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## **Due Diligence versus Positive Obligations: Critical Reflections on the Council of Europe Convention on Violence against Women**

Vladislava Stoyanova

### **1. Introduction**

With its sixty-five substantive provisions, the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention or the Convention) is impressive not only in terms of its length, but also in terms of the amount of details. This stands in sharp contrast with general human rights treaties, like the European Convention on Human Rights (ECHR) that describes abstract rights that need to be subject to interpretation so that their corresponding obligations can be transformed into relatively more precise and certain rules.<sup>1</sup> In addition to its detailed and concrete provisions (e.g. Article 23 (shelters), Article 24 (telephone helplines), Article 16 (teaching perpetrators to adopt non-violent behaviour)), the Istanbul Convention also contains general provisions. Two of these are particularly notable. First, Article 3(a) defines “violence against women” as “a violation of human rights.”<sup>2</sup> Second, Article 5 enshrines the principle of state responsibility that is important for conceptualizing this violence as a human rights law issue. In particular, under the heading “State obligations and due diligence” Article 5 contains the following two paragraphs:

1. Parties shall refrain from engaging in any act of violence against women and ensure that State authorities, officials, agents, institutions and other actors acting on behalf of the State act in conformity with this obligation.
2. Parties shall 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.<sup>3</sup>

Clearly the detailed provisions in Chapter II (Integrated policies and data collection), Chapter III (Prevention), Chapter IV (Protection and support), Chapter V (Protection and support), Chapter VI (Investigation, prosecution, procedural law and protective measures), Chapter VII (Migration and asylum) and Chapter VIII (International cooperation) of the Istanbul Convention inform what measures States are expected to undertake to comply with the standard of due diligence as required by Article 5(2).<sup>4</sup> However, this provision also imposes a more general obligation of due diligence

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<sup>1</sup> M Addo, *The Legal Nature of International Human Rights* (Martinus Nijhoff Publishers, 2010) 187.

<sup>2</sup> This is also reflected in the preamble of the Istanbul Convention: “[...] women and girls are often exposed to serious forms of violence [...], which constitute a serious violation of the human rights of women and girls.”

<sup>3</sup> In my analysis, I will ignore the definitional divergence between Article 5(1) and 5(2): the first one referring more narrowly to “violence against women”, while the second one referring more broadly to “acts of violence covered by the scope of this Convention.” Generally, this chapter does not address the definitions contained in Article 3 of the Istanbul Convention.

<sup>4</sup> It needs to be also taken into account that many of the detailed provisions contain qualifiers, which also denotes some flexibility as to how States can comply with them. For example, Article 20(1) stipulates that “Parties shall take the *necessary legislative or other measures* to ensure that victims have access to services facilitating their recover

that extends beyond the more concrete measures as outlined in the above-mentioned chapters of the Convention. This calls for an inquiry as to the meaning of the due diligence standard, its limits and any reasons to be cautious about it. Are there any peculiarities as to how it has been framed in the Istanbul Convention, which could be a reason for concern? How does the obligation of due diligence compare with positive human rights obligations, their scope and the standards for determining the circumstances when they are triggered as developed by the ECtHR?<sup>5</sup>

In the existing literature in the area of violence against women, the adoption of the standard of due diligence has been uncritically endorsed;<sup>6</sup> the reason is that it has played a crucial role in the recognition of this violence as a human rights issue.<sup>7</sup> This endorsement,<sup>8</sup> accompanied by efforts to push the boundaries of this standard and to 're-imagine' it for advancing broad interpretations,<sup>9</sup> has happened without an in-depth engagement with the actual meaning of the due diligence standard, the circumstances when it is triggered and any negative ramifications for using it as the yardstick.<sup>10</sup>

Sufficient efforts have not been made to better understand the interrelationship between the standard of due diligence and positive obligations under human rights law. Chinkin's position

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from violence. These measures should include, *when necessary*, services such as legal and psychological counselling, financial assistance, housing, education, training and assistance in finding employment. [emphasis added]"

<sup>5</sup> The ECtHR has developed a very complex framework of positive obligations. See Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart, 2004). The ECtHR is part of the Council of Europe human rights law standards like the Istanbul Convention, which further justifies the comparative parallels between the two treaties.

<sup>6</sup> J Sarkin, 'A Methodology to Ensure that States Adequately Apply Due Diligence Standards and Processes to Significantly Impact Level of Violence against Women around the World' (2018) 40(1) *Human Rights Quarterly* 1, 4.

<sup>7</sup> R McQuigg, 'What Potential does the Council of Europe Convention on Violence against Women Hold as Regards Domestic Violence?' (2012) 16(7) *International Journal of Human Rights* 947, 951; K Bourke-Martignoni, 'The History and Development of the Due Diligence Standard in International Law and Its Role in the Protection of Women against Violence' in C Benninger-Budel (ed), *Due Diligence and Its Application to Protect Women from Violence* (Brill, 2008) 47, 52: the "use of the standard [of due diligence] by the women's movement has been crucial to the advancement of our understanding of state responsibility for violence perpetrated by non-state actors."

<sup>8</sup> Committee on the Elimination of Discrimination against Women, General Recommendation No. 19, UN Doc. A/47/38, para.9: "Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation." See also Article 4(c), Declaration on the Elimination of Violence against Women, UN General Assembly Resolution 48/104, 20 December 1993.

<sup>9</sup> Special Rapporteur on Violence against Women, its Causes and Consequences, *The Due Diligence Standard as a Tool for the Elimination of Violence against Women*, UN Doc. E/CN.4/2006/61 (20 January 2006) (by Yakin Ertürk); Y Ertürk, '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* (Brill, 2008) 27; Special Rapporteur on Violence against Women, its Causes and Consequences, *Report on Violence against Women, its Causes and Consequences*, UN Doc. A/HRC/23/49 (14 May 2013) (by Rashida Manjoo) (where all possible measures are subsumed under the due diligence obligation and it is argued that "[t]he State responsibility to act with due diligence must continue to evolve in a cumulative and inclusive approach."); S de Vido, 'States' Due Diligence Obligations to Protect Women from Violence: A European Perspective in Light of the 2011 CoE Istanbul Convention' 14 *European Yearbook of Human Rights* 365, 368: "the trend at the international level is to push the boundaries of the standard of due diligence [...]."

<sup>10</sup> For rare exceptions see J Goldscheid and D Liebowitz, 'Due Diligence and Gender Violence: Parsing Its Power and its Perils' (2015) 48 *Cornell International Law Journal* 301 (the authors warn of "state overreach", including the risks of stronger criminal justice responses, and of the risk of "situating the State as the entity charged with program delivery when other entities would be more effective."); see also M Kamminga, 'Due Diligence Mania' in I Westendorp (ed), *The Women's Convention Turned 30* (Intersentia, 2012) 407: "Due diligence in general international law therefore is rather weak standard with a high threshold."

is illustrative; she maintains that "States' obligation to respect, protect and fulfill women's rights to be free from violence have been conceptualised and *made more concrete* through the duty and standard of due diligence [emphasis added]."<sup>11</sup> It is doubtful whether the reference to due diligence adds any concreteness and, in any case, Chinkin fails to show how due diligence does this. I would contend that the reference to due diligence obscures, rather than injects concreteness. An additional danger is that the reference to due diligence in Article 5(2) of the Istanbul Convention lowers the standards expected of States as regards violence performed by non-state actors.

Bourke-Martignoni has specifically looked into the interaction between due diligence and positive obligation and has posited that "the positive obligation to protect, respect and fulfil human rights that are contained in human rights treaty law imply a duty to act with due diligence to protect individuals against human rights violations by private persons or entities."<sup>12</sup> It follows that she assumes some form of convergence and, in a move similar to the one made by Chinkin, superimposes the standard of due diligence on the positive obligations. Sarkin can be also added to this group of authors since he argues that

[...] due diligence is not about undermining positive obligations but about reinforcing them. It is about ensuring compliance with positive obligation that a state already has. Thus, due diligence is really an oversight tool. It is about what states need to do, and how they comply with their obligations. It is simply a device to ensure that states do what they need to in their quest to carry out their obligations. It does not subtract from their positive obligations.<sup>13</sup>

The Explanatory Report to the Istanbul Convention also assumes the indistinguishability of due diligence and positive obligations.<sup>14</sup>

This chapter attempts to challenge the assumption in the literature that the reference to the standard of due diligence makes a positive contribution to the framework of positive obligations. This assumption appears to reign due to insufficient exploration of how the standard of due diligence and the framework of positive human rights obligations relate to each other. As an attempt to address this insufficiency, the chapter first clarifies the difficulty in basing state responsibility on failure to perform an act (i.e. an omission) and in making the distinction between the existence of the obligation to act, on the one hand, and the *post facto* assessment whether this obligation has not been performed (Section 2), on the other. Then the two frameworks (due diligence versus positive obligations) are juxtaposed against each other in Section 3. This exercise necessarily requires a better understanding of each one of them which is also offered in Section 3.1 as to the standard of due diligence and in Section 3.2 as to the types of positive obligations and the different tests that they invoke.

## 2. Due Diligence, Omissions and Positive Obligations

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<sup>11</sup> C Chinkin, 'Addressing Violence against Women in the Commonwealth within States' Obligations under International Law' (2017) 40(3) Commonwealth Law Bulletin 471, 479.

<sup>12</sup> J Bourke-Martignoni, 'The History and Development of the Due Diligence Standard in International Law and its Role in the Protection of Women against Violence' in C Benninger-Budel (ed), *Due Diligence and Its Application to Protect Women from Violence* (Brill, 2008) 47, 52.

<sup>13</sup> J Sarkin, 'A Methodology to Ensure that States Adequately Apply Due Diligence Standards and Processes to Significantly Impact Level of Violence against Women around the World' (2018) 40(1) Human Rights Quarterly 1, 16.

<sup>14</sup> The Explanatory Report, para 58.

Inadequate efforts have been invested in developing an in-depth analysis of the conceptual framework underpinning the due diligence standard. This standard has been injected in the discussion about violence against women for addressing the relationship between violence and the State given that perpetrators are likely to be non-state actors. Since harm inflicted by non-state actors is not attributable to the State,<sup>15</sup> "due diligence" provides the framework for linking the harm to the State by making the claim that the state ought to have adopted certain conduct to prevent the harm. The State can thus be held responsible for its omission to adopt a specific conduct. Within this frame, human rights lawyers understand "due diligence" as a standard of conduct required to discharge an obligation.<sup>16</sup> At this point, it is crucial to make the following analytical distinction: the existence of an obligation as such to act needs to be distinguished from the question as to the failure to fulfil this obligation. First, one needs to identify a separate legal obligation to act; only then, can one ask the question about the failure of the State to act. I will return to this distinction in the text below.

Since "due diligence" directs our attention to state omissions, it is important to also clarify that generally the law on state responsibility under international law for omissions is not well developed and that specific literature on the notion of "omission" in the law of state responsibility is rare.<sup>17</sup> Any more profound engagement with the issue has to start with Article 2 of the International Law Commission (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts. This article stipulates that "[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation." The Commentary to the ILC Draft Articles clarifies that "[...] no difference in principle exists between the two [an action and an omission]."<sup>18</sup> This, however, is an oversimplification. True, certain conduct can be simultaneously framed as both action and omission depending on the baseline that one chooses to adopt and on certain normative standpoints.<sup>19</sup> As Pogge has observed, the application of the distinction between acts and omissions to collective agents and social institutions i.e. the State, is baffling, if we do not have "baseline comparisons."<sup>20</sup> Still, normally an omission cannot cause harm in the same way as a positive action.<sup>21</sup> This fundamental difference has been well developed in the context of national administrative law and tort law. In contrast to public international law and international human rights law, domestic administrative law and tort law have developed complex analytical frameworks for measuring and assessing when state authorities can be held liable for omissions.<sup>22</sup>

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<sup>15</sup> For the rules on attribution see ILC Draft Articles.

<sup>16</sup> For a useful discussion, see J Bonnitch and R McCorquodale, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights' (2017) 28(3) *European Journal of International Law* 899, 900.

<sup>17</sup> J Klabbers, 'Reflections on Role Responsibility: The Responsibility of International Organizations for Failing to Act' (2017) 28(4) *European Journal of International Law* 1133, 1135.

<sup>18</sup> ILC Commentary, p.35.

<sup>19</sup> For example, often, the ECtHR refuses to explicitly say whether it will review the case from the perspective of States' negative or positive obligations. See L Lavrysen, *Human Rights in a Positive State. Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Intersentia, 2016) 241.

<sup>20</sup> T Pogge, 'Recognized and Violated by International Law: The Human Rights of the Global Poor' (2005) 18(4) *Leiden Journal of International Law* 717, 728.

<sup>21</sup> Generally on the complexities surrounding causation between harm and state omissions in the context of human rights law, see V Stoyanova, 'Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights' (2018) 18(2) *Human Rights Law Review* 309.

<sup>22</sup> J Plunkett, *The Duty of Care in Negligence* (Hart Publishing, 2018); see also the contributions in D Fairgrieve, M Andenas and J Bell (eds), *Tort Liability of Public Authorities in Comparative Perspectives* (The British Institute of International and Comparative Law, 2002).

The issue of causation has played a major role here, i.e. the causal connection between the omission and the harm.<sup>23</sup> However, causation is far from being the single criteria; policy and other considerations (knowledge and foreseeability of the harm, the reasonableness of imposing a positive duty to act etc.) also intervene in the assessment required by the national legislation,<sup>24</sup> which clearly demonstrates that establishing responsibility for omissions is an exercise fraught with complications.

Basing state responsibility on omission is problematic because there are numerous omissions that a State might have committed. Many of these might not even be cognizable.<sup>25</sup> It will be absurd to suggest that every single omission that can be somehow related to the harm suffered by an individual (or risk of harm), should be a basis for establishing state responsibility. In this connection, the assertion in the Istanbul Convention that all "violence against women" is "a violation of human rights" cannot be correct. The assertion assumes that in all instances of violence against women, the State has necessarily failed to fulfil its obligations. While one can be certainly sympathetic to any efforts of preventing violence, showing disregard of some basic principles underlying state responsibility in international law is hardly helpful. There must be an obligation to act in the first place that has remained unperformed, against which state responsibility can be assessed. As Crawford has framed it:

[...] omission is more than simple 'not-doing' or inaction: it is legally significant only when there is a legal duty to act which is not fulfilled, and its significance can only be assessed by reference to the content of that duty. So an omission is the failure to do that which should be done; the absence of any primary obligation 'to do' will mean that no omission may be complained of.<sup>26</sup>

This brings us back to the above-mentioned distinction between the existence of an obligation to act and the *ex post facto* assessment whether this obligation has been performed. The challenge is framing this primary obligation to act *ex ante*. At the same time, this primary obligation can be framed at different levels of abstraction and with different level of concreteness,<sup>27</sup> an issue to which I will also return below in the text. The level of abstraction and concreteness is important because it has an impact on the mere possibility of making an assessment whether the State has failed to fulfil it.<sup>28</sup>

Framing the primary obligation is a challenge because general human rights treaties are not framed in terms of obligations; rather rights have been used as the organizing principles (the right

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<sup>23</sup> S Steel, *Proof of Causation in Tort Law* (Cambridge University Press, 2015).

<sup>24</sup> C Booth and D Squires, *The Negligence Liability of Public Authorities* (Oxford University Press, 2006) 165.

<sup>25</sup> To make the omissions cognizable, a reference to the national legislation might be useful since it sets detailed standards. See V Stoyanova, 'Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights' (2018) 18(2) *Human Rights Law Review* 309, 332. Since national authorities operate in accordance with detailed legal frameworks, their omissions are more easily cognizable. See Lehner, 'Judicial Review of Administrative Inaction' (1983) 83 *Columbia Law Review* 627.

<sup>26</sup> J Crawford, *State Responsibility. The General Part* (Cambridge University Press, 2013) 2018.

<sup>27</sup> On the framing of positive obligations, see generally V Stoyanova, 'The Disjunctive Structure of Positive Rights under the European Convention on Human Rights' (2018) 87(3) *Nordic Journal of International Law* 344.

<sup>28</sup> For example, Article 5(2) of the Istanbul Convention that contains the obligation of due diligence to "prevent, investigate punish and provide reparation" is very abstract. The same level of abstraction can be found in Article 12(2) of the same Convention: "Parties shall take the necessary legislative and other measures to prevent all forms of violence covered by the scope of this Convention by any natural or legal person." In contrast, Article 16(1) (support programs for perpetrators) that also aims at prevention of violence is framed in more concrete terms.

to life; the right not to be subjected to torture, inhuman or degrading treatment; the right to private life etc.). There has been, however, an increased interest in the "supply side" of human rights,<sup>29</sup> i.e. in the corresponding obligations,<sup>30</sup> because of the awareness that framing the obligations is crucial for the realisation of rights. If we take rights seriously and see them as normative, we must take obligations seriously.<sup>31</sup> In other words, rights have to be matched by obligations.<sup>32</sup>

Due diligence as a standard of conduct that requires the discharge of an obligation helps in this respect. It has been "a fundamental feature of many disparate areas of international law",<sup>33</sup> however, international treaty law rarely uses the term "due diligence."<sup>34</sup> Similarly, human rights treaties do not generally explicitly contain the term "due diligence". Article 5(2) of the Istanbul Convention is thus exceptional in this sense. Within the UN human rights treaty system, the framework of the obligations to respect, protect and fulfil is rather used.<sup>35</sup> This has a basis in the text of the treaties. The International Covenant on Civil and Political Rights (ICCPR) stipulates that "Each Party to the present Covenant undertakes to respect and to ensure [...] the rights recognised in the present Covenant."<sup>36</sup> Article 1 of the ECHR also stipulates that "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention." The obligation to secure the right has been interpreted by the European Court of Human Rights (ECtHR) as imposing positive obligations upon States to take positive measures.<sup>37</sup> The ECtHR has thus adopted the terminology of positive and negative obligations. Brief clarification is necessary at this juncture as to the conceptual framework of the obligations to respect, protect and fulfil and its relationship to the positive versus negative obligations dichotomy.

The obligation to respect refers to circumstances when the State has to refrain from infringing human rights and, in this sense, the State is under a negative obligation. Responsibility

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<sup>29</sup> J Griffin, *On Human Rights* (OUP, 2008) 111.

<sup>30</sup> J Nickel, 'How Human Rights Generate Duties to Protect and Provide' (1993) 15(1) *Human Rights Quarterly* 77; J Nickel, *Making Sense of Human Rights* (2007) 37-41; J S Besson, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights: A Quiet (R)evolution' (2015) 32(1) *Social Philosophy and Policy* 244; A Kuper, Introduction: The Responsibilities Approach to Human Rights in A Kuper (ed), *Global Responsibilities. Who Must Deliver on Human Rights?* (Routledge, 2005).

<sup>31</sup> O O'Neill, 'The Dark Side of Human Rights' (2005) 81(2) *International Affairs* 427, 430; H Shue, 'The Interdependence of Duties' in P Alston and K Komarsevski (eds) *The Right to Food* (Martinus Nijhoff, 1984) 83, 84: "The bottom line of the intellectual enterprise, [], must be the specific designation of what should be done by whom at a level of detail that will permit assessments of compliance by responsible agents themselves and, where appropriate, by others charged with supervision over their compliance".

<sup>32</sup> "Identifying the multiple duties that may be relevant to any one rights sharpens an understanding of what is distinctive to and necessary to realize that right." HR Steiner, P Alston and R Goodman, *International Human Rights in Context: Law, Politics, Morals* (Oxford University Press) 186.

<sup>33</sup> D French and T Stephens (Rapporteurs), International Law Association Study Group on Due Diligence in International Law, First Report, 7 March 2014, 6; J Kulesza, *Due Diligence in International Law* (Brill, 2016).

<sup>34</sup> D French and T Stephens (Rapporteurs), International Law Association Study Group on Due Diligence in International Law, First Report, 7 March 2014, 6.

<sup>35</sup> There is no consistency among the different UN treaty bodies though. This corresponds to the taxonomy originally developed in H Shue, *Basic Rights* (Princeton University Press, 1996) 52.

<sup>36</sup> Article 2(1) ICCPR.

<sup>37</sup> *Opuz v Turkey* App no 33401/02 (ECHR, 9 June 200) para 159. It needs to be acknowledged that in some judgments the ECtHR has used the term "due diligence". See, for example, *Talpis v Italy* App no 41237/14 (ECHR, 2 March 2017) para 124 and *Opuz v Turkey* paras 137-149), however, not as a general standard and without prejudice to the detailed elaboration of the concrete tests applicable under the positive obligations framework.

does not pivot here on due diligence,<sup>38</sup> since the issue is one of state action, not a failure to act. At this junction, it is pertinent to observe that Article 5(1) of the Istanbul Convention has somehow sown confusion in this respect since it uses the term “ensure” (not “respect”) with reference to state agents’ activities that will *normally* give rise to negative obligations.<sup>39</sup> Pursuant to Article 5(1), State Parties have to ensure that state agents act in conformity with the obligation to refrain from engaging in any act of violence. The clearer formulation would rather be that state agents have to respect the obligation, i.e. they shall not commit any acts of violence.

The text of Article 5(1) of the Istanbul Convention also introduces a distinction between actions of State Parties, on the one hand, and actions of “State authorities, officials, agents, institutions and other actors acting on behalf of the State”, on the other. This distinction is non-existent from the perspective of international law that assumes the unity of the State.

An importation qualification is immediately due here. Negative obligations in human rights law are usually relevant when state agents cause harm. However, positive obligations might be also relevant in these circumstances: States are under the obligation to “structure their relationship between their agents and individuals in such a way that harm is prevented and, if it occurs, is adequately addressed.”<sup>40</sup> This has been particularly relevant in the context of the right to life, where human rights law assumes that state agents can legitimately use lethal force under certain circumstances (see Article 2(2) ECHR) and that there is a need to regulate these circumstances.<sup>41</sup> However, in the context of violence that cannot be justified as, for example Article 2(2) ECHR justifies it, harm caused by state agents is a breach of negative obligations and no issues of due diligence arise. This means that, for instance, the standard of reasonableness that will be discussed in the next section, is not pertinent.

In contrast to the negative obligation to respect, the obligations to protect and fulfil can be generally framed as positive obligations. These raise some of the same challenges as those discussed above in relation to the concept of due diligence; namely, framing the obligations *ex ante* and then using them to assess state conduct *post factum*. However, generally the ECtHR does not use the concept of due diligence and, as I will show below, not all positive obligations are obligations of due diligence. Better sensitivity as to the divergences and their implications is called for.

### 3. Due Diligence Contrasted to Positive Human Rights Obligations

The attempt to disentangle and better understand the relationship between due diligence and positive obligations in human rights law has to start with the emphasis that the classification of positive obligations under the ECHR is much more complex and nuanced than the general standard of due diligence. The ECtHR has made important advances in framing the positive obligations at a more concrete level. These can be generally systematised as (1) the obligation to criminalise harmful conduct, (2) the procedural obligation to investigate allegations of criminal

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<sup>38</sup> R Pisillo-Mazzeschi, 'Due Diligence Rule and the Nature of International Responsibility of States' (1992) 35 German Yearbook of International Law 9, 23.

<sup>39</sup> This confusion can be perhaps resolved by reading Article 5(1) as a whole to the effect that States have to ensure that state authorities refrain from engaging in any act of violence against women.

<sup>40</sup> V Stoyanova, 'Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights' (2018) 18 Human Rights Law Review 309.

<sup>41</sup> *McCann and Others v United Kingdom* [GC] App no 18984/91 (ECHR, 27 September 1995) para 194. A similar argument can be made under Article 5 ECHR (the right to liberty) that exhaustively indicates circumstances when the State can inflict harm upon individuals in the form of detention.



conduct, (3) the obligation to take protective operational measures, (4) the obligation to adopt effective regulatory frameworks for general prevention and (5) the obligation to offer remedies.<sup>42</sup> To some extent, these are reflected in the text of Article 5(2) of the Istanbul Convention that refers to prevention, investigation, punishment and provision of reparation. Article 5(2) of the Istanbul Convention, however, subjects all of these to the standard of due diligence. This implies that the text of the treaty assumes convergence between due diligence and positive obligations. As I will show below, this should be a reason for concern. A meaningful effort to juxtapose the two frameworks (due diligence versus positive obligations) requires a better understanding of each one of them, which is attempted below.

### 3.1. Factors Relevant to the Due Diligence Assessment

When it comes to the standard of due diligence, perhaps the most in-depth study so far has been conducted by the International Law Association (ILA) that has issued two reports on due diligence.<sup>43</sup> In contrast to the first report that is thematic (i.e. how the standard of due diligence is applied in distinctive areas of international law, including human rights law),<sup>44</sup> the second report aims to address broader analytical questions as to what functions due diligence serves, why it is employed as a standard of conduct and what factors influence the variability of the standard.<sup>45</sup> As to the first two questions, the second ILA report highlights that since due diligence triggers obligations of conduct, rather than of result, it preserves for States "a significant measure of autonomy and flexibility in discharging their international obligations."<sup>46</sup> The ILA report contends that it is possible to identify certain factors when making an assessment whether the State has acted with due diligence: (1) reasonableness, (2) control, (3) degree of risk and (4) state knowledge about the harm or the risk of harm. As to the first one, it implies that the State is only required to take reasonable measures, which necessarily presuppose a context-specific assessment and hardly any *in abstracto ex ante* determination can be made as to what is reasonable to expect from the State.<sup>47</sup> This relates to the second factor mentioned above, namely control. This factor implies that the more control the State has over non-state actors, the more reasonable it is to impose higher expectations on the State in terms of measures taken.<sup>48</sup> The control factor can be linked to state capacities and resources. The less resources the State has, the less control it is likely to have, which might relax the actual conduct required. As to the risk, the measures expected from the State have

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<sup>42</sup> For this systematization see V Stoyanova, *Human Trafficking and Slavery Reconsidered. Conceptual Limits and States Positive Obligations in European Law* (Cambridge University Press, 2017) 329. For other systematizations see C Dröge, *Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention* (Springer, 2003), who frames two dimensions of positive obligations: horizontal dimension and social dimension. The horizontal dimension covers obligations of protecting individuals against interferences by other private parties (the obligations to criminalise and to take protective operational measures fall here). According to Dröge, the social dimension is very versatile since it includes 'obligations of the state to realize the effective enjoyment of human rights in social reality'. See also L Lavrysen, *Human Rights in a Positive State. Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Intersentia, 2016) 45.

<sup>43</sup> See the Due Diligence Study Group <http://www.ila-hq.org/index.php/study-groups>

<sup>44</sup> ILC Study Group on Due Diligence in International Law, First Report, Duncan French (Chair) and Tim Stephens (Rapporteur) 7 March 2014.

<sup>45</sup> ILC Study Group on Due Diligence in International Law, Second Report, Tim Stephens (Rapporteur) and Duncan French (Chair) July 2016.

<sup>46</sup> ILC Second Report, 2.

<sup>47</sup> ILC Second Report, 9.

<sup>48</sup> ILC Second Report, 11.

to be appropriate and proportionate to the degree of risk of harm.<sup>49</sup> The higher the risk, the more demanding obligations of diligence can be imposed on the State. The element of state knowledge is also crucial: the State can be expected to take measures only when it knew or should have known about the harm or the risk of harm.<sup>50</sup>

Given these factors, it is clear that it cannot be ascertained with certainty in advance whether the State's conduct meets the standard of due diligence. Once harm materialises, an *ex post facto* review can be made given the circumstances.<sup>51</sup> This inevitably creates a great deal of uncertainty since nobody can know in advance what is required for satisfying the due diligence obligation. This uncertainty, however, also denotes flexibility, which, as mentioned above, is a reason as to why the standard of due diligence in international law has been attractive.

It is also crucial to highlight that these four factors determine both the existence of an obligation and the question whether the obligation has been breached.<sup>52</sup> The factors also determine the *scope* of the obligation, understood as how demanding the obligation should be. For example, the higher the degree of risk, the higher the demands that can be imposed upon the State to prevent it. As to the *content* of the obligation, understood as the concrete measures that the State should have adopted but failed to do so, it is also dependent on these four factors. For example, given the circumstances, the expectation from the State to take the concrete measure of, say, a restraint order, might not be reasonable.<sup>53</sup> However, in the process of making the *ex post facto* assessment as to the existence of a breach, the decision maker needs to have some idea as to the concrete measures that could have been adopted. Otherwise, it will be difficult to measure the omission. The decision maker still needs to ask the question of what measures should have been taken (if no measures whatsoever were actually undertaken) or what alternative protective measures could have been undertaken (if some protective measures were undertaken, but they arguably turned out to be ineffective). Despite the *ex post factum* inquiry as to any concrete alternatives, generally the State preserves its discretion and flexibility as to how it fulfils its due diligence obligations. It has to be, however, acknowledged that there might be cases where the particular circumstances are such that no other but a specific measure is called for. In addition, there might be general agreement that in certain type of circumstances certain measures are required (e.g. support programs for teaching perpetrators to adopt non-violent behaviour;<sup>54</sup> locating victim support services on the same

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<sup>49</sup> ILC Second Report, 12.

<sup>50</sup> ILC Second Report, 12. See also M Hakimi, 'State Bystander Responsibility' (2010) 21(2) *European Journal of International Law* 341, who has developed a framework with factors that determine the identification and the requirements raised by the obligation to protect from abuses committed by third parties. The factors that she proposes are (1) control (it corresponds to the factor proposed in the ILA report); (2) severity of harm; and (3) reasonableness (it corresponds to the factor proposed in the ILA report). As to the second factor that is absent from the ILA report, Hakimi contends that '[s]tates must protect only against conduct that: (1) causes serious physical or psychological harm; or (2) affects people because they belong to vulnerable group.' While it might be correct that the severity of the harm might influence the assessment what measures are reasonable and, thus, this factor needs to be taken into account, the starting assumption in human rights law is that fundamental and important interests are protected and framed in terms of rights.

<sup>51</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v Serbia)* (ICJ February 2007) para 430: "the notion of 'due diligence' [...] calls for an assessment *in concreto*."

<sup>52</sup> See English law of state negligence where a similar overlap can be observed. C Booth and D Squires, *The Negligence Liability of Public Authorities* (Oxford University Press, 2006), where the questions asked for establishing the existence of a duty of care (i.e. the obligation to take positive action) and the questions asked for determining whether this duty has been breached are explained.

<sup>53</sup> Restraint and protection order are regulated by Article 53, Istanbul Convention.

<sup>54</sup> Article 16(1), Istanbul Convention.

premises<sup>55</sup>). The concrete provisions of the Istanbul Convention provide a good example in this respect.<sup>56</sup> The Convention is an expression of the coalescence around certain more specific measures that States have to undertake, which clearly shapes the standard of reasonableness. In particular, it is harder to make an argument that it is not reasonable to undertake those specific measures. It is also harder to make an argument that since the State has less control and fewer resources, a relaxation of the obligation should follow.

Not only does the State preserve its flexibility as to what measures to adopt to fulfil its due diligence obligations, but these measures, as the State has chosen to take, are not required to achieve particular outcomes. As already mentioned above, the due diligence obligation is an obligation of conduct, not of end result.<sup>57</sup> This implies that even if the harm has actually materialised, this is far from enough for establishing state responsibility under human rights law with reference to the due diligence standard. It is simply not reasonable to expect from the State to prevent *any* domestic violence inflicted by private parties. The materialization of the harm (i.e. suffering domestic violence) will likely trigger the *ex post facto* concrete assessment whether the state conduct (the range and the sequence of measures taken) has actually lived up to the due diligence standard in the concrete circumstances.

Another question that has to be raised is whether the materialization of harm is a *necessary* requirement so that a State can be found to have failed to fulfil its due diligence obligation. The judgment of the International Court of Justice (ICJ) in the *Bosnia Genocide* case offers some insights.<sup>58</sup> The ICJ found that a State can be held responsible for a failure to prevent genocide (an obligation that the ICJ framed as one of due diligence) only if genocide is actually committed.<sup>59</sup> To substantiate this, the ICJ referred to a general rule of the law of state responsibility as codified in Article 14(3) of the ILC Draft Articles on State Responsibility: "The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation."

It is crucial, however, to clarify that "a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed."<sup>60</sup> As Milanovic has remarked,

There is a slight, if unavoidable, contradiction in defining the scope of the duty to prevent genocide as arising whenever there is awareness of a serious risk of genocide, yet requiring that genocide actually be committed in order that state responsibility for a breach of the obligation to prevent should ensue.<sup>61</sup>

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<sup>55</sup> Article 18(3), Istanbul Convention.

<sup>56</sup> It needs to be, however, also acknowledged that these concrete provisions also allow for considerable state discretion and flexibility. See, for example, the qualifiers "where appropriately" (used in Article 4(2), 13, 16(3), 18(3), 44(6), 45(1), 56(2), 62(4) of the Istanbul Convention) and 'under appropriate conditions' (used in Article 28 of the Istanbul Convention).

<sup>57</sup> J Knox, 'Horizontal Human Rights' (2008) 102 *American Journal of International Law* 1, 21-24; Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States' (1992) 35 *German Yearbook of International Law* 9, 30.

<sup>58</sup> *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro) (ICJ, 27 February 2007) (hereinafter *Bosnia Genocide Case*).

<sup>59</sup> *Bosnia Genocide*, para 431.

<sup>60</sup> *Bosnia Genocide*, para 431.

<sup>61</sup> M Milanovic, 'State Responsibility for Genocide: A Follow-Up' (2007) 18(4) *European Journal of International Law* (2007) 669, 687.

It follows that the obligation of due diligence has a “dual nature”: it arises whenever there is a serious risk of harm, but is capable of being breached only when the harm has already materialised.<sup>62</sup> Therefore, it is crucial to clarify the distinction between the arising and the existence of the due diligence obligation, on the one hand, and the assessment of whether the State is responsible for its failure to fulfil it, on the other. An assessment affirming failure and thus responsibility implies the materialization of harm. The trigger of the obligation of due diligence requires only a risk of harm, which intimately relates to the whole rationale behind the due diligence standard, namely the prevention of harm.<sup>63</sup>

To recapitulate, the standard of due diligence implies that States have to act without achieving any certain results; the standard allows a wide margin of flexibility as to the substance of conduct (i.e. the measures); the assessment as to the sufficiency of the conduct is influenced by the following factors: reasonableness, degree of control, degree of risk and knowledge about the risk of harm. No assessment in advance can be made on whether the state conduct complies with the standard of due diligence. True, the standard is triggered and applies whenever there is a risk of harm and in this way has preventive functions. However, the assessment that aims at determining whether a State carries international responsibility for its omissions to exercise due diligence requires the materialization of harm.

### 3.2. Positive Human Rights Obligations

I will review the five positive human rights obligations already identified above in the introductory paragraph to Section 3. Although this review will be extensively based on the case law of the ECtHR in the area of violence against women, judgments from other areas where similar analytical issues arise are also used. Article 2 (the right to life), Article 3 (the right not to be subjected to torture, inhuman or degrading treatment) and Article 8 (the right to private life) have been the main ECHR provisions under which the Court has engaged with violence against women. Therefore, the judgments cited below have been decided based on these articles.

The main objective here is to see whether indeed the above described factors and characteristics of the due diligence standard have any role to play in the context of *all* positive obligations without any variations. How do these factors and characteristics manifest themselves in the context of positive obligations?

The establishment of state responsibility for breaches of ECHR requires the materialization of harm. Before engaging with the issue of obligations, the Court has to assess whether the specific ECHR provision has been engaged, i.e. whether the definitional threshold of Article 3 or Article 8

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<sup>62</sup> Ibid 688.

<sup>63</sup> Prevention has been the main reason as to why “due diligence” has been invoked in the context of violence against women. See Special Rapporteur on Violence against Women, its Causes and Consequences, *The Due Diligence Standard as a Tool for the Elimination of Violence against Women*, UN Doc. E/CN.4/2006/61 (20 January 2006) (by Yakin Ertürk) 6, para 15; Special Rapporteur on Violence against Women, its Causes and Consequences, *Report on Violence against Women, its Causes and Consequences*, UN Doc. A/HRC/23/49 (14 May 2013) (by Rashida Manjoo) 7, para 20.

has been passed,<sup>64</sup> in the first place.<sup>65</sup> This corresponds to one of the characteristics of the due diligence standards as clarified in Section 3.1 above; namely, the requirement that the harm has actually materialised so that the state responsibility can be established.

### 3.2.1. *Obligation to criminalise*

It has been firmly established in the ECtHR's case law that States have the positive obligation to criminalise abuses.<sup>66</sup> The leading judgments in this respect are *X. and Y. v the Netherlands*<sup>67</sup> and *M.C. v Bulgaria*,<sup>68</sup> both of them involving violence against women reaching the threshold of Article 3 and Article 8 ECHR. In the context of Article 2, the Court has held that this provision requires from States

to take appropriate steps to safeguards the lives of those within its jurisdiction. This involves a primary duty on the State to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.<sup>69</sup>

It is important to observe here that the obligation to criminalise does not require an engagement with any of the factors the shape the due diligence standard. More specifically, no issue arises as to whether a criminal law measure should be available in light of any assessment as to its reasonableness or knowledge about the risk of harm.<sup>70</sup> In *Valiuliene v Lithuania*, the ECtHR clarified that

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<sup>64</sup> This has been referred as the bifurcated structure of rights. See J Gerards and H Senden, 'The Structure of Fundamental Rights and the European Court of Human Rights' (2009) 7 *International Journal of Constitutional Law* 619; J Gerards and E Brems, 'Introduction' in E Brems and J Gerards (eds), *Shaping Rights in the ECHR. The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press) 1.

<sup>65</sup> This assessment done by the ECtHR has to be clearly distinguished from the substantive obligation that implies that at the time when the events were unfolding risk of harm was enough to trigger the national authorities' obligation to take preventing operational measures (see Section 3.2.2). For an example of this confusion, see L Grans, 'The Istanbul Convention and the Positive Obligation to Prevent Violence' (2018) 18 *Human Rights Law Review* 142. It needs to be also mentioned that judgments can be identified where the Court does not make a definitive determination that the definitional threshold of the invoked provision has been passed. An example of such a judgment is *Rantsev v Cyprus and Russia* App no 25965/04 (ECHR 7 January 2010). For elaboration see V Stoyanova, 'Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the Rantsev Case' (2012) 30(2) *Netherlands Quarterly of Human Rights* (2012) 163.

<sup>66</sup> For general analysis as to the relationship between human rights law and criminal law see F Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 *Journal of International Criminal Justice* 577; L Lazarus, 'Positive Obligations and Criminal Justice: Duties to Protect or Coerce' in L Zadner and J Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press, 2012) 136.

<sup>67</sup> *X. and Y. v the Netherlands* App no 8978/80 (ECHR, 26 March 1985) para 27.

<sup>68</sup> *M.C. v Bulgaria* App no 39272/98 (ECHR, 4 December 2003) para 153.

<sup>69</sup> *Konrova v Slovakia* App no 7510/04 (ECHR 31 May 2007) para 49; *Branko Tomašić and Others v Croatia* App no 46598/06 (ECHR, 15 January 2009) para 49.

<sup>70</sup> This has also given a basis for a critique see by L Lazarus, 'Positive Obligations and Criminal Justice: Duties to Protect or Coerce', in L Zadner and J Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press 2012) 136, who refers to the "coercive duties on the state to criminalise, prevent, police, and prosecute harmful acts." See also F Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 *Journal of International Criminal Justice* 577.

[...] the choice of means to secure compliance with Article 3 in the sphere of relations of individuals between themselves is in principle a matter that falls within the domestic authorities' margin of appreciation, *provided that criminal-law mechanisms are available to the victim* [emphasis added].<sup>71</sup>

The assumption is that criminalization aims at specific and general deterrence. In *Valiuliene v Lithuania*, the Court framed this objective in the following way: "[...] one of the purposes of imposing criminal sanctions is to restrain and deter the offender from causing further harm."<sup>72</sup> The clarification in *A. v Croatia* that "[b]ringing to justice perpetrators of violent acts serves mainly to ensure that such acts do not remain ignored by the relevant authorities and to provide effective protection against them"<sup>73</sup> suggests that criminalization also aims at general deterrence.<sup>74</sup>

The relevance of the due diligence standard emerges if an assessment has to be made as to the *actual application* of the criminal law at national level. In circumstances where no issues arise as to the scope of the criminalization (i.e. there are relevant criminal law offences and they are interpreted in a sufficiently broad way), but an assessment needs to be made as to any deficiencies in the application of the criminal law. As it becomes clear from *A. v Croatia* and *M.C. v Bulgaria*, there might be deficiencies as to the way the criminal law was applied.<sup>75</sup> Although, "it is not the Court's task to verify whether the domestic courts correctly applied domestic criminal law,"<sup>76</sup> the Court can review the implementation of the national criminal law.<sup>77</sup> The ECtHR has also acknowledged that States retain some flexibility as to the application of the national criminal law.

In sum, the obligation to criminalise is not an obligation of due diligence. States are, however, allowed flexibility as to the actual application of the national criminal law.

### 3.2.2. *Obligation to investigate*

The positive obligation to investigate alleged crimes is intimately related to the implementation and effectiveness of the criminal law. A proper assessment of the obligation to investigate requires the introduction of the following conceptual distinction: the conditions under which the obligation is triggered and the criteria for making the assessment of whether the investigation (once triggered) was effective.<sup>78</sup>

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<sup>71</sup> *Valiuliene v Lithuania*, App no 33234/07 (ECHR, 26 March 2013) para 85; *X and Y v the Netherlands* App no 8978/80 (ECHR, 26 March 1985) para 27: "This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions."

<sup>72</sup> *Valiuliene v Lithuania*, para 85.

<sup>73</sup> *A. v Croatia* App no 55164/08 (ECHR, 14 October 2010) para 67.

<sup>74</sup> J Rogers, 'Applying the Doctrine of Positive Obligations in the European Convention on Human Rights to Domestic Substantive Criminal Law in Domestic Proceedings' (2003) *Criminal Law Review* 690, 695.

<sup>75</sup> *A. v Croatia* App no 55164/08 (ECHR, 14 October 2010) para 67; *M.C. v Bulgaria* App no 39272/98 (ECHR 4 December 2003) para 150.

<sup>76</sup> *A. v Croatia* para 66.

<sup>77</sup> *Bălșan v Romania* App no 49645/09 (ECHR, 23 May 2017) para 64.

<sup>78</sup> For an elaboration, see V Stoyanova, *Human Trafficking and Slavery Reconsidered. Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press, 2017) 351. For the clear distinction between the positive obligation to investigate as such and the positive obligation to conduct effective investigation, see *M.C. v Bulgaria* App no 39272/98 (ECHR, 4 December 2003) paras 151 and 152.

### *Triggering of the obligation*

As to the first issue, i.e. the triggering of the obligation, some nuances in the framing can be identified in the case law under Article 2 (the right to life), on the one hand, and under Article 3 and 8, on the other. In relation to the right to life in *Branko Tomašić and Others v Croatia*, the Court use the following framing:

[...] the obligation to protect life under Article 2 of the Convention requires that there should be some form of effective official investigation when individuals have been killed as a result of the use of force, either by State officials or private individuals. [...] Whatever mode is employed, *the authorities must act of their own motion once the matter has come to their attention* [emphasis added].<sup>79</sup>

The obligation to investigate is set into motion once the matter comes to the attention of the authorities, which is a low threshold, and no issues of due diligence arise as to the triggering of the obligation. The State is under a concrete obligation to initiate the investigation.

In relation to Article 3 and 8 ECHR, the Court has referred to the tests of “an arguable claim of ill-treatment”<sup>80</sup> and “reasonable suspicion”<sup>81</sup> of ill-treatment for assessing the circumstances as to when the obligation to investigate should have been set into motion. The reference to these tests implies that once allegations of ill-treatment are made that are “arguable” and “raise a reasonable suspicion”, the obligation to investigate is triggered. The reference to the standard of reasonableness (i.e. “reasonable suspicion”) seems to imply certain level of state discretion and flexibility that are suggestive of the due diligence standard. If the Court makes a *post factum* assessment that given the circumstances, the positive obligation to investigate should have been triggered but it was not, the State is directly in violation of the ECHR.

### *Obligation of conduct, not of result*

In most circumstances, the State would have conducted some sort of an investigation into the allegations of ill-treatment. This triggers the assessment at the level of the ECHR whether the domestic investigation was effective. In making this assessment, the Court has referred to the standard of reasonableness:

The authorities must take the *reasonable steps* available to them to secure the evidence concerning the incident. Any deficiency in the investigation which undermines its ability

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<sup>79</sup> *Branko Tomašić and Others v Croatia* App no 46598/06 (ECHR, 15 January 2009) para 62.

<sup>80</sup> *Dimitar Shopov v Bulgaria* App no 17253/07 (ECHR, 16 April 2013) para 47.

<sup>81</sup> *M.C. v Bulgaria* App no 39272/98 (ECHR 4 December 2003) para 151; *Beganovic v Croatia* App no 46423/06 (ECHR, 25 June 2009) para 66; *C.A.S. and C.S. v Romania* App no 26692/05 (ECHR, 20 March 2012) para 69; *Milanovic v Serbia* App no 44614/07 (ECHR 14 December 2010) para 85-6; *M. and Others v Italy and Bulgaria* App no 40020/03 (ECHR, 31 July 2012) paras 101 and 113. It has to be, however, acknowledged that there has not been firm consistency as to how the test that triggers the obligation to investigate is formulated in the judgments. For example, in some judgments, the Court simply says: “Article 3 requires that the authorities conduct an effective official investigation into the alleged ill-treatment even if such treatment has been inflicted by private individuals.” See *Eremia v the Republic of Moldova* App no 3564/11 (ECHR, 28 May 2013) para 51; *Denis Vasilyev v Russia* App no 32704/04 (ECHR, 17 December 2009) para 98-99.

to establish the cause of death, or identify the person or persons responsible, will risk falling foul of this standard [emphasis added].<sup>82</sup>

The same standard has been framed in relation to Article 3:

The authorities must have taken *the reasonable steps* available to them to secure the evidence concerning the incident, such as by taking witness statements and gathering forensic evidence, and a requirement of promptness and reasonable expedition is implicit in this context.<sup>83</sup>

The Court has also added that the investigation should be “capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. This is not an obligation of result, but one of means.”<sup>84</sup> *D.M.D. v Romania* shows that even though the essential purpose of the investigating might be achieved (i.e. conviction of the perpetrator), the State can still be found responsible because of the manner in which the investigation was conducted. This confirms that it is the conduct that is under scrutiny, not necessarily the final result as such.<sup>85</sup>

#### *Relevance of the result from the investigation*

The qualification that the obligation to investigate as “not one of result, but one of means” has to be, however, subjected to some further analysis. The Court has never held that States are under the concrete positive obligation to prosecute a specific individual, who might have inflicted harm.<sup>86</sup> Nor has it framed a positive obligation to punish.<sup>87</sup> This certainly supports the assessment of the obligation as one of means and thus one of due diligence, given the analysis in Section 3.1 above, where it was clarified that the standard of due diligence allows States flexibility and imposes no demands of achieving particular outcomes (e.g. prosecution and conviction of a particular individual).

However, the Court has also added that it will maintain “a certain power of review and the power to intervene in cases of manifest disproportion between the gravity of the act and the results obtained at domestic level.”<sup>88</sup> The Court has also added that

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<sup>82</sup> *Branko Tomašić and Others v Croatia* App no 46598/06 (ECHR, 15 January 2009) para 62.

<sup>83</sup> *M.A. v Slovenia* App no 3400/07 (ECHR, 15 January 2015) para 47; *N.D. v Slovenia* App no 16605/09 (ECHR, 15 January 2015) para 57.

<sup>84</sup> *Eremia v the Republic of Moldova* App no 3564/11 (ECHR, 28 May 2013) para 51; *P.M. v Bulgaria* App no 49669/07 (ECHR, 24 January 2012) para 64; *W v Slovenia* App no 24125/06 (ECHR 23 January 2014) para 64; *Mikheyev v Russia* App no 77617/01 (ECHR, 26 January 2006) para 107-9: “[...] the failure of any given investigation to produce conclusions does not, by itself, mean that it was ineffective”.

<sup>85</sup> *D.M.D. v Romania* App no 23022/13 (ECHR, 3 October 2017).

<sup>86</sup> For detailed analysis and reference to case law and relevant literature, see V Stoyanova, *Human Trafficking and Slavery Reconsidered. Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press, 2017) 367.

<sup>87</sup> The severity of the punishment meted is often part of the assessment as to the effectiveness of the criminal proceedings when these included the trial stage extending beyond the investigation stage. *W v Slovenia* App no 24125/06 (ECHR 23 January 2014) para.68: “Moreover, it is worth noting that the defendants who were eventually convicted of the criminal acts against the applicant received prison sentences of between eight month and a year, which amounted to less than the minimum sentences prescribed by law, [...]”.

<sup>88</sup> *Valiuliene v Lithuania* App no 33234/07 (ECHR, 26 March 2013) para 76.



[...] *in so far as the investigation leads to charges being brought before the national courts*, the procedural obligations under Article 3 of the Convention extend to the trial stage of the proceedings. In such cases the proceedings as a whole, including the trial stage, must satisfy the requirements of the prohibition of ill-treatment [references omitted]. In this respect, the Court has already held that, regardless of the final outcome of the proceedings, the protection mechanisms available under domestic law should operate in practice in a manner allowing for the examination of the merits of a particular case within a reasonable time [emphasis added].<sup>89</sup>

The expression “the procedural obligations under Article 3 of the Convention extend to the trial stage of the proceedings” suggests that the result of the investigation (i.e. the initiation of the trial stage and any outcomes from this stage) might matter. Accordingly, and despite the rhetoric used in the text of the judgments themselves, the statement that the obligation to investigate is just one of means and not of result is too simplistic. More specifically, the above quotation does suggest that the Court’s assessment might include a review as to whether there have been any results from the investigation in terms of bringing criminal charges and any actual criminal trials.

#### *Criteria for assessing the quality of the investigation*

The Court has framed the criteria for assessing the quality of the investigation (i.e. independence, promptness,<sup>90</sup> thoroughness, capabilities of leading to the establishment of the facts).<sup>91</sup> These certainly denote more concreteness than any general references to due diligence. At the same time, the Court has also cautioned against the general applicability of the above-mentioned criteria.<sup>92</sup>

Finally, it is crucial to underscore that despite the flexibility as to the manner in which the State conducts investigations and criminal trials, the Court has identified certain factors that *cannot* be used by the State as justification for any delays:

[...] the failure of the State to ensure effective prosecution of rape cannot be justified by the backlog of cases in the relevant court [reference omitted]. Neither can it be justified by the frequent changes of the sitting judges who were dealing with the applicant’s case. Namely, as the Court has already emphasised on many occasions, it is for the State to organise its judicial system in such a way as to enable its courts to comply with the requirements of the Convention.<sup>93</sup>

In *N.D. v Slovenia*, the Court took the view

[...] that the failure of the State to ensure effective prosecution of rape cannot be justified by a backlog of cases in the relevant courts [reference omitted], cannot accept this argument

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<sup>89</sup> *W v Slovenia* App no 24125/06 (ECHR, 23 January 2014) para 65; *M.A. v Slovenia* App no 3400/07 (ECHR, 15 January 2015) para 48.

<sup>90</sup> *D.M.D. v Romania* App no 23022/13 (ECHR, 3 October 2017) para 40; *M.C. and A.C. v Romania* App no 12060/12 (ECHR, 12 April 2016) para 111.

<sup>91</sup> J Chevalier-Watts, ‘Effective Investigation under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State?’ (2010) 21(3) *European Journal of International Law* 701.

<sup>92</sup> *Velikova v Bulgaria* App no 41488/98 (ECHR, 18 May 2000) para 80.

<sup>93</sup> *W. v Slovenia* App no 24125/06 (ECHR, 23 January 2014) para 69.

[the government argument of systemic backlog], especially as, even in the face of difficulties, a prompt response by the authorities is vital in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in, or tolerance of, unlawful acts.<sup>94</sup>

As the above quotations show, certain standards (e.g. prompt response, availability of judges and consistency in dealing with the case) for measuring the effectiveness of the criminal trials are quite concrete and not susceptible to due diligence assessment. It follows that while certain standards for measuring the effectiveness and the quality of the investigation might be subject to a due diligence assessment; others might not. It is important to be sensitive to these nuances and differences. A general reference to the due diligence standard poses the danger of ignoring these divergences.

### 3.2.3. *Obligation to take protective / preventive operational measures*

Under certain circumstances, the State is under the positive obligation to take protective operational measures to prevent harm against a *specific* individual who is *at risk* from the criminal act of another individual. The first judgment where this positive obligation was developed was *Osman v the United Kingdom*.<sup>95</sup> Since *Osman*, the obligation of taking protective operational measures has been applied by the Court in different contexts, including domestic violence and violence against women.<sup>96</sup> Similarly to my analysis in relation to the obligation to investigate, the following analytical distinction has to be made from the outset: the circumstances when the obligation is triggered and, once triggered, the criteria for assessing how effectively the State has fulfilled its obligation to protect the specific individual.

#### *Triggering of the obligation*

As to the first threshold, i.e. the triggering of the obligation, the Court has observed that

[...] it must be established to its [the Court's] satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of identified individual or individuals from the criminal acts of a third party and they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid the risk.<sup>97</sup>

The following standards can be extracted from the above quoted paragraph: (1) state knowledge and (2) "real and immediate risk" of harm. The requirement of "knew or ought to have known" is clearly reflected in the due diligence standard (see Section 3.1). It is enough if the State knew or ought to have known about the *risk* of harm. In this sense, the obligation is one of prevention: no requirement is raised that the harm should have already materialised at the time when the events were unfolding and when the relevant national authorities had to make an assessment whether to intervene. At the same time, it needs to be acknowledged that these three elements (knowledge,

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<sup>94</sup> *N.D. v Slovenia* App no 16605/09 (ECHR, 15 January 2016) para 60.

<sup>95</sup> *Osman v the United Kingdom* [GC] App no 23452/94 (ECHR, 28 October 1998) para 116.

<sup>96</sup> *Konrova v Slovakia* App no 7510/04 (ECHR, 31 May 2007) para 49-50.

<sup>97</sup> *Osman v the United Kingdom* [GC] App no 23452/94 (ECHR, 28 October 1998) para 116.

risk of harm and actual harm) can be intertwined. In particular, if some form of harm has already materialised at the time when the national authorities might have undertaken protective operational measures, it will be easier to support an argument that the State should have known. This reveals the importance of bringing violent incidents to the attention of the authorities.<sup>98</sup>

The triggering of the obligation requires that the risk be "real and immediate." The Court has not offered further clarification as to the meaning of these two terms. It can be proposed that "real" risk is risk that is objectively given.<sup>99</sup> This presupposes some objective factual circumstances that can substantiate the existence of the risk. As to the standard of "immediate", it refers to the temporal dimension of the risk: how near or far in the future is it (i.e. the future from the perspective of the point in time when the events were unfolding)? The term "immediate" presupposes more temporal proximity: the risk is present "now" (i.e. "now" from the perspective of the point in time when the state authorities arguably should have taken measures). For this reason, "immediate risk" has been interpreted as "present and continuing" risk.<sup>100</sup>

### *Immediacy of the risk*

The requirement for immediacy of the risk has been found problematic in the context of domestic violence. Judge Pinto De Albuquerque in his Separate Opinion in *Valiuliene v Lithuania* has explained the underlying reasons. He has observed that "at the stage of an 'immediate risk' to the victim it is often too late for the State to intervene." For this reason, he has proposed revision of the test to the effect that the positive obligation of taking protective operational measures should be triggered when the risk is only present. Arguably, "present" risk implies a lower standard than "immediate" risk. As a consequence, he has formulated the following positive obligation:

If a State knows or ought to have known that a segment of its population, such as women, is subject to repeated violence and fails to prevent harm from befalling the members of that group of people when they face a present (but not yet imminent risk), the State can be found responsible by omission for the resulting human rights violation.

Two observations are pertinent in relation to this proposal for revision of the *Osman* test. First, in general, the Court has been quite flexible as to how it applies the "immediate" risk requirement.<sup>101</sup> Risks that could have materialised within months or even years have been accepted to be "immediate", which ultimately has stretched the notion of "immediacy" to a breaking point.<sup>102</sup> Therefore, it is doubtful whether the "immediate" risk requirement, as applied in the practice of the Court, is problematic.

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<sup>98</sup> *Irene Wilson* App no 10601/09 (ECHR decision on inadmissibility, 23 October 2012) para 48; *Bălșan v Romania* App no 49645/09 (ECHR, 23 May 2017) para 62.

<sup>99</sup> V Stoyanova, *Human Trafficking and Slavery Reconsidered. Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press, 2017) 402.

<sup>100</sup> *Re W's Application* [2004] NIQB 67; *Re Officer L* [2007] UKHL 36, Lord Carswell; *Smith v Chief Constable of Sussex* [2008] EWCA Civ 39.

<sup>101</sup> Ebert and Sijniensky, 'Preventing Violations of the Right to Life in the European and Inter-American Human Rights Systems: From the *Osman* Test to a Coherent Doctrine on Risk Prevention?' (2015)15 *Human Rights Law Review* 343.

<sup>102</sup> V Stoyanova, 'Causation between State Omission and Harm within the Framework of Positive Obligations under the ECHR' (2018) 18(2) *Human Rights Law Review* 309.

We should rather ask ourselves the question about the theoretical underpinning behind this requirement. More specifically, if “the state were to take protective actions against any potential risk *regardless of its immediacy*, then we might be confronted with the problem of a too intrusive state [emphasis in the original].”<sup>103</sup> There might thus be reasons to resist a development that implies undertaking protective *operational* measures regardless of the immediacy of the risk.<sup>104</sup>

The second observation in relation to the above quotation from Judge Pinto De Albuquerque’s Separate Opinion concerns his proposal for a modification of another segment of the *Osman* test. In particular, according to his proposal, the obligation is triggered not in relation to “identified individual or individuals” but in relation to “a segment of its [the states’] population, such as women” who are subjected to repeated violence.

In relation to this part of Judge Pinto De Albuquerque’s proposal, it is pertinent to clarify that the Court has attempted to make a distinction between the positive obligation of taking preventive operational measures and the positive obligation of adopting effective regulatory frameworks that can more generally ensure the prevention of harm.<sup>105</sup> The second one will be reviewed in more detail in the next subsection. Still, it is appropriate here to illustrate and explain the distinction.

The reasoning in *Rantsev v Cyprus and Russia* offers a good illustration of the distinction between the positive obligation of taking preventive operational measures and the positive obligation of adopting effective regulatory framework.<sup>106</sup> This case was about a young woman who was arguably trafficked from Russia to Cyprus. Under Article 4 of the ECHR (the right not to be subjected to slavery, servitude and forced labour), Cyprus was found in violation of its positive obligation to “to put in place an appropriate legislative and administrative framework” that could afford to Ms Rantseva “practical and effective protection against trafficking and exploitation.”<sup>107</sup> In particular, the Court found weaknesses in the Cypriot immigration legislation that regulated the visa regime conditions under which Ms Rantseva entered and stayed in the country. Cyprus was also found in violation of its positive obligation to take protective operational measures. In particular, by applying the *Osman* test, the Court concluded that “in circumstances which gave rise to a credible suspicion that Ms Rantseva might have been trafficking and exploited,” the Cypriot authorities failed to take measures to protect Ms Rantseva.<sup>108</sup> In the reasoning of the Court, these circumstances referred to the individual circumstances of Ms Rantseva against the general background of the situation in Cyprus characterised by serious concerns about exploitation of migrant women coming to the country to work as dancers. It follows

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<sup>103</sup> V Stoyanova, ‘Causation between State Omission and Harm’ (2018) 18(2) Human Rights Law Review; see Partly Dissenting Opinion of Judge Spano, para 13 in *Talpis v Italy* App no 41237/14 (ECHR, 2 March 2017).

<sup>104</sup> *Talpis v Italy* App no 41237/14 (ECHR, 2 March 2017) para 116-8, a case that exposed the problems ensuing from the application of the immediacy test in the context of domestic violence. In *Talpis*, however, the Court added a procedural twist; namely, as the Court’s reasoning is framed, the failure by the authorities to ‘conduct any assessment of the risks facing the applicant, including the risk of renewed assaults’ played a crucial role.

<sup>105</sup> *Mastromatteo v Italy* [GC] App no 37703/97 (ECHR, 24 October 2002); *Maiorano and Others v Italy* App no 28634/06 (ECHR, 15 December 2009); *Eremia v the Republic of Moldova* App no 3564/11 (ECHR, 28 May 2013) para 56.

<sup>106</sup> For an analysis of the case see V Stoyanova, ‘Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the Rantsev case’ (2012) 30(2) Netherlands Quarterly of Human Rights 163.

<sup>107</sup> *Rantsev v Cyprus and Russia* App no 25965/04 (ECHR 7 January 2010) para 290-293.

<sup>108</sup> *Rantsev v Cyprus and Russia* para 498. It needs to be acknowledged, though that the framing of the *Osman* test in *Rantsev v Cyprus and Russia* does reveals some idiosyncrasies. See V Stoyanova, *Human Trafficking and Slavery Reconsidered* (CUP, 2017) 401.

that some form of individualization of the harm is necessary for triggering the positive obligation of taking protective operational measures.

It might be correct that when one individual is part of a group of individuals identified as vulnerable at a more general level, this might make the triggering of the obligation to take protective operational measures easier.<sup>109</sup> Still, annihilation of the distinction between the two types of positive obligations (the obligation of taking preventive operational measures and the obligation of adopting an effective regulatory framework), which might ensue from Judge Pinto De Albuquerque's proposal mentioned above, is hardly desirable. There might be circumstances where a person is just a representative victim of certain deficiencies in the national regulatory framework that operates at a general level. In these circumstances, he or she is not identifiable in advance and, in this sense, no requirement should be raised that the State knew or should have known that he or she has specifically been at immediate risk of harm. Conversely, these requirements are pertinent in relation to the positive obligation of taking protective operational measures.<sup>110</sup> When there is no immediacy of the risk, but rather the applicant is a representative victim of some general deficiencies at the national level, the positive obligation of adopting an effective regulatory framework is the relevant one. *Rantsev v Cyprus and Russia* and the specific visa regime reviewed therein exemplify this relevance. In particular, Ms Rantseva was a representative victim of the deficiencies in the national legislation regulating the visa regime; these deficiencies made migrant women very vulnerable to abuses by employers.<sup>111</sup>

If the two types of positive obligations (to take protective operational measures and to adopt effective regulatory frameworks) are merged, there is a danger of transposing certain requirements from the first one upon the second one, which might lead to unfavourable results.<sup>112</sup> In the context of violence against women, a woman might suffer harm as a result of some general deficiencies in the national legislation (for example, how protection orders are administered) without necessarily the state authority knowing that she in particular will suffer from these deficiencies. Therefore, the individualization of the risk should not be raised as a requirement here. In contrast, in circumstances that call for protective operational measures, individualization seems pertinent, which is reflective of the standards of "real and immediate risk" to an "identified individual" as entrenched in the ECtHR's case law.

### *Assessment of the measures*

Once the positive obligation of taking protective operation measures is triggered, what is required from the State to do? The State has discretion as to what protective operational measures to undertake:

In verifying whether the national authorities have complied with their positive obligations under Article 3 of the Convention, the Court must recall that it will not replace the national

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<sup>109</sup> L Peroni and A Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11 *International Journal of Constitutional Law* 1056.

<sup>110</sup> See also V Stoyanova, 'L.E. v. Greece: Human Trafficking and the Scope of States' Positive Obligations under the ECHR' (2016) 2 *European Human Rights Law Review* 290, where a concrete example is discussed as to the distinction between these two positive obligations and the negative consequence from using one of them rather than the other.

<sup>111</sup> *Rantsev v Cyprus and Russia*, para 292-3.

<sup>112</sup> See the Partly Dissenting Opinion of Judge Bonello in *Mastromatteo v Italy* [GC] App no 37703/97 (ECHR, 24 October 2002).

authorities in choosing a particular measures designated to protect a victim of domestic violence.<sup>113</sup>

The language in relation to Article 8 has been even softer and more lenient to the State:

The Court reiterates that its task is not to take the place of the relevant national authorities in determining the most appropriate methods for protecting individuals from attacks on their personal integrity, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their discretion.<sup>114</sup>

Despite these quotations, in its judgments, the Court engages with an evaluation as to what measures could have been undertaken. As mentioned in Section 2 above, without such an evaluation it is difficult to assess the omission. For example, in *Kontrova v Slovakia*, the ECtHR enumerated the specific measures the authorities could have undertaken to protect the life of the applicant's children.<sup>115</sup> In *Opuz v Turkey* and *Branko Tomasic and Others v Croatia*, a similar enumeration was made.<sup>116</sup> It has to be also highlighted that despite the discretion that the national authorities have, in the domestic violence cases the Court has consistently emphasised the importance of the speedy and timely manner in which the authorities have to act.<sup>117</sup>

To assess the adequacy of the measures undertaken or the reasonableness of the failure to take any measures, the Court has invoked the following standards:

Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the scope of the positive obligations must be interpreted in a way which *does not impose an impossible or disproportionate burden on the authorities*. [...] they [the authorities] failed to take measures within the scope of their powers which, *judged reasonably*, might have been expected to avoid the risk. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which *legitimately place restraint on the scope of their action* to investigate crime and bring offenders to justice, [...].<sup>118</sup>

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<sup>113</sup> *Eremia v the Republic of Moldova* App no 3564/11 (ECHR, 28 May 2013) para 58.

<sup>114</sup> *Eremia v the Republic of Moldova* para 76; *Hajduova v Slovakia* App no 2660/03 (ECHR, 30 November 2010) para 47.

<sup>115</sup> In the case of *Kontrova v Slovakia*, para 53, after finding that the situation of the applicant's family was known to the police, the following measures were enumerated in the judgment as incumbent upon the authorities to undertake: '[...] accepting and duly registering the applicant's criminal complaint; launching a criminal investigation and commencing criminal proceedings against the applicant's husband immediately; keeping a proper record of the emergency calls and advising the next shift of the situation; and taking action in respect of the allegation that the applicant's husband had a shotgun and had made violent threats with in.'

<sup>116</sup> In *Branko Tomasic and Others v Croatia* para 54-59, the authorities failed to search M.M.'s premises although he claimed that he had a bomb. No adequate psychiatric treatment was provided to M.M, there was no assessment of his psychiatric condition prior to release from prison, nor was psychiatric treatment administered after his release.

<sup>117</sup> *Kowal v Poland* App no 2912/11 (ECHR decision on inadmissibility, 18 September 2012) para 51.

<sup>118</sup> *Opuz v Turkey* App no 33401/002 (ECHR, 9 June 2009) para 129.

In sum, the measures required have to be “within the scope of their [the authorities’] powers”, expected to avoid the risk,<sup>119</sup> and not disproportionately burdensome for the State. The requirement of “within the scope of their powers” requires some further elaboration. It cannot be interpreted to the effect that if the national legal framework has a gap and, as a consequence, does not require certain measures, the measures cannot be relevant in the assessment. In this sense, the scope of the powers conferred by the national regulatory framework might be too limited and this limitation cannot be used by the State to its advantage to argue that protection could not have been extended. “Within the scope of their powers” rather means that to protect individuals, the national authorities cannot be expected to violate human rights law. In this sense, conflicting interests might have to be taken into account.<sup>120</sup>

In sum, the obligation of taking protective operation measures raises a set of complex questions. These correspond to some of the factors identified in Section 3.1. (i.e. degree of risk and state knowledge about the harm or the risk of harm) that are of relevance in making the determination whether a State has exercised due diligence. However, in contrast to the due diligence standard, in the context of positive obligations important nuances have been introduced as to the individualization and the immediacy of the risk. While the positive obligation of taking protective operational measures requires such an individualization and immediacy, the positive obligation of adopting effective regulatory, to which I will turn in the next section, does not.

#### 3.2.4. *Obligation to adopt effective regulatory framework*

States are not only under the obligation to protect specific individuals who are at “real and immediate” risk of harm. States also have the positive obligation to ensure general prevention by adopting effective regulatory frameworks that structure the relationships between private parties in such a manner that harm can be prevented.<sup>121</sup> The Court has reiterated that “States are to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals.”<sup>122</sup>

#### *Strong focus on criminal law*

Generally, in the domestic violence and violence against women cases there has been a strong focus on the criminal law framework; however, the Court has made it explicit that protection by the legal framework extends beyond the realm of criminal law.<sup>123</sup>

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<sup>119</sup> The Court has referred to the standard of “real prospect”: “A failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State.” *E and Others v the United Kingdom* App no 33218/96 (ECHR, 26 November 2002) para 99.

<sup>120</sup> “[...] the Court is aware that in respect of a measure of restraint ordered against an individual, the interest of protection of a person’s physical integrity conflicts with the other person’s right to liberty.” *Kalucza v Hungary* App no 57693/10 (ECHR, 24 April 2012) para 63. In *Talpis v Italy* para 123, the Court stated that “in domestic violence cases perpetrators’ rights cannot supersede victims’ human rights to life and to physical and psychological integrity.”

<sup>121</sup> See generally L Lavrysen, ‘Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect the ECHR Rights’ in E Brems and Y Haeck (eds), *Human Rights and Civil Rights in the 21<sup>st</sup> Century* (Springer, 2014) 69; V Stoyanova, *Human Trafficking and Slavery Reconsidered* (Cambridge University Press, 2017) 369.

<sup>122</sup> *Eremia v the Republic of Moldova* para 52; *Bevacqua v Bulgaria*, App no 71127/01 (ECHR, 12 June 2008) para 65.

<sup>123</sup> *Bălșan v Romania* App no 49645/09 (ECHR, 23 May 2017) para 63, where the Court referred to the Romanian Law no. 217/2003 on preventing and combating domestic violence that ensured shelter, power of the national courts

Now, it is pertinent to reiterate the warning message that Judge Tulkens expressed in her Concurring Opinion in *M.C. v Bulgaria*:

Admittedly, recourse to the criminal law may be understandable where offences of this kind [rape] are concerned. However, it is also important to emphasise *on a more general level*, as, indeed, the Court did in *X and Y v. the Netherlands* itself, that “[r]ecourse to the criminal law is not necessary the only answer”. I consider that criminal proceedings remain, both in theory and in practice, a last resort or subsidiary remedy and that their use, even in the context of positive obligations, calls for a certain degree of “restraint”.<sup>124</sup>

In practice, however, the nature of the cases involving violence against women are such that usually the application and the effectiveness of the national criminal law and criminal proceedings are at the heart of the issues raised. It is also interesting to observe how the Court has generally framed States’ positive obligation in violence against women cases. In particular, the starting assumption seems to be that criminal law and criminal proceedings offer the structures within which responses are to be sought. For example, the Court has summarised the positive obligations in the context of domestic violence in the following way:

the States’ positive obligations under Article 3 include, on the one hand, setting up a legislative framework aimed at preventing *and punishing* ill-treatment by private individuals and, on the other hand, when aware of an imminent risk of ill-treatment of an identified individual or when ill-treatment has already occurred, to apply the relevant laws in practice, thus affording protection to the victims *and punishing* those responsible for ill-treatment [emphasis added].<sup>125</sup>

Another general formulation that can be extracted from the case law is that

[...] it goes without saying that the obligation on the State under Article 1 of the Convention cannot be interpreted as requiring the State to guarantee through its legal system that inhuman or degrading treatment is never inflicted by one individual on another or that if it is, *criminal proceedings* should necessary lead to a particular sanction. In order that a State may be held responsible it must, in view of the Court, be shown that the domestic legal system, *and in particular the criminal law application* in the circumstances of the case, failed to provide practical and effective protection of the rights guaranteed by Article 3 [emphasis added].<sup>126</sup>

Yet, if Judge Tulkens’ position is seriously considered, then other regulatory frameworks should be not simply of equal, but of higher importance. In this way, the preventive functions of positive obligations can be strengthened. Although criminal law it intended to act as a deterrent and thus to

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to order the aggressors to be held in psychiatric institutions or bans from entering the family home, and issuance of protection order.

<sup>124</sup> Concurring Opinion of Judge Tulkens in *M.C. v Bulgaria* App no 39272/98 (ECHR, 4 December 2003) para 2.

<sup>125</sup> *Eremia v The Republic of Moldova* App no 3564/11 (ECHR, 28 May 2013) para 56.

<sup>126</sup> *Valiuliene v Lithuania* App no 33234/07 (ECHR, 26 March 2013) para 75; *Beganovic v Croatia* App no 46423/06 (ECHR, 25 June 2009) para 71.



have preventive functions at a more abstract societal level, from the perspective of victims, it is a reactive tool that can deter further violence and/or offer a remedy.<sup>127</sup>

### *Relevance of other regulatory frameworks*

Besides criminal law, how are other regulatory frameworks relevant for compliance with positive obligations under the ECHR? The Grand Chamber judgment of *O'Keefe v Ireland* is a leading authority that can help us engage with this question.<sup>128</sup> The applicant complained under Article 3 ECHR that the system of primary education in Ireland failed to protect her from sexual abuse by a teacher in 1973. The ECtHR held that the question that needs to be answered to resolve the case is

[...] whether the State's framework of laws, and notably its mechanisms of detection and reporting, provided effective protection for children attending a National School against the risk of sexual abuse, of which risk it could be said that the authorities had, or ought to have had, knowledge in 1973.<sup>129</sup>

The Court clarified that

there was no evidence before the Court of an operational failure to protect the applicant [references omitted]. Until complaint about L.H. were brought to the attention of the State authorities in 1995, the State neither knew nor ought to have known that this particular teachers, L.H., posed a risk to this particular pupil, the applicant.<sup>130</sup>

In this way, the Court clearly distinguished the positive obligation of taking protective operational measures from the positive obligation of adopting an effective regulatory framework, a distinction whose value was already clarified in Section 3.2.2 above.

As to the standards for assessing any failure to fulfil the latter obligation, the Court held that:

The positive obligation to protect is to be interpreted in such a way as not to impose an *excessive burden on the authorities*, bearing in mind, in particular, the unpredictability of human conduct and operational choices which must be made in terms of priorities and recourses. Accordingly, not every risk of ill-treatment could entail the authorities a Convention requirement to take measures to prevent the risk from materializing. However, the required measures should, at least, provide protection in particular of children and other vulnerable persons and should include *reasonable steps* to prevent ill-treatment of which *the authorities had or ought to have had knowledge* [emphasis added].<sup>131</sup>

The Court also added that "it is not necessary to show that 'but for' the State omission the ill-treatment would not have happened. A failure to take *reasonably available measures* which could

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<sup>127</sup> The question of the actual deterrent effect of the criminal law has never been profoundly discussed by the ECtHR. In the ECtHR's judgments, it is simply assumed that the establishment of criminal offences can act as deterrence.

<sup>128</sup> *O'Keefe v Ireland* [GC] App no 35810/09 (ECHR, 28 January 2014).

<sup>129</sup> *Ibid* para 152.

<sup>130</sup> *Ibid* para 148.

<sup>131</sup> *Ibid* para 144.

have had a *real prospect of altering the outcome or mitigating the harm* is sufficient to engage the responsibility of the State [emphasis added].<sup>132</sup>

When these principles were applied to the case at hand, the issue of state knowledge was an important initial threshold question. However, there is an important difference with the way that this threshold operates in comparison with the positive obligation of taking protective operational measures. In *O'Keefe v Ireland*, it was sufficient that the State had general criminal laws on the subject of sexual abuses against children for the Court to conclude that the knowledge test was passed. Having established state knowledge, the ECtHR determined that since there was no "effective protective connection between the State authorities and primary-school children and/or their parents,"<sup>133</sup> the State failed and was in violation of Article 3. Crucially, no requirement was raised that the State knew or ought to have known that specifically the applicant was at risk of being sexually abused.

Various national regulatory frameworks can come under scrutiny depending on the factual circumstances of the particular case. Any aspect or branch of the national regulatory structures could be found deficient. In this sense, the Court has clarified that "it is for the national authorities to organise their legal systems so as to comply with their obligations under the Convention, including their obligation to ensure effective protection of victims of domestic violence."<sup>134</sup>

At the same time, States have discretion on how to organise their legal systems, which is certainly reflective of the flexibility implied by the due diligence standard, as mentioned in Section 3.1 above. The factors of reasonableness and knowledge that are of relevance in the assessment of any failure to comply with the positive obligation of adopting effective regulatory frameworks are also suggestive of the due diligence standard. However, as already emphasised, these factors operate differently in the context of the different positive obligations (e.g. the obligation of taking protective operational measures versus the obligation of adopting effective regulatory frameworks). These are differences that any general references to due diligence risk ignoring.

### *Causation*

A factor that was not mentioned in Section 3.1 where the due diligence standard was examined, but that might be of importance in the context of the positive obligation of adopting effective regulatory framework, is causation. This factor implies a causal link between any risk of harm and any deficiencies in the national regulatory framework. The standard of causation required can be a vexing issue since it raises the question to what extent the deficiencies should have contributed to the harm.<sup>135</sup> A separate question that might also intervene is to what extent it was possible for any alternative formulations of the national regulatory framework (that are arguably more protective for the individual) to prevent the harm.<sup>136</sup> In *O'Keefe v Ireland*, the Court referred to the "real prospect" test, but this test is far from being consistently applied in the case law.<sup>137</sup> The

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<sup>132</sup> Ibid para 149.

<sup>133</sup> Ibid para 165.

<sup>134</sup> *Kowal v Poland* App no 2912/11 (ECHR, decision on inadmissibility 18 September 2012) para 48.

<sup>135</sup> See V Stoyanova, 'Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights' (2018) 18(2) *Human Rights Law Review* 309. See also L Lavrysen, *Human Rights in a Positive State* (Intersentia, 2016)137.

<sup>136</sup> V Stoyanova, 'Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights' (2018) 18(2) *Human Rights Law Review* 309.

<sup>137</sup> *O'Keefe v Ireland* para 149.

Court has thus not determined a specific standard as to the requirement for causation, it has rather been quite flexible.

Since establishing lines of causation might be an exercise fraught with difficulties, it is easier when there are certain standards that can be used as initial baselines. The detailed provisions in the Istanbul Convention relating to, for example, training of professionals (Article 15) or cooperation between all relevant state agencies (Article 18) can be helpful in this respect. This implies that when a case manifests a national regulatory framework that does not ensure or sufficiently well regulates the coordination between the relevant national authorities or the training of professionals, the Court might be more ready to find a violation without going into a complex investigation whether and how the absence of coordination and training caused or was contributory to harm.

### 3.2.5. *Obligation to provide remedies*

It will be far beyond the scope of this section to engage with all the relevant issues revolving around the right to remedy in human rights law. The following observation is pertinent in light of the subject matter of this chapter. "Remedies" can be understood as "the process by which arguable claims of human rights violations are heard and decided."<sup>138</sup> "Remedies" can also refer to the outcome of the proceedings and the actual relief afforded when the claim is successful.<sup>139</sup> The relevant provisions from the ECHR are Article 13 (the right to effective remedy) and Article 6 (the right to fair trial).<sup>140</sup>

Article 5(2) of the Istanbul Convention uses the term "reparation" and stipulates that States have to exercise due diligence "to provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors." In the law of state responsibility, "reparation" is used in the context of inter-state claims<sup>141</sup> and its forms are restitution, compensation and satisfaction.<sup>142</sup> In contrast, Article 5(2) of the Istanbul Convention limits reparation to circumstances where violence is committed by private individuals. This is, however, rectified with Article 29(2):

Parties shall take the necessary legislative or other measures to provide victim, in accordance with the general principles of international law, with adequate civil remedies against State authorities that have failed in their duty to take the necessary preventive or protective measures within the scope of their powers.

Contrary to what Article 5(2) of the Istanbul Convention suggests, the existence of procedures and institutions at the national level for affording remedies (against the State and against private individuals) is not subject to the due diligence standard. This is, in fact, also supported by the text

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<sup>138</sup> D Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 2006) 7.

<sup>139</sup> *Ibid* 7.

<sup>140</sup> See *D.M.D. v Romania* App no 23022/13 (ECHR, 3 October 2017) paras 61-69 where the ECtHR found that the omission of the domestic courts to examine whether compensation should have been awarded to the applicant (a child victim of domestic violence) amounted to denial of justice, which amount to violation of Article 6 ECHR.

<sup>141</sup> D Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 2006) 7; Article 31, ILC Draft Articles on State Responsibility.

<sup>142</sup> Article 34, ILC Draft Articles on State Responsibility.

of both Article 29(2) and Article 30(1) of the Istanbul Convention.<sup>143</sup> States are under a *concrete* obligation to have such procedures and institutions. The due diligence standard is of relevance, however, in relation to the way these procedures are organised and the way institutions function. These might require contextualization in every concrete case.

As to the result of any remedial procedures, the obligation of the State is one of due diligence. Article 30(2) of the Istanbul Convention, however, might be perceived as a departure from this proposition. It stipulates that “[a]dequate state compensation *shall be awarded* to those who have sustained serious bodily injury or impairment of health, to the extent that the damage is not covered by other sources [...] [emphasis added].” Two observations are pertinent here. First, the personal scope of the right to compensation as formulated by Article 30(2) is limited to victims with “serious bodily injury or impairment of health”, which implies that victims whose injuries do not meet the seriousness threshold are excluded from the scope of this provision. Second, Article 30(2) is open to reservation and many States have taken advantage of this possibility.<sup>144</sup> The mere fact that Article 30(2) has been left open for reservation is indicative of the reluctance of States to endorse an obligation to afford remedies (understood as the actual outcome from the remedial proceedings) that goes beyond the due diligence standard.

#### 4. Conclusion

Article 5(2) of the Istanbul Convention causes confusion since it subjects all four types of obligations it refers to, namely the obligation “to prevent, investigate, punish and provide reparation” to the standard of due diligence. Given the practice of the ECtHR in the area of positive human rights obligations, the standards under which the obligations to prevent harm, to investigate, to punish and to provide remedies are triggered and the standards as to when the State is found to have failed to fulfil them, vary. Article 5(2) of the Istanbul Convention seems to be oblivious of these variations. Another source of concern emerging from Article 5(2) of the Istanbul Convention is that it textually limits these four obligations to prevent, investigate, punish and provide reparation to circumstances when violence is “perpetrated by non-State actors.” In fact, the same obligations are of equal relevance when state actors inflict harm. I contend that the confusion arising from this conceptual slippage is problematic and I call for better analytical rigor. I hope that this chapter has contributed in this respect.

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<sup>143</sup> Article 30(1) of the Istanbul Convention stipulates: “Parties shall take the necessary legislative or other measures to ensure that victims have the right to claim compensation from perpetrators for any of the offences established in accordance with this Convention.”

<sup>144</sup> Article 78(2), Istanbul Convention. The following State Parties have submitted reservations in relation to this provision: Andorra, Armenia, Cyprus, Georgia, Malta, Monaco, Poland, Romania, Serbia, Slovenia and Macedonia. See [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/declarations?p\\_auth=XfwEqXdj](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/declarations?p_auth=XfwEqXdj). See also W Burek in this volume.