



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

**DIVISION DE LA RECHERCHE  
RESEARCH DIVISION**

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*Articles 2, 3 and 14  
Equal access to justice in the case-law  
of the European Court of Human Rights on  
violence against women*

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The manuscript for this text has been finalised on June 2015.

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## INTRODUCTION

1. Violence against women is one of the most pronounced expressions of uneven power relations between women and men – both as a human-rights violation and as a major obstacle to gender equality.<sup>1</sup> Violence directed against women because they are women forms an integral part of a gender-biased social structure which leaves its victims in a particularly vulnerable situation. Widespread impunity and inadequate State responses to such violence – often based on patriarchal stereotypes of gender roles – leave many of the female victims of violence unprotected and without recourse to justice.<sup>2</sup>

2. This contribution explores the case-law of the European Court of Human Rights (hereinafter “the Court”) on violence against women, with the aim of identifying obstacles which victims of rape, domestic violence or other ill-treatment encounter in their efforts to seek protection and justice within the respective domestic systems of the member States of the Council of Europe. These obstacles impede non-discriminatory and effective access to justice which is crucial in order to empower the female victims of violence, to prevent individual consequences of traumatisation, feelings of powerlessness and secondary victimisation and to deter offenders and encourage society as a whole, including the law-enforcement authorities, to leave behind archaic attitudes amounting to repression of women.

3. The main provision on non-discrimination in Article 14 of the European Convention on Human Rights (hereinafter “the Convention”) proclaims that “[t]he enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground”, including sex.<sup>3</sup> Although one could suppose that violence against women to be an area which can quite logically be looked at from the point of view of gender discrimination, Article 14 has played only a marginal role in those cases before the Court. This can partly be explained by the applicants’ choice not to raise the issue of inequality or their inability to plead it in a substantiated manner. Generally, successful cases brought under Article 14 involve direct discrimination and it is more difficult for an applicant to

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<sup>1</sup>. *Council of Europe*, Gender Equality Strategy 2014-2017, Strasbourg 2014, at p. 5.

<sup>2</sup>. *Council of Europe*, Factsheet: Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), at p. 1.

<sup>3</sup>. A free-standing prohibition of discrimination is encompassed in Article 1 of Protocol No. 12 proclaiming that “[t]he enjoyment of any right set forth by law shall be secured without discrimination”. Protocol No. 12, however, only applies vis-à-vis the eighteen member States of the Council of Europe which have so far ratified it. The Protocol has thus been applied by the Court in only a handful of cases. See, for example, *Zornić v. Bosnia and Herzegovina*, no. 3681/06, 15 July 2014 and *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, ECHR 2009.

argue indirect discrimination, which is, however, necessary in the context of violence against women.<sup>4</sup> Owing to the usual order in which the Court examines an application, it is further quite typical for the Court to decide that no separate issue arises under Article 14 of the Convention after the claim has been dealt with extensively under other substantive Articles of the Convention. Some commentators argue, moreover, that the rigid test<sup>5</sup> applied by the Court in the course of examining a claim under Article 14 is not well suited to sex-discrimination cases.<sup>6</sup>

4. Rather than Article 14 of the Convention, the great majority of the cases concerning violence against women that reveal problems in the area of access to justice turn on the procedural and positive obligations arising under Article 2 (right to life), Article 3 (prohibition of torture), Article 4 (prohibition of slavery and forced labour) and Article 8 (right to respect for private and family life) of the Convention.<sup>7</sup> Yet, aspects of gender equality can also be drawn from the reasoning of the Court under these Articles. This is due to the gender specificity of the violence, its sexual character or the gender-biased response of the authorities to the ill-treatment – all factors demonstrating male domination over women. Given the focus of this commentary on access to justice, the case-law discussed below has been chosen, and will be analysed, with only this aspect in mind.

## I. PROTECTIVE OPERATIVE MEASURES

5. In the context of violence against women access to justice is not limited to considerations, from the *ex post* perspective, of how the victim is to be compensated for the ill-treatment. When incidents of domestic

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<sup>4</sup> *R.J.A. McQuigg*, *International Human Rights Law and Domestic Violence*, Routledge 2013, at p. 51.

<sup>5</sup> Article 14 cannot be invoked independently, but only in conjunction with other Convention rights when the facts at issue fall within the ambit of those rights. According to the well-established case-law of the Court, Article 14 prohibits different treatment of individuals in analogous situations and equal treatment of individuals in significantly different situations unless there is a reasonable and objective justification for the treatment in question.

<sup>6</sup> See, for example, *I. Radacic*, *Gender Equality Jurisprudence of the European Court of Human Rights* (2008) 19 EJIL 841, 850, arguing for the application of a “*disadvantage approach*” that would start from the acknowledgement of gender equality, discrimination against women, rather than from the presumption of the irrelevance of gender difference. Such an approach would require the Court to pay more attention to the political context and power relations between the sexes.

<sup>7</sup> Owing to the development of the procedural obligations in particular under these provisions, Articles 6 (right to a fair trial) and 13 (right to an effective remedy) as traditional procedural rights are only seldom invoked and/or examined before the Court with regard to claims by victims of violence.

violence, for instance, are reported to the domestic authorities this knowledge triggers an obligation to implement protective measures with a view to preventing further harm. The existence of positive obligations upon Contracting Parties to protect Convention rights by safeguarding individuals' rights from the acts of others had already been recognised as early as in the case of *X and Y v. the Netherlands*<sup>8</sup> in 1985 concerning the rape of a mentally handicapped girl of 16 years of age in a home for children with mental disabilities. *Kontrová v. Slovakia*<sup>9</sup> – the first case on domestic violence dealt with by the Court – in substance provided the opportunity to deal in more detail with such a positive obligation to introduce protective measures *ex ante*.<sup>10</sup> The applicant lodged a criminal complaint against her husband with the local police accusing him of having assaulted and beaten her with an electric cable the previous day. She submitted a medical report by a trauma specialist indicating that her injuries would render her unfit for work for up to seven days. The applicant also stated that there was a long history of physical and psychological abuse by her husband. Some two weeks later the applicant and her husband jointly sought to withdraw the applicant's criminal complaint. A police officer advised them that, in order to avoid a prosecution, they would have to produce a medical report showing that after the reported incident the applicant had not been unfit for work for more than six days. The applicant produced such a report and the officer in charge of the case decided that, now that the matter was to be considered under the Minor Offences Act, no further action was to be taken in the case. In the following weeks the emergency service of the local police were alerted several times by the applicant or a relative that the applicant's husband had a shotgun and was threatening to kill himself and the children. The police arranged for a police patrol to visit the premises but found that the applicant's husband had left the scene prior to their arrival. The next day the applicant's husband shot their two children and himself dead.

6. The applicant complained before the Court that the State had failed to protect the life of her two children and alleged a violation of Article 2 of the Convention. Mindful of 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 Court reiterated the scope of the positive obligation of the authorities to take preventive operational measures to protect an individual whose life was at risk from the criminal acts of another individual. The scope of that obligation was to be interpreted in a way which did not impose an impossible or disproportionate burden on

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<sup>8</sup>. *X and Y v. the Netherlands*, 26 March 1985, § 23, Series A no. 91.

<sup>9</sup>. *Kontrová v. Slovakia*, no. 7510/04, 31 May 2007.

<sup>10</sup>. Before *Kontrová* there had only been one admissibility decision of the Court that dealt with domestic violence: *Myszk v. Poland*, no. 7510/04, 24 September 2007.

the authorities.<sup>11</sup> Not every alleged risk to life could entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For a positive obligation to arise, it must be established that the authorities “*knew or ought to have known*” at the time of the existence of a “*real and immediate risk*” to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.<sup>12</sup> A difficulty that arises in this context is that domestic violence takes place behind closed doors as an “*unseen*” crime which victims are often too frightened or too ashamed to report.<sup>13</sup>

7. The Court noted that one of the main tasks of the police was to serve to protect fundamental rights and freedoms, such as life and health. The situation in the applicant’s family had been known to the local police force further to the various communications with her and her relatives in the weeks before the applicant’s husband’s final deed. In response to the applicant’s situation, the police had an array of specific obligations.<sup>14</sup> However, as had been established by the domestic courts, the police failed to ensure that these obligations were complied with. On the contrary, one of the officers involved assisted the applicant and her husband in modifying her criminal complaint so that it could be treated as a minor offence calling for no further action. The direct consequence of these failures was the death of the applicant’s children in violation of Article 2 of the Convention.<sup>15</sup> The abuse suffered by the applicant herself was not directly addressed.

8. The case of *Kontrová* provides a good illustration of the vulnerability of the female victim of domestic violence. When the reporting of serious instances of domestic violence fails to prompt an adequate response, help can come hopelessly late. Although the case was not brought under Article 14 of the Convention, it raises issues of equality of access to justice. This includes, for instance, the fact that an alleged instance of domestic violence, in a chain of known incidents of ill-treatment, was downgraded to a minor offence at the behest of the perpetrator himself.

9. Cases of domestic violence prompting requests for protective measures by the domestic authorities have also typically been brought

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<sup>11</sup>. This approach was developed by the Court in the case of *Osman v. the United Kingdom*, 28 October 1998, § 115, *Reports of Judgments and Decisions* 1998-VIII.

<sup>12</sup>. *Kontrová*, cited above, § 50.

<sup>13</sup>. *R.J.A. McQuigg*, What potential does the Council of Europe Convention on Violence against Women hold as regards domestic violence? (2012) 16 IJHR 947, 957.

<sup>14</sup>. These included, *inter alia*, 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 it.

<sup>15</sup>. *Kontrová*, cited above, §§ 51–55.

before the Court under the aspect of a breach of the victim's right to respect for private and family life under Article 8 of the Convention. In the case of *Bevacqua and S. v. Bulgaria*<sup>16</sup>, for instance, the applicants claimed that the Bulgarian authorities had failed to ensure respect for their private and family life with regard to protecting the first applicant against the violent behaviour of her former husband and the excessive length of custody proceedings with regard to the second applicant, the first applicant's young son. The Court held that there had been a violation of Article 8 of the Convention, given the cumulative effects of the domestic courts' failure to adopt interim custody measures without delay in a situation which had adversely affected the applicants and, above all, the well-being of the second applicant and the lack of sufficient measures by the authorities during the same period in reaction to the behaviour of the first applicant's former husband. In the Court's view, this amounted to a failure to assist the applicants contrary to the State's positive obligations under Article 8 to secure respect for their private and family life. The Court stressed in particular that considering the dispute to be a "*private matter*" was incompatible with the authorities' obligation to protect the applicants' family life.<sup>17</sup> The case of *Bevacqua and S.* shows how rigid rules of proceedings can hamper the access of victims of domestic violence to justice.<sup>18</sup> Instead, the national authorities should have the means at their disposal to act flexibly and with the utmost urgency if need be. The case is also significant in that the Court held, for the first time, that there had been a breach of Article 8 of the Convention in respect of the actual abuse suffered through domestic violence.

10. In *Opuz v. Turkey*<sup>19</sup> the Court dealt, under Article 2 of the Convention, with the issue of whether the authorities had been justified in not pursuing criminal proceedings against the violent husband after the withdrawal of the complaints by the victims. The applicant's mother was shot and killed by the applicant's husband as she attempted to help the applicant flee the matrimonial home. In the years preceding the shooting the husband had subjected both the applicant and her mother to a series of violent assaults, some of which had resulted in injuries which doctors had certified as life-threatening. The incidents and the women's fear for their lives had been repeatedly brought to the authorities' attention. Although criminal proceedings had been brought against the husband for a range of

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<sup>16</sup>. *Bevacqua and S. v. Bulgaria*, no. 71127/01, 12 June 2008.

<sup>17</sup>. *Ibid.* §§ 83–84.

<sup>18</sup>. See also *E.S. and Others v. Slovakia*, no. 8227/04, § 43, 15 September 2009, in which the applicant was not in a position to apply to sever the joint tenancy with her abusive husband until her divorce was finalised. At the same time, the joint tenancy prohibited the domestic authorities from issuing an interim measure ordering the applicant's husband to move out of the shared home.

<sup>19</sup>. *Opuz v. Turkey*, no. 33401/02, ECHR 2009.



offences, including death threats, serious assault and attempted murder, in at least two instances they were discontinued after the women withdrew their complaints, allegedly under pressure from the applicant's husband. Despite the seriousness of the injuries, the husband was convicted in respect of only two of the incidents, for which he received light sentences. For the fatal shooting of the applicant's mother – an act the husband said he had carried out to protect his honour – he was convicted of murder and sentenced to life imprisonment. He was, however, released pending appeal and renewed his threats against the applicant, who sought the authorities' protection. It was not until seven months later, following a request from the Court for information, that measures were taken to protect her.

11. The Court found that the practice in the other member States of the Council of Europe showed that the more serious the offence or the greater the risk of further offences, the more likely it was that the prosecution would proceed in the public interest even when the victim had withdrawn her complaint. Various factors were to be taken into account in deciding whether to pursue a prosecution. These related to the offence (its seriousness, the nature of the victim's injuries, the use of a weapon, planning), the offender (his record, the risk of his reoffending, any past history of violence), the victim and potential victims (any risk to their health and safety, any effects on the children, the existence of further threats since the attack) and the relationship between the offender and the victim (the history and current position, and the effects of pursuing a prosecution against the victim's wishes). In the *Opuz* case, despite the pattern of violence and use of lethal weapons, the authorities had repeatedly dropped proceedings against the husband in order to avoid interfering in what they perceived to be a "*family matter*" and did not appear to have considered the motives behind the withdrawal of the complaints, despite being informed of the death threats. The Court observed that the authorities had failed to assess the imminent threat posed by the husband to the mother's life. In domestic violence cases perpetrators' rights could not supersede victims' rights to life and physical and mental integrity. Lastly, the Court noted that the authorities could have ordered protective measures under the relevant legislation or issued an injunction restraining the husband from contacting, communicating with or approaching the applicant's mother or entering defined areas. The criminal justice system, as applied in the applicant's case, had not acted as an adequate deterrent. Once the situation had been brought to the authorities' attention, they could not rely on the victims' attitude for their failure to take adequate measures to prevent threats to physical integrity being carried out. In sum, they had not displayed due diligence and

had therefore failed in their positive obligations to protect the applicant's mother's right to life under Article 2 of the Convention.<sup>20</sup>

12. Under Article 3 of the Convention, the Court deemed the authorities' response to the husband's acts as manifestly inadequate in the light of the gravity of his offences. The judicial decisions had had no noticeable preventive or deterrent effect and had even disclosed a degree of tolerance with regard to the mildness of the sentences imposed on the husband.<sup>21</sup> Furthermore, it was not until 1998 that Turkish law had provided specific administrative and policing measures to protect against domestic violence, and even then the available measures and sanctions were not effectively applied in the applicant's case. Lastly, it was a matter of grave concern that the violence against the applicant had not ended and that the authorities had continued to take no action. Despite the applicant's request for help, nothing was done until the Court requested the Government to provide information about the protective measures it had taken. The authorities had failed to take protective measures in the form of effective deterrence against serious breaches of the applicant's personal integrity by her former husband, thus violating their positive obligations under Article 3 of the Convention.<sup>22</sup>

13. The duty of the State to take reasonable preventive measures in cases of domestic violence even if threats uttered by the alleged offender have not yet materialised into concrete acts of physical violence was established in the case of *Hajduová v. Slovakia*<sup>23</sup>. The applicant's former husband verbally and physically assaulted her in a public place. Although the applicant suffered only minor injuries, out of fear for her life and safety she and her children moved out of the family home and into the premises of a non-governmental organisation. A week later the applicant's former husband repeatedly made death threats against the applicant. Criminal proceedings were instituted against him and he was remanded in custody. In the course of the proceedings, expert witnesses established that he was suffering from a serious personality disorder. He was subsequently convicted by a district court and ordered to undergo in-patient psychiatric treatment. He did not, however, receive any treatment in the hospital he was then transferred to, but was, instead, released a week later. Following his release, the applicant's husband repeatedly threatened the applicant and her lawyer. He was again arrested and the district court subsequently ordered his psychiatric treatment in accordance with its previous order.

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<sup>20</sup>. *Ibid.* §§ 138–49. See Explanatory report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, at paragraph 58, referring to the case of *Opuz*.

<sup>21</sup>. He received a short prison sentence commuted to a fine for trying to run down the two women with his car, and a small fine, payable in instalments, for stabbing the applicant seven times.

<sup>22</sup>. *Opuz*, cited above, § 166–76.

<sup>23</sup>. *Hajduová v. Slovakia*, no. 2660/03, 30 November 2010.

14. The Court observed first that the application was distinguishable from cases such as *Kontrová* and *Opuz*, in which domestic violence had resulted in death. However, considering the applicant's husband's history of physical abuse and menacing behaviour towards the applicant, any threats made by him could arouse in the applicant a well-founded fear that they might be carried out. This, in the Court's estimation, was enough to affect her psychological integrity and well-being so as to give rise to an assessment as to compliance by the State with its positive obligations under Article 8 of the Convention. In the Court's view, it was also on account of the domestic authorities' inactivity and failure to ensure that the applicant's husband was duly detained for psychiatric treatment which enabled him to continue to threaten the applicant and her lawyer. Moreover, it was only after the applicant and her lawyer had lodged fresh criminal complaints that the police had taken it upon themselves to intervene. The Court reiterated that the domestic authorities were under a duty to take reasonable preventive measures where they "*knew or ought to have known at the time of the existence of a real and immediate risk*".<sup>24</sup> His conviction for violence against the applicant, his criminal antecedents, and the District Court's assessment that the applicant's husband was in need of psychiatric treatment were sufficient, in the circumstances of the case, to render the domestic authorities aware of the danger of future violence and threats against the applicant. Concluding that there had been a violation of the State's positive obligations under Article 8 of the Convention, the Court reiterated the particular vulnerability of victims of domestic violence and the need for active State involvement in their protection. This heightened vulnerability placed a duty on the domestic authorities to exercise an even greater degree of vigilance in the present case.<sup>25</sup>

15. The case of *Rantsev v. Cyprus and Russia*<sup>26</sup> is the only human trafficking case to have been decided by the Court on the merits.<sup>27</sup> In that case the applicant was the father of a young woman who had died in Cyprus, where she had gone to work in a cabaret on an "*artiste*" visa. After abandoning her place of work after only two weeks in Cyprus the applicant was subsequently found by the manager of the cabaret and taken to the police, where he asked them to declare her an illegal immigrant and to

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<sup>24</sup>. *Osman v. the United Kingdom*, cited above, § 116.

<sup>25</sup>. *Hajduová v. Slovakia*, cited above, §§ 45–52.

<sup>26</sup>. *Rantsev v. Cyprus and Russia*, no. 25965/04, ECHR 2010 (extracts). See also *Siliadin v. France*, no. 73316/01, ECHR 2005-VII, a case in which the Court found that French criminal law had failed to afford the Togolese applicant, who had been a minor at the time, sufficient and effective protection against the "*servitude*" in which she had been held as a domestic servant in a private household in Paris in breach of Article 4 of the Convention.

<sup>27</sup>. See also *S.Z. v. Bulgaria*, no. 29263/12, 3 March 2015, a case of attempted human trafficking in which the Court found a violation of Article 3 of the Convention owing to undue delays in criminal proceedings and failure to properly investigate the allegations of rape and assault of the applicant.

detain her, apparently with a view to expelling her so that he could have her replaced in his cabaret. The police, after checking their database, concluded that the applicant's daughter did not appear to be illegal and refused to detain her. They asked the cabaret manager to collect her from the police station and to return with her later that morning to make further inquiries into her immigration status. The applicant's daughter was then taken by the cabaret manager to the house of another employee of the cabaret, where she was left in a room on the sixth floor of the apartment block. She was later found dead in the street below the apartment. A bedspread was found looped through the railing of the apartment's balcony. The applicant complained before the Court, *inter alia*, that the Cypriot police had not done everything in their power to protect his daughter from human trafficking while she had been alive.

16. The Court examined the applicant's claim under two aspects with regard to Cyprus's positive obligations arising under Article 4 (prohibition of slavery and forced labour) of the Convention.<sup>28</sup> First, Cyprus had failed to put in place an appropriate legal and administrative framework to combat trafficking under the existing system of *artiste* visas. The Court emphasised that while an obligation on employers to notify the authorities when an *artiste* left her employment was a legitimate measure to allow the authorities to monitor the compliance of immigrants with their immigration obligations, responsibility for ensuring compliance and for taking steps in cases of non-compliance should remain with the authorities themselves.<sup>29</sup>

17. Second, the Cypriot police had failed to take operational measures to protect the applicant's daughter from trafficking, despite circumstances which had given rise to a credible suspicion that she might be a victim of trafficking. It became clear from reports of the Ombudsman and the Council of Europe's Commissioner for Human Rights that there had been a serious problem in Cyprus since the 1970s involving young foreign women being forced to work in the sex industry. These sources further noted the significant increase in the number of *artistes* coming from former Soviet countries following the collapse of the USSR, which highlighted the fact that human trafficking was able to flourish in Cyprus on account of the tolerance of the immigration authorities and that the authorities were aware that many of the women who entered Cyprus on *artiste*'s visas would work in prostitution. In the Court's opinion, there were sufficient indicators available to the police authorities, against the general backdrop of trafficking issues in Cyprus, for them to have been aware of circumstances giving rise to a credible suspicion that Ms Rantseva was at real and immediate risk of being a victim of trafficking or exploitation. Accordingly,

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<sup>28</sup>. The Court's first task was to clarify that, despite the lack of an express reference to the crime in the wording of Article 4 of the Convention, trafficking in human beings fell within the scope of application of that Article.

<sup>29</sup>. *Rantsev*, cited above, § 292.

a positive obligation arose to investigate without delay and to take any necessary operational measures to protect Ms Rantseva. In the present case, the shortcomings of the police authorities were multiple. Firstly, they failed to make immediate further enquiries into whether Ms Rantseva had been trafficked. Secondly, they did not release her but decided to hand her over to the custody of her employer at the cabaret. Thirdly, no attempt was made to comply with the provisions of the national law on combating trafficking and sexual exploitation imposing a duty on the State to protect victims of trafficking by providing them with support, including accommodation, medical care and psychiatric support.<sup>30</sup>

## II. ACCESS TO JUDICIAL REMEDIES

18. Access to justice – defined as the ability to seek and obtain a remedy through formal or informal institutions of justice for grievances in compliance with human rights standards – lies at the centre of effective human rights protection.<sup>31</sup> Without the ability to claim redress for violations of the agreed human rights guarantees this protection remains toothless - even illusory. The Court has held that absolute barriers to accessing the criminal justice system for a rape victim amount to a denial of justice.<sup>32</sup> Other less intrusive barriers can, however, also hamper the victim's access to judicial remedies in a manner relevant under the Convention. Lack of legal aid, for instance, can, under certain circumstances, hinder a victim of violence from accessing legal avenues to put an end to a dangerous situation. The early case of *Airey v. Ireland*<sup>33</sup>, decided in 1979, was arguably the first case in which domestic violence came before the old Court. The applicant had for years been attempting to obtain a decree of judicial separation from her husband on the grounds of alleged physical and mental cruelty to her and their children. At the time such a court decree was the only way in which spouses could be relieved of the duty of cohabitating.<sup>34</sup> In the absence of legal aid and not being in a financial position to meet the costs involved herself, the applicant had, however, not been able to find a solicitor willing to act on her behalf. The decree was only obtainable in the High Court and required the petitioner to furnish evidence proving one of three specified matrimonial offences, namely, adultery, cruelty or unnatural

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<sup>30</sup>. *Rantsev*, cited above, §§ 294-98.

<sup>31</sup>. United Nations Development Programme, *Programming for Justice: Access for All: A Practitioner's Guide to Human Rights-Based Approach to Access to Justice* (Bangkok: UNDP, 2005).

<sup>32</sup>. *X and Y v. the Netherlands*, cited above, §§ 28-30.

<sup>33</sup>. *Airey v. Ireland*, 9 October 1979, Series A no. 32.

<sup>34</sup>. The Irish law at the time did not provide for the possibility of divorce.

practices. The parties could in principle conduct their case in person, yet in practice every petitioner was represented by a lawyer owing to the complexity of the proceedings.

19. The Court examined the applicant's claim that the remedy of judicial separation was inaccessible owing to the prohibitive cost of proceedings.<sup>35</sup> It held that it was most improbable that a person in the applicant's position, coming from a humble family background with no education, could effectively present her own case in proceedings for a judicial separation before the High Court. Not only did those proceedings involve litigation as to complicated points of law but a complex gathering of evidence. Lastly, the emotional involvement often present in marital disputes was, in the Court's view, hardly compatible with the degree of objectivity required by advocacy in court. Combined with the fact that legal aid for civil matters did not exist in Ireland at the time, the Court concluded that the applicant had not enjoyed effective access to the High Court for the purpose of petitioning for a decree of judicial separation, in breach of Article 6 of the Convention.<sup>36</sup>

20. Although the Court was not directly called upon in *Airey* to decide on the State's obligations as to the protection of the applicant from her violent husband, the case nevertheless demonstrates a crucial aspect of access to justice in the area of domestic violence: the judicial remedies that can allow a victim of domestic violence to escape the violent situation through, *inter alia*, divorce or separation proceedings must be accessible and effective in order to guarantee practical – not just theoretical or illusory – protection to the victim in a vulnerable position. Such effective access can, from time to time, require that the victim be afforded legal aid on account of the complexity of the case and the victim's unfamiliarity with the court proceedings, but also from the point of view of the victim's weakened capacity to represent herself owing to her emotional involvement. The Court did not, however, hold that legal aid should necessarily be granted in civil claims in situations comparable to the one in *Airey* as effective access to the judicial separation could have been provided by other means as well, such as by simplifying the procedure.<sup>37</sup>

21. Viewed from a broader perspective, the Court appears to conclude in *Airey* that ensuring effective access to a particular means of protection may in certain situations entail the expenditure of monetary resources. Whether

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<sup>35</sup>. The applicant complained before the Commission that the State had failed to protect her against physical and mental cruelty from her allegedly violent and alcoholic husband by omitting, *inter alia*, to detain him for treatment as an alcoholic. The Commission declared this part of the application inadmissible. NB: Until 1998 the Court functioned under a two-tier system in which the cases were first examined by the Commission as to their admissibility and only the admissible cases were filtered for examination by the Court.

<sup>36</sup>. *Airey v. Ireland*, cited above, §§ 24–28.

<sup>37</sup>. *Ibid.* § 26.

this could be interpreted as a sign of support for an obligation upon the Contracting States to provide victims of domestic violence with social support measures, such as shelter accommodation and housing, remains to be seen.<sup>38</sup>

### III. THE NATURE OF THE REMEDY

22. Violence against the physical integrity of a person infringes the human rights of the person concerned in the most serious manner. In order for the Contracting State to live up to its procedural obligation to ensure an adequate remedy for such violations the victim has to be afforded remedies based in criminal law. This was established in the case of *X and Y v. the Netherlands*. Because the applicant, a girl of 16 years of age with a mental handicap, was deemed unfit to sign an official complaint with the police given her low mental age she was not able to lodge a criminal complaint about having been raped in a children's home. Her father signed in her place, but proceedings were not brought against the perpetrator because the law provided that the complaint had to be made by the victim herself. The Court deemed the civil-law remedies at the applicants' disposal insufficient in the case of wrongdoing of the kind inflicted on the applicant. Concluding that there had been a violation of Article 8 of the Convention, the Court took the view that effective deterrence was indispensable in this area, where fundamental values and essential aspects of private life were at stake, and that this could be achieved only through the criminal law.<sup>39</sup> The Court has, however, held that the fact that certain acts of domestic violence can be the subject of minor-offences proceedings does not in itself appear discriminatory on the basis of gender.<sup>40</sup> By the same token, a State-assisted prosecution, as opposed to a prosecution by the victim, is not a necessary requirement for a remedy to comply with the procedural standards of the Convention, e.g. under Article 8.<sup>41</sup>

23. Finding a violation of Article 13 taken together with Article 8 of the Convention, the Court repeated in *Kontrová*, in respect of the issue of violence against women, what had earlier been decided regarding other issues: compensation for non-pecuniary damage suffered as a result of breaches of Articles 2 and 3 of the Convention – ranking as the most

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<sup>38</sup>. *R.J.A. McQuigg*, *supra*, n. 14, at p. 957.

<sup>39</sup>. *X and Y v. the Netherlands*, cited above, § 27.

<sup>40</sup>. *A. v. Croatia*, no. 55164/08, § 100, 14 October 2010.

<sup>41</sup>. *Bevacqua and S.*, cited above, § 82.

fundamental provisions of the Convention – was to be awarded to victims of such violence.<sup>42</sup>

#### IV. THE PRINCIPLE OF NON-DISCRIMINATION

24. Effective access to justice for female victims of violence also entails the prerequisite that the access is provided free of any discriminatory treatment based on sex or any other ground. Although, as has been mentioned above, not many cases on violence against women have been successfully pleaded under Article 14 of the Convention, in cases of extreme inactivity on the part of the authorities the Court has been willing to accept the dimension of domestic violence as gender-based violence and the implications of this approach from the angle of discrimination based on gender.

25. The case of *Opuz* represents the leading case in this respect. The Court examined the complaint of the applicant that she and her mother had been discriminated against on the basis of their gender under Article 14 read in conjunction with Articles 2 and 3 of the Convention. Having regard to the provisions of more specialised legal instruments, such as the 1979 United Nations Convention Eliminating All Forms of Discrimination Against Women (CEDAW Convention) or the Inter-American Convention On The Prevention, Punishment And Eradication Of Violence Against Women (Belém do Pará Convention) and the decisions of international legal bodies, such as the CEDAW Committee, the United Nations Commission on Human Rights and the Inter-American Commission in the field of violence against women, the Court considered that the State's failure to protect women against domestic violence breached their right to equal protection of the law and that this failure did not need to be intentional.<sup>43</sup>

26. Turning then to the specific circumstances prevailing at the time in Turkey, the Court observed that although the Turkish law then in force did not make an explicit distinction between men and women in the enjoyment of rights and freedoms, it needed to be brought into line with international standards in respect of the status of women in a democratic and pluralistic society. It thus appeared to the Court that the alleged discrimination at issue was not based on the legislation per se but rather resulted from the general attitude of the local authorities, such as the manner in which the women were treated at police stations when they reported domestic violence and judicial passivity in providing effective protection to victims. Furthermore, there appeared to be serious problems in the implementation of the law that was relied on by the Government as one of the remedies for women facing domestic violence. The research produced by the applicant of two leading

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<sup>42</sup>. *Kontrová*, cited above, §§ 63-65.

<sup>43</sup>. *Opuz*, cited above, §§ 185-91.



NGOs in the field indicated that when victims reported domestic violence to police stations, police officers did not investigate their complaints but sought to assume the role of mediator by trying to convince the victims to return home and drop their complaint. Police officers considered the problem as a “*family matter with which they could not interfere*”. Moreover, it transpired from these reports that there were unreasonable delays in issuing injunctions by the courts against perpetrators of domestic violence, because the courts treated them as a form of divorce action and not as a matter of urgency. Delays were also frequent when it came to serving injunctions on the aggressors, given the negative attitude of the police officers. Moreover, the perpetrators of domestic violence did not seem to receive dissuasive punishments because the courts mitigated sentences on the grounds of custom, tradition or honour. As a result of these problems, the above-mentioned reports suggested that domestic violence was tolerated by the authorities and that the remedies indicated by the Government did not function effectively. In sum, the Court considered that the applicant had been able to show, supported by unchallenged statistical information, the existence of a *prima facie* indication that the domestic violence affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence:

“200. Bearing in mind its finding above that the general and discriminatory judicial passivity in Turkey, albeit unintentional, mainly affected women, the Court considers that the violence suffered by the applicant and her mother may be regarded as gender-based violence which is a form of discrimination against women. Despite the reforms carried out by the Government in recent years, the overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors, as found in the instant case, indicated that there was insufficient commitment to take appropriate action to address domestic violence ... .”

The Court concluded that there had been a violation of Article 14 of the Convention, read in conjunction with Articles 2 and 3 of the Convention.<sup>44</sup>

27. The approach initiated by the Court in *Opuz* has since been followed in domestic violence cases, especially against the Republic of Moldova in which the domestic authorities’ passive attitude towards female victims has clearly demonstrated that the authorities’ actions were not a simple failure or delay in dealing with the cases of domestic violence but amounted to condoning such violence and reflected a discriminatory attitude towards female victims.<sup>45</sup>

28. In contrast to the precedent established in *Opuz*, the applicant’s allegation of discriminatory practice in dealing with cases concerning

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<sup>44</sup>. *Opuz*, cited above, §§ 192–98.

<sup>45</sup>. *Eremia v. the Republic of Moldova*, no. 3564/11, 28 May 2013; *Mudric v. the Republic of Moldova*, no. 74839/10, 16 July 2013; *T.M. and C.M. v. the Republic of Moldova*, no. 26608/11, 28 January 2014.

domestic violence was not accepted by the Court in the case of *A. v. Croatia*<sup>46</sup>. The applicant was allegedly subjected to repeated physical violence causing bodily injury and to death threats over many years by her then husband, suffering from post-traumatic stress disorder, paranoia, anxiety and epilepsy. He also regularly abused her in front of their young daughter. After going into hiding, the applicant requested a court order preventing her husband from stalking or harassing her. It was refused on the ground that she had not shown an immediate risk to her life. The Court held that there had been a violation of Article 8 of the Convention in that the Croatian authorities had failed to implement many of the measures ordered by the courts to protect the applicant or deal with her ex-husband's psychiatric problems, which appeared to be at the root of his violent behaviour.

29. The Court rejected the applicant's claim under Article 14 of the Convention, however, as manifestly ill-founded. It found that the applicant had not produced sufficient prima facie evidence that the measures or practices adopted in Croatia in the context of domestic violence, or the effects of such measures or practices, were discriminatory. Unlike in *Opuz* there was insufficient statistical or other information disclosing an appearance of discriminatory treatment of women who were victims of domestic violence on the part of the Croatian authorities such as the police, law-enforcement or health-care personnel, social services, prosecutors or judges of the courts of law. The applicant had not alleged that any of the officials involved in the cases concerning the acts of violence against her had tried to dissuade her from pursuing the prosecution or giving evidence in the proceedings against the perpetrator, or that they had tried in any other manner to hamper her efforts to seek protection against the violence.<sup>47</sup> The Court further noted that, in Croatia, incidents of domestic violence could be addressed both in minor-offences proceedings and in ordinary criminal proceedings – similar to the position in Slovakia, as had been shown above in the case of *Kontrová*.

30. Lastly, in the case of *B.S. v. Spain*<sup>48</sup>, the Court had to deal with alleged discrimination based on a wider set of grounds. The applicant, a woman of Nigerian origin who was stopped and allegedly verbally and physically abused by the police while working as a prostitute on the outskirts of Palma de Mallorca, alleged that she had been discriminated against because of her profession as a prostitute, her skin colour and her gender as evidenced by the racist remarks made by the police officers in violation of Article 14 taken in conjunction with Article 3 of the Convention. She submitted that other women in the same area carrying on the same activity but with a “*European phenotype*” had not been stopped by the police. Rejecting the Government's argument debating the severity of the

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<sup>46</sup> *A. v. Croatia*, cited above.

<sup>47</sup> *Ibid.* §§ 94–104.

<sup>48</sup> *B.S. v. Spain*, no. 47159/08, 24 July 2012.

injuries in the case, the Court took tacit note of the gender aspect of the alleged violation. It found that whilst the injuries suffered by the applicant could not be considered serious, when combined with the racist and degrading remarks uttered by the police officers they were serious enough to meet the threshold of severity for the applicability of Article 3 of the Convention.<sup>49</sup> The Court went on to state that the decisions made by the domestic courts failed to take account of the applicant's particular vulnerability inherent in her position as an African woman working as a prostitute. The authorities thus failed to comply with their duty under Article 14 of the Convention taken in conjunction with Article 3 to take all possible steps to ascertain whether or not a discriminatory attitude might have played a role in the events.<sup>50</sup> Although it would have been possible for the Court to deal with this claim as an aspect of the respondent State's procedural obligations arising under Article 3 of the Convention, it is noteworthy that it decided to give the issue of discrimination based on race and sex greater visibility under the separate heading of Article 14.

## V. THOROUGH AND EFFECTIVE INVESTIGATION

31. At the core of the procedural obligations under Articles 2 and 3 of the Convention lies the duty of the domestic authorities to conduct a thorough and effective investigation capable of leading to the identification and, as appropriate, to the punishment of those responsible.<sup>51</sup> The substance of this obligation has been analysed by the Court in the context of violence against women on several occasions.<sup>52</sup>

32. *Aydın v. Turkey*<sup>53</sup> is one of the oldest and most brutal cases of rape and ill-treatment in the hands of State officials to come before the Court. The applicant, a young Turkish woman of Kurdish origin, aged 17 at the relevant time, was arrested without explanation and taken, along with two other members of her family, into custody. She was blindfolded, beaten, stripped naked, placed in a tyre and hosed with pressurised water before being raped by a member of the security forces. A subsequent medical examination established that her hymen had been torn and her thighs

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<sup>49</sup>. *Ibid.* § 40.

<sup>50</sup>. *Ibid.* §§ 58–63.

<sup>51</sup>. *Aksoy v. Turkey*, 18 December 1996, § 98, *Reports of Judgments and Decisions* 1996-VI.

<sup>52</sup>. See, for example, *Maslova and Nalbandov v. Russia*, no. 839/02, § 91-97, 24 January 2008, in which the relevant authorities committed procedural errors of an irremediable nature ultimately leading to a stalemate in the criminal proceedings against the police officers accused of rape and other ill-treatment of the applicant.

<sup>53</sup>. *Aydın v. Turkey*, 25 September 1997, *Reports of Judgments and Decisions* 1997-VI.

extensively bruised. For the first time the Court affirmed that rape represented a form of torture.<sup>54</sup>

33. The applicant's claims that she was denied effective access to a court to seek compensation for the suffering which she experienced while detained, on account of the inadequacy of the investigation into her complaints, were dealt by the Court under Article 13 of the Convention. It found a violation on account of the lack of a thorough and effective investigation into the applicant's allegations, undermining the effectiveness of any other remedies which may have existed given the centrality of the public prosecutor's role to the system of remedies as a whole, including the pursuit of compensation.<sup>55</sup> For instance, the public prosecutor ordered medical examinations but these were performed by doctors who had no experience of dealing with rape victims. Moreover, it appeared that the public prosecutor's primary concern in ordering the medical examinations was to establish whether the applicant had lost her virginity when the focus should really have been on whether the applicant was a rape victim, which was the very essence of her complaint. No reference was made in either of the rather summary reports drawn up by the doctors as to whether the applicant was asked to explain what had happened to her or to account for the bruising on her thighs. Neither doctor volunteered an opinion on whether the bruising was consistent with an allegation of involuntary sexual intercourse. Further, no attempt was made to evaluate, psychologically, whether her attitude and behaviour conformed to those of a rape victim. In the context of women's access to justice it is particularly noteworthy to mention the Court's stand on what constitutes a thorough and effective investigation into an allegation of rape in custody:

"107. ... The Court notes that the requirement of a thorough and effective investigation into an allegation of rape in custody at the hands of a State official also implies that the victim be examined, with all appropriate sensitivity, by medical professionals with particular competence in this area and whose independence is not circumscribed by instructions given by the prosecuting authority as to the scope of the examination. It cannot be concluded that the medical examinations ordered by the public prosecutor fulfilled this requirement."

34. The States' positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution

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<sup>54</sup>. *Ibid.* §§ 83-86.

<sup>55</sup>. The Court had previously held in *Aksoy* that where an individual had an arguable claim that he or she had been tortured by agents of the State, the notion of an "*effective remedy*" entailed, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure.

were established in the leading case of *M.C. v. Bulgaria*<sup>56</sup>. In particular, the case acknowledged the important development in the national criminal laws of Council of Europe member States and under international criminal law that no longer required proof of physical force and resistance for the purpose of prosecuting sexual offences. The decisive factor for establishing the crime of rape must instead be the lack of consent of the victim to the sexual intercourse. The applicant in the case, aged 14, was raped by two men on two occasions during the same night. Reflecting the Bulgarian criminal law at the time, the perpetrators were not prosecuted because it could not be established beyond reasonable doubt that physical or psychological force had been used against the applicant and that sexual intercourse had taken place against her will and despite her resistance. The applicant alleged that this defective legislation led to the predominant practice of prosecuting rape perpetrators only in the presence of evidence of significant physical resistance by the victim. Relying on the comparative material at its disposal, the Court made the following conclusions:

“164. [T]he evolving understanding of the manner in which rape is experienced by the victim has shown that victims of sexual abuse – in particular, girls below the age of majority – often provide no physical resistance because of a variety of psychological factors or because they fear violence on the part of the perpetrator.

165. Moreover, the development of law and practice in that area reflects the evolution of societies towards effective equality and respect for each individual’s sexual autonomy.

166. In the light of the above, the Court is persuaded that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual’s sexual autonomy. In accordance with contemporary standards and trends in that area, the member States’ positive obligations under Articles 3 and 8 of the Convention 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>57</sup>

The Court considered that, while in practice it might sometimes be difficult to prove lack of consent in the absence of “*direct*” proof of rape, such as traces of violence or direct witnesses, the authorities must nevertheless explore all the facts and decide on the basis of an assessment of all the surrounding circumstances. The investigation and its conclusions must be centred on the issue of non-consent. In sum, the Court, without expressing an opinion on the guilt of the alleged perpetrators, found that the investigation of the applicant’s case and, in particular, the approach taken

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<sup>56</sup>. *M.C. v. Bulgaria*, no. 39272/98, ECHR 2003-XII.

<sup>57</sup>. See the Explanatory report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, at paragraph 191, referring to this passage in *M.C. v. Bulgaria*.

by the investigator and the prosecutors in the case fell short of the requirements inherent in the member States' positive obligations under Articles 3 and 8 of the Convention to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse.<sup>58</sup>

35. Apart from the Cypriot authorities' failure to take positive measures to combat trafficking in *Rantsev*, the Court also examined the case from the point of view of possible violations of Article 2 and 4 respectively with regard to Russia's and Cyprus' procedural obligations. In light of the ambiguous and unexpected circumstances surrounding Ms Rantseva's death and the allegations of human trafficking and ill-treatment, the Court considered that there had been a violation of procedural obligations under Article 2 of the Convention in respect of the Cypriot authorities' shortcomings in investigating the circumstances of the death. By necessity, the investigation was required to consider also the broader context of Ms Rantseva's arrival and stay in Cyprus, in order to establish whether there was a link between the allegations of trafficking and Ms Rantseva's subsequent death. Furthermore, an effective investigation into a death in the transnational context of trafficking included the seeking of legal assistance in foreign countries relevant for the gathering of evidence. The Court found no evidence that the Cypriot authorities had made any such requests to Russia in the course of their investigations. Russia, for its part, was found to have infringed its procedural obligations under Article 4 of the Convention to investigate the possibility that individual agents or networks operating on its soil were involved in the trafficking of Ms Rantseva to Cyprus. Failure to investigate the recruitment aspect of alleged trafficking would otherwise allow an important part of the trafficking chain to act with impunity.<sup>59</sup>

36. In *B.S. v. Spain* the Court examined the case under the aspect of a breach of a procedural obligation under Article 3 of the Convention regarding the effectiveness of the national authorities' investigations into the alleged ill-treatment of the applicant, who had been stopped and allegedly verbally and physically abused by the police while working as a prostitute on the outskirts of Palma de Mallorca. The Court was not satisfied that the investigations carried out were sufficiently thorough and effective. Ignoring the numerous evidence-gathering measures requested by the applicant, the investigating judges merely requested incident reports from the police headquarters which were prepared by the immediate superior of the officers in question. Furthermore, the investigating judges disregarded the medical reports provided by the applicant, did not take any measures to identify or hear evidence from witnesses who had been present during the incidents, nor did they investigate the applicant's allegations regarding her transfer to the police station, where the police had allegedly attempted to

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<sup>58</sup>. *Ibid.* §§ 156–66.

<sup>59</sup>. *Rantsev*, cited above, § 307.

make her sign a statement admitting that she had resisted orders. The Government had submitted that the incidents had taken place in the context of the implementation of preventive measures designed to combat networks of trafficking in immigrant women in the area. The Court made it clear that this could not justify treatment contrary to Article 3 of the Convention.<sup>60</sup>

37. A thorough and effective investigation into allegations of domestic violence encompasses open-minded and unbiased consideration by the investigating authorities of all possible leads in the case. In *Durmaz v. Turkey*<sup>61</sup> the applicant's daughter had died in a hospital after her husband had taken her to the emergency department, informing the doctors that she had taken an overdose of two medicines. When questioned by the police, her husband admitted that the couple had had a row on the same day and he had hit her. The father of the applicant subsequently lodged a complaint with the prosecutor, stating that his daughter had not been suicidal, and alleging that her husband was responsible for her death. In the course of the ensuing investigation, a forensic medical examination found no trace of medicines or other drugs in the applicant's daughter's blood or in other samples taken from her body, but it noted that there was an advanced oedema in her lungs. Despite objections raised by the applicant, the prosecutor decided to close the investigation, concluding that the applicant's daughter had committed suicide.

38. The Court reiterated its general stand on the nature of the obligation to investigate under Article 2 of the Convention as “*not an obligation of result, but of means*”. Not every investigation should necessarily be successful or come to a conclusion which coincides with the claimant's account of events. However, it should in principle be capable of leading to the establishment of the facts of the case and, if the allegations are proved to be true, to the identification and punishment of those responsible. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony. The Court observed that in the case before it neither the prosecutor nor the investigating police officers had kept an open mind during the investigation as to the cause of the applicant's daughter's death. Both the prosecutor and the police seemed to have accepted from the outset that the applicant's daughter had committed suicide when they had no evidence to support such a conclusion. Referring to *Opuz* the Court stated that the flaws in the investigation in that case bore the hallmarks of other investigations into allegations of domestic violence in Turkey where there was *prima facie* evidence that domestic violence affected mainly women and that the general and discriminatory judicial passivity in the country created a climate that was conducive to domestic violence. In the Court's

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<sup>60</sup>. *Ibid.* §§ 60–62.

<sup>61</sup>. *Durmaz v. Turkey*, no. 3621/07, 13 November 2014.

view, the prosecutor's serious shortcomings in the case of *Durmaz* were part of that pattern of judicial passivity in response to allegations of domestic violence.<sup>62</sup>

## VI. PROMPTNESS

39. Taking part in criminal proceedings brought against one's rapist or sexual offender is hardly easy for every victim. It is onerous to be forced to relive the painful experiences from the past and to open them to more or less public scrutiny. The proceedings should be concluded as soon as the administration of justice so allows. The prerequisite of promptness of the proceedings is therefore also an aspect of victim protection - ever more so in cases of heightened vulnerability of the victim of rape or domestic violence for example.

40. According to the Court, a requirement of promptness and reasonable expedition is implicit in the context of an effective investigation.<sup>63</sup> In *P.M. v. Bulgaria*<sup>64</sup> it took the domestic authorities more than 15 years to complete the ensuing investigation into the rape of the applicant. The Court held that owing to the dormant investigation and exceptionally slow pace of the proceedings a number of urgent investigative measures, such as the commissioning of an expert examination of the applicant's clothes and interviewing witnesses, were taken only many years after the rape, leading in the end to the prosecution becoming time-barred.<sup>65</sup>

41. The issue of length of proceedings in cases concerning violence against women also arose in the very recent case of *Y. v. Slovenia*<sup>66</sup> concerning the criminal proceedings the applicant's mother had originally brought against a family friend, an older man, whom the applicant accused of having repeatedly sexually assaulted her at the age of 14. The proceedings had been marked by several longer periods of complete inactivity. While it was impossible for the Court to speculate as to whether the fact that more than seven years had elapsed between the applicant lodging her complaint and delivery of the first-instance judgment had prejudiced the outcome of the proceedings, such a delay could not be reconciled with the requirements of promptness. There had accordingly been a violation of the State's procedural obligations under Article 3 of the Convention. Only some months prior to its judgment in *Y. v. Slovenia* the Court had held in the cases of *M.A. v. Slovenia* and *N.D. v. Slovenia* that

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<sup>62</sup> *Ibid.* §§ 55–68.

<sup>63</sup> See, for example, *Opuz*, cited above, § 150.

<sup>64</sup> *P.M. v. Bulgaria*, no. 49669/07, 24 January 2012.

<sup>65</sup> *Ibid.* §§ 65–66.

<sup>66</sup> *Y. v. Slovenia*, no. 41107/10, 28 May 2015.



criminal proceedings into allegations of rape lasting 26 years and over nine years respectively, had not complied with the procedural requirements imposed by Article 3 of the Convention.<sup>67</sup>

## VII. RESPECT FOR THE APPLICANT'S PERSONAL INTEGRITY

42. As stated above, victims of violence against women find themselves in an extremely vulnerable situation. More often than not, the perpetrator is a member of the victim's entourage, which increases her sense of helplessness. Victims of sexual violence are especially prone to feel embarrassed and humiliated. Under these circumstances the investigating authorities need to show the utmost sensitivity in dealing with the case and respect for the applicant's natural wish to protect her personal integrity.

43. The lack of sensitivity was appalling in three cases against Turkey dealing with the practice of compulsorily subjecting female detainees to a gynaecological examination.<sup>68</sup> The use of such medical examination as an investigatory tool was not subject to any procedural requirements and was taken by the authorities in order to safeguard the members of the security forces who had arrested and detained the applicant against a potential false accusation of sexual assault. Even if this could in principle be regarded as a legitimate aim, the Court did not find that the carrying out of such an examination could be proportionate to such an aim. However, in a situation where a female detainee complains of a sexual assault and requests a gynaecological examination, the obligation of the authorities to carry out a thorough and effective investigation into the complaint would include the duty to carry out the examination promptly.<sup>69</sup> A detainee could not be compelled or subjected to pressure to undergo such an examination against her wishes. The general practice of automatic gynaecological examinations for female detainees was not in the interests of detained women and had no medical justification. Accordingly, depending on the facts of each case, the Court found violations of the applicants' rights under Article 3 or 8 of the Convention.<sup>70</sup>

44. Apart from the issue of length of proceedings, the case of *Y. v. Slovenia* was also significant given the Court's findings under Article 8 of

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<sup>67</sup>. *M.A. v. Slovenia*, no. 3400/07, 15 January 2015; *N.D. v. Slovenia*, no. 16605/09, 15 January 2015.

<sup>68</sup>. *Y.F. v. Turkey*, no. 24209/94, ECHR 2003-IX; *Juhnke v. Turkey*, no. 52515/99, 13 May 2008 and *Yazgül Yılmaz v. Turkey*, no. 36369/06, 1 February 2011.

<sup>69</sup>. See *Aydın*, cited above.

<sup>70</sup>. *Juhnke*, cited above, § 82, finding a violation of Article 8 of the Convention; *Yazgül Yılmaz*, cited above, § 65, finding a violation of Article 3 of the Convention.

the Convention regarding the way in which the criminal proceedings against the applicant's assailant were conducted. The applicant complained before the Court, *inter alia*, of breaches of her personal integrity protected by Article 8 of the Convention during the criminal proceedings and in particular that she had been traumatised by being cross-examined by the defendant himself during two of the hearings in her case. Thus, what was in issue was the alleged lack or inadequacy of measures aimed at protecting the victim's rights in the criminal proceedings.

45. The Court had to determine whether a fair balance had been struck between the applicant's personal integrity and the rights of the defence. Criminal proceedings concerning sexual offences were often perceived as an ordeal by the victim, in particular when the latter was unwillingly confronted with the defendant. These features were even more prominent in a case involving a minor. Therefore, in such proceedings certain measures could be taken for the purpose of protecting the victim, provided that they could be reconciled with an adequate and effective exercise of the rights of the defence. The Court reiterated that, as a rule, the defendant's rights under Article 6 §§ 1 and 3(d) of the Convention required that he be given an adequate and proper opportunity to challenge and question a witness against him either when he was making his statements or at a later stage of the proceedings. On the other hand, in the opinion of the Court, a person's right to defend himself did not provide for an unlimited right to use any defence arguments. Thus, since a direct confrontation between defendants charged with criminal offences of sexual violence and their alleged victims involved a risk of further traumatising for the latter, in the Court's opinion personal cross-examination by the defendant should be subject to a very careful assessment by the national courts, particularly regarding the more intimate questions.<sup>71</sup>

46. In the Court's opinion, the fact that the applicant's questioning had stretched over four hearings, held over seven months, without an apparent reason for the long intervals between hearings, in itself raised concerns. With regard to the nature of the cross-examination by the defendant himself, the Court noted that, while the defence had to be allowed a certain leeway to challenge the applicant's credibility, cross-examination should not be used as a means of intimidating or humiliating witnesses. Offensive insinuations exceeded the limits of what could be tolerated for the purpose of mounting an effective defence. It was first and foremost the responsibility of the presiding judge to ensure that respect for the applicant's integrity was adequately protected from those remarks, an intervention which could have mitigated what must have been a distressing experience for her. The Court acknowledged that the authorities had taken a number of measures to prevent the applicant from being traumatised further, such as excluding the

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<sup>71</sup>. *Y. v. Slovenia*, cited above, §§ 103, 106.

public from the trial and having the defendant removed from the courtroom when she gave her testimony. However, given the sensitivity of the matter and her young age at the time when the alleged sexual assaults had taken place, a particularly sensitive approach was required. The Court found that – taking into account the cumulative effect of the shortcomings of the investigation and the trial – the authorities had failed to take such an approach and to provide the applicant with the necessary protection, in breach of Article 8 of the Convention.<sup>72</sup>

## CONCLUSION

47. The Court has explicitly found that the overall unresponsiveness of the judicial system to cases of violence against women can amount to condoning such violence, reflecting a discriminatory attitude towards the victim as a woman.<sup>73</sup> Yet overall there is little examination under Article 14 of the question of equality between the sexes in the context of access to justice. However, some protection of the access of female victims to justice can be found in the principles which can be adduced from the specific case-law of the Court on violence against women dealing with positive/procedural aspects of Articles 2, 3, 4 and 8 of the Convention.

48. The national authorities have a duty to take reasonable preventive operational measures in order to react in a timely manner to cases of violence against women where they knew or ought to have known at the time of the existence of a real and immediate risk.<sup>74</sup> The measures must be sufficient to effectively deter the violent acts and prevent them from materialising. This duty of the authorities to act can be triggered even if threats uttered by the alleged offender have not materialised into actual physical violence.<sup>75</sup> Where necessary, the authorities must take action *ex officio*, even against the express wishes of the victim.<sup>76</sup> The heightened vulnerability of victims of violence calls for a greater degree of vigilance on the part of the authorities.<sup>77</sup> Depending on the circumstances, adequate protective measures may entail interim measures before more permanent protection can be achieved.<sup>78</sup> Excessively rigid procedural rules can hamper

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<sup>72</sup> *Y. v. Slovenia*, cited above, §§ 107–16.

<sup>73</sup> *Opuz*, cited above, § 198.

<sup>74</sup> *Kontrová*, cited above, § 50; *Hajduová*, cited above, § 50.

<sup>75</sup> *Hajduová*, cited above, § 49.

<sup>76</sup> *Ibid.* § 48.

<sup>77</sup> *Ibid.* cited above, § 50.

<sup>78</sup> *Bevacqua and S.*, cited above, § 73.

access to protection from violence. Instead, more flexible ways of reacting to a violent situation are called for.<sup>79</sup>

49. In order for access to judicial remedies against allegations of violence against women to be practical, regard must be had to measures such as the granting of legal aid in assisting victims of violence against women to effectively pursue their rights before the judiciary.<sup>80</sup> Whether this could include an obligation upon the Contracting States to provide victims of domestic violence with social support measures, such as shelter accommodation and housing, has not yet been dealt with by the Court.

50. As to the nature of the remedy, effective deterrence, indispensable in the area of violence against women where fundamental values and essential aspects of private life are at stake, can only be achieved through the criminal law.<sup>81</sup>

51. Victims of violence against women are to be granted access to justice without discrimination on any ground.<sup>82</sup> Allegations of ill-treatment must be scrutinised in thorough and effective investigations into whether the ill-treatment was inflicted by State officials or at the hands of third persons as in cases of domestic violence.<sup>83</sup> They must have due respect for the personal integrity of female victims, who often perceive criminal proceedings, especially in the case of sexual offences, as an ordeal, in particular when unwillingly confronted with the defendant.<sup>84</sup> Investigations must encompass open-minded and unbiased consideration by the investigating authorities of all possible leads in the case,<sup>85</sup> and they should be completed in a timely manner.<sup>86</sup>

52. The case-law of the Court on violence against women played an important role in the negotiations for the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (“the Istanbul Convention”), which entered into force on 1 August 2014. Many of the issues raised by the Court in this case-law are now codified as obligations on the Parties to the Istanbul Convention.<sup>87</sup>

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<sup>79</sup>. *Ibid.* § 76.

<sup>80</sup>. *Airey*, cited above, § 27.

<sup>81</sup>. *X and Y v. the Netherlands*, cited above, § 27.

<sup>82</sup>. *Opuz*, cited above, § 191; *B.S. v. Spain*, cited above, § 58; *Durmaz*, cited above, § 55.

<sup>83</sup>. *Aydın*, cited above, § 107; *M.C. v. Bulgaria*, cited above.

<sup>84</sup>. *Y. v. Slovenia*, cited above, § 103.

<sup>85</sup>. *Durmaz*, cited above, § 55.

<sup>86</sup>. *P.M. v. Bulgaria*, cited above, § 66; *Y. v. Slovenia*, cited above, § 99.

<sup>87</sup>. See, for example, the Preamble to the Istanbul Convention stating: “Taking account of the growing body of case law of the European Court of Human Rights which sets important standards in the field of violence against women”.

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