

26 March 2013, Vilnius

EUROPEAN COURT OF HUMAN RIGHTS

Case D.P. v. LITHUANIA

Application No. 27920/08

**WRITTEN SUBMISSIONS
Third-Party Intervention**

Submitted by the Human Rights Monitoring Institute

I. INTRODUCTION

1. Human Rights Monitoring Institute has the honour to make written submissions to the European Court of Human Rights (hereinafter – the Court) by leave granted by the President of the Section of the Court in accordance with Rule 44(3) of the Rules of Court.
2. Human Rights Monitoring Institute (HRMI) is a non-governmental organization founded in Lithuania in 2003 with a mission to promote an open democratic society through the implementation of human rights and freedoms. Since 2008 HRMI engages in a strategic litigation intended to bring in necessary legal and/or social changes that would have a positive impact on the wider public. HRMI has been engaged in the drafting of the *Law on Protection against Domestic Violence*, and of subordinate legislation necessary for the implementation of the Law. HRMI has also represented domestic violence victim before this Court. Taking the above into account, HRMI would like to use this opportunity to intervene in the case and place its expertise before the Court.
3. These written submissions are composed of three interconnected parts: Part II addresses background information relevant to the Lithuanian authorities' approach towards domestic violence; Part III presents the analysis of the content of State's positive obligation to exercise due diligence when addressing domestic violence; Part IV analyses the case-law related to the level of severity and legal standards for the ill-treatment to fall under Article 3 of the Convention; finally, Part V focuses on the legal standards of application of Article 8 of the Convention. As instructed, HRMI will not comment on facts or merits of the present case.

II. BACKGROUND INFORMATION

4. Until the *Law on Protection against Domestic Violence* came into force on 15 December 2011, domestic violence in Lithuania has been regarded as a private matter addressed by way of bringing private prosecution, i.e. a victim herself/himself had to initiate and pursue the case. This meant that in cases where the victim refrained from filing a complaint with the prosecuting authorities (which is common in domestic violence cases), neither protective measures were to be enforced, nor investigation of the crime and/or prosecution of the perpetrator were to be practically implemented. The private prosecution rule made the victim, and not the State, responsible for protecting her or his human rights and ensuring accountability.
5. The UN Special Rapporteur on Violence against Women, its Causes and Consequences, Yakin Ertürk, had explicitly named this practice of public/private dichotomy in international human rights law to be one of the main obstacles to the protection of women's rights.¹ Indeed, the application of private prosecution rule in Lithuanian context had often paralyzed a domestic violence investigation and/or prosecution and therefore prevented the State from effectively protecting domestic violence victims and prosecuting aggressors thus condoning the practice of domestic violence.

¹ Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Integration of the Human Rights of Women and the Gender Perspective: violence against women; 20 January 2006, E/CN.4/2006/61, http://www.coe.int/t/dg2/equality/domesticviolencecampaign/Source/PDF_UN_Sp_Rapp_report_due_diligence_standard.pdf, 59 para

6. Domestic violence is a distinctive type of violence, therefore effective fight against this crime requires both adoption of specific legal rules and effective practical enforcement of those rules. Yet another equally important moment is a shift of the State's approach towards domestic violence as a serious crime and as a grave danger to victim's life and health rather than as a private family matter.
7. Though after the adoption of the *Law on Protection against Domestic Violence* the domestic violence is formally regarded as a matter of public interest, in practice, however, the mental shift is yet to come: the State authorities lack responsible approach to the crime and its grave damage and, as a result, on a number of instances fail to act in accordance with due diligence obligation. For example, in the period of January-March 2013, three women were killed in Lithuania by their husbands or partners because the police failed to react effectively to emergency calls and arrive to the places of crimes. At least in one of these cases the State authorities were well aware of the high-risk situation in the household. As rightly noted by Judge Pinto de Albuquerque in his Concurring Opinion in *Valiulienė v Lithuania* case, Lithuanian society is still faced with a serious, long-lasting and widespread problem of domestic violence (see *Valiulienė v. Lithuania*, 26 March 2013, Application No. 33234/07; Concurring Opinion of Judge Pinto de Albuquerque).
8. Furthermore, the State authorities still fail to treat domestic violence as a human rights violation and keep referring to the crime as family quarrels, where both the perpetrator and the victim are equality responsible for the psycho-traumatic atmosphere in the household. This flawed attitude leads the authorities to conclude that such measure as psychological consultations concerning family relations could be an effective tool to fight domestic violence. Failure to understand the specific character of domestic violence crime could be equally seen from the State authorities' attempts to justify the crime by identifying the pretext for violent acts, for example, unsolved property issues, as their root cause.

III. STATE'S POSITIVE OBLIGATION TO EXERCISE DUE DILIGENCE

9. International human rights law clearly affirms that States have a responsibility to secure human rights and freedoms to everyone within their jurisdiction.² This responsibility exists not only when the State itself commits a human rights violation, but also when the State fails to protect those under their jurisdiction from such violations.³
10. The concept of State's positive obligation to exercise due diligence in ensuring human rights has been well-established by this Court as well as by other international human rights bodies, i.e. UN Committee on the Elimination of All Forms of Discrimination Against Women, or the Inter-American Court of Human Rights. This obligation of exercising due diligence encompasses the acts of prevention of violation, protection against it, investigation, prosecution, punishment of perpetrator, and provision of redress for a victim.⁴
11. The due diligence standard requires measures that will be effective in the particular context, taking into account number of factors. The question whether certain measures taken by the State are to be considered effective, can only be answered in the light of all the circumstances of a particular case (see *Opuz v. Turkey*, 9 June 2009, Application No. 33401/02, para 130).

² Article 1 of the European Convention on Human Rights, Council of Europe

³ Inter-American Court of Human Rights, *Velasquez-Rodriguez v. Honduras*, 29 July 1988, para 172

⁴ Inter-American Court of Human Rights, *Velasquez-Rodriguez v. Honduras*, 29 July 1988, para 174

12. In accordance with the international standards, Part III of the Submissions draws the scope of due diligence obligation of the State in relation to a) the State's duty to prevent the repetitive crime and protect the victim, and b) the State's duty to investigate, prosecute, punish the perpetrator and compensate the victim.

A. State's Duty to Prevent the Recurrent Crime and Protect the Victim

13. When assessing whether the State fulfilled its due diligence obligation to prevent domestic violence crime and protect its victim, the specific character of the crime of domestic violence must be taken into account. As indicated by the Constitutional Court of South Africa, what distinguishes domestic violence is its repetitive character.⁵ It is exactly this feature, i.e. the repetitiveness, which sets a higher degree of due diligence obligation for the State to prevent the ongoing violation and protect its victim from numerous repetitive assaults.

14. Although usually the State's due diligence obligation is asserted through the effectiveness of the measures implemented by the State authorities, the repetitive character of the crime of domestic violence urges for different approach towards State's duty to prevent the recurrent numerous violations and protect the victim.

15. This suggests that the mere fact that the State failed to protect victim, where previous cases of assaults were reported and known to the State authorities, presupposes the failure of the State to fulfill its due diligence obligation. This approach in principal requires the State to ensure no repetitiveness of domestic violence acts and thus ensure physical security of the victim.

16. This approach is supported by the international case-law. As indicated by the Inter-American Court of Human Rights in *Maria de Penha Maia Fernandes v. Brasil* case, the failure of the State to prevent domestic violence crimes and protect the victim despite her repeated complaints revealed the tolerance by the State authorities towards violence, and thus amounted to the violation of State's positive obligation to exercise due diligence.⁶

17. The Committee on the Elimination of Discrimination against Women also supports the approach in *A.T. v. Hungary* case: the Committee found the violation of the Convention of Elimination of Discrimination against Women due to the State's failure for four years to provide the victim with effective protection or security from the danger of continued violence.⁷

18. In case of *Osman v. the United Kingdom*, this Court has held that it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk of which they have or ought to have knowledge (see *Osman v. the United Kingdom*, 28 October 1998, Application No 87/1997/871/1083, para 116).

19. The States have a margin of appreciation to decide on the measures necessary to prevent repetitive crime and protect victim from long-term suffering, however the due diligence obligation in

⁵ Constitutional Court of South Africa, *the State v Baloyi* case, 3 December 1999, CCT 29/99, para 11, <http://www.saflii.org/za/cases/ZACC/1999/19.html>

⁶ Inter American Court on Human Rights, *Maria de Penha Maia Fernandes v. Brasil*, 16 April 2001, Report No. 54/01

⁷ *A.T. v. Hungary*, 26 January 2005, Views of the Committee on Elimination of Discrimination against Women under article 7, paragraph 3, of the Optional Protocol o the Convention on the Elimination of All Forms of Discrimination against Women, Communication No.: 2/2003

relation to this duty, indicates that the primer target is victim's physical security. For the measures to be considered effective – be they timely, accessible, enforced – they must ensure the result. In other words, the key aspect of due diligence standards is for the duty to have an effective result: prevent the repetitiveness of ongoing domestic violence crime and thus secure the victim. Those measures could *inter alia* include removal of suspected perpetrator from the premises, taking suspected perpetrator into custody, banning the perpetrator from contacting or approaching the victim, restriction of access to premises, ensuring alternative accommodation for the victim, etc.

20. Therefore, the mere fact that the State failed for a number of years to prevent repetitive episodes of domestic violence and thus protect the victim despite the repeated complaints, indicates the lack of due diligence on the State's part. Such measures like sending police to the household, observation of the situation in the family, provision of social assistance, offering psychological consultations concerning family relations, analysis of the situation, cannot be considered sufficient in effectively implementing State's duty to prevent recurrent domestic violence crimes and protecting victims in cases of repeated assaults.

B. State's Duty to Investigate, Prosecute, Punish the Perpetrator and Compensate the Victim

21. In order to fulfill its due diligence obligation to investigate, prosecute, punish the perpetrator and provide redress to the victim, the State is required to take reasonable steps,⁸ in particular with regard to children and other vulnerable individuals (see *Z and Others v. The United Kingdom*, 10 May 2001, Application No. 29392/95, para 73; *Osman v. the United Kingdom*, 28 October 1998, Application No 87/1997/871/1083, para 116). When national authorities fail to investigate, prosecute or punish the perpetrators of domestic violence, the State might be held responsible for such acts.
22. Investigation in domestic violence cases should be conducted thoroughly and effectively (see *Najaflı v. Azerbaijan*, 2 October 2012, Application No. 2594/07, para 47). As defined by this Court, this means that the authorities must always make a serious attempt to find out what happened; there must be an element of public scrutiny of the investigation (see *Najaflı v. Azerbaijan*, 2 October 2012, Application No. 2594/07, para 48) and it must be independent and impartial, in law and in practice (see *Savitskyy v. Ukraine*, 26 July 2012, Application No. 38773/05, para 100) and the competent authorities must act with exemplary diligence and promptness (see *Celik and Imret v. Turkey*, 26 October 2004, Application No. 44093/98, para 55). Investigation must not be a mere formality but be capable of leading to identification and punishment of culprits (see *Aydin v. Turkey*, 25 September 1997, Application No. 23178/94, Summary, part IV). Beyond these general principles, the nature of domestic violence demands that special consideration be given to the types of evidence gathered and to how the evidence is collected. According to the case-law of the Court, the case where a criminal investigation was delayed as long as to become time-barred, amounts to a procedural violation of the Convention (see *Valiulienė v. Lithuania*, 26 March 2013, Application No. 33234/07).
23. The part of due diligence obligation in relation to the State's duty to investigate and prosecute requires action in different spheres: adoption of efficient criminal law provisions (see *M.C. v. Bulgaria*, 4 December 2003, Application No. 39272/98, para 150), application of the said provisions in practice, prompt response by the authorities (see *Karabet and Other v. Ukraine*, 17

⁸ Inter-American Court of Human Rights, *Velasquez-Rodriguez v. Honduras*, 29 July 1988, para 174

January 2013, Application Nos. 38906/07 and 52025/07, para 261), accessible criminal procedures, etc.

24. As indicated by the UN Special Rapporteur on Violence against Women, its Causes and Consequences, and supported by international standards, legal framework where domestic violence is seen as a private matter dealt with under private prosecution procedure means that the State – by leaving the private sphere off limits to State intervention and thus normalizing the use of violence in the privacy of the home – is failing to give effect to its obligation to investigate, prosecute and punish the perpetrator of the domestic violence.⁹ Due diligence obligation requires the State to set up such a mechanism of prosecution, which establishes that ensuring accountability is an obligation of the State not the victim.
25. In terms of duty to prosecute and punish, the Committee of Ministers of the Council of Europe has on multiple occasion expressed its position that all forms of violence within the family should be classified as criminal offences,¹⁰ therefore perpetrator should be charged in accordance with the criminal law procedures, and if proven guilty of a criminal act, to receive adequate punishment under criminal law. A proportional and adequate punishment is a part of due diligence obligation. As stated by the Council of Europe, impunity must be fought as a matter of justice for the victims, as a deterrent to prevent new violations and to uphold the rule of law and public trust in the justice system.¹¹ Civil law remedies may complement criminal law procedures but they cannot substitute them in general.
26. The case-law of this Court suggests that any rigid approach to the prosecution of serious offences, risks leaving certain types of crimes unpunished and thus jeopardising the effective protection of the individual (see *M.C. v. Bulgaria*, 4 December 2003, Application No. 39272/98, para 166). 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 domestic violence crime.

IV. APPLICATION OF ARTICLE 3: LEVEL OF SEVERITY

27. According to the well-established case-law of the Court, for a particular case to fall within the scope of Article 3 of the Convention, the ill-treatment must attain a minimum level of severity. The assessment of this minimum level is, in the nature of things, relative; it depends on all the circumstances of the case and the nature and context of the treatment, such as the duration of the treatment, its physical and mental effects and, the sex, age, and state of health of the victim, etc. (see *Opuz v. Turkey*, 9 September 2009, Application No. 33401/02).
28. According to the case-law of the Court, one of the main purposes of Article 3 is to protect person's dignity and physical integrity (see *Tyrer v. the United Kingdom*, 25 April 1978, Application No 5856/72, para 33). As noted by the International Criminal Tribunal for the Former Yugoslavia in *Furundžija* case “[t]he general principle of respect for human dignity is the basic underpinning

⁹ Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Integration of the Human Rights of Women and the Gender Perspective: violence against women; 20 January 2006, E/CN.4/2006/61, http://www.coe.int/t/dg2/equality/domesticviolencecampaign/Source/PDF_UN_Sp_Rapp_report_due_diligence_standard.pdf, 59 para

¹⁰ Council of Europe position presented in *Bevacqua and S. v. Bulgaria*, 12 June 2008, Application no. 71127/01, para 51

¹¹ Council of Europe, *Eradicating Impunity for Serious Human Rights Violations*, Guidelines and Reference Texts, 30 March 2011, at 5, http://www.coe.int/t/dgi/publications/others/h-inf_2011_7en.pdf

and indeed the very raison d'être of [international] human rights law".¹² Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity (see *A. v. the United Kingdom*, 23 September 1998, 100/1997/884/1096).

29. Developing jurisprudence on the nature of torture and ill-treatment supports the view that it encompasses physical as well as mental suffering, including the threat or fear of violence. International treaties, such as *UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (1984), or *Rome Statute of the International Criminal Court* (2002) do not limit the ill-treatment amounting to torture, inhuman or degrading treatment to acts causing physical pain or injury, but include acts that cause mental suffering as well.¹³ In *Akayesu* case the International Criminal Tribunal for Rwanda noted that both "*serious bodily or mental harm [could] mean acts of torture, be they bodily or mental, inhuman or degrading treatment...*"¹⁴
30. The ill-treatment also comprises the feelings of fear, anguish and inferiority capable of humiliating and debasing victim (see *Ireland v the United Kingdom*, 18 January 1978, Application No. 5310/71, para 167). Undoubtedly, psychological terror and recurrent physical attacks subject victim to a state of constant suffering, sense of less human and dignified, and thus assaults person's dignity and physical integrity. This view has been supported by this Court in *Valiuliene v. Lithuania* case, where a violation of Article 3 of the Convention was found (see, *Valiuliene v. Lithuania*, 26 March 2013, Application no. 33234/07).
31. As accepted internationally, children and other vulnerable persons are entitled to a particularly high State protection against such crimes as domestic violence. Had the victim already been subjected to abuse in the past, his/her vulnerability would be of a higher degree. Furthermore, due weight must be given to such factor as family circumstances. As noted by the Inter-American Court, the threat that a person and the members of his/her family would be subjected to torture inflicts psychological suffering and thus can itself amount to torture or cruel or inhuman treatment.¹⁵
32. In the cases of *Beganovic v. Croatia* (25 September 2009, Application No 46423/06), and *Tyrer v. the United Kingdom* (25 April 1978, Application No 5856/72), the Court held a single episode of violence to reach the level of severity required for Article 3. A number of episodes of physical violence together with constant terror, threats, psychological, emotional and verbal abuse directed both to the victim and victim's children is a severe assault on person's dignity and physical integrity and to fall under Article 3.

V. APPLICATION OF ARTICLE 8

¹² International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Anto Furundžija*, Trial Chamber, Case No. IT-95-17/1-T, 10 December 1998, para 183

¹³ See Article 1(1) of the *UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*; Article 7(2)(e) of the *Rome Statute of the International Criminal Court*

¹⁴ International Criminal Tribunal for Rwanda, *Prosecutor v. Jean-Paul Akayesu*, Trial Chamber, Case No. ICTR-96-4-T, 2 September 1998, para 504.

¹⁵ Inter-American Court of Human Rights, *Maritza Urrutia v Guatemala*, 27 November 2003, Ser. C, No. 103 (2003), para 86 and 88

33. The concept of “private life” covers person’s physical and moral integrity (see *X and Y v. the Netherlands*, 26 March 1985, Application No 8978/80, para 22; *Sandra Jankovic v Croatia*, 14 September 2009, Application No 38478/05, para 45), which the State has a duty to protect. To that end the State is to maintain and apply in practice an adequate legal framework affording effective protection against acts of violence. The State’s due diligence obligation to protect the physical and moral integrity of children and vulnerable persons is of a higher degree, especially when the assaults are of a repetitive character.
34. The mere fact that the victim had been repetitively subjected to suffer physical and psychological pain indicates that no adequate protection against an attack on his/her physical integrity was guaranteed. Furthermore, the manner in which the criminal law mechanisms were implemented was defective as it lasted as long as to become time-barred thus constituting a violation of the respondent State’s positive obligations to afford effective protection to the right to respect for the victim’s private life as it is required under Article 8 of the Convention.

VI. CONCLUSIONS

35. As seen in *Valiuliene v. Lithuania* case, the developing case-law of this Court establishes rather firmly that the very act of domestic violence has an inherent humiliating and debasing character for the victim and thus may be considered as attaining a minimum level of severity to fall within the scope of Article 3 of the Convention. Taken into account the repetitive character of the crime, the State must assume an obligation of due diligence of such an extent as to prevent the ongoing violation and protect its victim from numerous repetitive assaults. The mere fact that the State failed to protect victim from repetitive assaults presupposes the failure of the State to fulfill its due diligence obligation.

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