



UiO : **Det juridiske fakultet**

JUS 2111

**INTERNASJONALE MENNESKERETTIGHETER**  
*Institusjonell del*

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## 4 Forholdet mellom negative og positive statsplikter

### 4.1 Oppgave

***Er EMK artikkel 8 en positiv eller negativ rettighet?***

**Diskuter i 2 min. med den som sitter ved siden av deg.**

#### **Art. 8 Retten til respekt for privatliv og familieliv**

1. Enhver har rett til respekt for sitt privatliv og familieliv, sitt hjem og sin korrespondanse.
2. Det skal ikke skje noe inngrep av offentlig myndighet i utøvelsen av denne rettighet unntatt når dette er i samsvar med loven og er nødvendig i et demokratisk samfunn av hensyn til den nasjonale sikkerhet, offentlige trygghet eller landets økonomiske velferd, for å forebygge uorden eller kriminalitet, for å beskytte helse eller moral, eller for å beskytte andres rettigheter og friheter.

## Nunez mot Norge (EMD, 2011)

Premiss 68:

“The Court recalls that, while the essential object of this provision is to protect the individual against arbitrary action by the public authorities, there may in addition be positive obligations inherent in effective “respect” for family life. However, the boundaries between the State’s positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar....”

## Premiss 69:

Since the applicable principles are similar, the Court does not find it necessary to determine whether in the present case the impugned decision, namely the order to expel the applicant with a two-year prohibition on re-entry, constitutes an interference with her exercise of the right to respect for her family life or is to be seen as one involving an allegation of failure on the part of the respondent State to comply with a positive obligation.

....

## 4.2 Litt om det tradisjonelle (utdaterte) utgangspunktet

Sivile og politiske rettigheter: Passivitetsplikter (negative plikter)

Økonomiske, sosiale og kulturelle rettigheter: Positive plikter

Dette er kritisert:

- Skillet anses ikke å gjenfinnes i praksis. Dermed er det lite treffende å klassifisere rettigheter *enten* som positive *eller* negative
- Skillet bidrar til å svekke muligheten til å håndheve brudd på ØSK-rettigheter

## 4.3 En mer treffende tilnærming

- Å fokusere på innholdet i statenes ulike forpliktelser fremfor hvilken kategori en rettighet skal plasseres i, gir det beste analytiske utgangspunktet ved tolkning og implementering av menneskerettigheter
- Rettigheter inneholder en «vifte» av *ulike* plikter
- «Viften» går ut på at statene skal:
  - «respect» [respektere],
  - «protect» [beskytte] og
  - «fulfill» [sikre]hver menneskerettighet.

## «Respect, protect, fulfill»:

Respektere: Plikt til ikke å gripe inn  
(Passivitetsplikt)

Beskytte: Plikt til å beskytte oss mot  
menneskerettskrenkelser foretatt av  
andre ikke-statlige aktører  
(Positiv plikt)

Sikre: Offentlige myndigheter skal aktivt  
iverksette ulike tiltak for å sikre at  
rettigheter oppfylles  
(Positiv plikt)

## 4.4 Forholdet mellom umiddelbare og progressive statsplikter

Umiddelbare plikter - gjelder med en gang staten blir part til en konvensjon

Progressive plikter - en rettighet skal realiseres over tid

SP-rettigheter: en tendens (men ikke et fast kjennetegn) at disse krever umiddelbar gjennomføring

ØSK-rettigheter: inneholder gjerne en kombinasjon av umiddelbare og progressive forpliktelser



SP art. 2(1) har følgende ordlyd:

Hver konvensjonspart forplikter seg til å respektere de rettigheter som anerkjennes i denne konvensjon, og å sikre dem for alle som befinner seg på dens territorium og er undergitt dens jurisdiksjon, uten forskjellsbehandling av noe slag ...

I ØSK art. 2(1) heter det:

Hver konvensjonspart forplikter seg til så vel hver for seg som gjennom internasjonal bistand og internasjonalt samarbeid, særlig på det økonomiske og tekniske område, å sette alt inn på at de rettigheter som anerkjennes av denne konvensjon, **gradvis blir gjennomført fullt ut** med alle egnede midler, og da særlig ved lovgivningstiltak.

Flere deler av forpliktelsene etter ØSK gjelder umiddelbart:

- ØSK-rettigheter skal ivaretas uten diskriminering
- Staten skal ta aktive skritt for å realisere ulike ØSK-rettigheter:

“while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant’s entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.” (General Comment nr. 3 punkt 2)

- Staten skal selv følge med på i hvilken grad ØSK-rettigheter ivaretas
- Den har plikt til å ivareta et visst minstenivå (sett i forhold til statens ressurser)
- Tilbakeskritt (svekkelse av rettighetsnivået) krever en særskilt begrunnelse

## ØSK art. 12:

1. Konvensjonspartene anerkjenner retten for enhver til den høyest oppnåelige helsestandard både fysisk og psykisk.
2. De tiltak som konvensjonspartene treffer for å oppnå full virkeliggjørelse for denne rettighet, skal omfatte tiltak som er nødvendige for å:
  - a. Minske foster- og spedbarnsdødeligheten og fremme barnets sunne utvikling,
  - b. Forbedre alle sider ved hygienen i miljø og industri,
  - c. Forebygge, behandle og kontrollere epidemiske, endemiske, yrkesmessige og andre sykdommer,
  - d. Skape vilkår som trykker alle legebehandling og pleie under sykdom.

## 5 Nærmere om statens plikt til å forebygge og forhindre vold i hjemmet

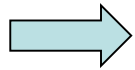
### 5.1 Hindringer

To underliggende hindre på dette feltet:

- Hvor langt rekker statens plikter i møte med hva som skjer i den private sfære?
  - Gammel tilnærming: Staten skal ikke gripe inn i privatlivet.
- Tematikken har hatt en tendens til å bli analysert i et «nøytralt» perspektiv: at dette er like relevant for alle.
  - MEN: Statistikk viser at vold i den private svære rammer langt flere kvinner enn menn.

“Prevalence rates for Europe do not exist, but many member States have increasingly conducted surveys to measure the extent of violence against women nationally. Although methodologies vary, an overview of these surveys suggests that across countries, one-fifth to one-quarter of all women have experienced physical violence at least once during their adult lives and more than one-tenth have suffered sexual violence involving the use of force. Figures for all forms of violence, including stalking, are as high as 45%. The majority of such violent acts are carried out by men in their immediate social environment, most often by partners and ex-partners.”

(Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, 2011, punkt 2).



Spørsmål om vold i hjemmet har en klar kjønnsdimensjon!

Hvordan favner menneskerettighetene om dette problemfeltet?

Hva er utviklingstrekkene?

## 5.2 FNs kvinneskikrimineringskonvensjon (KDK)

### Artikkel 1:

I denne konvensjon menes med uttrykket «diskriminering av kvinner», enhver forskjellsbehandling, utestengning eller begrensning på grunnlag av kjønn som har som virkning eller formål å oppheve eller svekke anerkjennelsen, nytelsen eller utøvelsen av kvinners menneskerettigheter og grunnleggende friheter på det politiske, økonomiske, sosiale, kulturelle, sivile eller ethvert annet område, uavhengig av sivilstatus og med likestilling mellom menn og kvinner som utgangspunkt.

## **Statens plikt til å sikre effektivt vern mot kjønnsbasert vold**

### **Kilder etter KDK:**

*Generelle rekommandasjoner*

(GR nr. 12 (1989) *Violence against women*)

GR nr. 19 (1992) *Violence against women*

GR nr. 28 (2010) *on the core obligations of States parties under article 2 of the Convention*

GR nr. 35 (2017) *on gender-based violence*

*against women, updating general recommendation No. 19*

*Individklagesaker om kjønnsbasert vold*

Temaet tas opp i en rekke *konkluderende observasjoner til statsrapporter*

*De ulike typene konvensjonspraksis bindes på dette feltet sammen og trekker samme vei. Det styrker vekten.*



## 5.2.1 *Generelle rekommandasjoner*

### GR nr. 19:

“6. The Convention in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that 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. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.

7. Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention. These rights and freedoms include:

- (a) The right to life;
- (b) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment;
- (c) The right to equal protection according to humanitarian norms in time of international or internal armed conflict;

- (d) The right to liberty and security of person;
- (e) The right to equal protection under the law;
- (f) The right to equality in the family;
- (g) The right to the highest standard attainable of physical and mental health;
- (h) The right to just and favourable conditions of work.

8. The Convention applies to **violence perpetrated by public authorities**. Such acts of violence may breach that State's obligations under general international human rights law and under other conventions, in addition to breaching this Convention.

9. It is emphasized, however, that discrimination under the Convention is not restricted to action by or on behalf of Governments (see articles 2 (e), 2 (f) and 5). For example, under article 2 (e) the Convention calls on States parties to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. **Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.**

## GR nr. 28

### III. General obligations contained in article 2

#### A. Introductory sentence of article 2

“19. Discrimination against women on the basis of sex and gender comprises, as stated in general recommendation No. 19 on violence against women, gender-based violence, namely, violence that is directed against a woman because she is a woman or violence that affects women disproportionately. It is a form of discrimination that seriously inhibits women’s ability to enjoy and exercise their human rights and fundamental freedoms on the basis of equality with men. **It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty, the violence that occurs within the family or domestic unit or within any other interpersonal relationship, or violence perpetrated or condoned by the State or its agents regardless of where it occurs.** Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence. States parties have a due diligence obligation to prevent, investigate, prosecute and punish such acts of gender-based violence.”

## GR nr. 35

«The present general recommendation complements and updates the guidance to States parties set out in general recommendation No. 19 and should be read in conjunction with it.»

(Punkt 8)

For nærmere informasjon, se:

<https://www.youtube.com/watch?v=PkhUINmj1ZI>

(laget av The Office of the UN High Commissioner for Human Rights)

## 5.2.2 *Individklagesaker*

KDK-komiteen har behandlet en rekke saker som omhandler vold mot kvinner.

Individklagesakene ligger her:

<http://juris.ohchr.org/en/search/results?Bodies=3&sortOrder=Date>

Sak om grov vold i hjemmet:

Saken ***Fatma Yildirim mot Østerrike*** (sak nr. 6/2005)

## Saken *Vertido mot Filippinene* (sak nr. 18/2008)

“8.9

... the Committee is of the view that the State party has failed to fulfil its obligations and has thereby violated the rights of the author under article 2 (c) and (f), and article 5 (a) read in conjunction with article 1 of the Convention and general recommendation No. 19 of the Committee, and makes the following recommendations to the State party:

(a) Concerning the author of the communication

- Provide appropriate compensation commensurate with the gravity of the violations of her rights

(b) General

- Take effective measures to ensure that court proceedings involving rape allegations are pursued without undue delay
- Ensure that all legal procedures in cases involving crimes of rape and other sexual offences are impartial and fair, and not affected by prejudices or stereotypical gender notions. To achieve this, a wide range of measures are needed, targeted at the legal system, to improve the judicial handling of rape cases, as well as training and education to change discriminatory attitudes towards women.

Concrete measures include:

(i) Review of the definition of rape in the legislation so as to place the lack of consent at its centre;

(ii) Removal of any requirement in the legislation that sexual assault be committed by force or violence, and any requirement of proof of penetration, and minimization of secondary victimization of the complainant/survivor in proceedings by enacting a definition of sexual assault that either:

a. Requires the existence of “unequivocal and voluntary agreement” and requiring proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting; or

b. Requires that the act take place in “coercive circumstances” and includes a broad range of coercive circumstances;

(iii) Appropriate and regular training on the Convention on the Elimination of All Forms of Discrimination against Women, its Optional Protocol and its general recommendations, in particular general recommendation No. 19, for judges, lawyers and law enforcement personnel;

(iv) Appropriate training for judges, lawyers, law enforcement officers and medical personnel in understanding crimes of rape and other sexual offences in a gender-sensitive manner so as to avoid revictimization of women having reported rape cases and to ensure that personal mores and values do not affect decision-making.



8.10 In accordance with article 7, paragraph 4, the State party shall give due consideration to the views of the Committee, together with its recommendations, and shall submit to the Committee, within six months, a written response, including any information on any action taken in the light of the views and recommendations of the Committee. The State party is also requested to publish the Committee's views and recommendations and to have them translated into the Filipino language and other recognized regional languages, as appropriate, and widely distributed in order to reach all relevant sectors of society.”

### **5.2.3 Konkluderende observasjoner**

**Komiteens «concluding observations» til Norges 9. periodiske rapport (datert 22. nov. 2017):**

Punkt 24:

“The Committee, however, remains concerned about:

(a) The high level of gender-based violence against women in the State party, especially domestic and sexual violence, including rape; ...”

Punkt 25:

**“The Committee recommends that the State party:**

**(a) Develop and implement comprehensive measures for the prevention and elimination of gender-based violence against women and girls, in particular domestic violence and rape and other forms of sexual violence, and ensure that perpetrators of gender-based violence are prosecuted and punished commensurately with the gravity of their crimes, in accordance with the Committee’s general recommendation No. 35 (2017) on gender-based violence against women, updating general recommendation No. 19;...”**

**Link:**

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fNOR%2fCO%2f9&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fNOR%2fCO%2f9&Lang=en)

# Violence against Women, the Obligation of Due Diligence, and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women—Recent Developments

Andrew Byrnes\* and Eleanor Bath\*\*

## **I. Introduction**

The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW-OP)<sup>1</sup> was adopted by the UN General Assembly in 1999, 20 years after the adoption of the Convention itself. It contains both an individual complaints procedure and an inquiry procedure. As of 15 February 2008, 90 of the States Parties to the Convention were also parties to the CEDAW-OP, all of which were subject to the individual complaints procedure and 87 of which were subject to the inquiry procedure. As of the end of 2007, the Committee on the Elimination of Discrimination against Women (the Committee) had made public decisions in 10 individual communications submitted under the CEDAW-OP,<sup>2</sup> as well as completing one inquiry

## 5.3 Den europeiske menneskerettskonvensjon (EMK)

EMD, Opuz mot Tyrkia, Application No. 33401/02, 9. juni 2009.

“the Court considers that the violence suffered by the applicant and her mother may be regarded as gender-based violence which is a form of discrimination against women. Despite the reforms carried out by the Government in recent years, the overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors, as found in the instant case, indicated that there was insufficient commitment to take appropriate action to address domestic violence (see, in particular, section 9 of the CEDAW Committee’s General Recommendation No. 19...).” (premiss 200)  
[...]

“In view of the above, the Court concludes that there has been a violation of Article 14 of the Convention, read in conjunction with Articles 2 and 3, in the instant case.” (premiss 202)

## 5.4 Europarådets konvensjon on preventing and combating violence against women and domestic violence (2011)

“Article 1 – Purposes of the Convention

1. The purposes of this Convention are to:

- a) protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence;
- b) contribute to the elimination of all forms of discrimination against women and promote substantive equality between women and men, including by empowering women;
- c) design a comprehensive framework, policies and measures for the protection of and assistance to all victims of violence against women and domestic violence;
- d) promote international co-operation with a view to eliminating violence against women and domestic violence;
- e) provide support and assistance to organisations and law enforcement agencies to effectively co-operate in order to adopt an integrated approach to eliminating violence against women and domestic violence.

2. In order to ensure effective implementation of its provisions by the Parties, this Convention establishes a specific monitoring mechanism.”

Link:

<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210>