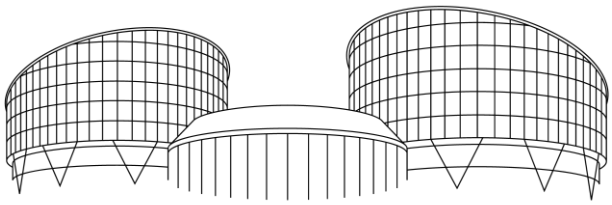

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF VALIULIENĖ v. LITHUANIA

(Application no. 33234/07)

JUDGMENT

STRASBOURG

26 March 2013

FINAL

26/06/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Valiulienė v. Lithuania,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Guido Raimondi, *President,*
Danutė Jočienė,
Dragoljub Popović,
András Sajó,
Işıl Karakaş,
Paulo Pinto de Albuquerque,
Helen Keller, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 19 February 2013,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 33234/07) against the Republic of Lithuania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Lithuanian national, Ms Loreta Valiulienė ("the applicant"), on 11 July 2007.

2. The applicant was represented by Mr H. Mickevičius, the director of a non-governmental organisation *Human Rights Monitoring Institute*. The Lithuanian Government ("the Government") were represented by their Agent, Ms E. Baltutytė.

3. The applicant alleged that the State had failed to protect her from acts of domestic violence. She also complained that the criminal proceedings she had instituted had been futile, given that the perpetrator of the crimes had been left unpunished.

4. On 7 March 2011 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. On 1 September 2011 the Government presented the Court with a unilateral declaration, acknowledging a violation of Article 8 of the Convention. On 5 June 2012 the Government's unilateral declaration was examined by the Court, which decided not to accept it.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1976 and lives in Panevėžys.

7. The applicant stated that between 3 January and 4 February 2001, she had been beaten up on five occasions by her live-in partner, J.H.L., a Belgian citizen. She submitted that she had been strangled, pulled by the hair, hit in the face and kicked in the back and in other parts of her body.

8. The applicant's injuries were documented by forensic expert examinations, the results of which were as follows:

(i) report of 5 January 2001 concerning injuries sustained on 3 and 4 January: hypodermic bruising on the left hip and thigh;

(ii) report of 8 January concerning injuries sustained on 7 January: a scrape on the right cheek and brachium;

(iii) report of 30 January concerning injuries sustained on 29 January: bruising on the right eye and cheek, the left temple, the shin, and a scrape on the left shin;

(iv) report of 7 February concerning injuries sustained on 4 February: hypodermic bruising on the face.

Each time the experts concluded that the bodily injuries sustained were minor and had not caused any short-term health problems (*lengvi kūno sužalojimai, nesukėlę trumpalaikio sveikatos sutrikimo*).

A. Pre-trial investigation into the alleged injuries

9. On 14 February 2001 the applicant lodged an application with the Panevėžys City District Court to bring a private prosecution. She stated that J.H.L. had beaten her up on five occasions and gave the following detailed statement:

> "I have lived with J.H.L. since 1996. Recently he started to harass and beat me.
>
> On 3 January 2001 at around 8 p.m., I came home and found J.H.L. drunk; he was pulling up floor tiles. I complained about how he was behaving and he started to pull at my clothes. I crouched down and he then kicked me in the ribs and in the buttocks and tried to strangle me and pull my hair. When he had calmed down, I went into another room.
>
> The next morning, on 4 January 2001 at around 9 a.m., J.H.L. stated that if I did not want to live with him any more and did not behave as he wished, he would move everything out of the apartment and would then make me pay for what I had done. He got angry when I suggested that we talk things through and he started kicking and hitting me again. He hit me a few times in various parts of my body. After that, he left home and I went to my friend G.V.'s apartment. She saw that I had been beaten up and I told her everything that had happened.
>
> On 7 January 2001 at around 5.30 p.m., I came home and found J.H.L. drunk again. He started to reproach me for seeking medical expert attention for my injuries and told me that he wanted me to leave. He then called the police. Later, after the police officers had left the apartment without having taken any action (they asked me to come in to the police station the following day), J.H.L. got mad and pushed me out of the apartment into the stairwell and hit me in the face. Hearing a noise, B. and J., neighbours from apartments nos. 51 and 52, came out of their apartments to the landing and saw what was happening.

On 29 January 2001 at around 6.30 p.m., I came back from school and J.H.L. got mad about our relationship falling apart (I wasn't staying at the apartment as I was trying to avoid any confrontation) and he started to beat me again: he kicked me in the face, waist, and other parts of my body and hit me in the head. When he finally stopped beating me, I went to my friend J.V.'s apartment. She lives in the same building, at apartment no. 34.

On 4 February 2001 at around 8 p.m., while I was at home, a drunken J.H.L. got mad because I had told him not to waste electricity (I pay for the electricity as the apartment is in my name, as is the contract with the electricity supplier) and hit me in the face. After that, he blocked the door to stop me from leaving. Because I was so afraid of being beaten up even more I had to flee the apartment by climbing through the window. This must have been seen (or at least heard) by an unknown girl who had been visiting J.H.L. After fleeing the apartment I ran to my neighbour R.'s apartment at no. 48, from where I called the police. My neighbour from apartment no. 47 saw that I had been beaten up. I do not know her last name.

I sought medical attention from forensic experts about the injuries, which were classed as being minor bodily injuries."

10. In her application to the court, the applicant alleged that the repeated acts of violence against her had constituted the offence of causing minor bodily harm under Article 116 § 3 of the Criminal Code in force at the material time ("the old Criminal Code"). She requested that the court open a criminal case against J.H.L. and that he be charged and punished under the above-mentioned provision of the Code. The applicant provided a list containing the names and addresses of five neighbours she wanted to call to the court as witnesses. She also requested the court to provide her with evidence from the Panevėžys city police about the violence she had sustained. Lastly, the applicant provided medical reports about her injuries.

11. In May 2001 the Panevėžys city police informed the applicant that "in reply to your complaint of 9 March 2001 we inform you that in the matter of your personal disagreements with J.H.L., we suggest that you apply to the Panevėžys City District Court for proceedings to be brought by way of a private prosecution".

12. When questioned about her conflicts with J.H.L. on 8 May 2001, the applicant told a criminal investigator that she had lived with J.H.L. for three years in Belgium from 1996 to 1999. In 2000 she had returned to Lithuania and J.H.L. would visit her there. In 2000 she had sold him a half share of her apartment at 22-46 Statybininkų Street in Panevėžys. In early 2001, when she no longer wished to maintain her relationship with J.H.L., he had started insulting her and threatened to "rearrange her face" and injure her. The threats had continued on a regular basis. The applicant admitted to the court that she had not reported those threats to the police, but that this had been because the police officers would have told her to bring civil proceedings against J.H.L. She also made it clear that she had taken the threats seriously.

13. On 21 January 2002 a judge of the Panevėžys City District Court forwarded the applicant's complaint to the Panevėžys city public prosecutor, ordering him to start his own pre-trial criminal investigation so that the

examination of the case would not be delayed. To explain the request for a public prosecution to be carried out, the judge noted that J.H.L. had failed to appear in court on a number of occasions.

14. In the applicant's reply to the Government's observations on the admissibility and merits of the case, she provided the Court with a copy of an e-mail dated 12 June 2001 (in Dutch) sent by a certain Y.L., who appears to be the son of J.H.L., to what appears to be the applicant's address. The e-mail reads as follows:

> "(...) I will come for you and then we will see what will happen. One thing I can tell you [is that] you can forget your life and your [boy]friend's life, I can promise you that. Order yourself a wheelchair already. My friends and I will grab you and you will see what real bandits are like, that you have never seen in Lithuania. Father did everything for you and now look at you. Do you think we can just leave it at that? You are a rotten street whore".

15. On 1 February 2002 the pre-trial investigator decided to place J.H.L. under investigation on suspicion of the offence of systematically causing minor bodily harm to the applicant (Article 116 § 3 of the old Criminal Code).

16. According to a report of 11 December 2002 produced by D.D., a police investigator, police officers had been called to the applicant and J.H.L's apartment twice, namely on 7 January and 4 February 2001. The applicant had told the police that J.H.L. had been verbally abusive to her and had tried to throw her out of the apartment. J.H.L. had been cautioned by the police on both occasions. The investigator noted that on those two occasions the applicant had not mentioned anything about her injuries to the police. The applicant had written to the police on 15 January 2001 that J.H.L. had cursed her and had not let her into the apartment, but she had not mentioned physical injuries.

17. In 2002 J.H.L. was charged with having deliberately and systematically injured the applicant, resulting in her having sustained minor bodily harm. The investigation was suspended and reopened numerous times because J.H.L. had failed to appear at court and had absconded. Each time the investigation was suspended, the applicant lodged an appeal.

18. In December 2002 the police investigator D.D. deemed that there was insufficient evidence to prove that J.H.L. was responsible for having beaten the applicant. On the basis of the applicant's appeal, the prosecutor quashed that decision on the ground that the pre-trial investigation had not been thorough enough.

19. On 21 January 2003 the police investigator D.D. again decided to discontinue the pre-trial investigation, considering that there was no conclusive evidence that J.H.L. had perpetrated the crimes against the applicant and that that all the means to discover the truth had already been exhausted. The investigator noted that in the one-month period during which the violence had allegedly taken place, the police had only been called to the apartment twice to sort out "family quarrels", and that in her

statements to the police the applicant had not made any complaints of having been physically attacked by J.H.L. She had only complained that she had been shouted at by him and that he had refused to let her enter the apartment which they both shared as co-owners. The investigator did not rule out the possibility that the applicant had initiated the criminal investigation because there had been unresolved financial disputes between them.

The investigator's decision was upheld by a public prosecutor on 10 February 2003.

The applicant appealed against those two decisions and on 9 February 2004 a higher prosecutor reopened the proceedings on the grounds that "the criminal investigation had not been [sufficiently] thorough".

20. By a decision of 17 March 2004, the Panevėžys prosecutor's office granted the applicant's request to remove (*nušalinti*) the criminal investigator D.D. from the case because of concerns as to her impartiality. The prosecutor also noted that the criminal investigation had been delayed (*tyrimas buvo vilkinamas*).

21. On 10 June 2005 the prosecutor held that during the pre-trial investigation "it had been established" that the applicant had been strangled, hit and kicked on five separate occasions between January and February 2001 in the apartment situated at 22-46 Statybininkų Street in Panevėžys. As a result, she had sustained minor bodily harm. The prosecutor went on to say that "J.H.L. was suspected of having perpetrated the criminal acts in question". Nevertheless, he decided to discontinue the pre-trial investigation on the grounds that the law had changed in 2003 and a prosecution in respect of minor bodily harm should have been brought by the victim in a private capacity. The prosecutor also considered there was no reason for a public prosecution, as the case did not fall within the ambit of Article 409 of the new Code of Criminal Procedure (see paragraph 36 below), that is to say, the prosecutor did not consider the crime to be of "public importance". It was therefore up to the applicant to proceed accordingly and to apply to a court to bring a private prosecution against J.H.L.

22. The applicant appealed, arguing that she had already addressed the law-enforcement authorities about her injuries four years previously and had initiated a private prosecution at that time. However, the judge had transferred her complaint to a public prosecutor, who had initiated the pre-trial investigation. The investigation had continued after 1 May 2003, when the new Code of Criminal Procedure had entered into force. Those circumstances had led her to believe that the charges in the case were being pursued by the public prosecutor. Given that the public prosecutor had waited for two years before informing the applicant that he would not be prosecuting J.H.L., his position was difficult to understand. As far as the applicant was concerned, such a decision was in breach of the principle that

criminal offences should be investigated promptly and that the perpetrator should receive a fair punishment. If the prosecutor deemed that private prosecution was the procedure which the applicant's case should follow, then he should have informed the applicant immediately after the reform of the legislation on 1 May 2003. As a result the criminal proceedings had clearly been delayed, to the applicant's detriment, since the guilty party had remained unpunished up until that day and the applicant had been unable to bring him to justice. Lastly, she submitted that the end of the limitation period for prosecuting J.H.L. was approaching (see paragraph 34 below).

23. By a decision of 19 July 2005, the deputy chief prosecutor at the Panevėžys City District Prosecutor's Office dismissed the applicant's appeal.

24. The applicant lodged a further appeal with the Panevėžys City District Court, again reiterating that the statutory time-limit for charging J.H.L. was approaching. If she were forced to start criminal proceedings all over again, the judgment would be delayed.

25. On 15 September 2005 the Panevėžys City District Court upheld the prosecutor's decision, dismissing the applicant's appeal. The court noted that, under Article 409 of the new Code of Criminal Procedure, a prosecutor had a right, but not an obligation, to initiate a pre-trial investigation. There was no information in the case file to indicate that the case was of public interest or that the victim could not protect her own rights by means of a private prosecution. The ruling was final and not amenable to appeal.

B. The private prosecution proceedings

26. On 28 September 2005 the applicant lodged a complaint with the Panevėžys City District Court, describing the five episodes of violence that had taken place between 3 January and 4 February 2001, and requesting that J.H.L. be privately prosecuted for causing minor bodily harm. She did not mention any other instances of ill-treatment, either physical or psychological.

27. On the basis of forensic reports and the applicant's testimony at the hearing, the Panevėžys City District Court considered that J.H.L.'s acts corresponded to the offence of causing minor bodily harm under Article 140 § 1 of the new Criminal Code. The court considered that the limitation period for the prosecution of those offences was one-year. Accordingly, by a ruling of 15 December 2005 the court refused the applicant's request on the ground that the prosecution had become time-barred.

28. The applicant appealed, arguing that her attacker would remain unpunished, which would breach her rights under the Convention, although she did not specify any particular provision thereof.

29. On 4 January 2006 the Panevėžys Regional Court reinterpreted the criminal procedure rules relating to the statutory limitation periods for

prosecuting specific offences, found the limitation period to be five years, and therefore upheld the applicant's appeal.

30. On 21 February 2006 the District Court again refused to open a pre-trial investigation on the basis of a private prosecution because the last date on which the applicant had been injured by J.H.L. was 4 February 2001, which meant that the five-year statutory limitation period for prosecution had been exceeded.

31. The applicant appealed, emphasising that although she had lodged a criminal complaint with the courts for J.H.L.'s prosecution immediately after she had been beaten up, the criminal proceedings had been pending for years on account of mistakes and inaction on the part of the prosecutors and courts. As a result, her attacker had not been prosecuted by the public prosecutor's office of its own motion and her attempts to pursue her criminal complaint against him had been futile.

32. By a final ruling of 8 February 2007, the Panevėžys Regional Court dismissed the applicant's appeal, finding that any kind of prosecution had become time-barred. The appellate court noted that the applicant had initiated private prosecution proceedings back in 2001. In 2002 the court had transferred the case to a public prosecutor to pursue an investigation into the charges being brought against J.H.L. of his own motion. As a result of the legislative changes in 2003, it had not been possible for the public prosecutor to carry on with the investigation. The Panevėžys Regional Court also observed that on 28 September 2005 the applicant had brought proceedings by means of a private prosecution regarding the same events. However, because of the five-year limitation period, the prosecution had no longer been possible.

II. RELEVANT DOMESTIC LAW AND PRACTICE

33. Article 140 § 1 of the Criminal Code, in force from 1 May 2003 ("the new Criminal Code"), establishes criminal liability for causing minor bodily harm. The crime is punishable by community service or by a deprivation of liberty for up to one year.

Before 1 May 2003, the offence of intentionally causing minor bodily harm fell under Article 116 § 1 of the old Criminal Code. If the offence had been committed systematically, it was punishable by deprivation of liberty for up to three years (Article 116 § 3).

34. Article 95 § 1 of the Criminal Code in force at the material time provided that a prosecution could not be pursued if a minor (*nesunkus*) intentional crime had been committed more than five years earlier.

35. Following the legislative changes of 1 May 2003, Article 407 of the new Code of Criminal Procedure provides that criminal proceedings for offences such as causing minor bodily harm may only be opened upon a complaint by the victim. If the victim lodges such a complaint, he or she becomes the private prosecutor (Article 408 § 1).

36. Under Article 409 § 1 of the new Code, the public prosecutor has a right to open a criminal investigation into criminal offences normally investigated by means of private prosecution, such as the offence of causing minor bodily harm, if the crime is of public importance (that is, if it is in the public interest that the crime be solved) or if there are important reasons as to why the victim is unable to protect his or her rights.

37. On 26 May 2011 the Seimas of the Republic of Lithuania adopted the Law on Protection Against Domestic Violence (*Apsaugos nuo smurto artimoje aplinkoje įstatymas*), which entered into force on 15 December 2011. The law states that its aim is to protect persons against domestic violence. The damage such violence causes to society means that it is in the public interest to respond promptly to threats of domestic violence, to undertake prevention measures, to apply protection measures and to provide appropriate assistance. The law also acknowledges that domestic violence is a violation of an individual's human rights and freedoms (Article 1). As regards the measures to be taken by the police, the law provides that when notified of an incident of domestic violence, on arrival at the scene or on witnessing the incident, police officers are to make a domestic violence incident report and initiate a pre-trial investigation. It is not the responsibility of the victim to lodge a complaint (Article 7 § 1).

38. The Civil Code provides that where a person sustains bodily harm, that is, he or she is injured or his or her health is damaged in any other way, the person liable for the damage caused must compensate the aggrieved person for all the damage suffered, including any non-pecuniary damage (Article 6.283).

III. RELEVANT INTERNATIONAL LAW AND MATERIALS

39. In 1979 the United Nations General Assembly adopted the Convention on Elimination of All Forms of Discrimination against Women (CEDAW). Lithuania ratified the Convention on 18 January 1994. It ratified the Optional Protocol to the CEDAW on 5 August 2004. On 8 January 2008, the CEDAW Committee issued concluding observations on the State. The Committee noted the various efforts undertaken by Lithuania to combat violence against women, including domestic violence, including the adoption of the National Strategy for Combating Violence against Women, a number of amendments to the Criminal Code, the establishment of a network of crisis centres providing support to victims of violence and the extension of a specialized assistance by telephone for battered women countrywide to a continuous (24 hours a day) service in 2008. However, it remained concerned at the high prevalence of violence against women in Lithuania, in particular domestic violence, and at the absence of a specific law on domestic violence. The Committee was also concerned that this may lead to such violence being considered a private matter, in which case the consequences of the relationship between the victim and the perpetrator are

not fully understood by police and health officers, the relevant authorities and society at large. The Committee thus urged Lithuania to ensure that comprehensive legal and other measures are in place to address all forms of violence against women, including domestic violence. It also recommended that Lithuania elaborate and introduce without delay a specific law on domestic violence against women that provides for redress and protection, and set a time frame for its adoption (paragraphs 74 and 75 of the Concluding Observations).

40. A nation-wide study of 1,010 women conducted in 1999 found that 42 percent of married or partnered Lithuanian women aged 18-74 have been physically assaulted or threatened with physical assault by their current partners in their lifetime (UN General Assembly, *In-depth study on all forms of violence against women: report of the Secretary-General*, 6 July 2006). Similarly, statistics from a 2000 survey by the United Nations Entity for Gender Equality and the Empowerment of Women indicated that in their lifetime 32.7% of women in Lithuania had experienced physical violence at the hands of their intimate partner.

41. On 5 May 2011 the Council of Europe adopted the Convention on Preventing and Combating Violence against Women and Domestic Violence. To this day he Convention has been signed by twenty eight Council of Europe Member States and ratified by three. The Convention has not yet entered into force, nor has it been signed by Lithuania. One of the purposes of the Convention is to protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence.

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 3 AND 8 OF THE CONVENTION

42. Relying on Articles 6 and 13 of the Convention, the applicant complained that the domestic authorities had failed to investigate the repeated acts of domestic violence against her and to hold the perpetrator accountable. She also complained that the criminal proceedings against him had been excessively lengthy.

43. The Court, which is master of the characterisation to be given in law to the facts of the case, finds that the above complaints fall to be examined solely under Articles 3 and 8 of the Convention, which read as follows:

Article 3

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 8

"1. Everyone has the right to respect for his private ... life ..."

A. The parties' submissions

1. The applicant

44. In her application to the Court, the applicant complained that the domestic authorities' compliance with the relevant procedural rules, as well as the manner in which the criminal-law mechanisms were implemented in the instant case as regards her complaints of attacks on her physical integrity, were defective to the point of constituting a violation of her rights under Articles 6 and 13 of the Convention.

45. Once the application had been communicated to the Government, the applicant further elaborated on her claims, claiming a violation of Articles 3 and 8 of the Convention.

46. The applicant argued that her complaints fell to be examined under Article 3 of the Convention, submitting that the ill-treatment she had been subjected to attained the minimum level of severity required by the Court's case-law (*Opuz v. Turkey*, no. 33401/02, § 161, ECHR 2009). On this point, she maintained that the actual physical force which she had been subjected to on multiple occasions had not been moderate. She had been kicked in the face, buttocks and other parts of the body, grabbed by the throat, pulled by the hair, punched in the face and hit on the head. The applicant saw those physical injuries as serious enough not to be regarded as being "of a merely trivial in nature", as suggested by the Government (see paragraph 55 below). Furthermore, the mere fact that the applicant had not suffered long-lasting or permanent injuries did not mean that the ill-treatment had failed to reach the level of severity to fall within the scope of Article 3, because in *Tyrer v. the United Kingdom* (25 April 1978, § 33, Series A no. 26) the Court had found a violation of Article 3, even though "the applicant did not suffer any severe or long lasting physical effects".

47. Whilst noting the Government's attempts to dispute the accuracy of the medical certificates provided as evidence of her injuries, the applicant maintained that her case was different from that of *Bevacqua and S. v. Bulgaria* (no. 71127/01, § 77, 12 June 2008), in which the Court had held that certificates issued six days after the incident had less evidential value. In the instant case, however, the applicant had been examined between one and three days after each incident.

48. As far as the applicant was concerned, contrary to the Government's perception of events, the ill-treatment she was subjected to had not just consisted of attacks on her physical integrity. It also comprised mental suffering, humiliation, fear and anguish, constant terror, threats and verbal abuse. On this issue the applicant submitted that at one point she had also been threatened by J.H.L. that he would "dispose of" her if she refused to

live with him or burn the apartment down with her in it. Moreover, the fact that ill-treatment amounting to torture, inhuman or degrading treatment did not extend only to acts causing physical pain or injury, but included acts that cause mental suffering, had also been recognised by the United Nations treaties and the case-law of the International Criminal Tribunals.

49. As concerns the duration of her ill-treatment, the applicant maintained that, contrary to what had been suggested by the Government (see paragraph 58 below), the five incidents of violence could not be perceived as "separate episodes". She contended that the incidents, which had occurred within a one-month period from 3 January to 4 February 2001, had constituted a continuing situation. She also submitted that the ill-treatment by J.H.L. had not consisted of those five episodes alone and that his violent behaviour, both physical and psychological, had continued until the end of March 2001. On this point the applicant maintained that, after court proceedings had already commenced at the beginning of March 2001, she had been attacked again. She had reported the incident to the Panevėžys police on 9 March, and they had suggested that she should apply to the court regarding any "personal disagreements". Moreover, on 12 June 2001 J.H.L. had sent the applicant an e-mail in which he had threatened to put her in a wheelchair. The applicant submitted that there had been further correspondence of a similar tone.

50. Turning to the legal remedies providing protection against domestic violence in Lithuania, the applicant was also critical of the Government's argument that she "could have used civil-law mechanisms" against her perpetrator, a possibility which the applicant saw as only theoretical. The applicant believed that the latter argument by the Government was nothing less than an attempt to diminish the State's responsibility for actual inaction in the sphere of domestic violence by suggesting alternative procedures that were only theoretically possible mechanisms for protecting victims' rights. If the State authorities failed to maintain and apply in practice an adequate legal framework and criminal-law mechanisms affording protection against acts of violence, victims could not be held responsible for not looking to other means of punishing perpetrators and of ensuring just satisfaction. The responsibility to ensure accountability and safeguards against impunity lay with the State, not with the victim. Likewise, the fact that alternative procedures existed which could have been carried out against the perpetrator did not in any way eliminate the positive obligation on the State to investigate, prosecute and punish him in accordance with the Code of Criminal Procedure.

51. The applicant further considered that she, as a woman, had been a victim of gender-based violence, thus falling within the group of "vulnerable individuals" entitled to a higher degree of State protection. She submitted (without naming the source of such statistics) that in Lithuania, women were the victims most frequently subjected to domestic violence, that is to say in more than 95% of all domestic violence incidents.

Moreover, around twenty women were killed every year as a result of domestic violence; in 2006, 63.3% of women admitted having been subjected to domestic violence by their partners or husbands at least once; and more than 40,000 telephone calls to the police were registered each year regarding complaints of domestic violence. The applicant thus maintained that Lithuania remained among the "leading" countries in Europe as far as the number of gender-based violence incidents was concerned. Accordingly, given the particular vulnerability of women affected by domestic violence, a heightened degree of vigilance was required by the State.

52. For the applicant, her case clearly illustrated how domestic violence was often tolerated by the State authorities, which allowed perpetrators to enjoy impunity. On this point she argued that despite her application to the Panevėžys City District Court in January 2001 for criminal proceedings to be initiated against J.H.L., the court had remained inactive for more than a year. In January 2002, that court had forwarded the applicant's criminal complaint to the Panevėžys district prosecutor, ordering him to pursue the case by way of a public prosecution. In June 2005, the prosecutor had taken the decision to discontinue the investigation, based on legislative amendments enacted two years prior to his decision. Finally, the case had been dismissed as time-barred. The applicant thus considered that the way the proceedings had been handled was a clear illustration that the State had failed to fulfil its positive obligations under Article 3 of the Convention. She maintained that a large number of women today remained affected by the failure of the State authorities to take domestic violence seriously as a real threat to life and by their unwillingness to prosecute and punish the perpetrators of domestic violence appropriately.

53. In the alternative, the applicant argued that the manner in which the criminal-law mechanisms had been implemented in her case were defective to the point of constituting a violation of the State's positive obligations under Article 8 of the Convention.

2. The Government

54. At the outset the Government maintained that the treatment to which the applicant had been subjected by J.H.L. had not attained the minimum level of severity to fall within the scope of Article 3 of the Convention. Accordingly, any positive obligations of the State with regard to the applicant's complaints were to be dealt under Article 8 of the Convention. Their argument was as follows.

55. As regards the severity of the injuries sustained by the applicant and the effects of the treatment to which she had been subjected, the Government noted that, as established by the forensic experts, the applicant had sustained minor bodily harm that had not caused short-term health problems. Furthermore, in contrast to the facts in *A. v. the United Kingdom* (23 September 1998, § 21, *Reports of Judgments and Decisions* 1998-VI), the applicant had not been beaten with considerable force and the treatment

inflicted had not resulted in a permanent injury. Accordingly, for the Government, "it could be said that the injuries sustained by the applicant had been of a merely trivial nature".

56. The Government also appeared to have doubts about the evidential value of expert reports confirming the applicant's injuries, implying that the applicant's case was similar to that of *Bevacqua and S.* (cited above, § 77), in that the medical certificates in the instant case had been issued several days after the incidents. They also criticised the applicant's statement that at the beginning of March 2001 she had been repeatedly attacked by J.H.L., observing that it was not clear whether she had indeed been subjected to violence on that occasion and, if so, to what extent. The same could be noted about the correspondence from J.H.L. she had submitted as evidence, which had not been mentioned in her complaints lodged with the domestic authorities.

57. The Government observed that, as had also been noted by the criminal investigator in her decision of 21 January 2003, within one month of the alleged violence occurring the police had been called only twice, but the applicant had made no allegations of being physically attacked by J.H.L., either in her statements to the police or to the officers who had attended her apartment on those two occasions. She had only complained that J.H.L. had refused to let her enter the apartment which they both shared as co-owners (see paragraph 16 above). However, on four occasions the applicant had taken it upon herself to ask the forensic experts to issue reports about the alleged injuries. In this connection, it had to be observed that, having analysed the evidence, the criminal investigator had had certain doubts concerning the nature of the disagreements between the applicant and J.H.L., and in her decision of 21 January 2003 the investigator had considered that the criminal investigation could have been initiated by the applicant because there existed unresolved financial disputes between her and J.H.L. For the Government, the latter decision by the investigator also revealed inconsistency in the statements given by J.H.L., the applicant and some of the witnesses regarding the alleged acts of violence, such discrepancies being an important aspect when deciding the issue of the applicability of Article 3 of the Convention.

58. As concerns the duration of the applicant's ill-treatment, although she maintained that she had been injured on five occasions, she had not reported the first incident to the police. Nor had she mentioned any physical violence when the police were called to the apartment on 7 January or 4 February 2001. Furthermore, it was the Government's view that after the institution of the court proceedings on 14 February 2001 the applicant had sustained no further injuries at the hands of J.H.L. In any case, the applicant's complaints were related to five alleged incidents of ill-treatment that had occurred over approximately a month, quite a short period of time. Therefore, contrary to the facts in *Beganović v. Croatia* (no. 46423/06, § 67, 25 June 2009), and even assuming that the facts provided by the applicant to

the Court were wholly indisputable, the alleged ill-treatment was not premeditated and it had not been applied in one continuous stretch, but rather had consisted of "separate episodes of alleged violence".

59. The Government also considered that apart from the criminal-law mechanisms, other means or mechanisms responding to the allegedly inflicted ill-treatment could have been explored by the applicant. For instance, she could have used other protective measures available at the relevant time aimed at the provision of assistance to the victims of domestic violence, for example, approaching a women's crisis centre or a family support centre. Moreover, the applicant also could have used civil-law mechanisms against the alleged perpetrator by bringing a claim for compensation, a remedy which, according to the Government, "might still be available". The latter remedy was also relevant as regards the allegedly sustained mental suffering that the applicant had also complained about.

60. Noting that the context of "domestic violence" does not necessarily attract the State's responsibility under Article 3 of the Convention, the Government maintained that the applicant could not be automatically considered a vulnerable person because of her age – as, for example, children would be – or her gender or social status, contrary to the Court's judgment in *Opuz* (cited above). The situation of women in Lithuania could be described as being significantly different from that of women in Turkey, given that the applicant and J.H.L. had shared ownership of an apartment and, moreover, they had been business partners. The applicant thus had not been financially dependent on J.H.L.; she was an educated, independent woman who owned her own property. Eventually their relationship had become discordant and the applicant had entered into a close relationship with another man, her future husband, who had later moved in to live with her.

61. As concerns the State's positive obligations under Articles 3 and 8 of the Convention, the Government acknowledged that the investigation of the applicant's complaints had lasted too long and that this had resulted in the case being dismissed as time-barred. They also admitted that, notwithstanding that there were certain objective reasons why criminal proceedings had been pending, namely international elements and legislative reform, it was regrettable that the case had not been fully and efficiently investigated and the perpetrator of the alleged crime had not been convicted.

62. Lastly, the Government noted that in the meantime the Law on Protection against Domestic Violence had been enacted in Lithuania. Although they had doubts as to whether the circumstances of the instant case could be regarded as domestic violence, the Government admitted that it might take some time for the legislation to become really efficient in this regard. Nonetheless, it was very important that all acts of domestic violence thereafter were classified as crimes of public importance and investigated under the general public prosecution procedure instead of by private

prosecution. Accordingly, the State had thus shown its intention to provide a proper response to the domestic violence cases and to ensure that victims were placed in a more favourable procedural position.

63. In the light of the foregoing considerations, the Government submitted that the applicant's claims within the meaning of Article 3 of the Convention were manifestly ill-founded.

B. The Court's assessment

1. Admissibility

(a) Applicability of Articles 3 and 8 of the Convention to the circumstances of the present case

64. The Court will first address the Government's argument that the applicant's complaints were not covered by Article 3 of the Convention because of the "trivial nature" of the injuries she had sustained.

65. The Court reiterates that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim (see *Đorđević v. Croatia*, no. 41526/10, § 94, ECHR 2012).

66. Treatment has been held by the Court to be "inhuman" because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering (see *Labita v. Italy* [GC], no. 26772/95, § 120, ECHR 2000-IV). Treatment has been considered "degrading" when it was such as to arouse in its victims feelings of fear, anguish and inferiority, capable of humiliating and debasing them and possibly breaking their physical or moral resistance (see *Hurtado v. Switzerland*, 28 January 1994, § 67, Series A no. 280-A; and *Wieser v. Austria*, no. 2293/03, § 36, 22 February 2007).

67. Turning to the circumstances of the instant case, the Court first notes the physical violence suffered by the applicant. As confirmed by the forensic experts, as a result of the ill-treatment she had experienced, the applicant sustained hypodermic bruising on the left hip and thigh, a scrape on the right cheek and brachium, bruising on the right eye and cheek, the left temple and the shin, a scrape on the left shin and hypodermic bruising on her face. The Government suggested that at least some of those injuries had not been properly documented. However, the Court does not share this view. Firstly, and contrary to the facts in *Bevacqua and S.* (cited above, § 77), in the present case the forensic experts saw the applicant between one and three days after each incident (see paragraph 8 above). Secondly, those injuries had been considered to have been "established" by the prosecutor in his decision to close the criminal investigation on 10 June 2005 (see paragraph 21 above). The same conclusion appears to have been supported

by the criminal court (see paragraph 27 above). Even though the Government argued that certain inconsistencies had been found in the investigator's decision of 21 January 2003, the prosecutor subsequently quashed that decision as superficial and the investigation was reopened (see paragraphs 19 and 20 above). That being so, and without being able to rely on the final decision by the Lithuanian courts as to the merits of the applicant's complaint about her ill-treatment, the Court cannot but conclude that she did sustain the injuries listed above.

68. The Court further observes that the five incidents of violence occurred within a time frame of one month, in the period between 3 January and 4 February 2001. Although in her submissions to the Court the applicant argued that the ill-treatment had continued after she had instituted criminal proceedings on 14 February 2001, referring in that connection to her complaint to the Panevėžys police on 9 March 2001, the Court cannot find the reply given by the police conclusive, as it does not know the contents of the applicant's complaint (see paragraph 11 above). Neither can the Court rule on the credibility of the e-mail containing threats to the applicant (see paragraph 14 above), given that the contents of that e-mail were never drawn to the attention of the Lithuanian authorities. In this connection the Court nevertheless notes that in one of her last complaints of impunity, namely her application of 28 September 2005 to bring a private prosecution (see paragraph 26 above), the applicant mentioned the five incidents that took place between January and February 2001. That being so, the Court considers that the five instances of ill-treatment stretched over a period of time. Accordingly, it will examine those acts as a continuing situation, which it finds to be an aggravating circumstance.

69. Lastly, the Court cannot turn a blind eye to the psychological aspect of the alleged ill-treatment. It observes that the applicant made credible assertions that over a certain period of time she had been exposed to threats to her physical integrity and had actually been harassed or attacked on five occasions. The Court acknowledges that psychological impact is an important aspect of the domestic violence. Moreover, whilst in the circumstances of the present case it is unable to fully share the applicant's view that she, as a woman, by default fell into the category of vulnerable persons (see, by contrast, *Đorđević*, cited above, § 91), the Court nonetheless notes that, as it had been acknowledged by the Government, following the enactment of the Law on Protection against Domestic Violence, crimes of such a nature fall into the category of those having public importance.

70. In the light of the foregoing, the Court considers that the ill-treatment of the applicant, which on five occasions caused her physical injuries, combined with her feelings of fear and helplessness, was sufficiently serious to reach the level of severity under of Article 3 of the Convention and thus raise the Government's positive obligation under this provision (see *Milanović v. Serbia*, no. 44614/07, § 87, 14 December 2010).

(b) Exhaustion of domestic remedies

71. The Government implied that the applicant had a civil-law avenue as regards her complaints about perpetrators of domestic violence enjoying impunity. The Court notes, however, that the applicant made full use of the remedy provided by criminal procedure. It also considers that what is at the heart of this case is the question of impunity for the acts of domestic violence, which is a matter to be addressed by the criminal courts. On this point the Court also reiterates that, in the event of there being a number of domestic remedies which an individual can pursue, that person is entitled to choose a remedy that addresses his or her essential grievance. In other words, when a remedy has been pursued, use of another remedy that has essentially the same objective is not required (see *Jasinskis v. Latvia*, no. 45744/08, § 50, 21 December 2010 and the case-law cited therein).

(c) Conclusion

72. The Court also finds that the complaints under Article 3 of the Convention are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further finds that they are not inadmissible on any other grounds. They must therefore be declared admissible.

Lastly, the Court considers that, since the applicant's complaint under Article 8 of the Convention is based on the same facts, it must also be declared admissible.

2. Merits

73. Once the Court has found that the level of severity of violence inflicted by private individuals attracts protection under Article 3 of the Convention, its case-law is consistent and clear to the effect that this Article requires the implementation of adequate criminal-law mechanisms (see *Beganović*, cited above, § 69; *M.C. v. Bulgaria*, no. 39272/98, § 151, ECHR 2003-XII). However, the scope of the State's positive obligations might differ between cases where treatment contrary to Article 3 of the Convention has been inflicted through the involvement of State agents and cases where violence is inflicted by private individuals. The Court observes in the first place that no direct responsibility can be borne by Lithuania under the Convention in respect of the acts of the private individuals in question.

74. The Court notes, however, that even in the absence of any direct responsibility for the acts of a private individual under Article 3 of the Convention, State responsibility may nevertheless be engaged through the obligation imposed by Article 1 of the Convention. In this connection the Court reiterates that the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that

individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals (see *A. v. the United Kingdom*, cited above, § 22).

75. Furthermore, Article 3 requires States to put in place effective criminal-law provisions to deter the commission of offences against personal integrity, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions, and this requirement also extends to ill-treatment administered by private individuals. On the other hand, it goes without saying that the obligation on the State under Article 1 of the Convention cannot be interpreted as requiring the State to guarantee through its legal system that inhuman or degrading treatment is never inflicted by one individual on another or that if it is, criminal proceedings should necessarily lead to a particular sanction. In order that a State may be held responsible it must, in the view of the Court, be shown that the domestic legal system, and in particular the criminal law applicable in the circumstances of the case, failed to provide practical and effective protection of the rights guaranteed by Article 3 (see *Beganović*, cited above, § 71).

76. It must be stated at this juncture that it is not the Court's task to verify whether the prosecutors and the domestic courts correctly applied domestic criminal law; what is in issue in the present case is not individual criminal-law liability, but the State's responsibility under the Convention. The Court must grant substantial deference to the national courts in the choice of appropriate measures, while also maintaining a certain power of review and the power to intervene in cases of manifest disproportion between the gravity of the act and the results obtained at domestic level (see, *mutatis mutandis*, *Nikolova and Velichkova v. Bulgaria*, no. 7888/03, § 62, 20 December 2007, and *Atalay v. Turkey*, no. 1249/03, § 40, 18 September 2008).

77. In this connection, the Court notes that the obligation on the State to bring to justice perpetrators of acts contrary to Article 3 of the Convention serves mainly to ensure that acts of ill-treatment do not remain ignored by the relevant authorities and to provide effective protection against acts of ill-treatment (see *Beganović*, cited above, § 79).

78. As regards the criminal-law mechanisms provided by the Lithuanian legal system in connection with the State's obligations under Article 3 of the Convention, the Court notes at the outset that Article 116 of the old Criminal Code and Article 140 § 1 of the new Criminal Code define causing minor bodily harm as a specific criminal offence. The Court further observes that up to 1 May 2003 such crimes were amenable to investigation by the public prosecutor. After that date, criminal acts causing minor bodily harm are to be prosecuted only upon a complaint by the victim, who in turn becomes the private prosecutor. Even so, a public prosecutor retains the right to open a criminal investigation into acts causing minor bodily harm, if

the crime is of public importance or the victim is not able to protect his or her interests (see paragraphs 33, 35 and 36 above). The Court is thus satisfied that at the time relevant to the instant case Lithuanian law provided a sufficient regulatory framework to pursue the crimes attributed by the applicant to J.H.L.

79. The Court will now examine whether or not the impugned regulations and practices, and in particular the domestic authorities' compliance with the relevant procedural rules, as well as the manner in which the criminal-law mechanisms were implemented in the instant case, were defective to the point of constituting a violation of the respondent State's positive obligations under Article 3 of the Convention.

80. Turning to the circumstances of the case the Court notes that as early as 14 February 2001 the applicant had addressed the Panevėžys City District Court to bring a private prosecution. On the basis of forensic reports produced soon after each incident of violence, she claimed that J.H.L. had ill-treated her on five separate occasions, describing each incident in detail. She gave the names and addresses of five witnesses whom she wanted to call in the case. She alleged that the acts of violence against her constituted a crime mentioned in Article 116 of the old Criminal Code, that is to say, acts which had caused her minor bodily harm. She provided the domestic court with relevant medical documentation in support of her allegations. The Court thus concludes that the Lithuanian authorities received sufficient information from the applicant to raise a suspicion that a crime had been committed. It thus finds that as of that moment those authorities were under an obligation to act upon the applicant's criminal complaint.

81. Indeed, as appears from the Panevėžys City District Court ruling of 21 January 2002, that court took immediate steps to bring J.H.L. to justice. However, given that the latter had failed to appear in court on numerous occasions, the court decided to transfer the case to a public prosecutor. The Court thus considers that, up until that moment, the Lithuanian authorities had acted without undue delay.

82. Be that as it may, the Court nevertheless notes that, once the case had been transferred for public prosecution, the investigation was suspended two times for lack of evidence. Each time the applicant had shown great interest in her case and had made serious attempts to have J.H.L. prosecuted. Upon her persistent appeals, the prosecutors quashed the investigator's decisions as not being thorough enough (see paragraphs 18 and 19 above). The Court thus finds that this was a serious flaw on the part of the State.

83. The Court further notes that even though the Lithuanian Code of Criminal Procedure had changed in May 2003, it was only in June 2005, that is to say two years after the legislative reform, that the prosecutor decided to return the case to the applicant for private prosecution, thus taking her back to square one, to the same situation she had been in four years previously, when she had first approached the Panevėžys City District

Court in February 2001. In this connection the Court observes that the prosecutor's decision was upheld by a higher prosecutor and then by a court, despite the applicant's pleas that this would risk J.H.L. enjoying impunity given that the statutory time-limit to prosecute him was approaching. The Court also finds it noteworthy that, as it appears from the reading of Article 409 § 1 of the Code of Criminal Procedure, even after the reform of 1 May 2003 the investigation of acts causing minor bodily harm may still be pursued by a public prosecutor, provided that it is in the public interest. In this context it notes the Government's submission that the new Law on Protection against Domestic Violence serves to acknowledge such crimes as having public importance, to be prosecuted by means of general criminal procedure instead of private prosecution.

84. Indeed, once the criminal proceedings instituted by the public prosecutor had been terminated, the events transpired exactly as the applicant had predicted. Even though the applicant without any delay addressed the same Panevėžys City District Court with an application for private prosecution, that court dismissed her application on the very ground she feared, namely that the prosecution had become time-barred. Finally, the decision to terminate the criminal proceedings due to the statutory limitation was upheld by the Panevėžys Regional Court, thus leaving the applicant in a state of legal limbo. Accordingly, all the attempts by the applicant to have her attacker prosecuted were futile.

85. Turning to the question of the State's responsibility under Article 3 of the Convention, the Court firstly reiterates that, within the limits of the Convention, the choice of the means to secure compliance with Article 3 in the sphere of the relations of individuals between themselves is in principle a matter that falls within the domestic authorities' margin of appreciation, provided that criminal-law mechanisms are available to the victim (see *Beganović*, cited above, § 85). Thus, and inasmuch as it concerns the circumstances of the instant case, it is not for the Court to speculate whether the applicant's criminal complaint should have been pursued by the public prosecutor, or by a way of private prosecution, although the Government's argument suggests the former (see paragraph 62 above). Be that as it may, the fact remains that the circumstances of the case were never established by a competent court of law. In this connection the Court notes that one of the purposes of imposing criminal sanctions is to restrain and deter the offender from causing further harm. However, these aims can hardly be achieved without having the facts of the case established by a competent criminal court. The Court thus cannot accept that the purpose of effective protection against acts of ill-treatment is achieved where the criminal proceedings are discontinued owing to the fact that the prosecution has become time-barred and where this has occurred, as is shown above, as a result of the flaws in the actions of the relevant State authorities (see *Beganović*, cited above, § 85).

86. In the Court's view, the practices at issue in the present case, together with the manner in which the criminal-law mechanisms were implemented, did not provide adequate protection to the applicant against acts of violence. Therefore the Court finds that there has been a violation of Article 3 of the Convention.

87. Having regard to the above, the Court finds that it is not necessary to examine the complaint separately under Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

88. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

89. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage.

90. The Government contested that claim as unreasonable.

91. The Court considers that the applicant's suffering and frustration cannot be compensated for by a mere finding of a violation. Nevertheless, the particular amount claimed appears excessive. Making its assessment on an equitable basis, it awards the applicant EUR 5,000 in respect of non-pecuniary damage.

B. Costs and expenses

92. The applicant also claimed EUR 4,000 for the costs and expenses incurred before the Court. She broke that sum down into EUR 3,000 (30 hours of work with the fee of EUR 100 per hour) for the preparation of her response to the Government's observations and her arguments that there had been a violation of the Convention, and EUR 1,000 (10 hours of work at a rate of EUR 100 per hour) for the preparation of her claims for just satisfaction.

93. The Government observed that the applicant had not provided evidence to show that she had actually incurred the amount claimed. They also noted that the applicant had failed to provide a copy of the legal services agreement to show that she was contractually obliged to pay the required sum. The costs claimed could not therefore be considered actual.

94. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, as there are no documents in the Court's

possession except for the authority form signed by Mr H. Mickevičius and having regard to the above criteria, the Court rejects the applicant's claim for costs and expenses in the proceedings before the Court.

C. Default interest

95. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the application admissible;

2. *Holds* by six votes to one that there has been a violation of Article 3 of the Convention;

3. *Holds* by six votes to one that there is no need to examine the complaint under Article 8 of the Convention;

4. *Holds* unanimously
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Lithuanian litai at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 26 March 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Guido Raimondi
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Pinto de Albuquerque;

(b) dissenting opinion of Judge Jočienė.

G.R.A.
S.H.N.

CONCURRING OPINION OF JUDGE PINTO DE ALBUQUERQUE

In *Valiuliene* the Court is again confronted with the excruciating question of domestic violence. The legal relevance of lesser forms of violence such as verbal abuse and minor bodily injuries, the failure to acknowledge the public interest of prosecuting this form of ill-treatment and the final dismissal of the criminal case owing to the statute of limitations give to this case all the ingredients of a leading case, raising fundamental legal issues which have not been dealt with properly by the majority. With all due respect, the majority said too much in some respects and yet not enough in others. This is why I voted for the operative part of the judgment, but cannot subscribe to its motivation.

Domestic violence as a human rights violation

The 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) aimed to prevent discrimination against women in the public as well the private sphere, not violence against women.[1] In

[1] It was only in 1989 that the CEDAW Committee included violence against women within its remit. General Recommendation no. 12 considered that States parties had to protect women against violence within the family, at the workplace and in any other area of social life and should include in their periodic reports to the Committee information on various topics related to this issue. Three years later, General Recommendation no. 19 confirmed that gender-based violence breached gender equality and that the "full implementation of the Convention required States to take positive measures to eliminate all forms of violence against women." In *A.T. v. Hungary*, Communication no. 2/2003, 26 January 2005, the CEDAW Committee found that the rights of the author under Articles 5 (a) and 16 of the

1984 the U.N. Economic and Social Council passed Resolution 1984/14 on violence in the family. Based on this resolution, the U.N. General Assembly adopted Resolution 40/36 on domestic violence one year later, inviting States to take specific action urgently in order to prevent domestic violence and to render the appropriate assistance to the victims thereof. In 1990, the UNGA passed Resolution 45/114, addressing the public and if necessary criminal response to domestic violence. In 1993 the UNGA Declaration on the Elimination of Violence Against Women[2] defined violence against women as including any public or private act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, and enjoined States to exercise due diligence to prevent, investigate and punish acts of violence against women, whether those acts are perpetrated by the State or by private persons. For the very first time, an international instrument referred to violence against women as a human rights violation and formally enshrined the due diligence clause as the applicable standard for the prevention and protection of the right of women to physical integrity and psychological well-being. In the same year, the General Assembly of the Organization of American States adopted the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (the Belém do Pará Convention), which sets out States' duties relating to the eradication of gender-based violence.[3] In 1995 the Fourth World Conference on Women made the elimination of violence against women one of its twelve strategic objectives and suggested concrete actions to be taken by States and non-State actors. In 2000 the

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1979 Convention had been violated owing to the fact that, after having been battered by her former common-law husband, she had been unable, either through civil or criminal proceedings, to temporarily or permanently bar him from the apartment where she and her children continued to reside. The Committee based its finding on the State's positive obligation to ensure effective equality between the sexes. This reading was confirmed in *Goecke v. Austria*, Communication no. 5/2005, 6 August 2007; *Fatma Yıldırım v. Austria*, Communication no. 6/2005, 1 October 2007; *V.K. v. Bulgaria*, Communication no. 20/2008, 17 August 2011; *Cecilia Kell v. Canada*, Communication no. 19/2008, 26 April 2012; and *Isatou Jallow v. Bulgaria*, Communication no. 32/2011, 28 August 2012. The issue of domestic violence has been addressed in many Concluding Observations of CEDAW as well (for example, on New Zealand, 2012, paras. 22-24, Mexico, 2012, paras. 11-12, Mauritius, 2011, paras. 20-23, and Australia, 2010, paras. 28-29).

[2] G.A. Res. 48/104, A/48/49.

[3] In *Maria da Penha Maia Fernandes v. Brazil*, Case 12.051, Report no. 54/01, 16 April 2001, the Inter-American Commission of Human Rights found that the Brazilian State had failed to exercise due diligence to prevent and investigate a domestic violence complaint, this failure warranting a finding of State responsibility under the American Convention and the Belém do Pará Convention. More recently, in *Jessica Lenahan (Gonzales) et al. v. United States*, Case 12.626, Report no. 80/11, 21 July 2011, the Commission held the US responsible for the systematic violation of its international obligation to protect individuals from domestic violence. The Inter-American Court also found, in *Gonzales et al. ("Cotton Field") v. Mexico*, 16 November 2009, that the Mexican authorities had failed to prevent and investigate the rape and murder of circa 600 women in Ciudad Juarez.

Human Rights Committee General Comment no. 28 on Equality of Rights Between Men and Women interpreted Article 3 of the International Covenant on Civil and Political Rights as requiring proactive conduct by States to ensure to men and women equally the enjoyment of all rights provided for in the Covenant in both the public and the private sectors and, in order to assess compliance with Articles 7 and 24 of the Covenant, enjoined States parties to provide information on national laws and practice with regard to domestic and other types of violence against women[4]. The same year, the Committee on the Elimination of Racial Discrimination issued General Recommendation no. 25 on gender-related dimensions of racial discrimination, admitting that certain forms of racial discrimination affect women more intensely than men. In 2002, in its First World Report on Violence and Health, the World Health Organization discussed the health and economic consequences of and the responses to domestic violence as a human rights violation. In 2003 an Additional Protocol to the African Charter on Human and People's Rights on the Rights of Women was approved, including new structural or economic forms of violence against women, such as unequal rights in marriage, polygamy, negative media campaigns, and traditional and religious practices which treat women as second-class citizens. In 2005 the Committee on Economic, Social and Cultural Rights issued General Comment no. 16 on The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights, stating that gender-based violence is a form of discrimination that inhibits the ability to enjoy rights and freedoms, including economic, social and cultural rights, on a basis of equality, and that States parties must take appropriate measures to eliminate violence against men and women and act with due diligence to prevent, investigate, mediate, punish and redress acts of violence against them by private actors, as well as provide victims of domestic violence, who are primarily female, with access to safe housing, remedies and redress for physical, mental and emotional damage. In her third report, of 20 January 2006, the Special Rapporteur on violence against women Yakin Ertürk considered that there is a rule of customary international law that "obliges States to prevent and respond to acts of violence against women with due diligence".[5] In 2008 the Council of the

[4] Thus, according to the Committee, domestic violence could constitute a violation of the right not to be ill-treated under Article 7. Domestic violence has been a major concern of the Committee, as evidenced in numerous Concluding Observations, such as on the Russian Federation, 2010, para. 10, Moldova, 2009, para. 16, Denmark, 2008, para. 8, Mauritius, 2005, para. 10, Uzbekistan, 2005, para. 23, Iceland, 2005, para. 12, Benin, 2005, para. 9, Albania, 2004, para. 10, Poland, 2004, para. 11, Morocco, 2004, para. 28, and Yemen, 2002, para. 6.

[5] Due diligence standard as a tool for the elimination of violence against women, Report of the Special Rapporteur on violence against women, E/CN.4/2006/61, para. 29, citing CEDAW General Recommendation no. 19, para. 9; the Declaration on the elimination of violence against women, Article 4 (c); the 1995 Beijing Platform for Action, paragraph 125 (b); and the Inter-American Convention on the Prevention, Punishment and Eradication of

European Union adopted the "EU guidelines on violence against women and girls and combating all forms of discrimination against them". In her first report, of 23 April 2010, the Special Rapporteur on violence against women Rashida Manjoo considered that the obligation to provide adequate reparations to the victims involves ensuring the rights of women to access to both criminal and civil remedies and the establishment of effective protection, support and rehabilitation services for survivors of violence.[6] Finally, in 2011 the Committee of Ministers of the Council of Europe adopted the Convention on Preventing and Combating Violence against Women and Domestic Violence, which not only distinguishes both concepts, but includes among the victims of domestic violence any natural person who is subjected to the violent conduct.[7] The due diligence clause is designed as an obligation of means, not of result.[8]

Violence Against Women, Article 7 (b). According to the Special Rapporteur, due diligence requires States to use the same level of commitment in preventing, investigating, punishing and providing remedies for acts of violence against women as they do with other forms of violence (para. 35).

[6] Reparations to Women Who Have Been Subjected to Violence, Report of Special Rapporteur on Violence Against Women, A/HRC/14/22 (2010). This position corresponds to the general consensus of the international community, as results from CEDAW General Recommendation no. 28 on the core obligations of States parties under Article 2 of the Convention, para. 34; CEDAW, General Recommendation no. 19, cited above, para. 23 (t), (iii); the Declaration on the Elimination of Violence Against Women, Article 4 (g); the 1995 Beijing Platform for Action, para. 125 (a); the Report of the Special Rapporteur on violence against women, Yakin Ertürk, para. 83; the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, Article 7 (f) and (g); the Additional Protocol to the African Charter on Human and People's Rights on the Rights of Women, Article 4 (2) (f); the EU guidelines on violence against women and girls, para. 3.2.7.1.; the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, Articles 20 and 23; WAVE, "More than a roof over your head: A survey of quality standards in European women's refuges, 2002; the HRC Concluding Observations on the Russian Federation, 2009, para. 10, on Moldova, 2009, para. 16, and on Croatia, 2009, para. 8, and the critiques on the lack of shelter places for the victims in the cases of *A.T. v. Hungary* and *Goecke v. Austria*.

[7] ETS. No. 210. This new instrument of international law is crucial in interpreting the States parties' obligations under the European Convention on Human Rights, even though it has only been ratified by three of them until now, not including the respondent State (for a justification of this method of interpretation, see my separate opinions in *De Souza Ribeiro v. France (GC)*, footnote 10, and *Tautkus v. Lithuania*, footnote 16). This is particularly obvious since this instrument was approved following a call of the Council of Europe Task Force to Combat Violence against Women for a legally binding convention on, *inter alia*, domestic violence (Final Activity Report, 2008) and the issuance of several recommendations of the Committee of Ministers, such as Recommendation No. R (85) 4 on violence in the family, Recommendation No. R (90) 2 on social measures concerning violence in the family, and Recommendation Rec(2002)5 of 30 April 2002 on the protection of women against violence. Lastly, the new instrument also took in account the Court's case-law on an enforceable and justiciable positive obligation to protect women from domestic violence, established in *Kontrova v. Slovakia*, no. 7510/04, 24 September 2007; *Bevacqua and S v. Bulgaria*, no. 71127/01, 12 September 2008; *Branko Tomasic and Others v. Croatia*, no. 46598/08, 14 October 2010; *Opuz v. Turkey*, no. 33401/02,

Against the backdrop of these developments in international law, which are supported by the findings of modern psychology,[9] it can be concluded that domestic violence has emerged as an autonomous human rights violation consisting in the commission of physical, sexual or psychological harm, or the threat or attempt thereof, in private or public life, by an intimate partner, an ex-partner, a member of the household, or an ex-member of the household.[10] Yet a human rights litigation approach to domestic violence faces three strong conceptual obstacles, all of them very well entrenched in the history of democratic societies: respect for privacy, tolerance *vis-a-vis* different cultures and the upholding of the rights of defendants. The classical human rights approach focuses on violations occurring in the public arena, which clearly disadvantages victims of domestic violence since this frequently occurs in the hidden private sphere of the family or other forms of intimate relationship.[11] In regard to some ethnic groups that disadvantage is compounded by a pretentious cultural relativism, according to which certain traditional practices should be tolerated in the name of respect for different cultures, even though those

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9 September 2009; *E.S. and Others v. Slovakia*, no. 8227/04, 15 December 2009; *A. v. Croatia*, no. 55164/08, 14 October 2010; and *Hajduova v. Slovakia*, no. 2660/03, 30 November 2010.

[8] Convention on Preventing and Combating Violence against Women, Article 5 (2) and Explanatory report, para. 59.

[9] In regard to the causes and effects of domestic violence, as well as the available prevention, outreach and redress programmes see, *inter alia*, Judd, Domestic violence sourcebook, Detroit, Omnigraphics, 2012; Preventing intimate partner and sexual violence against women: taking action and generating evidence. Geneva, World Health Organization, 2010; Walker, The battered woman syndrome, New York, Springer, 2009; Estimating the costs and impacts of intimate partner violence in developing countries: a methodological resource guide, Washington, International Center for Research on Women, 2009; McCue, Domestic Violence: A Reference Handbook, Santa Barbara, ABC-CLIO, 2008; Shipway, Domestic violence: a handbook for health professionals, London, Routledge, 2004; Violence against women: impact of violence on women's health, Ottawa, Health Canada, 2002; Tjaden and Thoennes, Extent, nature and consequences of intimate partner violence: Findings from the national violence against women survey, US Department of Justice, 2000; Jacobson and Gottman, When Men Batter Women, New Insights into Ending Abusive Relationships, New York, Simon & Schuster, 1998; and Jasinski and Williams (eds.), Partner Violence: A Comprehensive Review of 20 Years of Research, Thousand Oaks, CA, Sage, 1998. The Court used the findings of modern psychology to support a common European standard, for example, in *M.C. v. Bulgaria*, no. 39272/98, § 164, 4 December 2003. I followed that approach also in my separate opinion in *Konstantin Markin* [GC], footnote 21.

[10] The concept of "domestic violence" is thus broader than "intimate partner violence", since it includes child or elder abuse, or abuse by any member of a household. It also encompasses violence occurring in formal or informal partnerships, including same-sex partnerships, and after the cessation of the partnership (see *Kalucza v. Hungary*, no. 57693/10, § 67, 24 April 2012). The violence may assume the form of a continuum or a one-off incident. Violence against women can evidently occur within and outside the context of domestic violence. The case at hand lies in the intersection of these two forms of violence, i.e. domestic violence against women.

[11] See, for instance, the Yakin Ertürk report, cited above, para. 59.

practices may constitute forms of discrimination and even ill-treatment.[12] Moreover, courts and scholars are traditionally more attentive to ensuring the effectiveness of the defendant's rights than to protecting those of the victims, the common belief being that the former should always be prioritised over the latter.[13] These obstacles can only be overcome by breaking the classical public-private divide and acknowledging the State's positive obligation to act against domestic violence. States have the obligation not only to bring to justice the alleged offenders and empower the victims of domestic violence with an active role in the criminal proceedings, but also to prevent private actors from committing or reiterating the offence and provide elementary social support measures to victims, such as post-traumatic care and shelter. Such an international positive obligation must be acknowledged, in view of the broad and long-lasting consensus mentioned above, as a principle of customary international law, binding on all States. This is *a fortiori* true in the case of violence against women. Domestic violence is basically violence against women.[14] All the available data shows worldwide that domestic violence is in the vast majority of cases violence perpetrated by men against women, and violence by women against men accounts for a very small percentage of domestic violence.[15]

Hence, the full *effet utile* of the European Convention on Human Rights (the Convention) can only be achieved with a gender-sensitive interpretation and application of its provisions which takes in account the factual inequalities between women and men and the way they impact on women's

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[12] Again, the Yakin Ertürk report, cited above, para. 66, and Explanatory report of the Council of Europe Convention on Preventing and Combating Violence against Women, para. 216.

[13] For the opposite stance, see *Opuz*, cited above, § 147: "perpetrators' rights cannot supersede victims' rights to life and physical and mental integrity". This statement can also be found in *Fatma Yildirim*, cited above, para. 12.1.5.

[14] As the Special Rapporteur on violence against women put it, "even though all women are at risk of experiencing violence, not all women are equally susceptible to acts of violence" (Rashida Manjoo's Report on Multiple and intersecting forms of discrimination and violence against women, A/HRC/17/26 (2011). While pregnant, disabled, of minor age, elderly, displaced, migrant, refugee, or illiterate women are particularly vulnerable (see a non-exhaustive list in paragraph 87 of the Explanatory Report of the Council of Europe Convention on Preventing and Combating Violence against Women), any other woman may be vulnerable too if confronted with a bullying and violent partner. Furthermore, the Court has underlined, in general terms, the "particular vulnerability of the victims of domestic violence" since the very first judgments on domestic violence (see *Bevacqua and S.*, cited above, § 65, and *Opuz*, cited above, § 132). Thus, I cannot accept the line of reasoning presented in paragraph 69 of the judgment.

[15] Ever since CEDAW Recommendation no. 19, it has been widely acknowledged that violence between intimates affects women disproportionately, demarcating women as a group in need of proactive State protection. The same conclusion was reached, for instance, in the UN Secretary-General's In-depth Study on All Forms of Violence Against Women, 2006, and the UNICEF report on Domestic Violence Against Women and Girls, Innocenti Digest, volume 6, 2000.

lives.[16] In that light, it is self-evident that the very act of domestic violence has an inherent humiliating and debasing character for the victim, which is exactly what the offender aims at. Physical pain is but one of the intended effects. A kick, a slap or a spit is also aimed at belittling the dignity of the partner, conveying a message of humiliation and degradation.[17] It is precisely this intrinsic element of humiliation that attracts the applicability of Article 3 of the Convention.[18] The imputation of an Article 8 violation would fall short of the real and full meaning of violence in the domestic context, and would thus fail to qualify as a "gendered understanding of violence".[19]

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[16] As the UN Report on Violence Against Women in the Family had already stated in 1989, and the 1995 Beijing Platform for Action, para. 118, repeated, violence against women is a manifestation of historically unequal power relations between men and women. This inequality is fuelled by old fashioned prejudice about the role of women in society, as has been repeatedly noted (for example, CEDAW General Recommendation no. 19, para. 11, and Inter-American Commission of Human Rights, Access to Justice for Women Victims of Violence in the Americas, OEA/Ser.l/V/II, Doc. 68, 20 January 2007, para. 147). Since it is aimed to counter these real factual inequalities, the said gender-sensitive interpretation cannot be accused of patronising women as a stereotyped group of persons unable to protect themselves and in need of public protection. This differential legal treatment has therefore an "objective justification" in the sense affirmed in the *Belgian Linguistic* case ("certain legal inequalities tend only to correct factual inequalities"; see the same underlying idea in Article 4 (4) of the Council of Europe Convention on preventing and combating violence against women and domestic violence, HRC General Comment no. 18 on non-discrimination, para. 10, and CESR Comment no. 16, paras. 7 and 8). Conversely, a gender-blind interpretation of the Convention would only reinforce the prevailing inequalities that affect women.

[17] As confirmed by some of the research listed in footnote 9.

[18] The majority missed the opportunity to set out a principled reasoning to impute a violation of Article 3, and not of Article 8, to the respondent State, preferring once again to remain attached to the particular specificities of the case. Yet that reasoning was much needed in view of the current disparate case-law. In *Bevacqua*, *Sandra Jankovic*, and *A. v. Croatia*, the Court found a violation of Article 8 (bodily injuries), as well as in *Hadjuova* (threats), but in *Opuz* it found a violation of the applicant's mother's Article 2 right (killing) and the applicant's Article 3 right (bodily injuries) and of Article 14 in conjunction with both Articles 2 and 3, and in *Kontrova* a violation of Articles 2 and 13 (killing). In *E.S. and Others v. Slovakia*, it found a violation of both Articles 3 and 8 (physical violence)! Finally, *Kalucza* appears to be a special case of an Article 8 violation, since there were mutual bodily injuries and verbal abuse. These different interpretations of the Convention are obviously not irrelevant, for compensation and other purposes. Moreover, having rejected the respondent Government's unilateral declaration, which acknowledged a violation of Article 8, the Court had an additional duty to provide a thorough reasoning of its finding of a violation of Article 3.

[19] The expression is used in Article 18 (3) of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence. It is important to note that the Court protects victims of domestic violence and female victims of violence regardless of any discriminatory intent of the offender. That is the reason why normally no additional article 14 violation is to be found in cases of female victims. Nevertheless, there might be situations where domestic violence and violence against women are perpetrated also with a specific discriminatory intention in regard to the victim,

The reviewed Osman test in domestic violence

One of the most problematic aspects of the State's positive obligation is the definition of the exact ambit of its duty to prevent and protect. The Court has developed the so-called Osman test, which normally assesses if the authorities knew, or ought to have known at the time, of the existence of real and immediate risk to the life of an 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 that risk. Put simply, the State answers for the wrongful conduct of non-State actors when their conduct was foreseeable and avoidable by the exercise of State powers.[20] The heart of the dispute in the current case lies in the adequateness of this standard to the particular situation of domestic violence. Realistically speaking, at the stage of an "immediate risk" to the victim it is often too late for the State to intervene. In addition, the recurrence and escalation inherent in most cases of domestic violence makes it somehow artificial, even deleterious, to require an immediacy of the risk. Even though the risk might not be imminent, it is already a serious risk when it is present. A more rigorous standard of diligence is especially necessary in the context of certain societies, like Lithuanian society, which are faced with a serious, long-lasting and widespread problem of domestic violence. Thus, the emerging due diligence standard in domestic violence cases is stricter than the classical Osman test, in as much as the duty to act arises for public authorities when the risk is already present, although not imminent.[21] If a State knows or ought to know that a segment of its population, such as women, is subject to repeated violence and fails to prevent harm from befalling the members of that group of people when they face a present (but not yet imminent) risk, the State can be found responsible by omission for the resulting human rights violations. The constructive anticipated duty to prevent and protect is the reverse side of the context of widespread abuse and violence already known to the State authorities.

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for example by denigrating her race or ethnic origin. In these cases, there will be a violation of both Articles 3 and 14.

[20] *Osman v. the United Kingdom*, 28 October 1998, § 116, Reports 1998-VIII. The Court has applied this standard in domestic violence cases (see for instance, *Opuz*, cited above, § 130, and *Hajduova*, cited above, § 50). The exact same criterion has been adopted on the other side of the Atlantic by the Inter-American Court (see the *Cotton Field* case, cited above, para. 282, and the *Case of the Massacre of Pueblo Bello* judgment, 31 January 2006, para. 152).

[21] The claim that domestic authorities should exercise an "even greater degree of vigilance" in view of the "particular vulnerability of victims of domestic violence", made in *Hajduova*, cited above, § 50, corresponds in substance to this stricter standard.

The public interest in the prosecution of domestic violence

The second major problem raised by the current case is the failure, under the successive applicable prosecution regimes of the old and the new (2003) Code of Criminal Procedure, to acknowledge the "public interest" of prosecuting this form of ill-treatment, with the final dismissal of the case due to the statute of limitations. The Court has already rejected the suggestion that the Convention right to physical integrity could only be secured with public prosecution in all cases of domestic violence, but it was not satisfied either with a Bulgarian law that allowed room for public prosecution of domestic violence only in "exceptional cases".[22] In fact, both the new Council of Europe Convention on domestic violence, Article 55, and the previous Recommendation Rec (2002), paragraphs 38 and 39, as well as the CEDAW General Recommendation No. 28 on the core obligations of States parties under Article 2 of the Convention, paragraph 34, establish the preference for a public prosecutable offence which is not entirely dependent on the will of the victim, in regard either to the initiation of the proceedings or to the withdrawal of the complaint. The reason is crystal-clear: in most cases, to place the victim of domestic violence in the unbearable quandary of having to decide for herself whether she wants to harm the family/intimate relationship through private prosecution is to perpetuate the subordinate position of the victim, and therefore, the violence itself, because she is evidently not in a position of freedom to make that choice due to her state of dependency on the offender.[23] In other words, the requirement of a victim to act as a private prosecutor, which reflects the misconception of violence between members of a family/intimate relationship as "private business", is not compatible with the above-mentioned international obligation to protect.

The application of the Convention standard to the present case

The applicant and JHL had lived together as a couple since 1996. In 2001, the applicant complained of having been beaten by JHL in her apartment. In 2005, the public prosecutor considered as "established" that the applicant had been strangled, hit and kicked on five separate occasions between January and February 2001, although in none of these cases had she sustained any long-lasting injuries or unfitness to work. On all these

[22] *Bevacqua*, cited above, § 82, and *Sandra Jankovic v. Croatia*, no. 38478/05, § 50, 5 March 2009. In the same vein, the ECJ concluded, in its judgment on the joined cases *Magette Gueye* and *Valentin Salmeron Sanchez* (C-483/09 and C-1/10), that the mandatory imposition of injunctions to stay away for a minimum period on persons who commit violence within the family did not breach Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings, even when they were opposed by victims.

[23] The Court has already considered that it is in the public interest to prosecute even in a case where the victim withdraws the complaint (*Opuz*, cited above, § 139).

occasions, she was also verbally abused with insults and threats. These facts, which undoubtedly constitute a breach of the applicant's physical integrity and psychological well-being, attained *per se* the level of seriousness required for Article 3 of the Convention, since the violent episodes endured by the applicant violated not only her right to privacy but also her Convention right not to be ill-treated, abused and humiliated.

The question of State liability for these acts must be assessed against the background of general abuse of women in Lithuanian society.[24] Since the violation was the work of a private person, and the domestic public authorities had knowledge of the present risk she was facing, the respondent State had a positive obligation to protect the applicant. In fact, at least on 7 January, 15 January and 4 February 2001, the applicant told the police that she had been verbally abused by her partner and had been obstructed when entering her apartment.[25] Repeated verbal abuse like insults and threats is a sufficient cause to trigger the positive obligation to protect the applicant's physical and psychological integrity under Article 3. The lack of adequate reaction by the police authorities, who only took note of the incidents, leaves much to be desired, falling foul of the requirement to intervene "in a proactive way in order to gather evidence" of violence.[26]

There was also a procedural violation since the domestic proceedings were not only unduly delayed, but even worse, severely flawed. The police investigation was twice considered insufficient, and had to start again following an order of the competent public prosecutor. This inadmissible waste of time was aggravated by a new delay of two years, which was the time the public prosecutor took to decide to discontinue the investigation, not for lack of evidence of the alleged offences, but for lack of reason for a public prosecution. In fact, the discontinuation decision was only taken on 10 June 2005, in spite of the fact that its ground was already apparent when the new criminal code entered into force in 2003. Although the applicant launched a private prosecution immediately after the district court

[24] According to the data from the Government of the Republic of Lithuania's Department of Statistics, 408 women and 69 men suffered violence from their spouses or cohabitants in 2007, and 359 women and 60 men suffered violence from their spouses or cohabitants in 2008. This data shows that women are victims of domestic violence six times more often than men (Domestic Violence in the South Baltic Region, Kaliningrad, Lithuania, Poland and Sweden, South Baltic - Violence Free Zone project report, September 2010, p. 20). On the evidential value of statistics, see *Hoogendijk v. the Netherlands (dec.)*, no. 58461/00, 6 January 2005, and *Zarb Adami v. Malta*, no. 17209/02, §§ 77-78, ECHR 2006-I. See also the CEDAW Concluding Observations on Lithuania, 2008, which expressed concern at the high prevalence of violence against women – particularly domestic violence – and at the insufficient number of crisis centres.

[25] Another complaint was presented to the police on 9 March 2001. The majority declares, in paragraph 66, that it cannot take this complaint into account, but in the following paragraph it goes on to admit that the applicant made "credible assertions" that she had been exposed to threats to her physical integrity.

[26] To quote paragraph 280 of the Explanatory Report of the Council of Europe Convention on Preventing and Combating Violence against Women.

confirmed the public prosecutor's discontinuation decision, the case was dismissed again on the basis of the applicable statute of limitations.[27] In view of the obvious risk of prescription, the minimum the public interest commanded in June 2005 was that the prosecutor continue the proceedings. The wrongful decision of the public prosecutor not to prosecute the case, in conjunction with the time-bar on the private prosecution, stood in the way of JHL's full accountability for his alleged offences.[28]

Conclusion

Poor Loreta, who had to endure the repeated attacks of her bullying and intemperate partner, and was left without justice![29] The new Law on protection against domestic violence came too late for her. It is high time now to assert her human rights. Having in account the international obligation to prevent and protect from domestic violence, the reviewed Osman test and the public interest in the prosecution of the applicant's case, and the failure of the respondent State to meet its obligations, I find that there was a substantive and a procedural violation of Article 3.

[27] The district court's decision of 15 December 2005 was wrong. Although it was revoked by the regional court, the mistake caused an additional delay in the proceedings, which finally became time-barred.

[28] The majority refrained, in paragraph 83, from considering that the applicant's criminal complaint should have been pursued by the public prosecutor. Yet, the majority accepted the Government's argument that the new law on domestic violence of 15 December 2011, which converted domestic violence into a public prosecutable offence, serves to acknowledge the "public importance" of the crimes affected by the public prosecutor's decision of 2005. In other words, the majority is ready to apply retroactively the new Law against domestic violence to the detriment of the defendant, but is not willing to draw the conclusion that it was the public prosecutor's fault that the case was wrongfully closed.

[29] I take inspiration, once again, in Justice Blackmun, who raised his voice for "Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father" in his famously dissenting opinion joined to the heinous case of the State's failure before domestic violence *DeShaney v. Winnebago Cty. DSS*, 489 U.S. 189 (1989).

DISSENTING OPINION OF JUDGE JOČIENĖ

1. Violence against women, in particular domestic violence, can be described as a phenomenon of public importance which is a common problem not only in Lithuania but all over the world. Many important steps have been taken by international organisations (in both the United Nations and the Council of Europe framework) to combat violence against women, including domestic violence, to respond promptly to threats of domestic violence, to take preventive measures in this field and to provide effective and appropriate assistance to the victims of such crimes (see paragraphs 38-41 of the judgment; see also a summary of relevant international material in the Court's judgment in *Opuz v. Turkey*, no. 33401/02, §§ 72-86, ECHR 2009, in particular Recommendation Rec(2002)5 of the Committee of Ministers of the Council of Europe, of 30 April 2002, on the protection of women against violence).

2. In that Recommendation the Committee of Ministers stated, *inter alia*, that member States should introduce, develop and/or improve where necessary national policies against violence based on maximum safety and protection of victims, support and assistance, adjustment of the criminal and civil law, raising of public awareness, training for professionals confronted with violence against women, and prevention. The Committee of Ministers also recommended, in particular, that member States should penalise serious violence against women, and recommended that the member States classify all forms of violence within the family as criminal offences and envisage the possibility of taking measures in order, *inter alia*, to enable the judiciary to adopt interim measures aimed at protecting victims, by banning the perpetrator from contacting, communicating with or approaching the victim, or residing in or entering defined areas, to penalise all breaches of the measures imposed on the perpetrator and to establish a compulsory protocol so that the police and the medical and social services follow a set procedure.

3. According to the new Convention on Preventing and Combating Violence against Women and Domestic Violence, adopted by the Council of Europe on 7 April 2011 (not yet ratified by the Republic of Lithuania), the States must also take the necessary legislative and other measures to ensure that the intentional conduct of committing acts of physical violence against another person is criminalised, and also to ensure that effective investigations and judicial proceedings in relation to all forms of violence are carried out without undue delay and the people responsible are punished (see Articles 1, 3, 5, 35 and Chapter VI of the 2011 Convention).

4. In the case of *Bevacqua and S. v. Bulgaria* (no. 71127/01, §§ 53, 66, 77-84, 12 June 2008) the Court also relied on the position taken by the Commission on Human Rights of the UN Economic and Social Council (E/CN.4/2006/61; 20 January 2006), where the Special Rapporteur on violence against women considered that there is a rule of customary international law that "obliges States to prevent and respond to acts of

violence against women with due diligence". This conclusion was based mainly on analysis of developments in the case-law of several international bodies, including our Court (reference to *Osman v. the United Kingdom*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII), the Inter-American Court of Human Rights (reference to the case of Velasquez Rodriguez v. Honduras), the Inter-American Commission of Human Rights (reference to Report no. 54/01, Case 12.051, Maria da Penha Maia Fernandes (Brazil)) and the committee monitoring the UN Convention on the Elimination of All Forms of Discrimination against Women (reference to the case of A.T. v Hungary – 2005).

5. Domestic violence is a common phenomenon and a very sensitive issue in Lithuanian society (see § 40 of the judgment). The Committee on the Elimination of Discrimination against Women in its Concluding Observations concerning Lithuania (8 July 2008) noted the various efforts undertaken by the State party to combat violence against women, including domestic violence, ... including the adoption of the National Strategy for Combating Violence against Women, a number of recent amendments to the Criminal Code, the establishment of a network of crisis centres and the extension in 2008 of a specialised help-line service for battered women countrywide to a continuous 24-hour round-the-clock service.

6. However the Committee also noted that no specific law had been adopted in Lithuania to combat violence against women and grant full and effective protection to the victims, and expressed concern at the high prevalence of violence against women in Lithuania, in particular domestic violence (see paragraph 39 of the judgment).

7. Therefore the adoption on 26 May 2011 by the Seimas of the Republic of Lithuania of the Law on Protection Against Domestic Violence (*Apsaugos nuo smurto artimoje aplinkoje įstatymas*), which entered into force on 15 December 2011, can be regarded as an important positive step forward in the effort to effectively protect people against domestic violence (see § 62 of the judgment). The Law acknowledges that domestic violence is a violation of an individual's human rights and freedoms (Article 1) and provides some legal footing for the police to react effectively to instances of domestic violence. It is not the responsibility of the victim to lodge a complaint (Article 7 § 1).

8. With the adoption of this Law, Lithuania has fully endorsed the recommendation made by the *Committee on the Elimination of Discrimination against Women* to introduce a specific law on domestic violence (see paragraph 39 of the judgment).

9. However, while the adoption of the Law in question is an important step forward, it is not in itself sufficient to combat such a sensitive and widespread phenomenon in Lithuanian society.[30] All necessary and

[30] The ECHR has communicated another case concerning domestic violence – *Praškevičienė v. Lithuania*, No. 27920/08 – to the Government of the Republic of Lithuania; see Internet page of the Ministry of Justice - http://www.tm.lt/eztt/naujiena/154.

appropriate steps must be taken at all levels by the competent Lithuanian authorities in order effectively to implement the newly enacted Law on Protection against Domestic Violence in practice. I hope that the country will take all the necessary steps to condemn and eliminate all forms of violence against women, including domestic violence, in an effort, according to the wording of the Preamble of the 2011 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence "to create a Europe free from violence against women and domestic violence".

10. Turning to the main legal issue raised by the present case, that is to say, whether the State fulfilled its positive obligation under the Convention to take all necessary measures in order to protect the applicant from the alleged sustained domestic violence, in my personal opinion the Court has incorrectly relied on Article 3 in the circumstances of the present case. This position of the Chamber is not supported by the Court's case-law, where domestic violence cases are mostly examined from the perspective of Article 8 of the Convention.

11. Accordingly, and referring to the Court's case-law on the subject, in my personal opinion, the applicant's complaint in connection with the physical attacks on her should have been examined under Article 8 of the Convention and the applicant's right to respect for her private life (see *Bevacqua and S. v. Bulgaria*, cited above, §§ 66, 77-84; *Sandra Janković v. Croatia*, no. 38478/05, §§ 31, 44 and 45, 5 March 2009; *Hajduová v. Slovakia*, no. 2660/03, §§ 45-46, 30 November 2010; and, most recently, *Kalucza v. Hungary*, no. 57693/10, §§ 13, 14, 16, 23 and 42, 24 April 2012), as this concept, as the Court has previously held in various contexts, also includes a person's physical and psychological integrity (see *X and Y v. the Netherlands*, 26 March 1985, §§ 22 and 23, Series A no. 91; *Costello-Roberts v. the United Kingdom*, 25 March 1993, § 36, Series A no. 247-C; and *Sandra Janković*, cited above, § 45).

12. Of course, I can accept that in the specific circumstances of certain cases the authorities' positive obligations under the Convention can vary and can also attract the application of either Article 2 or Article 3, while in other cases the Court could rely on Article 8 taken alone or in combination with Article 3 (see *Bevacqua and S. v. Bulgaria*, cited above, §§ 65, 12 June 2008, where the Court relied on Article 8 of the Convention as regards the State's positive obligation to protect the applicant and her son from the aggressive behaviour of her former husband; *Opuz v. Turkey*, cited above, §§ 72-86, where the Court relied on Articles 2, 3 and even 14 of the Convention as regards the State's positive obligation to protect people from domestic violence; or the *Osman* judgment, cited above, §§ 128-130, where the Court applied Article 2 and 8 of the Convention as regards the State's positive obligation to take adequate and appropriate steps to protect the lives of the second applicant and his father from the alleged real and known danger).

13. In the present case the applicant relied in her application form on Articles 6 and 13 of the Convention only. As I have already said, I can accept that in some specific circumstances the State's failure to investigate violence inflicted by private individuals and/or to put in place effective criminal-law provisions to deter the commission of offences against personal integrity can demand the application of Article 3 of the Convention (see *Beganović v. Croatia*, no. 46423/06, §§ 64-71, 86-87, 25 June 2009); and this requirement can also be extended to ill-treatment administered by private individuals (see *Šečić v. Croatia*, no. 40116/02, §§ 49- 60, 31 May 2007). In some cases even Article 2 can be affected when acts of violence or domestic violence which the competent authorities fail to stop end in the death of the victim (see the *Opuz* case cited above, §§ 136 and 145-149, where the Court also relied on Article 2 and found a violation of that Article, and, *mutatis mutandis*, *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, §§ 95-97, ECHR 2005-VII).

14. Turning to the circumstances of the present case, I think that the attacks against the applicant did not attain the minimum level of severity to fall within the scope of Article 3 (see, on this point *Labita v. Italy* [GC], no. 26772/95, § 120, ECHR 2000-IV; *Selmouni v. France*, [GC], no. 25803/94, § 100, ECHR 1999-V; and contrast *Beganović*, cited above, §§ 64-66, 68, and *Opuz*, cited above, §§ 9, 10, 13, 20, 23 and 161). In particular, in the *Valiulienė* case, although the applicant was beaten by her live-in partner on five occasions, each time she sustained only minor health impairment, which did not cause any short-term health problems (see paragraphs 7 and 8 of the judgment). The injuries sustained by the applicant were without any lasting consequences and did not result in her being unfit to work (contrast *Iljina and Sarulienė v. Lithuania*, no. 32293/05, §§ 11 and 47, 15 March 2011, where the Court, when finding a violation of Article 3, specifically took into account the fact that a forensic expert had deemed her to be unfit for work for 9 days).

15. Accordingly in the particular circumstances of the present case (very minor injuries), I cannot accept that the applicant was subjected to ill-treatment which was sufficiently serious to be considered inhuman and degrading and thus to fall within the scope of Article 3 of the Convention (see, most recently, *Kalucza*, cited above, §§ 13, 14, 16, 23, 61 and 62, 24 April 2012, and also *Bevacqua and S.*, cited above, §§ 66, 77-84, 12 June 2008). In my opinion, taking into account its specific circumstances, the case should have been examined exclusively under Article 8 of the Convention, and the Government's unilateral declaration, submitted under Article 8 of the Convention (paragraph 5 of the judgment), should have been accepted.

16. However, the Chamber decided to examine the case under Article 3 of the Convention, so, in my opinion, the compensation for non-pecuniary damage under Article 41 should have been increased.