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Conceptualising Torture in Domestic Violence Cases: The ECHR's Dynamic Approach

ABSTRACT: *From 2007, when the first judgment strictly related to domestic violence was enacted before the ECHR, domestic violence is considered to be a human rights violation. The possibility for such a conceptualisation was previously rooted in positive obligations doctrine which shifted the postulates of human rights law. From the obligation to merely refrain from the abuse, states now have an obligation to protect an individual from the abuse of another individual. Enabling the horizontal effect of the rights from the Convention, the ECHR broadened up the scope of human rights tackling all sorts of cases which occur between individuals, such as domestic violence. However, certain elements of such constructs remain uncoherent and some immature aspects of this doctrine may cause some challenging issues in its practical implementation. Although the ECHR has established criteria on assessing whether a conduct is torture, degrading or inhuman behaviour, such an assessment lacked in the recent domestic violence judgments. Clearly, the dynamic and evolutive approach of the ECHR did not yet followed a substantial change in before mentioned domestic violence conceptualisation. In this paper, author analyses an early ECHR jurisprudence regarding Art. 3. of the Convention as well as the structure and the content of positive obligations which enabled domestic violence to be perceived as human rights violation. The author provides a brief review of the development of domestic violence concept as violation of torture.*
KEYWORDS: *domestic violence, torture, Art. 3., positive obligations, ECHR jurisprudence, European Convention on Human Rights*

1. Introduction

The United Nations Office on Drugs and Crime estimates that in 2020 alone, approximately 47,000 women and girls were killed by their intimate partners or family

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members worldwide.[1] Sadly, these numbers are merely a 'tip of the iceberg' bearing in mind a big 'dark figure'[2] which accompanies domestic violence along with the fact that victims of domestic violence are men and boys also. Today, there is no more room for doubt: domestic violence is a global phenomenon and represents a violation of human rights which states are obliged to prevent. The invisibility of domestic violence and the fact that it was long considered a private issue,[3] not a social problem, have significantly slowed down the recognition of the phenomenon as a human rights violation.[4] Although many countries had already criminalised domestic violence at that point, it was only in 2007 that the European Court of Human Rights (hereinafter referred to as the ECHR) issued the first judgement strictly related to domestic violence.[5] Since then, the ECHR has repeatedly emphasised the existence of member states' positive obligations in the sphere of domestic violence and determined the minimum standards for the protection of its victims. The latter provided a possibility that domestic violence was conceptualised as a human rights violation. While the European Convention on Human Rights[6] (hereinafter referred to as the Convention) does not explicitly mention the term 'domestic violence', the ECHR has repeatedly referred to the protection of other rights from the Convention in these cases, including the right to life (Art. 2),[7] the prohibition of torture (Art. 3),[8] the right to respect for private and family life (Art. 8),[9] and the prohibition of discrimination (Art. 14),[10] always referring to the 'positive obligations' doctrine. However, the way in which domestic violence cases have been contextualised through the aforementioned rights from the Convention by the ECHR has varied and evolved.[11] Numerous rights contained in the Convention are formulated in the form of negative rights as a reflection of the policy of ‚non-interference', but this formulation has caused many difficulties in the implementation and effectiveness of international human rights law. This is precisely why, in recent years, on countless occasions, the ECHR has imposed positive obligations on states in situations where a fundamental human right

1 Gibbons 2021. Also see: World Health Organisation, 2002.
2 Gracia, 2004, p. 536.
3 Farris and Holman, 2015, p. 1117.
4 Council of Europe, 2022.
5 Kontrová vs. Slovakia, (ECHR Application No. 7510/04), Judgment 31 May 2007.
6 Council of Europe, 1950.
7 E.g. Osman vs. United Kingdom, (ECHR Application No. 87/1997/871/1083), Judgment 28 October 1998.
8 E.g. J.I. vs. Croatia, (ECHR, Application No. 35898/16), Judgment 8 September 2022.
9 E.g. Y.F. vs. Turkey, (ECHR, Application No. 24209/94), Judgment 22 October 2003.
10 E.g. Volodina vs. Russia, (ECHR, Application No. 41261/17), Judgment 4 November 2019.
11 McQuigg, 2021, p. 155. The constant evolution of the ECHR interpretations is also rooted in the fact that the ECHR mainly approaches the interpretation of the convention teleologically in the sense that it interprets the convention rights in the light of the purpose that they serve. Also, it is well known that the ECHR is a living instrument which keeps in track with changes in common values and generally in society. Dzehtsiarou, 2011, p. 1730.

has been violated within an individual vs. individual relationship. After the provisions of the ECHR were transformed from merely negative rights into positive obligations,[12] in the next step, it was necessary to define the meaning, concept, and scope of these binding obligations, as well as their extent, that is, the time point of their activation. Considering that according to the doctrine of positive obligations, the state can be held responsible for the violation of the Convention if it does not adequately protect the rights of individuals, the question arose as to what the practical meaning was, and, perhaps most importantly, at what moment such an obligation was activated. For this purpose, the ECHR has been developing doctrines, tests, standards, and rules (e.g., *due diligence* standard, Osman test, etc.) for its interpretations. However, the constantly expanding jurisprudence on the issue of domestic violence showed its flaws in detecting the state's obligations in these cases as well as the focal point of their activation. In addition, in cases where domestic violence was conceptualised as states' violation of the prohibition of torture, detecting positive obligations turned out to be even more complex, especially as the concept of torture is still blurry. Even though torture (together with inhuman and degrading treatment) is considered one of the most serious international human rights violations (due to its profound violation of an individual's dignity), it is particularly difficult to pinpoint its exact scope and meaning because of the changing nature of the human rights concept. The latter occurs as a clear consequence of adding a new dimension to these rights, especially through the doctrine of positive obligations. The statement, 'The legal system is designed to protect men from the superior power of the State but not to protect women or children from the superior power of men'[13] does not apply anymore and the international human rights system is no exception. By protecting individuals from the state, a horizontal approach within humanitarian law opens up the possibility of a state violation of human rights in cases of domestic violence. Despite the clear trend of stretching the conceptualisation of both (positive obligations and human rights in general), the ECHR remains reluctant to label domestic violence as torture (rather than merely an inhuman or degrading behaviour) despite its longstanding earlier jurisprudence which imbedded concreteness into such an assessment.

In the first part of this paper, the author will provide an early conceptualisation of Art. 3 of the Convention. The second part of this paper will deal with the ECHR's positive obligations implementation and the manner in which its criteria were framed, focusing on the assessment standards in detecting violations of the Convention. The third part of the paper will follow the development of the aforementioned standards within the ECHR's jurisprudence and the transformation of the approach towards domestic violence. The paper ends with a conclusion of thoughts on the future of

12 Although, some authors criticise this dichotomy and suggest that its false (Donnelly, 2003, pp. 30-33) and that 'all rights are positive'. See: Holmes and Sustein, 1999.

13 Lewis Herman, 1992, p. 72.

positive obligations in domestic violence cases and their interpretation as violations of Art. 3 of the Convention.

2. Early Conceptualisation of Art. 3 of the European Convention on Human Rights (Convention)

Art. 3 of the Convention enshrines the most fundamental value of democratic societies bound up with the ultimate respect for human dignity. Despite the absolute and non-derogable character[14] of the prohibition of torture, inhuman or degrading treatment, or punishment,[15] the violation of Art. 3 of the Convention is one of the most frequently violated Convention rights in the case law of the ECHR.[16] Art. 3 is the shortest Convention provision, stating that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.[17] At first glance, one might think that this provision, due to the simplicity of its wording, would be easy to apply in practice. However, despite the concise wording and the fact that it applies without exception, the freedom of torture evolved into a highly and conceptually challenging and complex human right. One must bear in mind that '...no law, especially not a human rights law can speak with absolute clarity in all possible situations',[18] so numerous terms from the Convention needed further interpretation and clarification. Before the final design of the Convention, its creators considered amendments that would provide more precision in its provisions, including listing certain procedures that would constitute torture/inhuman/degrading treatment or punishment. At the end of the *travaux preparatoires* of the Convention, it was concluded that briefness was the best way to express the fundamental importance of this principle.[19] The initial idea behind this right is that, without any exception, member states shall not maltreat individuals. The legal *rationale* behind this is that human dignity presents a right that must be guaranteed to all, regardless of who they are or what they have done, and that the potential highest reasons of public interest

14 That is why some suggest that Art. 3. should not be trivialised in the sense that actions which do not represent the most serious forms of abuse should not be subjected to this prohibition. Harris, O'Boyle, and Warbrick, 2009, p. 69.

15 An absoluteness and non-derogability is reflected in a fact that no exception can be accepted, defended, justified, or tolerated in any circumstance whatever. Also, there is no room for a margin of appreciation doctrine.

16 In 2021, regarding subject-matter of the Court's violation judgments in the first place in terms of frequency are violations of the right to a fair trial (Art. 6), which comprise around 20% of all established violations, followed by violations of the right to personal freedom and security (Art. 5) – 18%, and, violations of the prohibition of torture, inhuman treatment and punishment (19%). ECHR, 2021, p. 7.

17 Art. 3 of the Convention.

18 Marochini, 2014, p. 65.

19 See preparatory work on Art. 3: Council of Europe 1956, p. 2.

(e.g., the need to fight terrorism or organised crime) cannot justify state conduct that would otherwise be in breach of Art. 3 of the Convention.[20] In its earlier ruling, the ECHR applied Art. 3 only in cases of states' maltreatment of an individual. The first conceptualisation did not include the infliction of harm between individuals.

There are three types of actions prohibited in Art. 3 of the Convention (torture, inhuman, or degrading treatment or punishment), and in any case, for an ill treatment to fall within the scope of Art. 3, it must attain a minimum level of severity.[21] Even though Art. 3 is supplemented by the *European Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (hereinafter referred to as the Convention against Torture), where the concept of torture is defined more precisely,[22] the demarcation of the three and assigned level of severity remains somewhat blurry at the conceptual level and relative in practice.[23] It depends on all the circumstances of the case. On the question of whether the treatment constituted 'torture' or (merely) an 'inhuman and degrading treatment', the ECHR checks a number of relevant factors, including duration of the treatment, its physical or mental effects, and, in some cases, the sex, age, and state of health of the victim,[24] in addition to the purpose for which the treatment was inflicted together with the intention or motivation behind it.[25] The case of *Ireland vs. United Kingdom*[26] illustrates that torture

20 See Tomasi vs. France,(ECHR, Application No. 12850/87), Judgment 27 August 1992, para 115. "The requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals."

21 Compare: Muršić vs. Croatia, (ECHR, Application No. 7334/13), Judgment 20 October 2016, § 97 & Savran vs. Denmark, (ECHR, Application No. 57467/15), Judgement 7 December 2021, § 122.

22 In the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) the term 'torture' is defined as "... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions." (Art. 1 of Convention against torture).

23 The first expansion of the conceptual content of the torture happened in the famous Gäfgen vs. Germany case where it was concluded by the ECHR that a threat of torture can also amount to torture because torture should also cover cases of mental torture (of course, the intensity of mental suffering is a crucial element of such an assessment (Gäfgen vs. Germany, (ECHR, Application No. 22978/05), Judgment 1 July 2010, § 108).

24 Ireland vs. the United Kingdom, (ECHR, Application No. 5310/71), Judgment 18 January 1978, §162; Jalloh vs. Germany, (ECHR, Application No. 54810/00), Judgment 11 July 2006, §67.

25 Aksoy vs. Turkey, (ECHR, Application No. 21987/93), Judgment 18 December 1996, §64; Egmez vs. Cyprus, (ECHR, Application No. 30873/96), Judgment 21 December 2000, §78 and Krastanov vs. Bulgaria, (ECHR, Application No. 50222/99), Judgment 30 September 2004, §53.

26 Ireland vs. United Kingdom, (ECHR, Application No. 5310/71), Judgment 18 January 1978.

is usually connected to severe physical abuse, while inhuman treatment is connected to the following factors: long duration, intense physical and mental suffering, and acute psychiatric distress. When discussing a degrading treatment, the ECHR implies feelings of fear, anguish and inferiority, humiliating behaviour, and breaking moral resistance.[27] Although their essence overlaps, torture and inhuman treatment are more focused on physical pain, while emotional or dignitary injury is emphasised when detecting a degrading conduct.

It is important to note two aspects which relativise[28] the conceptualisation of the aforementioned concepts. First, the practical scope of this demarcation is narrowed because no exception can be made regardless of whether the action constitutes torture, inhumanity, or degrading behaviour. This fact might only be relevant in terms of the awardable compensation under Art. 41 of the Convention or in terms of illegal evidence.[29] The latter refers to the fact that according to Art. 15 of the Convention against Torture, statements obtained by torture must not be given as evidence in criminal proceedings, whereas the same result does not necessarily follow if the treatment is 'merely' inhuman and degrading.[30] Second, the Court established that the categorisation of ill treatment might change over time, so that acts which were once classified as 'inhuman and degrading' as opposed to 'torture' could be classified differently in the future.[31] In some cases, the Court simply finds the breach of Art. 3 as a whole,[32] and in some cases, it makes that kind of distinction.[33] In its landmark case *Ireland vs. United Kingdom,*[34] the ECHR defined torture as 'deliberate inhuman treatment causing very serious and cruel suffering'.[35] Basic logic dictates that the level of suffering required for an inhuman treatment as opposed to the level of suffering

27 Janis, Kay and Bradley, 2008, p. 181.
28 Even though in its early decisions the ECHR stated that the Court had wished to reserve the epithet 'torture' for the most serious cases. Ireland vs. United Kingdom, §97.
29 First decision by which the ECHR introduced the exclusionary rule, i.e. said that obtaining evidence via torture must always lead to an unfair procedure, was passed in the case of Jalloh vs. Germany. However, unlike in cases of torture, the ECHR did not introduce a general evidentiary prohibition for lower degrees of violation of Article 3. See Jalloh vs. Germany, (ECHR, Application No. 54810/00), Judgment 11 July 2006.
30 Art. 15 of the Convention against Torture: "Each State Party shall ensure that any Statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the Statement was made".
31 Selmouni vs. France, (ECHR, Application No. 25803/94), Judgment 28 July 1999, §101.
32 Usually when referring to procedural limb of Art. 3 e.g. in X & others vs. Bulgaria (ECHR, Application No. 22457/16), Judgment 2 February 2021.
33 E.g., Fenech vs. Malta, ,(ECHR, Application No. 19090/20),1 June 2022; Ireland vs. United Kingdom, (ECHR, Application No. 5310/71), Judgment 18 January 1978, Selmouni vs. France , (ECHR, Application No. 25803/94), Judgment 28 July 1999.
34 Ireland vs. United Kingdom, (ECHR, Application No. 5310/71), Judgment 18 January 1978.
35 Ireland vs. United Kingdom, (ECHR, Application No. 5310/71), Judgment 18 January 1978, §101.

within the concept of torture is less intensive. Moreover, in contrast with torture, inhuman or degrading treatment does not have to be intended to cause suffering.[36]

The third element of Art. 3 refers to an inhuman or degrading treatment/punishment. There is no unambiguous distinction between the two in terms of ECHR jurisprudence.[37] Sentencing imposed on a convicted person is rarely reviewed under Art. 3 of the Convention. However, death penalty methods (which include a higher level of suffering), life imprisonment (without the possibility of release), or indeterminate sentencing might be considered inhuman (not merely degrading) punishment.[38] Treatment is degrading if it 'is such as to arouse in the victim's feelings of fear, anguish, and inferiority capable of humiliating and debasing them'.[39] Similar to an inhuman treatment, it is not essential that the intention to humiliate someone is found.[40] Such a violation was found in the case of *Svinarenko & Slyadnev v. Russia,*[41] where the applicants were held in metal cages during their trial hearings, which the ECHR found the treatment to be degrading, whereas in the case of *Kupinskyy v. Ukraine*, the ECHR reiterates that an irreducible life sentence is not compatible with the requirements of Art. 3.[42]

To get a deeper clue on the essence of the cases where the violation of torture is found and follows an earlier conceptualisation of Art. 3, a few examples should be shown:

- *Aksoy vs. Turkey*[43,44]: the applicant was stripped naked, with his arms tied together behind his back and suspended by his arms ('Palestinian hanging') by state agents while in police custody in to extract a confession [torture];
- *Maslova and Nalbandov vs. Russia*[45]: the applicant was repeatedly raped and subjected to a number of acts of physical violence during interrogation [torture];

36 Premeditation is considered when deciding whether treatment is inhuman, but it is not required. Harris, O'Boyle and Warbrick 2009, p. 75, footnote 70.
37 Harris, O'Boyle and Warbrick, 2009, p. 91.
38 E.g. in case Yabari vs. Turkey, (ECHR, Application No. 40035/98), Judgment 11 October 2000 – stoning to death for adultery; Kafkaris vs. Cyprus, (ECHR, Application No. 21906/04), Judgment 12 February 2008 – mandatory life sentence with no prospect of release for good behaviour.
39 Kudla vs. Poland, (ECHR, Application No. 30210/96), Judgment 26 October 2000, §92.
40 Price vs. United Kingdom, (ECHR, Application No. 33394/96), Judgment 10 October 2001."The Court found no evidence of any positive intention to humiliate or debase the applicant. However, it considered that to detain a severely disabled person in conditions where she was dangerously cold, risked developing sores because her bed was too hard or unreachable, and was unable to go to the toilet or keep clean without the greatest of difficulty, constituted degrading treatment contrary to Article 3."
41 Svinarenko & Slyadnev vs. Russia, (ECHR, Application No. 32541/08 & 43441/08), Judgment 17 July 2014.
42 Kupinskyy vs. Ukraine, (ECHR, Application No. 5084/18), Judgment 10 November 2022.
43 Aksoy vs. Turkey, (ECHR, Application No. 21987/93), Judgment 18 December 1996.
44 Which was also the first case where the Court concluded that an individual had been tortured. Overmeyer, 2021, p. 11.
45 Maslova and Nalbandov vs. Russia, (ECHR, Application No. 839/02), Judgment 7 July 2008.

- *Zontul vs. Greece*[46]: illegal immigrant was raped by a coastal guard responsible for supervising him [torture];
- *Batı & others vs. Turkey*[47]: the applicants were deprived of sleep, subjected to 'Palestinian hanging' and 'falaka', sprayed with water, beaten for several days while in custody in order to extract a confession [torture];
- *Nevmerzhitsky vs. Ukraine*[48]: the applicant, a detainee who was on hunger strike, was force-fed [torture];
- *Satybalova & others vs. Russia*[49]: severe beatings by police officers on different occasions resulting in the death of the applicants' relative [torture];
- *Selçuk & Asker vs. Turkey*[50]: the applicants' homes and property were intentionally destroyed by security forces [inhuman treatment];
- *Simeonovi vs. Bulgaria*[51]: the applicant was serving his life sentence for a long time in poor conditions and under a very restrictive regime [inhuman treatment];
- *Yankov vs. Bulgaria*[52]: the applicant's hair was forcefully shaved by the prison administration without any justification or legal basis [degrading treatment];
- *Iwańczuk vs. Poland*[53]: the applicant was subjected to a strip search in an inappropriate manner, such as the making of humiliating remarks [degrading treatment];
- *Kalashnikov vs. Russia*[54]: the applicant was detained for a lengthy time in a severely overcrowded and unsanitary environment in prison [degrading treatment].

Although the previous practice of the ECHR provided a relatively detailed understanding of Art. 3 of the Convention, Convention interpreters continued to challenge its content.[55] The initial conceptualisation of Art. 3 of the Convention in older ECHR jurisprudence clearly evolved over time and substantially changed its scope. Therefore, at one point, from negative right (simplified: state shall not torture anyone nor behave in an inhuman or degrading manner towards an individual – refrain from

46 Zontul vs. Greece, (ECHR, Application No. 12294/07), Judgment 17 February 2012.
47 Batı and Others vs. Turkey, (ECHR, Application No. 33097/96 et 57834/00), Judgment 3 September 2004.
48 Nevmerzhitsky vs. Ukraine, (ECHR, Application No. 54825/00), Judgment 12 October 2005.
49 Satybalova & others vs. Russia, (ECHR, Application No. 79947/12), Judgment 30 June 2020.
50 Selçuk & Asker vs. Turkey, (ECHR, Application No. 2/1997/796/998-999), Judgment 24 April 1998.
51 Simeonovi vs. Bulgaria, (ECHR, Application No. 21980/04), Judgment 12 May 2017.
52 Yankov vs. Bulgaria, (ECHR, Application No. 39084/97), Judgment 11 March 2004.
53 Iwańczuk vs. Poland, (ECHR, Application No. 25196/94), Judgment 12 February 2002.
54 Kalashnikov vs. Russia, (ECHR, Application No. 47095/99), Judgment 15 October 2002.
55 Webster, 2016, p. 372.

abuse[56]) to positive obligation (simplified: state shall prevent and efficiently protect individuals from such a behaviour inflicted by another individual – protect from abuse of another individual). In the first rulings of the ECHR, it was impossible to apply a violation of Art. 3 to domestic violence cases because such cases occurred between individuals. However, transforming negative rights from the Convention into the 'positive obligations' doctrine provided a possibility of domestic violence to be treated, in some occasions, as a violation of Art. 3 In the next chapter, I deal with the features of the 'positive obligations' structure within Art. 3, which substantially change the concept of its violation.

3. The Scope of Positive Obligations within Art. 3 of the Convention: Framing the Criteria

Over the last couple of decades, the 'positive obligations' standard has been playing an important role in sculpting the European human rights system within the jurisprudence of the ECHR.[57] A common justification for the judicial transformation of the rights imposed in the Convention has been to ensure that the rights are 'practical and effective',[58] especially considering the fact that proper human rights protection is much more challenging to provide today than it was years ago.[59]

From the states' authority's ill treatment of citizens, the violation of Art. 3 was later found in cases where there was no active behaviour of the state, but rather a lack of it. In later ECHR jurisprudence, Art. 3 served as a framework for the state's omission in cases where one's rights were violated by another individual. In its earlier rulings, the ECHR exclusively adhered to the original vision of the authors,[60] but today, although the ECHR still deals with state authorities' wrongdoing towards individuals,[61] it also

56 Preparatory work on Art. 3 of the Convention reveals that the original idea of the scope of this article was prohibition procedures like physical mutilation, sterilisation, medical, scientific experimentation, use of psychological interrogation techniques, forced drug infliction, imprisonment with darkness as to cause mental suffering etc. Council of Europe, 1956, p. 2 and p. 15.

57 Sarıkaya Güler, 2017, p. 359.

58 Mowbray, 2004, p. 221; Fredman, 2006, p.1.

59 Harris and Warbrick, 2009, p. 71.

60 E.g. Ireland vs. United Kingdom, (ECHR, Application No. 5310/71), Judgment 18 January 1978; Aksoy vs. Turkey, (ECHR, Application No. 21987/93), Judgment 18 December 1996; Aydin vs. Turkey, (ECHR, Application No. 23178/94), Judgment 25 September 1997; Nevmerzhitsky vs. Ukraine, (ECHR, Application No. 54825/00), Judgment 12 October 2005; Ilascu et al. vs. Moldova and Russia, (ECHR, Application No. 48787/99), Judgment 8 July 2004, etc.

61 E.g. Wenner vs. Germany, (ECHR, Application No. 62303/13), Judgment 1 September 2016 – long-term heroin addict that had been denied drug substitution therapy in prison; Hellig vs. Germany, (ECHR, Application No. 20999/05), Judgment 7 July 2011 – applicant places naked in a security cell in prison for seven days; Shmorgunov and others vs. Ukraine, (ECHR, Application No. 15367/14), Judgment 21 January 2021 & Lutsenko and Verbytskyy vs. Ukraine (ECHR,

deals with different cases of states' passive attitudes towards prevention, effective investigation, and criminalisation of certain behaviours between individuals.[62] By imposing such hardcore obligations on the member states, followed by the 'horizontal effect' (i.e., extending the scope of the Convention to private relationships between individuals[63]),[64] as *Dickens* mentions, it seems like the ECHR has aimed on transforming itself from being 'a factory churning out thousands of judgements each year' to 'an institution that can make a real difference to the lives of people throughout the continent'.[65] When examining such a transformation and the problems that may arise from it, democratic accountability comes to question.[66] Courts telling states what they must do as opposed to what they must not do increases the cargo on the state's autonomy as well. Without getting into a matter of the state's autonomy, legal reasoning, and plausibility behind positive obligations, the question is, what is the core content and scope of such obligations? As will be seen later on, certain elements of the double obligation doctrine remain unclear, lacking coherence and structure, which is why the urge for its clarification is well recognised.[67]

There are several systematisation schemes of the 'positive obligations' doctrine which can be found in the ECHR's rulings. Obligations can be divided into those which relate to the legal and administrative frameworks and those that encompass more *ad hoc* practical measures which states need to take.[68] Another typology of positive obligations divides them based on vertical (those that protect the individual from the state) and horizontal (those that protect individuals against other individuals) obligations.[69] However, the most fundamental typology of positive obligations probably refers to the

Application No. 12482), Judgment 19 January 2021 – police brutality; Korneykova and Korneykov vs. Ukraine, (ECHR, Application No. 56660/12), Judgment 24 March 2016 – mother and a newborn baby held in a pre-trial detention centre, without adequate medical care; Muršić vs. Croatia, (ECHR, Application No. 7334/13), Judgment 20 October 2016 – applicant held in a cell with insufficient personal space.

62 A.E.J. vs. Romania, (ECHR, Application No. 33463/18), Judgmetn 30 August 2022 (The applicant complained that the authorities had not investigated her allegations of sexual abuse effectively and had thus breached their positive obligation to protect her from inhuman and degrading treatment); Oganezova vs. Armenia, (ECHR, Application No. 71367/12 and 72961/12), Judgmetn 17 August 2022 (State's alleged failure to protect the applicant from harassment, homophobic attacks and threats because of her sexual orientation and to conduct an effective investigation into her complaints).

63 Akandji-Kombe, 2007, p. 14.

64 Despite the ECHR's earlier statement that 'The Court does not consider it desirable, let alone necessary, to elaborate a general theory concerning the extent to which the Convention guarantees should be extended to relations between private individuals inter se'. Verein Gegen Tierfabriken vs. Switzerland, (ECHR, Application No. 24699/94), Judgment 30 June 2009, §46.

65 Dickson, 2010, p. 205.

66 Dickson, 2010, p. 205.

67 Akandji-Kombe, 2007, p. 6.

68 Lavrysen, 2016, p. 112.

69 Beijer, 2016.

dichotomy of procedural (e.g., the obligation to conduct effective official investigations into violations of fundamental rights) and substantive (e.g., obligations to adopt legislative measures) positive obligations.[70] On a conceptual level, detecting a substantial violation of the mentioned positive obligation seems to be more problematic, for example, failure to prevent abuse between individuals. What constitutes the positive obligations behind Art. 3 of the Convention at a substantial level? If the state fails to prevent abuse in individual vs. individual cases, it may be responsible before the ECHR for the violation of human rights. At what point is such an obligation activated, that is, what conditions must be met for the ECHR to establish an omission to prevent?

The most fundamental issue that is intrinsically connected to the problem of the structure of failure to prevent is connected with the *due diligence* standard established by the ECHR to make the doctrine of positive obligations more concrete. Basically, the *due diligence* standard provides the framework for linking harm to the state by making the claim that the state ought to have adopted certain conduct to prevent the harm.[71] The harm in such cases refers to an illegal act which violates human rights, which is initially not directly imputable to a state (because the torture was perpetrated by an individual, and not by a state representative) but can lead to international responsibility[72] of the state, not because of the act itself, but because of the lack of *due diligence* to prevent the violation or to respond to it as required by the Convention. The most challenging part is detecting criteria for the assessment of whether the state has fulfilled its positive obligations in a *due diligence* manner within a certain case. The ECHR provided certain guidance in its rulings; however, the complexity, generality, and abstractness of the aforementioned can hardly be more concrete, especially considering that the circumstances of each case must be respected.[73]

Guideline criteria vis-à-vis 'positive obligations' assessment can be generally systematised as (1) the obligation to criminalise harmful conduct, (2) the procedural obligation to investigate allegations of criminal conduct, (3) the obligation to take protective operational measures, (4) the obligation to adopt effective regulatory frameworks for general prevention, and (5) the obligation to offer remedies.[74]

70 E.g., in Öneryıldız vs. Turkey, (ECHR, Application No. 48939/99), Judgment 30 November 2004. ECHR 2022, p. 6. In the literature, similar systematization may be found: (1) the obligation to criminalise harmful conduct, (2) the procedural obligation to investigate allegations of criminal conduct, (3) the obligation to take protective operational measures, (4) the obligation to adopt effective regulatory frameworks for general prevention and (5) the obligation to offer remedies. See Stoyanova, 2017, p. 329.

71 Stoyanova, 2020, p. 4.

72 Same standard can be found also in American Convention on human rights. See Centre for Human Rights & Humanitarian Law, 2018, p. 7.

73 ICJ 2007, para 430: "the notion of 'due diligence' [...] calls for an assessment in concreto."

74 Stoyanova, 2017, p. 329 and Stoyanova, 2020, p. 8.

3.1. Obligation to Criminalise Harmful Conduct

Regarding the criminalisation of a certain conduct, at first glance, it seems rather simple to detect whether a state has criminalised some kind of misconduct or failed to do so. However, some cases show that the assessment is not always easy and that criminalisation is a fluid term. The leading judgments in this respect are *X. & Y. vs. the Netherlands*[75] and *M.C. vs. Bulgaria*.[76] In both cases, the states concerned were held responsible for violating the obligation, either to pass criminal legislation or to interpret criminal law in accordance with the Convention standards. In *X. & Y. vs. Netherlands*, the ECHR states that with regard to less serious acts between individuals, which may lead to a violation of bodily integrity, the obligation of the state does not always require the adoption of some effective criminal law provisions that include a certain misconduct, and that the legal framework can also consist of civil law remedies providing sufficient protection.[77] The same was confirmed in *M.C. vs. Bulgaria* where, in his concurring opinion, Judge Tulkens states thus:

> *'Admittedly, recourse to the criminal law may be understandable where offences of this kind [rape, a.n.] are concerned. However, it is also important to emphasise on a more general level, as, indeed, the Court did in X and Y v. the Netherlands itself, that "[r]ecourse to the criminal law is not necessarily the only answer" (p. 12, § 24 in fine). I consider that criminal proceedings should remain, both in theory and in practice, a last resort or subsidiary remedy and that their use, even in the context of positive obligations, calls for a certain degree of "restraint".'*[78]

3.2. Investigate Allegations

Here, the situation is slightly more complicated. In relation to the domestic violence case in *Tomašić vs. Croatia*,[79] the Court used the following framing: *'...there should be some form of effective official investigation when individuals have been killed as a result of the use of force, either by state officials or private individuals. Whatever mode is employed, the authorities must act of their own motion once the matter has come to*

75 X & Y vs. the Netherlands, (ECHR, Application No.8978/80), Judgment 26 March 1985.
76 M.C. vs. Bulgaria, (ECHR, Application No.39272/98), Judgment 4 March 2004.
77 X & Y vs. the Netherlands, (ECHR, Application No.8978/80), Judgment 26 March 1985, §24 & §25.
78 M.C. vs. Bulgaria, (ECHR, Application No.39272/98), Judgment 4 March 2004, dissenting opinion of Judge Tulkens, §2.
79 Branko Tomašić & others vs. Croatia, (ECHR, Application No. 46598/06), Judgment 15 January 2009.

their attention'.[80] More simply put, the state is under a concrete obligation to initiate an investigation once allegations are made in a manner that raises reasonable suspicion. At this point, the positive obligation to investigate is activated. However, the state must be aware of such allegation. It can investigate only if it possesses the knowledge of the abuse that has taken place, which is why, according to the *due diligence* standard, the ECHR will first detect the existence of the state's actual or putative knowledge.[81] While the state's actual knowledge might be easy to detect (e.g., the victim reported the abuse to the police), putative knowledge means that even if the state in fact had no knowledge of the risk of harm (e.g., the victim never called the police), the ECHR will examine whether the state should have known or should have foreseen the harm based on the information it already has.[82] Establishing putative knowledge is mostly not self-evident, and it requires a delicate analytical assessment of all the circumstances *ex post facto.* Putative knowledge indicators could be, for example, if the family has a track record of previous violence settings or is already put under a social system surveillance. However, the determination of these criteria is very uncertain, especially in domestic violence cases which usually occur in private settings and, in a great proportion, remain hidden.[83]

Another problem related to the determination of this criterion entails the burden of proof: Does the victim have to prove that the state should have known/knew about the existence of violence, or is the burden of proof on the state? The disparity of weapons may suggest that it is more realistic to ask the state to prove that it has not been negligent than to ask the victim to prove negligence in how the state has managed the situation.[84]

80 Ibid. §62.

81 Stoyanova, 2020, p. 606.

82 In D.P. & J.C. vs. The United Kingdom, (ECHR, Application No. 38719/97), Judgment 10 January 2002. In this case, although local authorities did not know about the sexual abuse, the ECHR analysed whether there were some signs or risk factors which might present a red flag to the authorities. In the mention case, no violation of the Art. 3 was found, with an explanation that: *'The Court was not persuaded that there were any particular aspects of the turbulent and volatile family situation which should have led the social services to suspect a deeper, more insidious problem in a family which was experiencing financial hardship, occasional criminal proceedings and with a mother observed to be "less caring" than she should be'.*

83 An interesting interpretation could be found in United Kingdom case law where in determining whether the available information is sufficient to give rise to a reasonable suspicion, the test to be applied is that laid down by the House of Lords in Hussein vs. Chang Fook Kam 1970, Appeal Cases at p. 942: *'Suspicion in its ordinary meaning is a state of conjuncture or surmise where proof is lacking: "I suspect but I cannot prove". Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is at the end'.*
F. Osman vs. the United Kingdom, (ECHR, Application No.87/1997/871/1083), Judgment 18 October 1998, §78.

84 Stoyanova, 2020, p. 612. See Öneryildiz vs. Turkey, (ECHR, Application No.48939), Judgment 30 November 2004.

After establishing putative or real knowledge of the state authorities about the abuse, *due diligence* mandates further steps, —undertaking reasonable measures for prevention.

3.3. Obligation To Take Protective/Preventive Operational Measures

Right away, we encounter another challenge. What measures should the state take which would be qualified as reasonable, preventive, and expected in a certain case? This assessment usually implicates a normative evaluation of the measures provided within the normative framework of a member state. For the sake of brevity, I would not get into the rationale behind this criterion; however, it is worth mentioning that another principle from the ECHR jurisprudence can be put to the test when it comes to the evaluation of provisions in a certain state—the margin of appreciation.[85] The first judgement in which this positive obligation was developed was *Osman vs the United Kingdom,*[86] where the Osman test was introduced.

Since Osman, the obligation of taking protective operational measures has been applied by the Court in different contexts, including domestic violence and violence against women under the prohibition of torture. The Court has observed that *'it must be established to its [the Court's] satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of identified individual or individuals from the criminal acts of a third party and they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid the risk'*. The triggering of the obligation requires that the risk be 'real and immediate'. The Court has not offered further clarification regarding the meaning of the terms 'immediate' or 'real'. While 'real' risk might mean that the risk must be objective, considering the circumstances of the case, the requirement for the immediacy of the risk has been found to be problematic in the context of domestic violence. Judge Pinto De Albuqerque in his separate opinion in case *Valiuliene vs Lithuania*[87] has explained the underlying reasons emphasising that 'at the stage of an "immediate risk" to the victim, it is often too late for the state to intervene'. The same judge proposed the use of a present risk instead, which would arguably, imply a lower standard than 'immediate' risk. *'If a state knows or ought to have known that a segment of its population, such as women, is subject to repeated violence and fails*

85 The term 'margin of appreciation' refers to the space for manoeuvre that the Strasbourg organs are willing to grant national authorities, in fulfilling their obligations under the European Convention on Human Rights (the Convention. Council of Europe, 2022b.

86 Osman vs. the United Kingdom, (ECHR, Application No.87/1997/871/1083), Judgment 28 October 1998.

87 Valiulienė vs. Lithuania, (ECHR, Application No.33234/07), Judgment 26 March 2013.

to prevent harm from befalling the members of that group of people when they face a present (but not yet imminent) risk, the state can be found responsible by omission for the resulting human rights violation'.

In general, the Court has been quite flexible[88]: risks that could have materialised within months or even years have been accepted to be 'immediate', ultimately stretching the notion of 'immediacy', which might be problematic.[89]

Assuming that there was a real and immediate risk and that state authorities knew or ought to have known about such a risk, what measures should be undertaken for a state to fulfil its positive obligation? Generally, the ECHR detects a lack of measures provided instead of determining the quality of the ones which the state applies. However, a few times, the ECHR has enumerated specific measures in this regard. In the case *Kontrova vs. Slovakia,*[90] it mentioned measures such as

> *'accepting and duly registering the applicant's criminal complaint; launching a criminal investigation and commencing criminal proceedings against the applicant's husband immediately; keeping a proper record of the emergency calls and advising the next shift of the situation; and taking action in respect of the allegation that the applicant's husband had a shotgun and had made violent threats with in'.*[91]

3.4. Obligation To Adopt Effective Regulatory Frameworks for General Prevention

Generally, in the domestic violence and violence against women discourse, there has traditionally been a strong focus on the criminal law framework; however, the Court has stated that the effective legal framework extends beyond the realm of criminal law.[92] For these criteria to be met, the state has to obtain the capacity to anticipate infringements to the rights from the Convention through the establishment of a proper legislative and administrative framework aimed at providing effective deterrence from the violation of Convention rights.[93]

88 See Ebert and Sijniensky, 2015.
89 Stoyanova, 2020, p. 18.
90 Kontrova vs. Slovakia, (ECHR, Application No.7510/04), Judgment 24 September 2007.
91 Ibid., §53.
92 Bălşan vs. Romania, (ECHR, Application No.49645/09), Judgment 23 May 2017, §63.
93 See Budayeva & others vs. Russia, (ECHR, Application No.15339/02, 21166/02, 20058/02, 11673/02 & 15343/02), Judgment 29 August 2008.

3.5. Obligation To Provide Remedies

If an effective legal remedy in cases of human rights violations does not exist, the state is obligated to create one. This obligation aims to protect the victim; therefore, basic legal principles imply that such remedies must be accessible to facilitate everyone's access to justice. The ECHR underlines that *'the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'*.[94] Remedies on a general level imply 'the process by which arguable claims of human rights violations are heard and decided'.[95] Art. 5 of the Istanbul Convention uses the term 'reparation' in cases where violence is committed by private individuals which, in a much broader sense, can be perceived as a remedy.

Although there are still open questions about conceptualising positive obligations (especially in domestic violence cases), it is undisputable that their framing is the focal point for the possibility that states can be held responsible for the violation of Art. 3 in domestic violence cases. The aforementioned transformation from negative rights into positive obligations, provided that cases where a father abuses its child or is violent towards his wife, come to an appliance of Art. 3. From a simple restraint of torturing its citizens, states must now hold up to numerous standards and duties to avoid condemnation by the ECHR. Although it was effective in human rights protection as an incentive for creating the latter, it seems that the ECHR still has not managed to illuminate clear and unambiguous interpretations of the same. As seen earlier, the structure, content, and scope of such obligations have remained unclear and blurry.

4. Domestic Violence as Torture? Not yet: Case of Tunikova & Others vs. Russia

The second thematic report of the Special Rapporteur on Torture to the UN Human Rights Council has authoritatively categorised domestic violence as a form of torture.[96] There is no doubt that in its essence that domestic violence appears to share similar properties with torture, as both deny human dignity and integrity.[97]

As already highlighted, imposing positive obligations, despite the lack of their coherent conceptualisation, made the jurisprudence of the Court deal with not only

94 Akandji-Kombe, 2007, p. 10.
95 Shelton, 2006, p. 7.
96 UNHRC Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Manfred Novick: Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights Including the right to Development (15 January 2008) UNDOC A/HRC/7/3.
97 Marcus, 2014, p. 20; Başoğlu, Şalcıoğlu and Başoğlu, 2017, p. 107.

cases of states' infliction of maltreatment but also those of domestic violence. The ECHR imposes duties for the effective prevention of domestic violence on a daily basis, aiming to create a united and efficient European legal system which would protect victims of domestic violence across Europe. Cases of violations of Art. 3 are substantially different today than they were initially. Broadening the scope of the rights from the Convention and applying them horizontally opened a door towards the extensiveness of the content of Art. 3; however, this process was gradual and sensible. The conceptualisation of domestic violence as a violation of Art. 3 is an ongoing process that started in 2009.

- *Step 1 (2009): domestic violence is a human rights violation*

In 2007, the case of *Kontrova vs. Slovakia*[98] was brought before the ECHR. It was the first ECHR judgement strictly related to domestic violence, highlighting the approach that domestic violence is indeed a human rights violation[99] and falls under the scope of the Convention. Later jurisprudence showed that violations of Arts. 3 (rarely), 8, 14, and 2 (mostly) are usually found in cases of domestic violence.

- *Step 2 (2013): the centre of gravity lies on Art. 3*

Until 2013, in domestic violence cases, the ECHR would sometimes find a violation of Art. 3 (e.g., *Opuz vs. Turkey*[100]) and sometimes decided that it was not necessary when a violation of other Arts. from the Convention was already found (e.g., *Bevacqua & S. vs. Bulgaria*[101]); therefore, the ECHR's approach was incoherent. However, in 2013, in the case *Valiuliene vs. Lithuania,*[102] a different approach was adopted. In the latter case, despite the state's claim that the ill treatment of the applicant was not severe enough to fall within the scope of Art. 3 but rather acknowledging a breach of Art. 8, the ECHR stated that as the violation of Art. 3 was already established, there was no need to go further and determine whether Art. 8 was also violated. This case clearly marked the starting point for the use of Art. 3 more extensively in domestic violence cases from then on.[103][104] Therefore, from the previous practice in which the ECHR was

98 Kontrova vs. Slovakia, (ECHR, Application No.7510/04), Judgment 24 September 2007.
99 McQuigg, 2016, pp. 1009 and 1010.
100 Opuz vs. Turkey, (ECHR, Application No.33401/02), Judgment 9 June 2009.
101 Bevacqua & S. vs. Bulgaria, (ECHR, Application No.71127/01), Judgment 12 September 2008.
102 Valiuliene vs. Lithuania, (ECHR, Application No.33234/07), Judgment 26 June 2013.
103 Mcquigg, 2021.
104 Also, since its entry into force in 2014, the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention, Council of Europe, 2014) has frequently been referred to by the Court. (adopted 11 May 2011, entered into force 1 August 2014) CETS No 210.

almost reluctant to observe a violation of Art. 3 in domestic violence cases, a change of approach in 2013 suggested that from then on, if Art. 3 was to be found in these cases, it might mean that no further examination of another violation was necessary.

• *Step 3 (2019): the requirement for precision is set*

The next step in the ECHR approach occurred in 2019 in the case of *Volodina vs. Russia,*[105] in which a violation of Art. 3 had been established. In a separate opinion issued by Judge *Pinto De Albuquerque*, the question of whether it is sufficient to observe a violation of Art. 3 or further gradation should be addressed in terms of deciding whether the ECHR should assess violations concerning torture, inhuman, or degrading treatment.

• *Step 4 (2021): Case of Tunikova & Others vs. Russia*[106]

In 2021, the ECHR refused to characterise domestic violence as torture. In this case, the ECHR's decision is a valuable addition to its jurisprudence on domestic violence.[107] In this case, Russia has violated its positive obligations by failing to take adequate measures to protect victims of domestic violence and conduct an effective investigation due to the continuing structural problems in that society. The four applicants were victims of domestic violence from their partners or (former) husbands, ranging from an assault on Ms. Tunikova's life (application no. 55974/16) to recurrent violence in the cases of Ms. Petrakova (application no. 53118/17), Ms. Gershman (application no. 27484/18), and Ms. Gracheva (application no. 28011/19), and, eventually, to an extreme form of mutilation in Ms. Gracheva's case, leaving her disabled for life (her hands were chopped off). Three of the four applicants argued that they had been subjected to the most severe forms of domestic abuse which caused them very serious and cruel suffering that amounted to 'torture' rather than merely 'inhuman or degrading treatment'. In their view, recognising severe instances of domestic abuse as constituting 'torture' would emphasise the gravity of the abuse in the eyes of the public and authorities. The ECHR stated thus:

> *'The additional characterisation, although important for the applicants and capable of influencing the public perception of domestic violence, is not necessary in the circumstances of the present case, in which there is no*

105 Volodina vs. Russia, (ECHR, Application No.41261/17), Judgment 9 July 2019.
106 Tunikova & others v. Russia, (ECHR, Application No.55974/16, 53118/17, 27484/18 & 28011/19), Judgment 14 March 2021.
107 Mcquigg, 2021.

> *doubt that the treatment inflicted on the applicants attained the necessary threshold of severity to fall within the scope of Art. 3 of the Convention'.*[108]

Therefore, the ECHR did not consider it necessary to examine whether the impugned treatment could also be characterised as constituting 'torture'.

5. Conclusion

It will be far beyond the scope of the paper in hand to engage with all the relevant issues revolving around the conceptualisation of domestic violence, torture, and positive obligations. However, the previous chapters strived to not only highlight the few challenges of the evolution of Art. 3 within the jurisprudence of the ECHR but also set out a thought-provoking discussion on domestic violence and its connection to torture. The first challenge refers to the problematic and incoherent conceptualisation of the positive obligations imposed through the Convention. Despite the ECHR's attempt to make them more concrete, some of the elements within its content remain unclear. Second, although understanding domestic violence as torture might be challenging from the conventional human rights lens, today's indisputable approach of the ECHR suggests that domestic violence will be even more frequently referred to as a violation of Art. 3. Such a shift in modelling human rights by stretching its scope into a horizontal model has its justification in a more efficient human rights law system; however, the question remains as to whether such an approach is followed by sufficient consistency and clarity to achieve its goal. Finally, an ongoing reluctance of the ECHR to determine whether domestic violence should be recognised as torture, as opposed to an inhuman or degrading treatment (i.e., by explicitly conceptualising it as torture), does not necessarily mean that at one point, the ECHR would not take a further step in this regard. The *Tunikova* and *Volodina* cases both illustrate the constant evolution of the ECHR's jurisprudence on domestic violence, followed by the simultaneous development of positive obligations. Creativity, dynamism, and evolvability as characteristics of ECHR judgments will probably engender a more concrete application of Art. 3 in the future—on the one hand, creating a clearer criterion when it comes to positive obligations, and, on the other hand, establishing a more consistent conceptualisation of domestic violence as torture. Only by crystallising the content of and giving teeth to the norms prohibiting torture and positive obligations will greater victim protection be provided.

108 Tunikova & others vs. Russia, 55974/16, 53118/17, 27484/18 & 28011/19, Judgment 14 March 2021, §77.

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