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STATE POSITIVE OBLIGATIONS AND DUE DILIGENCE IN HUMAN RIGHTS AND DOMESTIC VIOLENCE PERSPECTIVE

Research article is devoted to the issue of state responsibility for violence and infringement of human rights, committed by private actors. The article clarifies the substance, legal grounds and groups of positive obligations of the state regarding the fundamental human rights. It determines the scope of state duties in cases of domestic violence that used to be considered as a "private matter" to be in compliance with the "due diligence" standard. The doctrinal analysis led to conclusion that Ukraine shall revise and enhance its legal framework to ensure a comprehensive legislative approach to domestic violence and exercise due diligence to prevent, investigate, punish and provide reparation for acts of private parties which violate human rights.

In Ukraine as well as in other countries which have been severely influenced by the socialistic law and legal concepts the category of human rights has been applied to private relations among individuals. Within the three main elements involved in human rights protection: the rights holders, the contents of the right, and the duty-bearer[1]- private persons are considered to be the rights holders and the duty-bearers at the same time. In the meantime liberal human rights doctrine as well as international human rights law has focused primarily on protecting private individuals from abuse by public authorities. As prof. H. Collins states the rights protected in leading conventions on human rights and national constitutions focus on civil liberties and political freedoms. In most instances their original purpose was to protect individuals and groups against the abuse of power by governments[2].

Governments and various state agencies have the greatest effect on the level of equality and application of human rights in the society. International and constitutional law is therefore basically addressed to states and covers the "negative obligation" of the state not to violate individuals' rights in any way. Negative obligations of the state apply to the introduction of legislation or the application of such legislation. But it is clear that general fulfillment of human rights cannot be achieved

[1] Bexell, M. (2005). *Exploring Responsibility Public and Private in Human Rights Protection*. Lund: Department of Sociology. Lund University, 2.

[2] Collins, H. (2012). On the (In)compatibility of Human Rights Discourse and Private Law. LSE Law, *Society and Economy Working Papers, 7*, 2.

if only public authorities are subject to their protection and respect. Therefore, the obligations of the state regarding human rights are not only to comply with them itself, but also to ensure that human rights concepts and principles are implemented within the state between private actors. The leading international NGO "Interights" comes to conclusion that there would be no practical and effective guarantee of rights or remedy if they did not exist[1]. So the state is responsible not only for restraining itself (its agents) from violation of human rights but also it shall exercise due diligence to implement, to ensure and to protect basic rights that is to fulfill its "positive obligations".

So the *aim* of the study is to clarify the substance, legal grounds and groups of positive obligations of the state regarding the fundamental human rights, to determine the extension of the state responsibility for the acts of private actors, which violate human rights, and the scope of state duties in this matter to be in compliance with the "due diligence" standard. The perspective of domestic violence that used to be considered as a "classic private issue" provides a fruitful platform to illustrate the main outcomes of this article.

Nowadays the doctrine of positive obligations of the state makes the integral part of the modern theory of human rights as well as international, prima facie, European human rights law. The most substantial concept of positive obligations is developed by European Court of Human Right as the result of its interpretation and application of the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols (hereinafter - European Convention). Significant input in the doctrine of the state positive obligations was made by the prominent European researchers (Akandji-Kombe J.-F., Droge C., Feldman D., Mowbray A. R., Starmer K., Sudre F., Xenos D. etc.) whose monographs and doctoral thesis provide the stable theoretical background for such obligations[2].

The European Court of Human Rights (hereinafter – the Court or ECtHR) has not developed an authoritative definition of positive obligations. However, Judge Martens in his dissenting opinion in *Gul v. Switzerland* defined them as "requiring member states to … take action". This simple definition captures the essence of the varied obligations: their

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[1] *See also:* INTERIGHTS (2011). *Non-Discrimination in International Law. A Handbook for Practitioners*. London: The International Centre for the Legal Protection of Human rights, 19-20.

[2] *See:* Христова, Г. О. (2013). До питання про формування доктрини позитивних зобов'язань держави у сфері прав людини. *Філософія права і загальна теорія права. Додаток до юридичного журналу «Право України», 2,* 124-134.

key characteristic is the duty upon states to undertake specific affirmative tasks: for example, to investigate a killing, to protect vulnerable persons from serious ill-treatment inflicted by others, to provide arrested persons with a prompt explanation of the reasons for their arrest, to provide free legal assistance for impecunious criminal defendants, to provide legal recognition of the new gender acquired by transsexuals who have successfully completed gender re-assignment treatment and to deploy reasonable police resources to protect media organisations from unlawful violence directed at curbing the legitimate exercise of free expression[1].

Also most of the rights under the European Convention are negative rights ("or rights to freedom from interference"), they may impose obligations on the state to take positive action to protect people. Some of the positive obligations are imposed expressly by the language of the European Convention (articles 2, 3, 6 of Convention, article 3 of the First protocol). But most of them are legally grounded on the combination of three inter-related principles: 1) the requirement under article 1 of the European Convention that states should secure Convention rights to all persons within their jurisdiction; 2) the principle that Convention rights must be practical and effective (see *Airey v. Ireland);* 3) the principle, derived from article 13 of the Convention, that effective domestic remedies should be provided for arguable breaches of rights, protected by the Convention[2].

Positive obligations of the state may be legal or practical; substantive or procedural[3]. Starmer K. identifies five categories of duties placed upon states by European Convention positive obligations[4] 1) a duty to create a national legal framework which provides effective protection for Convention rights (for example, *X and Y v. Netherlands)*; 2) a duty of states to provide information and advice relevant to the breach of Convention rights (for example, *Guerra v. Italy*); 3) a duty to respond to breaches of Convention rights, e. g. by conducting an effective investigation; (for example, *Aydin v. Tyrkey;* 4) a duty to provide resources to individuals to prevent breaches of their Convention rights (for example, *Airey v. Ireland*); 5) at last but not at least - a duty to

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1 Mowbray, A. R. (2004). *The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights (Human rights law in perspective)*. Oxford. Portland Oregon: Hart Publishing, 2.

2 Starmer, K. (1999). *European human rights law.* London: Legal Action Group, 5.

3 Akandji-Kombe, J.-F. (2007). *Positive obligations under the European Convention on Human Rights. A guide to the implementation of the European Convention on Human Rights*. Council of Europe: Human rights handbooks.

4 Starmer, K. (2001). Positive obligations under the Convention. *Understanding Human Rights Principles*. Oxford: Hart Publishing, 159.

prevent breaches of Convention rights even by other individuals (so called "horizontal affect" of the Convention, see *Osman v. UK, Marckx v. Belgium, Plattform «Ärtze für das Leben» v. Austria* etc).

C. Droge presents a "normative" categorisation of positive obligations within which the study of positive obligations can be undertaken through a more "holistic" human rights theory as liberal, social and multidimensional understanding of fundamental rights. The division of these categories breaks down to a "horizontal" and "social" dimension within which the case-law of the Court can fit. The former concerns the protection of human rights between private parties, while the latter comprise not only the so-called economic and social rights, but also rights to legislative action, for example to enact the laws necessary for the enjoyment of right in a given national system[1].

Thus the substantial doctrine of positive obligations of the state developed by ECtHR recognizes the responsibility of the state not only for direct violations perpetrated by state actors, but also for a state's failure to act or to provide equal protection of the law in cases of infringement of human rights by private parties, whose abusive behavior requires an effective response from the state.

The Court began to shape such conceptual approach from the the first positive obligations cases of *Marckx v. Belgium (1979), Airey v. Ireland (1979)* and the case of *X and Y v. Netherlands (1985)*. In these cases, the Court's ruling should be considered quite ahead of its time when the issue of protection of human rights against acts of interference from private actors was either not relevant (as in *Marckx)* or did not concern the general question of the state's indirect responsibility as such (as in *Airey)*[2].

The case of *X and Y*[3] concerned the rape of the second applicant (the incident occurred on the day after Miss Y's sixteenth birthday) who could not initiate criminal law proceedings against the perpetrator due to her being mentally handicapped. The applicants complained that the state did not make available a criminal law remedy against rape in the circumstances of the victim. It was admitted by the government that rape attracted generally a punishment in criminal law which could not apply in her case due to the applicable procedural requirements. However, it

[1] Droge, C. (2003). *Positive Verpflichtungen der Staaten in der Europaischen Menschenrechtskonvention.* Heidelberg: Springer, 381, 382.

[2] Xenos, D. (2011). *The Positive Obligations of the State under the European Convention of Human Rights*. Routledge: Routledge Research in Human Rights Law, 22.

[3] *X and Y v. Netherlands,* no. 8978/80, 26 March 1985 ECHR.

argued that an alternative remedy was available in civil law, although if this had been a serious argument, a preliminary objection on the non-exhaustion of domestic remedies would have already been made.

The ECtHR stated that when a private party violates a human right of another individual, the liability of the state is sought over its failure to protect the victim in the given circumstances. In the cases of rape or other forms of bodily harm, the basic content of protection and, by extension, of positive obligations is to regulate the commission of offences against the person and prescribe sanctions of an appropriate deterring effect that must be backed up by law-enforcement procedures in order to ensure due compliance of law[1]. The state was found in violation of its positive obligations on the ground that the protection offered (i.e. civil law-remedy) could not guarantee the appropriate deterring effect in relation to the human rights interest concerned (i.e. respect for private life under Article 8 of the European Convention) and the higher degrees of severity therein (i. e. "where fundamental values and essential aspects of private life are at stake").

Thus the case of *X and Y* constitutes what can conveniently be called the classic positive obligation case that arises when the state is rendered "indirectly" responsible for its failure to actively protect an individual, either at all or adequately (as in that case) from acts of interference of another private actor.

The Court applied, for the first time, positive obligations as "inherent" in the effective protection of human rights in the case of *Marckx*[2]. The main complaint under Article 8 of the European Convention concerned the lack of appropriate administrative measures that would establish a legal bond between an unmarried mother and her child from the mere fact of birth. Positive obligations were justified by simply pointing to the first paragraph of the Convention right that was engaged in the applicant's circumstances. The judgment in *Marckx* makes clear that the state is under a positive obligation to assist the integration of a child into a family environment, including the offspring of non-marital women. If the measures taken by the state's administration do not comply with this obligation, it breaks the Convention.

The case of *Airey*[3] arose from a wife's decision to separate from her abusive husband. In this context of relationships between private individuals, the positive obligations of the state concern regulations

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[1] *See also: Osman v. the United Kingdom,* no. 87/1997/871/1083, 28 October 1998, § 115, ECHR.

[2] *Marckx v. Belgium,* no. 6833/74, 13 June 1979 ECHR.

[3] *Airey v. Ireland*, no. 6289/73, 9 October 1979 ECHR.

that prescribe appropriate sanctions in the event of physical violence. If violence occurs within a marital relationship, then the possibility of separation should easily be accessible to the victim. The general question of whether such a situation raises the indirect responsibility of the state in the form of positive obligations was not discussed as such in the Court's judgment, because it had been presupposed by both the applicant and the respondent state.

So the favorable judgments of *Marckx* and *Airey* complete each other in covering both the substantive (in *Marckx)* and procedural (in *Airey)* content of positive obligations that are indispensable for the effective protection of human rights. These judgments are not only the beginning of the application of positive obligations in the jurisprudence but reveal also their more expanded and sophisticated content that only the recent case-law has started to explore[1].

There are two other cases that play principle role in developing the standards of state responsibility in cases of abusive interaction of private persons that violates basic human rights: case of *Osman v. the United Kingdom (1998)* and case of *A. v. the United Kingdom (1998)*.

In the case of *Osman v. the United Kingdom* a man was killed after the police failed to respond when threats of violence were brought to their attention. The applicants claimed that this represented a violation of the positive obligation of the State under Article 2 (the right to life) to safeguard the lives of those within its jurisdiction. The Court found that the State would be in breach if this obligation if "the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge.[2]" In other words, in the context of threats to the right to life, the State must use due diligence to investigate and if necessary intervene to prevent such threats from being carried out. So Article 2 of the European Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual[3].

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1 Xenos, D. (2011). *The Positive Obligations of the State under the European Convention of Human Rights*. Routledge: Routledge Research in Human Rights Law, 22-27.

2 *Osman v. the United Kingdom,* no. 87/1997/871/1083, 28 October 1998, § 116, ECHR.

3 *Osman v. the United Kingdom,* no. 87/1997/871/1083, 28 October 1998, § 115, ECHR.

In case of *A. v. the United Kingdom* a young English boy who made an application to the ECtHR had been beaten repeatedly by his stepfather with a garden cane. The stepfather was prosecuted in an English court, but used the common law defence of "reasonable penalty" and was found not guilty by the jury.

The Court found that the punishment of the boy amounted to "inhuman or degrading treatment or punishment" in violation of article 3 of the European Convention and that UK law had failed to provide adequate protection. In particular the Court stated "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... Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity.[1]"

These cases explicitly show that if a state can not protect a person within its jurisdiction from violence or abusive behavior of private party, i. e. family members or the persons who are in intimate relations it might be considered as a violation of right to life or prohibition of torture, inhuman or degrading treatment or punishment.

Such approach of the European Court of Human Rights reflects the role of domestic violence in creating and sustaining inequality that has been recognized by both national and international tribunals and courts. Domestic violence may damage the physical and mental integrity of its victims and deprive them of the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms. Because of gender-based nature of such violence it may also help to maintain the subordinate position of victims in society and contribute to low levels of public participation, education and higher levels of relative poverty. The perpetrators of domestic violence (and much gender-based violence on the whole) are individuals and not the state. This kind of violence, occurring within the home in the context of an intimate relationship, was historically been viewed as a "private" matter and was seen as outside the purview of state responsibility.

Over time, however, the prevailing understandings of both domestic violence and state responsibility have changed. Domestic violence as

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1 *A. v. the United Kingdom,* no. 100/1997/884/1096, 23 September 1998 ECHR.

well as other forms of violence against women was viewed as less and less of a "private" issue and more as a legitimate and pressing concern of communities and governments alike. International law has increasingly recognized the positive obligations of the state to intervene to prevent domestic violence (and other forms of violence against women), to investigate and prosecute incidents of violence and adopt rules of procedure that protect victims of violence, including by countering discriminatory attitudes and stereotypes[1]. Such concept has been approved and expanded in recent Court's jurisprudence.

In the case of *Kontrova v. Slovakia (2007)*[2] the applicant was married and had two children with her husband: a daughter born in 1997 and a son born in 2001. The applicant filed a criminal complaint against her husband, accusing him of having assaulted and beaten her with an electric cable. She submitted a medical report indicating that her injuries would prevent her from working for up to seven days. She also stated that there was a long history of physical and psychological abuse by her husband. Accompanied by her husband, she later tried to withdraw her criminal complaint. On advice of the police officer she consequently modified the complaint such that her husband's alleged actions were treated as a minor offence which called for no further action. She and her relatives consistently informed police on the cases of violence but no appropriate and effective actions have been undertaken. Eventually the applicant's husband shot dead their two children and himself. Before the Court the applicant complained that the state had failed to protect the life of her two children and that it had been impossible for her to make a compensation claim concerning the non-pecuniary damage suffered.

Under Article 2 of the Convention, the Court observed that, under section 2 (1) (a) and (b) of the Police Corps Act of 1993, it was one of the main tasks of the police to protect fundamental rights and freedoms, life and health. However the police failed to ensure that those obligations were complied with. As found by the domestic courts, the direct consequence of those failures was the death of the applicant's children. All these and the Slovakian Government's acknowledgment that the domestic authorities had failed to take appropriate action to protect the lives of the applicant's children, were found by the Court in violation of Article 2 of the European Convention.

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[1] *See:* INTERIGHTS. (2011). *Non-Discrimination in International Law. A Handbook for Practitioners*. London: The International Centre for the Legal Protection of Human rights, 228-229.

[2] *Kontrová v. Slovakia* (merits and just satisfaction), no. 7510/04, 31 May 2007 ECHR.

In the case of *Bevacqua and S. v. Bulgaria*[1] the first applicant was married and gave birth to a child. When the relations between the spouses soured, her husband became aggressive and she left the family home, filling an application for divorce. She also sought interim measures granting her custody of their minor child. During the domestic proceedings, which took long period of time, her husband assaulted the applicant several times, battered her, threatened her and abducted their child preventing her from seeing him. She lodged criminal complaints but the prosecuting authorities refused to institute criminal proceedings against her husband noting that it was open to her to bring private prosecution proceedings, as the alleged injuries inflicted on her were of the category of lights bodily injuries. Under Article 8 of the European Convention, the Court found that the cumulative effects of the District Court's failure to adopt interim custody measures without delay in a situation of domestic violence amounted to a failure to assist the applicants contrary to the state positive obligations under Article 8 of the Convention to secure respect for their private and family life[2].

In 2009, in a landmark case *Opuz v. Turkey*[3], the European Court of Human Rights has found Turkey in violation of its obligations to protect women from domestic violence, and for the first time has held that gender-based violence is a form of discrimination under the European Convention. The case was brought by Nahide Opuz who with her mother suffered years of brutal domestic violence at the hands of her husband. Despite their complaints the police and prosecuting authorities did not adequately protect the women, and ultimately Ms. Opuz's mother was killed by him. The case highlights the positive obligations of states to effectively protect women from domestic violence, recognized by the Council of Europe as the leading killer of women aged between 16 and 44. The applicants argue violations of Articles 2 (right to life), 3 (prohibition of torture or inhuman or degrading treatment), 13 (right to an effective remedy) and 14 (freedom from discrimination) of the European Convention.

For the first time the Court has elaborated the nature of state obligations with respect to domestic violence – recognizing the gravity

[1] *Bevacqua and S. v. Bulgaria* (merits and just satisfaction), no. 71127/01, 12 June 2008 ECHR.

[2] See: Кочемировська, О., Стрейстяну, Д. Й., Христова, Г. (2010). *Ефективне запобігання та реагування на випадки насильства в сім'ї.* Методичний посібник для тренерів з проведення тренінгів для дільничних інспекторів міліції. Запоріжжя: Друкарський світ, 160-164.

[3] *Opuz v. Turkey* (merits and just satisfaction), no. 33401/02, 9 June 2009, ECHR.

of domestic violence in Europe, acknowledging the problems created by the "invisibility" of the crime, and highlighting the seriousness with which states must respond. In a judgment relying heavily on international and comparative law, the Court emphasized that domestic violence is not a private or family matter, but is an issue of public interest which demands effective state action.

While acknowledging the existence of laws in Turkey criminalizing domestic violence the Court emphasized the need for such laws to be implemented in practice. It found that the criminal law in place did not have an adequate deterrent effect capable of ensuring effective prevention of violence against the women, and that there was widespread passivity on the part of police and prosecutors in responding to such complaints. The Court observed that "the overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors… indicated that there was insufficient commitment to take appropriate action to address domestic violence"[1].

Interights, the third party intervener in *Opuz case*, comments that this case established the international human rights framework in which state obligations to protect, and to effectively investigate, prosecute and punish perpetrators should be considered in the particularly context of domestic violence. Interights emphasizes that while the obligation to prosecute perpetrators requires that the criminal justice process must be responsive to victims' needs, it cannot put the onus on victims to initiate and impel that process[2].

At last in the case of *Opuz v. Turkey the Court definitely* approved the obligation of due diligence, that is of the greatest importance in the context of this study. It has established that the positive obligation to protect the right to life (Article 2 of the European Convention) requires state authorities to display due diligence, for example by taking preventive operational measures, in protecting an individual whose life is at risk[3].

So the concept of positive obligations of the state to protect an individual in cases of infringement of human rights by private parties, developed primarily by the jurisprudence of the European Court of

[1] *Opuz v. Turkey* (merits and just satisfaction), no. 33401/02, 9 June 2009, § 200, ECHR.

[2] European Court finds Turkey in violation of obligations to protect women from domestic violence. *Interights* <//www.interights.org/opuz/index.html>

[3] *Opuz v. Turkey* (merits and just satisfaction), no. 33401/02, 9 June 2009, § 131, § 146, §149, ECHR.

Human Rights, is closely interrelated with *due diligence* as a principal base for state responsibility for violence, committed by private actor.

In the broadest sense, due diligence refers to the level of care or activity that a duty-bearer is expected to exercise in the fulfilment of their duties. For various areas of law, standards of due diligence have been developed in order to provide a sort of "measuring stick" with which to assess if a State or other actor is meeting the obligations that they have assumed. Using the language of a rights-based approach, a due diligence standard serves as a tool for rights-holders to hold duty-bearers accountable by providing an assessment framework for ascertaining what constitutes effective fulfilment of the obligation, and for analyzing the actions or omissions of the duty-bearer. This is especially important where the potential infringement comes through a duty-bearer's failure to act, as it can be difficult for rights-bearers to assess if an omission constituted a violation of their right without some normative basis for the appraisal[1].

Due diligence is the standard often used to determine what actions states should take to address violence against women, including domestic violence[2]. A requirement of due diligence has been adopted in a number of international human rights instruments, interpretations, and judgments with respect to these issues[3]. These include Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) General Recommendation No. 19 on violence against women (1992), Article 4 of the United Nations General Assembly Declaration on the Elimination of Violence against Women (1993), the Convention on the Prevention of Violence against Women (Convention of *Belém do Pará,* 1994) adopted by the Organisation of American States as well as the Council of Europe Recommendation Rec(2002)5 of the Committee of Ministers to member states on the protection of women against violence (2002)[4]. In particular the CEDAW Committee noted in its General Recommendation No. 19 that "States may also be responsible for private acts if they fail to act

1 The Due Diligence Standard for Violence against Women. *Summary paper.* <http://www2.ohchr.org/ english/issues/women/rapporteur/docs/SummaryPaperDueDiligence.doc> (2014, October, 13).

2 Farrior, S. (2004). The Due Diligence Standard and Violence Against Women. *Interights Bulletin, Vol. 14, 4.*

3 *See also: Opuz v. Turkey* (merits and just satisfaction), no. 33401/02, 9 June 2009, § 76-79, § 83, § 84, § 86, ECHR.

4 *See:* Council of Europe Convention on preventing and combating violence against women and domestic. CETS № 210. Explanatory report, § 58. <http://conventions.coe.int/Treaty/EN/Reports/Html/210.htm> (2014, October, 13).

with due diligence to prevent violations of rights or to investigate and punish acts of violence"[1].

In 2006, however, the Special Rapporteur on Violence against Women (Yakin Ertürk) published a report on using the due diligence standard as a tool for the elimination of violence against women. It sets up a framework of analysis under the principles of *(1) prevention, (2) protection, (3) punishment and (4) reparations,* and details ways the due diligence standard could be expanded to solidify obligations to prevent and compensate victims of violence against women i. e., and include non-state actors as duty-bearers in the due diligence framework[2].

The concept of due diligence has become one of the pillars of the first international treaty provided legally-binding standards on preventing, protecting against and prosecuting domestic violence and other the most severe and widespread forms of gender-based violence - The Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)[3]. It was opened for signature on May 11, 2011 and came in to force on August 1, 2014.

Article 5 of the Istanbul Convention not only addresses the state obligation to ensure that their authorities, officials, agents, institutions and other actors acting on behalf of the state refrain from acts of violence against women and domestic violence (to be in compliance with their "negative duties"), but also sets out parties' positive obligation to "exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-state actors". In both cases, failure to do so will incur state responsibility.

Important to say, that it is not an obligation of result, but an obligation of means. Parties are required to organise their response to all forms of violence covered by the scope of this Convention in a way that allows relevant authorities to diligently prevent, investigate, punish and provide reparation for such acts of violence. As such, violence against women and domestic violence perpetrated by non-state actors crosses the threshold

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[1] CEDAW General Recommendation 19. (1992). U.N. Doc. A/47/38. *Legislationline, a free-of-charge online legislative database.* <http://www.legislationline.org/documents/id/7908> (2014, October, 13)

[2] Special Rapporteur on Violence Against Women. (2006). *The Due Diligence Standard as a Tool for the Elimination of Violence Against Women*, U.N. Doc. E/CN.4/2006/61.

[3] Council of Europe Convention on preventing and combating violence against women and domestic violence (adopted 11 May 2011, entered into force 1 August, 2014). CETS № 210 <http://conventions.coe.int/Treaty/EN/ Treaties/HTML/210.htm> (2014, October, 13)

of constituting a violation of human rights insofar as Parties have the obligation to take the legislative and other measures necessary to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention, as well as to provide protection to the victims, and that failure to do so violates and impairs or nullifies the enjoyment of their human rights and fundamental freedoms[1]. So the Istanbul Convention explicitly requires the adoption and implementation of comprehensive and coordinated policies that offer a holistic response to violence against women including domestic violence (Art. 7) through: prevention, protection and support, prosecution and integrated policies and data collection.

On Novermber 7, 2011 the Minister of foreign affairs of Ukraine has singed the Istanbul Convention and now we are on the way of its ratification[2] with the support of Office of Council of Europe in Ukraine[3]. At the same time application of current legislation of Ukraine explicitly shows that the comprehensive legislative approach is not incorporated in domestic legislative framework[4]. In practice so called special measures on prevention of family violence are not affective at all, protective orders are not delivered. There is lack of shelters in every region of Ukraine. An only "working" instrument is the Art. 173-2 of the Code of Ukraine on Administrative Offences, that provides the administrative sanctions for the perpetrator. But as it's approved by numerous comprehensive researches[5] it does not provide effective sanctions that are able to prevent

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1 Council of Europe Convention on preventing and combating violence against women and domestic. CETS № 210. Explanatory report, § 59. < http://conventions.coe.int/Treaty/EN/Reports/Html/210.htm > (2014, October, 13)

2 Наказом Міністерства соціальної політики України від 13.05.2014 № 293 утворено робочу групу з питань підготовки до ратифікації Конвенції Ради Європи про запобігання насильству стосовно жінок і домашньому насильству та боротьбу із цими явищами.

3 Project "Preventing and combatting violence against women and domestic violence in Ukraine". *Supported by SIDA*. <http://coe.kiev.ua/projects/wdv.html> (2014, October, 13)

4 *See: Закон про попередження насильства в сім'ї 2001* (Верховна Рада України). *Офіційний сайт Верховної Ради України.* <zakon.rada.gov.ua/rada/show/2789-14> (2014, October, 13)

5 Кочемировська, О. О., Христова, Г. О. (2011). *Мінімальні стандарти соціальних послуг для осіб, які постраждали від насильства в сім'ї міжнародний досвід та рекомендації для України*. Київ: Вид-во ФОП Клименко Ю. Я.; Бондаровська, В. М., Кочемировська, О. О., Лактіонова, Г. М, Онишко, Ю. В., Хаар, Р., Христова Г. О. (2010). *Стан системи попередження насильства в сім'ї в Україні: правові, соціальні, психологічні та медичні аспекти.* Київ: Вид-во ФОП Клименко Ю.Я. etc.

future violence. Despite of the conclusions of all abovementioned researches the family violence is not still considered as criminal offence. Thus the current Ukrainian legislative framework and the application practice fully are not in compliance with the comprehensive legislative approach and due diligence obligations of Ukraine.

Thus to be in compliance with European human rights standards Ukraine shall revise and enhance its legal framework to ensure a comprehensive legislative approach to domestic violence and to exercise due diligence to prevent, investigate, punish and provide reparation for acts of private parties which violate human rights.

On the whole the conducted research leads to conclusion that the substantial doctrine of positive obligations of the state developed by ECtHR recognizes the responsibility of the state not only for direct violations perpetrated by state actors, but also for a state's failure to act or to provide equal protection of the law in cases of infringement of human rights by private parties, whose abusive behavior requires an effective response from the state. The positive obligations of the state to implement, to guarantee or to respect human rights shall be fulfilled even in case of violence or abusive interaction, occurring within the home in the context of an intimate relationship (i. e. domestic violence), that historically has been considered as a "private" matter and was seen as outside the purview of state responsibility. In this perspective the concept of positive obligations of the state is closely interrelated with the due diligence as a principal base for state responsibility for violence, committed by private actors. Incorporation of the concepts of state positive duties and the due diligence approach to the national legal framework and law-application practice will considerably contribute to efficiency of the state actions and policies in the field of human rights and ensure their compliance with European human rights standards.