

The Leap from Theory to Practice: Snapshot of Women's Rights Through a Legal Lens

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Keywords

Violence against Women, Women's Rights, Due Diligence, Inter-American Court of Human Rights, European Court of Human Rights

Abstract

Globally, at least one in three women will be beaten, coerced into sex or otherwise abused by an intimate partner over the course of her lifetime. It can be argued that the perpetuation of violence against women is a result of the failure to provide equality under international law and to protect universal human rights. Over the last three decades, the international community has utilised human rights instruments and international bodies of law to advance the conceptualisation of women's rights as human rights. However, the continued prevalence of violence against women points to evidence of gender-based discrimination and lack of gender equality within the legal realm.

This paper will highlight how the evolving jurisprudence of the Inter-American Court of Human Rights and the European Court of Human Rights has helped shape gender norms and reinforce positive State obligations to prevent and protect women against violence. Moreover, these shifts in the theoretical rights of women will be analysed to see whether they are translated into practice within domestic jurisdictions.

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I. Introduction

Globally, at least one in three women will be beaten, coerced into sex or otherwise abused by an intimate partner over the course of her lifetime.¹ In his campaign to end violence against women United Nations Secretary-General, Ban Ki-Moon, stated: “*Violence against women and girls continues unabated in every continent, country and culture. Most societies prohibit such violence – yet the reality is that too often, it is covered up or tacitly condoned*”.² Violence and discrimination against women continue to exist in a multitude of forms and on a global scale, depriving half the world’s population of their social, economic, and political rights. It can be argued that this perpetuation of violence against women is a result of the failure to provide equality under international law and to protect universal human rights.

Over the last three decades, the international community has utilised human rights instruments and international bodies of law to advance the conceptualisation of women’s rights as human rights. Pursuant to the *Universal Declaration of Human Rights*, the notion of women’s human rights are based on the principle of universal, inalienable, and indivisible rights which are granted to individuals by virtue of their humanity.³ While the conceptualisation of women’s rights as human rights is a fundamental benchmark for ensuring equal rights based on gender, it should be noted that the term “women’s rights” extends beyond the basic parameters provided for under a human rights framework. The fulfilment of women’s rights requires a framework supplementary to that of universal human rights, one which addresses discrimination and inequality, violations of rights, and specific needs and challenges based on gender.⁴ With this conceptualisation of women’s rights being equal to and extending beyond the basic human rights framework, a shift has occurred in State obligations, moving from negative obligations to positive obligations which require the State to respect, protect, and fulfil the full realisation of women’s rights. In fulfilling these positive obligations, the State is required to take measured steps to address the challenges faced by women in the realisation of their rights, such as outreach programs which provide services to victims of domestic violence and provide information on legal options moving forward.

However, the continued prevalence of violence⁵ against women points to evidence of gender-based discrimination and lack of gender equality within the legal realm.⁶ This gender-based discrimination within the legal realm is evidenced by gaps in the protection of women’s rights.⁷ First, the women’s rights often fall victim to the public/private dichotomy and are pushed from the public sphere into matters which are considered “private”, and therefore not within the jurisdiction and scope of State responsibility to protect.⁸ For example, in some States domestic violence against women is seen as a “private” issue, as it involves familial matters and is thus outside the State’s jurisdiction, leading States to remain inactive in protecting women from violence. Moreover, the violation of women’s rights is often relegated to a “secondary” crime, overshadowed by matters considered of greater importance, such as global and State security and stability.⁹ Lastly, numerous situations exist where discriminatory practices against women, such as female genital mutilation and “honour” killings, are perpetuated under the guise of cultural norms.¹⁰

1 UN Secretary-General’s Campaign “UNiTE TO END VIOLENCE AGAINST WOMEN,” ‘Framework for Action: Programme of United Nations Activities and Expected Outcomes 2008-2015’ (2008) 2 (UNSG Campaign Unite to End Violence Against Women).

2 Ibid.

3 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR). The Preamble of the UDHR states, ‘the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women’. Article 1 of the UDHR reaffirms the concept of equal dignity and rights as a corollary to being human, and Article 2 specifically stipulates that all rights provided for within the UDHR shall be fulfilled and protected “without distinction of any kind such as race, color, sex, language... or other status”.

4 Specific needs and challenges based on gender include, but are not limited to issues related to access to justice, education, and adequate general and reproductive healthcare. Discriminatory practices against women which are widely accepted as human rights violations and in need of special attention include, but are not limited to, issues relating to lack of economic empowerment, political participation, and participation in peace processes, as well as the need to address all forms of violence against women.

5 This paper will adhere to the definition of “violence against women” as provided for in the Declaration on the Elimination of Violence against Women. Article 1 defines violence against women as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”. See UNGA ‘Declaration on the Elimination of Violence against Women’ (20 December 1993) UN Doc A/RES/48/104

6 See e.g. Inter-American Commission on Human Rights (IACHR) ‘Report on the Rights of Women in Chile: Equality in the family, Labor and Political Spheres’ (27 March 2009) OEA/Ser.L/V/II.134, 43.

7 Please note, the primary objective of this paper is not to offer an extensive overview of gaps within the legal realm which leave women’s rights unprotected and thus, this subject will only be highlighted to demonstrate the existence of such gaps.

8 See generally Charlotte Bunch and Samantha Frost, ‘Women’s Human Rights: An Introduction’ in Cheris Kramarae and Dale Spender (eds), Routledge International Encyclopedia of Women, Global Women’s Issues and Knowledge (Routledge 27 December 2000).

9 There is a growing trend which recognises the protection and advancement of women’s rights as a key component of global stability, peace and prosperity. For example, UN Security Council Resolution 1325 (SCR 1325), passed in 2000, calls for a gendered perspective in peacekeeping, peacebuilding and post-conflict reconstruction, as well as the direct involvement of women in planning and implementing these concerns.

10 Newman Wadesango et al., ‘Violation of Women’s Rights by Harmful Traditional Practices’ (2011) 13(2) Anthropologist 121-129.

This paper will highlight the steps taken by the Inter-American Court of Human Rights (IACtHR) and the European Court of Human Rights (ECtHR) respectively to protect the rights enshrined in the Universal Declaration of Human Rights and the use—and consequences—of findings of positive State obligations with regard to violence against women. It will not address cultural relativism, as the right to be free from violence is a right that is not limited by the principles of any given culture.¹¹ Part II will offer an analysis of how the IACtHR has historically addressed cases involving use of violence or discrimination¹² against women, examining how State obligations have changed over time and the varying impact of Court decisions on gender norms. Part III will build from the previous section with a similar overview of the judgments on women's rights cases by the ECtHR. Part IV will analyse the evolution in State obligations and jurisprudence within these two legal systems, highlighting the potential impact of these obligations on the policies of national jurisdictions regarding violence against women. It should be noted that the purpose of this paper is not to provide a comprehensive illustration of how due diligence standards have impacted women's rights within national jurisdictions. Instead, this paper will explore the potential of increased State obligations derived from international human rights treaties, conventions, and jurisprudence to impact national policies on violence against women.

II. Evolution of Women's Rights within the IACtHR

Over the course of nearly three decades, the IACtHR has utilised human rights instruments to create a judicial culture in which women's rights are held to the same standards as international human rights. This transformation of norms regarding women's rights stems from consistent use of human rights instruments and precedents set by case law. Human rights instruments deployed by the IACtHR include but are not limited to the American Convention on Human Rights¹³ (the American Convention), American Declaration of Rights and Duties of Man¹⁴ (the American Declaration), Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women¹⁵ (Belém do Pará), Inter-American Convention to Prevent and Punish Torture,¹⁶ Inter-American Convention on Forced Disappearance of Persons,¹⁷ Convention on the Elimination of All Forms of Discrimination against Women,¹⁸ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), General Recommendations issued by the Committee on the Elimination of Violence Against Women,¹⁹ and a range of other core international human rights instruments.²⁰

With regard to case law, the IACtHR has established a precedent in which women's rights are regarded as human rights and has fostered a new situation in which the right of women to be free from violence and discrimination is seen as a basic, non-derogable right. Prior to the establishment of this precedent, women's rights were either disregarded or non-existent. In the earliest case law on principles of equality, the IACtHR noted in Advisory Opinion 4/84 that, "*the notion of equality springs*

11 Jack Donnelly 'Cultural relativism and universal rights' (2005) 6(4) HRQ 400-419.

12 In the interest of limiting this paper's scope, the wide-ranging issues surrounding discrimination against women will not be discussed in-depth. However, it is important to note the correlation between violence against women and discriminatory practices, as discrimination itself is often a contributing factor in the prevalence and perpetuation of violence against women. In addition, discrimination against women extends to a multitude of spheres which include: (1) labour rights, (2) economic, social, and cultural rights; (3) reproductive rights; (4) sexual rights; (5) political rights; (6) family rights; and (7) media. See Inter-American Commission on Human Rights (IACHR) 'Legal Standards Related to Gender Equality and Women's Rights in the Inter-American Human Rights System: Development and Application' (3 November 2011) OEA/Ser.L/V/II.143, p. 84.

13 American Convention on Human Rights (Pact of San Jose), adopted at the Inter-American Specialized Conference on Human Rights (adopted 22 November 1969, entry into force 18 July 1978).

14 American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser. L V/II.82 Doc 6 Rev 1 at 17 (1992).

15 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), adopted at the Twenty-Fourth Regular Session of the General Assembly to the Organization of American States (adopted 9 June 1994, entry into force 3 May 1995).

16 Inter-American Convention to Prevent and Punish Torture (adopted 9 December 1985) OAS Treaty Series, No 67.

17 Inter-American Convention on Forced Disappearance of Persons (adopted 9 June 1984) OAS Treaty Series, No 60.

18 Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entry into force 3 September 1981) Res 34/180.

19 Office of the United Nations High Commissioner for Human Rights, Committee on the Elimination of Discrimination against Women (established in 1982).

20 Core international human rights instruments include: the International Convention on the Elimination of All Forms of Racial Discrimination, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Declaration on the Elimination of Violence against Women, Convention on the Rights of the Child, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Optional Protocol to the International Covenant on Civil and Political Rights, Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, Optional Protocol to the Convention on the Elimination of Discrimination against Women, Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, and Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

directly from the oneness of the human family and is linked to the essential dignity of the individual'.²¹ The Court's ruling set in motion a reshaping of the norms surrounding human rights by drawing parallels between human dignity and the concept of universal human rights. In addition to equating women's rights with human rights, the IACtHR has held that any violation of these rights is a violation of the State parties' duty to respect and protect the rights of their constituents, thereby failing to fulfil positive obligations of the State. While the IACtHR is the only body of law within the Inter-American human rights system with *expressis verbis* binding authority, recommendations made by the IACtHR continue to influence the development of international jurisprudence and can become binding if adopted by a member State.

Under the American Convention and American Declaration, each State party has a positive obligation to prevent and protect individuals, investigate crimes, provide access to justice, punish perpetrators, and provide redress to victims of human rights violations. Although the American Declaration is not a legally binding instrument *per se*, the combined jurisprudence of the IACtHR and Inter-American Commission on Human Rights (IACHR) hold this convention to be binding for the 25 of the member States of the Organization of American States (OAS) that have ratified the American Convention.²² In addition, Article 64 of the American Convention has been interpreted to hold all member States subject to the protections provided under the American Declaration.²³ Thus, it can be inferred that despite the fact only 25 of the 35 OAS members ratified the American Declaration, all State parties are subject to the principles of universal human rights as stated in the OAS Charter and American Convention, subjecting themselves to obligations that can be reasonably drawn from the American Declaration.

In analysing how the IACtHR addresses cases relating to discrimination and violence against women, a number of aspects must be taken into account. This analysis will evaluate the handling of a case by taking into account the evidence presented, status of norms regarding women's rights, potential human rights violations, obligations of the State, and subsequent impacts on the status of women's rights as a result of the Court's findings. The primary objective of this paper is to analyse the evolution of the law and its application, while analysing how this transformation might impact obligations and policies in national jurisdictions relating to violence against women.

A. Evolution of Principles and Application of Law

The large amount of American human rights instruments mean that States are bound by numerous obligations to uphold and respect the fundamental rights of citizens. These obligations are expressed differently from treaty to treaty, but generally include duties such as the full realisation of economic, social and cultural rights to the maximum of their available resources.²⁴ Furthermore, the enjoyment of such rights must be without discrimination to ensure the equal rights for all persons. State obligations can be summed up in three categories: respect for fundamental rights; protection of the enjoyment of fundamental rights; and taking the appropriate measures to ensure the full realisation of fundamental rights. State obligations are realised in large part through the exercise of effective due diligence, as it creates a framework by which States must protect human rights, prevent and prosecute violations, and provide redress for victims whose rights have been violated. As a general rule, State responsibility is triggered by acts or omissions committed either by State actors or non-State actors whose actions are attributable to the State.²⁵ However, States may be held accountable for failure to exercise due diligence in response to acts or omissions of non-State actors.²⁶

21 Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-American Court of Human Rights Series A No 4 (19 January 1984) 55.

22 Pact of San Jose (n 13).

23 Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-American Court of Human Rights Series A No. 10 (14 July 1989) 34-45.

24 Article 2 (1) the International Covenant on Economic, Social and Cultural Rights requires States "to take steps" to the maximum of their available resources to achieve progressively the full realisation of economic, social and cultural rights.

25 UNHRC 'Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo' (14 May 2013) A/HRC/23/49, 11. See also the draft articles on responsibility of States for internationally wrongful acts, general commentary, 'Report of the Commission to the General Assembly on the work of its fifty-third session' (2001) ILC II (Part Two) and corrigendum, 77. The modern approach to State responsibility is defined in Article 2 and 12 of the International Law Commission draft articles on responsibility of States for internationally wrongful acts. States are accountable for 'an act or omission attributable to it under international law where the conduct breaches an international obligation of that State and when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character. The standard of fault that applies, whether intent, negligence or the failure to exercise due diligence, depends on the applicable international legal rule. The commentary to the articles notes that the standard of due diligence is context specific and is dependent on the substantive international legal rule at issue.' See 'Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo,' 12 citing ILC, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) UN Doc A/56/10, commentary to Art 2, 3.

26 Amos Hershey, *The essentials of international public law* (New York, 1st edn, Macmillan 1918) 162.

The due diligence standard serves as a tool for State accountability, as it provides an assessment framework for determining effective fulfilment of State obligations and analysing State actions or omissions.²⁷ The obligation to conduct adequate due diligence by the State and its implications for domestic policies on violence against women will be discussed at length within this article, as it is ultimately one of the key mechanisms which ensures accountability for adherence to human rights standards.

The shifting obligations of States under the IACtHR were first seen in the case of *Velasquez Rodriguez v. Honduras*.²⁸ In this case regarding the forced disappearance of Rodriguez under the commission of Honduras, the IACtHR found that regardless of who committed this crime, “*the failure of the State apparatus to act, which is clearly proven, is a failure on the part of Honduras to fulfill the duties it assumed*”.²⁹ The Court went on to find that as a signatory of the American Convention, the State had an obligation to exercise due diligence to ensure these rights. The mere existence of a legal system does not alone fulfil the State’s obligations to protect human rights, it also requires the State to “*conduct itself so as to effectively ensure the free and full exercise of human rights*”. This case played an instrumental role in the establishment of increased State responsibility, to be measured by the level of compliance with due diligence standards, and a move from negative obligations of the State to positive obligations. Positive obligations of the State, as identified by the IACtHR, now included: prevention, investigation, punishment and redress of human rights violations, and the obligation to prevent impunity.³⁰ These positive obligations were further supported in “*The Street Children*” (*Villagrán Morales et al.*), as the Court found it was not adequate for a remedy to simply be provided for by law or Constitution, but rather that it must be “*effective in establishing whether there has been a violation of human rights and in providing redress*”.³¹

Despite the IACtHR’s recognition of positive State obligations in relation to individual human rights, the Court consistently failed to uphold these ideals in cases of violence and discrimination against women following the Velasquez ruling. In failing to properly identify violations and gender-specific harms in cases where women and girls were victimised, the Court missed opportunities to establish guidelines on the standard of proof for such violations.³² An example of such a missed opportunity can be found in *Caballero Delgado and Santana v. Colombia*,³³ where a woman was seen naked after being detained by armed forces. The Court dismissed witness testimonies as vague, ignored the sexual violence dimension of nudity, and sidestepped any discussion on the required standard of proof. Furthermore, in the first case to reach the Court involving rape, *Loayza Tamayo v. Peru*, the IACtHR found it could not prove the rape given the nature of the allegation and lack of evidence.³⁴ The Court was ambiguous in supporting their decision to dismiss the charges, much to the detriment of the jurisprudence developed on violence against women in the Inter-American system. Years later, the Court dealt another blow to the development of positive case law on sexual violence against women in *Maritza Urrutia v. Guatemala*.³⁵ In this case the victim, while in detention, “*was deliberately subjected to psychological torture arising from the threat and continual possibility of being assassinated, physically tortured, or raped*”.³⁶ While the Court acknowledged the violation of Urrutia’s rights as provided for under Article 5 of the American Convention, it failed to recognise threats of rape as a form of sexual violence that could affect women distinctively from men.³⁷ This failure to recognise the gendered elements of crime, in this case threats of rape, demonstrates that specific types of violence that women are subjected to were not specifically considered under the existing human rights framework at the time of this decision.

In 2003, the IACtHR propelled the Inter-American system forward in the case of *Maria da Penha Fernandes v. Brazil*, as it specifically recognised State obligations in relation to violence against women.³⁸ The IACtHR drew from the Court’s decision in *Rodriguez v. Honduras* to determine the State’s obligation, finding the State failed to prosecute the victim’s husband for acts

27 Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo (n 25) 13.

28 Velásquez Rodríguez v. Honduras (Judgment) Inter-American Court of Human Rights Ser. C No. 4 (1988).

29 Ibid.

30 Ibid.

31 “*The Street Children*” (*Villagrán Morales et al.*) (Judgment) Inter-American Court of Human Rights Series C No. 63 (19 November 1999) 235, citing *Cesti Hurtado Case* (Judgment) Inter-American Court of Human Rights Series C No. 56 (29 September 1999) 121; *Castillo Petrucci et al. Case*. (Judgment) Inter-American Court of Human Rights (30 May 1999); *Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87, Inter-American Court of Human Rights Series A No 9 (6 October 1987) 24.

32 Ruth Rubio-Marín and Clara Sandoval, ‘Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the Cotton Field Judgment’ [2011] 33(4) HRQ 1062, 1071.

33 *Caballero Delgado and Santana v. Colombia* (Judgment) Inter-American Court of Human Rights Series C No. 31 (8 December 1995) 36, 38.

34 *Loayza Tamayo v. Peru* (Merits) Inter-American Court of Human Rights Series C No. 33 (17 September 1997) 2.b, 58.

35 *Maritza Urrutia v. Guatemala* (Judgment) Inter-American Court of Human Rights Series C No. 103 (27 November 2003).

36 Ibid 78.b.

37 Ibid 94.

38 *Maria Da Penha Maia Fernandes v. Brazil* (Merits) Inter-American Commission on Human Rights (Case 12.051) No. 54/01 (2001).

of physical abuse and attempted murder over the course of 15 years. This gross misconduct on the part of the State left the victim a paraplegic. The Commission found the State in violation of the victim's right to a due process under Article 8 and right to an effective recourse under Article 25 of the American Convention. In addition, the Commission invoked the Belém do Pará for the first time and found the State had not only failed to condemn all forms of violence against women, but that its "*judicial ineffectiveness vis-à-vis cases of violence against women creates a climate of impunity conducive to domestic violence*".³⁹ In the Commission's report on *Penha Fernandes* a number of recommendations were provided in an attempt to place greater emphasis on steps the State could take to prevent the cycle of violence against women. The findings and recommendations of *Penha Fernandes* are of significance to the development of international jurisprudence because the highly publicised case set in motion demands for greater State accountability and mechanisms for protecting women against violence.⁴⁰ While the recommendations issued by the Commission are not binding, they can become legally binding if the respective State adopts them. Additional credibility is given to recommendations of the IACtHR in that the IACtHR often refers back to these recommendations when issuing judgments on similar cases. While recommendations provided by the Commission signify a step in the right direction, it remains unclear whether monitoring mechanisms within the Inter-American system are capable of ensuring compliance on the part of the State.

In another landmark case, *Castro-Castro Prison v. Peru*, the IACtHR first specifically addressed violence against women in its judgment.⁴¹ The State was found guilty of having caused the death of at least 42 inmates, wounding 175, and subjecting another 322 inmates to cruel, inhuman and degrading treatment. In its judgment, the Court analysed the scope and impacts of the sexual violence suffered by the women under State custody, taking into consideration that the attack began in the pavilion occupied only by women. The Court referenced the Belém de Pará in its interpretation of the scope, finding the State had violated Article 5 of the American Convention.⁴² Significantly, the Court recognised violence against women as a form of discrimination.⁴³ In its judgment, the Court referenced a broader definition of the phenomenon of "sexual violence" which stated: "*sexual violence consists of actions with a sexual nature committed with a person without their consent, which besides including the physical invasion of the human body, may include acts that do not imply penetration or even any physical contact whatsoever*".⁴⁴ By utilising an expansive definition of sexual violence the Court afforded greater protection to victims and widened the scope of State obligations to prevent such acts. In addition, the Court determined that the State was responsible for violating the duty to investigate and punish crimes, as stated under Articles 8(1) and 25 of the American Convention, by referring to the State obligation to act with due diligence in cases of violence against women.⁴⁵

The case of *González et al. ("Cotton Field") v. Mexico* followed the judgment of *Castro-Castro v. Prison* in an effort to address women's rights in a holistic manner.⁴⁶ Referred by the IACtHR, this case contained allegations of Mexico's failure to investigate the disappearance and subsequent death of three young women who were found weeks later in a cotton field with visible signs of sexual violence and physical abuse.⁴⁷ The authorities were accused of failing to act with the due diligence required for a prompt and thorough investigation into the disappearance and death of the women. The parties argued the State's failure to act was based on discriminatory sociocultural practices and stereotypes regarding the behaviour and lifestyle of the victims, practices which are inherently detrimental to the rights of women and promote impunity.⁴⁸ In perpetuating these discriminatory practices, the Court found that the State failed to ensure the fundamental rights set forth in Article 1(1) of the American Convention and did not provide the legal provisions necessary to uphold express rights and freedoms encompassed

39 Inter-American Commission of Human Rights (Rapporteurship on the Rights of Women) 'Access to Justice for Women Victims of Violence in the Americas' (20 January 2007) OEA/Ser.L/V/II. Doc. 68, 38 ("Access to Justice for Women").

40 Fernandes (n 38) 61. Recommendations by the Commission included: the development of a training program that would educate officials in the criminal justice sector on the importance of not condoning violence against women; simplify criminal proceedings to make the system more expedient without compromising the rights of the victim; implement a non-judicial mechanism for addressing domestic conflicts in an effective manner and ensure the crime of violence is associated to a consequence; increase the number of institutions equipped to process complaints by victims of domestic violence; and implement training programs that educate the public with regard to domestic violence.

41 should be 'legal standards (n 12) 33Inter-American Commission on Human Rights 'Legal Standards Related to Gender Equality and Women's Rights in the Inter-American Human Rights System: Development and Application' (3 November 2011) OEA/Ser.L/V/II.143, 33 citing Case of Miguel Castro-Castro Prison v. Peru (Merits, Reparations, and Costs Judgment) Inter-American Court of Human Rights Series C No. 160 (25 November 2006).

42 Ibid 35 citing Miguel Castro-Castro Prison, *ibid* 276.

43 Miguel Castro-Castro Prison (n 41) 303.

44 Miguel Castro-Castro Prison (n 41) 306. Also see *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T, T Ch I (2 September 1998) 688.

45 Article 7(b) of the Belém de Pará stipulates States have an obligation to act with due diligence in cases of violence against women.

46 Case of *González et al ("Cotton Field") v Mexico* (Preliminary Objection, Merits, Reparations, and Costs Judgment) Inter-American Court of Human Rights Series C No. 205 (16 November 2009).

47 Application filed with the Inter-American Court of Human Rights in the case of *Campo Algodonero: Claudia Ivette González, Esmeralda Herrera Monreal and Laura Berenice Ramos Monárez* against the United States Inter-American Commission on Human Rights Cases 12,496, 12,497, and 12,498 (4 November 2007) 68-138. See also *Cotton Field* (n 39) 2-4.

48 *Ibid.*

within the Convention.⁴⁹ This finding further solidified an evolving norm in which the failure to protect and ensure basic human rights as a direct consequence of gender was recognised as a violation.

Also significant to the development of State due diligence obligations was the case of *Dos Erres Massacre v. Guatemala*.⁵⁰ The IACtHR application addressed the State's failure to investigate, prosecute and punish all persons responsible for the 1982 massacre of La Dos Erres, La Libertad. The Court took note of initial investigations in 1994, noting the absence of any reference to allegations of widespread rape and violence against women. Reiterating the precedent set in *Plan de Sánchez Massacre v. Guatemala*, the IACtHR asserted that the "*rape of women was a State practice, executed in the context of massacres, directed to destroying the dignity of women at a cultural, social, family, and individual level*".⁵¹ This cogent assertion acknowledged the far-reaching implications of violence against women, further establishing a norm in which pervasive sexual violence is not tolerated. In addition, the Court emphasised that the "*lack of investigation of grave facts against humane treatment such as torture and sexual violence in armed conflicts and/or systematic patterns, constitutes a breach of the State's obligations in relation to grave human rights violations, which infringe non-revocable laws*".⁵² This statement lends support to the increased gravity of sexual violence against women and cardinal obligations of States to investigate, prosecute, and punish such crimes.

Thus, the IACtHR evolved greatly in its application of fundamental rights with regard to violence against women. Since the first formal recognition of State obligations to protect the rights of individuals in *Velasquez Rodriguez v. Honduras*, the Court has made progressive strides to acknowledge the specific harm caused by violence against women and emphasised the State's positive obligations to prevent, prosecute, and punish cases where violence against women is evident. Significantly, the case of *Lenahan (Gonzales) v. United States*⁵³ equated domestic violence to a human rights violation. The IACtHR's decision emphasised the international consensus that "*a State's failure to act with due diligence to protect women from violence constitutes a form of discrimination, and denies women their right to equality before the law*".⁵⁴

B. Addressing Violence and Discrimination Against Women

The IACtHR and IACtHR have taken considerable steps to condemn violence against women, as seen in the emphasis placed on adequate due diligence of States, pronouncements on violence against women, and expansive application of the law and jurisprudence. The definition of sexual violence and its application have become broader, thereby encompassing multiple criminal acts of a sexual nature and providing greater justice to victims. Furthermore, the establishment of rape as torture was a monumental advancement in justice, as it acknowledged the element of control by State authorities and the increased gravity of rape when such control is misused. In addition, the IACtHR has slowly come to understand the particular vulnerability of indigenous women and their struggle to gain access to justice.

In analysing how cases of violence and discrimination against women are addressed by the IACtHR, it is important to look not only at the standards by which States are held accountable, but also the criteria utilised in the Court's decisions. In examining how cases of violence and discrimination are addressed by the IACtHR, this section will review the interpretation and application of relevant laws and jurisprudence, criteria used to determine State obligations, and the recognition of how violations impact the women's rights.

In the case of *Raquel Martí de Mejía v. Perú*⁵⁵ the IACtHR's expansive interpretation of the legal definition of rape increased the severity with which courts would categorise rape. Prior to this case, rape was considered an invasion of privacy and a violation of Article 11 of the American Convention. It was also considered a lesser form of inhuman treatment, prohibited under Article 5 of the American Convention. The IACtHR concluded there was enough evidentiary support to prove the rape of Mejía constituted torture because it met the required elements under Article 2 of the American Convention. The Commission found the acts committed against Mejía included the following elements of torture: "*1) an intentional act*

49 The IACtHR found the State had violated rights which included: Articles 1(1) and 2; the right to life per Article 4(1); right to humane treatment pursuant to Articles 5(1) and 5(2); right to personal liberty protected by Article 7(1) of the Convention and Articles 7(b) and 7(c) of the Belém do Pará; special protections afforded to children under Articles 8(1) and 25 of the Convention. See Cotton Field (n 46) 602 (4-9).

50 Case of "Las Dos Erres" Massacre v Guatemala (Preliminary Objection, Merits, Reparations, and Costs Judgment) Inter-American Court of Human Rights Series C No. 211 (24 November 2009).

51 *Ibid.* at 139.

52 *Ibid.* 141.

53 *Lenahan (Gonzales) v United States* (Merits) Inter-American Commission on Human Rights Report (Case 12.626) No. 80/11 (21 July 2011).

54 *Ibid* at 111.

55 *Raquel Martí de Mejía v Perú*, Inter-American Commission on Human Rights (Case 10.970) No 5/96, (1 March 1996).

through which physical and mental pain and suffering is inflicted on a person; 2) committed with a purpose; and 3) committed by a public official or by a private person acting at the instigation of the former".⁵⁶

In addition, the IACtHR found Peru had violated the State's positive obligation to respect and guarantee the exercise of rights under Article 1 of the American Convention, right to humane treatment under Article 5, right to due process under Article 8, right to protection of honour and dignity under Article 11, and the right to an effective recourse under Article 25.⁵⁷ While the findings of *Mejía* are not binding, they were nonetheless significant because they created a baseline by which future cases involving rape by a State official would be measured. It could also be argued that by equating rape to torture, the IACtHR's decisions were more likely to impact the societal values and perceptions, thereby placing greater importance on State accountability for protecting women's rights and reshaping the norms associated with violence against women. The IACtHR took a similar line of reasoning in *Ana, Beatriz, and Celia Gonzalez Perez v. Mexico*, marking the first time sexual violence was conceptualised as torture and the importance of access to justice for victims of violence had been addressed in the individual case system.⁵⁸

The findings of *Raquel Martí de Mejía v. Perú* are also applicable to the case of *Inés Fernández Ortega v. Mexico*,⁵⁹ as the Court's judgment stemmed from the findings and recommendations issued in *Mejía*. The IACtHR's judgment found that the State had deprived *Fernández Ortega* of several rights protected under the American Convention and deemed the rape by a State official met the same elements of torture outlined in *Mejía*, also drawing a parallel to the standards set forth in the Inter-American Convention to Prevent and Punish Torture,⁶⁰ thereby strengthening the precedent for cases where rape is committed by a State official to be treated as torture. A second important outcome of this case was the Court's acknowledgement of a correlation between guaranteed access to justice and the States' obligation to exercise due diligence in cases of sexual violence.⁶¹ The acknowledgement of this correlation played a key role in establishing sexual violence against women as a non-derogable right and a State's failure to ensure adequate access to justice will not go unnoticed by the public. Referred by the Court by the IACtHR, the case of *Valentina Rosendo Cantú et al. v. Mexico* further demonstrated discriminatory practices by a State in the failure to investigate allegations of sexual violence.⁶² In this case the applicant was raped by members of the Mexican Army and was subsequently denied medical treatment on multiple occasions, as the medical providers feared reprisals from the Army. While Rosendo Cantú reported the rape to civil authorities, the matter was turned over to the military jurisdiction where it remained for nearly a decade without any steps taken to investigate the allegations or prosecute the perpetrators.⁶³ Upon reaching the IACtHR, the State was found to have violated the rights of Rosendo Cantú as provided for under the American Convention and Belém do Pará.⁶⁴

This case was significant for a number of reasons. First, the Court drew from the case of *Inés Fernández Ortega*, further emphasising the importance of State considerations which address the varying forms of violence and discrimination. Second, this case highlighted the vulnerability of indigenous women and emphasised State obligations to implement protective measures which take into consideration the customs, values, as well as economic and social characteristics of indigenous

56 Ibid Part A under "Questions Raised".

57 Ibid.

58 *Ana, Beatriz, and Celia Gonzalez Perez v Mexico* (Report on the Merits) Inter-American Commission on Human Rights (Case 11/565) No 53/01 (2 April 2001).

59 *Inés Fernández Ortega v United Mexican States* (Judgment) Inter-American Court of Human Rights Series C Case 12.580 (30 August 2010).

60 The IACtHR found violations of the State included "denial of the rights protected by Articles 5, 8, 11, and 25 of the American Convention; failure to comply with the general obligation of respecting and ensuring those rights set forth in Article 1.1 thereof; a violation of Article 7 of the Convention of Belém do Pará; and noncompliance with the obligations established by Articles 1, 6, and 8 of the Convention against Torture". See, Ibid fn 3.

61 Based on findings from *Inés Fernández Ortega v. Mexico*, the IACtHR established the following links between guaranteed access to justice and the States' obligation to exercise due diligence in cases of sexual violence : 1) sexual violence is a paradigmatic form of violence that specifically targets women and has consequences that transcend the victim; 2) rape can constitute torture even if it only occurs once and is outside state installations, if the perpetrators act intentionally and cause severe suffering; 3) a rape violates the values and core aspects of private life and interferes with an individual's right to make intimate decisions of a person; 4) it is particularly important for persons with authority to investigate an act of rape with efficiency and diligence, taking into account the State's obligations prevent rape and to restore trust in the victims; 5) investigation should prevent revictimisation and post-traumatic stress; and 6) the declaration of the victim regarding an occurrence of sexual violence is imperative in the investigation and prosecution of such cases. See, Legal Standards Related to Gender Equality and Women's Rights (n 12).

62 *Case of Rosendo Cantú et al. v Mexico* (Preliminary Objection, Merits, Reparations, and Costs) Inter-American Court of Human Rights Series C No. 216 (31 August 2010).

63 Application to the Inter-American Court of Human Rights in the case of *Valentina Rosendo Cantú et al v Mexico* Inter-American Commission on Human Rights (Case 12,579) 38, 59.

64 The Court found the State had violated Rosendo Cantú's rights under the American Convention which included the right to privacy and dignity, humane treatment, access to justice, judicial protection and guarantees, and special protection as a child. Under the Belém do Pará, the State had violated Rosendo Cantú's right to be free from violence. Also acknowledged was the harm suffered (inhumane treatment) by Rosendo Cantú's daughter as a result of these events. See *Cantú* (n 62) 37-139, 295 (4).

communities.⁶⁵ Significantly, the Court recognised that violence against women permeates through all social sectors and reiterated the duty of the State to refrain from all forms of discrimination.⁶⁶

In summation, jurisprudence from the IACtHR highlights the recognition of women's rights as human rights and an increased emphasis on the gravity of sex crimes against women. In addition, this jurisprudence reveals the establishment of State obligations and positive measures required to ensure the full realisation of women's rights.

III. Evolution of Women's Rights within the ECtHR

The ECtHR has publicly stated that "*the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe*".⁶⁷ In working to achieve this goal the ECtHR is the arbitrator of human rights within the 47 member States⁶⁸ of the Council of Europe who have ratified the European Convention on Human Rights (ECHR).⁶⁹ The ECtHR issues decisions and judgments based on the principles of equality and protection of universal human rights, articulated in the ECHR and its relevant Protocols.⁷⁰ When issuing judgments, the ECtHR also takes into consideration case law from international courts,⁷¹ General Recommendations of the Committee on the Elimination of Discrimination against Women,⁷² and Recommendations issued by the Committee of Ministers of the Council of Europe. Judgments issued by the ECtHR are legally binding for *all member States* and the execution of judgments are monitored by the Committee of Ministers of the Council of Europe. While the ECtHR utilises human rights instruments in each case with the intent of furthering universal human rights, it attempts to balance the universality of human rights with cultural relativism by allowing States to exercise a margin of appreciation. In allowing for a margin of appreciation the ECtHR provides States with some flexibility in which they must meet the requirements of the ECHR, but are able to simultaneously incorporate their communal values and beliefs into domestic policies.

However, it is important to note that a key obstacle in the practice of individual rights is the existence of discrepancies in case law, established in part through use of the margin of appreciation. The ECtHR circumvents the concept of universal human rights and allows national bodies to incorporate their communal values and beliefs when interpreting the European Convention. This adherence to cultural relativism allows for inconsistent judgments and varying perceptions of the norms regarding women's rights. In the case of *Bevacqua and S. v. Bulgaria*, the claimant argued that the Bulgarian Penal Code violated rights protected under the European Convention by placing the burden of proof on victims of domestic violence whose injuries were categorised as "light" or "medium" by State officials. In response to these accusations the ECtHR applied the margin of appreciation doctrine and found the Bulgarian Penal Code did not violate the right to respect for an individual's private and family life, protected under Article 8 of the ECHR.⁷³ It could be argued that judgments such as this send mixed signals and undermine the validity of justice because it allows States to deviate from the principles of universal human rights and implement discriminatory practices without any legal repercussions.

In analysing how the ECtHR addresses cases relating to discrimination and violence against women, this analysis will utilise the same criteria as the previous section regarding the IACtHR. This analysis will evaluate the handling of a case by taking into account the evidence presented, status of norms regarding women's rights, potential human rights violations, obligations of the state, and subsequent impacts on women's rights as a result of the Court's findings. The primary objective of this paper

65 Legal Standards Related to Gender Equality and Women's Rights (n 12) p 17.

66 Ibid.

67 Abdulaziz, Cabales and Balkandali v. The United Kingdom App no 15/1983/71/107-109 (Council of Europe: ECtHR, 24 April 1985) <<http://www.unhcr.org/refworld/docid/3ae6b6fc18.html>> accessed 24 June 2013.

68 European Court of Human Rights, 'The Court in Brief' <http://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf> accessed 24 June 2013.

69 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) (ECtHR).

70 Instruments include but are not limited to the European Convention, *ibid*; Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966 UNGA Res 2200 (XXI), entered into force 3 January 1976)(ICESCR); Convention on the Elimination of All Forms of Discrimination against Women (adopted in 1979) (CEDAW); Declaration on the Elimination of Violence Against Women (adopted 20 December 1993 GA Res 48/104) (DEVAW).

71 International courts from which case law is considered includes the International Court of Justice, International Criminal Court, International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda.

72 UN Committee on the Elimination of Discrimination Against Women (CEDAW), 'CEDAW General Recommendations Nos. 19 and 20' (1992) UN Doc A/47/38.

73 In both *A. v Croatia and Bevacqua and S. v. Bulgaria*, the ECtHR notes that the Court's role is not to replace the authorities in determining the appropriate measures to protect an individual's integrity, but instead belongs to the State. However, in *Bevacqua v Bulgaria*, the Court took the opportunity to emphasise the particular suitability of the measures mentioned in Recommendation (2002)5.

is to analyse the evolution of laws regarding violence against women and their application, while seeking to identify how this transformation has the potential to impact State obligations and domestic policies related to violence against women.

A. Evolution of Principles and Application of Law

As highlighted in the previous section, State obligations are set forth in the provisions of international human rights standards and reinforced through the findings of international courts. These requirements serve as a mechanism for protecting individual human rights and ensure accountability of the State to fulfil their positive obligations. State obligations are realised in large part through the exercise of effective due diligence, as it creates a framework by which States must protect human rights, prevent and prosecute violations, and provide redress for victims whose rights have been violated. The obligation to conduct adequate due diligence by the State will again be discussed at length within the subsequent section of this article in an effort to illustrate the parallel increase in women's rights from one human rights court to the other. Significantly, the shift from negative to positive State obligations could be considered a catalyst in the promotion of women's rights and protection against violence, as it is ultimately one of the key mechanisms which ensures State accountability for adherence to human rights standards.

A significant benchmark in the evolution of State obligations was the case of *Airey v. Ireland*,⁷⁴ as the ECtHR recognised the extension of State obligations to take positive steps in ensuring access to justice. The applicant sought judicial separation from her husband, who had previously been convicted for assaulting her. However, judicial separation was available only through the High Court and legal aid was not provided in such proceedings. The ECtHR held that the obligation to secure rights provided under the Convention were not limited to a State's duty to refrain from committing violations, but extended further to sometimes require "*positive action on the part of the State*".⁷⁵ The Court pointed to Article 6(1) of the European Convention, which requires States to provide free legal aid when such assistance is indispensable for ensuring access to justice in cases where legal representation is mandatory under the domestic law or the nature of the case is particularly complex. This move from States' negative obligations to positive ones was significant in ensuring the protection of individual rights. Subsequent cases have reinforced the recognition of the State's obligation to protect individual rights and provide a remedy where required.⁷⁶ In *Osman v. the United Kingdom* the ECtHR took an approach similar to the IACtHR's decision in *Velasquez Rodriguez*, acknowledging that a State's obligation "*extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offenses against the person backed up by the law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions*".⁷⁷ This was the first case in which the ECtHR formally recognised that the State's positive obligations under Article 2 of the European Convention include, in certain circumstances, the obligation to take preventive measures to protect an individual's life from the criminal acts of another individual. The Court went a step further, establishing a framework by which the initiation of State responsibility was contingent upon four cumulative requirements: (i) "the authorities knew or ought to have known" of the existence of a risk; (ii) the risk must have been "real and immediate"; (iii) the targeted individual must have been identified; and (iv) the state must have failed to take all reasonable measures.⁷⁸ This framework was critical in widening the scope of State obligations, as the language used allowed for its application to a multitude of scenarios while enabling the Court to exercise its own discretionary powers.

A decade later, the ECtHR formally recognised State responsibility to prevent violence and discrimination against women in two landmark cases, *Opuz v. Turkey* and *Bevacqua and S. v. Bulgaria*. In *Opuz v. Turkey*,⁷⁹ the ECtHR applied the 'Osman test' to assess "*whether the authorities displayed due diligence to prevent violence against the applicant and her mother*".⁸⁰ The Court held that "*having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could reasonably be expected of them to avoid a real and immediate risk to life of which they have or ought to have the knowledge*".⁸¹ This recognition was significant, as it established a higher degree of vigilance from State authorities in cases involving the right to life. In addition, the Court stated that "*the issue of domestic violence, which can take various forms ranging from physical to psychological violence or verbal abuse, cannot be*

⁷⁴ Airey v Ireland Series A, No 32 (ECtHR, 11 September 1979).

⁷⁵ Ibid 25-26.

⁷⁶ X and Y v the Netherlands App no 8978/80 (ECtHR, 26 March 1985).

⁷⁷ Osman v United Kingdom Reports 1998-VIII 87/1997/871/1083 (ECtHR, 28 October 1998), 115. See also L.C.B. v. the United Kingdom, Reports of Judgments and Decisions ECtHR 1998-III, 36.

⁷⁸ Osman (n 77) 116.

⁷⁹ Opuz v Turkey App no 33401/02 (ECHR, 9 June 2009).

⁸⁰ Ibid 131.

⁸¹ Ibid 130.

confined to the circumstances of the present case. It is a general problem which concerns all member States”.⁸² In highlighting the varying forms of violence and its applicability to all member States, the Court helped to establish the conceptualisation of violence against women as a phenomenon which must be addressed in all jurisdictions.

Also significant, *Opuz* was the first domestic violence case in which the Court recognised the violence directed toward the women as being gender-based and therefore in violation of Article 14 of the European Convention. In response to the staggering evidence against the applicant’s husband, combined with the State’s failure to protect the applicant and take necessary investigative and judicial measures, the Court concluded that the mere existence of a criminal law system was not enough to fulfil the State’s positive obligations.⁸³ In issuing a judgment, the Court applied relevant international and comparative law to conclude Turkey’s criminal justice system had failed to respect and protect the rights of citizens, thereby failing to fulfil the State’s positive obligations.⁸⁴

In *Bevacqua and S. v. Bulgaria*, the applicant was assaulted on four separate occasions by her husband during their custody and divorce proceedings. Failure of the State to impose protective measures was grounded on the notion that the dispute was a private matter, thereby depriving the applicant of the immediate assistance needed. The ECtHR applied the concept of due diligence and affirmed the existence of a duty to prevent, investigate, and punish acts of violence directed against women, regardless of whether they were perpetrated by an individual or State official.⁸⁵

The Court noted that “*Bulgarian law did not provide for specific administrative and policing measures and the measures taken by the police and prosecuting authorities on the basis of their general powers did not prove effective*”. The ECtHR referred to the *Osman* case to establish the “*duty [under Article 2 or 3 ECHR and in other instances under Article 8 ECHR taken alone or in combination with Article 3 ECHR] to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals, in certain circumstances*”.⁸⁶ Thus, the Court found the State’s domestic policies, or rather lack thereof, were incompatible with their positive obligation to protect rights provided for under Article 8 ECHR.⁸⁷

These decisions were important, as they signified the growing importance of States’ positive obligations. Additionally, the Court applied findings from *Maria da Penha v. Brazil*, in which the IACtHR “*characterized violence against women as a form of discrimination owing to the State’s failure to exercise due diligence to prevent and investigate a domestic violence complaint*”.⁸⁸ The ECtHR concluded that the “*State’s failure to protect women against domestic violence breaches their right to equal protection of the law and that this failure does not need to be intentional*”.⁸⁹ The judgments issued in *Opuz* and *Bevacqua and S.* were significant because they established higher standards of due diligence that were binding for State parties to the ECHR. In establishing a State’s obligation to exercise due diligence it also signifies greater emphasis on the threefold obligation of State parties to respect and protect human rights while providing access to justice and redress for victims.

With each additional case of violence or discrimination against women brought before the ECtHR, the Court has gradually established principles which guide its assessment of whether the response of domestic authorities to domestic violence has been compatible with their positive obligations under Article 8 ECHR towards the victim of that violence. The ECtHR first identified these guiding principles in *Hajduová v. Slovakia*⁹⁰ by drawing upon several international instruments and

⁸² Ibid 132.

⁸³ The Court collected medical documentation proving the applicant had endured repetitive assaults over many years. At one point H.O. stabbed his wife seven times and when prosecuted for this assault, the domestic courts issued H.O. a fine of €385, which could be paid out over several instalments.

⁸⁴ The ECtHR examined relevant international and comparative law material to accurately assess the standards by which a State is obligated to take action in the pursuit of stemming violence and discrimination against women. In this assessment, the Court considered the previous decisions of *A.T. v. Hungary* and *Fatma Yildirim v. Austria*, where on both occasions the State had failed to provide adequate measures to “guarantee the physical and mental integrity of the applicant”.

⁸⁵ In its decision the Court applied the rights provided for under Article 4(c) of the Declaration on the Elimination of Violence against Women. See UNGA ‘Declaration on the Elimination of Violence against Women’ (DEVAW) (adopted 20 December 1993) UN Doc A/RES/48/104, Art 4(c).

⁸⁶ *Bevacqua and S. v Bulgaria* App no 71127/01 (ECtHR, 12 June 2008) 65.

⁸⁷ Ibid 83.

⁸⁸ *Opuz* (n 79) 190.

⁸⁹ *Opuz* (n 79) 191.

⁹⁰ It is important to note the Court’s application of the ‘*Osman test*’ to determine whether there was a violation of Article 8, based on the fact that the threats to the applicant’s life might have been carried out, and therefore that her fear was well-founded. The Court held for the first time that, although threats may not actually materialise in concrete violence, the State is obligated to take reasonable measures. The judgment does not explicitly refer to due diligence duty, but it seems that the latter is implied by the application of the ‘*Osman test*’. See *Hajduová v. Slovakia* App no 2660/03 (ECtHR, 30 November 2010), 45-47.

jurisprudence⁹¹ explicitly concerning the duty of due diligence in relation to domestic violence.⁹² First, while the primary objective of Article 8 is to protect persons from arbitrary action by public authorities, there may be additional positive obligations inherent in effective ‘respect’ for private and family life. Such obligations may encompass protecting the relationship between individuals, especially children and other vulnerable individuals.⁹³ Second, States have a duty to protect the physical and psychological integrity of an individual from other persons. States must protect individuals from acts of violence by other persons through the maintenance and application of an adequate legal framework.⁹⁴ The Court emphasised the particular vulnerability of victims of domestic violence and the need for active State involvement in their protection, a need which has been underscored in a number of international instruments.⁹⁵ Third, the Court underscored its duty to review prior decisions in which competent authorities exercised their power of appreciation under the ECHR, not to determine appropriate methods for protecting individuals from attacks on their personal integrity in lieu of competent domestic authorities.⁹⁶

These principles have been applied in subsequent cases, including *M.T. and S.T. v. Slovakia*,⁹⁷ *Irene Wilson v. the United Kingdom*,⁹⁸ and *Kowal v. Poland*.⁹⁹ The application of these principles in subsequent cases furthers the customary norm of higher due diligence standards by the State.¹⁰⁰ Also important, the impacts of greater specificity in States’ due diligence obligations can be seen in the acknowledgment of the need for increased safeguards for victims of violence and discrimination.¹⁰¹

Since the Court’s first recognition of State positive obligations in cases such as *Airey and Osman*, the ECtHR has placed greater emphasis on the due diligence obligations of the State and established an expansive framework under which State accountability is triggered. The ECtHR’s jurisprudence has established higher standards of State due diligence and a new norm in which the State is accountable for intentionally or unintentionally failing to protect women from domestic violence.¹⁰² Furthermore, through the consistent acknowledgement of State obligations to conduct effective and adequate due diligence, the ECtHR has established a strong precedent in which women’s rights must be respected and protected.

B. Addressing Violence and Discrimination Against Women

In examining jurisprudence under the ECtHR, there is a clear shift in how cases of violence and discrimination against women have been addressed. Similar to the IACtHR, the ECtHR established a precedent under which the act of rape, when committed under the custody of a State official, was considered a form of torture.¹⁰³ In addition, the Court enforced a definition of rape which removed the burden of proving resistance on the part of the victim, instead focusing on the violation itself.

As previously stated, in analysing how cases of violence and discrimination against women are addressed by an international

91 Kontrová v Slovakia App no 7510/04 (ECHR 31 May 2007); Bevacqua and S. (n 86); Opuz (n 79) 143-149, 166-176; A v. Croatia App no. 55164/08 (ECHR 14 October 2010).

92 CEDAW, Article 2; CEDAW, General Recommendation No 19 on “Violence Against Women;” A.T. v Hungary; Fatma Yildirim v Austria; UN GA Declaration on the Elimination of Violence Against Women; Recommendation Rec (2002)5; Velazquez-Rodriguez v Honduras the due diligence obligation of States to investigate and sanction perpetrators, and provide for reparation; Maria Da Penha v Brazil on the failure of the state to due diligently prevent and investigate a domestic violence complaint.

93 See X and Y v The Netherlands (n 76) 23-24; and August v the United Kingdom (Decision) App no 36505/02 (ECtHR, 21 January 2003).

94 See Hajduová (n 90) 46; X and Y (n 76) 22, 23; Costello-Roberts v the United Kingdom, Series A No.247-C (ECtHR, 25 March 1993) 36; D.P. and J.C. v the United Kingdom Application No 38719/97 (ECtHR, 10 October 2002) 118; and M.C. v Bulgaria Application No 39272/98 (ECtHR, 4 December 2003) 150, 152; and A v Croatia (n 91) 60.

95 Bevacqua (n 86) 64-65, Sandra Janković v Croatia Application No 38478/05 (ECtHR 5 March 2009) 44-45; Opuz (n 79) 27; Hajduová (n 90) 46.

96 Hajduová (n 90) 47; Janković (n 95) 46.

97 M.T. and S.T. v Slovakia Application No 59968/09 (ECtHR, 29 May 2012).

98 Irene Wilson v the United Kingdom Application No 10601/09 (ECtHR, 23 October 2012).

99 Kowal v. Poland Application No 2912/11 (ECtHR, 18 September 2012).

100 In the Bevacqua judgment (2008), the duty of due diligence was said to have customary value. This assertion was based on UNCHR, Economic and Social Council, Special Rapporteur on Violence Against Women, its Causes and Consequences, ‘Integration of the Human rights of Women and the Gender Perspective: violence Against Women: The Due Diligence Standard as a Tool for the Elimination of Violence Against Women’ (20 January 2006) E/CN.4/2006/61 (hereinafter the “2006 Due Diligence Report”).

101 The UN Special Rapporteur on violence against women noted that violence had hitherto been raised as an afterthought. The thrust of human rights safeguards had been to protect individuals against abuses by the State, and violence against women was thus marginalised because the State was not the culprit. The previous attitude was that a State violated human rights only when its agents had committed abuses. See Katarina Tomaševski, Rights of Women: from prohibition to elimination of discrimination, (Oxford: Blackwell Publishers, 1998), 552.

102 Branko Tomašić and Others v Croatia Application No. 46598/06 (ECtHR, 15 January 2009); E.S. and Others v Slovakia Application No 8227/04 (ECtHR, 15 September 2009); A. v Croatia (n 91).

103 Raquel Martí de Mejía (n 56) ; Maslova and Nalbandov v Russia Application No 839/02 (ECtHR, 24 January 2008).

court, it is important to look not only at the standards by which States are held accountable *but also the criteria under which to the question over whether States have fulfilled their positive obligations is answered*. In examining how cases of violence and discrimination are addressed by the ECtHR, this section will review the interpretation and application of laws and jurisprudence related to violence against women, criteria used to determine State obligations, and the recognition of how violations impact the women's rights.

In the case of *X and Y v. the Netherlands*, the victim was a 16 year-old girl with a mental handicap.¹⁰⁴ While living in a home for children for mental disabilities, she was raped the day after turning 16, which is the legal age for consent under the local jurisdiction. The applicant was unable to sign an official complaint given her young mental age, but the domestic courts did not recognise the complaint as admissible when brought forth by the victim's father. The ECtHR found the State had violated Article 8 ECHR because the criminal legal system lacked any provision which could provide remedy for a mentally disabled girl who had been sexually assaulted. Thus, the Court reaffirmed the State's positive obligation to put in place effective provisions to deter the commission of offences against persons and reinforce protective legal frameworks through enforcement mechanisms whose duty it is to oversee the prevention, suppression, and punishment of violations of such provisions. The Court has stated that it is not the task of the Court to give an interpretation of domestic law, ergo, it is the State's responsibility to exercise their margin of appreciation in the implementation of criminal law provisions when absent in the current legal system. These provisions must, however, adhere to human rights standards set by the ECHR.¹⁰⁵

In the case of *Aydin v. Turkey* the ECtHR found a State official had raped a 17 year-old young Kurdish girl while she was in custody.¹⁰⁶ This act was described as an abhorrent form of ill-treatment which caused deep psychological scars, thereby constituting torture. In addition, the Court found the State had failed to fulfil its positive obligation to investigate the victim's allegations of rape and thereby violated Aydin's rights under Article 3 ECHR. This case was significant to international jurisprudence on women's rights in that it was the first case within the ECtHR to equate rape to torture, referencing the IACtHR's judgments in *Inés Fernández Ortega v. Mexico*.

The ECtHR reframed the approach of States to cases involving allegations of rape in the case of *MC v. Bulgaria*.¹⁰⁷ In this case no charges were brought against two men who were accused of raping a 14 year-old girl because the Bulgarian Criminal Code defined rape as occurring *inter alia* when a woman is coerced into sexual nature by means of force or threats. The Bulgarian courts did not investigate this claim because the complainant had failed to illustrate clear physical resistance against the act of sexual intercourse. The ECtHR concluded the complainant's rights under Articles 3 and 8 ECHR had been violated and the State had failed to fulfil its positive obligations in the "*penalization and prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim*".¹⁰⁸ States had historically enjoyed a wide margin of appreciation in ensuring adequate protection against rape, but in this case the ECtHR ruled against Bulgaria and challenged the legitimacy of its criminal code. This ruling was instrumental in amending the standard definitions of rape, placing greater emphasis on the non-consensual elements of the act itself, rather than the victim's reaction.¹⁰⁹ This progression in case law also affected gender norms as it moved away from the examination of a woman and her characteristics to find reason for why the violation was committed, instead focusing on the accused and whether their actions violated a protected right.

Thus, similar to the IACtHR, the ECtHR witnessed an evolution in the recognition of women's rights and positive State obligations. Though the ECtHR's jurisprudence women's rights were firmly established and protected per recognition of State obligations to prevent, investigate, prosecute, and provide redress for violations of fundamental human rights.

IV. State Obligations and the Global Perpetuation of Violence Against Women

The IACtHR and ECtHR both draw upon human rights instruments which enshrine the universality of women's rights and have undergone a similar evolution in which women's rights became defined as human rights. In addition, both bodies of law cited landmark cases of other courts when issuing judgments, aiding in the development of a more comprehensive

¹⁰⁴ X and Y v The Netherlands (n 76).

¹⁰⁵ M.C. v Bulgaria (n 94) 155; X and Y v The Netherlands (n 76); Handyside v United Kingdom Application No 5493/72 (ECtHR, 7 December 1976); Christine Goodwin v the United Kingdom Application No 28957/95 (ECtHR, 2002) 74.

¹⁰⁶ Aydin v Turkey Application No 23178/94 (ECtHR, 25 September 1997).

¹⁰⁷ M.C. v Bulgaria (n 94).

¹⁰⁸ Ibid 156-159.

¹⁰⁹ Ibid 181.

international jurisprudence on women's rights.¹¹⁰ Lastly, both bodies of law are binding on the states party to the individual cases and have established the State's failure to exercise due diligence in cases of discrimination or violence against women as gender-based discrimination. Recognition of State failure to fulfil positive obligations by way of adequate due diligence, and its direct correlation with continued violence against women, is a significant acknowledgement for women's rights. This acknowledgment places greater emphasis on the State to adhere to human rights standards and gender norms which ultimately promote equality.

The following section will begin by identifying key positive obligations of the State as employed by both courts in an attempt to illustrate the breadth of required protective measures with regard to women's rights. The subsequent sections will build from this illustration of State obligations, examining the potential of such obligations to influence policies related to violence against women in national jurisdictions.

A. Increase in Rights for Women through State positive Obligations

The evolution of law and its application is illustrated by the fluctuating relationship between State obligations and individual rights, as well as a more gender-sensitive and nuanced approach to how criminal conduct is defined. The evolution of State positive obligations is illustrated through analysing the case law of the IACtHR and ECtHR. According to both courts, an investigation by State authorities should be capable of leading to the identification and punishment of those responsible.¹¹¹ The investigation must be independent, impartial, subject to public scrutiny, and the competent authorities must act with exemplary diligence and promptness.¹¹² With regard to rape, the investigation and its conclusion must be centred on the issue of non-consent.¹¹³ The State also has a positive obligation to carry out effective prosecution¹¹⁴ and prevent degrading practices.¹¹⁵

The aforementioned State obligations are further reinforced through the emergence of due diligence standards as customary international law. This emergence is illustrated in part by the "due diligence" standard, endorsed in 2006 by UN Secretary-General, Kofi Annan, in response to the growing coalescence of norms related to violence against women.¹¹⁶ This standard stipulates "*violence against women is a form of discrimination and a violation of human rights*".¹¹⁷ The Secretary-General went on to declare that failure to adhere to due diligence standards results in impunity for perpetrators while depriving victims of justice and reinforcing discriminatory norms which ultimately all affect women and girls.¹¹⁸ Within the same year, the second UN Special Rapporteur on Violence Against Women, Yakin Ertürk, issued a significant report which provided guidance on how to utilise the due diligence standard as an evaluative means when assessing State compliance with positive obligations related to violence against women. This report, entitled "The Due Diligence Standard as a Tool for the Elimination of Violence Against Women," comprises an extensive critique of international law to demonstrate there is "*a rule of customary international law that obliges States to prevent and respond to acts of violence against women with due diligence*".¹¹⁹ Ertürk called for States to adhere to the standard and to "*prevent, protect, prosecute and provide compensation and map out parameters of responsibility for State and non-State actors alike in responding to violence*".¹²⁰

¹¹⁰ For example, in *Opuz v Turkey* the ECtHR cited the findings and recommendations of the IACtHR in *Maria da Penha v Brazil*, a landmark case which established higher standards for the State to respect and protect women's rights.

¹¹¹ *Maslova and Nalbandov v Russia* (n 103); *Labita v Italy* App No 26772/95 (ECtHR, 6 April 2000); *Loayza Tamayo Case (Reparations (Art. 63.1 American Convention on Human rights))* Inter-American Court of Human Rights Series C No. 42 (27 November 1998) 170.

¹¹² *Maslova and Nalbandov* (n 103); *Isayeva v Russia Application No 57950/00* (ECtHR, 24 February 2005); *Juan Carlos Abella y Otros v Argentina (Merits)* Inter-American Commission on Human Rights Report No 55/97 (18 November 1997) 412.

¹¹³ *M.C. v Bulgaria* (n 94) 181.

¹¹⁴ *M.C. v Bulgaria* (n 94) 153; *The Street Children* (n 31) 230.

¹¹⁵ *Maria Da Penha Fernandes* (n 38) 56.

¹¹⁶ Lee Hasselbacher, 'State Obligations Regarding Domestic Violence: the European Court of Human Rights, Due Diligence, and International Legal Minimums of Protection' 8(2) JIHR 190, 198.

¹¹⁷ Study of the Secretary-General, 'Ending Violence Against Women: From Words to Action' (2006) UN Sales No. E.06.IV.8.

¹¹⁸ *Ibid* 6-7.

¹¹⁹ 2006 Due Diligence Report (n 100) 29.

¹²⁰ 2006 Due Diligence Report (n 100) 103 ("The due diligence obligation of protection requires States to ensure that women and girls who are victims or at risk of violence have access to justice as well as to health care and support services that respond to their immediate needs, protect against further harm and continue to address the ongoing consequences of violence for individual woman."); *Ibid* 82. More recently, during the 57th session of the Commission on the Status of Women (4 March 2013), Ms. Rashida Manjoo, Special Rapporteur on Violence against women, highlighted the causes and consequences of violence against women, stressing the importance of due diligence. "The exercise of due diligence requires that States (a) conduct effective investigations of the crime, and prosecute and sanction acts of violence perpetrated by State or private actors; (b) guarantee de jure and de facto access to adequate and effective judicial remedies; (c) include in the obligation of access to justice, a requirement to treat women victims and their relatives with respect and dignity throughout the legal process; (d) ensure comprehensive reparations for women victims of violence and their relatives; (e) identify certain groups of women as being at particular risk for acts of

Suggested preventive measures included programs to empower women and teach self-reliance, encompassing educational classes, skills training, legal literacy workshops, and access to community resources. In addressing the “protective” facet of due diligence obligations, Ertürk noted that States are required to develop “*appropriate legislative frameworks, policing systems and judicial procedures to provide adequate protection*”.¹²¹ Furthermore, in highlighting examples of best practices, Ertürk cited States with reformed legislation that demanded greater accountability and adequate investigation and punishment of violence against women.¹²²

B. Impact of State Obligations on Women’s Rights in National Jurisdictions

The aforementioned cases illustrate an evolution of State obligations in which well-established jurisprudence has created a concrete framework of positive obligations to prevent, protect, prosecute, and provide redress for victims. In addition, within this framework exist specific recommendations of measures that ought to be taken and those which are necessary, thereby creating a set of guiding principles for States in the creation and modification of policies related to violence against women. Importantly, such recommendations are determined in large part by the close correlation between gender inequality and the prevalence of gender-based violence.¹²³ In recognition of this correlation, the IACtHR examined which social contexts had the highest correlation with violence against women, finding violence was a “manifestation of custom and practice or evidence of a social structure that relegated women to a position of subordination and inequality and thus left them at a disadvantage”.¹²⁴ In light of the historically unequal power relationship between men and women, and the subsequent inferior roles of women within society, State obligations have shifted to accommodate this continued inequality.¹²⁵ Positive obligations of States require not only mere adherence to human rights, but also measured steps which respect, protect, and fulfil human rights obligations. The protection of women against violence through creation of State obligations can be illustrated by two classifications of State duties. The first is the duty to amend discriminatory norms, practices, and policies. This duty requires States to amend existing discriminatory practices and legislation to protect women against violence and discrimination. This obligation is illustrated in cases such as *Bevacqua and S. v. Bulgaria*, where the existing criminal justice system operated on discriminatory norms and practices, thereby contributing to the violation of the victim’s rights.¹²⁶ The second duty is to conduct effective and efficient due diligence which incorporates positive anti-discrimination measures, as demonstrated in many of the aforementioned cases.¹²⁷ The exercise of effective due diligence in preventing violence against women can be evidenced through numerous developments, of which a few include: the creation of specific legislation; development of national strategies and action plans; expansion of the role and/or powers of the police services; expansion of powers and discretion of prosecutors and judges accompanied by appropriate training; provision of social services by State authorities; establishment of analytical disaggregated data collection systems; and implementation of awareness-raising programs.¹²⁸ These two obligations, and the steps taken to fulfil them, can serve as indicators of the degree to which State obligations impact the policies of national jurisdictions, looking specifically at women’s rights and protection from violence and discrimination.

1. Duty to amend discriminatory norms, practices, and policies

States are required to take all appropriate measures to modify customary practices and amend or repeal existing laws which promote and tolerate violence against women.¹²⁹ Given the correlation between discriminatory practices and violence against

violence due to having been subjected to discrimination based on more than one factor, including women belonging to ethnic, racial and minority groups; and (f) modify the social and cultural patterns of conduct of men and women and eliminate prejudices, customary practices and other practices based on the idea of the inferiority or superiority of either of the sexes, and on stereotyped roles for men and women”.

121 2006 Due Diligence Report (n 100) 82 (Such protective measures also include providing “a safe and conducive environment for women to report acts of violence” and measures such as counselling centres, legal assistance, restraining orders, etc.).

122 2006 Due Diligence Report (n 100) 50 (Ertürk also suggested that States reinforce the “capacities and powers of police, prosecutors and magistrates” to ensure effective responses).

123 This correlation is recognised in Article 6 of the Convention of Belém do Pará. See also Access to Justice for Women (n 39) 59.

124 Ibid.

125 Ibid 65. (The Convention of Belém do Pará made it clear that the inter-American system had recognised that gender-based violence was a “manifestation of the historically unequal power relations between women and men.”); Convention of Belém do Pará, Preamble. Also see ESC, Commission on the Status of Women ‘Report on the fifty-seventh session’ (4-15 March 2013) UN Doc E/2013/27, 10 (“CSW, Report on the fifty-seventh session”).

126 Other examples include, but are not limited to: *Bevacqua and S.* (n 86); *Castro-Castro Prison* (n 40); “*Cotton Field*” (n 46); *MC v. Bulgaria* (n 94).

127 Examples include, but are not limited to: *Maria da Penha Fernandes* (n 38); *Velasquez Rodriguez* (n 28); “*The Street Children*” (n 31); “*Cotton Field*” (n 46); *Dos Erres Massacre v. Guatemala*; *Airey* (n 74); *Osman* (n 77); *M.T. and S.T.* (n 97); *Irene Wilson* (n 98); *Kowal* (n 99); *X and Y v the Netherlands* (n 76); *Aydin* (106); *MC v. Bulgaria* (n 94).

128 Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo (n 25) 46 - 64.

129 See also Access to Justice for Women (n 39) 71 citing Article 7(e) of the Convention of Belém do Pará. While Article 7(e) explicitly prohibits discriminatory practices and violence toward women, other conventions provide similar protection but without the same specificity. For example, Article 21 of the Charter of Fundamental Rights of the European Union recognises the right to be free from discrimination, including on the basis of sex. Violence against women can be

women, this requirement can also be interpreted as an obligation to repeal discriminatory laws.

In a 2007 survey commissioned by the Office of the UN High Commissioner for Human Rights, a questionnaire on laws that discriminate against women was sent, by electronic mail, to a number of agencies around the world.¹³⁰ A primary objective of this questionnaire was to ascertain the extent to which discriminatory laws were still in existence. Responses to this questionnaire indicated the existence of discriminatory laws in many States,¹³¹ with laws pertaining to family life being the most likely to contain discriminatory provisions.¹³² Laws which govern family life include provisions on the age of marriage, consent to marriage, citizenship, divorce, guardianship of children and marital power of the husband. In addition, other prejudicial procedural provisions included laws related to rape or sexual assault, employment, and business.¹³³

In its response, Nepal noted a 2006 survey by the Forum for Women, Law and Development found “*173 legal provisions of the 83 various Acts and Regulations are discriminatory against women*”.¹³⁴ Of these, 65 have been amended by the Gender Equality Act 2006. There have also been judicial decisions ruling that discriminatory laws are *ultra vires*,¹³⁵ thereby finding 101 pieces of legislation which discriminate against women.¹³⁶ Additionally, the Women’s Centre for Legal Aid and Counselling based in Jerusalem, noted in its response that civil society had “*presented 65 amendments for all laws with a special focus on Personal Status law*” to the Model Parliament Project.¹³⁷

Many States have amended or repealed laws which allow rapists to avoid criminal punishment if they marry their victim.¹³⁸ There has also been a general increase in the criminalisation of sexual crimes and rape within marriage, as well as an expansion of the definition and sanction of rape. This is demonstrated in the domestic policies of countries such as Mexico, Belize, Costa Rica, Honduras, Nicaragua and Panama.¹³⁹

Despite State obligation to repeal discriminatory laws which promote violence against women, many States continue to uphold policies that fail to expressly prohibit such violence. In its second and third periodic reports to the UN Committee on the Elimination of Discrimination against Women (CEDAW), Nigeria stated: “*In a traditional setting, spousal rape is inconceivable. Under Nigerian Laws in both section 357 of the Criminal Code and section 282 of the Penal Code, a husband cannot be charged with marital rape. Once the marriage is subsisting and the wife has attained puberty then any sexual intercourse with her is never rape*”¹⁴⁰ These provisions of Nigeria’s criminal and penal code are a clear violation of the aforementioned conventions, treaties, and human rights norms, but are not an anomaly in light of other State policies which are equally discriminatory. For Example, the United Nations Mission in Sierra Leone (UNAMSIL) and Ethiopia and Eritrea (UNAMEE) noted Ethiopia’s “*Penal law defines ‘rape’ restrictively as only taking place outside of wedlock thereby indirectly giving husbands license to rape their wives. This is discrimination viewed in light of staggering increase of prevalence of domestic violence in Ethiopia*”¹⁴¹

linked to several Charter articles – such as human dignity (Article 1) and the right to life (Article 2) and integrity of the person (Article 3), the prohibition of torture and inhuman or degrading treatment or punishment (Article 4), and the right to liberty and security (Article 6).

130 See OHCHR ‘Project on a Mechanism to Address Laws that Discriminate against Women’ (6 March 2008) (“Mechanism to Address Laws that Discriminate against Women”) for additional information regarding this survey. A more detailed methodology section can be found in Appendix B, while the questionnaire can be found in Appendix C. A list of questionnaire recipients is in Appendix D. This survey does not claim to be a comprehensive review of the laws of all UN member States, but rather presents a glimpse of some discriminatory laws that remain in effect. While every effort has been made to check the accuracy of information provided, it is possible that some States have amended their laws and others have discriminatory laws.

131 Concluding comments of the Committee on the Elimination of Discrimination against Women to the combined initial, second and third periodic report of Benin (CEDAW/C/BEN/1-3) at its 687th and 688th meetings on 7 July 2005 (see CEDAW/C/SR.687 and 688), CEDAW, A/60/38 part II (2005), 145.

132 See Mechanism to Address Laws that Discriminate against Women (n 130) p 56. For example the response from Niger listed 8 areas of discrimination in the Civil Code. ONG DIMOL (a local NGO) response to questionnaire A:3. Concluding comments of the Committee on the Elimination of Discrimination against Women to the combined initial, second, third, fourth and fifth periodic report of the Congo (CEDAW/C/COG/1-5 and Add.1) at its 606th and 607th meetings, on 27 and 29 January 2003 (see CEDAW/C/SR.606 and 607), CEDAW, A/58/38 part I (2003), 160.

133 Ibid.

134 Ibid, citing Forum for Women, Law and Development (FWLD) questionnaire response A:3, April 2007.

135 Ibid, citing FWLD Nepal Part A:3 p 14 and B:1 p 15.

136 Ibid, citing OHCHR Nepal questionnaire response Part A:3 cited 101 discriminatory laws, May 2007.

137 Ibid citing S. Hussein Head of Research and Documentation Unit, Women’s Centre for Legal Aid and Counselling, OHCHR Questionnaire response Part B:1, April 2007. See also A. An Na’im (ed.) *Islamic Family Law in a Changing World: A Global Resource Book* (London, Zed Press, 2002).

138 A few of these States include Argentina, Brazil, Guatemala, Peru and Uruguay. See Access to Justice for Women (n 39) 268.

139 Access to Justice for Women (n 39) 268.

140 Mechanism to Address Laws that Discriminate against Women (n 130) p 87 citing Combined Second and Third Periodic Report of states parties: Nigeria CEDAW/C/NGA/2-3, 22.

141 Ibid citing UNAMEE questionnaire response Part A:3. The Ethiopian Penal Code, art 589, defines rape as forcing a woman to “submit to sexual intercourse outside wedlock...” thus suggesting that force used in wedlock is acceptable. F. Banda, ‘*Blazing a Trail: The African Protocol on Women’s Rights Comes into Force*’ (2006) 50 *Journal of African Law* 72, 175.

In addition, the penal codes of States such as Haiti¹⁴² and Morocco¹⁴³ violate CEDAW's recommendation that States should “*enact legislation to remove the defence of honour in regard to the assault or murder of a female family member*”.¹⁴⁴ These States allow for the partial or full defence of honour killings. States such as Syria,¹⁴⁵ Pakistan,¹⁴⁶ Turkey,¹⁴⁷ Yemen,¹⁴⁸ Jordan,¹⁴⁹ Lebanon,¹⁵⁰ and Egypt¹⁵¹ have technically outlawed the practice of honour killings but the practice continues unabated, partially as a result of the lenient sentences within their respective penal codes. Importantly, Turkey and Pakistan repealed these discriminatory laws in 2004 but gaps in the implementation of new policies continue to persist, an indication that while the legal framework has changed, societal values regarding violence against women may not progress at the same rate – the exact reason states should be under positive obligations as well as negative obligations to actively prevent abuses.¹⁵² In addition, despite the existence of legal reforms, reporting, prosecution and conviction rates remain low for acts of violence against women.¹⁵³

2. Due diligence and positive anti-discriminatory measures

In addition to repealing or amending discriminatory policies and practices, States are obligated to fulfil positive obligations through effective due diligence and measures which stem from the continuation of discriminatory practices. Measures may encompass the creation of policies which address violence against women and its causes, programs that raise awareness about the importance of preventing violence against women, and support programs which provide aid to victims of violence.

The due diligence standard for violence against women is laid out in Article 4(c) of the Declaration on the Elimination of Violence against Women (1993) where States are urged to “*exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons*”. In addition, in General Comment 19, CEDAW highlighted State responsibility for private acts arises “*if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence*”.¹⁵⁴

In a 2006 report the second UN Special Rapporteur on violence against women, Yakin Ertürk, re-examined the meaning and scope of State responsibility to act with due diligence, finding one of the primary problems of the due diligence standard was its failure to address violence against women in a holistic manner. The due diligence standard approached violence as an

142 Article 269 of the Penal Code states that “in the case of adultery as provided for in Article 284, the murder by a husband of his wife and/or her partner, immediately upon discovering them in flagrante delicto in the conjugal abode, is to be pardoned”.

143 Article 418 of the Penal Code states “Murder, injury and beating are excusable if they are committed by a husband on his wife as well as the accomplice at the moment in which he surprises them in the act of adultery”.

144 CEDAW ‘General Recommendation 19’ (1992) UN Doc A/47/38, 24 (r) (ii). See also Jane Connors, “United Nations Approaches to ‘Crimes of Honour’” in L. Welchman & S. Hossain (Eds.), ‘Honour’: Crimes, Paradigms and Violence against Women (Melbourne, Spinifex Press 2005) pp. 22-41.

145 Syria Penal Code, Article 548 exempts a man from penalty who kills or injures his wife (or a female) after finding her committing adultery or other “illegitimate sexual acts with another”. The law also allows a reduced penalty for a man who kills or injures his female relative after catching her in a “suspicious state with another”. This tendency to award lesser punishment in cases where the victim is considered to have “provoked” the crime by violating cultural norms is a glaring violation of human rights norms. See Maliha Zia Lari, “A Pilot Study on: ‘Honour’ Killings: in Pakistan and Compliance of Law” (2011) Aurat Publication and Information Service Foundation 26 < http://www.af.org.pk/pub_files/1366345831.pdf> accessed 24 June 2013.

146 The Criminal Law (Amendment) Act 2004, made numerous changes to the Pakistan Penal Code 1860 (PPC) and the Criminal Code of Procedure 1898 (CrPC), mainly adding to existing provisions to include qatl-i-amd (intentional murder) under the pretext of ‘honour’. Ibid., 31. See also Sohail Warraich, “Honour Killings’ and the Law in Pakistan” in L. Welchman & S. Hossain (Eds.), ‘Honour’: Crimes, Paradigms and Violence against Women (Melbourne, Spinifex Press 2005).

147 Turkey Penal Code, Art 81 and 82 (1) outlaw homicide and prescribe a heavy life imprisonment sentence for killings which encompass aspects seen in honour killings (i.e. committed against a family member or spouse; motivated by ethical reasons).

148 Article 232 of the Penal Code of Yemen states “if a man kills his wife or her alleged lover in the act of committing adultery or attacking them causing disability, he may be fined or sentenced to imprisonment for a term not exceeding one year”.

149 Part of Article 340 of the Penal Code states that “he who discovers his wife or one of his female relatives committing adultery and kills, wounds, or injures one of them, is exempted from any penalty”. While Article 340 has since been repealed, perpetrators of “honour” crimes may inappropriately benefit from the provisions in Articles 97 and 98, which allow for a reduction in sentence if a man is “provoked” into killing.

150 Lebanon Penal Code, Article 562 stipulates that a man who catches his wife or female relative engaging in sex outside of wedlock can kill or injure her in a moment of passion and receive a lenient sentence.

151 Egypt Penal Code, Art 17 provides for judicial discretion to allow reduced punishment in certain circumstances, which is often utilised in cases of honour killings. See Centre for Egyptian Women Legal Assistance (CEWLA), “Crimes of Honour” as Violence Against Women in Egypt” in L. Welchman & S. Hossain (Eds.), ‘Honour’: Crimes, Paradigms and Violence against Women (Melbourne, Spinifex Press 2005).

152 Fundamental lacunae in this Act include the non-mandatory punishment for perpetrators of ‘honour’ crimes, existence of provisions of waiver and compoundability, impunity as a consequence of the Court’s use of discretion in sentencing, lack of accountability mechanism for co-perpetrators, and harsh penalties which prove counter-productive in securing a conviction. See Honour Killings in Pakistan (n 145) pp 33-36 additional information.

153 Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo (n 25) 47.

154 CEDAW General Recommendation 19 (n 144) 19. Also stressed was the need to move away from a public/private dichotomy in viewing violence against women. By categorising some forms of violence against women as a “private” matter it has a normalising effect, and State intervention is perceived differently than if it were a “public” incident of violence. See Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo (n 25) 18.

isolated act, failing to recognise the correlation between violence and violations of basic human rights principles, including gender equality and non-discrimination.¹⁵⁵

In addition, Ms. Ertürk argued that principles of non-discrimination obligate States “*to use the same level of commitment in relation to prevention, investigation, punishment and provision of remedies for violence against women as they do with regards to other forms of violence*”.¹⁵⁶ She noted that due diligence had previously “*tended to be limited to responding to violence against women when it occurs and in this context it has concentrated on legislative reform, access to justice and the provision of services. There has been relatively little work done on the more general obligation of prevention, including the duty to transform patriarchal gender structures and values that perpetuate and entrench violence against women*”.¹⁵⁷ This focus on one particular aspect of women’s rights is of significance, as it implied that policies which expressly prohibit violence and discrimination against women will have a limited impact where they are not coupled with additional measures which address the practice of discriminatory gender norms. A UN official with experience working with a plurality of legal systems noted: “*There is a distinction between cultural discrimination and de jure discrimination. There are few laws promoting discrimination but many de facto practices. It is more about practices than laws. The law will say there is equality but the practice is different*”.¹⁵⁸

In the subsequent sections this article will highlight measures taken within national jurisdictions to fulfil positive State obligations in addressing violence against women. Due diligence measures which will be discussed include the creation of legislation prohibiting violence against women, national action plans, social service programs, awareness-raising programs, measures to provide redress for victims, and the implementation of data collection systems. The goal of this overview is to illustrate the existence of due diligence measures that address violence against women at the national level.

i. Creation of legislation prohibiting violence against women

Efforts to fulfil positive obligations can be partially satisfied through the creation and effective implementation of domestic policies which prohibit violence against women. This effort has spawned numerous committees focused on the legislative aspects of violence against women. These include: the Commission of Women and Human Development in Peru’s Congress; Equity and Gender Committees in Mexico’s legislative branch; Equity and Gender Committee and women’s caucus in Uruguay; and Legislative Committee for the Family, Women, Children and Adolescents in El Salvador. Regional bodies which have helped shape gender-sensitive legislation include the Inter-American Commission of Women (CIM); Women’s Rights Committee of the European Parliament; and Equal Opportunities Unit of the European Commission. The creation of such committees is a positive development because it demonstrates a societal demand for better legislation to address violence against women. Moreover, the growth in State sponsored committees indicates the political will required for positive legislative reforms is present.

Most countries have incorporated provisions into their national constitutions and have amended their penal codes to prohibit violence against women, or address gender equality more broadly. Laws regarding violence against women use a range of terminology and are applicable to “*family violence, domestic violence, intimate partner violence, trafficking, sexual violence, and female genital mutilation respectively*”.¹⁵⁹ An emphasis on domestic or intrafamily violence is prevalent within such legal reforms, with a growing trend toward gender neutrality in laws.¹⁶⁰ These countries include, but are not limited to: Antigua and Barbuda, Argentina, the Bahamas, Barbados, Belize, Bermuda, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Lucia, Saint Vincent and the Grenadines, St. Kitts and Nevis, Trinidad and Tobago, the United States, Uruguay and Venezuela.¹⁶¹

155 Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo (n 25) 18.

156 Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo (n 25) 19 citing 2006 Due Diligence (n 100) 35.

157 Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo (n 25) 19 citing 2006 Due Diligence (n 100) 15.

158 Mechanism to Address Laws that Discriminate Against Women (n 130) p. 144. See also Rikki Holtmaat, ‘Towards Different Law and Public Policy: The Significance of Article 5a CEDAW for the elimination of structural gender discrimination’ (Research undertaken for the Ministry of Social Affairs and Employment in the Netherlands, Leiden May 2004); Shaheen Sardar Ali, Gender and Human Rights in Islam and International Law: Equal Before Allah, Unequal Before Man? (The Hague, Kluwer Law International 2000) 151; OHCHR ‘General Comment 18: Non-Discrimination’ (10 Nov 1989) CCPR/C/21/Rev.1.Add.1, 9.

159 Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo (n 25) 47.

160 Ibid.

161 Access to Justice for Women (n 39) 259. Among the laws adopted are Antigua and Barbuda: Domestic Violence (Summary Proceedings) Act (1999); Argentina: Law No. 25.087 amending the Penal Code (1999); Law No. 24.417, “Protection against Family Violence” (1994); Bahamas: Sexual Offenses and Domestic Violence Act (1991); Barbados: Domestic Violence (Protection Orders) Act (1992), Sexual Offenses Act (1992); Belize: Domestic Violence Act (1992); Bolivia: Law No 1674, “Law against Domestic and Family Violence” (1995); Law 2033 of Protection to Victims from Crimes against Sexual Liberty (1999); modifies the Penal

Moreover, many States have adopted criminal sanctions with the aim of addressing sexual violence while others have amended their penal codes to make sexual violence a criminal offense with harsher penalties.¹⁶² Some examples include Bolivia, Ecuador, El Salvador, Canada, Chile, the Dominican Republic, Honduras, Peru and the United States.¹⁶³ Significantly, a primary result of these legal reforms has been the partial elimination of discriminatory cultural stereotypes and prohibition of unjust considerations in the judicial process.¹⁶⁴ In addition, some forms of sexual aggressions, including rape within marriage, have been re-characterised as criminal conduct.¹⁶⁵ These legal and policy changes indicate a shift in gender norms, as sexual violence is more likely to be viewed as a crime, instead of threats to the subjective concepts of the victim's "honour" and "morality".¹⁶⁶ Examples of changes to the language of Penal Codes can be seen in Bolivia,¹⁶⁷ Brazil,¹⁶⁸ Ecuador,¹⁶⁹ and Argentina.¹⁷⁰

ii. Drafting and implementation of national action plans

International human rights bodies continually call on State parties to develop, implement, and monitor national action plans (NAPs) which address violence against women.¹⁷¹ Additionally, the adoption and implementation of multi-sectoral NAPs to address violence against women is one of the five key goals which the UN Secretary-General's campaign 'UNiTE to end violence against women' aims to achieve in all countries by 2015.¹⁷² Taking a human rights approach, the guiding principles

Code about crimes of sexual violence (1997); Brazil: Law 11.340 on domestic or intrafamily violence (August 7, 2006); Canada: Law 4635 related to equal opportunity for men and women; although the Penal Code contains no provision for a specific crime classified as intrafamily violence, the batterer or abuser can face a variety of criminal charges for violation of laws criminalizing various behaviors, such as sexual abuse; Chile: Law No. 20.066, Law of Intrafamily Violence (2005); Colombia: Law 294 to Prevent, Remedy and Punish Intrafamily Violence (1996); Law 360 on Crimes against Sexual Freedom and Human Dignity (1997); Law 575, partially amending Law 294 (2000); Costa Rica: Law 7142 on Promotion of Women's Social Equality, Chapter 4, 1990; Law 7586 against Domestic Violence (1996); Dominica: Sexual Offenses Act (1992); Dominican Republic: Law 24-97 criminalizing domestic violence, sexual harassment and incest (1997); Ecuador: Law prohibiting Violence Against Women and Family (1995); El Salvador: Decree Law 902 against Intrafamily Violence (1996); Guatemala: Law 97-96 to Prevent, Punish and Eradicate Intrafamily Violence, Congressional Decree 7-99 "Law for the Dignity and Advancement of Women" (1999); Guyana: Domestic Violence Act (1996); Honduras: Law for the Prevention, Punishment and Eradication of Violence Against Women, Decree 132-97; Jamaica: Law on Domestic Violence (1995); Mexico: Law on Prevention of Family Violence and Provision of Related Assistance for Distrito Federal (1996); Decree to reform the Civil Code and Penal Code on the matter of intrafamily violence and rape (1997); Nicaragua: Law containing amendments and additions to the Penal Code (1996); Panama: Law 38 on Domestic Violence (2001); Law No. 27 on Intrafamily Violence Offenses and Child Abuse (1995); Law No 4 "Equal Opportunity for Women" (1999); Paraguay: Law 1600/00 on Intrafamily Violence (2000); Peru: Law 26260, establishing the policy of the State and society vis-à-vis domestic violence (1993); Saint Vincent and the Grenadines: Domestic Violence/Matrimonial Proceedings Act (1984) and the Domestic Violence Summary Proceedings Act; Saint Lucia: Domestic Violence Summary Proceedings Act (1995); Trinidad and Tobago: Act No 10 Domestic Violence Act (1999); United States: Public Law 103-322 - Title IV, Violence Against Women Act (1994); Uruguay: Law 16707 on Citizen Safety, which adds the legal figure of domestic violence and amends the Penal Code regarding violence (1995); Law 17514 on Domestic Violence (2002); Venezuela: Law on Violence against Women and the Family (2000).

162 See, as examples, Law 25.087 (1999), amending the Penal Code to include crimes of sexual violence (Argentina); Law 1674, amending the Penal Code on the matter of sex offenses (1997) and Law 2033, which protects victims of this crime (Bolivia); Law 360 on Crimes against Sexual Freedom and Human Dignity (1997) (Colombia); Law 19.617, which amends the Penal Code on the subject of sex offenses (1999) (Chile); Law 105, which amends the Penal Code on the subject of sex offenses (Ecuador); a 1998 amendment of the Penal Code to include crimes involving sexual violence (El Salvador); 1997 amendment of the Penal Code where sexual violence is defined as a "public order crime" (Honduras); a 1989 reform of the Penal Code, which introduced a more severe penalty for the crime of rape (Mexico); Law 27.115 which requires public criminal prosecution of offenses against sexual freedom (Peru); Law 24-97, criminalizing domestic violence, violence against women, sexual harassment and incest in 1997 (Dominican Republic). See Women's Access to Justice (n 39) fn 340.

163 Access to Justice for Women (n 39) 267.

164 Prohibited considerations include, but are not limited to, the honour of victims as a basis for establishing a crime occurred, their previous sexual history, and their conduct during the judicial process. See Women's Access to Justice for Women (n 39) 267.

165 Access to Justice for Women (n 39) 267 citing Elizabeth Guerrero, Violence against Women in Latin America and the Caribbean 1990-2000: An Assessment of a Decade, Isis Internacional, Santiago, Chile, April 2002, p 18; Tamayo, Giulia, (2000) Derechos humanos de las mujeres, violencia contra la mujeres y la paz en la región [Women's human rights, violence against women and peace in the region]. A review of the progress and challenges in the five years since the Fourth World Conference on Women. Report prepared by CLADEM for "Something more than words... mechanisms, resources and gender justice in the XXI century". Regional Meeting of Latin American and Caribbean NGOs in preparation for Beijing+5. Lima, February 5-7, 2000.

166 Elizabeth Guerrero, Violence against Women in Latin America and the Caribbean 1990-2000: An Assessment of a Decade, Isis Internacional, Santiago, Chile, April 2002, p 18.

167 In Bolivia, Law 2033 of October 29, 1999, Ley de Protección a las Víctimas de Delitos Contra la Libertad Sexual [Law to Protect Victims of Crimes against Sexual Freedom] increased the Judgment for rape to 5 to 15 years, whereas it had been 4 to 10 years. The law also eliminated the phrase "decent women".

168 In February 2005, Brazil's Penal Code was amended to remove the expression "decent women".

169 The Ecuadorian Penal Code was amended on June 1, 2005, to remove the expression "decent women" and replace it with the word "victim"; in the case of sexual crimes, the language "attack on decency" was replaced with the expression "sexual abuse"; no exceptional circumstances will be considered to reduce Judgments in sexual crimes, such as the accused turning himself in voluntarily or cooperating with the authorities in the investigation of the crime.

170 Language like "purity," "chastity," "decency" of the victims and "decent women" has been struck from the Argentine law on sexual violence.

171 For example A/57/38(SUPP) (CEDAW 2002), 332; CEDAW/C/AUT/CO/6, 24; CEDAW/C/LUX/CO/5, 20; CEDAW/C/FIN/CO/6, 16; CEDAW/C/RWA/CO/6, 26; CEDAW/C/EST/CO/4, 17, CEDAW/C/TLS/CO/1 , 30; E/C.12/KHM/CO/1, 20; E/C.12/AUS/CO/4, 22; E/C.12/1/Add.83, 36, E/C.12/1/Add.108, 52, E/C.12/HUN/CO/3, 43; CCPR/C/AUS/CO/5, 17; CCPR/C/SDN/CO/3, 14; CRC/C/CMR/CO/2, 60; CAT/C/BDI/CO/1, 18; CAT/C/SRB/CO/1, 21; CAT/C/LVA/CO/2, 20; and CERD/C/AZE/CO/6.

172 UNSG Campaign Unite to End Violence Against Women (n 1) 11.

for drafting a national action plan on addressing violence against women should encapsulate an indivisible, holistic and multi-sectoral response to violence against women.¹⁷³

The development and implementation of NAPs aimed at addressing violence against women is evidenced by legislative reforms in several States. One example of a domestic policy adopted with the aim of addressing violence against women and its causes is the Argentinean based *National Program for Training, Technical Assistance and Awareness of Violence against Women*. This program creates and strengthens interdisciplinary teams throughout the country in an effort to prevent and remedy the effects of domestic violence and form inter-institutional and social networks.¹⁷⁴

In December 2004, the Brazilian Government adopted the *National Policy Plan for Women* (PNPM), a comprehensive approach to the problem of gender-based violence aimed at lowering rates of violence and amend relevant laws. The PNPM comprises 31 measures which address violence against women. A few of these measures include training for professionals, creation of a service network, implementation of targeted laws, research on women's rights, and creation of public defender's offices equipped to meet the needs of women. Importantly, this plan was also analysed for compatibility at the local level to ensure full implementation.¹⁷⁵

These NAPs are a few examples of the best practices currently implemented by States, as they utilise a holistic approach when addressing the multifaceted causes and consequences of violence against women. In examining how due diligence standards of States have influenced domestic policies related to violence against women, it is evident that in many States, these standards have been incorporated into the NAPs. However, NAPs are multi-sectoral and often cross-jurisdictional, meaning their development is not limited to drafting actions, but rely on the establishment of structures and engagement of stakeholders necessary for an effective implementation.¹⁷⁶ Thus, the establishment of a NAP is not wholly indicative of a State's fulfilment of positive obligations with regard to addressing violence against women.

iii. Creation of government programs to address violence and discrimination against women

A strong indicator of a State's compliance with positive obligations to prevent violence and discrimination against women is the creation of programs which help to prevent violence against women and provide services to victims. In some countries inter-institutional collaborations are used to better coordinate State measures to prevent, punish and eradicate violence against women.¹⁷⁷ While this paper is focused on programs which address violence and discrimination against women, it is important to take into consideration the correlation between gender inequality and violence against women. This correlation indicates that programs and policies geared toward gender equality and non-discriminatory practices will have an indirect impact on the prevalence of violence against women. With this holistic approach in mind, effective preventative programs may address a variety of issues surrounding gender-based violence, such as lack of education, access to justice, and adequate healthcare.

In the Bahamas, the Ministry of Social Services and Community Development established a task force on violence against women to institutionalise a coordinated and systematic framework for healthcare policies, and general social services. Chile adopted a similar collaborative strategy, initiating projects which emphasise inter-sectoral coordination with the aim of establishing cooperative agreements between the Ministry of Education, Ministry of Justice, National Police, and the Servicio Nacional de la Mujer (SERNAM).¹⁷⁸ Additionally, the UK-based Multi-Agency Risk Assessment Conferences (MARACs) implemented a cooperative strategy in which statutory and voluntary agency representatives produce a coordinated action plan to increase victim safety through the sharing of information regarding high risk victims of domestic violence. These MARACs operate as one component of a larger infrastructure, designed to protect and support victims of domestic abuse.

173 UN Women, 'Handbook for National Action Plans on Violence Against Women' (New York, 2012) 11. More specific guiding principles include: define violence against women according to international norms and acknowledge this as a human rights violation; respond explicitly to State obligations under relevant human rights treaties; acknowledge violence against women is a form of discrimination and manifestation of historically unequal power relations between men and women; recognise and address the multiple and intersecting forms of violence against women; draw on research regarding the root causes, nature and impact of violence against women worldwide; collate and communicate data/research on the nature, prevalence and impact of different forms of violence against women while identifying gaps for future work; Recognise that women's experience of violence is shaped by numerous factors related to their personal and cultural identity; and tailor strategies and actions to meet specific needs.

174 Access to Justice for Women (n 39) 274.

175 Access to Justice for Women (n 39) 275. See paras 274-281 for additional national implementation plans.

176 Handbook for National Action Plans on Violence Against Women (n 173) 17.

177 Access to Justice for Women (n 39) 289.

178 Ibid.

Working collaboratively with other components such as the Specialist Domestic Violence Courts (SDVCs) and Independent Domestic Violence Advisor (IDVA) service, MARAC addresses case referrals based on their risk assessment.¹⁷⁹

In addition to preventative programs, most States have created national and local agencies with the mandate of protecting women's rights.¹⁸⁰ One such example is the establishment of the Women and Family Commissions in 17 of Ecuador's 30 provinces.¹⁸¹ State agencies charged with promoting women's rights oversee similar programs in partnership with CSOs.¹⁸² Other common services include victim hotlines that provide legal advice and psychological counselling, information centres with advisory services on physical and psychological violence, crisis centres, legal advisory services, and targeted intervention programs in domestic violence cases.¹⁸³

In some States, the fulfilment of this positive obligation has resulted in an expansion of policing services and judicial discretion. For example, Honduras police stations have been established across the country and staffed with multidisciplinary service teams to better address cases of violence against women.¹⁸⁴ In Brazil, the Office of the Special Secretary for Women's Affairs created a prosecutor's office whose sole function is to respond to and prosecute complaints of violence against women and discrimination. In Luxembourg, specialised training on domestic violence issues was provided to Grand Duchy future members of the police force. This specialised training has since been incorporated into the formal police curriculum, thereby enabling law enforcement units as a whole to better assist victims of domestic violence.¹⁸⁵ The expansion of judicial discretionary powers and policing services --both of which have adequate training and the capacity to address cases of violence against women--is a positive development for women's rights. With increased services and properly trained law enforcement and judicial officers, victims of violent crimes are more likely to receive a gender-sensitive response when seeking services from State officials.

a. Awareness-Raising Programs

A key objective of the UN Secretary-General's campaign to end violence against women is to increase public awareness, political will, and resources for preventing and responding to all forms of violence against women.¹⁸⁶ The establishment of awareness-raising programs which disseminate information on violence against women is another way in which States take measures to meet their positive obligations. Awareness-raising programs vary by need, but generally take on a two-pronged approach. The first objective of these programs is to inform victims and vulnerable sectors¹⁸⁷ of the population of their rights and the resources available to them. This first approach is demonstrated in numerous State programs, one of which includes Denmark's awareness-raising campaign "Stop violence against women - Break the Silence" ("Stop volden mod kvinder – bryd tavsheden"). In November 2003, a communication campaign specifically geared toward migrant and ethnic minority women was launched with the aim of breaking the taboo surrounding violence against women in local ethnic communities and to inform ethnic minority women about their rights and available resources for support. By increasing awareness of rights

¹⁷⁹ European Institute for Gender Equality, 'MARAC' <<http://eige.europa.eu/content/marac>> accessed 25 June 2013.

¹⁸⁰ The Rapporteurship learned that the following specific agencies have been created: Antigua and Barbuda (Directorate of Gender Affairs); Argentina (National Women's Council); the Bahamas (Bureau of Women's Affairs); Belize (Department of Women's Affairs and the National Women's Commission); Bolivia (Office of the Vice Minister of Women); Brazil (Office of the Special Secretary for Women's Policies); Colombia (Office of the Presidential Advisor on Women's Affairs); Costa Rica (National Women's Institute); Dominican Republic (Office of the Secretary of State for Women's Affairs); Ecuador (National Council of Women); El Salvador (ISDEMU); Guatemala (Office of the Presidential Secretary for Women's Affairs, the Office of the First Lady's Secretary for Social Works, and the National Coordinator for the Prevention of Intrafamily Violence and Violence against Women); Honduras (National Women's Institute); Mexico (National Women's Institute); Panama (Office of the National Director of Women's Affairs of the Ministry for Social Development); Nicaragua (Nicaraguan Women's Institute); Paraguay (Office of the Presidential Secretary for Women's Affairs); Peru (Ministry of Women and Social Development); St. Kitts and Nevis (Bureau of Women's Affairs); Saint Lucia (Gender Relations Division within the Ministry of Health); United States (Office on Violence against Women, Department of Justice); Saint Vincent and the Grenadines (Gender Affairs Division); and Venezuela (National Institute of Women). See Access to Justice for Women (n 39) fn 356.

¹⁸¹ See Access to Justice for Women (n 39) fn 351.

¹⁸² The following are examples of these programs: in Jamaica a support unit for victims of violence against women has been created and operates under the Ministry of National Security; in Paraguay, the Office of the Presidential Secretary for Women's Affairs has set up services to assist women victims of intrafamily violence and a referral centre for trafficking victims. See Access to Justice for Women (n 39) fn 353.

¹⁸³ Some examples of these programs can be found in Antigua and Barbuda, Argentina, Brazil, Honduras, Mexico and Venezuela. In Mexico, for example, INMUJERES has created a telephone hotline program called "Life Without Violence" and in Buenos Aires, Argentina, a telephone hotline has also been established called "línea mujeres". In Venezuela, the State has created a nationwide, toll-free hotline worked by psychologists and attorneys who specialise in offering services to women victims of domestic violence. Since its establishment in November 2004, a total of 14,563 calls have been taken: 100% of those who call in say they are the victims of psychological violence; 74.51% report being the victims of physical violence. See Women's Access to Justice (n 39) 283, fn 354. See Women's Access to Justice" (n 39) fn 351.

¹⁸⁴ European Institute for Gender Equality, 'Specialised training on domestic violence for Grand Duchy future members of police forces' <<http://eige.europa.eu/content/specialised-training-on-domestic-violence-for-grand-duchy-future-members-of-police-forces>> accessed 25 June 2013.

¹⁸⁵ UNSG Campaign Unite to End Violence Against Women, (n 1) 8.

among migrant and ethnic minority women, the goal was also to reduce differences between migrant and Danish women and aid integration.¹⁸⁷

The second objective of awareness-raising programs is to disseminate information to the general public regarding human rights standards and how discriminatory and violent acts against women violate fundamental human rights. Outreach programs aimed at increasing public awareness of the impacts surrounding violence against women are present in many States. For example, in January 2007 Croatia initiated “Silence is not gold” (“Šutnja nije zlato”), a program aimed at increasing understanding and awareness of gender-based violence with the end goal of enhancing gender equality on a broader scale. In this program 64 teachers were educated on creative techniques to regarding the prevention of gender-based violence, which subsequently reached over 1,200 students all over Croatia. Croatia’s initiative to educate youth on gender-based violence and gender equality is important because it demonstrates how educational strategies can circumvent problems on women’s rights before they materialise.¹⁸⁸ In Bulgaria the SOS “Families at risk” Foundation and Open Society Institute implemented a “court watching” joint initiative in 2006, aimed at increasing accountability for implementation of the Law on Protection against Domestic Violence 2005 while simultaneously increasing public awareness through the use of mass media.¹⁸⁹

While many States may establish awareness-raising programs, such measures do not meet positive obligations if State authorities have reason to know that these programs are ineffective in preventing violence against women. The aforementioned examples of awareness-raising programs have utilised specific communicative strategies to maximise the positive impacts on their target audience. For example, Denmark’s campaign was incredibly effective in raising awareness in migrant and ethnic minority communities by placing hairbrushes with crisis hotline information on them in salons frequented by individuals at the greatest risk of victimisation. Likewise, Croatia’s youth oriented program understood that creative teaching techniques and use of social media would have the greatest impact on the target audience. These examples highlight the strategic analysis and forethought required for an effective awareness-raising campaign. Thus, while most States have implemented programs aimed at raising awareness, an in depth study would be required to determine whether these programs are effective and adequately fulfil States’ due diligence obligations to prevent violence against women.

b. Providing redress for victims

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power stipulates that victims’ rights include access to justice, fair treatment, restitution, compensation and assistance.¹⁹⁰ In fulfilling due diligence obligations, States are required to uphold the rights of victims, providing access to justice, fair treatment, and a prompt redress.¹⁹¹ Victims’ rights can be divided into two separate categories: service rights and procedural rights.¹⁹² Service rights include initiatives aimed at providing victims with better treatment in the criminal justice system. Procedural rights provide victims with a more central participatory role in the decision-making process.¹⁹³ Given the differences in victim’s procedural rights between adversarial and inquisitorial systems, this paper will place greater focus on service rights and the right to a prompt redress.

With regard to service rights of victims, States have a positive obligation to provide access to a formal or informal mode of justice and initiate outreach programs to impart some degree of legal literacy within vulnerable groups of the population. These educational outreach programs are imperative to the full realisation of justice, as knowledge of the law and the available

¹⁸⁷ European Institute for Gender Equality, ‘Stop violence against women - break the silence’ <<http://eige.europa.eu/content/stop-violence-against-women-break-the-silence-0>> accessed 25 June 2013.

¹⁸⁸ European Institute for Gender Equality ‘National Campaign to prevent gender based violence - “Silence is not gold” (“Šutnja nije zlato”’ <<http://eige.europa.eu/content/national-campaign-to-prevent-gender-based-violence-%E2%80%93%E2%80%9Csilence-is-not-gold%E2%80%9D-%E2%80%9C%C5%A1utnja-nije-zlato>> accessed 25 June 2013.

¹⁸⁹ European Institute for Gender Equality ‘Court Watching for monitoring the implementation of the Law on victims’ protection against Domestic Violence’ <<http://eige.europa.eu/content/court-watching-for-monitoring-the-implementation-of-the-law-on-victims%E2%80%99-protection-against-d>> accessed 24 June 2013.

¹⁹⁰ UNGA ‘Use and application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power’ in ‘Note by the Secretary-General’ (1985) UN doc. E/CN.15/1997/16, 1. (Declaration of Basic Principles of Justice for Victims).

¹⁹¹ See Declaration of Basic Principles of Justice for Victims, *ibid* at Article 6 for specific information regarding victim rights.

¹⁹² Andrew Ashworth and Mike Redmayne, *The Criminal Process* (4th edn, OUP 2010).

¹⁹³ Service rights include the right have to information regarding court dates, progress of the case, assistance for vulnerable victims, and compensation. Procedural rights include opportunities to provide information, views, and opinions to criminal justice agencies and courts on a plethora of issues which include but are not limited to bail/custody, sentencing decisions, and parole release. Views and concerns of victims are often shared through “victim impact/personal” statements. See Andrew Sanders, ‘Victim participation in an exclusionary criminal justice system’ in Carolyn Hoyle and Richard Young (eds), *New Visions of Crime Victims* (Oxford, Hart Publishing 2002).

mechanisms for redress are central to women's access to justice.¹⁹⁴ Outreach programs, similar to those highlighted in a previous section, should embody initiatives wide in scope to act as an effective educational tool in raising awareness on issues from basic human rights to information on how to navigate the local judicial system. A second component of making justice more accessible to victims is to close the wide geographic gaps between locations where crimes may be reported. Physical accessibility is a major issue in accessing justice for women.¹⁹⁵ Often centres equipped to handle cases involving violence against women are not within close proximity, leaving the victim with additional costs of travel.

The State is also obligated to ensure the victim understands their procedural options regarding adjudication and mediation, with an awareness of the time implications for each and the opportunity to be informed in a language of their understanding. In addition, the State is obligated to initiate a thorough investigation, ensure an effective prosecution, and facilitate a "timely" trial.

The second component of redressing human rights violations addressed within the parameters of this paper is the provision of reparations for victims. Reparations are often provided to acknowledge the harm incurred by a victim. Reparations at times are provided in monetary form, although not always, and embody varying forms which include "*compensatory, restitutive, rehabilitative and/or symbolic in nature, and can be individual ... or collective ...*".¹⁹⁶ This variance in redress is important, as it allows victims to select a type or mixture of remedies, which will be most effective in addressing the harm caused to them. Furthermore, the "*actual implementation of reparations programs must be accompanied by a concerted commitment and effort on the part of the State to addressing the structural causes of human rights violations. Communities and individuals need to see that, rather than just paying lip service to their suffering, concrete measures are being undertaken by the state to redress the harms done to them in the past ...*".¹⁹⁷ It is crucial that States address the root causes of violence against women in order to break the cyclical effects of violence both within the public and private spheres.

A significant obstacle to ensuring redress for victims is the lack of information on State obligations to provide adequate reparations for acts of violence against women. This aspect of due diligence remains grossly underdeveloped and is in need of a monitoring mechanism to ensure justice is provided and impunity surrounding violence against women is stemmed.¹⁹⁸ For the purpose of this paper, the lack of data and monitoring mechanism do not allow for a conclusive analysis of whether strengthened due diligence standards have impacted women's rights within national jurisdictions. However, given the continued lack of such information, coupled with general knowledge these gaps exist in reporting redress for violence against women, we can reasonably infer that States are not conducting due diligence adequately.

c. Establishment of data collection systems

In adhering to the requests set forth under the UN resolution on intensification of efforts to eliminate all forms of violence against women, States are encouraged to collect data on violence against women using a widespread and consistent set of indicators.¹⁹⁹ The collection of sex-disaggregated data is crucial to the prevention of continued violence against women, as statistical analysis exposes trends in violence while indicating its causes and consequences. This increased knowledge enables States to implement informed development strategies and legislative reforms aimed at addressing violence against women.²⁰⁰ An accurate and comprehensive data collection system is also an imperative mechanism for monitoring and enhancing State accountability for measures to prevent violence against women. Thus, it can be argued States have a positive obligation to ensure adequate data collection as one component of their obligation to address violence against women.²⁰¹

Fulfilment of this obligation to establish an accurate data collection system is evidenced in numerous national jurisdictions. For example, Argentina's National Women's Council collaborated with UNICEF to launch a National Training, Technical

194 United States Institute of Peace, *Guiding Principles for Stabilization and Reconstruction* (1st, USIP Press, Washington, D.C. 2010).

195 Lisa Denney and Aisha Fofana Ibrahim 'Violence against Women in Sierra Leone: How women seek redress' (Politics and Governance, December 2012) p 13.

196 Romi Sigdworth, *Gender-Based Violence in Transition*, (Centre for the Study of Violence and Reconciliation, 2008), p 18.

197 *Ibid.*

198 2006 Due Diligence Report (n 100) 55.

199 UNGA 'Intensification of efforts to eliminate all forms of violence against women' (19 December 2006) UN Doc A/RES/61/143. The resolution requested: 'the Statistical Commission to develop and propose, in consultation with the Commission on the Status of Women, and building on the work of the Special Rapporteur on violence against women, its causes and consequences, a set of possible indicators on violence against women in order to assist States in assessing the scope, prevalence and incidence of violence against women.'

200 'Indicators to measure violence against women' Expert Group Working Meeting organised by the UN Division for the Advancement of Women, UN Economic Commission for Europe, and UN Statistical Division (8-10 October 2007) p 3.

201 *Ibid.* 6.

Assistance and Awareness Program on Violence against Women, *with one outcome including* the establishment of a centralised record of cases involving violence against women. The program collects data which includes: general profile characteristics of the informant population; history of intrafamily violence; the degree of danger at the time of the consultation; and underlying fears to utilise available services.²⁰² In 2006, the Italian National Institute of Statistics (ISTAT) carried out a survey on violence against women. The survey encompassed elements of violence which included: typology of violence; identification of perpetrator(s); period of occurrence; intensity, severity, consequences, and costs of violence; rate of reporting; and strategies to end violence.²⁰³ States have also made efforts to standardise the survey forms used to compile data on incidents of violence against women. For example, Guatemala has implemented a single form survey to compile data on intra-family violence, with the aim of delineating information by characteristics such as sex, age, ethnicity, and marital status.²⁰⁴ This move to standardise data collection is a positive indication of State measures which fulfil their obligations and better address violence against women.

However, in some cases the figures provided by State institutions did not fully capture the magnitude of the systematic violence against women because many cases are not reported and variables, like rape and mental health issues, are not always represented in the figures.²⁰⁵ These unrepresented violations present a challenge to the task of designing and executing measures that are effective in helping to reduce the problems which go unrecorded. Additional challenges include disparities in the data collected by States as a result of numerous variables, a few of which include differences in the indicators of violence and methods of data collection. These disparities in data, or lack thereof, are widespread and present a significant obstacle to the development of informed policies.²⁰⁶ Such challenges continue at a national level despite the fact 'Friends of the Chair,' a group established in 2008 by the UN Statistical Commission, is mandated with the development of globally acceptable indicators of violence and methods of data collection to be used in national statistical systems.²⁰⁷

In brief, the aforementioned due diligence measures indicate an increased emphasis by the international community and human rights courts on positive obligations of States to address violence against women has impacted women's rights within national jurisdictions.

In summation, it could be argued that an increased emphasis by international human rights courts on the positive obligations of States to address violence against women has translated to enhanced legislation and programs on women's rights within national jurisdictions. Most States have taken steps to fulfil their due diligence obligations by repealing discriminatory laws and implementing measures which respect and protect women's right to be free from violence. These efforts are evidenced by countless amendments to existing legal frameworks, implementation of national action plans, creation of programs aimed at preventing violence against women and providing social services, establishment of data collection systems, and enhance provisions for redress. However, the impact of these efforts remains limited in some States as a result of failure to adequately implement and monitor new legislation. In addition, many national action plans and preventative programs aimed at preventing violence against women fail to establish a holistic framework, thereby limiting their potential impact. Furthermore, data collection systems have the capacity to create evidence-based programming in order to better address violence against women, yet the availability of statistics on violence against women remains sporadic and weak in many countries and areas of the world.²⁰⁸

V. Conclusion

Gender-based violence continues to exist as one of the most extreme and pervasive forms of discrimination, severely impairing and nullifying the enforcement of women's rights.²⁰⁹ While the strong correlation between the problems of discrimination and

202 Access to Justice for Women (n 32) 292. Additional examples of national data collection systems can be found in paragraphs 291-293.

203 Indicators to measure violence against women (n 188) p 16.

204 Access to Justice for Women (n 32) 293.

205 Access to Justice for Women (n 32) 291 citing Reply from the Dominican Republic to the IACHR questionnaire about the Situation of Access to Justice for Women in the Americas, October 31, 2005.

206 UNFPA, 'The Role of Data in Addressing Violence against Women and Girls' (New York, 21 February 2013) (Role of Data in Addressing Violence against Women and Girls).

207 Ibid.

208 Ibid.

209 See, e.g., UNGA Resolution, Human Rights Council, Accelerating efforts to eliminate all forms of violence against women: ensuring due diligence in prevention, A/HRC/14/L.9/Rev.1, 16 June 2010; United Nations Declaration on the Elimination of Violence against Women, General Assembly Resolution 48/104, 20 December 1993, A/RES/48/104, 23 February 1994; United Nations, Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995); CEDAW Committee, General Recommendation 19: Violence against Women,

violence against women has been consistently highlighted,²¹⁰ women's rights as international human rights did not gain such recognition before the 21st century. The late blooming of women's rights is evidenced in the underlying tones of inequality in many societies. However, the global community must overcome the historically constructed inferior role of women in both the public and private realm, as these "*patriarchal disparities of power, discriminatory cultural norms and economic inequalities serve to deny women's human rights and perpetuate violence.*"²¹¹

The international jurisprudence established by both the IACtHR and ECtHR was imperative to the paradigm shift in which norms regarding women's rights were recognised as human rights. One outcome of this international jurisprudence was the establishment of a lower tolerance threshold in cases regarding violence and discrimination against women. In addition, courts have placed greater emphasis on the positive obligations of States to prevent violence and discrimination against women and to exercise the appropriate due diligence when violations of women's rights have been committed.

It could be argued that an increased emphasis by international, or supra-national, human rights courts on the positive obligations of States to address violence against women has impacted the rights of women in national jurisdictions. This is evidenced in the fulfilment of State due diligence to address violence against women through enhanced legislation, creation of national action plans, and implementation of social services which include awareness-raising programs and increased training for judiciary and law enforcement officers. However, the impact of these efforts is limited by State failure to frame policies and social services with a holistic, cross-cutting approach. Data collection systems, an indicator of State due diligence standards, have the capacity to create evidence-based programming and better address violence against women, yet the availability of statistics on violence against women remains sporadic and weak in many countries and areas of the world, thereby hindering the growth of effective policies and measure to address violence against women.²¹² This ironic twist is illustrative of a cyclical relationship between State's success or failure in conducting effective due diligence, and the corresponding impacts on rates of violence against women.

Thus, the importance of enhanced due diligence standards for States underscores measures to better address violence against women in national jurisdictions. However, the extent to which State obligations are capable of positively impacting the status of women's rights is limited by the ineffective implementation of such obligations. Furthermore, the absence of a binding instrument with an international mandate to monitor State compliance with due diligence obligations related to violence against women hints at a slow progression moving forward.²¹³ ■

(11th Session 1992), U.N. Doc.A/47/38 at 1 (1993).

210 See generally, Case of Claudia Ivette González and Others v Mexico (Report No 28/07) Inter-American Commission on Human Rights Cases 12.496-12.498 (9 March 2007); Maria Da Penha Maia Fernandes v Brazil (n 38); Access to Justice for Women (n 39); "Cotton Field" (n 46).

211 Study of the UN Secretary-General, Ending violence against women: From words to action (n 117) ii.

212 UNFPA, 'The role of Data in Addressing Violence against Women and Girls' (New York, 21 February 2013).

213 'Report of the Special Rapporteur on violence against women, its causes and consequences', Rashida Manjoo (n 25) 42.