Application of the Elements of Torture and Other Forms of Ill-Treatment, as Defined by the European Court and Commission of Human Rights, to the Incidents of Domestic Violence

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Application of the Elements of Torture and Other Forms of Ill-Treatment, as Defined by the European Court and Commission of Human Rights, to the Incidents of Domestic Violence

BY ELA GRDINIC*

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I. Introduction

Statistics show that violence against women in the family is one of the most common forms of violence as well as the most common cause of physical injuries to women.1 Europe is not an exception. In France women comprise 95% of the victims of reported violence. Of these, 51% were assaulted by their husbands. In the Forensic Hospital in Bucharest, Romania, 28% of the women seeking treatment had been beaten by an intimate male partner. Judges estimate that 60% of the divorce cases in Bucharest involve claims of physical violence.2

A few examples from European countries show the insufficiency of legal protection for women from violence in their homes. From data available in the 1990s,3 only in Austria is there a protection order available in cases of domestic violence. Not a single European country has a specific criminal provision on domestic violence. However, special provisions on marital rape were incorporated into the legal systems of Austria, Cyprus, Norway and the United Kingdom.4 Only Austria, Germany, Cyprus and Norway had specific procedural protections for victims.

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1. According to Julie Mertus, Nancy Flowers and Mallika Dutt: Battering is the greatest single cause of injury among US women, accounting for more emergency room visits (over one million per year) than auto accidents, muggings and rape combined. In Papua New Guinea, 67% of rural women and 56% of urban women have been victims of domestic violence. A three-month surveillance survey in Alexandria, Egypt, indicated that domestic violence was the leading cause of injury to women, accounting for 27.9% of all visits by women to trauma units. A random sample of 150 women in Trondheim, Norway, found that 25% had been physically or sexually abused by their male partners. In Canada, 62% of women murdered died at the hands of an intimate partner.


3. See id.

4. In Croatia, it was included in a revised Criminal Code in November, 1997.
Domestic violence has been omnipresent for centuries, and yet, until recently, women were generally not able to seek any protection from the law, either before domestic courts or at the international level. Moreover, it was unthinkable until the emergence of human rights instruments in the second part of this century that an individual might ever claim a violation of her or his rights of any kind before an international judicial or quasi-judicial body. However, the development of concepts in international law such as the individual right to petition, the positive obligations of states, the absolute character of certain rights, and the expansion of the application of state responsibility for the acts of private individuals, all provide fertile ground for the recognition of domestic violence as a human rights issue.

Simultaneously with such developments, the global women's movement has concentrated on, among other gender-related issues, the "recognition of domestic violence as widespread and largely unprosecuted and the understanding that the systematic, discriminatory nonprosecution of domestic violence constitutes a violation of the right to equal protection under international law." The idea of regarding incidents of domestic violence as a form of torture has long been around. While some fiercely oppose the idea that suffering inflicted in the private sphere, without the direct involvement of state officials and without being for the restricted list of purposes, might ever be seen as torture, feminists have argued about the artificiality of the private/public distinction. Feminist

7. See, e.g., Celina Romany, Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law, 6 Harv. Hum. Rts. J. 87 (1993). According to Romany, Susan Okin provides a useful framework for the critique of the public/private division of spheres within human rights law. As she explains, the public/private dichotomy, by ignoring the political character of power unequally distributed in family life, obscures the political nature of so-called private life. The dichotomy clouds the fact that the domestic arena is itself created by the political realm where the state reserves the right to intervene. The dichotomy hides the area in which ourselves become gendered. Finally, the dichotomy obscures the psychological and practical barriers that the social division of labor imposes upon women. Similarities between the structural components of the family and the state illustrate the arbitrariness inherent in the demarcation of social spheres. The blurring of institutional lines between the family and the state is less pronounced than those between the market and the family. Both the family and the state are units of
scholars divide into those who tend to incorporate the incidents of domestic violence into already recognized forms of ill-treatment, including torture, and those who stress the parallels between domestic violence cases and officially inflicted torture, while still recognizing the differences of the two and pointing out that drawing similarities between domestic violence cases and officially inflicted torture contributes to the recognition of domestic violence as a serious human rights abuse.

This Article argues that as far as the European human rights enforcement bodies are concerned, the incidents of domestic violence do satisfy the criteria imposed by the case law of the European Court of Human Rights and the European Commission of Human Rights necessary to qualify various forms of ill-treatment as prohibited by Article 3 of the European Convention on Human Rights. In this respect, the question arises whether the European Convention may be used by women of European countries as a tool of protection against abuse that occurs within their homes and as a catalyst for changes in legislation and practices pertinent to domestic violence cases. In other words, the present concern is how likely it would be that the European Court, if presented by an alleged violation of Article 3 in the context of domestic violence, would accept those

government within which actors play fiduciary roles, while the market is deemed pre-political. Both the family and the state lack the relative freedom from rules which the market enjoys since family and state decisions are informed by "overarching ideals." Both the family and the state share similar discourses whereby political philosophy refers to family ideals while family theorists allude to political ideals, sharing an arsenal of linguistic imagery of the market as a cornerstone of consent.

Id. at 110.


10. The terms "the Court" or "the European Court" will be used in this article to refer to the European Court of Human Rights.

11. The term "the Commission" will be used in this article to refer to the European Commission of Human Rights.


13. As Rhonda Copelon has pointed out, "Domestic violence is not gender-neutral. While in heterosexual relationships women sometimes fight back and in exceptional cases kill or injure their partners, severe, repeated domestic violence is overwhelmingly initiated by men and inflicted upon women." Copelon, supra note 9, at 303.
allegations and provide women with a means of protection in an international human rights forum against intimate violence.

The approach in this Article is to establish the elements of the forms of ill-treatment prohibited by the European Convention in Article 3 through an analysis of the Court's and the Commission's cases. In Parts II through VI, the elements of torture, inhuman treatment, degrading treatment, inhuman punishment, and degrading punishment, respectively, are discerned and applied to the incidents of domestic violence. Part VII discusses yet another significant aspect of the Court's decision-making process: the interpretation of the Convention. Like most other human rights instruments, the European Convention does not define the content or the scope of the protection offered by each article, thus opening the possibility for various interpretations of its provisions. A brief historic overview of the Court's decisions regarding Article 3, as well as certain other provisions of the Convention, provides a basis to anticipate with more certainty the possible outcome of a human rights claim before the Court in the future.

II. Torture: Definition and Application to the Incidents of Domestic Violence

A. Arriving at the Definition

The European Convention on Human Rights and Fundamental Freedoms does not give the definition of either torture or any other form of ill-treatment covered by Article 3. The text of Article 3 of the Convention only refers to the prohibited acts as follows: “No one shall be subjected to torture, inhuman or degrading treatment or punishment.”

It has therefore been left to the enforcement bodies of the Convention to categorize the various treatments prohibited by Article 3 on a case-by-case basis.

In the case of Ireland v. United Kingdom, the European Court of Human Rights stated 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, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of

14. European Convention, art. 3.
the victim, etc.\textsuperscript{15}

The minimum level of severity requirement applies to all forms of ill-treatment under Article 3. In \textit{Ireland v. United Kingdom}, the landmark case relating to Article 3 of the Convention, the Irish government alleged that some practices against Irish Republican Army (IRA) suspects amounted to torture.\textsuperscript{16} The background of this case was the long-lasting crisis in Northern Ireland, including the fact that by the middle of 1971, the campaign of violence carried out by the IRA had attained unprecedented proportions.\textsuperscript{17} The Northern Ireland government, in an attempt to prevent ongoing terrorism in Northern Ireland, introduced extra-judicial measures of detention and internment of suspected terrorists. From August 9, 1971, until November 7, 1972, when certain of the Special Powers Regulations were replaced, the authorities in Northern Ireland exercised four such extra-judicial powers: arrest for interrogation purposes during forty-eight hour periods; arrest and remand to custody; detention of an arrested person; and internment.\textsuperscript{18} After establishing the facts of the case, a majority of the Court arrived at the decision that the treatment against IRA suspects in some cases amounted to inhuman treatment, in some cases to degrading treatment, and in some cases to both.

The European Commission of Human Rights was of the opinion that the conditions of detention and the occurrence of treatment known as "the five techniques"\textsuperscript{19} allegedly applied against IRA suspects by the British authorities in five separate places constituted


\textsuperscript{16} Id. at 16.

\textsuperscript{17} Id.

\textsuperscript{18} See id.

\textsuperscript{19} The treatment known as "the five techniques" consisted of the following:

(a) wall-standing: forcing the detainees to remain for periods of some hours in a "stress position," described by those who underwent it as being "spreadeagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers;"

(b) hooding: putting a black or navy colored bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation;

(c) subject to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise;

(d) deprivation of sleep: pending their interrogations, depriving the detainees of sleep;

(e) deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations.

\textit{Id.} at 41.
torture. The Commission attempted to define torture in relation to inhuman treatment, stating that inhuman treatment is that which deliberately causes severe mental or physical suffering, while torture is an aggravated form of inhuman treatment. This definition of torture in essence does not differ from the one given by the Court in the same case: torture is deliberate inhuman treatment causing very serious and cruel suffering.

The Court explained that the practice of the five techniques represented inhuman treatment within the meaning of Article 3 of the Convention. The Court did not further explain what specific elements of the treatment satisfied the requirements of inhuman treatment. However, the Court explained why the treatment in this case did not amount to torture:

In order to determine whether the five techniques should also be qualified as torture, the Court must have regard to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. In the Court's view, this distinction derives principally from differences in the intensity of the suffering inflicted.

The Court considers in fact that, whilst there exists on the one hand violence which is to be condemned both on moral grounds and also in most cases under the domestic law of the Contracting States but which does not fall within Article 3 of the Convention, it appears on the other hand that it was the intention that the Convention, with its distinction between "torture" and "inhuman or degrading treatment," should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.

Moreover, this seems to be the thinking lying behind Article 1 in ... Resolution 3452 ... adopted by the General Assembly of the United Nations on 9 December 1975, which declares: "Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."

Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so
understood.\textsuperscript{20}

Both the Court and the Commission concentrate on the effects of the treatment applied—the intensity of the suffering. The difference between torture and inhuman treatment is, according to both the Court and the Commission, one of degree. However, a definition where the only criteria to distinguish between the various forms of ill-treatment are severity of suffering does not contribute much to the clarity of the definition or the predictability of the outcome of cases. In this case, it seems that the only difference between the Court’s judgment and the Commission’s decision was the fact that more commissioners than judges deemed the level of suffering experienced by the victims of the five techniques as serious enough to constitute torture.

Four judges did not agree with the Court’s opinion that the five techniques did not constitute torture. Judge Zekia, in his dissenting opinion, stated that torture is "an aggravated form of inhuman treatment causing intense physical and/or mental suffering."\textsuperscript{21} While this part of his opinion does not differ from either the Court’s or the Commission’s definitions of torture, Judge Zekia further argued that the degree of intensity and the length of such suffering were not the only considerations:

\begin{quote}
[T]he nature of ill-treatment inflicted, the means and methods employed, the repetition and duration of such treatment, the age, sex and health condition of the person exposed and whether the injuries inflicted caused serious consequences for short or long duration are all relevant matters to be considered together and arrive at a conclusion whether torture has been committed.\textsuperscript{22}
\end{quote}

This part of his opinion is in accordance with the Court’s view that when deliberating upon whether a treatment in question amounts to torture or not, all the circumstances of the case have to be taken into consideration. Judge Zekia went on to give several examples of what should, in his eyes, be seen as torture:

\begin{quote}
[I]f a mother, for interrogation, is separated from her suckling baby by keeping them apart in adjoining rooms and the baby, on account of hunger, starts yelling for hours within the hearing of the mother and she is not allowed to attend to her baby, again I should say both the mother and the baby have been subjected to inhuman
\end{quote}

\begin{itemize}
\item \textsuperscript{20} Id. at 66-67.
\item \textsuperscript{21} Id. at 97 (Zekia, J., dissenting).
\item \textsuperscript{22} Id. (Zekia, J., dissenting).
\end{itemize}
treatment, the mother by being agonized and the baby by being deprived of the urgent attention of the mother. Neither the mother nor the child has been assaulted.\textsuperscript{23}

Judge Zekia did not agree with the majority's opinion because he deemed the five techniques to be a treatment of such severity and applied in such circumstances as to bring it beyond the level of inhuman treatment to the level of torture.

Judge O'Donoghue, in opining that the five techniques amounted to torture, expressed the view that "in the present-day world there can be little doubt that torture may be inflicted in the mental sphere."\textsuperscript{24} By this remark, he stressed that intense physical suffering is not a necessary element of torture, and that suffering in only the mental sphere could suffice to constitute torture.

Judge Matscher, in his dissenting opinion, agreed with the majority's view that torture was characterized by a physical or psychological suffering of a certain severity. But he regarded the element of intensity "as complementary to the systematic element: the more sophisticated and refined method, the less acute will be the pain. . . . The modern methods of torture, which in their outward aspects differ markedly from the primitive, brutal methods employed in former times, are well known."\textsuperscript{25} Therefore, in this view, the element that prevailed in the case of \textit{Ireland v. United Kingdom} was the systematic application of the treatment of the five techniques.

Sir Gerald Fitzmaurice dissented from the majority's opinion and disagreed with the opinions of the other dissenters in addressing the issue of the five techniques. He alone stated that the five techniques did not amount to either torture or inhuman treatment. In his opinion, the treatment in question belonged to the class of treatment that would have to be condemned by the domestic laws of European countries, for it was not of such a severity as to be covered by the protection of an international human rights instrument. His argument was that the Convention was drafted at the point in history when Europe was just recovering from the atrocities of the Second World War and that the drafters, when deliberating upon Article 3 of the Convention, primarily had in mind the prevention of the practices that occurred in concentration camps of Nazi Germany or against prisoners of war. Less severe treatments were to be protected solely

\textsuperscript{23} \textit{Id.} at 97-98 (Zekia, J., dissenting).
\textsuperscript{24} \textit{Id.} at 106 (O'Donoghue, J., dissenting).
\textsuperscript{25} \textit{Id.} at 139 (Matscher, J., dissenting).
by means of domestic laws. He saw the function of an international human rights instrument as one that should be invoked only when a major, gross violation of human rights was in question. He distinguished between categories of torture or of what is inhuman—categories which, both of them, imply treatment reaching a serious, even an extreme degree of cruelty, barbarity or severity, [from] something which, though to be condemned, is in comparison mild. . . . The fact that the Convention made no provision against lesser forms of ill-treatment than such as would amount to torture, or fall into the category of the inhuman, [shows] that these lesser forms were not intended to be covered.  

What is to be further observed in his opinion is that he, like the Court and the Commission, stressed the importance of the severity of suffering involved. But again, such concentration on that one element proves to be highly unreliable and subjective. While the majority of the commissioners saw the treatment in question as torture, and the majority of the judges saw it as inhuman or degrading, Judge Fitzmaurice concluded that it was not covered at all by Article 3 of the Convention, but remained in the realm of less severe violations that were to be protected only by domestic law.

All these opinions agree on one point: for treatment to amount to torture, it has to include a severe and intense form of suffering. From all the expressed views on the definition of torture, some common elements may be discerned: torture is a treatment that (1) is inhuman; (2) is deliberately inflicted; and (3) causes suffering that is very serious and cruel (in the Court’s language) or severe (in the Commission’s language). The suffering can be physical or mental.

B. The Elements of Torture

1. Inhuman Treatment

The Court has not defined inhuman, nor has it clarified what specific elements of a particular treatment make it fall into this category. In this Article, the word “inhuman” will be used to mean treatment that has a dehumanizing effect on its victim. The effect is that it destroys human dignity and adversely affects the psychological well-being of a person: “It is not primarily the victim’s information,
but the victim, that torture needs to win—or reduce to powerlessness.”

27. “Torture tends to the disintegration and consequent annihilation of the psychic and moral personality, to the non-physical destruction, practically speaking, of the human person, with long lasting results.”

In the domestic violence context, inhuman treatment is a process in which one partner, by means of dominance and control, imposes upon the other a picture of himself or herself as an object, a dehumanized thing. In this process, a man intimidates a woman by using coercion and threats to make her obey and comply with his demands. Some men justify violence as a means of disciplining their women or changing their behavior or way of thinking, acting or living. Through violence, they seek to impose on women their picture of the right role for women, their right place in life. Such a view represents another aspect of the degradation of women—seeing women as less than adults, as incapable of deciding things for themselves or making their own choices. In a context of violence, there is no space for equality, negotiation, discussion, or compromise. Outbursts of violence occur without predictable reason and therefore keep women in constant fear and anguish.

Violent episodes are usually followed by loving and contriving phases, where the abuser appears extremely kind and regretful of his violent deeds. Rhonda Copelon has observed that “the alternation of active and passive brutality with kindness is one of the most effective means to undermine the prisoner’s . . . hatred of the torturer and convert the torturer into a savior.”

28. Id. at 187 (citing the argument of Francesco Compagnoni).


30. Copelon, supra note 9, at 7.

Feminists have argued that
domestic violence against women is systemic and structural, a mechanism of patriarchal control of women that is built upon male superiority and female inferiority, sex-stereotyped roles and expectations, and the economic, social and political predominance of men and dependency of women. While the legal and cultural embodiments of patriarchal thinking vary among different cultures, there is an astounding convergence in regard to the basic tenets of patriarchy and the legitimacy, if not necessity, of violence as a mechanism of enforcing that system. Violence is encouraged and perpetuates women's dependence and her dehumanization as "other," a servant and a form of property. It is also necessary to preserve overbearing male entitlement and unbearable female constraint. The imperfection of—or inevitable tension in—the system is reflected in the ever-present potential and fact that women will defy this destiny. Jealousy is a common theme in violent scenarios. Women are to be feared because they are sexually voracious, tricksters, sorcerers and lesbians. Women's capacity and power—exhibited through pregnancy, mothering, beauty, or offer of intimacy, through competence at wage-earning work, social relations or household management, or through "rebellions," small or large—trigger attack. Through violence, men seek both to deny and destroy the power of women. Through violence, men seek and confirm the devaluation and dehumanization of women.  

2. Deliberately Inflicted Torture

This requirement relates to the state of mind of a batterer, or, in other words, to the level of his culpability. "Deliberately" in this context has the same meaning as "intentionally." To act intentionally is to act purposely or knowingly. "A defendant acts purposefully when he acts with the conscious objective of causing a particular result." The Model Penal Code defines acting purposely and acting knowingly as follows:

(a) Purposefully.

A person acts purposely with respect to a material element of an

32. WALKER, supra note 29, at Prologue (quoting an anonymous victim).
33. Copelon, supra note 9, at 5.
offense when:

(i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and

(ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

(b) Knowingly.

A person acts knowingly with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.35

Most of the men who use violence against their female intimate partners act with the purpose of bringing about a desired state of affairs.36 Lenore Walker, after many years of research on battered wives, concluded that a batterer acts "in order to coerce [the victim] to do something he wants her to do."37 They act with intent to inflict severe pain and suffering and they plan their attacks.38 Wife beating

35. MODEL PENAL CODE § 2.02.
36. See Copelon, supra note 9, at 12.
37. WALKER, supra note 29, at xv.
38. The following is an example of the intentional character of the abusive acts of wife abusers:

Melanie came across a file card that sickened her. On it her husband had written a list of dates corresponding to the forced-sex episodes of the previous few months. Next to each date was a code. "As close as I could figure it, he had graded each rape on some sort of zero-to-ten ranking, depending, I guess on how good it was." There were other numbers and letters which she suspects indicated the types of acts he committed. "The card totally stunned me. And it opened my eyes to the fact that he wasn’t going to change." She had thought that his attacks had been spontaneous, but it became clear that his behavior was calculated. She was not sure whether he had planned the attacks beforehand or just evaluated them afterward, but she knew that his attitude toward the rapes was much more rational than she ever suspected.

almost never occurs in a public place or in front of witnesses who might interfere. It occurs in private, when no one is present, or sometimes in the presence of family members who are too young or too old, or just too frightened themselves, to intervene, or are otherwise unable to prevent the battering. Despite showing violent behavior toward their wives, most batterers are entirely capable of maintaining perfect self-control in other social relations.

a. The Heat of Passion Defense

The heat of passion defense may be described as the commitment of an offense while the offender is under the influence of an extreme emotional disturbance. Often there is an additional requirement that there be a reasonable explanation or excuse for such disturbance. Such conduct may be described as impulsive, the result of provocation or a loss of control.

The heat of passion defense is often evoked by wife abusers as they claim that they were provoked by something their wives did or said, or did not say or do, or the way they looked, were dressed or behaved. However, women's stories reveal that such claims are often unjustifiable, as any possible reason may satisfy an abuser as a motive for violence. "In in-depth interviews with eighteen batterers involved in a counseling program, which examined their excuses and justifications, forty-four percent said they reacted to a wife's verbal aggressiveness/nagging, while seventy-eight percent gave justifications based on her failure to fulfill the obligations of a good wife. These failures ranged from serving fatty foods to refusing sex."40

Another common characteristic of wife abusers is the complete arbitrariness in their judgments about what is wrong with their wife's behavior. Their acts are unpredictable, and violence may erupt at any moment, for any reason. Often, there need not be any reason. Lenore Walker has noted, "In my research, I have attempted to look at battered women as victims of battering behavior rather than as the causes of the violence. Although these women often did or said things to make the batterers angry, it was obvious that he would have beaten her anyway."

39. See Model Penal Code § 210.3.
40. Copelon, supra note 9, at 335-36.
b. Intention in the Context of Alcohol or Drug Abuse

In the criminal law there are three contexts in which acting under the influence of alcohol or drugs may be seen as intentional. The first and most obvious situation is when a batterer plans the battering before becoming drunk, and then consumes alcohol and begins battering. In this situation, his act is purposeful. He becomes drunk as part of the plan to beat his wife. Drunkenness is simply a device to help him fulfill his criminal plans.

In the second situation, although the batterer does not plan the battering, it just so happens that each time he becomes drunk, he beats his wife and claims to have no control over his behavior. He is aware that when becomes drunk, he is likely to beat his wife. Here, he is acting knowingly, and acting knowingly is one of the forms of intentional behavior.

The third situation is when someone is aware that being drunk makes him extremely likely to beat his wife; he is acting purposely at all times. In this context, becoming drunk is just a way to ease whatever inhibitions he might have against a violent outburst. In this case the batterer is acting purposely.

c. The Insanity Defense

It may indeed be true that some batterers are insane. The insanity defense requires a defendant to have had a severe mental illness, defect or disorder at the time of the alleged criminal acts. Further, this condition must have impaired the defendant's mental capacity to such an extent that either (s)he did not understand the nature and consequences of what (s)he was doing or did not understand that what (s)he was doing was wrong.42

Batterers who can use this defense cannot be held criminally liable and criminal sanctions cannot be applied against them. Nevertheless, there are other measures to which they might be subjected.43

3. Suffering

The element of suffering is apparent in the various definitions of

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43. The nature and duration of such measures would depend on the nature of the illness as well as the level of dangerousness of such individuals. However, this sphere is not the relevant issue for this thesis.
domestic violence. Lenore Walker offers one such definition:

A battered woman is a woman who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights. . . . Furthermore, in order to be classified as a battered woman, the couple must go through the battering cycle at least twice.  

Similarly, the U.N. Committee on the Elimination of Discrimination Against Women defines gender-based violence as "violence that is directed against a woman because she is a woman or which affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty." Finally, the United Nations' Declaration on the Elimination of Violence Against Women defines violence against women to include "physical, sexual and psychological violence occurring in the family." 

In the context of domestic violence, some form of physical brutality is usually present. Acts such as "beating with hands or objects, biting, spitting, punching, kicking, stabbing, strangling, scalding, burning, and attempted drowning," as well as forced sex with the batterer or others, obviously result in physical and mental pain and suffering. As to the psychological element of suffering, Audrey E. Stone has observed, 

An extensive and continually expanding research literature supports the assertion that domestic violence is associated with a wide range of traumatic psychological reactions. . . . Trauma theory explains the psychological and physical impact of traumatic experiences, including violence, on victims. Research on a wide variety of both acute and chronic trauma has established that exposure to serious traumatic events can lead to exceptional mental states both during and following the trauma. . . . Such altered mental states during trauma exposure can include flashbacks and other forms of re-experiencing the trauma, a generalized flattening of affect to avoid overwhelming emotions associated with the

44. Walker, supra note 29, at xv.
47. Copelon, supra note 9, at 311.
trauma, and pathological feelings of shame or guilt.48

a. The Physical and Psychological Components of Suffering

Lenore Walker writes the following:

While it was perfectly evident that women suffering physical mutilation were battered, some women reported incidents which did not produce physical damage.

... I could not, however, ignore the pleas of battered women who insisted that psychological abuse was often more harmful than the physical.... I found that both forms of violence exist in battering couples and they cannot be separated .... To measure psychological abuse, the severity must be estimated with both the frequency with which it occurs and the subjective impact it has upon the woman. Most of the women in this project describe incidents involving psychological humiliation and verbal harassment as their worst battering experiences, whether or not they had been physically abused.49

Following is a comparison between some of the cases in which European human rights bodies have found treatment that amounted to torture, and incidents of domestic violence that involved similar treatment. These cases are neither the most violent, nor do they include the most severe consequences or injuries, but they show the astonishing similarities of treatment received by victims of officially inflicted torture and victims of spousal abuse.

In the case of Aksoy v. Turkey, the Commission found that the applicant was subjected to ill-treatment by Turkish police. The applicant was “strung up by the arms. This caused injury for which he subsequently received medical treatment. The ill-treatment of the applicant was of such a serious nature that it should be deemed torture within the meaning of Article 3 of the Convention.”50 Zeki Aksoy51 was kept in police custody for at least fourteen days, and the treatment that was deemed torture was alleged to have lasted for “four days, the first two being very intensive. He allegedly lost the

48. Stone, supra note 42, at 300.
49. WALKER, supra note 29, at xiv-xv.
51. Zeki Aksoy was shot and killed on April 16, 1994, allegedly as a result applying to the Commission. See id.
movements of his arms and hands as a result."\(^\text{52}\)

The story of Lorraine is as follows:

The night my arm was so badly damaged, Dick and I had a horrible fight... He choked me to the point I knew I was going unconscious... He reached out and grabbed my right arm and twisted it behind my back to the point where my hand was clear up between my shoulder blades, almost up to my neck. There were a lot of other blows that night, on the shoulder and the back and around my head.

He used an open hand or the side of his hand, like a karate-type thing. I didn't even realize that my arm was injured that bad until I went to the doctor a couple of days afterward and had him count my bruises.... I began to have trouble with real severe backaches and then my arm just wouldn't work. My hand muscles wouldn't work.... My arm would be just horribly tired and I couldn't move it anymore.... I finally had to have surgery. It was thirteen months after it happened that I was finally taken off disability.\(^\text{53}\)

There are certain similarities between the treatments of Aksoy and Lorraine. While the treatment against Aksoy consisted of being strung up by the arms for prolonged periods of time during fourteen days, Lorraine was seriously attacked for a period of a couple of hours during a single night. However, her story revealed that the described event was just one of many similar events during her marriage.\(^\text{54}\) Both Aksoy and Lorraine suffered the same consequences: loss of the movement of the arms. It can be argued that Aksoy's torturers were trained in applying the treatment known as "Palestinian hanging," and that it was designed to disable the victim, while Lorraine's husband was not a person trained to inflict violence that would selectively attack certain bodily functions. Still, the level of suffering and injury caused to Aksoy and Lorraine are comparable as they both were left without movement of the arms.

In another case against Turkey, the Commission found that Ahmet Cakici had been subjected to torture that included "beatings and electric shocks and an injury to his head and ribs."\(^\text{55}\) Although women in the cases of domestic violence are not exposed to electro-

\(^{52}\) Id.

\(^{53}\) Walker, supra note 29, at 89-90.

\(^{54}\) See id. at 88.

shocks, they often undergo treatment similar to that of Cakici. Bernardette Powell's case represents abuse that parallels the violence inflicted on Cakici:

[H]er husband had crushed burning cigarettes into her body, kicked her down the stairs, beat her with a metal ring closed in his fist, forced her to have cold and hot water showers and attempted to assault her with a linoleum knife. . . . [T]his violence, in one form or another, occurred on an average of twice a week. 56

Both Cakici and Powell received beatings to various parts of their bodies. Cakici was exposed to electroshock, and while there is no comparable treatment in Powell's story, one may still imagine that the level of pain inflicted by electroshock is comparable to the level of pain caused by burning cigarettes. In these two cases, the main point of comparison is the level of pain.

b. Rape

In the case of Aydin v. Turkey, the applicant was detained for three days. She was blindfolded. She was tortured to make her give information about the hiding places of terrorists. She was hit by fists, kicked in the eyes, arms and legs. They took off her clothes and on separate occasions she was raped three times. . . . The applicant was taken to a torture chamber. She was stripped naked and forced into two car wheels, which were spun round. She was also beaten and sprayed with pressurized cold water. 57

The Commission referred to the circumstances of the treatment as follows:

[T]he applicant was aged approximately seventeen when she was taken into custody by the security forces. She was isolated from the other members of her family and blindfolded. She was in the circumstances in a highly vulnerable situation. The deliberate ill treatment inflicted on her by beating and being placed in a tire and hosed with pressurized water, combined with the humiliation of being stripped naked, falls clearly within the scope of the prohibition contained in Article 3. Rape committed by an official or person in authority on a detained person must in addition be regarded as treatment or punishment of an especially severe

56. RUSSELL, supra note 8, at 274.
kind. . . . The nature of such an act (rape) which strikes at the heart of the victim's physical and moral integrity, must be characterized as particularly cruel and involving acute physical and psychological suffering. This is aggravated when committed by a person in authority over the victim. Having regard therefore to the extreme vulnerability of the applicant and the deliberate infliction on her of serious and cruel ill-treatment in a coercive and punitive context, the Commission finds that such ill treatment must be regarded as torture . . . . 

The comparison of Aydin's case with the story of a woman named Anne, as reported in Lenore Walker's *The Battered Woman*, reveals many the similarities between the two situations. Anne married at the age of eighteen and in marriage she was subjected to serious abuse by her husband over a period of several years. She described some of the treatment that she received in the following words: "He grabbed me, stuck me in the shower, and started dousing me with cold water. . . . He would sometimes drag me out on the flat roof on a cold night to make love, while I cried and kept saying no." In addition, Anne was often beaten by her husband.

Anne's treatment remarkably resembles the treatment Sukran Aydin received in police custody. Both of them were raped, severely beaten, and exposed to unwanted showers of water. They were of approximately the same age at the time, Aydin seventeen and Anne eighteen.

Yet there were also certain differences. One of the elements often stressed as a dividing line between officially inflicted torture and domestic violence is the fact that victims of officially inflicted torture are kept in custody, unable to escape, while women victims of domestic violence are free to leave any time. However, psychologists who have been working with battered women stress that those women do not feel free to leave because they have been often exposed to serious threats to their own lives, or the lives of close relatives or friends if they leave. Additionally, abusers keep their victims in entire economic dependency, making the chances of their leaving even lower.

58. *Id.* at para. 189.
59. WALKER, *supra* note 29, at 4-5.
60. Diana Russell describes many other cases where battered women were prevented from leaving their abusive husbands or were persecuted after they left:

The experiences of these women illustrate the extraordinary lengths some women have to go to get away from abusive husbands, and the
Battered women often find themselves trapped in their homes, isolated from friends and relatives, under constant threats, economically deprived, with no place to escape. Some men lock up their wives for prolonged periods of time while they inflict various forms of violence upon them. According to Radika Kumaraswamy,

A battered woman’s fear of precipitating deadly violence against herself or her children may make escape dangerous: the lack of resources, legal and community support, or alternative means to survive may make escape seem impossible as well as reinforce her shame, hopelessness, and sense that she deserves this treatment.

The battered woman thus is seemingly not free to leave, making her similar to a prisoner.

Another point of comparison reflects on the person of the perpetrator. In Aydin’s case, the Commission stated that rape in custody committed by a person clothed in the authority of the State where the victim is in a position of isolation and dependency, had a particularly serious stigma attached, not least as a result of the long term and serious mental and psychological trauma and damage that may be caused by such treatment.

In domestic violence cases, by comparison, the aggravating

enormous sacrifices they sometimes have to make; these are likely major reasons why some women stay with abusive husbands. As Ann Jones pointed out, it is a fact that has rarely been explored. Mrs. Ashmore was kidnapped three times by her husband after they were already separated. He followed her to another state even after their divorce. According to Mrs. Ashmore, the police even said that it was fine if she killed him, since there was nothing they could do to protect her.

Mrs. Clayton’s husband tried to murder her several times. She claimed that the police concurred in this conclusion, but said they could not protect her, and advised her to leave the state, which she did. Fortunately for Mrs. Clayton, her husband died a year later.

Mrs. Freeman left her husband, but a bartender, her landlord, her doctor, all cooperated with her husband’s effort to find her again and/or to make it difficult for her to leave him.

Finally, Mrs. Goddard had to leave her home, her family, a good job, her friends, and move to another state because she believed her husband’s threat to kill her was serious. She is still living in extreme fear for her life.

Leaving husbands who view their wives as their property can mean risking death, and some who take this risk are killed.

Russell, supra note 8, at 233.

61. Diana Russell reports the story of Mrs. Jones, whose husband had kept her locked in the apartment for five weeks, raping her repeatedly. See id. at 148.
63. Her fear may be as strong as physical confinement.
64. Aydin v. Turkey at para. 183.
nature of sexual assaults arises precisely from the intimate nature of the relationship between victim and abuser, where violence breaks trust, intimacy and closeness forever. That it occurs in a private sphere, namely the home, makes it no less severe. On the contrary, it shatters a woman's picture of the world and her beliefs and expectations of home as a place of safety, kinship and protection.65

Battered women also suffer from long-term serious mental trauma and damage. David Finkelhor and Kersti Yllo have reported that the victims of spousal rape to whom they talked experienced, in addition to the immediate trauma, serious long-term effects. This sometimes continued even for many years after divorcing their husbands. They talked about “an inability to trust, lingering fear and emotional pain[,]... terrifying flashbacks and nightmares[,]... apprehensions about men and sexual dysfunction—problems that kept them from having a social life or that interfered with subsequent marriages.”66

Similarly, Diana Russell reports that the effects of marital rape on women include suicide and attempted suicide, feelings of anxiety, fear, general mistrust, depression, increased anger, and a desire to hurt.67 Victims refer to the effects of spousal rape as worse than just being beaten. Often they feel that it is a final humiliation, that they are worthless, and that they are in existence simply to be used, as evidenced by certain victims' reports of the boasting of their abusers.68

Diana Russell stresses the parallels between domestic violence and officially inflicted torture with respect to the level of severity of the suffering: “A man’s home may be his castle, but for his wife, it is sometimes a prison. The tactics some abusive husbands use to make their wives comply with them are equivalent to torture, as cruel and destructive of the will as the treatment received by prisoners of

65. Rhonda Copelon writes, [T]he betrayal and shock of being beaten by a partner can be more numbing and world-destroying than being beaten by a jailor. Rape by a husband may be experienced as more devastating and the psychological harms may last longer than when rape is perpetrated by a stranger. Resistance to emotional dependency and the deepest level of trauma is more complicated for the battered woman than for the hostage, as she is courted rather than kidnapped into violence. She must... “unlearn love and trust, hope and self-blame.”

Copelon, supra note 9, at 349.
66. FINKELHOR & YLLO, supra note 38, at 126.
67. See RUSSELL, supra note 8, at 190-205.
war.”

c. The Duration of the Treatment

Feminist researchers, mainly psychologists, who have been working with battered women for many years have identified several phases of a “cycle of violence.” Lenore Walker writes about three identifiable phases: the tension-building stage, the acute battering incident, and the kindness and contrite loving behavior stage. These three phases continue in a cycle that lasts for many years. The actual violence within the cycle may occur once in every few days or once in several months, depending on the speed of the cycle. However, even the phases that do not include physical violence are characterized by other forms of violent behavior: threats, verbal abuse, controlling devices, constant jealousy and dominance.

The duration of ill-treatment within the context of domestic violence often exceeds the duration of ill-treatment in the context of officially inflicted torture. For example, in the cases described in this Part, Ahmet Cakici was held in custody for almost two and a half years; Zeki Aksoy for fourteen to sixteen days; and Sukran Aydin for three days. In all the cases of domestic violence cited in this Part, the abuse continued for several years. Diana Russell writes about the story of Dolores Churchill, who “describes the last seven years of her marriage as a private hell of beatings, grotesque sexual abuse, rape, threats with weapons and harassment administered by her husband.”

4. Purpose

It has long been argued that not every instance of deliberately inflicted pain and suffering that in its severity might be seen as torture satisfies the requirements to be torture as it is recognized by international legal standards. Usually, two additional requirements must be present. One such requirement is that the torture must be inflicted by state officials; the other is that the torture must be inflicted in pursuit of certain prohibited purposes. When the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was created in 1984, it reflected the view

69. RUSSELL, supra note 8, at 273.
70. See generally WALKER, supra note 29, at 55-77.
71. RUSSELL, supra note 8, at 276.
72. See discussion infra Part V.
73. Convention Against Torture and Other Cruel, Inhuman or Degrading
described above on the criteria needed to deem a certain treatment torture.\textsuperscript{74}

Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides as follows:

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

(2) This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.\textsuperscript{75}

According to this definition, the necessary defining element of torture is the set of special purposes in pursuit of which the torture is inflicted. The range of prohibited purposes includes obtaining information or a confession from the person subjected to the torture or a third person; punishing the person subjected to the torture; intimidating or coercing the person subjected to the torture or a third person; and any reason based on discrimination of any kind.

As paragraph 2 of Article 1 of the CAT suggests, the definition of torture found in paragraph 1 is not exclusive in respect to any other international instrument which contains provisions of wider application. There is significant room to argue that the jurisprudence of the European Court of Human Rights has broadened the scope of torture by omitting a requirement for specified purposes. For example, in the case of Ireland v. United Kingdom, the Court, while trying to discern between treatment that amounts to torture and that

\textsuperscript{74} It is still uncertain whether all these requirements are necessary for the other forms of ill-treatment covered by the CAT because the CAT gives only a definition of torture and not of the other forms of ill-treatment. \textit{See CAT.}

\textsuperscript{75} CAT, pt. 1, art. 1, ¶¶ 1-2.
which constitutes inhuman treatment, stated the following:

Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.\(^\text{76}\)

This statement, together with the definition of torture from the CAT, might lead to the conclusion that to be classified as torture, a treatment needs to be applied for the purpose of extracting a confession, a naming of others, or information, or for some other purpose that would satisfy the CAT requirement.

Such a conclusion, however, if applied to the jurisprudence of the European Court of Human Rights, would not be entirely correct. Already, in the case of *Ireland v. United Kingdom*, two judges in their dissenting opinions discussed the question of the purpose of torture. It is important to observe that their dissents were not related to the majority's view on purpose, but to the majority's view on what constitutes torture in terms of severity of suffering and consequences inflicted. It seems that the majority in that case did not give their final or determining view on the issue of the purpose of torture. The purpose issue was sporadically addressed, and even then only to discern between torture and inhuman treatment regarding the practice of the five techniques.

Judge Sir Gerald Fitzmaurice addressed the part of the majority's opinion quoted above as follows:

If it is intended to indicate that the existence of such objectives is a necessary ingredient before the treatment concerned can constitute torture, such an idea must be firmly rejected. Torture is torture whatever its object may be, or even if it has none, other than to cause pain, provided it is inflicted by force . . . .

\[T\]he real question suggested by the references to the objectives of the torture is whether there can ever be an objective *justifying* its use.\(^\text{77}\)

Judge Matscher, while explaining his dissent from the opinion of the majority of the Court and his concurrence with the unanimous


\(^{77}\) *Id.* at 129-30 n.19 (Fitzmaurice, J., dissenting).
Commission opinion that the practice of the five techniques did constitute torture, also addressed the issue of the objectives of torture:

[T]he distinguishing feature of the notion of torture is the systematic, calculated (hence deliberate) and prolonged application of treatment causing physical or psychological suffering of a certain intensity, the aim of which may be to extort confessions, to obtain information or simply to break a person's will in order to compel him to do something he would not otherwise do, or again, to make a person suffer for other reasons (sadism, aggravation of punishment, etc.).

From this opinion, there does not appear to be any single exhaustive list of purposes of torture; rather, any reason may suffice if a certain level of deliberately inflicted suffering is present.

However, it should be stressed that it is necessary that the torture be deliberately inflicted; the infliction of pain or suffering that is only accidental would not be deemed torture. Such a requirement has to be distinguished from the specified purposes requirement. While both refer to mens rea, the element of deliberation is connected with the intentionality of the act as discussed above, and the specified purposes requirement is a step further than the intentionality requirement. The specified purposes requirement excludes from the protection against torture all the acts that would otherwise satisfy the remaining requirements of the definition of torture, but which are not designed to obtain specified purposes.

5. Involvement of the State

The definition of torture in the CAT imposes an additional requirement: it has to be inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

One might argue that in domestic violence cases, the acquiescence of public officials is present since they do not perform their duty to protect women from attacks in their homes. Nevertheless, such a discussion is obviated by the argument here that the involvement of state officials is not a requirement of the European Convention, as determined by the decisions of the Court and the Commission. What is required is the existence of a legal basis

78. Id. at 139 (Matscher, J., dissenting).
79. CAT, pt. 1, art. 1, ¶ 1.
for the responsibility of the state.

There is no question about the existence of state responsibility, under the human rights instruments, for violations of the rights and freedoms guaranteed by those instruments when the violation is committed by organs of the state. That issue is not a concern of this Article, however, because most acts of domestic violence are perpetrated by private individuals, by and large in the private sphere.\(^8\) Therefore, the focus of the present discussion is the responsibility of the state for the acts of private individuals, as it can be discerned from the European human rights bodies' jurisprudence.

In the case of X. & Y. v. Netherlands,\(^8\) Miss Y., a sixteen year old, mentally disabled girl, was raped in a privately-run home for mentally handicapped children. The perpetrator was a son-in-law of the directress, who lived on the premises of the institution but was not employed there. The applicant claimed that there had been a violation of Articles 3, 8, 13 and 14 of the Convention. There was no dispute as to the applicability of Article 8 because the facts underlying the application concerned a matter of private life.\(^8\) During the proceedings, it was established that under the criminal law provisions of the Netherlands, the applicant herself was excluded from the list of persons legally able to bring up the charge of rape, as was her father because the applicant was not placed under his guardianship. The Court found a violation of Article 8 and based its decision on the following grounds:

The Court recalls that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private and family life . . . . These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.\(^8\)

It is crucial that the Court in this decision recognized the responsibility of the state for the acts of private persons. The Court

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80. While some men sometimes abuse their female partners in public spaces, systematic, prolonged, repeated violence perpetrated by men against women in the great majority of incidents occurs at home.
82. See id. at 11.
83. Id.
stressed that the state did not only have a negative obligation to abstain from the acts that may be an infringement of the rights recognized by the Convention, but also had a positive obligation to protect those rights for individuals when those rights are infringed by the acts of other individuals acting solely in their individual private capacity.

Although the applicant alleged that there had also been a violation of Article 3 of the Convention, claiming that she suffered inhuman and degrading treatment, the Court decided not to examine the case under Article 3 because it had already found a violation of Article 8 of the Convention. The Court's decision does not necessarily support the view that there had not been a violation of Article 3 of the Convention for two reasons. First, it is common for allegations of violations of Articles 3 and 8 of the Convention to come together, and the Court always examines the violation of Article 8 first and usually decides not to examine the violation of Article 3 if it finds a violation of Article 8. Also, when no violation under Article 8 is established, it is most likely that there would be no violation of Article 3 either.

Second, if the Court had been of the opinion that Article 3 could not have been applied to the acts of private individuals, it would have been easy for the Court to have so decided, and, therefore, the Court might not have abstained from giving such decision. It is important to note that the concept of the positive obligation of the state and its responsibility for the acts of private citizens is not restricted to the application of Article 8 of the Convention, but is equally valid for the application of Article 3.

Such a view is supported by the Court's judgment in the case of A. v. United Kingdom. The applicant, a nine year-old boy was forcefully beaten by his stepfather with a cane on more than one occasion. After the Court simply stated that treatment of this kind reached the level of severity prohibited by Article 3 of the Convention, there still remained the issue of state responsibility for the beating of the applicant by his stepfather. The Court arrived at the following decision:

The Court considers that the obligation on the high contracting

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86. Id. at para. 21.
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.\(^{87}\)

Although this was not the first decision in relation to Article 3 of the Convention where the Court, arguably, established the responsibility of the state for the acts of private individuals,\(^{88}\) it was the first case where the Court was to decide on an alleged violation of Article 3 in an entirely private context. The judgment indicated both that the state was responsible for the ill-treatment inflicted by the private individuals and that the acts of private individuals shall be regarded, if those acts attain a required level of severity, as torture and the other forms of ill-treatment covered by Article 3 of the Convention.

There is yet another significant aspect of the Court’s decision in this case. This is one of the first cases where no distinction was made among the categories of treatment covered by Article 3. The Court simply stated that in the case of *A. v. United Kingdom*, there was a violation of Article 3.\(^{89}\) Such an approach not only expresses a recent tendency to not distinguish among the elements of the various forms of ill-treatment, but also stresses that all forms of ill-treatment prohibited by Article 3 of the Convention may be inflicted by the acts of private citizens. This decision resolves the long-persisting dilemma of whether some forms of ill-treatment, specifically torture, might exist where the acts of private individuals are at issue. It is not insignificant that the decision in the case of *A. v. United Kingdom* was reached unanimously. This fact gives the judgment strong credibility.

\(^{87}\) *Id.* at para. 22.

\(^{88}\) *See, e.g.*, H. L. R. v. France, Eur. Ct. H.R., No. 11/1996/630/813, Apr. 22, 1997. The Court reasoned that by virtue of the positive obligations incumbent on the States and the absolute character of the right concerned, Article 3 applied to inhuman and degrading treatment resulting from the actions of private individuals. This is present where a contracting State has, through its acts or passivity, failed to comply with its duties under the Convention.

*Id.*

\(^{89}\) Although the Commission had labeled the treatment in question as degrading treatment and punishment, the Court did not follow the Commission’s statement in this respect.
and suggests that the opinions expressed therein would most likely be followed in the future.

### III. Inhuman Treatment

As noted in the discussion of torture in Part II of this Article, the Court defines inhuman treatment as that which deliberately causes severe mental or physical suffering. The definition of inhuman treatment encompasses the same elements as the definition of torture. The difference between the two is only one of degree: torture represents an aggravated form of inhuman treatment, involving more serious suffering and greater cruelty.\(^{90}\)

In the case of *Ireland v. United Kingdom*, the Court’s judgment was that the practice of the five techniques that was applied to suspected Irish Republican Army terrorists during interrogation by British officials amounted to inhuman treatment within the meaning of Article 3. As mentioned in Part II of this Article, the five techniques consisted of wall-standing, hooding, subjection to noise, sleep deprivation, and deprivation of food and drink.\(^{91}\) The Court found that those techniques were applied in combination and caused "if not actual bodily injury, at least intense physical and mental suffering . . . and led to acute psychiatric disturbances during interrogation."\(^{92}\) The Court found that the five techniques amounted to inhuman treatment, without specifying what elements of the treatment were considered crucial in reaching the decision.

In the following three cases, the Court found both inhuman and degrading treatment, but did not distinguish among them as which specific elements constituted inhuman treatment and which constituted degrading treatment. First, in *Tomasi v. France*\(^{93}\) the

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90. As to the practical consequences of deeming conduct to be torture as opposed to inhuman treatment, some have observed that a stronger degree of condemnation is associated with the term torture than with inhuman treatment. Historically, that point has significance in that torture has longer been recognized as one of the most serious crimes against humanity, grave crimes, or war crimes, and as the most serious form of ill-treatment proscribed by international human rights instruments. However, this distinction has been losing its significance recently as far as the European human rights enforcement bodies are concerned. The European Court of Human Rights has recently been inclined to announce a violation of Article 3 of the European Convention without labeling the treatment in question as torture or inhuman or degrading treatment or punishment.


92. *Id.* at para. 167.

applicant was held in police custody for two days while he "was struck... by police-officers[,]... not allowed any rest[,]... left without food[,]... left naked in front of an open window for two to three hours[,]... then dressed and beaten up."94 This treatment left bruises on his chest, superficial scratches on his body, and a hematoma on his head. The Court characterized this treatment as inhuman and degrading. The applicant stated in his application that the blows inflicted upon him "had not only caused him intense physical and mental suffering; they had also aroused in him feelings of fear, anguish and inferiority capable of humiliating him and breaking his physical or moral resistance."95 The Commission expressed the view that "[a]lthough the injuries observed might appear to be relatively slight, they nevertheless constituted outward signs of the use of physical force on an individual deprived of his liberty and therefore in a state of inferiority."96 The treatment, therefore, was both inhuman and degrading.

Second, in the case of Ribitch v. Austria,97 the applicant was held in police custody for two to three days, where, while questioned by police officers as a crime suspect, he was "grossly insulted and then assaulted repeatedly.... He received punches to the head, kidneys and right arm and kicks to the upper leg and kidneys. He was pulled to the ground by the hair and his head was banged against the floor."98 This treatment caused him "bruises on his right arm and one thigh and he suffered from a cervical syndrome, vomiting, diarrhea and a violent headache."99 The Court found that he had suffered inhuman and degrading treatment, explaining that "in respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention."100

Third, the Commission found in Tekin v. Turkey101 that "it has been established beyond reasonable doubt that the applicant was kept in a cold and dark cell, blindfolded and treated in a way which

94. Id. at para 45.
95. Id. at para. 112.
96. Id. at para. 113.
98. Id. at para. 12.
99. Id.
100. Id. at para. 38.
left wounds and bruises on his body in connection with his interrogation.\textsuperscript{102} The Commission's view was that such treatment amounted at least to inhuman and degrading treatment within the meaning of Article 3 of the Convention. The Commission explicitly stated that the treatment against the applicant was to be regarded as a whole, without distinguishing between inhuman and degrading elements.

Again, striking parallels may be drawn to the incidents of domestic violence. For example, Shirley, a woman interviewed during the course of research on marital rape, reported that she was, \textit{inter alia}, forced by her husband "to sit in a chair for hours on end while he watched her. If she looked at the clock, she got hit . . . ."\textsuperscript{103} This treatment may be compared to that part of the "five techniques" described as "wall-standing."\textsuperscript{104} While wall-standing included standing in an unpleasant position, Shirley had to sit on the edge of the chair for hours, which undoubtedly was very unpleasant and even painful after a long period of time. The discomfort of her position was aggravated by the fact that her husband would watch her continuously. The treatments in both cases did not include the application of physical force and in both cases the abusers kept the victims in a stress position for long periods of time, causing suffering without leaving physical injuries.

Lenore Walker divides physical assaults against women within the context of domestic violence into two major categories: minor physical assaults and major physical assaults. According to Walker, the former includes "a slap in the face, a smack on the rear end, a pinch on the cheek or arm, a playful punch and hair pulling."\textsuperscript{105} These incidents were considered battering only if they occurred regularly. Within the category of major physical assaults, Walker included slaps and punching all over the body, choking to the point of consciousness loss; pushing and throwing across a room, down the stairs, or against objects; severe shaking; arms twisted or broken; burns from irons, cigarettes, and scalding liquids; injuries from thrown objects; forced shaving of pubic hair; forced violent sexual acts; stabbing and mutilation with a variety of objects, including

\textsuperscript{102} \textit{Id.} at para. 214.
\textsuperscript{103} Finkelhor \& Yllo, \textit{supra} note 38, at 19.
\textsuperscript{105} WALKER, \textit{supra} note 29, at 79.
knives and hatchets; and gunshot wounds.\textsuperscript{106}

Such treatment has resulted in more or less severe consequences, such as

broken necks and backs[,] ... [the] loss of a kidney and severe injury to [the] second kidney[,] ... serious internal bleeding and bruises, swollen eyes and noses, [and] lost teeth. ... Surgery was required in a large number of cases. Women were often knocked unconscious by the blows. Many others were choking nearly unconscious.\textsuperscript{107}

Subsumption of the above described examples of incidents of domestic violence under the forms of ill-treatment prohibited by Article 3 of the Convention would depend on the level of severity reached in each particular case. This level is to be judged according to all the relevant circumstances of the case. While, arguably, some of the incidents of domestic violence may well satisfy the level of severity regarding physical and psychological suffering combined with the duration necessary for treatment to amount to torture, most of them would undoubtedly amount to the level of inhuman treatment or inhuman and degrading treatment combined.

\textbf{IV. Degrading Treatment}

In the majority of its decisions on the violation of Article 3 of the Convention, the Court and the Commission have found that the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{106} \textit{Id.} at 79.
\item \textsuperscript{107} \textit{Id.} at 79-80. As Rhonda Copelon notes,
\begin{quote}
A study of 100 battered women in the United States reported:
All had received the minimum of bruises, but 44 had also received lacerations of which 17 were due to attack with a sharp instrument such as a bottle, knife or razor. Twenty-six had received fractures of nose, teeth or ribs and eight had fractures of other bones, ranging from fingers and arms to jaw and skull. Two had their jaws dislocated and two others had similar injuries to the shoulder. There was evidence of retinal damage in two women and one had epilepsy as a result of her injuries. In 19 cases there were allegations that strangulation attempts had been made. Burns and scalds occurred in eleven and bites in seven cases. All the women had been attacked with the minimum of a clenched fist, but 59 claimed that kicking was a regular feature. In 42 cases a weapon was used, usually the first available object, but in fifteen cases this was the same object each time, eight being a belt with a buckle.
\end{quote}
\end{itemize}
\end{footnotesize}

treatment in question represented both inhuman and degrading treatment, without distinguishing between the two as to what elements were seen as constituting inhuman treatment and what elements as constituting degrading treatment. However, with respect to the label degrading treatment, in its judgment in the case of Ireland v. United Kingdom, the Court, when referring to the practice of the five techniques, held that

the techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.\(^{108}\)

In the case of Raninen v. Finland,\(^{109}\) the Commission found a breach of Article 3 of the Convention. The applicant had been handcuffed while being transferred from the Court, where he was sentenced to imprisonment as a conscientious objector, to the County Prison. The handcuffing had occurred in a courtyard in the presence of the applicant's support group and had lasted for about two hours during the transportation to the prison. The Commission expressed the view that this treatment amounted to degrading treatment within the meaning of Article 3. As a rationale, the Commission stated that

[a] treatment may also be said to be degrading if it grossly humiliates a person in front of others or drives him to act against his will or conscience. . . . A measure which does not involve physical ill-treatment but lowers a person in rank, position, reputation or character may also constitute degrading treatment, but again provided it attains a minimum level of severity, thereby interfering with human dignity. . . . [But] the absence of publicity does not necessarily prevent the treatment from attaining the proscribed level of severity. It may suffice that the victim is humiliated in his own eyes. . . . It is essential whether or not the treatment in question denotes contempt or lack of respect for the personality of the person subjected to it and whether it was designed to humiliate or debase him instead of, or in addition to, achieving other aims.\(^{110}\)

These factors are in addition to the elements noted by the Court in Ireland v. United Kingdom.

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110. Id. at paras. 50-52.
From various cases in which the Court and the Commission have deemed a treatment to be a degrading treatment within the meaning of Article 3 of the Convention, two types of effects can be discerned to qualify a treatment as degrading. One such set of effects includes the arousal of feelings of fear, anguish or inferiority in the victim. Those feelings have to reach such an extent that they may humiliate or debase the victim and break the victim's physical or moral resistance. The other set of effects includes the gross humiliation of a victim in front of others or in the victim's own eyes. For both the first and the second group of effects, it is required that the treatment in question denote contempt or a lack of respect for the victim and that it be designed to humiliate or debase the victim.

In the domestic violence context, marital rape certainly has the most degrading effect. Describing the impact of marital rape, David Finkelhor and Kersti Yllo state, "An intense feeling of humiliation was another major response." (This followed the first response of hatred and fury.) "For many women this [humiliation] took the form of feeling defiled or unclean. A quarter of our interviewees reported that they felt dirty and degraded in the aftermath of rape." The same authors also report that "[r]esearch on rape victims has shown that they overwhelmingly experience fear, pain, humiliation, and disgust." Feelings of fear and terror persist for years even after the women have left their abusive relationships. A long-lasting and severe negative effect of marital rape is reflected in the women's low self-esteem. Indeed, one of the men who battered and raped his wife claimed that "he had no interest in inflicting physical pain on his wife but wanted, instead, to dominate and degrade her." Such claims explicitly show that marital rape is often deliberately designed to humiliate or debase. Victims of marital rape feel degraded and humiliated in their own eyes and develop a negative image of themselves, which, in the views of the European Court and Commission, suffices to establish degrading treatment.

112. FINKELHOR & YLLO, supra note 38, at 118-19.
113. Id. at 119.
114. Id. at 117.
115. See id. at 130-36.
116. RUSSELL, supra note 8, at 134.
Marital rape is not the only act in the repertoire of domestic violence that includes elements of degrading treatment. Incidents of actual physical violence or threats of physical violence, both of which almost always are accompanied by verbal abuse that includes insulting remarks about a woman's body, personality, abilities or behavior, are meant to humiliate or debase women and show a significant lack of respect for them. It seems that most episodes of domestic violence, taken as a whole, encompass the elements of either inhuman and degrading treatment or, in the most severe cases, torture and degrading treatment.

V. Degrading Punishment

The element necessary for treatment to fall under the category of degrading punishment is that its purpose has to be to punish. Violent acts against women, perpetrated by their male partners, are sometimes motivated by the purpose of punishment. Some men inflict violence on their female partners partly because they feel that the victim deserves to be punished for some reason. Sometimes it would be to make her obey him, to correct her, or to discipline her.

All of these explanations have one thing in common: the view that the woman is the one to be blamed. The concept of blame is closely connected with the concept of punishment. Punishment is usually "justified" by an act of the person against whom it is inflicted; the act was wrong and therefore the person who is punished is blameworthy. It is not only the batterer who feels justified in his right to punish his female partner: "The batterer feels justified in his violent behavior because society says it is truly the woman's fault, not his. It perpetuates his notion that he should beat her because she did something to make him angry." Lenore Walker gives some of the reasons behind the myth that women need to be punished by their husbands:

The myth that battered women provoke their beatings by pushing their men beyond the breaking point is a popular one. Everyone can recount a story where a woman seemed to deserve what she

117. Russell cites the words of a battered woman about her husband's behavior: "He'd come home and knock me in the head saying: 'Here's for what you did today. If you didn't do it today, you'll do it tomorrow.'" Id. at 230.
118. Another husband would beat his wife saying, "'You've got to learn to behave!"' Id. at 150.
119. WALKER, supra note 29, at 15.
got: she was too bossy, too insulting, too sloppy, too uppity, too angry, too obnoxious, too provocative, or too something else. In a culture where everyone takes sides between winners and losers, women who continuously get beaten are thought to deserve it. It is assumed that if only they would change their behavior, the batterer could regain his self-control. The stories of the women in this study indicate that batterers lose self-control because of their own internal reasons, not because of what the women did or did not . . . .

Concerning the element of degradation, much of what has been discussed in Part IV on degrading treatment is applicable here. In most cases, the Court and the Commission have found both degrading treatment and punishment, regarding the treatment in question as a whole.

As in all other cases where a violation of Article 3 of the Convention has been involved, the Court and the Commission have continuously stressed the relative nature of the assessment of the severity of the treatment questioned in each case by taking into consideration all of the circumstances of the case. For example, in the case of *Warwick v. United Kingdom*, the Commission found that the treatment at issue, which consisted of administering one stroke of a cane to the hand of a sixteen year-old girl by a man, in the presence of another man, which left a physical injury the effects of which were visible for over a week, attained the level of severity necessary to amount to degrading punishment prohibited by Article 3 of the Convention. By contrast, in the case of *Costello-Roberts v. United Kingdom*, the Court found that the applicant had been "slippered three times on his buttocks through his shorts with a rubber-soled gym shoe" and that this had not produced any severe or long-lasting effects as a result. The treatment thus did not reach the minimum threshold of severity required.

In the case of *A. v. United Kingdom*, the applicant, a nine year-old boy, was over a period of approximately one week caned by his stepfather, over the clothes, not less than six times. The Court stated only that the applicant had been beaten forcefully with a cane on more than one occasion, and that this kind

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120. *Id.*
123. *Id.* at para. 32.
of treatment reaches the level of severity prohibited by Article 3, whereas the Commission labeled it degrading treatment and punishment.

Certain specific circumstances in the domestic violence context may add to the degrading character of abusive treatment. One example would be any punishment that is arbitrarily applied to an adult. Also, men are usually physically stronger than women, so that women are unable to defend themselves, thus adding to their degradation. Women who are victims of domestic violence are often regarded as deserving it for their perceived shortcomings as wives or partners—this adds to their humiliation. Finally, social stigma and shame attach to the victims, thus aggravating the humiliating nature of their treatment.

VI. Inhuman Punishment

As for the category of inhuman punishment, there appear to be no reported cases decided either by the Court or the Commission where a breach of Article 3 of the Convention has been established on this basis. Therefore, a comparison between the jurisprudence of the European human rights enforcement bodies and the incidents of domestic violence on this matter cannot be made.

VII. Interpretation of the Convention

The text of the European Convention on Human Rights and Fundamental Freedoms does not differ significantly from the texts of other international or regional human rights instruments that protect mainly what are usually labeled as first generation rights: civil and political rights. However, due to the interpretation of the Convention by the European human rights enforcement bodies, the European Convention has been used in a way that has broadened the scope of certain rights and strengthened the responsibility of the states to uphold them. This is certainly the case with respect to Article 3 of the Convention. The Court and the Commission have reduced the requirements for torture by not including into its definition the element of the involvement of the state officials and,

arguably, the element of specified purposes. Such an approach is crucial to the argument that European human rights bodies are very close to accepting certain cases of domestic violence as a breach of Article 3. Therefore, further observations on the interpretation of the Convention are necessary.

Already in the case of Ireland v. United Kingdom, Judge Evrigenis, referring to the interpretation of the Convention, stated that the Convention has to be interpreted by taking the current situation as well as history into consideration. Such an approach strongly favors seeing cases of domestic violence as possible violations of Article 3.

Judge Evrigenis's view of how the Convention ought to be interpreted differs significantly from the approach of Judge Sir Gerald Fitzmaurice, who argues as follows:

It would be reasonable to suppose that, at the date when the Convention was framed, during the aftermath of war and atrocity, it would have been the severer forms of ill-treatment that the Parties would have had in mind, those that . . . amount recognizably to torture or inhuman treatment, etc. These were, at the time, well known, within contemporary experience, easily discerned. To go further would have necessitated much more careful and detailed consideration—and drafting.

This view holds that the forms of ill-treatment covered by Article 3 are those that a majority of people would immediately recognize as such, or, in other words, those that are so manifestly wrong that we need not think about them. Furthermore, Judge Fitzmaurice seemed to suggest that the Convention is to be interpreted according to the standards of the time when it was adopted.

History shows that the Court has undertaken a different approach. The Court has often referred to the Convention as a living instrument that has to follow the ever-developing and ever-improving standards of the social judgments relevant to legal judgments in Europe. These developments include not only scientific or

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127. Id. at para. 17 (Fitzmaurice, J., dissenting).
128. There are many problems with this view—it is vague and it is disputable whether a common European standard exists at all. The community that includes countries such as Norway, Portugal, Cyprus and Bulgaria may encounter many difficulties in an attempt to discern common standards for itself. For the purposes of this Article, however, it is sufficient to note that the idea of a European standard has
technical aspects of progress, but also changes in human conscience about such issues as the treatment of children, the treatment of psychiatric patients in hospitals, the conditions in prisons, as well as wife abuse. On many of these issues, the Court has defended the position that the Convention should be applied according to the contemporary standards of living society, and not the time when it was drafted. As far as Article 3 is concerned, such an attitude was expressed in the cases involving corporal punishment of children, where the Court stated explicitly that

[t]he Court must also recall that the Convention is a living instrument which must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.129

The European human rights enforcement bodies have also disagreed with Judge Fitzmaurice’s opinion regarding what should be seen as constituting ill treatment under Article 3. They are more likely to defend the position of Judge O’Donoghue, expressed in his dissenting opinion in Ireland v. United Kingdom. In that case, when discussing whether the five techniques constituted torture, Judge O’Donoghue stated, “One is not bound to regard torture as only present in a mediaeval dungeon where the appliances of rack and thumbscrew or similar devices were employed.”130 This suggests that times have changed and we are to interpret the scope and meaning of the categories of treatment prohibited in Article 3 according to present day standards.

Consequently, the Court has expanded the scope of Article 3 in significant ways. This expansion has been connected mostly to deportation cases, where the applicants were foreign nationals that were under a deportation order from the state party to the Convention.

Starting with the case of Soering v. United Kingdom, and following in cases such as Chahal v. United Kingdom, Ahmed v. Austria, and many others, the expansion of the scope of Article 3 has gone in a few directions. The Court has stated that Article 3

consistentely been used by the Court to introduce progressive ideas.

encompasses all persons within the jurisdiction of the state, despite the fact that the applicants may be found to be in the territory of the state party illegally. Another direction of expansion has been the holding that there is a violation of Article 3 even when there is only a threat of ill treatment in a particular situation, and when such a threat is coming from a country that is not a party to the Convention. The state party would be held responsible because with its act of deportation if it would have exposed the applicant to a real and substantial risk of being subjected to one of the prohibited treatments.

While in the type of case just mentioned the threat was at least coming from the state authorities of another country, in the case of *H. R. L. v. France*, the Court went a step further. In this case, the threat of prohibited ill-treatment originated from the acts of private individuals—drug dealers in Columbia. Although the Court found no violation of Article 3 on the ground that there was not enough evidence of the treatment as being real and substantial, it still held that there would be no obstacle to imposing state responsibility in cases where the acts of private individuals were in question.

In *D. v United Kingdom*, the ill treatment at issue consisted of the fact that the applicant who suffered from AIDS would receive a lower quality of medical treatment for his disease in St. Kitts, to whence he was to be deported because of a drug smuggling conviction, than in the United Kingdom. In this case, it is hard to identify the source of the risk of, or the responsibility either of another state or private individuals for, the lack of medical treatment of persons with AIDS on St. Kitts. The Court found a violation of Article 3 on the part of the United Kingdom, however, thus establishing the view that the source of the risk, or the source of the acts that represent the violation of protected rights, are irrelevant. The only relevant element is that there is some ground for state responsibility.

In all of these cases, the Court has based its opinion on the absolute character of Article 3. Not only are the states unable to derogate from, limit, or put reservations on the protections of Article 3, but they might even be held responsible for violations that occur outside of their territories and where the source of the violation was completely unrelated to the authorities of the state party to the Convention. Such developments of the scope of Article 3 are

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significant because they show that there is a better likelihood that the absolute character of Article 3 would encompass the protection of women in domestic violence cases.

**VIII. Conclusion**

In this Article, two sets of stories have been compared: cases that represent torture and other forms of ill-treatment, seen through the lenses of the European human rights enforcement bodies, and the cases of a great number of women who have been exposed daily to the atrocities of domestic violence. Some centuries ago, the word torture exclusively referred to the type of treatment applied to a person indicted for a crime for the purpose of obtaining his or her confession. But times have changed. In the last century, the atrocities committed against individuals and peoples in many wars, as well as during periods of "peace," have impeded the development of human rights and strongly influenced the notion of the legal standards to be applied in cases involving various forms of ill-treatment. European human rights bodies have shown a great deal of compliance with the ideas that support the view that ill-treatment is not to be tolerated by the law, no matter where it occurs. In a period of some thirty years, these bodies have significantly broadened the scope of the application of Article 3 of the European Convention.

It is uncertain what will be seen by the Court as insufficient protection. On the one hand, there are positive obligations of the states to secure the rights stemming from the Convention to everyone. On the other hand, the margin of appreciation doctrine might give wide discretion to the states as to what measures and tools are the most appropriate regarding the various rights of the Convention.\textsuperscript{132}

If cases of domestic violence were to be regarded as violations of the rights stemming from the Convention, it would be an important milestone for women. The Court might order changes in domestic legislation as well as introduce positive measures for the protection of women against violence in their homes. Secondarily, the decisions of the European Court would probably be regarded as illustrating a

\textsuperscript{132} In the case of Stabbing v. United Kingdom, the Court found that there was no violation of Article 3 of the Convention where the victim was not able to sue for civil damages an adoptive father who allegedly molested the victim during several years of her childhood because the limitation period was five years after the victim's eighteenth birthday. The Court expressed the opinion that it was sufficient that the father could have been criminally prosecuted.
significant change in the attitudes toward women and the responsibility for violence inflicted against them. Finally, women would be able to seek damages for the sufferings they have undergone and to reinforce the rights that have been denied them in their domestic legal systems.133

The progressive direction of the Court’s jurisprudence has been expressed in various areas of life. In cases such as *Marckx v. Belgium*134 and *Johnston v. Ireland,*135 the Court protected the rights of illegitimate children. In *Dudgeon v. United Kingdom,*136 the Court expressed the view that the criminalization of certain homosexual activities among consenting adults in Ireland is an infringement of the right to privacy. In *B. v. France,*137 it was decided that the inability of a transsexual to change names according to the new gender following the operation is a violation of the right to private life. In *Sunday Times v. United Kingdom,*138 the Court fiercely protected the freedom of expression and other rights.

The broad interpretation of the scope and purpose of Article 3 of the Convention, as well as the progressive tendencies of many of the Court's judgments, some of which are mentioned above, support the conclusion that the Court would show little hesitation in finding a case of significant violence against a woman in the private sphere to be a violation of Article 3. One must not forget, however, that the Court is not bound by its previous decisions. Therefore, the final conclusion cannot be discerned from the previous judgments of the Court with absolute certainty. Still, the Court has shown a tendency to repeat its previous decisions in similar matters.

There are certain other elements that may influence the Court’s decision. One of these is the growing awareness of the phenomenon of violence against women as a widespread cause of gender inequality as well as women’s health problems. There is also a growing understanding of domestic violence as a public issue and of the state’s responsibility for the non-prosecution of perpetrators. There is little doubt that such developments would significantly influence the future jurisprudence of the European Court of Human Rights. Also, one of

133. The reason for this is that the protection of the European human rights bodies may be sought only after all domestic remedies are exhausted.
the expressed policies of the Council of Europe is the achievement of equal gender representation by the European Court of Human Rights. It might be expected that a greater number of women judges would increase sensibility towards women’s issues.

This Article began by asking how likely it would be for the Court to accept an allegation that violence that occurred in the private sphere against a woman by her male partner as a violation of Article 3 of the Convention. The arguments presented, taken together, strongly support the view that the answer to the question is much closer to the positive protection of women than not.