Recommendation no. 19, *Violence against Women*, eleventh session, 1992. (hereinafter General Recommendation no. 19)

<sup>226</sup> Edwards, *supra* note 201, p. 182.

<sup>227</sup> I have made a selection of the measures I found most relevant for this thesis.

- (a) to take all appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act,
- (b) to ensure that laws against family violence give adequate protection to women and respect their integrity and dignity, to provide judicial and law enforcement officers with gender-sensitive training,
- (c) to support the compilation of statistics and research on the extent, causes and effects of violence, as well as the measures to prevent and deal with violence,
- (e) to identify in their reports the nature and extent of attitudes, customs and practices that perpetuate violence against women and to report on the measures that they have taken to overcome the violence and their effectiveness,
- (k) to establish or support services such as refuges, specially trained health workers, rehabilitation and counselling to victims of family violence
- (r) to use criminal penalties where necessary and civil remedies in cases of domestic violence,
- (s) to report on the extent of domestic violence and on the preventive, punitive and remedial measures that have been taken,
- (t, ii) to take preventive measures such as public information and education programmes to change attitudes concerning the roles and status of men and women, and
- (v) to report on the legal, preventive and protective measures that have been taken to overcome violence against women, and on the effectiveness of such measures.

### **5.1.3 Concluding remarks on the ‘gender-based violence is discrimination’ approach**

The importance of General Recommendation no. 19 is that CEDAW became a gender-based violence treaty in addition to being an anti-discrimination treaty. First, it has allowed the CEDAW Committee to address various forms of violence against women, including domestic violence and marital rape, as a human rights issue. Second, by linking violence against women with discrimination, the Committee can address it from an equality approach, meaning that the structural causes of violence against women are made visible. As Edwards has noted, it represented a conceptual breakthrough in that violence against women was transformed from a private and individual harm to a group-based harm, deriving from “a systemic and political problem, [and] requiring a systemic, political solution.”<sup>228</sup> However, the main concern with the ‘gender-based violence is discrimination’ approach is that it does not recognise violence against women as prohibited conduct *per se*. In contrast, Article 5(b) of the International Convention on the Elimination of All Forms of Racial Discrimination *expressly* prohibits race-based violence. Edwards argues that women are indirectly protected against violence as they must establish that the violence they suffer is either discriminatory, or that it fits under another

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<sup>228</sup> Edwards, *supra* note 201, pp. 181-186.

human rights provision.<sup>229</sup> This in turn results in the unequal treatment of men and women under international law.<sup>230</sup>

## 5.2 Views from the Committee on the Elimination of Discrimination against Women

According to Articles 1 and 2 of the Optional Protocol of CEDAW (OP), state parties to the OP recognise the competence of the CEDAW Committee to receive and consider communications from individuals or groups of individuals under their jurisdiction, claiming to be victims of a violation of any rights under CEDAW.<sup>231</sup> However, the ‘views’ of the Committee are recommendations and not legally binding as such, their legal relevance lies in the obligation states have to participate in good faith once they have submitted themselves to an international procedure. Nonetheless, the views are made public,<sup>232</sup> and certainly, the public shame associated with violations of CEDAW is an incentive for state parties to comply with the recommendations. In order to illustrate state obligations under CEDAW regarding domestic violence, three cases will be presented.

### 5.2.1 Ms. A.T. v. Hungary

In *Ms. A.T. v. Hungary*,<sup>233</sup> the author of the communication was Ms. A.T., a Hungarian national who claimed to be a victim of a violation of Hungary on the grounds of a failure to implement their positive obligations under CEDAW and provide the author with effective protection from L.F., her former common law husband.<sup>234</sup>

Under a period of four years, the author had suffered severe physical violence and serious threats by L.F, including threats to kill her and rape their two children. After L.F. moved out of the family residence, he continued to terrorise her, break into their apartment and beat her. The author’s attempts to have L.F. bared from the apartment through civil proceedings were unsuccessful; the Hungarian court ruled that L.F.’s right to property, including possession, could not be restricted and that there was a lack of substantiation to the author’s claim of her subjection to violence by

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<sup>229</sup> Edwards refers to the right to life and the right to be free from torture, however following the reasoning of paragraph 7 of the General Recommendation no. 19, any of those listed rights should suffice, *see* section 5.1.2.

<sup>230</sup> Edwards, *supra* note 201, p. 194.

<sup>231</sup> As of April 2012, there are 104 state parties to the OP, UN treaty collection website, CEDAW OP ratifications, <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8-b&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en)>, accessed 2012-04-02.

<sup>232</sup> Tomuschat C., *Human Rights: Between Idealism and Realism*, 2<sup>nd</sup> Ed. (Oxford University Press, New York, 2008), pp. 220 and 222.

<sup>233</sup> Committee on the Elimination of Discrimination against Women, communication no. 2/2003, *Ms. A. T. v. Hungary*, 26 January 2005.

<sup>234</sup> *Ibid.*, paras. 1.1 and 3.1.

L.F. The author was also unable to obtain a protection order or a restraining order, as Hungarian law did not provided them. Furthermore, there was no shelter in Hungary that was equipped to take in the author and her two children as one of the children was disabled due to severe brain damage.<sup>235</sup>

Two criminal procedures had been brought against L.F. for assault and battery; they were later joined and resulted in fines. The criminal proceedings were lengthy and the state party admitted that domestic violence cases were not a high priority in court proceedings. L.F. was not detained during the proceedings and the Hungarian authorities made no effort to protect the author from him. Due to the continuing violence and lack of protection, the author had lived in constant fear for four years, severely affecting her physical and mental health as well as posing a risk to her life.<sup>236</sup>

The Committee found Hungary to be in violation of Articles 2(a), (b) and (e), 5(a) and 16 of CEDAW.<sup>237</sup> The Committee referred to its General Recommendation no. 19, which established that the definition of discrimination against women includes gender-based violence and gender-based violence can breach specific provisions of CEDAW regardless of if the provision mentions violence. The recommendation also refers to state responsibility for the actions of non-state actors if the state fails to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.<sup>238</sup> On this basis, the Committee held that Article 2(a), (b) and (e) of the convention extend to the prevention of and protection from violence against women and found that Hungary had not fulfilled their obligations which constituted a violation of the author's human rights and fundamental freedoms, particularly her right to security of person. The Committee noted that the remedies available to the author under Hungarian law were not capable of providing her with immediate protection from her former common law husband. The legal and institutional arrangements in Hungary were not on par with the internationally recognised framework needed to provide effective protection and the criminal and civil proceedings in the present case were inadequate and, by the state party's own admission, not a priority. The Committee stated: "[w]omen's human rights to life and to physical and mental integrity cannot be superseded by other rights, including the right to property and the right to privacy." Furthermore, the Committee was concerned with the lack of specific domestic violence legislation and that no protection orders, restraining orders or shelters existed.<sup>239</sup>

According to the Committee the author's situation showed a "persistence of entrenched traditional stereotypes regarding the role of women and men in the family" that was characteristic of the state because there was no

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<sup>235</sup> *Ibid.*, paras. 2.1-2.4.

<sup>236</sup> *Ibid.*, paras. 2.4, 2.6, 6.11 and 7.3.

<sup>237</sup> See section 5.1.1 for details on the articles.

<sup>238</sup> *Ms. A.T. v. Hungary*, *supra* note 233, paras. 9.2. and 9.6.

<sup>239</sup> *Ibid.*, para. 9.3.

protection available for the author under the state's legislation. The Committee had stated on several occasions that stereotypes that regard women as subordinate to men contribute to violence against women and thus found a violation of Article 5(a) in conjunction with Article 16.<sup>240</sup> The Committee recommended the state party to *inter alia* introduce specific domestic violence legislation that provides for protection orders, restraining orders, and shelters, and investigate all allegations of domestic violence promptly and impartially as well as bring the offenders to justice in accordance with international standards.<sup>241</sup>

## 5.2.2 Sahide Goekce v. Austria

In the case of *Sahide Goekce v. Austria*,<sup>242</sup> the authors of the communication were two organisations in Vienna, Austria that work with women victims of gender-based violence. The complaint was made on behalf of the two children of deceased Sahide Goekce, the alleged victim. Sahide was an Austrian national of Turkish origin who had been a client of the one of the authors prior to her death. The authors claimed that Austria had violated its obligations under CEDAW by failing to take all the appropriate measures to protect the life of Sahide and her right to personal security. Furthermore, they claimed that the state had failed to exercise due diligence in investigating and prosecuting acts of violence committed by Sahide's husband Mustafa.<sup>243</sup>

According to the authors, Sahide had been subjected to violence and threats by Mustafa during a period of at least three years. The first violent attack occurred in the family's apartment in December of 1999 at which time Mustafa choked Sahide and threatened to kill her. She reported the incident to the police the following day and they issued an expulsion and prohibition to return order against Mustafa covering their apartment. In cases of criminal dangerous threats by a relative living in the same household, the Austrian penal code required the victim to authorise the authorities in order to prosecute the alleged offender. Sahide did not authorise the authorities and consequently Mustafa was charged only with the offence of causing bodily harm. He was later acquitted because Sahide's injuries, two light red bruises on her neck from the alleged choking, were too minor to constitute bodily harm.<sup>244</sup> A second incident occurred six months later, which led to the issuance of a second expulsion and prohibition to return order, valid for 10 days. However, the public prosecutor denied a police request to detain Mustafa for an alleged death threat.<sup>245</sup>

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<sup>240</sup> *Ibid.*, para. 9.4.

<sup>241</sup> *Ibid.*, para. 9.6, part II.

<sup>242</sup> Committee on the Elimination of Discrimination against Women, communication no. 5/2005, *Sahide Goekce v. Austria*, 6 August 2007.

<sup>243</sup> *Ibid.*, paras. 1, 3.1 and 3.5.

<sup>244</sup> *Ibid.*, paras. 2.1-2.3.

<sup>245</sup> *Ibid.*, para. 2.4.

During the following two years, the police were called to the family's apartment on several occasions due to reports of disputes and battering. A third expulsion and prohibition to return order was issued in October of 2002 and Sahide pressed charges against Mustafa for causing bodily harm and making a criminal dangerous threat. The public prosecutor denied the police's request that Mustafa be detained and two months later on 5 December 2002 stopped the prosecution on grounds of insufficient evidence. Despite an interim injunction, issued by the district court, which forbade Mustafa to return to the family apartment as well as contacting Sahide and their three children for a period of three months, Mustafa continued to live in the family apartment, though the police did not find him there when they checked.<sup>246</sup> According to the authors, Sahide's father and Mustafa's brother had informed police that Mustafa had threatened to kill Sahide on several occasions and that he owned a handgun. The police failed to record the statements and file a report and even though there was a weapons prohibition in effect against Mustafa; they did not check whether he owned a handgun.<sup>247</sup> Mustafa shot and killed Sahide in the family apartment, in front of their two daughters, on 7 December 2002. According to the police report, no officer was sent to the apartment prior to the shooting despite their knowledge of an ongoing dispute between Sahide and Mustafa. Mustafa was sentenced to life imprisonment in an institution for mentally disturbed offenders.<sup>248</sup>

The state party disputed several of the facts presented by the authors. The Austrian government submitted that Mustafa's initial acquittal for causing bodily harm was due to an absence of evidence; Sahide had not wanted to testify against him and had asked the court not to punish her husband. The public prosecutor had stopped the prosecution in December 2002 because Sahide had submitted a written statement in which she claimed her injuries had been caused by a scrap. According to the state party, Sahide had contributed to the acquittal and the dropped charges by refusing to testify in the criminal proceedings. Furthermore, she had downplayed the incidents on several occasions after filing charges and requested the authorities not prosecute her husband.<sup>249</sup>

The Austrian government challenged the admissibility of the communication on the grounds that domestic remedies had not been exhausted.<sup>250</sup> The government referred to several remedies that would have been available to Sahide had she wished to use them, for example the possibility of prosecuting Mustafa for the criminal dangerous threat had she authorised the authorities to do so. The government also emphasised Sahide's unwillingness to testify against her husband and separate from him

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<sup>246</sup> *Ibid.*, paras. 2.5-2.8 and 2.10.

<sup>247</sup> *Ibid.*, para. 2.9.

<sup>248</sup> *Ibid.*, paras. 2.11-2.12.

<sup>249</sup> *Ibid.*, paras. 4.1, 4.8 and 4.11.

<sup>250</sup> According to Article 4.1 of the Optional Protocol of CEDAW, the CEDAW Committee cannot consider a communication unless it has ascertained that all available domestic remedies have been exhausted. This does not apply if the application of remedies is unreasonably prolonged or unlikely to bring effective relief.

as factors that impeded the protection available to her by Austrian law. The government held that the *Federal Act for the Protection against Violence within the Family* was capable of providing protection for victims as well as effectively combating domestic violence. However, without the cooperation of the victim the effectiveness of the protection could not be guaranteed. Furthermore, Sahide had the ability to bring action against Mustafa by ‘associated prosecution’; that is the injured party brings the action if the public prosecutor refuses to prosecute.<sup>251</sup>

The Committee rejected associated prosecution as an available remedy that Sahide should have exhausted for the communication to be admissible. The Committee noted that the requirements for a private individual to take over prosecution are more stringent than the requirements for the public prosecutor. Furthermore, the task would have been very difficult for Sahide considering that German was not her mother tongue and that she had been subjected to long-term domestic violence and threats of violence.<sup>252</sup>

As to the merits, the Committee noted that Mustafa had been prosecuted for the murder of Sahide to the full extent of the law; however, this could not rectify the actions or lack thereof by the public authorities prior to her death. The Committee found that Austria had violated their obligations under Article 2(a) and (c) through (f) and Article 3 of the convention read in conjunction with Article 1 of the convention and General Recommendation no. 19, which resulted in a violation of Sahide’s right to life, and right to physical and mental integrity.<sup>253</sup> The Committee noted that although Austria had a comprehensive system in place to address domestic violence, including legislation on domestic violence, criminal and civil remedies, shelters and counselling for victims, the system could not provide individual women victims with effective protection if state actors failed to implement the system.<sup>254</sup>

The Committee focused on the police response on the night Sahide was shot dead by her husband. A number of factors were of importance for the Committee’s decision: the frequency of calls to the police about disturbances and battering during the three-year period, the fact that prohibition to return orders had been issued by the police three times and they had requested that Mustafa be detained twice, the three-month interim injunction that was in effect at the time of her death, and the fact that the police were aware that Mustafa owned a gun. In light of these factors, the police knew, or should have known, that Sahide was in serious danger. Thus, when police did not respond immediately to the emergency call Sahide made a few hours before her death, they failed to exercise due diligence to protect Sahide.<sup>255</sup>

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<sup>251</sup> *Sahide Goekce v. Austria*, *supra* note 242, paras. 4.11-4.13 and 8.2.

<sup>252</sup> *Ibid.*, para. 11.3.

<sup>253</sup> *Ibid.*, para. 12.1.6. *See* section 5.1.1.

<sup>254</sup> *Ibid.*, para. 12.1.2.

<sup>255</sup> *Ibid.*, paras. 12.1.3-12.1.4.

The Committee also discussed the public prosecutor's decisions to deny police requests to arrest and detain Mustafa on two separate occasions. The Committee referred to its decision in *Ms. A. T. v. Hungary* and reiterated that the perpetrator's rights cannot supersede a woman's human rights to life and right to physical and mental integrity. The Committee did not consider that detainment of Mustafa would have amounted to a disproportionate interference with his rights to freedom of movement and to a fair trial as his behaviour "crossed a high threshold of violence of which the Public Prosecutor was aware of" and consequently the two police requests of detention should not have been denied.<sup>256</sup>

Several of the factual issues were disputed by the parties and the Committee did not examine the author's allegations that the Austrian criminal justice system personnel failed to act with due diligence to investigate and prosecute the acts of violence Mustafa committed against Sahide.<sup>257</sup> The authors asserted that the case showed "the prevailing lack of seriousness with which violence against women is taken by the public and by Austrian authorities," and requested that the Committee recommend the state party to implement a 'pro-prosecution policy'.<sup>258</sup> The Committee refrained from explicitly recommending a pro-prosecution policy; instead, they recommended Austria:

"[v]igilantly and in a speedy manner prosecute perpetrators of domestic violence in order to convey to offenders and the public that society condemns domestic violence as well as ensure that criminal and civil remedies are utilized in cases where the perpetrator in a domestic violence situation poses a dangerous threat to the victim."<sup>259</sup>

### 5.2.3 Fatma Yildirim v. Austria

In *Fatma Yildirim v. Austria*,<sup>260</sup> the authors were the same two organisations in Vienna, Austria as in *Sahide Goekce v. Austria*. The complaint was made on behalf of the three children of deceased Fatma Yildirim, the alleged victim. Fatma was an Austrian national of Turkish origin and was a client of one of the organisations prior to her death. The authors claimed that Austria had violated its obligations under CEDAW by failing to take all the appropriate measures to protect Fatma's right to life and her right to personal security.<sup>261</sup>

Fatma had married Irfan Yildirim in 2001 and she had three children (two adults and one minor) from her previous marriage. In July of 2003, Irfan threatened to kill Fatma during a trip to Turkey and on their return to

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<sup>256</sup> *Ibid.*, para. 12.1.5.

<sup>257</sup> *Ibid.*, para. 3.5.

<sup>258</sup> *Ibid.*, paras. 3.6 and 3.8.

<sup>259</sup> *Ibid.*, para. 12.3(b).

<sup>260</sup> Committee on the Elimination of Discrimination against Women, communication no. 6/2005, *Fatma Yildirim v. Austria*, 6 August 2007.

<sup>261</sup> *Ibid.*, paras. 1 and 3.1.

Austria; Fatma declared that she wanted a divorce. Irfan did not agree and threatened to kill her and her children should she divorce him. In August of 2003, Fatma left the family's apartment together with her youngest daughter because she feared for her life. A few days later, she was assaulted and threatened by Irfan and the police issued an expulsion and prohibition to return order against Irfan covering their apartment. Police also reported the criminal dangerous threat to the public prosecutor and requested that Irfan be detained; the public prosecutor denied the request.<sup>262</sup>

The weeks following, Irfan continued to harass Fatma by repeatedly showing up at her workplace, threatening to kill her and threatening her adult son. On 14 August 2003, after Fatma had given a formal statement about the threats made to her life, the public prosecutor again denied the police request to detain Irfan as detention seemed disproportionately invasive considering that Irfan had no criminal record and was socially integrated. The following week, Fatma filed a petition for divorce and on 1 September 2003, the district court issued an interim injunction against Irfan, which forbade him to return to the family's apartment, from going to Fatma's workplace and from contacting Fatma and her youngest child. On 11 September 2003, Irfan followed Fatma home from work and stabbed her to death. Irfan was convicted of Fatma's murder and was sentenced to life imprisonment.<sup>263</sup>

The Committee found Austria in violation of Article 2(a) and (c) through (f) and Article 3 read in conjunction with Article 1 of CEDAW and General Recommendation no. 19 as Fatma's right to life, and right to physical and mental integrity had been breached. Again, the Committee reasoned that although Austria had a comprehensive system in place to address domestic violence, the system cannot provide effective protection if state actors do not properly implement it. The Committee determined that it was the lack of detention of Irfan that resulted in the state party's failure to exercise due diligence to protect Fatma. A number of factors were noted, such as the repeated police interventions in the disputes, the numerous occasions that Irfan contacted and threatened Fatma, the numerous harassment at her workplace and the interim injunction order against him, which, considered together, showed that Fatma was in serious danger and that the Austrian authorities knew, or should have known, about her situation. Consequently, the public prosecutor should not have denied the police request of detention. Furthermore, the fact that Irfan's residence permit was dependent on his marriage to Fatma should have been considered when assessing how potentially dangerous he could be in connection to the request for detention.<sup>264</sup>

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<sup>262</sup> *Ibid.*, paras. 2.1-2.4.

<sup>263</sup> *Ibid.*, paras. 2.5-2.14 and 8.4.

<sup>264</sup> *Ibid.*, paras. 12.1.2-12.1.6.

Notably, Austria has amended its law on the prosecution of perpetrators for making criminal dangerous threats and no longer requires that a threatened family member must authorise the prosecution.<sup>265</sup>

#### 5.2.4 What obligations can be derived from these views?

Initially, what becomes clear is that the CEDAW Committee, despite the ‘gender-based violence is discrimination’ approach seems to depart from the obligation to exercise due diligence to prevent and respond to violence against women, reiterated in General Recommendation no. 19, when it addresses domestic violence. Although the Committee refers to how discrimination under CEDAW includes gender-based violence, this connection seems to be primarily necessary for the Committee to be able to consider domestic violence under the Convention. The issue of state responsibility for domestic violence still requires that violence impairs and/or nullifies an existing human right and for state responsibility to arise, a victim must show that the state failed to exercise due diligence. In these cases, the violence victims endured breached the right to personal security,<sup>266</sup> the right to life, and the right to physical and mental integrity.<sup>267</sup> In my opinion, this supports the argument by Edwards that the protection women are offered against violence is indirect; domestic violence is not a human rights violation *per se* under the ‘gender-based violence is discrimination’ approach.

In the cases above, the following state behaviour was considered a violation of the due diligence standard; failure to provide means of protection against domestic violence through the use of protection orders, restraining orders and shelters;<sup>268</sup> failure to respond immediately to an emergency call when the authorities knew, or should have known, that the woman was in serious danger;<sup>269</sup> and failure to place an abusive perpetrator in detention when authorities knew, or should have known, that the woman was in serious danger.<sup>270</sup> Thus, although the Committee recommends state parties to act with due diligence to prevent domestic violence under its concluding recommendations<sup>271</sup> (as well as its’ argumentation under Article 5(a), see paragraph below), the Committee’s reasoning for finding violations is mainly centred around the obligation to *respond* to domestic violence by

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<sup>265</sup> *Ibid.*, para. 8.8.

<sup>266</sup> *Ms. A. T. v. Hungary*, *supra* note 233.

<sup>267</sup> *Sahide Goekce v. Austria*, *supra* note 242 and *Fatma Yildirim v. Austria*, *supra* note 260.

<sup>268</sup> *Ms. A.T. v. Hungary*, *supra* note 233.

<sup>269</sup> *Sahide Goekce v. Austria*, *supra* note 242.

<sup>270</sup> *Sahide Goekce v. Austria*, *supra* note 242, and *Fatma Yildirim v. Austria*, *supra* note 260.

<sup>271</sup> *Ms. A.T. v. Hungary*, *supra* note 233, part II (a), *Sahide Goekce v. Austria*, *supra* note 242, para. 12.3 (a) and *Fatma Yildirim v. Austria*, *supra* note 260, para. 12.3 (a).

*protecting* women against further violence. That is, the state must take positive post-abuse measures to prevent further harm.<sup>272</sup>

Nonetheless, I believe the value of ‘gender-based violence is discrimination’ approach is that the Committee is able to use the provisions of CEDAW, which all serve the purpose of eliminating discrimination against women, to clarify the content of the due diligence standard. Although the provisions of CEDAW are independent obligations under the Convention, the due diligence standard seems to be the wider obligation, and the provisions of CEDAW appear to fall within the standard. Of great importance is the connection to discrimination, which allows the Committee to address the structural inequality that perpetuates violence against women under the obligation to prevent violence against women. For example, in *Ms. A.T. v. Hungary*, the Committee referred to the obligation to modify social and cultural patterns of conduct of men and women under Article 5(a) of CEDAW, an article that seeks to address structural inequality.<sup>273</sup> The author’s situation of years of abuse with no state protection showed unacceptable attitudes towards women that were considered characteristic of state because of the lack of specific legislation on domestic violence, in particular the lack of protection orders and the state party’s failure to prioritise domestic violence cases.

However, in the two cases against Austria, it was noted that the state had a comprehensive system in place to address domestic violence, which included legislation; yet, state authorities had failed to implement it. It seems as if failure to implement legislation does not provide a strong enough connection to the state as lack of legislation does. Austria was not found to violate Article 5(a) of CEDAW in either of the cases. If this is the reasoning of the Committee, I find it erroneous to fail to attribute the behaviour of the state authorities to the state itself, as this is a fundamental principle of the doctrine of state responsibility.<sup>274</sup> However, the fact that some measures to protect the victims were indeed taken, mainly prohibition to return orders, could have weighed in the state’s favour. Nevertheless, the Committee found a violation of Article 3, which stipulates the obligation to take measures in the political, social, economic and cultural fields to ensure the full development and advancement of women. Although this article is not as strong as Article 5(a), it nonetheless requires states to engage in promoting women’s substantive equality in society.

As to *Sahide Goekce v. Austria*, I find it noteworthy that the Committee did not comment on the Austrian government’s statements regarding how without the cooperation of the victim, the effectiveness of the protection

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<sup>272</sup> The phrase ‘positive post-abuse measures’ is taken from Edwards and although she used it in a different context, I find it clarifies my line of reasoning here. Edwards, *supra* note 201, p. 241.

<sup>273</sup> See section 5.1.1.

<sup>274</sup> Articles 4 and 5 the International Law Commission’s *Draft Articles on Responsibility of States for Internationally Wrongful Acts* stipulate state responsibility for the conduct of organs of the state or persons exercising elements of governmental authority, annexed to UN General Assembly Resolution 56/83, 12 December 2001.

offered by the legislation could not be guaranteed. The authors had alleged that Austria had failed in its obligation to investigate and prosecute the acts of violence with due diligence. Byrnes and Bath have held that the Committee did not address these issues because the parties disputed the facts regarding why the charges were dropped as well as the reasons for the initial acquittal, and the Committee was not in a position to resolve these disputes.<sup>275</sup> However, I argue that the admissions of the government alone should have sufficed for the Committee to address these issues. The government held that Sahide had refused to testify, downplayed the incidents and requested the authorities not to prosecute. These are all factors that seem to be common in domestic violence cases when the victim is reluctant to cooperate with criminal proceedings, usually resulting in insufficient evidence for prosecution. With that in mind, if the Committee wanted to dive into the issue of what specific legislation a state should have with regard to the prosecution of domestic violence, I believe it could have done so. Instead, the Committee recommended the rather vague statement to “vigilantly” prosecute perpetrators of domestic violence, without specifying how the state should fulfil this obligation, *i.e.* what kind of prosecution policy is needed. Furthermore, the Committee did not comment on the Austrian legislation that required the victim to authorise the prosecution when the criminal dangerous threat was made by a relative living in the same household.<sup>276</sup> The Committee’s silence on these issues is difficult to analyse and any reasoning will undoubtedly only be speculation. That said, I wonder if the Committee is conflicted on these issues and for that reason does not wish to recommend a specific policy. Then again, the Committee has held that obligations under CEDAW are generally quite open in that they give state parties a great deal of flexibility in deciding *how* they shall fulfil the obligations,<sup>277</sup> which speaks against the Committee engaging in the ‘state domain’ of specific provisions in domestic legislation. On a positive note, the Committee did not consider ‘associated prosecution’ to be an appropriate criminal law remedy for a victim of domestic violence.

Lastly, when the violated articles of CEDAW in these cases are analysed, specifically the provisions under Article 2, there appears to be a connection to women’s right to equal protection by the law even though it is not specifically elaborated on by the CEDAW Committee. I find the Committee’s reasoning on the violations of Article 2 to be insufficient in all of the views; therefore this section is strictly my own analysis. Specifically Article 2(c) refers to the obligation to establish legal protection of the rights of women on an equal basis with men and that courts and authorities must provide effective protection of women against any act of discrimination, which read together with General Recommendation no. 19, includes gender-based violence. Therefore, it *seems* possible that the Committee is arguing

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<sup>275</sup> Byrnes A. and Bath E., ‘Violence against Women, the Obligation of Due Diligence, and the Convention on the Elimination of all Forms of Discrimination against Women – Recent Developments’, 8 *Human Rights Law Review* (2008), p. 523.

<sup>276</sup> Notably, this legislation was changed after the cases.

<sup>277</sup> General Recommendation no. 28, *supra* note 220, para. 23. This is reflected in other international human rights law areas, *e.g.*, the margin of appreciation under the ECHR.

that by not responding to domestic violence in the same manner as other crimes, the state will violate a woman's right to equal protection by the law. Notably, the Committee only found a violation of Article 2(c) of CEDAW in the two cases against Austria and not in *Ms. A.T. v. Hungary*. However, in the latter case, Hungary was found to have violated Article 2(b), which refers to the obligation to adopt appropriate legislative and other measures prohibiting discrimination against women (*again read: gender-based violence*), most likely on account of the lack of specific legislation on domestic violence and that the law did not provide for protection orders.

As has been noted above, General Recommendation no. 28 provides that there is an obligation under Article 2(c) of CEDAW to initiate criminal proceedings, bring perpetrators to trial and impose penal sanctions in cases of domestic violence. The General Recommendation no. 28 succeeded the views of the CEDAW Committee presented above and perhaps, although this is only my own speculation, this interpretation of the article is a result of the two cases against Austria.

## 5.3 Soft law under the United Nations framework

Declarations and resolutions from international bodies within the UN, for example the General Assembly and the four world conferences on women, are considered 'soft law', *i.e.* they are not legally binding in and of themselves.<sup>278</sup> Declarations and resolutions draw on treaties and case law from treaty bodies to elaborate and clarify individual human rights. The interpretations are valuable resources that provide more detail on the contents of individual rights and the obligations states have under treaty law.<sup>279</sup> As is the case with views from the CEDAW Committee, declarations carry political weight, which should not be underestimated.

### 5.3.1 The Declaration on the Elimination of Violence Against Women

As was the case with national legislation on domestic violence, feminist organisations also played an instrumental part in demanding that violence against women be recognised as a human rights issue. The lobbying of the international women's movement culminated at the World Conference on Human Rights in Vienna in 1993, contributing to the UN General Assembly adoption of the Declaration on the Elimination of Violence against Women<sup>280</sup> (DEVAW or Declaration) in 1993.<sup>281</sup> From the preamble of the

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<sup>278</sup> Unless it is possible to argue that they embody principles that represent international customary law.

<sup>279</sup> See *e.g.*, Tomuschat, *supra* note 232, p. 39 and Boyle A., 'Soft Law in International Law-making', in M. D. Evans (ed.), *International Law, 2<sup>nd</sup> Ed.* (Oxford University Press, New York, 2006), pp. 142-143.

<sup>280</sup> UN General Assembly Resolution, *Declaration on the Elimination of Violence against Women*, UN Doc. A/RES/48/104, 20 December 1993.

Declaration, it is clear that the UN adopted the structural perspective on violence against women by stating that “violence against women is a manifestation of historically unequal power relations between men and 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.”

The purpose of the Declaration was to provide a comprehensive definition of violence against women and to clarify the obligations states have to eliminate violence against women. The definition of violence against women in DEVAW has been very influential in international human rights law.<sup>282</sup> Article 1 defines violence against women by referring to it as *gender-based* violence:

“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 the public or in private life.”

Article 2 contains a non-exhaustive list of violence included in the definition and domestic violence is referred to as “physical, sexual and psychological violence occurring in the family, including battery, ... marital rape, ... [and] non-spousal violence.” Article 3 of DEVAW reiterates certain rights women have in other human rights instruments that can be violated in cases of domestic violence.<sup>283</sup> Article 4 of DEVAW contains a policy of eliminating violence against women that states should pursue by all appropriate means. I will only list the provisions most relevant for this thesis and there is an overlap with the provisions listed in General Recommendation no. 19. The policy includes *inter alia*:

- (c) to exercise due diligence to prevent, investigate and punish acts of violence against women by the state or by private persons,
- (d) to develop *inter alia* penal and civil sanctions to punish acts of violence and provide women subjected to violence with access to the mechanisms of justice, just and effective remedies for the harm they have suffered and information from the state on their rights in seeking redress through such mechanisms,
- (e) to consider adopting national plans of actions or modifying existing ones to promote the protection of women against any form of violence and to take into account the cooperation that can be provided by NGOs,
- (f) to develop preventive approaches and all those measures of a legal, political, administrative and cultural nature that promote the protection of women against violence and ensure that women subjected to violence are not re-victimised because of laws, enforcement practices or other interventions are insensitive to gender considerations,

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<sup>281</sup> Division for the Advancement of Women, *supra* note 217.

<sup>282</sup> Edwards, *supra* note 201, pp. 20-21.

<sup>283</sup> The rights enumerated are almost identical to the list in the General Recommendation no. 19, *see* section 5.1.2 of this thesis.

- (g) to work to ensure that women subjected to violence receive specialised assistance such as rehabilitation, treatment, counselling and health and social services and to take all other appropriate measures to promote women's safety and wellbeing,
- (h) to include in the government budget adequate resources for their activities related to eliminating violence against women,
- (i) to take measures to ensure that law enforcement and other authorities receive training to sensitise them to the needs of women,
- (j) to adopt all measures to modify the cultural patterns of conduct of men and women and to eliminate prejudices and practices based on the idea of inferiority or superiority of the sexes and stereotyped roles,<sup>284</sup>
- (k) to promote research and compile statistics on the prevalence of violence against women, to encourage research on the causes, nature and consequences of violence against women and the effectiveness of measures implemented (this provisions applies especially concerning domestic violence and all results should be made public), and
- (p) to facilitate and enhance the work of the women's movement and NGOs and cooperate with them at local, national and regional levels.

One of the most pertinent criticisms of DEVAW is that it too does not recognise violence against women as a violation of women's human rights *per se*. Instead, it considers violence against women a barrier to women's enjoyment of human rights.<sup>285</sup>

### 5.3.2 The Beijing Declaration and Platform for Action

During the fourth world conference on women, held in Beijing in 1995, violence against women was identified as one of the twelve priority areas of concern. The world conference resulted in the unanimous adoption of the Beijing Declaration and Platform for Action<sup>286</sup> (the Platform for Action) by 189 countries. The Platform for Action is still of relevance today, reviews of its implementation have taken place three times, the latest in 2010, known as Beijing +15. These reviews result in the adoption of further documents and reaffirmation of the importance of implementing its objectives.<sup>287</sup>

Paragraph 113 of the Platform for Action, like DEVAW, defines violence against women as gender-based violence and paragraph 118 also declares that violence against women is a manifestation of the historically unequal power relations between men and women. The strategic objectives of the Platform for Action are *inter alia* to take integrated measures to prevent and eliminate violence against women and to study the causes and consequences

<sup>284</sup> The same as Article 5(a) of CEDAW.

<sup>285</sup> Edwards, *supra* note 201, pp. 22.

<sup>286</sup> UN Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, September 15, 1995, UN Doc. A/CONF.177/20 (1995) and UN Doc. A/CONF.177/20/Add.1 (1995), para. 44. (hereinafter Platform for Action)

<sup>287</sup> UN Women website, <[www.un.org/womenwatch/daw/beijing15/index.html](http://www.un.org/womenwatch/daw/beijing15/index.html)>, accessed 2012-05-02.

of violence against women and the effectiveness of preventive measures.<sup>288</sup> The Platform for Action proposes action that governments and other actors, such as NGOs, should take in order to achieve the objectives. However, many of the actions are also found in the policy outlined in DEVAW, for example to exercise due diligence in responding to violence against women, adopt and implement legislation on violence against women and to review and analyse its effectiveness in eliminating violence against women. In addition, legislation must emphasise prevention of violence and the prosecution of offenders.<sup>289</sup> Governments must provide women subjected to violence with access to the mechanisms of justice, just and effective remedies and the institutional mechanisms must be created in a way that enables women to report violence and file charges in a safe and confidential environment.<sup>290</sup> Shelters, other services such as counselling and free or low-cost legal aid and public awareness campaigns are also emphasised as integral measures to be taken by governments, NGOs and various public and private sectors.<sup>291</sup> Lastly, the Platform for Action also refers to the importance of studying violence against women and compiling and analysing statistics on domestic violence in particular, to evaluate the effectiveness of implemented measures.<sup>292</sup>

### **5.3.3 Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice**

The *Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice* (Model Strategies and Practical Measures) is a guideline for states to use in their efforts to address violence against women within the criminal justice system.<sup>293</sup>

According to paragraph 6(a) and (b) of the Model Strategies and Practical Measures, member states must review, evaluate and revise their laws, codes and procedures to ensure their value and effectiveness in eliminating violence against women, to remove any provisions that allow or condone violence against women and to ensure that all acts of violence against women are prohibited. Member states are urged to review, evaluate and revise their criminal procedure to ensure that the primary responsibility for initiating prosecution rests with the prosecution authorities and not with the woman subjected to violence, paragraph 7(b).

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<sup>288</sup> Platform for Action, *supra* note 286, strategic objectives D.1 and D.2.

<sup>289</sup> *Ibid.*, para. 124(b)-(d).

<sup>290</sup> *Ibid.*, para. 124(h) and (l).

<sup>291</sup> *Ibid.*, para. 125(a), (e) and (g).

<sup>292</sup> *Ibid.*, para. 129(a).

<sup>293</sup> Annexed to the UN General Assembly Resolution, *Crime prevention and criminal justice measures to eliminate violence against women*, UN Doc. A/RES/52/86, 2 February 1998, paras. 9-10.

According to paragraph 8(b) and (c), member states are urged to develop investigation techniques that do not degrade women subjected to violence and that minimise intrusion into their lives and to ensure that police procedures, including decisions on arrest, take into account the need for safety of the victim and that the procedures prevent further acts of violence. Under paragraph 11, member states are recommended to provide victim support and assistance as well as health and social services to women subjected to violence, and are encouraged to cooperate with NGOs working with women's rights and equality. Furthermore, member states are urged to provide law enforcement and other authorities with gender-sensitivity training, to conduct research on the prevalence, causes and consequences of violence against women and to evaluate the efficiency and effectiveness of the criminal justice system in fulfilling the needs of women subjected to violence (paragraphs 12 and 13). Paragraph 9 of the Model Strategies and Practical Measures stresses the need for appropriate sentencing of the offenders; it must hold offenders accountable; stop violent behaviour; it should reflect the severity of the physical and psychological harm the woman has suffered; and encourage sentencing that includes treatment of the offender. Lastly, under paragraph 14, member states are urged to encourage the work of NGOs concerned with women's rights and violence against women and, as crime preventive measures, develop and implement public awareness campaigns and education that promotes gender equality.

### **5.3.4 Handbook for Legislation on Violence against Women**

In 2008, the UN Secretary-General launched the campaign 'UNiTE to End Violence against Women'. One of the aims of the campaign is that all countries shall, by 2015, have adopted and enforced national laws pertaining to violence against women that are in line with international human rights standards. In 2009, the Division for the Advancement of Women<sup>294</sup> and the Department of Economic and Social Affairs prepared the *Handbook for Legislation on Violence against Women*<sup>295</sup> (the handbook). The handbook is intended to assist states in adopting and effectively implementing legislation that prevents violence against women, punishes perpetrators and ensures the rights of survivors. It seeks to codify international human rights standards by presenting a model framework for legislation on violence against women. Below is a small selection of the handbook's recommendations that I find most relevant for this thesis.

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<sup>294</sup> As of July 2010, the Division for the Advancement of Women has merged together with three other UN entities to create UN Women, the UN Entity for Gender Equality and the Empowerment of Women, UN Women website, <[www.unwomen.org/about-us/about-un-women/](http://www.unwomen.org/about-us/about-un-women/)>, accessed 2012-04-28.

<sup>295</sup> UN Department of Economic and Social Affairs, Division for the Advancement of Women, *Handbook for Legislation on Violence against Women*, 2009, <[www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf](http://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf)>, accessed 2012-04-28. (hereinafter Handbook)

The handbook makes an important point by stating that legislation must move beyond mere criminalisation of violence against women and adopt a comprehensive and multidisciplinary approach. This means that issues such as prevention, protection, survivor empowerment and support (which includes health, economic, social and psychological) should be mandated by law.<sup>296</sup> In terms of preventing violence against women, the handbook specifies the need for legislation to address the root causes of violence against women. This entails government funded awareness-raising campaigns on women's rights, gender equality and the right to be free from violence, educational programmes within all levels of schooling that act to modify discriminatory social and cultural patterns of behaviour and derogatory stereotypes, and lastly, encourage the sensitisation of the media regarding violence against women.<sup>297</sup>

Legislation must be gender-sensitive and recognise the specific needs and experiences of women. The Swedish Women's Peace reform, with the creation of the crime *gross violation of a woman's integrity*, is highlighted as a good example of legislation that is gender-specific for women; however, does not risk discrimination against men since the first paragraph of the provision is gender-neutral.<sup>298</sup> In terms of protection measures, legislation should oblige the state to provide funding and/or establish comprehensive and integrated support services, such as shelters, hotlines and women's advocacy, and counselling centres. As has also been noted by the SRVAW,<sup>299</sup> the state is often not the most appropriate body to run these services. Instead, NGOs that work based on feminist principles are often better equipped to provide gender-specific and empowering support to women victims of violence.<sup>300</sup> Legislation should mandate the collection of statistical data on the causes, consequences and frequency of all forms of violence against women, as well as the effectiveness of the implemented measures.<sup>301</sup>

Regarding prosecution policies, the handbook recommends that legislation should establish that the responsibility for prosecuting violence against women lies with the prosecution authorities and not with the victim. Furthermore, this should apply regardless of the level or type of injury. In cases of domestic violence, lack of information regarding the legal process can be intimidating for the victim and is a main factor that impedes her willingness to participate in the prosecution. Therefore, the prosecutor should provide the victim with information on the procedure and updates on her case on a regular basis. The handbook notes the difficulties prosecutors face when gathering evidence for the prosecution, and how states have tried to overcome this by employing mandatory policies and prosecution without victim participation. However, it also notes concern regarding the removal

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<sup>296</sup> *Ibid.*, p. 14.

<sup>297</sup> *Ibid.*, pp. 28-30.

<sup>298</sup> *Ibid.*, p. 15.

<sup>299</sup> See section 7.4.

<sup>300</sup> Handbook, *supra* note 295, p. 32.

<sup>301</sup> *Ibid.*, p. 23.

of agency from the victim in mandatory prosecution policies. The handbook recommends pro-prosecution policies, which mean that when there is probable cause to believe that a crime has occurred, prosecution should continue; however, there is a reference to the need for these policies to be “flexible” so that they retain a level of agency for the victim. What “flexible” in this context means is not clear from the handbook, for instance, it refers to legislation in Honduras where if a victim wishes to drop the case, a judge cannot do so without investigating the reasons for why the victim wishes to drop the case.<sup>302</sup> The handbook is sceptical towards legislation that forces a victim to provide testimony or a written statement against her will as this policy may prevent victims from contacting the police. Therefore, states should explore the possibility of prosecution without the participation of the victim.<sup>303</sup>

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<sup>302</sup> *Ibid.*, pp. 36-38.

<sup>303</sup> *Ibid.*, p. 42.

## **6 Domestic violence as a human rights issue under regional human rights law instruments**

This chapter will present how domestic violence can be a violation under regional human rights instruments and use case law to demonstrate how regional courts and commissions have dealt with domestic violence. The chapter will end by reconnecting the issue of evidence-based prosecution to the aforementioned debate by examining the issue in the context of the defendant's right to a fair trial in the European context.

### **6.1 The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women**

The Organisation of American States adopted the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (the Convention of Belém do Pará) in 1994 and it entered into force in 1995. It was the first human rights instrument where violence against women was the central theme.<sup>304</sup> The preamble of the convention recognises that “violence against women is an offense against human dignity and a manifestation of the historically unequal power relations between women and men.”

Article 1 of the convention defines violence against women as “any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere.” The convention encompasses domestic violence by referring to physical, sexual and psychological violence that occurs within the family unit or within any other interpersonal relationship, including *inter alia* rape, battery and sexual abuse, Article 2(a).

A unique feature of the convention compared to other human rights instruments is that Article 3 grants women a “freestanding” right to be free from violence in both the public and private spheres.<sup>305</sup> Article 4 contains a list of key human rights that are protected under the convention when they have been violated by acts of violence. These rights include, among others: (a) the right to life; (b) the right to physical, mental and moral integrity; (c)

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<sup>304</sup> Edwards, *supra* note 201, pp. 11-12.

<sup>305</sup> *Ibid.*, p. 22.

the right to personal liberty and security; (d) the right not to be subjected to torture; (e) the right to have the inherent dignity of her person respected and her family protected; (f) the right to equal protection before the law and of the law; and (g) the right to simple and prompt recourse to a competent court for protection against acts that violate her rights. Given this list of rights that may be violated by acts of violence, I find the meaning of Article 3, a freestanding right to be free from violence, unclear. It does not seem as though violence against women is a violation of human rights *per se*; instead, the convention seems to follow the ordinary approach of finding a violation when the violence impairs and/or nullifies an existing human right.<sup>306</sup>

Much like General Recommendation no. 19 and DEVAW, the Convention of Belém do Pará requires state parties to condemn all forms of violence against women and to pursue, by all appropriate means, policies to prevent, punish and eradicate violence against women. Article 7 specifies certain measures that states have an obligation to undertake. States must, *inter alia*:<sup>307</sup>

- (b) apply due diligence to prevent, investigate and impose penalties for violence against women,
- (c) include the penal, civil and administrative provisions in their domestic legislation that are needed to prevent, punish and eradicate violence against women,
- (d) adopt legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman, or other behaviour that harms the woman,
- (e) amend or repeal laws and customs which sustain the persistence and tolerance of violence against women,
- (f) establish fair and effective legal procedures for women victims of violence, which include protective measures and a timely hearing, and
- (g) establish mechanisms to ensure that women victims of violence have access to restitution and reparation.

These measures are very similar to those found in DEVAW and General Recommendation no. 19. Unfortunately, they too are rather vague. However, unlike those instruments, the Convention of Belém do Pará is a legally binding treaty and state compliance with Article 7 is overseen through a reporting mechanism in Article 10 of the convention,<sup>308</sup> as well as an individual complaint mechanism in Article 12, which provides that any person, group of persons, or NGO may lodge a complaint with the Inter-

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<sup>306</sup> In the case of *Maria da Penha Maia Fernandes v. Brazil*, *infra* note 309, the Commission found a violation of this article, however connected it to the obligations under Article 7, see below section 6.1.1. I argue that this is in favour of the Convention adopting the ordinary approach, however tempting it is to argue that women have a freestanding right to a life free from violence.

<sup>307</sup> I have made a selection of the measures I found relevant for this thesis.

<sup>308</sup> State parties must include in their reports to the Inter-American Commission of Women information on measures they have adopted to prevent and prohibit violence against women as well as measures adopted to assist women victims of violence.

American Commission on Human Rights (IACHR) of alleged violations of the convention by a state party.

Lastly, as it is recognised that structural inequality between men and women both legitimises and exacerbates violence against women, Article 8(b) of the Convention of Belém do Pará includes an agreement to “progressively undertake specific measures” to modify men and women’s social and cultural patterns of conduct as well as customs and practices which are based on the inferiority or superiority of either of the sexes or on the stereotyped roles of men and women. This is the same obligation as Article 5(a) of CEDAW; unfortunately, Article 8 does not seem as strong since the reference to “progressively” indicates that it is something that state parties should work towards realising. In other words, Article 8 is not an absolute obligation where failure to implement it entails state responsibility.

### **6.1.1 Maria da Penha Maia Fernandes v. Brazil**

The IACHR (the Commission) considered the issue of domestic violence in the case of *Maria da Penha Maia Fernandes v. Brazil*.<sup>309</sup> In addition to the Convention of Belém do Pará, the Commission also receives individual complaints regarding the American Declaration of the Right and Duties of Man (the Declaration) and the ACHR.<sup>310</sup> The present case raised issues of violations under all three instruments.

Maria da Penha Maia Fernandes filed the petition to the Commission together with two women’s rights NGOs. According to the petitioners, Maria had endured a situation of protracted domestic violence, which culminated in an attempted murder on 29 May 1983 when her husband at the time, Marco Antonio Heredia Viveiros, shot Maria while she was sleeping. As a result of the shooting, Maria sustained serious injuries and irreversible paraplegia. Two weeks after she returned home from the hospital Marco allegedly attempted to electrocute her while she was bathing.<sup>311</sup>

The police investigation into the first assault and attempted murder produced strong evidence that Marco was responsible and on 28 September 1984, the public prosecutor filed charges against him. However, it was not until 4 May 1991 that a jury in the district court found him guilty and sentenced him to 15 years imprisonment; however, since he had no prior convictions, the sentence was reduced to 10 years. Following an appeal by the defence, the Appeal Court threw out the decision and a new trial by jury took place on 15 March 1996, in which the jury again found Marco guilty and sentenced him to 10 years and 6 months imprisonment. Yet another appeal by the defence was accepted and the Commission noted that during

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<sup>309</sup> *Maria da Penha Maia Fernandes v. Brazil*, 16 April 2001, Inter-American Commission on Human Rights, Report no. 54/01, Case no. 12.051.

<sup>310</sup> According to Article 44 of the ACHR, any person, group of persons, or NGO may lodge a complaint with the IACHR of alleged violations of the convention by a state party.

<sup>311</sup> *Maria da Penha Maia Fernandes v. Brazil*, *supra* note 309, paras. 1, 8-9.

the proceedings before the Commission, more than 17 years had passed since the first police investigation was launched and no final ruling on the case had been made. Consequently, Maria had not received any compensation and despite the serious nature of his crime and the strong evidence against him, Marco had been free during the entire period. Furthermore, there was the impending risk of the offense becoming barred by the statute of limitations leading to impunity for Marco and preventing Maria's possibility of receiving compensation.<sup>312</sup>

The issue in this case was the extreme length of the criminal proceedings against Marco. The right to a fair trial (Article 8 of the ACHR), encompasses the right to a hearing "within a reasonable time." The right to judicial protection (Article 25 of the ACHR) stipulates "the right to simple and prompt recourse ... to a competent court or tribunal" and Article XVIII of the Declaration likewise affirms the right to "resort to the courts" for "a simple, brief procedure." The Commission concluded that the police investigation completed in 1984 produced sufficiently strong and decisive evidence against Marco for closing the case, yet proceedings and decisions were delayed on several occasions. Furthermore, the courts had accepted time-barred appeals that lead to further delays. The Commission considered the delay in the administration of justice unwarranted and found a violation of Article 8 of the ACHR.<sup>313</sup> The Commission also considered the conduct of the judicial authorities incompatible with the right to prompt and effective remedies under Article 25 of the ACHR and Article XVIII of the Declaration. Concerning the state obligation to respect and to ensure the rights of the convention to all persons under its jurisdiction (Article 1.1 of the ACHR), the Commission found a violation of said article in relation to Articles 8 and 25 of the convention as:

"the 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 ... [t]hey demonstrate that the State has not been capable of organizing its entities in a manner that guarantee those rights."<sup>314</sup>

In regards to the right to equal protection by the law (Article 24 of the ACHR) in relation to the right to equality before the law and the right to justice (Articles II and XVIII of the Declaration), the Commission found violations of these articles seeing that the Brazilian authorities' failure to respond adequately to cases of domestic violence resulted in clear discrimination against women. Although the state had implemented certain measures, *inter alia* the establishment of special police stations to handle reports on violence against women and the establishment of shelters for battered women, the Commission held that these measures "have not had any effect whatsoever."<sup>315</sup>

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<sup>312</sup> *Ibid.*, paras. 12-19, 38 and 44.

<sup>313</sup> *Ibid.*, para. 39.

<sup>314</sup> *Ibid.*, para. 44.

<sup>315</sup> *Ibid.*, paras. 46-50.

Concerning the Convention of Belém do Pará, the Commission found violations of Articles 7(b), (d), (e), (f) and (g)<sup>316</sup> in relation to Maria's right to be free from violence (Article 3) and her right to have her life, her physical, mental, and moral integrity, her personal safety, and personal dignity respected, her right not to be subjected to torture, and her right to equal protection before and of the law, and to simple and prompt recourse to a competent court for protection against acts that violate her rights.<sup>317</sup> The Commission reasoned that the state's failure to prosecute and convict the perpetrator is an indication that the state condones the violence Maria suffered and furthermore, the negligence represented a pattern of state tolerance of domestic violence. This pattern "serves to perpetuate the psychological, social, and historical roots and the factors that sustain and encourage violence against women" as it sends the message to society that the state has no interest in taking effective action to punish such acts. Moreover, because of a pattern of tolerance, the case involved not only failure to fulfil the obligation to prosecute and convict but also failure to fulfil the obligation to *prevent* domestic violence.<sup>318</sup>

The Commission's reasoning on the obligation to prevent domestic violence is, in my opinion, the most important aspect of this case. It is argued that state behaviour has an effect on the occurrence of domestic violence in society in that it maintains the societal attitudes that encourage domestic violence. However, the reasoning is also limited to the behaviour of the judicial authorities and the state machinery, an obligation to address the root causes of domestic violence, such as structural inequality, is not included under the Commission's interpretation of the obligation to prevent domestic violence.<sup>319</sup> Furthermore, the recommendations in this case were limited to improving the criminal justice system's response to domestic violence,<sup>320</sup> arguably important, yet not connected to gender inequality issues in society. Notably, Brazil enacted a new law on domestic violence in 2006, known as the *Maria da Penha Law*, after the attention this case brought to the deficiencies in both law and practice.<sup>321</sup>

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<sup>316</sup> See section 6.1 for an explanation of these articles. 7(b) is the obligation to exercise due diligence.

<sup>317</sup> Article 4(a), (b), (c), (e), (d), (f) and (g) of the Convention of Belém do Pará.

<sup>318</sup> *Maria da Penha Maia Fernandes v. Brazil*, *supra* note 309, paras. 55-56 and 58.

<sup>319</sup> This is in line with Article 8(b) being more an obligation to 'progressively' realise a right, as opposed to an obligation that can be violated, compare with Article 5(a) CEDAW and *Ms. A. T. v. Hungary*, *supra* note 233, sections 5.1.1 and 5.2.1.

<sup>320</sup> *Maria da Penha Maia Fernandes v. Brazil*, *supra* note 309, para. 61.

<sup>321</sup> IACHR, Press Release no. 30/60, 'The IACHR Rapporteurship on the Rights of Women Celebrates the Adoption in Brazil of a Specific Law to Prevent and Eradicate Domestic Violence and Family Violence', 11 August 2006, <[www.cidh.org/comunicados/english/2006/30.06eng.htm](http://www.cidh.org/comunicados/english/2006/30.06eng.htm)>, accessed 2012-05-05.

## 6.2 The protocol to the African Charter on Human and Peoples' Rights on the Human Rights of Women

The protocol to the African Charter on Human and Peoples' Rights on the Human Rights of Women (the African Protocol or the Protocol) was adopted in 2003 and entered into force in 2005. As of 2012, 32 countries have ratified the Protocol.<sup>322</sup> The Protocol is a woman's rights treaty and as such is not concerned exclusively with violence against women. Article 1(j) of the protocol defines violence against women as:

*“all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war.”*

Under Article 3, the right to dignity, state parties have an obligation to adopt and implement measures that protect women's right to respect for her dignity and protect her from all forms of violence. The second paragraph of Article 4, which stipulates the right to life, integrity and security of person, contains a list of measures state parties shall take that is quite similar to General Recommendation no. 19, DEVAW and the Convention of Belém do Pará. State parties shall, *inter alia*:

- (a) enact and enforce laws that prohibit all forms of violence against women, whether the violence takes place in private or public,
- (b) adopt legal, administrative, social and economic measures that are necessary to ensure the prevention, punishment and eradication of all forms of violence against women,
- (c) identify the causes and consequences of violence against women and take measures to prevent it,
- (d) through the use of social communication, eradicate traditional and cultural beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women,
- (e) punish the perpetrators of violence against women, and
- (f) establish mechanisms for *inter alia* effective rehabilitation and reparation for victims of violence against women.

Firstly, from this list follows that the Protocol has the potential to address domestic violence (“all forms of violence against women,” “in private” as well as the Protocol's comprehensive definition of violence against women). Secondly, although it does not mention the due diligence standard, the Protocol provides that women are entitled to protection against violence (Article 3), and states must prevent violence against women, punish perpetrators and provide reparations to victims, which essentially are the

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<sup>322</sup> African Union website, <[au.int/en/sites/default/files/Rights%20of%20Women.pdf](http://au.int/en/sites/default/files/Rights%20of%20Women.pdf)>, accessed 2012-04-23.

elements of the due diligence standard. Unfortunately, the implementation of the Protocol is monitored by a reporting mechanism in Article 26, under which states must indicate the measures they have taken in their periodic reports to the African Commission on Human Rights. In order to allow individual complaints regarding violations of the protocol, state parties must declare that they accept the competence of the Court to receive such complaints.<sup>323</sup> To my knowledge, no state party has made such a declaration. Lastly, the newly established African Court of Human and Peoples' Rights has the competence to consider the Protocol in its judgements;<sup>324</sup> however, to my knowledge this is yet to occur.

### **6.3 The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence**

The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Council of Europe Convention or the Convention) was adopted on 7 April 2011 by the Council of Europe Committee of Ministers, and as of April 2012, it has been signed by 18 countries and ratified by one country. The Convention is yet to enter into force;<sup>325</sup> therefore, I will only present a very brief presentation of the Convention.

The preamble of the Convention makes some key statements; “the realisation of *de jure* and *de facto* equality between men and women is a key element in the prevention of violence against women” and that “violence against women is a manifestation of historically unequal power relations between men and women.” The Convention applies to all forms of violence against women, including domestic violence, Article 2.1., which it defines as “all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners”, Article 3(b). According to Article 5.2, state parties are obligated to “take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors.” Regarding the investigation and prosecution of physical and sexual violence committed against a victim, the Convention states that it “shall not be wholly dependent upon a report or complaint filed by a victim

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<sup>323</sup> Pambazuka News 222, *The Protocol to the African Charter on Human and Peoples' Rights on Women's Rights in Africa – From Ratification to Realisation of African Women's Human Rights*, 2005, <[www.pambazuka.org/en/publications/pz\\_soawr.pdf](http://www.pambazuka.org/en/publications/pz_soawr.pdf)>, accessed 2012-04-23.

<sup>324</sup> Article 7 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

<sup>325</sup> The Convention will enter into force following the tenth ratification, whereof eight must be from member states of the Council of Europe, Article 75 of the Convention.

... and that the proceedings may continue even if the victim withdraws her or his statement or complaint”, Articles 35, 36 and 55.1.

The Convention elaborates extensively on the various aspects of the obligation to exercise due diligence and when it enters into force it may be the most comprehensive convention on violence against women. However, the monitoring mechanism chosen for the Convention is a reports-based procedure<sup>326</sup> and this does not offer the same level of human rights protection as an individual complaint procedure.

A precursor to the Convention is the Council of Europe’s *Recommendation Rec(2002)5 of the Committee of Ministers to member states on the protection of women against violence*. The recommendation referred to the state obligation to exercise due diligence in regards to violence against women. As to prosecution, paragraphs 38 and 39 provide that member states should ensure that all victims of violence can institute proceedings and make provisions to ensure that criminal proceedings can be initiated by the public prosecutor. When deciding whether or not to prosecute in the public interest, paragraph 40 encourages the prosecuting authorities to regard violence against women and children as a decisive or aggravating factor.

## **6.4 The European Convention on Human Rights and case law from the European Court of Human Rights**

In this section, I will exemplify how the ECtHR (the Court) has framed domestic violence as a human rights issue under the concept of positive obligations by presenting some of its case law on the subject. The ECHR is a legally binding convention and all member states of the Council of Europe (47 as of 2012)<sup>327</sup> are bound by the ECHR and have accepted the individual right of application to the Court and of a completely judicial system for the protection of human rights. The judgements are legally binding and the Court can declare that the facts of a case reveal a violation of one or more of the articles under the ECHR.<sup>328</sup>

### **6.4.1 The right to private life**

Article 8.1 of the ECHR provides that “everyone has the right to respect for his private and family life, his home and his correspondence.” Through the case law of the Court, a tendency has developed where the Court distinguishes between the protection of the right to private life and the protection of the right to family life of the Article. Domestic violence has been discussed under the right to respect for private life, and more

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<sup>326</sup> See Articles 66-69 of the Convention.

<sup>327</sup> Council of Europe website, <[www.coe.int/](http://www.coe.int/)>, accessed 2012-05-05.

<sup>328</sup> White and Ovey, *supra* note 208, pp. 7 and 20.

specifically, under the right to be free from interference with one's physical and psychological integrity.<sup>329</sup>

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

In *Bevacqua and S v. Bulgaria*,<sup>330</sup> the applicants were a mother and her son. The mother (the first applicant) had left the home and sought divorce and an interim custody order of her son because of the abuse she had suffered at the hands of her husband, Mr N., during their marriage.<sup>331</sup> Parts of the case involved state failure to respond adequately to the interim custody order without delay;<sup>332</sup> however, this will not be discussed as the issue relevant for this thesis is first applicant's protection against violence from her husband. Subsequent to leaving Mr N., the first applicant was assaulted by him in front of her son and parents, during an incident where he came to her home to take their son away with him. She visited a medical examiner and filed a complaint with the district prosecutor's office. At two later occasions, the first applicant was again assaulted by Mr N.<sup>333</sup> and the assaults caused injuries that were classified under the Bulgarian penal code as 'light bodily injuries'. The Bulgarian courts have held that facial bruises, a broken nose and head contusions without loss of consciousness are examples of light bodily injuries. Criminal proceedings involving medium and light bodily injuries wilfully inflicted by a close family member could only be instituted by the victim and under the Bulgarian code of criminal procedure it is required that the victim act as private prosecutor.<sup>334</sup>

The applicants submitted that the requirement to act as private prosecutor violated Articles 3, 8, 13 and 14 of the ECHR as it was incompatible with the State's duty to provide protection against domestic violence. It was argued that Bulgarian legislation trivialised domestic violence and by treating it as a private matter, the legislation did not ensure that victims of domestic violence would be able to institute proceedings. The applicants argued that victims of domestic violence were often in a vulnerable position, and the first applicant could not be expected to act as prosecutor and investigator because she risked a violent reaction by her husband. The framework's shortcomings disproportionately affected women and thus they were discriminatory under Article 14.<sup>335</sup>

According to the Court, the abuse perpetrated by the first applicant's husband concerned her physical integrity and well-being, thus bringing it within the scope of Article 8.<sup>336</sup> The court did not consider applying the other articles to the case and refrained from commenting on if the legislation affected women disproportionately and thus could be discrimination under

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<sup>329</sup> *Ibid.*, p. 355-357.

<sup>330</sup> *Bevacqua and S v. Bulgaria*, 12 June 2008, European Court of Human Rights, no. 71127/01.

<sup>331</sup> *Ibid.*, paras. 5-7.

<sup>332</sup> *See ibid.*, paras. 68-76 for the Court's reasoning regarding this issue.

<sup>333</sup> *Ibid.*, paras. 13-14, 22 and 38.

<sup>334</sup> *Ibid.*, paras. 44-46.

<sup>335</sup> *Ibid.*, para. 63.

<sup>336</sup> *Ibid.*, paras. 77-79.

Article 14. The Court reiterated that the positive obligations under Article 8 may involve the adoption of measures in the sphere of the relations of individuals between themselves, and they may include implementing an adequate legal framework that effectively affords protection against the violent acts of others. In particular, children and vulnerable individuals are entitled to effective protection and the Court noted how numerous international human rights instruments and case law from treaty bodies have called for active state involvement due to the vulnerability of victims of domestic violence.<sup>337</sup>

However, the Court refrained from stating that the Convention required state-assisted prosecution in all cases of domestic violence and avoided making a general statement regarding the Bulgarian legislation. Notably, the Court stated that it could not exclude that, under certain circumstances, the legislation could raise incompatibility issues with the Convention. The reasoning behind this position is that the Court's task is limited to the examination of the particular facts of the case as the Court's role is not to replace national authorities and choose which measures to apply to secure an individual's right to private life, in principle this falls within the domestic authorities' margin of appreciation.<sup>338</sup> In the present case, the Court considered that the first applicant's possibility to bring private prosecution proceedings was insufficient as "such proceedings obviously required time and could not serve to prevent recurrence of the incidents complained of."<sup>339</sup> Furthermore, the Court noted that at that time, there were no specific administrative and policing measures available under Bulgarian law regarding domestic violence, and the measures that were taken, *i.e.*, a police warning and an attempt to reach an informal agreement regarding the custody of the son, were ineffective. Furthermore, the authorities' failure to, *inter alia*, impose sanctions against Mr N. amounted to a refusal to provide the applicant's with the necessary assistance. Importantly, the Court stated "[t]he authorities' view that no such assistance was due as the dispute concerned a "private matter" was incompatible with their positive obligations to secure the enjoyment of the applicants' Article 8 rights."<sup>340</sup>

The Court found a violation of Article 8 based on cumulative effects of the failure to promptly adopt interim custody measures concerning the second applicant, as well as the lack of administrative and policing measures in Bulgaria regarding the first applicant's complaints about her husband's abuse.<sup>341</sup>

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<sup>337</sup> *Ibid.*, para. 64-65.

<sup>338</sup> *Ibid.*, para. 82.

<sup>339</sup> *Ibid.*, para. 83.

<sup>340</sup> *Ibid.*, paras. 80 and 83.

<sup>341</sup> *Ibid.*, para. 84.

### 6.4.1.2 Hajduová v. Slovakia

In the case of *Hajduová v. Slovakia*,<sup>342</sup> the question was if threats of violence, which had not yet materialised into concrete acts of violence, could raise positive obligations under Article 8. In 2001, the applicant had been verbally and physically attacked by A., her husband at the time. A. was convicted of the crime and sentenced to psychiatric treatment as he suffered from a severe personality disorder. The hospital failed to carry out the required treatment, the district court failed to order it to carry out the treatment, even though they were under a statutory obligation to do so, and A. was released after having spent one week in a psychiatric hospital without treatment. After his release, A. threatened the applicant again and she filed a new criminal complaint against him. One week later the applicant was threatened yet again and only then was A. arrested by the police. One month later A. was transported to a hospital to undergo the necessary psychiatric treatment.<sup>343</sup>

Even though the threats had not yet materialised into concrete acts of violence, the Court found a violation under Article 8. The Court reasoned that given A.'s past violent behaviour towards the applicant, threats from A. were enough to affect the applicant's psychological integrity and well-being thus warranting an assessment of state compliance of the positive obligations under Article 8. Firstly, the Court held that A.'s conviction for a violent crime, together with his substantiated need of psychiatric treatment, were enough to establish that the authorities should have known of the danger of future violence and threats against the applicant. Secondly, the Court stated that the authorities should have been extra vigilant given the particular vulnerability of victims of domestic violence, which the Court has highlighted in other cases. Therefore, the lack of sufficient measures taken by the authorities constituted a violation of the state's positive obligations under Article 8 to ensure the respect for the applicant's private life.<sup>344</sup>

### 6.4.2 The right to life and the right to be free from inhuman or degrading treatment

Concerning Article 2 of the ECHR, the right to life, the Court has in the case of *Osman v. United Kingdom*<sup>345</sup> assessed whether a state had fulfilled its positive obligations to secure the practical and effective protection under said article. According to the Court, states' positive obligations may include an obligation to "take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual."<sup>346</sup> Considering the difficulties in policing modern society, the

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<sup>342</sup> *Hajduová v. Slovakia*, 30 November 2010, European Court of Human Rights, no. 2660/03.

<sup>343</sup> *Ibid.*, paras. 6-13.

<sup>344</sup> *Ibid.*, paras. 49-52.

<sup>345</sup> *Osman v. United Kingdom*, 28 October 1998, European Court of Human Rights, no. 23452/94. In the case, the applicants' husband and father had been shot and killed by stalker.

<sup>346</sup> *Ibid.*, para. 115.

unpredictability of human conduct, and the availability of resources and issues of priorities, the obligation does not impose an impossible or disproportionate burden on the state. Thus, not every risk to the life of an individual will entail a duty to take preventive operational measures. The scope of the obligation depends on the circumstances of the particular case and assessment is a two-part test. In order for responsibility to arise, first, government authorities must have known or ought to have known about the real and immediate risk to an individual's life. Second, they must have failed to "take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."<sup>347</sup>

Article 3 of the ECHR provides a prohibition against torture, inhuman or degrading treatment and punishment. For ill-treatment to be considered "inhuman or degrading treatment," the treatment must reach a minimum level of severity.<sup>348</sup> According to the Court's case law, the positive obligations under said article require state parties to take measures designed to ensure that individuals under their jurisdiction are not subjected to ill-treatment by private persons.<sup>349</sup> In addition, the Court has argued that children and other vulnerable individuals are entitled to state protection in the form of effective deterrence against violence that seriously breaches their personal integrity.<sup>350</sup>

Below follows a landmark case concerning domestic violence in which the Court found violations of Articles 2 and 3 of the ECHR. The case below also found a violation of Article 14, the right to be free from discrimination on the grounds of sex. For this article to be applicable, the allegation of discrimination must fall within the scope of one of the substantive articles of the Convention.

#### **6.4.2.1 Opuz v. Turkey**

In the case of *Opuz v. Turkey*,<sup>351</sup> the applicant was a woman who, along with her mother, had suffered several years of physical abuse and death threats from the applicant's husband at the time, H.O. The facts of the case revealed that the Turkish authorities were, on at least seven occasions, aware of multiple incidences of assault and/or threats against the applicant and/or her mother, beginning in April 1995 and culminating with H.O.'s fatal shooting of the applicant's mother in March of 2002. The incidences showed a pattern in which the applicant and/or her mother would report the abuse and/or threats to the public prosecutor and later withdraw their complaints, which under Turkish legislation removed the basis for proceedings, causing the cases to be dropped.<sup>352</sup> In 1998, new legislation was introduced, *The Family Protection Act*, which aimed to provide

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<sup>347</sup> *Ibid.*, para. 116.

<sup>348</sup> White and Ovey, *supra* note 208, p. 168.

<sup>349</sup> *Ibid.*, pp. 175-176, citing the case of *Moldovan and others v. Romania*, 12 July 2005, European Court of Human Rights, nos. 41138/98 and 64320/01 at para. 98.

<sup>350</sup> White and Ovey, *supra* note 208, p. 176, citing the case of *A v. United Kingdom*, 23 September 1998, European Court of Human Rights, no. 25599/94 at paras. 22-24.

<sup>351</sup> *Opuz v. Turkey*, 9 June 2009, European Court of Human Rights, no. 33401/02.

<sup>352</sup> *Ibid.*, paras. 9-54.

protection for victims of domestic violence through the issuance of protection orders.<sup>353</sup>

In 1996, the applicant reported that H.O. had beaten her badly during an argument, resulting in injuries that, according to the medical report, were sufficient to endanger her life. H.O. was remanded in custody and at the initial hearing a month later, the applicant repeated her complaint. However, H.O. was then released pending trial and at the subsequent hearing, the applicant withdrew her complaint stating that the couple had reconciled and the case was dismissed.<sup>354</sup> Two years later, H.O. ran his car into the applicant and her mother after they had refused to get into the car with him, resulting in life-threatening injuries for the applicant's mother. The applicant brought divorce proceedings against H.O. but later dropped them because of threats and pressure from her husband. Several months later at the hearing, the applicant and her mother withdrew their complaints and the case was dismissed in respects to the offence committed against the applicant. However, since the applicant's mother's injuries were more serious, H.O. was sentenced to three months' imprisonment and a fine for the offence against her, although the imprisonment sentence was later commuted to a fine.<sup>355</sup> Three years later, H.O. stabbed the applicant with a knife seven times following a dispute between the couple. According to the medical report, the injuries were not life-threatening. The same day as the assault, H.O. turned himself in to the police who confiscated his knife. After his statement was taken, H.O. was released. Several months later, after considerable efforts from the applicant's lawyer to persuade the prosecutor to press charges of knife assault, H.O. was found guilty and sentenced to pay a fine.<sup>356</sup>

Starting in November of 2001, the applicant's mother filed several complaints that H.O. made death threats against her and the applicant. The authorities took statements from H.O., in which he denied the allegations and claimed his mother-in-law was living an immoral life and was trying to keep his wife away from him, and the authorities charged him with making death threats.<sup>357</sup> However, he was not remanded in custody and in March of 2002, H.O. shot and killed the applicant's mother during an attempt to move the applicant's furniture out of H.O.'s home. H.O. made a statement in which he claimed he had killed the applicant's mother because she lived an immoral life, induced the applicant to live an immoral life and that she tried to take the applicant and their children away from him. Thus, he had shot her for the sake of his honour and children. Six years later, H.O. was convicted of murder and illegal possession of a firearm. His sentence was reduced from life imprisonment to 15 years and 10 months imprisonment plus a fine. His sentence was reduced because his crime was considered to have been committed after provocation by the deceased and he had

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<sup>353</sup> *Ibid.*, para. 70.

<sup>354</sup> *Ibid.*, paras. 13-19.

<sup>355</sup> *Ibid.*, paras. 23-36.

<sup>356</sup> *Ibid.*, paras. 37-44.

<sup>357</sup> *Ibid.*, paras. 47-52.

conducted himself well during the trial. H.O. appealed against the judgement and was released because of the time he had spent in pre-trial detention. At the time of the ECtHR's examination of the applicant's case, the appeal proceedings were still pending and the applicant had filed a criminal complaint with the police regarding death threats H.O. had made against her and her new boyfriend after his release. The applicant had asked the authorities to take measures to protect her life; however, it was not until the ECtHR intervened, asking the government to inform them of the measures they had taken, that the authorities took special measures to protect the applicant from her former husband.<sup>358</sup>

The applicant claimed that the authorities had failed to safeguard the right to life of the applicant's mother under Article 2, and her right to be free from torture and ill-treatment under Article 3. Furthermore, the inadequate responses by the authorities were a result of gender-based discrimination and thus a violation of the prohibition of discrimination under Article 14 read in conjunction with Articles 2 and 3.<sup>359</sup> The Government contested the admissibility of the application and maintained that the applicant had failed to exhaust domestic remedies,<sup>360</sup> as she and her mother had withdrawn their complaints on numerous occasions, and thus preventing the criminal proceedings against H.O. from continuing. Furthermore, the applicant had not made use of the protection available to her under *the Family Protection Act*. The Court considered these questions to be "inextricably linked to the question of the effectiveness of the domestic remedies in providing sufficient safeguards for the applicant and her mother against domestic violence" and joined them to the consideration of the merits.<sup>361</sup>

As to the alleged violation of the mother's right to life under Article 2, the Court first reiterated the already established positive obligations under said Article, to, under certain circumstances, take preventive operational measures to protect the life of an individual from the criminal acts of others.<sup>362</sup> However, as the Court examined international law material in connection to the case,<sup>363</sup> it decided to depart from its previous two-part test<sup>364</sup> and incorporate the due diligence standard to determine whether the state party had failed under its positive obligations.<sup>365</sup>

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<sup>358</sup> *Ibid.*, paras. 53-69.

<sup>359</sup> *Ibid.*, paras. 118, 154 and 177-179.

<sup>360</sup> According to Article 35.1 of the ECHR, the ECtHR may only deal with a matter after all domestic remedies have been exhausted. This obligation on the applicant refers to remedies that are sufficient to afford redress in respect of the alleged violations, *i.e.* they must be available and effective. White and Ovey, *supra* note 208, p. 34.

<sup>361</sup> *Opuz v. Turkey*, *supra* note 351, paras. 114-116.

<sup>362</sup> *Ibid.*, paras. 128-129. These obligations were established in *Osman v. United Kingdom*, *see* section 6.4.2 above.

<sup>363</sup> The Court consulted inter alia CEDAW, General Recommendation no. 19, DEVAW, the SRVAW's report from 2006, the Council of Europe Committee of Ministers Rec(2002)5 on the protection of women against violence, the Convention of Belém do Para and *Maria da Penha Maia Fernandes v. Brazil*, *Opuz v. Turkey*, *supra* note 351, paras. 72-86.

<sup>364</sup> *See* section 6.4.2 above on *Osman v. United Kingdom*.

<sup>365</sup> *Opuz v. Turkey*, *supra* note 351, para. 131. Here my interpretation of the Court's reasoning, *i.e.* how it departs from the standard used in *Osman v. United Kingdom*, is based

The Court began by assessing whether the authorities could have foreseen a lethal attack by H.O. and reasoned that the facts of the case showed an obvious pattern of domestic violence, and that there was a significant risk of further violence. In addition, the Court argued that the crimes by H.O. were serious enough to warrant preventive measures, and that the authorities were undoubtedly aware of the victims' situations. Consequently, the Court found that the authorities could have foreseen a lethal attack by H.O.<sup>366</sup> The Court went on to assess whether the authorities had responded with due diligence to prevent the murder of the applicant's mother. The Turkish government had argued that to proceed with prosecution once a victim withdraws her complaint would breach the victim's Article 8 rights, as an attempt to separate the applicant and her husband would interfere with the applicant's right to family life. The Court began by considering the comparative law material regarding the state practice of member states of the Council of Europe and concluded that there does not seem to be a general consensus regarding the pursuance of prosecution of perpetrators of domestic violence when the victim withdraws her complaint. Nonetheless, the Court noted that many states acknowledged the obligation to strike a balance between the rights a victim has under Articles 2 or 3 and the rights under Article 8. The Court listed several factors from the practice of some states that can be considered while deciding whether to prosecute, they included: the seriousness of the crime; whether the injuries were physical or psychological; if the perpetrator used a weapon; if the perpetrator continued to make threats after the attack; whether the attack was planned or not; the effect on children living in the household; the current state of the victim's relationship with the defendant; the effect on that relationship of continuing with the prosecution against the victim's wishes; the history of violence in the relationship and the perpetrator's criminal history, particularly past violence.<sup>367</sup>

From this followed that "the more serious the offence or the greater risk of further offences, the more likely that the prosecution should continue in the public interest, even if the victims withdraw their complaints."<sup>368</sup> According to the Court, the authorities had not sufficiently considered the factors above. In fact, the Turkish authorities had refrained from interfering because they considered the situation a 'family matter'. In addition, the authorities had failed to consider why the applicant and her mother had withdrawn their complaints, despite hearing from the applicant's mother that she and her daughter had withdrawn their complaints because of death threats by H.O. Due to the seriousness of the risk to the applicant's mother, the Court considered that an interference into her rights under Article 8 would have been justified. Thus, the authorities had failed to strike a balance between

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on the observations made by Meyersfeld B., 'Opuz v. Turkey: Confirming the State Obligation to Combat Violence against Women', 5 *European Human Rights Law Review* (2009), pp. 685-686.

<sup>366</sup> *Opuz v. Turkey*, *supra* note 351, paras. 133-136.

<sup>367</sup> *Ibid.*, paras. 137-138.

<sup>368</sup> *Ibid.*, para. 139.

the competing rights and the failure to pursue prosecution; in essence, had “deprived the mother of the protection of her life and safety.”<sup>369</sup> The Court went quite far into the state’s margin of appreciation and stated:

“the legislative framework then in force ... fell short of the requirements inherent in the State’s positive obligations to establish and apply effectively a system punishing all forms of domestic violence and providing sufficient safeguards for the victims. The Court thus considers that, bearing in mind the seriousness of the crimes committed by H.O. in the past, the prosecuting authorities should have been able to pursue the proceedings as a matter of public interest, regardless of the victims’ withdrawal of complaints.”<sup>370</sup>

The Court reasoned that the deficient legislative framework, together with the fact that the authorities had failed to take protective measures, such as a protection order, showed that the authorities had failed to exercise due diligence and therefore had failed in their positive obligation to protect the life of the mother under Article 2. Importantly, the Court argued that the victim’s attitude could not preclude the state’s responsibility once the situation was brought to their attention.<sup>371</sup>

As to the alleged violation of Article 3, the right to be free from inhuman and degrading treatment, the Court found that the violence the applicant had suffered was sufficiently serious to amount to ill-treatment under the Article. Furthermore, due to the past violence, the threats by H.O. after his release, her fear of future violence and the vulnerable position of women in southeast Turkey, the applicant fell under the ‘vulnerable individuals’ category.<sup>372</sup> Therefore, the state had a positive obligation to take all reasonable measures to prevent further violent attacks against the applicant.<sup>373</sup> The Court argued that although the authorities had not remained completely passive, the measures that had been taken, *inter alia* detention and the imposition of a fine when H.O. had stabbed the application, were not sufficient to stop H.O. from committing further acts of violence and it cannot be said that the authorities displayed the required *diligence*. Moreover, H.O. enjoyed impunity for most of his crimes due to the deficiencies of the legislative framework.<sup>374</sup> The Court found that the authorities’ response to the husband’s conduct was “manifestly inadequate to the gravity of the offences in question ... It therefore observes that the judicial decisions in this case reveal a lack of efficacy and a certain degree of tolerance.”<sup>375</sup> Regarding the government’s assertion that the applicant could have requested a protection order pursuant to *the Family Protection Act*, the Court held that the authorities should have applied those measures without a specific request by the applicant given the overall amount of violence perpetrated by H.O. The Court concluded that the state’s failure to

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<sup>369</sup> *Ibid.*, paras. 143-145.

<sup>370</sup> *Ibid.*, para. 145.

<sup>371</sup> *Ibid.*, para. 152.

<sup>372</sup> See section 6.4.2 above.

<sup>373</sup> *Opuz v. Turkey*, *supra* note 351, paras. 160-162.

<sup>374</sup> *Ibid.*, paras. 166-169.

<sup>375</sup> *Ibid.*, para. 170.

take adequate measures to protect the applicant from the breaches to her personal integrity at the hands of her husband was a violation of Article 3.<sup>376</sup>

As to the complaint under Article 14 (the right to be free from discrimination) in conjunction with Articles 2 and 3, the Court began by examining other international law material on the meaning of discrimination in the context of domestic violence.<sup>377</sup> From these materials, the Court concluded that violence against women, including domestic violence is a form of discrimination against women and “the State’s failure to protect women against domestic violence breaches their right to equal protection of the law and that this failure does not need to be intentional.”<sup>378</sup> In this case, the Court applied this reasoning and noted that the Turkish legislation did not specifically differentiate between men and women; however, women were found to be disproportionately disadvantaged due to the application of the legislation. Statistics showed that domestic violence mainly affected women and due to, *inter alia*, the authorities’ lack of interference as domestic violence was considered a family matter, and that courts mitigated the sentences on the grounds of tradition and honour, the Court noted “that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence.”<sup>379</sup> After finding that the applicant had fulfilled the requirement to show the existence of a *prima facie* indication of discrimination,<sup>380</sup> the Court went on to consider if the applicant and her mother had been discriminated against due to the authorities’ failure to provide equal protection of the law. The Court found a violation of Article 14 in conjunction with Articles 2 and 3, as the general and discriminatory judicial passivity mainly affected women and the violence that the applicant and her mother had suffered constituted gender-based violence, which is a form of discrimination.<sup>381</sup>

### 6.4.3 What obligations can be derived from these cases?

These cases clearly show that the ECHR’s application to domestic violence is limited to a positive obligation to respond to a situation and take protective measures once the authorities know or should have known about the threat to a woman’s safety. The protective measures needed have

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<sup>376</sup> *Ibid.*, paras. 171 and 176.

<sup>377</sup> The Court examined *inter alia* CEDAW, General Recommendation no 19, the Convention of Belém do Pará and the case of *Maria da Penha Maia Fernandes v. Brazil*, *Opuz v. Turkey*, *supra* note 351, paras. 184-190.

<sup>378</sup> *Ibid.*, para. 191.

<sup>379</sup> *Ibid.*, paras. 192-198.

<sup>380</sup> The Court applies a burden of proof where the applicant must show that there has been a difference in treatment (*prima facie*), if that is established it is then the respondent state’s responsibility to show that the difference in treatment can be justified, White and Ovey, *supra* note 208, p. 566. In the present case, the applicant submitted reports and statistics from two NGO’s regarding domestic violence in Turkey and the Court also consulted Concluding Comments from the CEDAW Committee regarding the situation in Turkey, *Opuz v. Turkey*, *supra* note 351, paras. 193-197.

<sup>381</sup> *Opuz v. Turkey*, *supra* note 351, paras. 200 and 202.

vaguely been referred to as ‘administrative and policing measures’, which seem to mainly constitute protection orders. The issue of legislation, which is at the core of this thesis, is also addressed mainly under the obligation to protect; however, in a case where explicit reference to the due diligence standard is made.

In *Bevacqua and S v. Bulgaria*, the Court did not consider ‘private prosecution’ a remedy that can protect a victim of domestic violence from further abuse. However, the Court refrained from stating an obligation, under the Convention, to provide state-assisted prosecution in all cases of domestic violence, as to not overstep the margin of appreciation states have when deciding how to fulfil their obligations. The Court decided this case based largely on the failure to provide protective measures. In my opinion, there is a stark contrast between discretionary prosecution policies, under which the victim’s complaint is a prerequisite for prosecution, and policies that require the victim to act as private prosecutor. Both are problematic; however, the latter even more so and the Court failed to make a general comment on this issue. Nonetheless, the case rightfully affirms that justifying non-intervention on account of domestic violence being a ‘private matter’ is not compatible with the Convention.

It is my opinion that the due diligence standard, with the obligation to investigate and punish acts of violence, might have forced the Court to reconsider its position on state-assisted prosecution, had it been applied to this case. However, Hasselbacher writes that the due diligence standard was applied.<sup>382</sup> I disagree with her opinion, although the text of the case mentions the due diligence standard when considering relevant international material; in my opinion, the reasoning of the Court is based entirely on the application of positive obligations.<sup>383</sup> This leads to a question regarding positive obligations and the due diligence standard, are they essentially the same? Authors such as Hasselbacher appear to take this approach; Edwards has argued that the ECtHR has applied the due diligence standard in *M.C. v. Bulgaria*<sup>384</sup> and in *Osman v. United Kingdom*.<sup>385</sup> Then again, Meyersfeld has emphasised how the Court departed from the previous two-part test in the *Osman v. United Kingdom* and adopted the due diligence standard in the *Opuz v. Turkey* case.<sup>386</sup> My reasoning is that the Court applies the standard more as a *secondary* obligation, to measure if a state complies with the

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<sup>382</sup> Hasselbacher L., ‘State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, and International Legal Minimums of Protection’, 8:2 *Northwestern Journal of International Human Rights* (2010), p. 203.

<sup>383</sup> See *Bevacqua and S v. Bulgaria*, *supra* note 330, paras. 52-53 and 77-84.

<sup>384</sup> *M.C. v. Bulgaria*, 4 December 2003, European Court of Human Rights, no. 39272/98. This case does not make any explicit reference to the due diligence standard. It should however be noted that in the context of international human rights law’s ability to affect the domestic state legislation, this case established that the positive obligations under Articles 3 and 8 of the ECHR require “the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim,” para. 166.

<sup>385</sup> Edwards, *supra* note 201, pp. 241-242.

<sup>386</sup> Meyersfeld, *supra* note 365, pp. 685-686.

*primary* positive obligations it has to protect the rights of the Convention. In this sense, the standard is a tool, a yardstick to measure the actions states take under their positive obligations;<sup>387</sup> therefore, they are connected but not the same. If this were a valid reasoning, it would explain the discrepancy when the ECtHR navigates the due diligence standard, in contrast with the IACHR, which can refer to the explicit due diligence obligation in Article 7(b) of the Convention of Belém do Pará. Yet, another question is: should one make a differentiation between positive obligations and the due diligence standard? Does it matter? Perhaps I am focusing too much on literal interpretations, as Bourke-Martignoni has noted:

“[w]hether we call it due diligence, the implementation of positive obligations or something else entirely, it is established that states ... have responsibilities to ensure that violence against women is effectively prevented and responded to in accordance with international human rights law.”<sup>388</sup>

Nonetheless, I find these questions problematic in terms of understanding and identifying the obligations states have under international human rights law regarding violence against women and I am not in a position to resolve these questions in this thesis.

In *Opuz v. Turkey* the ECtHR explicitly refers to the due diligence standard in its reasoning on the positive obligations states have under the ECHR. The most important aspect of this case is that the Court departed from its position in *Bevacqua and S v. Bulgaria*, and dived into the margin of appreciation concerning domestic legislation. As Meyerfeld has noted, this is a welcome change as “it is at this level of detail that law and policy most often fail domestic violence victims.”<sup>389</sup> The case itself showed not only inadequate implementation of the law but a deficient legislative framework. From the Court’s reasoning, it is clear that states will breach their positive obligation to protect women from violence if the legislation does not *enable* prosecution in the public interest, regardless of the victim’s withdrawal of complaint. Noteworthy is that the Court does not specifically discuss this issue under the obligation to investigate and punish acts of violence within the due diligence standard, this is an example of the discrepancy noted above in the ECtHR’s application of the due diligence standard.

At first glance, it appears that the Court advocates mandatory prosecution policies. The Court argues that under the positive obligations, states are required to “establish and apply effectively a system punishing all forms of domestic violence.”<sup>390</sup> However, this does not seem to be the case as the Court considers the argument of the state party: proceeding with prosecution against the victim’s wishes interferes with her Article 8 rights, and the Court holds that states must strike a balance between those rights and the victim’s

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<sup>387</sup> This is in line with the argumentation by Benninger-Budel, *see* section 4.4.

<sup>388</sup> Bourke-Martignoni, *supra* note 209, p. 60.

<sup>389</sup> Meyersfeld, *supra* note 365, p. 687.

<sup>390</sup> *Opuz v. Turkey*, *supra* note 351, para. 145, also cited in section 6.4.2.1.

rights under Articles 2 and 3.<sup>391</sup> Generally, the more serious the violence is or the greater the risk is for further violence, the more likely prosecution should continue in the public interest. However, I believe a cause of concern is the Court's failure to specify *which* Article 8 right the interference may violate. The state party argued that if the authorities were to separate the applicant from her husband it would violate her right to family life. In my opinion, this is an antiquated view of valuing the unbreakable notion of family at the expense of the woman's well-being. The point of departure should have been the woman's right to respect for her private life, and perhaps the right to psychological integrity should she feel prosecution served to further harm her well-being by disregarding her agency and autonomy. It is not possible to ascertain the Court's views in relation to these issues. Lastly, it must be acknowledged that the ECtHR routinely considers the state practice of member states and searches for a consensus on the issue at hand.<sup>392</sup> Therefore, had the practice of the member states been predominately mandatory prosecution policies,<sup>393</sup> I think it is likely that the Court's reasoning would have been different.

Although the Court applied the due diligence standard in *Opuz v. Turkey*, the Court did not elaborate on the standard's obligation to prevent the *general* occurrence of domestic violence in society. Despite important statements on how the Turkish authorities' failure to intervene created a climate that was conducive to domestic violence and that it breached a woman's right to equal protection by the law and constituted discrimination, an express acknowledgment on the state's obligation to prevent domestic violence in general would have been welcome. Furthermore, I find the reasoning of the Court concerning discrimination under Article 14 of the ECHR to be limited. The state has an obligation to respond to domestic violence as it does to any other crime, it does not extend an obligation to address the structural inequality and discrimination in society that maintains and exacerbates domestic violence. Again, this could be due to the discrepancy the ECtHR shows when applying the due diligence standard; the Court does not seem to apply all the elements of the standard. However, it is likely that the ECHR is inherently limited as it was not from the outset envisaged to deal with violence against women and gender equality. These topics are outside the scope of the Convention. In my opinion, this indicates that women's realities and experiences are still marginalised in the European human rights context, perhaps more so than in the Inter-American context. The Council of Europe Convention may work towards filling this gap when it enters into force. Although this has no bearing on the argument, it is

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<sup>391</sup> Meyersfeld has made this observation, noting that the ECtHR was sensitive to the causes of concern associated with mandatory prosecution policies, Meyersfeld, *supra* note 365, pp. 686-687.

<sup>392</sup> White and Ovey, *supra* note 208, pp. 328-329.

<sup>393</sup> In 11 member states the prosecution policies stipulate mandatory prosecution against the victim's wishes, in 27 member states the authorities have varying discretion in deciding whether to prosecute in the public interest and in one state, Romania, prosecution is entirely dependent on the wishes of the victim, *Opuz v. Turkey*, *supra* note 351, paras. 87-90.

noteworthy that the ECtHR refers to the UN SRVAW in the masculine, although women have held the position since its creation in 1994.<sup>394</sup>

Hasselbacher has criticised the *Bevacqua and S v. Bulgaria* case for the Court's failure to consider the alleged violation of discrimination under Article 14 of the ECHR. She has argued that the Bulgarian legislation resulted in discrimination in practice because it distinguished between offenders that were strangers, and offenders that were close family members, providing state-assisted prosecution for the former and not for the latter. "Such a law yet again reflects the notion that violence in the family – violence that disproportionately impacts women – is a private issue, and prosecution is usually not in the 'public' interest."<sup>395</sup> I can only agree with Hasselbacher, the reasoning of the Court is disappointing as domestic violence most likely disproportionately affects women in all countries of the world. However, it is likely that the Court did not consider the applicant's allegation because she did not reach the burden of proof regarding *prima facie* evidence of discrimination. It seems that no information on the prevalence of domestic violence in Bulgaria and its gendered nature was introduced in the case.

Lastly, the *Hajduová v. Slovakia* case is important in that it establishes that threats that have not yet materialised into concrete acts of violence still violate a woman's right to psychological integrity under Article 8, thus evoking a state obligation to take positive measures to protect against such threats. However, given the questions above on the ambiguity surrounding the due diligence standard and its relation to positive obligations, this case does not specifically mention the due diligence standard. Since *Hajduová v. Slovakia* succeeded the *Opuz v. Turkey* case, does this mean that the ECtHR distinguishes between 'less serious' cases of domestic violence decided under Article 8 and 'more serious' cases of domestic violence under Articles 2 and 3, reserving the due diligence standard for the latter?

## 6.5 Evidence-based prosecution and the defendant's right to a fair trial

Evidence-based prosecution entails prosecuting without the victim participating during the criminal proceedings. Without going into the specific evidentiary rules various countries may have, *e.g.* hearsay rules in the US, an aspect of evidence-based prosecution is presenting previous statements made by the victim in lieu of her testimony during the proceedings. Undoubtedly, this may entail a few problematic issues; for example, statements by the victim to the police may not accurately reflect the victim's accounts of the incident.<sup>396</sup> Ellison notes that commentators

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<sup>394</sup> *Bevacqua and S v. Bulgaria*, *supra* note 330, para. 53 and *Opuz v. Turkey*, *supra* note 351, para. 79. *See also infra* note 402.

<sup>395</sup> Hasselbacher, *supra* note 382, pp. 208-209.

<sup>396</sup> Routinely videotaping statements made by victims of domestic violence is one way to avoid this problem, Ellison, *supra* note 128, p. 857.

have expressed concern that the use of these statements violates Article 6.3(d) of the ECHR.<sup>397</sup> the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. The case below suggests otherwise.

In *Asch v. Austria*,<sup>398</sup> the applicant had been convicted of causing the woman he lived with ‘actual bodily harm’. Prior to the hearing the victim had withdrawn her complaint and since she refused to give evidence, the statements she had made to the police officer when she reported the crime were read out in court, along with the officer’s testimony that the victim had seemed scared and that she had shown him her bruises.<sup>399</sup> The applicant complained that his conviction was based solely on the statements and that this breached his right to a fair trial. According to the Court, the crucial question to satisfy Article 6 is if the proceedings “considered as a whole, including the way in which evidence was taken, were fair.”<sup>400</sup> The Court noted that the applicant’s conviction was not based on the statements alone, but on other corroborative evidence and accordingly the fact that he could not question the victim during the hearing was not a violation of Article 6.3(d) together with 6.1.<sup>401</sup> This case shows that the ECHR will not necessarily make prosecution without victim participation impossible, the right to a fair trial of the accused is determined in the context of the entire proceedings as a whole.

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<sup>397</sup> *Ibid.*, p. 857.

<sup>398</sup> *Asch v. Austria*, 26 April 1991, European Court of Human Rights, no. 12398/86.

<sup>399</sup> *Ibid.*, paras. 11-12, 16-17.

<sup>400</sup> *Ibid.*, paras. 24-26.

<sup>401</sup> *Ibid.* paras. 30-31.

# 7 The content and scope of the due diligence standard

The UN Commission on Human Rights appointed the Special Rapporteur on Violence against Women, its causes and consequences (SRVAW), in 1994.<sup>402</sup> The mandate of the SRVAW is not dependent on international treaties and as such she is not bound by ratifications and periodic reporting by states. This makes her mandate wider to engage in issues relating to violence against women; however, there is also no obligation for states to cooperate with the SRVAW as an extra-treaty measure. Therefore, the reports and statements by the SRVAW are considered soft law; however, they are highly influential documents.<sup>403</sup> The SRVAW has issued several reports on domestic violence and one of the most important contributions is the former SRVAW Ertürk's report on the due diligence standard as a tool for the elimination of violence against women, in which she researched the current application of the standard by states and identified the areas that are less developed.<sup>404</sup> The current SRVAW Manjoo has continued this work in her report from 2011. This chapter will present the findings of these reports to further clarify the content and scope of the due diligence standard.

## 7.1 The due diligence standard is a rule of customary international law

In her 2006 report, former SRVAW Ertürk concluded that there is an obligation for states to prevent and respond to acts of violence against women with due diligence. Furthermore, this obligation is a rule of customary international law as the international human rights instruments along with jurisprudence and case law show evidence of practice and *opinio juris*.<sup>405</sup> She based her conclusion on *inter alia* the instruments that have

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<sup>402</sup> UN Commission on Human Rights, Resolution, *Question of integrating the rights of women into the human rights mechanisms of the United Nations and the elimination of violence against women*, E/CN.4/1994/45, 4 March 1994. The latest renewal of the SRVAW's mandate was in the spring of 2011, UN Human Rights Council Resolution, *Mandate of the Special Rapporteur on violence against women, its causes and consequences*, UN Doc. A/HRC/RES/16/7, 8 April 2011. The SRVAW have all been female, the first was Radhika Coomaraswamy (1994-2003), followed by Yakin Ertürk (2003-2009) and the current SRVAW is Rashida Manjoo.

<sup>403</sup> Edwards, *supra* note 201, p. 9.

<sup>404</sup> Report of the UN Special Rapporteur on violence against women, its causes and consequences, *The Due Diligence Standard as a Tool for the Elimination of Violence against Women*, Ertürk Y., UN Doc. E/CN.4/2006/61, 20 January 2006, para. 38. (hereinafter Ertürk 2006)

<sup>405</sup> Under international law, rules of customary international law exist when there is an established, widespread, and consistent state practice together with evidence of *opinio juris*, *i.e.* the state practice must be carried out under the belief that there exists such a rule. Rules of customary law are binding on all states, regardless of if they participated in the practice from which it derived, Thirlway H., 'The Sources of International Law', in M. D. Evans (ed.), *International Law, 2<sup>nd</sup> Ed.* (Oxford University Press, New York, 2006), pp. 122-123.

been presented in the previous two chapters; General Recommendation no. 19, DEVAW, the Beijing Platform for Action, the Convention of Belém do Para and *Ms. A.T. v. Hungary*.<sup>406</sup>

Since her statement in 2006, regarding the status of the due diligence standard in international human rights law, the UN General Assembly and the Human Rights Council have repeatedly stressed the state obligation to exercise due diligence in relation to violence against women.<sup>407</sup> In addition, the African Protocol refers to the elements of the due diligence standard, the new Council of Europe Convention specifically refers to the due diligence standard, and the ECtHR specifically referred to it in *Opuz v. Turkey*. Furthermore, in the 2011 case of *Jessica Lenahan (Gonzales) et al. v. United States*,<sup>408</sup> the IACHR made strong statements regarding the status of the due diligence standard. By examining various international instruments,<sup>409</sup> views from the CEDAW Committee and case law from regional human rights systems, the IACHR argued that there is “a broad international consensus over the use of the due diligence principle to interpret the content of State legal obligations towards the problem of violence against women; a consensus that extends to the problem of domestic violence.”<sup>410</sup>

It follows that the due diligence standard’s application to state responsibility for violence against women is strongly supported by international human rights law. However, the content and the scope of the standard remain unclear.<sup>411</sup>

## 7.2 General principles

In her 2006 report, the former SRVAW Ertürk listed four general principles, drawn from international legal instruments and state practice, which underlie the concept of due diligence. Firstly, the obligation to exercise due diligence is non-delegable, meaning that states cannot delegate their obligation even in situations where certain functions are performed by

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<sup>406</sup> Ertürk 2006, *supra* note 404, paras. 23-29.

<sup>407</sup> See e.g., UN General Assembly Resolution, Human Rights Council, *Accelerating efforts to eliminate all forms of violence against women: ensuring due diligence in prevention*, UN Doc. A/HRC/14/L.9, 11 June 2010, para. 1, UN General Assembly Resolution, *Intensification of efforts to eliminate all forms of violence against women*, UN Doc. A/RES/63/155, 30 January 2009, para. 10 and UN General Assembly Resolution, *Elimination of domestic violence against women*, UN Doc. A/RES/58/157, 19 February 2004, para. 5.

<sup>408</sup> *Jessica Lenahan (Gonzales) et al. v. United States*, 21 July 2011, Inter-American Commission on Human Rights, Report no. 80/11, Case no. 12.626. The issue of the case was an alleged violation of the US to act with due diligence in a domestic violence case. However, the circumstances of the case made it less relevant for this thesis and as such, the merits of the case have been omitted.

<sup>409</sup> The instruments included *inter alia* General Assembly resolutions, DEVAW, General Recommendation no. 19, the Beijing Declaration and Platform for Action and the Convention of Belém do Pará.

<sup>410</sup> *Jessica Lenahan (Gonzales) et al. v. United States*, *supra* note 408, paras. 123-124.

<sup>411</sup> Ertürk 2006, *supra* note 404, para. 14.

another state or a non-state actor. Secondly, the principle of non-discrimination means that states must use the same level of effort and resources when preventing and responding to violence against women as they do to other forms of violence. Thirdly, states must implement the obligation to exercise due diligence in good faith with the intention of effectively preventing violence against women. This requires states to take positive steps and measures “in order to ensure that women’s human rights are protected, respected, promoted and fulfilled.” Lastly, states must base their interventions and strategies on accurate empirical data. Ertürk emphasised great need for reliable statistics and indicators concerning violence against women, and how the effectiveness of the interventions and strategies chosen to eliminate violence against women, must be evaluated.<sup>412</sup>

Another general principle underlying the due diligence standard is the duty states have to not invoke custom, tradition or religious considerations to avoid obligations related to combating violence against women,<sup>413</sup> as declared in Article 4 of DEVAW and paragraph 124(a) of the Beijing Declaration and Platform for Action.<sup>414</sup>

The specific obligations under the due diligence standard are outlined below. It is important to keep in mind that the due diligence standard is a yardstick to measure the state’s actions, or lack thereof; the question of whether a state has failed to exercise due diligence in a particular situation can only be decided on a case-by-case basis.<sup>415</sup>

### 7.3 Prevention

To prevent violence against women states have focused mainly on three measures, the adoption of specific legislation, the development of awareness-raising campaigns and the provision of training for specific professional groups. Specifically in the area of domestic violence, many states have or are in the process of drafting specific legislation that in addition to criminalising domestic violence, also includes civil remedies such as restraining orders.<sup>416</sup> The first SRVAW Coomaraswamy advocated the enactment of legislation that recognises that domestic violence is a gender-specific crime directed towards women and that it should comply with international standards sanctioning domestic violence. She urged states to adopt comprehensive specific domestic violence legislation, which integrated criminal and civil remedies, rather than amending existing criminal and civil law. She emphasised the importance of the state sending the message that domestic violence is a serious crime that will not be

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<sup>412</sup> Ertürk 2006, *supra* note 404, paras. 34-37.

<sup>413</sup> Bourke-Martignoni, *supra* note 209, p. 57.

<sup>414</sup> The former SRVAW Ertürk argues that this duty is a violation of human rights in itself even in the absence of harm, Ertürk 2006, *supra* note 404, para. 88.

<sup>415</sup> Bourke-Martignoni, *supra* note 209, p. 57.

<sup>416</sup> Ertürk 2006, *supra* note 404, paras. 38-39.

tolerated.<sup>417</sup> In addition to criminal and civil remedies, legislation should also mandate coordinated emergency and non-emergency support services and, in order to ensure the implementation of the law, legislation should provide police and judiciary training.<sup>418</sup>

In terms of criminalising domestic violence, the world has made progress. In 2006, a reported 89 states had legislation addressing domestic violence, whereof 60 states had specific legislation. The former SRVAW Ertürk welcomed Switzerland's shift from mediation towards investigation and prosecution,<sup>419</sup> implying that the preferred course of action was to lay criminal charges. She also expressed concern over the domestic violence legislation in the Ukraine that allowed for the arrest of women for provoking violence through 'victim behaviour'. Importantly, in relation to the obligation of prevention, it is questionable what impact legislation has on curbing violence against women. She notes that there is little information and follow-up about this issue as well as on the issue of the effectiveness of law enforcement.<sup>420</sup>

The second prevention measure, awareness-raising campaigns, has been utilised by many states. The campaigns have been in the form of *inter alia* broad-based public education campaigns on violence against women using various kinds of media, national days of action on gender violence, and zero tolerance campaigns with high-profile persons to condemn violence against women. States such as Austria, Denmark, the Republic of South Korea and Sweden have set up programs to change the attitude and behaviour of men and boys and include them in the prevention activities by offering counselling and anger-management.<sup>421</sup> The first SRVAW Coomaraswamy noted that programs such as public awareness and public education should be mandated by law and that community participation in the prevention of domestic violence is of great importance.<sup>422</sup>

The third action taken by states to prevent violence against women has been to develop training manuals for various professional groups such as law enforcement, prosecutors, judges, doctors, nurses and social workers.<sup>423</sup>

In order to take a multi-sectoral approach to prevent violence against women, many states have adopted national plans of action to coordinate activities within different government agencies and established specialised committees, commissions and ombudsmen.<sup>424</sup> The current SRVAW Manjoo

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<sup>417</sup> Report of the UN Special Rapporteur on violence against women, its causes and consequences, *A Framework for Model Legislation on Domestic Violence*, Coomaraswamy R., UN Doc. E/CN.4/1996/53/Add.2, 2 February 1996, paras. 2 and 4.(hereinafter Coomaraswamy 1996 Add. 2)

<sup>418</sup> *Ibid.*, paras. 60-68.

<sup>419</sup> Ertürk 2006, *supra* note 404, para. 39.

<sup>420</sup> *Ibid.*, para. 40.

<sup>421</sup> *Ibid.*, paras. 42-43.

<sup>422</sup> Coomaraswamy 1996 Add. 2, *supra* note 417, para. 2.

<sup>423</sup> Ertürk 2006, *supra* note 404, para. 44.

<sup>424</sup> *Ibid.*, para. 41.

notes that it is important to provide sufficient financial and human resources to ensure the effectiveness of the national action plans. Often the plans are marginalised in the national agenda and government agencies and commissions lack decision-making authority as well as the capacity to influence their agenda. Another concern is the lack of effective coordination mechanisms between the police, forensic services, and the prosecutorial system, “which remain critical to prevent violence by combating impunity and instilling public trust in the justice system.”<sup>425</sup>

The former SRVAW Ertürk was sceptical of the state measures taken under the obligation to prevent violence against women with due diligence and noted that while states have been active in initiating preventative programs, “there is little evidence of active State engagement in overall societal transformation to demystifying prevailing gender biases or to provide support to civil society initiatives in this regard.”<sup>426</sup> She noted that there has been relatively little work done under this obligation and she connects this with how human rights work concerning violence against women has often fallen under a ‘victimisation-oriented approach’. This has made states more prone to respond to violence when it occurs, *i.e.* protecting the victims and punishing the perpetrators, as opposed to tackling the root causes of the problem at all levels, which is inherent in the obligation to prevent violence against women. Under this obligation, she recommends that states support women’s empowerment and work towards transforming society and “eradicating patriarchal norms and values that underlie violence and the subordination of women.” The ‘empowerment approach’ recognises that women are subjected to violence not because they are vulnerable and weak but because of “a gender order that privileges male violence through normative and institutional formations in society.”<sup>427</sup>

The current SRVAW Manjoo has expanded on the importance of empowerment and she argues that when women are empowered, they understand that they are not destined to subordination and can resist internalising oppression. In addition, empowerment leads women to question and negotiate the terms of their existence in both public and private spheres. Manjoo states that there is a correlation between prevalence rates of violence against women and effective investigation, prosecution, protection and redress measures, offered to women victims of violence. However, “these measures will not bring about substantive results if not implemented within a holistic approach that targets both societal transformation and the empowerment of women.”<sup>428</sup> She argues that “[i]nterventions that seek only to ameliorate the abuse, and do not factor in women’s realities, are not

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<sup>425</sup> Report of the UN Special Rapporteur on violence against women, its causes and consequences, Manjoo R., UN Doc. A/66/215, 1 August 2011, para. 55. (hereinafter Manjoo 2011)

<sup>426</sup> Ertürk 2006, *supra* note 404, para. 46.

<sup>427</sup> Ertürk Y., ‘The Due Diligence Standard: What Does it Entail for Women’s Rights?’, in C. Benninger-Budel (ed.), *Due Diligence and its Application to Protect Women from Violence* (Koninklijke Brill NV, Leiden, the Netherlands, 2008), p. 28.

<sup>428</sup> Manjoo 2011, *supra* note 425, paras. 76-77.

challenging the fundamental gender inequalities and discrimination that contribute to the abuse in the first place.”<sup>429</sup>

The ‘holistic approach’ requires states to recognise the structural and institutional inequalities that exacerbate violence against women and make women more susceptible to violence. These inequalities may be based on race, ethnicity, national origin, socio-economic class, religion, culture or tradition. Consequently, states must recognise that discrimination affects women in different ways and a “one-size-fits all programmatic approach” is insufficient for combating gender-based violence.<sup>430</sup> States must promote the empowerment of women through, among others, education, skills training and legal literacy aimed at enhancing women’s self-awareness, self-confidence and self-reliance. States should also actively engage in promoting women’s economic empowerment and independence, through, for example, land and property rights for women, adequate housing and access to secondary education. Furthermore, states must engage in discussions aimed at exposing the oppressive nature in certain cultural, religious and societal practices in order to challenge and transform patriarchal structures in society.<sup>431</sup>

## 7.4 Protection

The obligation to protect women from violence with due diligence is one of the more developed areas of the standard. The measures taken by states are mainly the provision of services to women such as telephone hotlines, health care, counselling centres, legal assistance, shelters, restraining orders and financial aid to victims of violence.<sup>432</sup> The first SRVAW Coomaraswamy noted that protective mechanisms should be mandated by law and be part of the state’s comprehensive legislation on domestic violence;<sup>433</sup> however, only a few states give protective services a legal basis in their formally adopted national action plans or in their legislation. Although many states have adopted protective measures, the former SRVAW Ertürk expressed concern regarding the inconsistencies in implementation and failure to exercise due diligence.<sup>434</sup>

Regarding shelters for women victims of violence, there is a consensus that shelters are better operated by NGOs that take a women’s rights approach. However, the obligation to protect women from violence entails a duty for the state to create and maintain shelters, and provide them with safety, for both victims and personnel.<sup>435</sup> A common problem is the insufficient

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<sup>429</sup> *Ibid.*, para. 84.

<sup>430</sup> *Ibid.*, paras. 84-86.

<sup>431</sup> *Ibid.*, paras. 77-78. The SRVAW treads carefully on the sensitive issues of culture and religion and states that it is not culture or religion *per se* that sanctions violence against women, it is those that monopolize the right to speak on behalf of culture or religion.

<sup>432</sup> Ertürk 2006, *supra* note 404, paras. 47-48.

<sup>433</sup> Coomaraswamy 1996 Add. 2, *supra* note 417, para. 2.

<sup>434</sup> Ertürk 2006, *supra* note 404, para. 48.

<sup>435</sup> *Ibid.*, para. 83.

number of shelters, the general lack of material and human resources, and the fact that many shelters are not located in areas that are accessible to all women. There is also a need to develop policy guidelines to better coordinate health, psychosocial and legal service sectors in order to ensure prompt and supportive services to victims. A good practice is to provide 'one stop centres' that provide a variety of services to women victims of violence in one place; services include help completing paperwork for protection orders, support during court proceedings, and help finding a shelter.<sup>436</sup> This is in line with the obligation to provide women a safe and conducive environment to report acts of violence against them.<sup>437</sup>

As part of the obligation to protect women from violence, the state must also provide victims with access to justice, which requires states to develop appropriate legislative frameworks, policing systems and judicial procedures.<sup>438</sup> Women who report instances of violence often suffer re-victimisation due to inadequate state protection; therefore, it is crucial that states adopt procedural rules regarding the giving of evidence as well as provide victims and witnesses with protection to prevent further harm.<sup>439</sup>

The former SRVAW Ertürk is concerned by the gaps in state practice concerning the obligation to protect women from violence with due diligence. She notes that the police and judiciary often inadequately enforce civil remedies and criminal sanctions; the lack of shelters in certain states leave women with no other choice than to continue to live with their abusers. Furthermore, states have focused on short-term emergency assistance and neglected to provide women victims the means needed to avoid re-victimisation.<sup>440</sup>

## 7.5 Investigation and punishment

The main state response to the obligation to investigate and punish acts of violence against women with due diligence has been to adopt or modify legislation and to expand the capacities and powers of the police, prosecutors and magistrates. As mentioned above, many states have adopted specific legislation regarding domestic violence in order to establish new criminal offences and create specialised investigatory or prosecutorial units.<sup>441</sup> The inclusion of female police officers with specific expertise in registering gender-based violence complaints as well as specialised police stations for women victims of violence are also regarded as positive state measures as they can help raise awareness of violence against women and create a responsive environment which encourages reporting.<sup>442</sup>

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<sup>436</sup> Manjoo 2011, *supra* note 425, paras. 66-67.

<sup>437</sup> Ertürk 2006, *supra* note 404, para. 82.

<sup>438</sup> *Ibid.*, para. 82.

<sup>439</sup> *Ibid.*, para. 92.

<sup>440</sup> *Ibid.*, para. 49.

<sup>441</sup> *Ibid.*, paras. 50-51.

<sup>442</sup> Manjoo 2011, *supra* note 425, para. 59, this also falls under the obligation to protect, *see* section 7.4.

Prosecution policies are undeniably linked to the state's willingness to investigate and punish acts of violence against women with due diligence. The current SRVAW Manjoo briefly discussed mandatory policies under the obligation to punish with due diligence in a positive light, stating that "mandatory prosecution policies aim to protect the victims from further physical harm and ensure that cases of domestic violence are not dismissed even if a victim is unwilling to be present in a court and testify."<sup>443</sup> However, the first SRVAW Coomaraswamy acknowledged that although mandatory state interventions appropriately shift responsibility for the violence from the victim to the state, the policies can be "contrary to the victim's best interests and threaten to further weakening of her position by taking away control over the proceedings."<sup>444</sup> Furthermore, in her *A Framework for Model Legislation on Domestic Violence* report from 1996, Coomaraswamy does not advocate any type of mandatory prosecution policy under the recommendations on criminal proceedings.<sup>445</sup>

The former SRVAW Ertürk presented an interesting argument about the judiciary and prosecutors' ability to "disempower patriarchal notions" by taking a strong stance on domestic violence. According to her, state interventions can have both *consequential* and *intrinsic* effects; the former being that "condemnations of patriarchy can lead to changes in socio-cultural norms," and the latter being that "prosecutors or judges can be considered to be the 'mouthpieces' of society, and strong statements condemning violence against women made on behalf of society through the judiciary or prosecutorial services will make that society less patriarchal."<sup>446</sup>

In conclusion, state action under the obligation to investigate and punish violence against women with due diligence has in many instances been inadequate. Despite the advancement many states have made in their legislation, failure by law enforcement to investigate crimes of violence against women in a serious manner is still a major problem. In addition, when cases of domestic violence reach the courtroom there is a high rate of cases resulting in reduced or inappropriate sentences.<sup>447</sup> Furthermore, testimonials, compiled by the current SRVAW Manjoo, of victims of domestic violence who have sought access to justice, indicate that inadequate responses from the criminal justice system remain common unless the violence resulted in serious physical injuries. The tendency to minimise the offences, classify them as administrative rather than criminal offences, or classify them as misdemeanours, as well as promoting conciliation rather than criminal proceedings, all work to uphold domestic violence as a private matter. This, in turn, results in the underreporting of crimes against women since the belief among victims, *i.e.* that the criminal

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<sup>443</sup> *Ibid.*, para. 58.

<sup>444</sup> Report of the UN Special Rapporteur on violence against women, its causes and consequences, Coomaraswamy R., UN Doc. E/CN.4/1996/53, 5 February 1996, para. 124.

<sup>445</sup> Coomaraswamy 1996 Add. 2, *supra* note 417, paras. 44-55.

<sup>446</sup> Ertürk 2006, *supra* note 404, para. 90.

<sup>447</sup> *Ibid.*, para. 54.

justice system will not punish the perpetrators, is reinforced, thus increasing the crime's invisibility and continuing to perpetuate violence against women.<sup>448</sup>

## 7.6 Reparation

The obligation to provide victims with adequate reparations includes the duty to provide access to criminal and civil remedies. States must also provide women victims of violence access to appropriate rehabilitation and support services. In terms of compensation, the obligation to provide reparation may include awarding financial damages for physical and psychological injuries as well as for harm to reputation and dignity, loss of employment and educational opportunities, loss of social benefits, and any legal, medical or social costs the victim has incurred because of the violence.<sup>449</sup> Only a few states reported that civil proceedings or funds for victims of crime existed in order to compensate women. In 2006, the former SRVAW Ertürk noted that very little information was available regarding state practice under the obligation to provide reparation and that “this aspect of due diligence remains grossly underdeveloped.”<sup>450</sup>

## 7.7 Assessing state compliance

The former SRVAW Ertürk stressed three initial measures that are prerequisites for state compliance with the due diligence standard: the ratification without reservations to all relevant human rights instruments, the incorporation of these into the domestic legal, judicial and administrative order, and the adoption of measures for their implementation.<sup>451</sup>

The first SRVAW Coomaraswamy relied upon the DEVAW and the CEDAW Committee's General Recommendation no. 19 in order to establish criteria for assessing state compliance of the due diligence standard. These included:

- ratification of all international human rights instruments including CEDAW,
- the existence of constitutional guarantees of equality for women or the prohibition of violence against women,
- the existence of national and/or administrative sanctions providing adequate redress for women victims of violence,
- the existence of policies or national action plans on violence against women, the gender-sensitivity of the criminal justice system, police and health professionals,
- accessibility and availability of support services including rehabilitation,

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<sup>448</sup> Manjoo 2011, *supra* note 425, paras. 62-63.

<sup>449</sup> Ertürk 2006, *supra* note 404, para. 84.

<sup>450</sup> *Ibid.*, para. 55.

<sup>451</sup> Ertürk 2006, *supra* note 404, para. 89.

- the existence of appropriate measures taken in the field of education and the media to raise awareness of violence against women as a human right and to modify practices that discriminate against women, and
- the collection of data and statistics concerning violence against women.<sup>452</sup>

## 7.8 Women's (un)willingness to participate – a neglected issue

Gormley has made a few pertinent observations concerning the discussions on the due diligence standard. She notes that the content of human rights standards concerned with domestic violence have been predominately focused on the criminal justice processes. However, the criminal justice processes in many countries are to varying degrees dependent on women's decisions to participate. In most cases, the initial complaint or situation that brought the crime to the attention of the authorities involves the woman victim. Very little attention has been paid to address issues that affect women's willingness to report the crime, seek protection from law enforcement, and participate in the criminal proceedings. The challenges women face when seeking justice, such as social ostracism, denial of economic and social rights, and rights to family life with their children,<sup>453</sup> need to be addressed through human rights standards as they are connected to her willingness and ability to seek access to justice through the criminal justice system.<sup>454</sup> In my opinion, Gormley's point is highly relevant for this thesis. The more recent approaches to how the obligation to prevent violence against women should be implemented, *i.e.* the 'empowerment approach' and the subsequent 'holistic approach',<sup>455</sup> can perhaps be of use here, as they require states to transform structural gender inequalities in society. These structures, be they social, economic or cultural, are a reality in women's lives and they may possibly be the main reasons for why women are unable, or do not want, to seek state assistance in cases of domestic violence.

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<sup>452</sup> Report of the UN Special Rapporteur on violence against women, its causes and consequences, *Violence against Women in the Family*, Coomaraswamy R., UN Doc. E/CN.4/1999/68, 10 March 1999, para. 25.

<sup>453</sup> These challenges are briefly discussed in section 2.1.

<sup>454</sup> Gormley, *supra* note 13, p. 178.

<sup>455</sup> See section 7.3.

## 8 Analysis

The main purpose of this thesis was to connect the debate on mandatory prosecution policies with state obligations under international human rights law regarding domestic violence by discussing my main research question: *To what extent does international human rights law impose an obligation on states to implement mandatory prosecution policies in cases of domestic violence?* It turns out that there is less to say regarding this question but more to say about the research question of part two of this thesis: *What are the obligations states have to respond to domestic violence under international human rights law?* This analysis begins with a few initial remarks, followed by initial findings on parts one and two of this thesis and these conclusions are then used in the final section where I discuss my main research question.

### 8.1 Initial remarks

It must be acknowledged that international human rights law is divided into a universal regime under the UN framework and regional regimes under the regional human rights systems. As a main rule, states are only bound by the conventions they ratify, unless the specific norm has the status of being a rule under customary international law. However, regardless of the status of the human rights norm, an individual's possibility of gaining access to the mechanisms aimed to protect their human rights and determine state responsibility for a violation, *i.e.* individual complaint or communication procedures, is still dependent on whether their state is bound by the convention in question. Consequently, a legitimate question may be: what is the value of discussing international human rights law as a whole? I argue that whereas the mechanisms are limited in their scope, principles and norms are often not because international human rights organs such as the CEDAW Committee, regional courts and commissions all consider developments outside of their system in their assessments. With regards to the due diligence standard's application on violence against women, this is particularly visible.<sup>456</sup> Whereas no definitive conclusions can be drawn for international human rights law as a whole when referring to individual judgments by regional courts, I argue that given the interconnected development of norms, there is relevance to my chosen approach of discussing international human rights law under the UN framework in conjunction with regional human rights law.

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<sup>456</sup> See section 7.1.

## 8.2 Initial findings

### 8.2.1 Conclusions from part one

*What are the advantages and disadvantages of mandatory prosecution policies, both from the state's perspective and from the individual woman victim's perspective?*

The advantages of mandatory prosecution policies must be seen in light of the historical failure to respond to domestic violence as a crime worthy of state attention. These policies have been an integral part of shifting domestic violence from the private sphere of the home to a matter of public interest and responsibility. From the state's perspective, these policies are consistent with the state interest in maintaining public safety, protecting its citizens from further harm, increasing offender accountability and sending the message that the state does not condone nor tolerate domestic violence. For domestic violence victims as a group, these policies greatly improve their chances of the criminal justice system taking their complaints seriously and although there is some debate over how well the policies keep victims safe, at least in the short-term, these policies can ameliorate the victim's situation. Furthermore, it has been argued that these policies are an important part of equal justice, ensuring victims of domestic violence the same protection and rights as victims of other crimes.

As a reaction to domestic violence victims' unwillingness to participate in criminal proceedings, mandatory prosecution policies in the US have taken two directions: hard no-drop policies, where coercive measures such as subpoenas to force women to testify in court may be used; and soft no-drop policies where women may, under certain circumstances, retain some decision-making ability and generally are not forced to testify. Evidence-based prosecution is increasingly used and is generally viewed as a welcome development, as it minimises the coercive nature of the policies by relieving the victim of the stress of testifying in court.

The disadvantages of mandatory prosecution policies are largely centred on the intrusive and coercive nature of the hard no-drop policies and the compromise of the victim's autonomy when she loses her decision-making ability in a situation that profoundly affects her life. By taking away the victim's autonomy, she may be further disempowered. This is in stark contrast with the battered women's movement where women's empowerment has been the central objective along with dismantling the structural inequalities in society that keep women vulnerable to violence. Furthermore, the issue of battered women's autonomy remains locked in opposing views on women's ability to make rational decisions in a domestic violence situation. Proponents of mandatory prosecution policies adhere to the premise underlying the response of the criminal justice system, *i.e.* that the only rational decision women can make is to leave their abuser and participate in criminal proceedings. Under this premise, explanations for

women's choices not to participate in the prosecution are centred on women's psychological passivity and powerlessness. Opponents are critical of this perception of rationality and they argue that the social conditions of gender inequality, which are considered the main reasons for women's reluctance to participate, are neglected.

The American debate has shown a conflict between promises of protection and battered women's safety, and the desire to preserve women's autonomy and the promotion of women's empowerment. Ultimately, it is argued that the US experience, where the response to domestic violence has been largely focused on intervention by the criminal justice system, shows the limitations of this approach in terms of addressing the root causes of domestic violence. Many battered women's advocates question criminal law's ability to promote gender equality in society: they argue that it is inadequate to address the social and economic aspects of domestic violence alone.

## 8.2.2 Conclusions from part two

*What are the obligations states have to respond to domestic violence under international human rights law?*

After trying to make sense of the obligations states have to respond to domestic violence under international human rights law in part two of this thesis, I find that I cannot give a conclusive answer to *exactly* what the obligations are. First off, while the soft law instruments are quite comprehensive and useful instruments for recommended state behaviour, they are at times vague and not legally binding. Therefore, when one speaks of 'obligations', they must be sought in legally binding instruments, norms of customary international law and case law. Undoubtedly, there is an obligation to exercise due diligence to prevent violence against women and to respond to violence against women, which in turn entails protecting women from violence, investigating and punishing acts of violence against women, and providing victims with adequate reparations.<sup>457</sup> Even under the CEDAW Committee's 'gender-based violence is discrimination' approach, the due diligence standard seems to be the main avenue for discussing state obligations.<sup>458</sup> However, the scope and content of the standard remains unclear; exactly which actions must be taken in a given situation? This obscurity is perhaps inherent in that it is a tool to measure a state's actions, or lack thereof, and thus is applied on a case-by-case basis. On the one hand, setting a clear scope and content may be counterproductive as the power in a standard may consist of the fact that it constantly evolves. On the other hand, when a standard is not tangible it offers less guidance to states.

In addition, I find the obscurity of the due diligence standard further exacerbated by the discrepancies in the various judicial and quasi-judicial

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<sup>457</sup> See section 7.1.

<sup>458</sup> See section 5.2.4.

bodies' application of the standard as well its relation to the concept of positive obligations under international human rights law. Furthermore, the 'gender-based violence is discrimination' approach taken by the CEDAW Committee and its use of articles of CEDAW in views on domestic violence cases remain somewhat unclear to me. These are all issues that I am not in a position to resolve and unfortunately, these issues affect the tentative conclusions that can be drawn.

### **8.2.2.1 An obligation to take positive post-abuse measures (under the due diligence standard)**

One initial and fundamental obligation is that states must criminalise domestic violence by either enacting specific legislation (which is the preferred approach), or amending or repealing provisions or judicial practices that previously prevented domestic violence from being charged under ordinary crimes. This obligation is found in a multitude of international law instruments<sup>459</sup> and the failure to treat violence committed against a woman in an intimate relationship as a crime, when the same violence against a stranger is treated as such, undoubtedly raises issues of discrimination and failure to provide equal protection by the law. Logically, this obligation must also be a prerequisite for exercising due diligence and fulfilling positive obligations; if domestic violence is not a crime, it follows that states have no domestic responsibility to respond either.

From the outset, the purpose of this thesis was not to evaluate international human rights law's response to domestic violence; however, this issue seems inseparable from my results. Violence against women is not a human rights violation *per se*, it becomes a human rights violation first when it impairs and/or nullifies an existing human right. Without an express prohibition on violence against women, women are indirectly protected under international human rights law and women victims of violence must establish that the state somehow failed to protect them. This entails that the violence they suffer must be serious enough to violate an existing human right. However, case law examples in this thesis suggest that this may not be a problem in situations of domestic violence. Domestic violence, including both physical abuse and threats, has been found to, *inter alia*, violate a woman's a right to personal security, the right to physical and mental/psychological integrity, the right to life and the right to be free from inhuman and degrading treatment.

However, the focus on the state failing to protect the woman means it is very much limited to an obligation to respond with positive post-abuse measures to prevent further harm. It falls, as the former SRVAW Ertürk has noted, firmly under a victimisation-oriented approach. According to case

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<sup>459</sup> DEVAW Article 4(d), CEDAW Article 2(b) read in conjunction with Article 1 and General Recommendation no. 19 paragraph 24(b) and (r), the Convention of Belém do Pará Article 7(c), the African Protocol Article 4.2(a), the Beijing Declaration and Platform for Action paragraph 124(c), Model Strategies and Practical Measures paragraph 6(a) and (b), the handbook and the 1996 and 2006 SRVAW reports.

law examples in this thesis, failure to exercise due diligence has been found as a:

- failure to provide means of protection against domestic violence through the use of protection orders<sup>460</sup> and shelters,<sup>461</sup>
- failure to respond immediately to an emergency call when the authorities knew or should have known the woman was in serious danger,<sup>462</sup>
- failure to place an abusive perpetrator in detention when the authorities knew or should have known the woman was in serious danger,<sup>463</sup> and lastly
- failure to have adequate legislation that enables prosecution, regardless of the victim's withdrawal of complaint.<sup>464</sup>

The above failures have, to my understanding, been argued mainly under the obligation to protect women against violence; granted, the last point regarding prosecution arguably seems more connected to the 'investigate and punish' obligation.<sup>465</sup> Apart from the failure to provide domestic violence victims with shelters, all of the failures are connected to responses within the criminal justice system. The failure to have adequate legislation that enables prosecution, regardless of the victim's withdrawal of complaint, is further elaborated on in section 8.3.

A prerequisite for failure to respond seems to be that the state authorities knew, or should have known, about the serious danger. It is likely that this qualification may be a cause of concern in some cases of domestic violence. What qualifies as serious danger? Repeated violence or threats? One serious incident of violence? Or will the mere systematic nature of domestic violence suffice so that one act of 'average' violence in an intimate relationship will meet the threshold?

As noted above, positive post-abuse measures have predominantly been argued under the obligation to protect women against violence; however, in the case of *Maria da Penha Maia Fernandes v. Brazil*, the IACHR referred to the obligation to investigate and punish. The IACHR argued that the conduct of the judicial authorities, mainly the extremely lengthy proceedings and the acceptance of time-barred appeals, violated Maria's right to adequate and effective judicial remedies. This right was found under

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<sup>460</sup> *Ms. A.T. v. Hungary*, *supra* note 233, *Bevacqua and S v. Bulgaria* (although I believe it was not situated under the due diligence standard but under the ECtHR's application of positive obligations), *supra* note 330, and *Opuz v. Turkey*, *supra* note 351.

<sup>461</sup> *Ms. A.T. v. Hungary*, *supra* note 233.

<sup>462</sup> *Sahide Goekce v. Austria*, *supra* note 242.

<sup>463</sup> *Sahide Goekce v. Austria*, *supra* note 242 and *Fatma Yildirim v. Austria*, *supra* note 260.

<sup>464</sup> *Opuz v. Turkey*, *supra* note 351.

<sup>465</sup> I refer again to the ECtHR's application of the due diligence standard as perhaps a more *secondary* obligation, which could be why the Court does not use the language of 'investigate and punish' and instead departs from 'protection' because of the *primary* positive obligations under the ECHR, *see* section 6.4.3.

substantive rights of the ACHR, the American Declaration on the Rights and Duties of Man as well as Article 7(f) and (g) of the Convention of Belém do Pará. However, the Commission also linked the right to adequate and effective judicial remedies with the obligation to investigate and punish acts of violence against women under the due diligence standard.<sup>466</sup> Variations of access to the mechanisms of justice are found in various instruments.<sup>467</sup> However, as was noted in section 6.4.3, the ECtHR did not find that the applicant in *Bevacqua and S v. Bulgaria* had an absolute right to state-assisted prosecution.<sup>468</sup> State-assisted prosecution could arguably be associated with a failure to provide access to the mechanisms of justice when one considers how difficult it must be for a victim of domestic violence to act as private prosecutor in order to gain access to criminal law remedies. In *Sahide Goekce v. Austria*, the CEDAW Committee argued along these same lines when it rejected associated prosecution, albeit in relation to the requirement to exhaust all available domestic remedies.<sup>469</sup>

The former SRVAW Ertürk argued that the principle of non-discrimination is a general principle underlying the due diligence standard. This principle is reflected in the right to equal protection by the law, which was found to have been violated in the *Maria da Penha Maia Fernandes v. Brazil* case, the *Opuz v. Turkey* case, and perhaps also in the cases before the CEDAW Committee.<sup>470</sup> Since domestic violence disproportionately affects women, failure to respond adequately in relation to other crimes results in discrimination, which violates the right to equal protection by the law.

Essentially, exercising due diligence means the state must show it is *committed* to responding to domestic violence by taking protective measures. To use similar language as that used in the cases, these measures need to be ‘reasonable’ and ‘adequate’ in relation to the domestic violence victim’s situation. They must provide ‘immediate’ and ‘effective’ protection. The assessment of these measures appears to be based on how well the measures deter future harm. Whether the obligation to respond with positive post-abuse measures is argued under the due diligence standard or positive obligations, the assessment is decided on a case-by-case basis, and what is deemed adequate in one case may be insufficient in another. What is clear is that some kind of state intervention is needed, and while it is difficult to set a minimum standard, policing measures such as a protection order may be a basic requirement the state must offer victims of domestic violence. Importantly, the discussed cases show that failure to intervene on account of considering domestic violence a ‘private’ or ‘family’ matter is incompatible with the obligation to respond with positive post-abuse measures.

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<sup>466</sup> See section 6.1.1.

<sup>467</sup> DEVAW Article 4(d), the Beijing Declaration and Platform for Action paragraph 124(d) and (h) and the 2006 report by the SRVAW.

<sup>468</sup> Although it was argued that private prosecution could not prevent further acts of violence, *i.e. protect* the applicant.

<sup>469</sup> See section 5.2.2.

<sup>470</sup> See section 5.2.4 for a tentative reasoning on the right to equal protection by the law under Article 2 of CEDAW.

### 8.2.2.2 A 'limited' obligation to prevent domestic violence (under the due diligence standard)

It is tempting to use the language often found in a multitude of instruments, some legally binding and others not, and argue that there is an obligation to 'eliminate' or 'eradicate' violence against women.<sup>471</sup> However, given the lack of attention paid to the obligation that I believe to be most closely connected to elimination, the obligation to prevent violence against women, this is simply not the case. Unfortunately, elimination of violence against women remains an objective, unenforceable and oftentimes completely neglected in the context.

The IACHR has been able to expand a bit further from the victimisation-oriented approach by finding a violation of the obligation to prevent domestic violence in the case of *Maria da Penha Maia Fernandes v. Brazil*. However, the reasoning of the Commission is 'limited' in that it focuses on how the state's failure to prosecute and convict the perpetrator is an indication of a pattern of state tolerance of domestic violence. Clearly, this is a very important statement made by the Commission, when authorities fail to properly respond to domestic violence it sends the message that the state condones the violence suffered by women, which perpetuates the factors that sustain and encourage violence against women. Likewise, the ECtHR in *Opuz v. Turkey* held that the negligence of the judicial authorities created a climate that was conducive to domestic violence.

Aside from these important statements, what I believe is lacking is a discussion on the state responsibility to actively address the root causes of domestic violence from a perspective of structural inequality. The multitude of references found in various instruments on how violence against women is a manifestation of historically unequal power relations between men and women, which have led to the domination and discrimination against women by men,<sup>472</sup> is a clear indication that domestic violence should be seen as a problem of gender inequality. As discussed in section 6.4.3, perhaps the ECHR has inherent limitations when it comes to addressing structural equality issues. The IACHR seems to be able to dive deeper into the due diligence standard because of the explicit reference to the obligation in the Convention of Belém do Pará; however, it too remains locked in a 'limited' interpretation of the obligation to prevent violence against women.<sup>473</sup> Predictably, the CEDAW Committee is the treaty body that has been able to most effectively address inequality issues in domestic violence cases. It is most visible in the *Ms. A.T. v. Hungary* case where the Committee found a violation of Article 5(a) of CEDAW, the obligation to modify the social and cultural patterns of conduct of men and women, an

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<sup>471</sup> E.g., Article 4 DEVAW, Article 7 of the Convention of Belém do Pará, Article 1(a) of the Council of Europe Convention and Article 4.2(b) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

<sup>472</sup> See e.g., the preambles of DEVAW, the Convention of Belém do Pará and the Council of Europe Convention and paragraph 118 of the Beijing Declaration and Platform for Action.

<sup>473</sup> See section 6.1.1.

article that is said to address structural inequality.<sup>474</sup> Possibly, as argued in section 5.2.4, the articles in CEDAW, which all deal with discrimination against women, can be used to clarify the due diligence standard; specifically with regards to the obligation to prevent violence against women. In this way, one might move beyond the limited focus on the judicial system's response and move towards finding state responsibility for failure to address the root causes of domestic violence in society. Unfortunately, CEDAW does not have the same power as the Convention of Belém do Pará or the ECHR; the views of the CEDAW Committee are not fully legally binding. Consequently, the most promising possibility of establishing a 'real' obligation to address the root causes of domestic violence remains quite weak.

### **8.2.2.3 International human rights law standards on domestic violence in soft law**

In *Ms. A.T. v. Hungary*, the CEDAW Committee referred to international human rights standards on domestic violence and concluded that the state actions and domestic legislation did not fulfil the recognised requirements. However, what these requirements actually are does not seem clear. Many of the soft law instruments presented in this thesis contain similar recommendations and although they may not be considered enforceable obligations just yet, they may represent a consensus on international human rights standards on domestic violence. I will present a brief summary of the most important recommendations presented in this thesis. The importance of criminalising domestic violence and providing women victims with access to the mechanisms of justice are basic provisions and have already been discussed. The provisions on prosecution are discussed in section 8.3.

A few instruments refer to the need of legislation to be gender-sensitive, which means that legislation should recognise the specific needs and experiences of women so that women victims of violence are not re-victimised when interacting with the criminal justice system.<sup>475</sup> Several instruments recommend gender-sensitivity training for law enforcement, prosecutors and other actors of the criminal justice system in order to improve their interaction with women victims of violence.<sup>476</sup> There is a large consensus that states should provide victims with various support services, including shelters, rehabilitation and counselling.<sup>477</sup> Furthermore, it is emphasised that whereas shelters should be financially supported by the state, they are better operated by NGOs working with women's rights and using an empowerment approach.<sup>478</sup> In general, cooperating with and

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<sup>474</sup> See sections 5.1.1 and 5.2.5.

<sup>475</sup> DEVAW Article 4(f) and the handbook.

<sup>476</sup> DEVAW Article 4(i), General Recommendation no. 19 paragraph 24(b), Model Strategies and Practical Measures paragraph 12 and the 1996 report of the SRVAW.

<sup>477</sup> DEVAW Article 4(g), General Recommendation no. 19 paragraph 24(k), the Beijing Declaration and Platform for Action paragraph 125(a), Model Strategies and Practical Measures paragraph 11, the handbook, the 1996 and 2006 reports by the SRVAW and *Ms. A.T. v. Hungary*.

<sup>478</sup> The handbook and the 2006 report by the SRVAW.

supporting NGOs is viewed as an integral part of a state's commitment towards eliminating violence against women.<sup>479</sup>

As noted above, addressing the root causes of violence against women and working towards dismantling structural inequalities are more or less neglected 'obligations' in the presented case law. Far greater support for these 'obligations' is found in the international human rights instruments;<sup>480</sup> the SRVAW has argued that targeting the root causes of violence against women is inherent in exercising due diligence to prevent violence against women. Government funded public awareness-raising campaigns and educational programmes on women's rights, gender equality and the right to be free from violence, preferably mandated by law, are considered important measures to address the root causes of violence against women.<sup>481</sup> Lastly, there is consensus on the importance of the state compiling research and statistics on the nature and extent of violence against women, its causes and consequences, the measures taken to address violence against women, and the effectiveness of the implemented measures. It is emphasised that this is particularly important in the case of domestic violence.<sup>482</sup>

### 8.3 Connecting the debate on mandatory prosecution policies with international human rights law

*To what extent does international human rights law impose an obligation on states to implement mandatory prosecution policies in cases of domestic violence?*

At first glance, it appears that the obligation to investigate and punish violence against women under the due diligence standard entails an absolute obligation to prosecute perpetrators of domestic violence. Logically, without prosecution, there can be no punishment. Strong statements are often made on how states must prosecute and punish all forms of domestic violence. However, case law does not seem to fully reflect this reasoning. Whereas failure to prosecute within reasonable time was considered a human rights violation in the case of *Maria da Penha Maia Fernandes v. Brazil*, the circumstances in that case were extreme, *i.e.* 17 years of impunity for an attempted murder charge that had resulted in irreversible paraplegia for the

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<sup>479</sup> DEVAW Article 4(p) and (e), Model Strategies and Practical Measures paragraph 14, the handbook, the 2006 report by the SRVAW and the CEDAW Committee's recommendations in *Sahide Goekce v. Austria* and *Fatma Yildirim v. Austria*.

<sup>480</sup> DEVAW Article 4(j), Convention of Belém do Pará Article 8(b) (the 'progressive' obligation), the handbook, the African protocol Article 4.2(c) and (d) and as already mentioned CEDAW Article 5(a) as well as Article 2(f).

<sup>481</sup> The Beijing Declaration and Platform for Action paragraph 125(e), Model Strategies and Practical Measures paragraph 14, the handbook and the 1996 and 2006 reports by the SRVAW.

<sup>482</sup> DEVAW Article 4(k), General Recommendation no. 19 paragraph 24(c), (e), (s) and (v), Beijing Declaration and Platform for Action paragraph 124(d) and 125(a), Model Strategies and Practical Measures paragraph 13, the handbook and the 2006 report of the SRVAW.

victim. My intent is certainly not to trivialise domestic violence assaults; however, there is a difference in severity between an assault charge and an attempted murder charge. Despite the statements by the IACHR regarding the pattern of state tolerance of domestic violence and the following failure to prevent domestic violence,<sup>483</sup> it is uncertain to what extent this case can show an obligation to prosecute every case of domestic violence, let alone provide guidance on which prosecution policy is needed.

In *Sahide Goekce v. Austria*, the CEDAW Committee refrained from advocating a specific prosecution policy and simply recommended the state party to ‘vigilantly’ prosecute perpetrators of domestic violence.<sup>484</sup> Similarly, in *Bevacqua and S v. Bulgaria*, the ECtHR refrained from making a general statement on the compatibility of the Bulgarian legislation, which required the victim of domestic violence to act as private prosecutor, with the ECHR.<sup>485</sup> Judicial and quasi-judicial human rights bodies generally refrain from in-depth comments on domestic legislation, as their task is to determine if there has been a violation of a human right in a specific situation. States are under an obligation to respect, protect and fulfil human rights; how they choose to do so under their domestic legislation is often considered to be in the state’s domain.

As previously noted the ECtHR departed from this approach by making specific statements on the deficient legislative framework in the *Opuz v. Turkey* case. The Court did not argue that mandatory prosecution policies were required in order to comply with the obligation under the Convention to protect women from violence. Instead, compliance required legislation that *enables* prosecution in the public interest, regardless of the victim’s withdrawal of the complaint.<sup>486</sup> Soft law instruments presented in this thesis support this approach. The handbook recommends that legislation should establish that the responsibility for prosecution lies with the authorities and not with the victim. Similar recommendations are found in paragraph 7(b) of the Model Strategies and Practical Measures as well as in paragraphs 30-40 of the Council of Europe’s Recommendation Rec(2002)5 of the Committee of Ministers to member states on the protection of women against violence. The new Council of Europe Convention draws on *Opuz v. Turkey* and affirms that the prosecution of domestic violence should not be completely dependent upon a report or complaint by the victim, and that prosecution must be able to continue even if the victim withdraws her complaint.

Based on the above, I believe the following tentative conclusion can be drawn:

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<sup>483</sup> See sections 6.1.1 and 8.2.2.2.

<sup>484</sup> See section 5.2.4.

<sup>485</sup> See section 6.4.3.

<sup>486</sup> See section 6.4.3 for a more detailed analysis of the Court’s reasoning.

*In order to comply with international human rights law, states are under an obligation to enact legislation that enables prosecution in the public interest, regardless of the victim's withdrawal of complaint.*

This conclusion means that states cannot employ a policy where prosecutors are required to drop charges at the victim's request. Nor can states tolerate a situation where prosecutors in practice routinely drop charges at the victim's request. Mandatory prosecution policies as such are not needed, but what is needed is a real state commitment to interfere in cases of domestic violence. In serious cases of domestic violence, the state is most likely compelled to prosecute in the public interest. This follows the reasoning of the ECtHR in *Opuz v. Turkey*, here the Court held that the more serious the violence is, or the greater the risk is of further violence, the more likely prosecution should continue in the public interest. Importantly, the Court argued that once the authorities are aware of the situation, the victim's attitude could not preclude state responsibility. In my opinion, there is an *emerging* obligation to prosecute perpetrators of domestic violence, but it is not yet absolute.

Based on this conclusion, the issue of what kind of policy is preferred is left quite unresolved. The international human rights law that can be said to have some binding effect on states does not provide detailed guidance on how a prosecution policy should be modelled. The closest to providing guidance is the case of *Opuz v. Turkey*, where the ECtHR listed factors that states should consider when deciding whether to pursue prosecution against the victim's wishes.<sup>487</sup> In soft law instruments the policy question is discussed, albeit mostly briefly and with little detail. The handbook recommends pro-prosecution policies and that legislation should be "flexible" so to retain a level of agency for the victim. Furthermore, it is sceptical towards mandatory policies that force a victim to participate through providing testimony and it encourages evidence-based prosecution where the victim does not have to participate.<sup>488</sup> The case of *Asch v. Austria* shows that evidence-based prosecution is an option that will comply with the defendant's right to a fair trial, as long as the conviction is not based solely on the statements the victim has made prior to the court proceedings, which are then used instead of her testimony in court.<sup>489</sup>

There are some divergent opinions in the reports of the SRVAW. The first SRVAW was sceptical of mandatory prosecution policies because those policies may further disempower the woman by taking away control over the proceedings and at times prosecution could serve contrary to the victim's best interests. The second and current SRVAW have not expressed these concerns and seem to be positive towards mandatory prosecution policies; however, it is not clear exactly to what kind of policy they are referring.<sup>490</sup> The debate has shown that there is a significant difference between hard no-drop policies or aggressive prosecution policies, and soft

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<sup>487</sup> See section 6.4.2.1 for the list of factors states should consider.

<sup>488</sup> See section 5.3.4.

<sup>489</sup> See section 6.5.

<sup>490</sup> See section 7.5.

no-drop policies or pro-prosecution policies, and even within these divisions, there may be considerable differences. It is my opinion that the overly coercive measures used in hard no-drop policies, such as subpoenas to force victims to testify, do not find support in the soft law instruments. Furthermore, the soft law instruments show that the issue of women's autonomy is not completely ignored in the human rights context and on a very positive note, the need to focus on women's empowerment is very clear, especially in the reports by the SRVAW.<sup>491</sup>

States have an obligation to take positive post-abuse measures to protect victims of domestic violence and the analysis of part two of this thesis has established that failure to intervene through the criminal justice system has been the focus point for finding state responsibility. Protecting victims from further violence is also the most important reason for enacting mandatory prosecution policies. The prosecution of domestic violence can be difficult and complicated, even in cases where the victim wants to pursue prosecution. Oftentimes the only witness is the victim herself as the violence is perpetrated predominantly in the privacy of the home. Prosecuting against the victim's wishes can be difficult and without legislation that forces victims to, for example, give statements or be photographed, the prosecutor's actual possibility of reaching the required 'sufficient evidence for prosecution' is uncertain. Thus, my question is this: where is the line drawn for state responsibility when the victim does not wish to cooperate and as a result, prosecution is not possible due to insufficient evidence? This resembles the argument that the government raised in *Sahide Goekce v. Austria*, and on which the CEDAW Committee did not comment.<sup>492</sup> Whereas the ECtHR stated that the victim's attitude could not preclude state responsibility in *Opuz v. Turkey*, the circumstances in that case did not show a lack of sufficient evidence. Therefore, I believe it is not possible to say how international human rights law would respond to this question. However, in this respect, states need to analyse thoroughly the judicial system's interaction with victims in order to shed light on the underlying attitudes of police and prosecutors. The self-fulfilling prophecy discussed in section 3.1 has shown not only a mutual distrust between victims and prosecutors, but also a problem rooted primarily in the assumptions police and prosecutors have of domestic violence victims, which taints their interaction with victims.

## 8.4 Concluding remarks

The focus on responses by the criminal justice system in international human rights law, firmly rooted in the obligation to protect women from further violence, and the possible *emerging* obligation to prosecute perpetrators of domestic violence are both strong incentives for states to enact some form of mandatory prosecution policies, preferably one that is less coercive. In the pursuit to exercise due diligence and to resemble, in the

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<sup>491</sup> See section 7.3.

<sup>492</sup> See sections 5.2.2 and 5.2.4.

eyes of the international community, a state where women's human rights are taken seriously, mandatory prosecution policies show that the state is committed towards responding to domestic violence. Now, I write this with some apprehension because states must not hide behind criminal law policies as their sole response to domestic violence just because it is there, up till now, that binding state obligations have been found.

The American experience shows how this can be problematic as criminal law creates circumstances for state intrusion into private lives without knowing if it really makes a difference in relation to the occurrence of domestic violence in society. However, the second SRVAW has argued that a strong stance against domestic violence by the state and its authorities can change both social-cultural norms and work towards disempowering patriarchal notions in society. The current SRVAW has also argued that there is a correlation between prevalence rates of violence against women and effective investigation, prosecution, protection and redress measures, offered to women victims of violence. Nonetheless, both the second and current SRVAW stress the need to address the root causes of violence against women, *i.e.* the structural inequalities that exacerbate violence against women and make women more susceptible to violence. Therefore, states must exercise due diligence to prevent violence against women in a broad sense, social transformation is needed and states must actively promote women's empowerment. In my opinion, states must pursue the 'holistic approach' advocated by the current SRVAW where the inequalities and discrimination women suffer are not only addressed through an analysis of gender, but also through an intersectional analysis based on *inter alia* race, ethnicity, socio-economic class and culture.<sup>493</sup> States must be open to how their prosecution policies affect minority women; the US is certainly not the only state in which minority women experience societal discrimination that differs from that of the majority.

Furthermore, I believe states must give heed to the observations Gormley has made.<sup>494</sup> If states find that women victims of domestic violence are reluctant to cooperate with state authorities and unwilling to participate in criminal proceedings, states must question why. If women feel that their concerns are not heard, that their realities are ignored, if they have no trust in the criminal justice system, or its ability to keep them safe, states must address these issues. In this respect, I think the debate has shown some valuable insights, states must distance themselves from a discussion based solely on the *perceived* irrationality of domestic violence victim's choices and be open to seriously exploring the social conditions of gender inequality,<sup>495</sup> which may be at the centre of women's unwillingness to participate in the prosecution of their abuser. Furthermore, as already touched upon above, states must examine the issue of 'uncooperative'

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<sup>493</sup> See section 7.3.

<sup>494</sup> See section 7.8.

<sup>495</sup> *E.g.*, lack of housing, sex segregation and unequal pay in the labour market, lack of available and affordable childcare facilities and victim blaming social attitudes prevalent in society, *see* section 3.2.4.

victims from the perspective of the attitudes of the judicial system and analyse how their behaviour may be the primary problem behind women's unwillingness to engage with the criminal justice system. The focus ought to be on improving the criminal justice system's working methods and interaction with victims, and to this end, many of the above mentioned 'obligations' found in soft law can provide guidance.

In the long term, I believe women will benefit far greater if states focus on implementing the international human rights law standards on domestic violence found in soft law and adopting a 'holistic approach', than if states implement the aggressive prosecution of every case of domestic violence, without stopping to take a closer look at the realities of women's lives. Women's empowerment must be at the centre of all state policies on domestic violence and the notion that domestic violence must be seen as a problem of gender inequality cannot be stressed enough. To this end, CEDAW can be a valuable instrument in transforming structural inequality in society; it is now time for states to take their obligations under CEDAW seriously.

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