

# COMBATING DOMESTIC VIOLENCE AGAINST WOMEN

## A Positive State Duty Beyond Sovereignty

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### 1. INTRODUCTION

Domestic violence against women has long been a matter of low priority in the human rights domain; it was regarded as a private matter rather than a human rights concern. Further, States were reluctant to combat forms of violence that originate from specific cultures, customs, religions and traditions. Nowadays, violence against women is widely recognised as a violation of women's human rights. Qualifying violence by non-state actors – including violence occurring in the private domain – as a human rights issue means that all forms of domestic violence are a matter of 'legitimate concern' of the international community,<sup>2</sup> and that States have obligations under international human rights law to prevent and combat this phenomenon.

Developments in international human rights law show a shift in the perceptions of domestic violence against women. In the past two decades monitoring bodies have concerned themselves much more extensively than before with the issue, and have formulated in concrete terms how States should give effect to the relevant rights laid down in the various human rights instruments. The applicable human rights norms have been set out in detail in the practice of human rights monitoring bodies, including the United Nations treaty bodies, the regional human rights courts and the United Nations Special Rapporteurs. Today, the issue is firmly on the agenda of regional and global international organisations and human rights treaty monitoring bodies. In their work all these bodies have addressed the issue of violence against women, and have formulated

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<sup>2</sup> A/CONF.157/23, *Vienna Declaration and Programme of Action*, Part I, par. 4.

specific obligations of States; at the same time they have developed concepts that define the way in which these obligations must be met.

These concepts are being developed in the specific context of each body. All have their own particular legal framework and powers. The regional courts have established a tradition of authoritative, legally binding decisions that play an important role in the national law and practice of States parties. In addition, four United Nations treaty monitoring bodies have the power to deal with individual complaints. Practice shows that increasingly, the different institutions take each other's views into account.

Human rights courts and treaty monitoring bodies consistently stress that States not only have negative obligations with respect to protection of individuals in the private sphere, but also positive obligations. Together these obligations constitute the framework for determining the scope of the sovereign power of the State.

In this contribution, we examine how the generally formulated obligations can be tailored to be applied effectively to situations of domestic violence against women. We will focus in particular on recent developments regarding the right to be free from torture and other cruel, inhuman or degrading treatment or punishment, and on the right to respect for private life, which is equally relevant, especially in the jurisprudence of the European Court of Human Rights. We intend to investigate the possible added value of including domestic violence against women in the concept of torture or inhuman treatment, also taking into account other international human rights obligations.

This contribution is divided into four parts. First, a section is devoted to the concept of positive obligations as developed in this context by the Inter-American Court of Human Rights and the European Court of Human Rights. Subsequently, we will examine how United Nations organs have amplified the positive obligations to protect women against domestic violence, in particular the duty to take all necessary legislative measures and the duty to investigate, prosecute and punish domestic violence as a form of ill-treatment. This is followed by an overview of a number of individual cases concerning domestic violence decided upon by regional and UN treaty bodies. The final section contains some concluding remarks. Since the Convention Against Torture (the Convention) contains detailed positive obligations aimed at protecting and abolishing torture and ill-treatment, this Convention and the work of the Committee Against Torture has been accorded a central place in this contribution. In examining how the various provisions of the Convention might be applied more effectively to domestic violence against women, we will make use of other human rights instruments, general comments and recommendations, concluding observations and views, and decisions of United Nations treaty monitoring bodies, as well as reports of

Special Rapporteurs. As formulated in a joint statement by the United Nations Special Rapporteurs on Torture and Violence against Women on the occasion of the International Day on the Elimination of Violence against Women (25 November 2007), the different sets of international standards ‘should be used more systematically to inform and strengthen one another. If taken together they will considerably reinforce women’s protection from violence and render it more effective, as well as contribute towards transforming unequal patriarchal values and structures that underlie acts of violence and discrimination against women.’<sup>3</sup>

## 2. THE DOCTRINE OF POSITIVE OBLIGATIONS AS DEVELOPED IN THE CASE-LAW OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS AND THE EUROPEAN COURT OF HUMAN RIGHTS

The concept of positive obligations has been developed in particular in the case-law of regional human rights courts. In the 1980s both the Inter-American Court of Human Rights and the European Court of Human Rights developed the doctrine of positive obligations. This doctrine is related to other doctrines that define the nature of international human rights, such as the evolutionary character of human rights provisions and the doctrine of subsidiarity.<sup>4</sup>

States have positive obligations to ensure that individuals are protected against human rights violations, which obligations may include a duty to interfere in the private sphere. The scope of the obligations depends on the circumstances of the case and the rights involved. This means that the State has a margin of appreciation in deciding which measures are appropriate. It is the State that has to find the balance between the (general and individual) interests concerned. Among the elements that play a role are the severity of the infringement and the personal circumstances of the individuals concerned. The nature of the obligations depends on the specific case as well. States can be required to take legal measures, as well as other actions. Thus, a distinction can be made between substantive obligations and procedural obligations. The first category refers to obligations that are related to the realisation of the specific right at stake, such as the obligation to provide education and health care. Procedural obligations are related to duties to investigate possible (threats of) violations, to prosecute and punish perpetrators, and to offer effective remedies, including

<sup>3</sup> ‘United Nations independent experts call on states to strengthen the protection of women from violence’, United Nations Press Release, 23 November 2007.

<sup>4</sup> See also: MARTIN KUIJER, *The Blindfold of Lady Justice, Judicial Independence and Impartiality in Light of the Requirements of Article 6 ECHR*, (Leiden: E.M. Meijers Instituut, 2004), Chapter 3.

compensation, restoration and reparation, to victims. Both types of obligations are aspects of the duty of the State *to fulfil* human rights by taking all appropriate measures, as well as of the duty *to protect*, obliging the State to protect individuals against violations by private persons.<sup>5</sup> Sandra Fredman describes the latter duty as the duty of the State to restrain others in the same way as it restrains itself.<sup>6</sup> The increasing emphasis on the duty to protect entailed growing interest in the horizontal effect of human rights and, as Nowak mentions, violence in the family is an example of this shift.<sup>7</sup> From this perspective it is understandable that some of the first cases that define positive duties are related to the protection of private life.<sup>8</sup> And it is also understandable that emphasis was put on the duties involved in protecting the most absolute rights: the right to life and to be free from torture or inhuman treatment.

The concrete positive obligations stemming from the duty to fulfil human rights and the duty to protect the right to life have been developed in the case-law of both the Inter-American Court of Human Rights and the European Court of Human Rights. The facts of the most important cases are very different, but the obligations defined by the Courts are similar. In 1988 the Inter-American Court decided, in the case of *Velásquez Rodríguez v. Honduras* among others, that ‘The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose appropriate punishment and to ensure the victim adequate compensation.’<sup>9</sup> The Court explicitly held that the State also fails to comply with its duties when ‘the State allows private persons ...to act freely and with impunity to the detriment of the rights recognized by the Convention.’<sup>10</sup> A few months later, the European Court of Human Rights emphasised in the *Osman* case that Article 2 of the European Convention on Human Rights (ECHR) may imply ‘a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.’<sup>11</sup> Since then these arguments have been reaffirmed in many cases related to the right to life and the right to freedom from torture.

<sup>5</sup> MANFRED NOWAK, *Introduction to the International Human Rights Regime*, (Leiden – Boston: Martinus Nijhoff, 2003), pp. 48–51.

<sup>6</sup> SANDRA FREDMAN, *Human Rights Transformed, Positive Rights and Positive Duties*, (Oxford: Oxford University Press, 2008), p. 73.

<sup>7</sup> NOWAK, *supra* note 5, p. 51.

<sup>8</sup> See for example, ECtHR, *Marckx v. Belgium*, 13 June 1979, *Series A*, Vol. 31.

<sup>9</sup> IACtHR, *Velásquez Rodríguez v. Honduras*, 29 July 1988, *Series C*, No. 4, par. 174.

<sup>10</sup> *Idem*, par. 176.

<sup>11</sup> ECtHR, *Osman v. the United Kingdom*, 28 October 1998, Appl. No. 23452/99, *Reports of Judgments and Decisions*, 1998–VIII, No. 95, par. 115.

However, so far both Courts have dealt with relatively few cases on the specific issue of domestic violence against women. Violence against women in other areas and child abuse in the private sphere have been considered in earlier cases. For example, in 2002 the European Court identified the duty of the State on the basis of Article 3 ECHR to protect children against maltreatment by their parents<sup>12</sup> and in 2005 it referred to positive duties under Article 4, in a case on the exploitation of a female minor as a domestic worker.<sup>13</sup>

In relation to the margin of appreciation doctrine it is significant to note that the European Court has not recognised a margin of appreciation in the context of State obligations under Articles 2 and 3. Since the majority of the cases concerning violence by private actors constitute violations of these non-derogable rights, the Court has made neither an explicit nor an implicit reference to the existence of a margin of appreciation in relation to the positive obligations identified in these cases. It only applies the margin of appreciation doctrine in cases where it has found a violation of Article 8.<sup>14</sup> In two cases, the Court determined a limitation of the States' margin of appreciation in relation to the penalisation of rape. In *M.C. v. Bulgaria* the Court analysed the limits of the margin of appreciation by looking at, *inter alia*, the evolving convergence in standards in Member States of the Council of Europe. It held that it must 'have regard to the changing conditions within Contracting States and respond, for example, to any evolving convergence as to the standards to be achieved (...)' The Court concluded that 'positive obligations under Articles 3 and 8 ECHR must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim.'<sup>15</sup> Similarly, the Court does not explicitly apply the proportionality principle in any of these cases that are relevant to violence against women by private actors.

United Nations monitoring bodies do not explicitly apply a doctrine similar to the margin of appreciation doctrine. UN instruments, in particular the Convention on the Elimination of all Forms of Discrimination Against Women (hereafter: the Women's Convention) and the Convention Against Torture, oblige States parties to take specific measures to implement the Conventions. If compared with the European Convention, it can be seen that the provisions of

<sup>12</sup> ECtHR, *Z and Others v. UK*, 10 May 2001, Appl. No. 29392/95, *Reports of Judgments and Decisions*, 2001-V.

<sup>13</sup> ECtHR, *Siliadin v. France*, 26 July 2005, Appl. No. 73361/01, *Reports of Judgments and Decisions*, 2005-VII.

<sup>14</sup> ECtHR, *X and Y v. the Netherlands*, 26 March 1985, *Series A*, Vol. 91, and ECtHR, *M.C. v. Bulgaria*, 4 December 2003, Appl. No. 39272/98, *Reports of Judgments and Decisions*, 2003-XII.

<sup>15</sup> ECtHR, *M.C. v. Bulgaria*, *supra* note 14.

these UN treaties contain many positive obligations, which have been further elaborated by the respective treaty monitoring bodies in their work under the reporting procedure and the individual complaints procedure. It is noteworthy that, in the context of the UN instruments, domestic violence against women is largely dealt with as a form of ill-treatment rather than as an issue under the right to respect for private life. Therefore, the following section addresses in particular positive obligations to protect individuals against ill-treatment by other individuals.

### 3. POSITIVE OBLIGATIONS TO PROTECT AGAINST DOMESTIC VIOLENCE AS A FORM OF ILL-TREATMENT

#### 3.1. *Introduction*

The definition of torture in the Convention Against Torture specifies that this instrument primarily addresses ill-treatment by State officials and other persons acting in an official capacity, as it refers to pain ‘inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’. The definition reflects on the one hand that the drafters of the Convention aimed to protect against repressive state regimes, but on the other hand their relative lack of awareness of the problem of violence against women.<sup>16</sup> Recent developments in the work of the Committee Against Torture show, however, that the relevance of the Convention for the issue of violence against women is beyond question. The long-awaited General Comment on Article 2 in particular makes this abundantly clear. The General Comment deals with torture and ill-treatment in different spheres, and by different actors. First, with respect to State officials and other persons acting in an official capacity, the General Comment provides that States must take ‘effective measures to prevent public authorities and other persons acting in an official capacity from directly committing, instigating, inciting, encouraging, acquiescing in or otherwise participating or being complicit in acts of torture under the Convention’,<sup>17</sup> thus ranging from acts by State officials themselves, to State officials organising in some way for others to do the dirty work, to State officials letting such dirty work happen. Second, the Committee has stressed that States bear international responsibility not only for their officials, but also for private contractors and

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<sup>16</sup> ANDREW BYRNES, ‘The Convention Against Torture’, in KELLY D. ASKIN and DOREAN M. KOENIG (eds.), *Women and International Human Rights Law*, Vol. 2. (Ardsey – New York: Transnational Publishers, 2000), pp. 183-208, at pp. 184-185.

<sup>17</sup> CAT, *General Comment No. 2, Implementation of Article 2 by States Parties*, CAT/C/GC/2/CRP.1/Rev.4, par. 17.

others who act on their behalf or under their control. Therefore, States parties must 'prohibit, prevent and redress torture and ill-treatment in all contexts (...) where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm.'<sup>18</sup> Third, the Committee has spelled out how the Convention is relevant to acts of private persons, not acting in an official capacity or under the control of the State, either in the public or the private sphere. The General Comment thus makes clear that obstacles arising from the strict definition in Article 1 can be overcome. Of relevance here are issues such as the reference to State officials as an element necessary to fulfil the definition of torture; the elaboration of the term acquiescence and the strict distinction between torture and other forms of ill-treatment.

The text of the Convention suggests a strict distinction between torture and other forms of ill-treatment. The definition in Article 1 relates exclusively to torture; Article 16 provides that States parties must also prevent 'other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1', without further defining these acts. In its General Comment on Article 2, however, the Committee has accepted that the obligations to prevent torture and other ill-treatment are interdependent, indivisible and interrelated, and that the obligation to prevent ill-treatment in practice overlaps and is largely congruent with the obligation to prevent torture. It also notes that the definitional threshold between torture and other ill-treatment is not always clear. It further observes that conditions that give rise to ill-treatment frequently facilitate torture. It concludes that 'the measures to prevent torture must be applied to prevent ill-treatment.'<sup>19</sup>

This conclusion is relevant to the issue of domestic violence. In its work under the reporting procedure, the Committee has dealt with domestic violence, as well as female genital mutilation, under Article 16 of the Convention, thus accepting that the severity of these forms of violence has passed the threshold of this provision, and that the failure to take all necessary measures aimed at preventing and combating domestic violence is attributable to the State.

Similarly, in connection with the duty to protect against infringements of rights by private persons under the International Covenant on Civil and Political Rights (ICCPR), the Human Rights Committee (hereafter: HRC) has referred to the obligation of due diligence. It has stated that a failure to ensure Covenant rights would give rise to violations as a result of States parties permitting the infringement of rights or failing 'to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts

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<sup>18</sup> CAT, *General Comment No. 2*, *supra* note 17, par. 15.

<sup>19</sup> CAT, *General Comment No. 2*, *supra* note 17, par. 3.

by private persons or entities'. The HRC refers to the interrelationship between the positive obligations imposed under Article 2 and the need to provide effective remedies in the event of breach under Article 2(3) paragraph 3. It noted that under some articles there are positive obligations on States parties to address the activities of private persons or entities. According to the HRC, it is implicit in Article 7 that States parties 'have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power.'<sup>20</sup> When reading Article 7 in conjunction with Article 2, it must be concluded that States are under a duty to prevent, punish and investigate domestic violence.

### **3.2. *Violent acts by non-state actors as torture or inhuman treatment***

The Committee Against Torture (hereafter: CAT) has always adhered to distinguishing torture from other acts of violence, and has consistently urged States parties to the Convention to adopt specific legislation criminalising torture as a specific offence, in strict conformity with Article 1 of the Convention, 'so as to draw a distinction between acts of torture committed by or at the instigation of or with the consent or acquiescence of a public official or any other person acting in an official capacity, and acts of violence in the broad sense committed by non-State actors.'<sup>21</sup> The Committee further elaborated on the meaning of the term 'acquiescence', which is particularly relevant when examining State responsibility for cases of domestic violence. The Committee has clarified the level of State involvement that is necessary to establish acquiescence, although not in domestic violence cases. In concluding observations under the reporting procedure, it referred to State responsibility when there was a certain level of active involvement on the part of State officials, for instance through financing.<sup>22</sup> In a case under the individual complaints procedure, however, it becomes clear that omission can just as well be regarded as acquiescence. The case considered by CAT concerned police officials who failed to prevent and subsequently to intervene in the demolition of houses, in violation of Article 16(1).<sup>23</sup> With regard to domestic violence against women, it can be argued that it is a well-established

<sup>20</sup> HRC, 'General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, HRI/GEN/1/Rev.8 (2006), pp. 233-238, par. 8.

<sup>21</sup> CAT, *Concluding Observations on France*, CAT/C/FRA/CO/3 (2005), par. 5.

<sup>22</sup> See for example CAT, *Concluding Observations on Colombia*, CAT/C/CR/31/1 (2003), par. 10(c), and CAT, *Concluding Observations on Indonesia*, CAT/C/XXVII/Concl.3 (2001), A/57/44, par. 45 (c).

<sup>23</sup> CAT, *Dzemajl et al. v. Yugoslavia*, 21 November 2002, CAT/C/29/D/161/2000, par. 9.2.



fact that this is a gross and serious problem. As Byrnes concludes, if the State does not undertake all appropriate measures to prevent and combat it effectively, the state ‘acquiesces’ in domestic violence.<sup>24</sup>

In General Comment No. 2, the Committee Against Torture further elaborated on the notion of ‘acquiescence’ and introduced the notion of ‘due diligence’, a term that it had not used before in its concluding observations. It stated:

(...) where State authorities or others acting in an official capacity or under colour of law, know or have reasonable ground to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with this Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State’s indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties’ failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation and trafficking.<sup>25</sup>

It is significant that CAT uses terms relating to failing to act, rather than actively contributing to bringing about the violent acts. It is also noteworthy that CAT does not distinguish between various types of non-state actors, nor does it specify the sphere in which the violence occurs. Responsibility can thus result from actively supporting and condoning violence by armed groups in the public sphere, as well as from failing to intervene in an individual case of domestic violence, provided that a State official has at least ‘reasonable ground’ to believe that such a situation exists. CAT’s explicit reference to the concept of due diligence opens up new avenues for its future dealings with domestic violence cases, not only in the context of the reporting procedure, but also in the context of the individual complaints procedure. The obligation to exercise due diligence relates both to preventing ill-treatment and to investigating, prosecuting and punishing it if it has occurred. The text of the Convention imposes clearly defined positive obligations to prevent ill-treatment and torture. The Committee Against Torture’s interpretation of the term ‘acquiescence’ implies that States parties have positive obligations under the Convention to prevent and combat domestic violence. An analogy can be drawn with the case-law of the regional

<sup>24</sup> BYRNES, *supra* note 16, pp. 193-194.

<sup>25</sup> CAT, *General Comment No. 2*, *supra* note 17, par. 18.

courts that assume the responsibility of the State when the risk of a violation of fundamental rights was known or could have been known by the State. In the following sections, we will examine the implications of the Committee Against Torture's interpretation: how can the Convention framework be applied in a gender-sensitive way, drawing inspiration from the Committee Against Torture's own work, as well as from other organs?

### ***3.3. Abolition of discriminatory legislation***

The obligation to prevent torture and other forms of ill-treatment relates to a duty to adopt general preventative measures as referred to in particular in Article 2 which imposes the obligation to take 'effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.' One interesting example is the Committee Against Torture's recommendation on the abolition of the evidentiary requirement of two witnesses in a rape complaint. According to the Committee Against Torture, this requirement in a law is discriminatory for women.<sup>26</sup> In further elaborating on this issue, it could draw inspiration from a report by the Special Rapporteur on torture. He has argued that acquiescence in domestic violence can include the failure to amend or abolish laws that contribute to the perpetuation of domestic violence, citing a UNIFEM study that refers to laws that restrict women's right to divorce or inheritance, or that prevent them from gaining custody of their children, receiving financial compensation or owning property, all of which serve to make women dependent upon men and limit their ability to leave a violent situation.<sup>27</sup> He concludes that 'States should be held accountable for complicity in violence against women, whenever they create and implement discriminatory laws that may trap women in abusive circumstances. State responsibility may also be engaged if domestic laws fail to provide adequate protection against any form of torture and ill-treatment in the home.'<sup>28</sup>

Other discriminatory legislative provisions include provisions that mitigate the sentence imposed for crimes committed in the name of honour. Such legislation should be abolished immediately, as has been acknowledged by the Human

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<sup>26</sup> CAT, *Concluding Observations on Indonesia*, CAT/C/IDN/CO/2, par. 16.

<sup>27</sup> UNIFEM, *Not a Minute More. Ending Violence Against Women*, (New York: Unifem, 2003), p. 43.

<sup>28</sup> *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, A/HRC/7/3* (2008), par 46.

Rights Committee (HRC)<sup>29</sup> and the Committee on the Elimination of Discrimination Against Women (CEDAW).<sup>30</sup>

### **3.4. The obligation to criminalise violence against women**

The Convention Against Torture requires States parties to criminalise torture (Article 4). It is widely accepted that rape by or with the acquiescence of a State official constitutes torture.<sup>31</sup> However, as to rape committed by private individuals, it is not entirely clear whether this falls within the scope of Articles 1 or 16 of the Convention. The concluding observations on South Africa seem to suggest that rape might be qualified as torture,<sup>32</sup> but in most concluding observations the Committee does not refer to either Article 1 or Article 16. The Committee Against Torture has recommended that marital rape must be a criminal offence,<sup>33</sup> in line with the practice of CEDAW<sup>34</sup> and the HRC, which consistently recommend States parties to criminalise rape.<sup>35</sup> CEDAW in particular has been quite precise in formulating recommendations relating to this crime. It has held that States must ensure that the definition is not too narrow,<sup>36</sup> that the law must penalise sexual acts committed against a non-consenting person, including in the absence of resistance<sup>37</sup> and that prosecution should not be dependent on a complaint by the victim.<sup>38</sup> Both CEDAW and the Special Rapporteur on Violence Against Women have stressed that rape is a crime against

<sup>29</sup> HRC, 'General Comment No. 28, Equal Rights Between Men and Women (Article 3)', in *Compilation of General Comments and General Recommendations*, *supra* note 20, pp. 218-225, par. 31.

<sup>30</sup> CEDAW, *Concluding Observations on Lebanon*, CEDAW/C/LBN/CO/3 (2008), par. 27.

<sup>31</sup> *Report of the Special Rapporteur on Torture*, *supra* note 28, par. 34 *et seq.*, with further references.

<sup>32</sup> CAT, *Concluding Observations on South Africa*, CAT/C/ZAF/CO/1 (2006), par. 23: 'The Committee is concerned about widespread acts of violence against women and children, especially rapes and domestic violence, and with the lack of an effective State policy to prevent and combat such violence (arts. 16 and 1).'

<sup>33</sup> CAT, *Concluding Observations on Republic of Korea*, CAT/C/KOR/CO/2 (2006), par. 17; CAT, *Concluding Observations on Iceland*, CAT/C/ISL/CO/3 (2008), par. 15.

<sup>34</sup> See for example CEDAW, *Concluding Observations on the Syrian Arab Republic*, CEDAW/C/SYR/CO/1 (2007), par. 20.

<sup>35</sup> HRC, *Concluding Observations on Republic of Korea*, CCPR/C/KOR/CO/3/CRP.1 (2006), par. 11.

<sup>36</sup> CEDAW, *Concluding Observations on India*, CEDAW/C/IND/CO/3, par. 22. Statute of the International Criminal Court, Elements of Crimes, Article 8 (2) (b) (xxii)-1.

<sup>37</sup> CEDAW, *Concluding Observations on Azerbaijan*, CEDAW/C/AZE/CO/3 (2007), par. 18. On this aspect see also ECtHR, *M.C. v. Bulgaria*, *supra* note 14, par. 163.

<sup>38</sup> CEDAW, *Concluding Observations on Republic of Korea*, *supra* note 33, par. 18.

bodily security and integrity rather than against decency and morals.<sup>39</sup> Rapists should be prosecuted, marrying the victim should not exempt them from punishment.<sup>40</sup> For the sake of consistency in the work of the various treaty bodies that address the issue of domestic violence against women, it would be beneficial if the Committee Against Torture were to subscribe to the recommendations formulated by the other treaty bodies. This would contribute to clarifying States parties' positive obligations to criminalise acts of ill-treatment, which is one of the preventive measures to be taken under the Convention Against Torture.

The Committee Against Torture has recommended the criminalisation of domestic violence,<sup>41</sup> without further specifying which forms of domestic violence can fall within the scope of the Convention. Generally, it deals with domestic violence as an issue under Article 16 of the Convention. CAT follows the HRC and CEDAW, which also stress the need to criminalise domestic violence without distinguishing which forms of violence should be made a criminal offence.<sup>42</sup> According to the Special Rapporteur on Torture, no exhaustive list of acts that constitute domestic violence exists, but in addition to intimate partner violence, it may encompass 'different types of so-called traditional practices (such as dowry-related violence and widow-burning), violence in the name of honour, sexual violence and harassment, as well as slavery-like practices often of a sexual nature.'<sup>43</sup> In various concluding observations of CAT, the recommendation to criminalise domestic violence is somewhat implicit, as it recommends that States must adopt 'preventive measures to combat sexual violence and violence against women, including domestic violence and gender-based violence, and promptly and impartially investigate all allegations of torture or ill-treatment with a view to prosecuting those responsible.'<sup>44</sup> This formulation suggests that sexual violence and violence against women can constitute torture or ill-treatment, and must be investigated and prosecuted as such. A prerequisite

<sup>39</sup> CEDAW, *Concluding Observations on Hungary*, CEDAW/C/HUN/CO/6 (2007), par. 2-21; Report of the *Special Rapporteur on Violence Against Women, its Causes and Consequences, Yakin Ertürk. Indicators on Violence Against Women and State Response*, A/HRC/7/6 (2008), par. 78.

<sup>40</sup> CEDAW, *Concluding Observations on Eritrea*, CEDAW/C/ERI/CO/3 (2006), par. 17. Also in CAT, *Concluding Observations on Cameroon*, CAT/C/CR/31/6, par. 11(c).

<sup>41</sup> CAT, *Concluding Observations on Burundi*, CAT/C/BDI/CO/1 (2006), par. 11.

<sup>42</sup> CEDAW, 'General Recommendation No. 19, Violence Against Women', in *Compilation of General Comments and General Recommendations*, supra note 29 pp. 302-307, par. 24 (r) (i).

<sup>43</sup> Report of the *Special Rapporteur on Torture*, supra note 28, par. 44.

<sup>44</sup> As for example in CAT, *Concluding Observations on Japan*, CAT/C/JPN/CO/1 (2007), par. 24.

of prosecution is a criminal provision. Recently, it recommended the adoption of 'a specific type of criminal offence for domestic violence.'<sup>45</sup>

### ***3.5. The duty to investigate, prosecute and punish***

The criminalisation of domestic violence is only a first step, which must be accompanied by measures aimed at enforcement. The effective investigation and prosecution of domestic violence cases, especially where sexual violence is involved, requires a gender-sensitive approach from the relevant authorities. Practice shows that victims have to overcome various hurdles, including financial and economic constraints.<sup>46</sup> The Convention Against Torture requires States parties to investigate, prosecute and punish cases of ill-treatment and torture. This obligation is firmly laid down in Articles 12 and 13 which require an independent and impartial investigation when there is reason to believe that an act of torture has been committed, and which ensure mechanisms for the submission and examination of complaints. In accordance with CAT's General Comment on Article 2, these provisions also apply to other forms of ill-treatment. As was noted above, the HRC has held that Article 7 ICCPR, read in conjunction with Article 2 ICCPR, also requires that States must prevent, punish, investigate and redress domestic violence.

In its work under the reporting procedure, CAT has stressed the need to implement laws on domestic violence, and has indicated which measures States parties must take to enforce legislation effectively. It has stated that States parties should 'create adequate conditions for victims to exercise their right to complain and have each case promptly, impartially and effectively investigated. Perpetrators must be brought to justice and punished with penalties appropriate to the gravity of their acts.'<sup>47</sup> CAT has acknowledged that effective implementation of laws requires training of all law enforcement personnel; it has recommended that States parties should 'ensure adequate training to sensitize law enforcement personnel on domestic violence, including sexual violence and violence against children.'<sup>48</sup> It has encouraged the establishment of dedicated police units.<sup>49</sup>

Access to justice implies a duty to take effective measures in cases of violence and to provide assistance and protection to victims, such as access to shelters and the imposition of restraining orders on the perpetrator. An example of the latter

<sup>45</sup> CAT, *Concluding Observations on Estonia*, CAT/C/EST/CO/4 (2007), par. 21; also in CAT, *Concluding Observation on Latvia*, CAT/C/LVA/CO/2 (2007), par. 20.

<sup>46</sup> *Report of the Special Rapporteur on Torture*, *supra* note 28, par. 61.

<sup>47</sup> CAT, *Concluding Observations on Ukraine*, CAT/C/UKR/CO/5 (2007), par. 14.

<sup>48</sup> CAT, *Concluding Observations on Estonia*, *supra* note 45, par. 21.

<sup>49</sup> CAT *Concluding Observations on Japan*, CAT/C/JPN/CO/1 (2007), par. 25.

is the Dutch bill which makes it possible to impose a temporary eviction order on an aggressive partner, forcing him to leave his home immediately.<sup>50</sup> On a few occasions, the Committee Against Torture included recommendations aimed at protection of and assistance to victims, including monitoring ‘the provision of social services with a view to ensuring the availability of a sufficient number of shelters, equipped to accommodate women with special needs, including women with disabilities, throughout the territory of the State party, and their adequate financing.’<sup>51</sup> States should adopt specific legislative and other measures, providing for access to medical, social and legal services.<sup>52</sup> CEDAW has specifically referred to access to immediate means of redress and protection, including protection orders, and access to a sufficient number of safe shelters, as well as to legal aid.<sup>53</sup> Further, it has recommended States to provide mandatory training for police, prosecutors and judges on the application of provisions relating to domestic violence; to encourage reporting of domestic violence through enhanced victim assistance and greater awareness of health and other professionals working with victims of domestic violence, in particular women and children.<sup>54</sup> It is noteworthy that the treaty bodies thus consider the duty to prosecute to encompass a duty to eliminate obstacles to prosecution.

#### 4. CASE-LAW ON POSITIVE OBLIGATIONS RELATED TO VIOLENCE AGAINST WOMEN

The preceding paragraphs make clear that the obligation to protect women against violence in the private sphere constitutes a comprehensive duty to take all appropriate measures: it is thus necessary to take into account general legislative and policy measures, as well as the response in concrete cases. A legislative framework, effective protective services and law enforcement officials and a judiciary capable of responding adequately and in a gender-sensitive way to reported cases of violence against women, are the necessary ingredients in the struggle for the elimination of violence against women.

In considering whether all appropriate measures have been taken, it is necessary not only to examine the general legislative and policy framework, but also the response in concrete cases. Following the elaboration of the general

<sup>50</sup> See Tweede Kamer [Parliamentary Proceedings (Second Chamber)] 2007-2008, No. 30 657.

<sup>51</sup> CAT, *Concluding Observations on Sweden*, CAT/C/SWE/CO/5 (2008), par. 23.

<sup>52</sup> CAT, *Concluding Observations on Russian Federation*, CAT/C/RUS/CO/4 (2006), par. 11.

<sup>53</sup> CEDAW, *Concluding Observations on the Republic of Korea*, CEDAW/C/KOR/CO/6 (2007), par. 18.

<sup>54</sup> CEDAW, *Concluding Observations on the Former Yugoslav Republic of Macedonia*, CEDAW/C/MKD/CO/1 (2006), par. 39.

interpretations of the treaty bodies, we will now examine the concrete application of them by various institutions. All the cases have been decided rather recently, so we may expect them to mark the beginning of a new jurisprudence on the interpretation of state duties in the sphere of domestic violence.

Here too, a landmark case can be found in the Inter-American system. In the case of *Maria da Penha v. Brazil*, the Inter-American Commission of Human Rights examined a serious case of wife battering, and found violations of a number of human rights as laid down both in the Convention of Belém do Para and in the Inter-American Convention on Human Rights. A particularly noteworthy aspect of this case is that the Commission pointed out that this case was not an isolated one, but constituted part of a pattern of domestic violence. According to the Commission:

(...) the violence suffered by Maria da Penha is part of a general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors, it is the view of the Commission that this case involves not only failure to fulfill the obligation with respect to prosecute and convict, but also the obligation to prevent these degrading practices. That general and discriminatory judicial ineffectiveness also creates a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts.<sup>55</sup>

While recognising a number of positive developments, the Commission found that ‘ineffective judicial action, impunity, and the inability of victims to obtain compensation provide an example of the lack of commitment to take appropriate action to address domestic violence.’<sup>56</sup> The Commission concluded that not only in this individual case were there shortcomings, but also that the system as a whole was inadequate. It must be noted that in August 2006 Brazil adopted a domestic violence act to prevent and combat domestic violence, that has become known as the ‘Maria da Penha Act’.<sup>57</sup>

In a number of cases of domestic violence against children, the European Court of Human Rights has explained how States can be held accountable for violating the right to be free from ill-treatment. It first examined whether the

<sup>55</sup> Inter-American Commission on Human Rights, Report No. 54/01, Case 12.051, *Maria da Penha Maia Fernandes v. Brazil*, 16 April 2001, par. 56.

<sup>56</sup> Inter-American Commission on Human Rights, *Maria da Penha Maia Fernandes v. Brazil*, *supra* note 55, par. 57.

<sup>57</sup> Special Secretariat for Women’s Policies, Presidency of the Republic, Brazil *Maria da Penha Law*, Law no 11.340 of August 7, 2006, Retrains domestic and family violence against Women, 2006. Available from <http://brazilink.org/GENDER%20PAPERS/Maria%20da%20Penha%20Law.pdf>.

neglect and/or abuse suffered by children reached the threshold of inhuman and degrading treatment. In the case of *Z et al. v. the United Kingdom* it established that this was the case, and that local authorities were aware of this treatment and were under a statutory duty to protect the children. They had a range of powers available to them, including the removal of the children from their home. However, the children were only taken into emergency care four and a half years later, at the insistence of the mother. While acknowledging the difficult and sensitive decisions facing social services and the important countervailing principle of respecting and preserving family life, the Court concluded that the system had failed to protect the children from serious, long-term neglect and abuse and found a violation of Article 3 of the Convention.<sup>58</sup> The Court did not further explain how it had weighed the two rights involved: the right to respect for family life and the right to be protected against ill-treatment. In another case involving serious child abuse, the Court added that it was not required to be shown that intervention by authorities could actually have prevented the ill-treatment. It stated that ‘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.’ In the case in question, the Court concluded that ‘the pattern of lack of investigation, communication and co-operation by the relevant authorities disclosed in this case must be regarded as having had a significant influence on the course of events and that proper and effective management of their responsibilities might, judged reasonably, have been expected to avoid, or at least, minimise the risk or the damage suffered.’ It therefore found that Article 3 had been violated.<sup>59</sup>

Not until 2008 did the ECtHR give a fundamental decision in a case of domestic violence. In the case of *Bevacqua and S. v. Bulgaria* the Court refers to relevant principles of the effective protection of individuals, as identified in the *Osman* case dealt with above. However, in this specific case, which deals with a series of violent outbursts of the husband and father of the applicants during the delays in divorce and custody procedures, the Court chose to examine the case exclusively under Article 8, rather than (also) under Article 3, without any particular reason.<sup>60</sup> Although this approach is in line with the earlier case-law mentioned in section 2, examination under Article 3 would have been appropriate, as being more consistent with the Court’s own case-law on child abuse and the developments in the Inter-American system and the United Nations organs.

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<sup>58</sup> ECtHR, *Z. and Others v. United Kingdom*, *supra* note 12, par. 74.

<sup>59</sup> ECtHR, *E. and Others v. United Kingdom*, 26 November 2002, Appl. No. 33218/96, par. 99-100.

<sup>60</sup> ECtHR, *Bevacqua and S. v. Bulgaria*, 12 June 2008, Appl. No. 71127/01, par. 55.



However, the Court upheld the substantial and procedural obligations of the State related to the protection of the right to private life of the mother and her child, which entails the examination of the interim measures application with due diligence and without delay and imposing sanctions or otherwise enforcing the obligation to refrain from unlawful acts.

In the first views on an individual complaint adopted under the Optional Protocol to the Women's Convention, CEDAW dealt with a domestic violence case and found violations of Article 2 (a), (b) and (e). It held that the available remedies were not capable of providing immediate protection against ill-treatment, that legal and institutional arrangements in the State party were not ready to ensure the internationally expected, coordinated, comprehensive and effective protection and support for the victims of domestic violence. According to CEDAW, 'Women's human rights to life and to physical and mental integrity cannot be superseded by other rights, including the right to property and the right to privacy.' It further found violations of Articles 5(a) and 16. In its reasoning, the Committee stated that traditional attitudes by which women are regarded as subordinate to men contribute to violence against them, which it had commented on when it had considered Hungary's report under the reporting procedure. It observed that A.T. had suffered from long-lasting threats and battering, and had been unsuccessful in temporarily or permanently barring her then partner from the apartment where she and her children had continued to reside. Hungarian law did not provide for a restraining or protection order, and a shelter was not available to her because none could take her in together with her children, one of whom was fully disabled.<sup>61</sup>

CEDAW has gone on to deal with two cases against Austria in which victims of domestic violence were killed by their husbands. It examined whether Austria had complied with its obligations under the Women's Convention. It noted that 'a comprehensive model to address domestic violence that includes legislation, criminal and civil-law remedies, awareness raising, education and training, shelters, counselling for victims of violence and work with perpetrators' was in place in Austria.<sup>62</sup> It stressed, however, that the political will that is expressed in this system must be supported by State actors, who adhere to the State party's due diligence obligations. Upon examining the circumstances of the case, CEDAW concluded that the authorities knew or should have known that the

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<sup>61</sup> CEDAW, *A.T. v. Hungary*, 26 January 2005, Comm. No. 2/2003 in *Report of the Committee on the Elimination of Discrimination Against Women*, A/60/38 (2005), Part I, Annex III, par. 9.3-9.4.

<sup>62</sup> CEDAW, *Goeke v. Austria*, 6 August 2007, Comm. No. 5/2005 in *Report of the Committee on the Elimination of Discrimination Against Women*, A/62/38 (2007), Part III, Annex VII, par. 12.1.2.

woman concerned was in grave danger, and that the failure to comply with a request to detain the husband constituted a violation of the due diligence obligation to protect her. Even though the husband was prosecuted and convicted for murder, CEDAW found a violation of Article 2(a) and (c) through (f); Article 3 in conjunction with Article 1; General Recommendation No. 19 of the Committee and the corresponding rights of the deceased to life and to physical and mental integrity.

## 5. WORK IN PROGRESS

The major conclusion that can be drawn from this contribution is that international norms on torture and other forms of ill-treatment are highly relevant for combating domestic violence against women (and children). Recent developments show that these norms provide for an effective framework, especially when the findings of the various monitoring bodies are taken together. They have formulated concrete obligations to protect women in the private sphere. These obligations are both substantive, such as the provision of shelters and temporary eviction of aggressors, and procedural, related to the existence of effective procedures and remedies. It is remarkable that this development has taken place in a period of just 20 years, and it can be assumed that the trends will be further developed in the near future. The statistics on domestic violence illustrate the urgency of effective implementation. Being so closely related to the essence of human dignity, the right to life and the right to be protected against torture and other ill-treatment constitute the most absolute human rights, and this character imposes very strict duties on the State which do not end on the threshold of the private home. Clearly, States must give high priority to combating domestic violence, because it is a form of ill-treatment. In this approach States' margin of appreciation is further restricted and any test like a fair balance test offering the State some scope to balance the different interests involved, including the costs of specific measures, is significantly less appropriate. Because of this consequence attached to the right to life and the right to be free from torture and other ill-treatment, it is even more necessary that serious forms of domestic violence are recognised as such: although the outcome of the *Bevacqua* case mentioned above has positive aspects, it remains unsatisfactory that the European Court of Human Rights does not pay due attention to this aspect.

The development of the concept of state responsibility in relation to domestic violence demonstrates an interactive involvement of all relevant institutions at different levels of international human rights law. The work of the treaty bodies in general comments is based on their knowledge of actual occurrences of domestic violence. In their case-law the treaty bodies use general comments and

concluding observations as a framework for findings in individual cases. So far, the reports of the Special Rapporteurs appear not to have played a role in the work of the treaty bodies, even though they are relevant. The regional human rights courts also make use of general information to decide in individual cases. This interaction gives a levelling-up impulse that human rights implementation needs and deserves: by using the experience of other bodies, the monitoring bodies at all levels can, together and step by step, contribute to effective protection against domestic violence.

As the European Court has stressed repeatedly, human rights must be interpreted in the light of present-day circumstances. The acknowledgement that States have responsibilities to address ill-treatment by private actors illustrates that the old adage 'a man's house is his castle' can no longer be sustained. By analogy, we can say that the castle 'State' is increasingly affected by international norms. In the case of domestic violence against women the sovereignty of the State is further restricted by the recognition of this form of violence as a violation of the right to life and a form of torture or inhuman treatment. This imposes an absolute duty on the State, which leaves little or no room for policy arguments.

