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## Due Diligence and Gender Violence: Parsing its Power and its Perils

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# Due Diligence and Gender Violence: Parsing its Power and its Perils

Julie Goldscheid & Debra J. Liebowitz†

Human rights advocates increasingly invoke the due diligence standard to hold States responsible for their actions and omissions with respect to gender violence. This Article traces the development of the due diligence obligation and analyzes how the United Nations, European, and Inter-American human rights systems interpret the due diligence principal in the guiding international documents and developing gender violence case law. On its face, the due diligence obligation calls on the State to take responsibility for preventing gender violence, prosecuting and punishing perpetrators, and protecting and providing redress for gender violence victims. The notion of State responsibility for gender violence offered by the due diligence obligation is foundational, and is appealing in many ways, particularly when considering the near-universal history of non-responsiveness to, State approval of, and all-too-frequent participation in gender violence.

We argue that emerging interpretations of the due diligence obligation, as applied to gender violence, pay insufficient attention to the risks of State intervention. While State response is clearly needed, we should be cautious about the ramifications of the demand. A reflexive focus on State response can encourage an undue emphasis on criminal justice responses, with adverse consequences such as arrests of survivors and other unwanted interventions that thwart, rather than advance, fundamental human rights principles of safety, equality, and dignity. This focus risks situating the State as the entity charged with program delivery when other entities would be more effective. An appropriate model of state responsiveness should explicitly grant the State discretion not to respond, or to delegate its response to other stakeholders such as community members, survivors, NGOs, and advocates. It should consider the impact of any intervention on those at the margins—particularly those from racial, ethnic, religious, and sexual minorities—and should take into account the experiences and recommendations of both advocates and survivors. A

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careful balancing of the need for State accountability with the risk of over-intrusiveness can best advance foundational human rights principles, such as non-discrimination, equality, autonomy, and dignity, in service of ending gender violence and advancing justice.

Introduction .....	302
I. Due Diligence and Gender Violence .....	304
II. Cautionary Tale: the Limits of State Intervention .....	311
III. The Role of the State and Due Diligence: Emerging Interpretations .....	317
A. Guiding Normative Documents .....	317
1. Creating the Conditions for an Over-Emphasis on Criminal Justice Responses to Gender Violence.....	320
2. Measuring and Monitoring State Implementation ...	322
3. State Agency and Accountability.....	323
B. Case Law .....	326
1. Ensuring Accountability: Positive Obligations Versus Balancing Rights .....	327
a. States' Positive Obligation to Respond.....	327
b. Balancing Defendants' and Victims' Rights .....	334
2. State's Obligation to Provide Redress .....	339
IV. The Way Forward: Toward Accountability.....	343

## Introduction

Human rights advocates increasingly invoke the due diligence standard as a tool in efforts to address gender violence via the international human rights system. That standard extends human rights protections to violations committed by non-State actors by holding States “responsible for private acts if they fail to act with due diligence”<sup>1</sup> to prevent gender violence, to prosecute and punish perpetrators, and to protect and provide redress for its victims.<sup>2</sup> International human rights bodies and some States’ national courts now recognize the due diligence principle in their decisions and policy discourse.<sup>3</sup> That recognition reflects a critical advance and is the product of concerted advocacy. As with all legal standards, the adoption of the legal obligation itself is only the first step towards meaningful change. The next challenge is defining the scope and implications of what it would mean for a State to discharge, or to fail to discharge, its due diligence obligation.

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1. Declaration on the Elimination of Violence against Women, G.A. Res. 48/104, art. 4(c), U.N. Doc. A/RES/48/104 (Dec. 20, 1993), [hereinafter DEVAW]. See also Comm. on the Elimination of Discrimination against Women, 11th Sess., *General Recommendation No. 19: Violence against Women*, ¶ 9, U.N. Doc. A/47/38 (Jan. 29, 1992), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19> [hereinafter CEDAW Gen. Rec. 19].

2. See DEVAW, *supra* note 1, at art. 4(d).

3. See, e.g., U.N. Secretary-General, *In-depth study on all forms of violence against women*, 73, 89, U.N. Doc. A/61/122/Add.1 (July 6, 2006).

The increasing recognition of the due diligence obligation requires us to grapple with what it means to call for State responsiveness.<sup>4</sup> On its face, the obligation calls on the State to take responsibility for addressing gender violence. State response can take many forms: from legislative and executive actions, to criminal justice interventions, to State-sponsored provisions of services. The notion of State responsibility is important, and is appealing in many ways, particularly when considering the near-universal history of non-responsiveness to, State approval of, and all-too-frequent participation in gender violence. But as this principle is newly applied to cases of gender violence, lessons from advocacy should be taken into account. The due diligence obligation's focus on State responsibility should be viewed with a cautious eye in light of the potential and proved hazards of State involvement. While asking governments to respond to gender violence, we should be cautious about the ramifications of the demand and should guard against over-reach and its attendant harms.<sup>5</sup> Conscious consideration of the scope of invited State action should be part of the analysis, both as a tool for implementation and for measurement of compliance, because the very notion of the State as actor can be problematic.

As many have detailed, advocacy for increased State responsiveness has sometimes led to an over-reliance on criminal justice responses. This has had disproportionate and harmful impacts, particularly on those from racial, ethnic, religious, and sexual minorities.<sup>6</sup> In these contexts, calling for more State action can be counterproductive to shared goals of safety, autonomy, and equality. The calls for State response to gender violence also raise the question of how much and what kinds of interventions are sufficient to satisfy international human rights obligations. Importantly, notions of State responsiveness should include the exercise of discretion for the State not to respond, or to delegate its response to other stakeholders, such as community members, survivors, NGOs, and advocates.

This Article aims to take stock and to offer suggestions at this moment of application of and burgeoning jurisprudence interpreting the due diligence principle. While the project of implementation is inherently challenging, it is particularly so when navigating in an arena of fundamentally contentious concepts, policies, and interventions, and when considering not simply whether the State should respond, but how the State should respond. Part I traces the development of the due diligence principles as

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4. See generally JULIE GOLDSCHIED & DEBRA LIEBOWITZ, *DUE DILIGENCE PROJECT, DUE DILIGENCE & STATE RESPONSIBILITY TO ELIMINATE VIOLENCE AGAINST WOMEN, REGION: AUSTRALIA, CANADA, NEW ZEALAND & UNITED STATES OF AMERICA* (2014), available at [http://www.duediligenceproject.org/Resources\\_files/Australia%20Regional%20Report%20Final%200315.pdf](http://www.duediligenceproject.org/Resources_files/Australia%20Regional%20Report%20Final%200315.pdf). This paper draws on the authors' experience working on a report that is part of the Due Diligence Project, a global project that aims to elaborate what the due diligence principle means on the ground by drawing on the experiences and perspectives of NGO-based advocates. See generally <http://www.duediligenceproject.org>.

5. Accord GEORGE J. ANDREPOULOUS & ZEHRA F. KABASAKAL ARAT, *THE USES AND MISUSES OF HUMAN RIGHTS: A CRITICAL APPROACH TO ADVOCACY* 8 (2014) (recognizing tension between feminist advocacy for criminalization of gender violence and criminalization's detrimental racialized consequences).

6. See *id.* at 20.

they apply to issues of gender violence, including a summary of commentary expounding on the principles' promise. The discussion highlights the reasons why the due diligence obligation is a promising framework for holding States accountable for responding to gender violence. Part II contrasts the prospect of the State as the agent of change with the ways State intervention has proved problematic in law and policy responses to gender violence. This Part focuses in particular on States' roles in perpetrating gender violence, and details how State-sponsored interventions in cases of private violence, particularly through criminal justice and related interventions, have often served to exacerbate, rather than ameliorate, rights violations. Part III analyzes key themes reflected in the guiding normative documents and case law, which adopt and broadly interpret States' due diligence obligation. While a robust view of the State's required response holds much promise, it also risks "state overreach." The breadth of recommended or mandated remedies, combined with the risk that a call for State response is interpreted as a call for stronger criminal justice responses, may exacerbate rather than ameliorate harm.<sup>7</sup> The sweep of the obligation raises further questions about whether or how compliance might be assessed, and about whether or when the State can delegate the obligation to respond. Part IV offers suggestions for ways to balance the need for State accountability with the risk of over-intrusiveness as the due diligence principles continue to be used to advance legal claims and policy initiatives in global efforts to end gender violence.

## I. Due Diligence and Gender Violence

Putting international human rights law to effective use requires a clear understanding of the complexity of State obligation as well as sound frameworks for evaluating State performance. Although international law unambiguously obligates State actors to refrain from committing human rights violations, the progressive realization of rights necessitates a broader understanding of the concept; one that includes measures to prevent human rights abuses before they happen, to prosecute effectively and punish them once they have been committed, and to ensure the provision of effective redress for individuals and groups that have been subject to rights violations. These obligations extend to violations committed by non-State actors, which, in the case of gender violence, most typically occur in the private sphere.<sup>8</sup> The principle of 'due diligence' captures this amplified notion of State obligation in cases where a "State's indifference or inaction

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7. In this way, the development of the due diligence principle with respect to gender violence risks engendering unintended outcomes contrary to human rights principles' underlying goals. See *id.* at 14-15.

8. See, e.g., Rachel Hammonds & Gorik Ooms, *World Bank Policies and the Obligation of Its Members to Respect, Protect and Fulfill the Right to Health*, 8 HEALTH & HUM. RTS. 26, 28 (No. 1 2004). See generally John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, 3 INNOVATIONS: TECH., GOVERNANCE, GLOBALIZATION 189, 192 (Spring 2008).

provides a form of encouragement and/or de facto permission<sup>9</sup> for gender violence. The 'due diligence' principle is now generally understood to include an obligation on the State to prevent, protect against, prosecute, punish, and provide redress for acts of violence against women ("5Ps").<sup>10</sup> It implicates the State as bearing responsibility for preventing and responding to rights violations committed by individuals and other non-State actors, and makes clear that effectively addressing gender violence necessitates the engagement of oft-uninvolved State entities.<sup>11</sup>

The development and application of the due diligence obligation to cases of gender violence is occurring in a context in which the battle to gain recognition of gender violence as a problem has largely been won, albeit recently.<sup>12</sup> It is also occurring in a context in which the "greatest challenge" facing human rights movements today is widely seen as imple-

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9. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Comm. Against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, ¶ 18, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008) [hereinafter CAT Gen. Comment 2].

10. Special Rapporteur on Violence against Women, its Causes and Consequences, *The Due Diligence Standard As a Tool for the Elimination of Violence Against Women*. Commission on Human Rights, ¶ 19, U.N. Doc. E/CN.4/2006/61 (Jan. 20, 2006) (by Yakin Ertürk) [hereinafter Ertürk Due Diligence Report]. Although the standard may be expressed in terms that vary, the essence of the obligation is the same. See, e.g., Directorate General of Human Rights and Legal Affairs, *Ad Hoc Committee on preventing and combating violence against women and domestic violence (CAHVIO), Interim Report*, Council of Europe, ¶¶ 7, 72 (May 27, 2009), available at [http://www.coe.int/t/dghl/standardsetting/convention-violence/CAHVIO/CAHVIO\\_2009\\_4%20FIN\\_en%20\\_2.pdf](http://www.coe.int/t/dghl/standardsetting/convention-violence/CAHVIO/CAHVIO_2009_4%20FIN_en%20_2.pdf) (discussing the due diligence obligation in terms of three or four "Ps").

11. See generally Michelle Madden Dempsey, *Toward a Feminist State: What Does Effective Prosecution of Domestic Violence Mean?*, 70 MOD. L. REV. 908, 910-11 (2007).

12. The key women's human rights treaty, the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, was signed in 1979 and came into force in 1981, and includes no mention of violence against women. Convention on the Elimination of all Forms of Discrimination against Women, G.A. Res. 34/180, U.N. Doc. A/RES/34/180 (Dec. 18, 1979) [hereinafter CEDAW]. See generally BONITA MEYERSFELD, *DOMESTIC VIOLENCE AND INT'L LAW* (2012) (explaining the comprehensive history of the relationship between domestic violence and international human rights law). The CEDAW Convention's drafters were conscious of the need to ensure support and did not want the document to be perceived as undermining women's rights. The omission of the issue was part of the negotiation that made CEDAW palatable for State ratification. See generally CEDAW. Women's rights activism over the ensuing three decades has created a rather dramatic shift in the international human rights policy landscape. Beginning in 1989 with the CEDAW Committee's General Recommendation 12, followed by its more developed General Recommendation 19 (1992), policy and legal discussions now treat interventions to address gender violence as key to women's human rights. Comm. on the Elimination of Discrimination against Women, 8th Sess., *General Recommendation No. 12: Violence against Women*, (1989), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> [hereinafter CEDAW Gen. Rec. 12]; CEDAW Gen. Rec. 19, *supra* note 1. Indeed, the CEDAW Committee's jurisprudence and review of State party reports centrally address the issue. Furthermore, two regional treaties specifically on violence against women have come into force. See generally Organization of American States, *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women* "Convention of Belém do Pará, 1994," June 9, 1994, available at [www.oas.org/juridico/english/treaties/a-61.html](http://www.oas.org/juridico/english/treaties/a-61.html) [hereinafter Convention of Belém do Pará]. See also Council of Europe, Council of Europe Convention on Preventing and Combating Violence against Women and Domes-

mentation.<sup>13</sup> The focus on implementation comes from all corners of the human rights field, and it is part and parcel of why the due diligence standard has received increased attention.<sup>14</sup> The focus on implementation of human rights norms is the result of a maturing international system,<sup>15</sup> one that is increasingly attentive to the gap between de jure and de facto human rights protections as well as the role of the international system in ensuring the fulfillment of human rights.

In the context of “fulfilling” or enforcing rights, there is a growing body of commentary, much of it focusing in the area of gender violence, discussing the due diligence principle’s meaning, application, and promise.<sup>16</sup> Traditional concepts of State responsibility in international law, limited to specific violations ascribed to the government or its agents, supported international human rights institutions’ practice of ignoring gender violence.<sup>17</sup> The due diligence framework expands this conception of State responsibility in a number of key ways, making its application to cases of gender violence particularly promising for a number of reasons.

First, the due diligence obligation explicitly challenges the public-private divide that historically undergirds international law by articulating the relationship between State responsibility and human rights violations by non-State actors. International law’s embrace of the public-private dichotomy obscures the fact that violence experienced in private life constitutes a human rights violation; the due diligence obligation, most agree, explicitly challenges this formulation.<sup>18</sup> Writing about State accountability to

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tic Violence, May 11, 2011, available at [www.conventions.coe.int/Treaty/EN/Treaties/Html/210.htm](http://www.conventions.coe.int/Treaty/EN/Treaties/Html/210.htm) [hereinafter Istanbul Convention].

13. Caroline Bettinger-Lopez, *The Challenge of Domestic Implementation of International Human Rights Law in the Cotton Field Case*, 15 CUNY L. REV. 315, 316 (2012).

14. See *id.*

15. Brooke Stedman, *The Leap from Theory to Practice: Snapshot of Women’s Rights Through a Legal Lens*, 29 MERKOURIOS: UTRECHT J. INT’L AND EUR. L. 4, 5 (2013) (framing the evolution of State responsibility in the Inter-American and European human rights systems as indicative of a move from negative to positive State obligations). Stedman also frames the move from negative to positive State obligations as 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 right standards.” See *id.* at 13.

16. See generally Special Rapporteur on Violence Against Women, Its Causes and Consequences, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 34, U.N. Doc. A/HRC/23/49 (May 14, 2013) (by Rashida Manjoo) [hereinafter Manjoo Due Diligence Report].

17. Dorothy Q. Thomas & Michele E. Beasley, *Domestic Violence as a Human Rights Issue*, 15 HUM. RTS. Q. 36, 39 (1993) (illustrating this point with inattention to domestic violence).

18. See Carin Benninger-Budel, *Introduction to DUE DILIGENCE AND ITS APPLICATION TO PROTECT WOMEN FROM VIOLENCE* 1, 2 (Carin Benninger-Budel ed., 2008). See also Yakin Ertürk & Bandana Purkayastha, *Linking Research, Policy and Action: A Look at the Work of the Special Rapporteur on Violence Against Women*, 60 CURRENT SOC. 142, 145 (2012). For concerns about use of the due diligence standard, see Amy J. Sennett, *Lenahan (Gonzales) v. United States of America: Defining Due Diligence?*, 53 HARV. INT’L L. J. 537, 545 (2012) (arguing that the due diligence obligation actually maintains the public/private split by reifying the dichotomy between public and private acts of violence, and characterizing this “fictional” erasure as “invidious”).

address economic rights violations, Daria Davitti argues that the due diligence obligation forces “corporate private actors” out of the “unregulated periphery of international law.”<sup>19</sup> Those focusing on addressing gender violence have shown interest in developing the due diligence obligation for precisely this reason. In its authoritative discussion of violence against women, the CEDAW Committee defines State responsibility to address violence against women as requiring “appropriate and effective measures”<sup>20</sup> to address “private acts”<sup>21</sup> committed by “any person, organization or enterprise.”<sup>22</sup> United Nations Special Rapporteur on Violence against Women, Rashida Manjoo, notes in her report on due diligence that violations do not have to be directly attributable to the State to invoke the State’s obligation to respect, protect, and fulfill human rights for all.<sup>23</sup> States are also understood to be accountable for omissions, or for their failure to take appropriate steps to address rights violations, even when a non-State actor commits the violation.<sup>24</sup> Jan Arno Hessbruegge refers to this as a “diagonal obligation” of States, where States must work to prevent and protect individuals and groups from rights-violating conduct of non-State actors.<sup>25</sup>

Second, with regard to gender violence, the due diligence obligation shines a spotlight on prevention. With the goal of further specifying and systematizing the due diligence obligation, Manjoo organizes State responsibility into two categories.<sup>26</sup> The first—“individual due diligence”—includes the obligations of States owed to individuals and groups.<sup>27</sup> Fulfilling the due diligence obligation would require “effective remedies” that take account of the full range of needs and preferences of those who have been harmed.<sup>28</sup> The second category—“systemic due diligence”—encompasses the obligations of States to create, monitor, and sustain a “holistic model” of prevention, protection, punishment, and reparation.<sup>29</sup> This two-tier focus makes clear that due diligence requires both preventing repeti-

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19. Daria Davitti, *On the Meanings of International Investment Law and International Human Rights Law: The Alternative Narrative of Due Diligence*, 12 HUM. RTS. L. REV. 421, 443–44 (2012).

20. CEDAW Gen. Rec. 19, *supra* note 1, ¶ 24(a).

21. *Id.* ¶ 9.

22. *Id.*

23. Manjoo Due Diligence Report, *supra* note 16, at ¶ 14 (quoting Robert McCorquodale & Penelope Simons, *Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law*, 70 MOD. L. REV. 598, 618 (2007)).

24. Ineke Boerefijn & Eva Naezer, *Emerging Human Rights Obligations for Non-State Actors*, in DUE DILIGENCE AND ITS APPLICATION TO PROTECT WOMEN FROM VIOLENCE 91, 92–93 (Carin Benninger-Budel ed., 2008).

25. Jan Arno Hessbruegge, *Human Rights Violations Arising from Conduct of Non-State Actors*, 11 BUFF. HUM. RTS. L. REV. 21, 25 (2005).

26. Manjoo Due Diligence Report, *supra* note 16, ¶ 70.

27. *Id.*

28. *Id.* ¶¶ 29, 70. See also Yakin Ertürk, *The Due Diligence Standard: What Does It Entail for Women’s Rights?*, in DUE DILIGENCE AND ITS APPLICATION TO PROTECT WOMEN FROM VIOLENCE 27, 40 (Carin Benninger-Budel ed., 2008) (discussing due diligence at the individual level).

29. Manjoo Due Diligence Report, *supra* note 16, ¶ 71 (also noting that this approach to the due diligence obligation has been adopted by the Committee on the



tion of rights violations and providing justice to individual victims.<sup>30</sup>

The spotlight that “systemic due diligence” puts on prevention makes the obligation particularly appealing for addressing gender violence, because it serves as a corrective to the dominant focus on protection and prosecution. Discussing the application of the due diligence standard to addressing harmful traditional practices, Cecilia M. Bailliet argues that the value of this approach is its attention to preventing violence by undermining the discriminatory gendered structures, ideas, and practices that buttress gender violence.<sup>31</sup> In another context, a December 2010 decision of the Inter-American Commission on Human Rights, for example, applied the due diligence requirement to the protection from violence towards women living in camps for the internally displaced (IDP camps) in Haiti.<sup>32</sup> The Commission found that the government’s knowledge of rapes and subsequent failure to require better security, lighting, and medical assistance constituted a failure of their due diligence obligation to protect women living in twenty-two different IDP camps.<sup>33</sup> The Commission recommended a host of precautionary measures, such as better security and access to the full range of medical and psychological care for victims, including provision of HIV prophylaxis and emergency contraception.<sup>34</sup> This precedent-setting ruling “has the potential to expand the number and type of precautionary measures granted in rape cases in every country that has signed an international convention with a due diligence clause.”<sup>35</sup> This ruling demonstrates the due diligence obligation’s instrumentality in the evolution of State responsibility for gender violence.

Third, related to the obligation of systemic prevention, the due diligence obligation requires that programs, policies, and practices address the root causes of gender violence. In particular, this centers the link between gender violence and gender discrimination by insisting that undoing pre-existing “socio-cultural patterns that stand in the way of women’s full access to justice” is necessary to any anti-gender violence program of action.<sup>36</sup> Attention to the root causes of violence have been variously inter-

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Elimination of All Forms of Discrimination against Women, the European Court of Human Rights, and the Inter-American system).

30. *Id.* ¶ 73.

31. Cecilia M Bailliet, *Persecution in the Home: Applying the Due Diligence Standard to Harmful Traditional Practices within Human Rights and Refugee Law*, 30 *NORDIC J. HUM. RTS.* 36, 41-42 (2012).

32. Inter-Am Comm’n H.R., *Women and Girls Residing in 22 Camps for Internally Displaced Persons in Port-au-Prince, Haiti*, Precautionary Measures, no. PM 340/10 OEA/Ser.L/V/II., doc. 5 rev. 1 (2010).

33. *Id.*

34. *Id.* See also April Marcus, *Grassroots Women’s Organizations’ Fight for Freedom from Sexual Violence and Recognition Under Domestic and International Law*, 14 *CUNY L. REV.* 329, 335-36 (2010).

35. *Id.* at 336.

36. Elizabeth A.H. Abi-Mershed, *Due Diligence and the Fight Against Gender-Based Violence in the Inter-American System*, in *DUE DILIGENCE AND ITS APPLICATION TO PROTECT WOMEN FROM VIOLENCE* 127, 136 (Carin Benninger-Budel ed., 2008); Manjoo Due Diligence Report, *supra* note 16, ¶ 75 (“This implies that remedies should aspire, to the extent possible, to subvert instead of reinforce pre-existing patterns of cross-cutting

preted as, among others, requiring the combatting of gender stereotypes,<sup>37</sup> tackling gendered economic inequalities,<sup>38</sup> and providing access to political empowerment and decision-making.<sup>39</sup> Attention to root causes challenges the notion that gender violence is a phenomenon distinct from the wider field of gender equality and women's rights.<sup>40</sup> By accounting for the roots of violence, the obligation easily accommodates an analysis of gender violence that is linked to other forms of discrimination. It requires attention to multiple and intersecting forms of discrimination because they are part and parcel of the cause and consequences of gender violence,<sup>41</sup> and it provides a tool for challenging "cultural" or normalizing justifications for gender violence.<sup>42</sup>

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structural subordination, gender hierarchies, systemic marginalization and structural inequalities that may be at the root cause of the violence that women experience." See also, e.g., Caleigh McRaith et al., *Due Diligence Obligations of the United States in the Case of Violence Against Women*, in *Violence Against Women in the United States and the State's Obligation to Protect: Civil Society Briefing Papers on Community, Military and Custody* 9, 10 (2011), available at <http://reproductiverights.org/sites/crr.civicactions.net/files/documents/vaw.pdf>.

37. Rikki Holtmaat, *Preventing Violence Against Women: The Due Diligence Standard with Respect to the Obligation to Banish Gender Stereotypes on the Grounds of Article 5(a) of the CEDAW Convention*, in *DUE DILIGENCE AND ITS APPLICATION TO PROTECT WOMEN FROM VIOLENCE* 63, 64 (Carin Benninger-Budel ed., 2008). See generally REBECCA J. COOK & SIMONE CUSAK, *GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES* (Bert B. Lockwood, Jr. ed., 2010).

38. U.N. Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights* (art. 3 of the *International Covenant on Economic, Social and Cultural Rights*), ¶ 27, U.N. Doc. E/C.12/2005/4 (Aug. 11, 2005). This Comment acknowledges that implementing the Convention

requires States parties, inter alia, to provide victims of domestic violence, who are primarily female, with access to safe housing, remedies and redress for physical, mental and emotional damage; . . . and to ensure that women have equal rights to marital property and inheritance upon their husband's death. Gender-based violence is a form of discrimination that inhibits the ability to enjoy rights and freedoms, including economic, social and cultural rights, on a basis of equality. States parties must take appropriate measures to eliminate violence against men and women and act with due diligence to prevent, investigate, mediate, punish and redress acts of violence against them by private actors. *Id.*

39. Ertürk Due Diligence Report, *supra* note 10, ¶¶ 78–81.

40. *Id.* ¶ 100. The Report goes on to state:

The universal phenomenon of violence against women is the result of 'historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of women's full advancement.' However, in practice, the response to the issue of violence against women has been fragmented and treated in isolation from the wider concern for women's rights and equality. *Id.*

41. See generally Special Rapporteur on violence against women, its causes and consequences, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural, Including the Right to Development*, U.N. Doc. A/HRC/17/26, (May 2, 2011) (by Rashida Manjoo) (addressing multiple and intersecting forms of discrimination) [hereinafter Manjoo 2011 Report].

42. Farida Shaheed, *Violence against Women Legitimised by Arguments of 'Culture'—Thoughts from a Pakistani Perspective*, in *DUE DILIGENCE AND ITS APPLICATION TO PROTECT WOMEN FROM VIOLENCE* 241, 241 (Carin Benninger-Budel ed., 2008).

Fourth, scholars explain that diligence must be assessed alongside other general human rights principles (for example, equality and non-discrimination), as these principles, enshrined in human rights agreements, are what give substantive meaning to the obligation.<sup>43</sup> Making the connections between gender violence and the broader fight to address gendered inequalities is critical to a robust application of the due diligence obligation and an adequate framing of State responsibility to address gender violence.<sup>44</sup> Some have argued that the CEDAW Committee has robustly connected due diligence with principles of non-discrimination and equality, while doing so conservatively in cases focusing on civil, political, or economic rights.<sup>45</sup>

Fifth, scholars generally agree that the due diligence obligation is one of means and not results.<sup>46</sup> In other words, an act of domestic violence itself would not be evidence of State failure to exercise due diligence. It is, rather, “a lack of reasonableness in measures of prevention, and/or a lack of seriousness in measures of response” that indicate such a failure.<sup>47</sup> This does not mean, however, that a State can simply claim that it did not have the structures in place to prevent or redress acts of gender violence. This defense fails because acting with due diligence requires the State to take measures that “have a real prospect of altering the outcome or mitigating the harm.”<sup>48</sup>

Although the vast majority of scholars and human rights advocates see promise in the due diligence obligation to address a wide range of concerns, the use of the concept is still relatively new. A few scholars argue that the obligation, as one of means and not results, is a weakness that presents a potential danger.<sup>49</sup> For example, as an obligation of conduct, it runs the risk of being used as a defensive standard, with the State claiming

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43. Manjoo Due Diligence Report, *supra* note 16, ¶ 76. The Report explains:

The foundation for dealing with violence against women is laid down by the general principles that define the nature of human rights, i.e., universality, inalienability, equality, non-discrimination, indivisibility, interdependence and interrelatedness; and the principles related to the respect, protect and fulfil [sic] goals of human rights. Thus participation, inclusion, the rule of law, and accountability should be core values underpinning the State's response when it acts with due diligence to meet its obligations to eliminate violence against women. *Id.*

44. See Ertürk Due Diligence Report, *supra* note 10, ¶ 100.

45. See generally Simone Cusack & Lisa Pusey, *CEDAW and the Rights to Non Discrimination and Equality*, 14 MELB. J. INT'L L. 54 (2013).

46. See, e.g., Abi-Mershed, *supra* note 36, at 137; Davitti, *supra* note 19, at 444.

47. See Abi-Mershed, *supra* note 36, at 137.

48. Manjoo Due Diligence Report, *supra* note 14, ¶ 72. Although due diligence is not an obligation of result, Riccardo Pisillo Mazzeschi's review of court and arbitral bodies' decisions across the 19th and 20th centuries finds wide support for the view that a State's actions, when judged, should be compared internationally. See Gabe Shawn Vargas, Book Review, 85 AM. J. INT'L L. 568, 568 (1991) (reviewing RICCARDO PISILLO MAZZESCHI, “DUE DILIGENCE” E RESPONSABILITÀ INTERNAZIONALE DEGLI STATI, (A. Guiffrè ed. (1989)).

49. See e.g., Menno T. Kamminga, ‘Due Diligence’ Mania: *The Misguided Introduction of an Extraneous Concept into Human Rights Discourse* 1 (Maastricht Faculty of Law, Working Paper No. 2011/07).

that even though the desired result was not achieved, it acted with diligence.<sup>50</sup> Skeptics suggest that the lack of clarity of the obligation gives States a door through which they can “escape responsibility.”<sup>51</sup> Others, while not wholly critical, recognize the potential danger, but indicate that the jury is still out on the question of whether the obligation will be used to weaken internationally agreed-upon human rights obligations.<sup>52</sup>

Finally, the flip-side of the concern about the principle’s imprecision is its openness and flexibility. The due diligence obligation is open enough to take account of a wide variety of circumstances. The obligation is context- and fact-specific, providing a “flexible reasonableness standard.”<sup>53</sup> Inadequate resources are not a valid excuse for failing to act with diligence because State resources “must be allocated on a non-discriminatory basis.”<sup>54</sup> Yet, as with many questions of implementation, translating theory to practice surfaces myriad challenges. In this context, one key challenge is how to frame and define the scope of invited State responses.

## II. Cautionary Tale: the Limits of State Intervention

By definition, the due diligence obligation calls on the State to increase its response to gender violence. Implicit in this concept is the notion that State involvement is inherently useful and good. At the same time, at a minimum, a turn to the State calls for critical reflection on the risks as well as the benefits of an enhanced State role. The call for State responsibility for gender violence is appealing and important, particularly in light of the global history and, in some cases, enduring reality of States’ failure or refusal to recognize gender violence as a legal, social, and political wrong. But, as criticism in recent decades of advocacy details, the State’s role in committing gender violence, and the dangerous ramifications of State involvement in efforts to end private violence, should lead us to be cautious.<sup>55</sup> Recognizing that the due diligence obligation applies to

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50. See *id.* at 5.

51. Sennett, *supra* note 18, at 547.

52. See, e.g., ROBERT P. BARNIDGE, JR., NON-STATE ACTORS AND TERRORISM: APPLYING THE LAW OF STATE RESPONSIBILITY AND THE DUE DILIGENCE PRINCIPLE 67 (2008) (citing James Crawford & Simon Olleson, *The Nature and Forms of International Responsibility*, in *INTERNATIONAL LAW* 445, 460 (Malcolm D. Evans ed., 2003) (noting that “affirmative State action tends to attract objective responsibility, while a State’s failure to act, or omission, typically triggers subjective responsibility.”); Joanna Bourke-Martignoni, *The History and Development of the Due Diligence Standard in International Law and Its Role in the Protection of Women Against Violence*, in *DUE DILIGENCE AND ITS APPLICATION TO PROTECT WOMEN FROM VIOLENCE* 47, 57 (Carin Benninger-Budel ed., 2008); Stephanie Fariior, *The Due Diligence Standard and Violence Against Women*, 14 *INTERRIGHTS BULL.* 150, 151 (2004).

53. BARNIDGE, *supra* note 52, at 138–141.

54. Fariior, *supra* note 52, at 151.

55. Debate about the role of the State in addressing gender violence has animated discourse over reforms for the last several decades. See generally CYNTHIA R. DANIELS, *FEMINISTS NEGOTIATE THE STATE: THE POLITICS OF DOMESTIC VIOLENCE* (1997) (examining paradoxes of working with the state to address gender violence); SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN’S MOVEMENT* 185–191 (1982) (discussing the contradictory effects of government involve-

State responses to gender violence is a key advance; the challenge now is to ensure that it is implemented in a way that takes into account both its promise and its challenges.

Examples abound of sexual violence committed by State actors, both as individuals acting in official or semi-official capacities, and through group or collective actions. Sexual violence committed by the military, both against members of the military and against civilians, is all too common.<sup>56</sup> Tragic accounts of the widespread and systematic use of rape in war starkly highlight this point.<sup>57</sup> In other cases, the State turns a blind eye toward abuses carried out by paramilitary forces as a way to deflect culpability.<sup>58</sup> Outside of military settings, women and girls, particularly racial, ethnic, religious, and sexual minorities, are subjected to sexual assault, rape, brutal strip-searches, beatings, and even shootings and killings by law enforcement and other state officials.<sup>59</sup> As but one example, the United Nations Committee Against Torture has noted with alarm reports of women being subjected to sexual violence in police stations in Guatemala.<sup>60</sup> State agents explicitly advocate or frequently condone violence against sex workers,<sup>61</sup> migrant women,<sup>62</sup> and trans people.<sup>63</sup>

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ment); ELIZABETH M. SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* 182-184 (2000) (tracing history of debates about the role of the State).

56. See, e.g., Sylvanna Falcon, "National Security" and the Violation of Women: Militarized Border Rape at the U.S.-Mexico Border, in *THE COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY* 119 (INCITE! Women of Color Against Violence ed., 2006) [hereinafter, *THE INCITE! ANTHOLOGY*]; Doris Buss, *Rethinking 'Rape as a Weapon of War'*, 17 *FEMINIST LEGAL STUD.* 145 (2009) (discussing sexual violence and the Rwandan genocide).

57. See generally Dara Kay Cohen, *Explaining Rape During Civil War: Cross-National Evidence (1980-2009)*, 107(3) *AM. POL. SCI. REV.* 461 (2013); Paul Kirby, *How is Rape a Weapon of War?: Feminist International Relations, Modes of Critical Explanation and the Study of Wartime Sexual Violence*, 19(4) *EUR. J. INT'L REL.* 797 (2013).

58. Julia Meszaros, *The Continued Silencing of Torture in Kashmir*, *THE HUFFINGTON POST*, (Apr. 22, 2014), [http://www.huffingtonpost.com/julia-meszaros/the-continued-silencing-kashmir\\_b\\_4821002.html](http://www.huffingtonpost.com/julia-meszaros/the-continued-silencing-kashmir_b_4821002.html) (discussing the documentary, *The Torture Trail*, and its treatment of the use rape of women by the Indian army and paramilitary groups).

59. See, e.g., Amnesty International, *Women of Atenco, Mexico, Raped, Beaten, Never Forgotten*, available at <http://www.amnestyusa.org/our-work/cases/mexico-women-of-atenco> (discussing a case where "dozens" of women "were subjected to physical, psychological and sexual violence by the police officers who arrested them"). See generally BETH E. RICHIE, *ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA'S PRISON NATION* 47-53 (2012) (describing violence by state agencies and against Black women in state custody); Andrea J. Ritchie, *Law Enforcement Violence Against Women of Color*, in *THE INCITE! ANTHOLOGY*, *supra* note 56, at 138-50.

60. U.N. Comm. against Torture, *Consideration of Reports Submitted by State Parties under Article 19 of the Convention, Conclusions and Recommendations on Guatemala*, U.N. Doc. CAT/C/GTM/CO/4, ¶ 17 (July 25, 2006).

61. Anna-Louise Crago, "Bitches Killing the Nation": Analyzing the Violent State-Sponsored Repression of Sex Workers in Zambia, 2004-2008, 39(2) *SIGNS* 367, 372-73 (2014) (noting that police violence against sex workers is common in Zambia where they are being blamed for the spread of HIV).

62. Special Rapporteur on Violence Against Women, its Causes and Consequences, *Integration of the Human Rights of Women and a Gender Perspective: Violence against Women, Addendum, Mission to Mexico*, ¶¶ 27, 29, U.N. Doc E/CN.4/2006/61/Add.4 (Jan. 13, 2006) (by Yakin Ertürk) (noting that Mexican migration law prohibits undocumented migrants in the country from accessing State officials so migrants from Guatemala, when subject to violence, have no legal recourse).

Even when calling for increased State responsiveness to private violence, caution is warranted. Many scholars argue that the anti-violence movement's partnership with the State has resulted in a de-politicization, professionalization, and standardization of the anti-domestic violence movement, with a problematic emphasis on criminal justice responses.<sup>64</sup> Others caution that mainstream approaches to gender violence serve to reinforce women's traditional roles, rather than targeting root causes and gender-based inequalities.<sup>65</sup>

In particular, the due diligence standard's explicit focus on prosecution and punishment amplifies concerns about inviting an enhanced State role in criminal justice interventions.<sup>66</sup> For many, the State, particularly as embodied by the criminal justice system, is a perpetrator of violence rather than a protector against violence. State criminalization and incarceration policies exacerbate and perpetuate interconnected forms of gender violence, particularly for racial, ethnic, religious, and sexual minorities, and for others from marginalized communities, such as indigenous, immigrant, and disabled survivors.<sup>67</sup> Criminal justice interventions have acute ramifi-

63. Jenna M Calton, et al., *Barriers to Help Seeking for Lesbian, Gay, Bisexual, Transgender, and Queer Survivors of Intimate Partner Violence*, in *TRAUMA, VIOLENCE & ABUSE* (2015), available at <http://tva.sagepub.com/content/early/2015/05/14/1524838015585318.abstract>.

64. See, e.g., Conny Roggeband, *Shifting Policy Responses to Domestic Violence in the Netherlands and Spain (1980-2009)*, 18 *VIOLENCE AGAINST WOMEN* 784, 801 (2012) (explaining that the "success" of the anti-gender violence movement in gaining State support "resulted in a decline of feminist mobilization" and ultimately a loss of early policy gains). For critique of the anti-domestic violence movement's partnership with the State, see KRISTIN BUMILLER, IN AN ABUSIVE STATE: HOW NEOLIBERALISM APPROPRIATED THE FEMINIST MOVEMENT AGAINST SEXUAL VIOLENCE 1- 15 (2008); Alice M. Miller, *Sexuality, Violence Against Women, and Human Rights: Women Make Demands and Ladies Get Protection*, 7(2) *HEALTH & HUM. RTS.* 17, 32-33 (2004). See generally LEIGH GOODMARK, *A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM* (2012); Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 *BUFF. CRIM. L. REV.* 801 (2001); PATRICIA ENG WITH SHAMITA DAS DASGUPTA, *MS. FOUNDATION FOR WOMEN, SAFETY AND JUSTICE FOR ALL: EXAMINING THE RELATIONSHIP BETWEEN THE WOMEN'S ANTI-VIOLENCE MOVEMENT AND THE CRIMINAL LEGAL SYSTEM* (2003), available at [files.praxisinternational.org/safety\\_justice.pdf](http://files.praxisinternational.org/safety_justice.pdf); RICHIE, *supra* note 59.

65. See, e.g., Pinar Akpınar & Jasmine L. George, *Violence compared: rape in Turkey and India*, 50.50 *INCLUSIVE DEMOCRACY*, <https://www.opendemocracy.net/5050/pinar-akpinar-jasmine-lovely-george/violence-compared-rape-in-turkey-and-india>.

66. See, e.g., Office of the U.N. High Comm'r for Human Rights, *Summary Paper, The Due Diligence Standard for the Violence Against Women*, 4, available at <http://www2.ohchr.org/english/issues/women/rapporteur/docs/SummaryPaperDueDiligence.doc> (describing potential improvements for how "punishments" should be handled under the due diligence standard).

67. See, e.g., MICHELLE LINDLEY, AUSTRALIAN HUMAN RIGHTS COMMISSION, *Submission to the Coroners Court of Western Australia: Inquest into the Death of Andrea Louise Pickett, No. 41/09* (2012), available at [https://www.humanrights.gov.au/sites/default/files/content/legal/submissions\\_court/guidelines/Submissions%2025%20June%202012%20%282%29.pdf](https://www.humanrights.gov.au/sites/default/files/content/legal/submissions_court/guidelines/Submissions%2025%20June%202012%20%282%29.pdf) (discussing the findings of the Australian Human Rights Commission that State agents such as the coroner, parole system, police, and Department of Corrective Services inadequately investigated and responded to cases of domestic violence, particularly in relation to Aboriginal women). See generally Angela Y. Davis, *Violence Against Women and the Ongoing Challenge to Racism* (1985) (connecting violence against women with racism and global imperialism); JOEY L. MOGUL ET AL, *QUEER (IN)JUSTICE:*

cations for women accused or convicted of defending themselves against a violent partner.<sup>68</sup> In other cases, a dysfunctional criminal justice system itself perpetrates many rights violations.<sup>69</sup>

Numerous examples illustrate the harmful ramifications of criminal justice-driven policy responses to gender violence. For example, State efforts to encourage law enforcement responsiveness have led to mandatory interventions, such as mandatory arrests and no-drop prosecutions.<sup>70</sup> Though some advocates support those reforms, the resulting dual arrests and arrests of women who use violence in self-defense raise a number of concerns.<sup>71</sup> Multiple collateral consequences can follow a victim's arrest. For example, arrest records can jeopardize women's parental rights, through child-welfare interventions or the use of an arrest record in custody hearings.<sup>72</sup> Battered immigrant women may be reluctant to call the

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THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES 118-140 (2011) (critiquing criminal legal responses to violence against LGBT people); RICHIE, *supra* note 59, at 99-124 (tracing the trajectory and impact of the criminal justice response on African American women); Crago, *supra* note 61, at 373 (noting that police violence against sex workers is common in Zambia where they are being blamed for the spread of HIV); Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J. L. & POL'Y 13, 23-32 (2011) (tracing interconnections between criminalization, gender violence, and the interests of women, sexual minorities, racialized minorities, and straight-identified men).

68. See, e.g., Julie Sudbury, *Lessons from the Black Women's Movement in Britain*, in THE INCITE! ANTHOLOGY, *supra* note 56, at 13-21 (discussing the criminalization of women of color who experience male violence); Abbe Smith, *The "Monster" in All of Us: When Victims Become Perpetrators*, 38 SUFFOLK U. L. REV. 367, 370 (2005) (challenging the sharp distinction between victims and perpetrators); Kana Takamatsu, *Domestic Violence Victims as Homicide Offenders: A Study of Gender Ideology in the Japanese Criminal Justice System*, 8(2) GENDER, TECH. & DEV. 255, 260 (2004) (arguing that women criminal offenders are punished more harshly if their "character" is seen as deviating from the dictates of traditional gender norms). See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012).

69. See, e.g., HUM. RTS. WATCH, *BROKEN SYSTEM: DYSFUNCTION, ABUSE, AND IMPUNITY IN THE INDIAN POLICE*, 51-52, available at <http://www.hrw.org/sites/default/files/reports/india0809web.pdf> (discussing dysfunction in the Indian police system, including discrimination against victims of gender-based violence).

70. See, e.g., U.N. Div. for the Advancement of Women in the Dept. of Econ. & Soc. Affairs, *Handbook for Legislation on Violence Against Women*, 37-39 U.N. Doc. ST/ESA/329 (2010) [hereinafter UN Handbook for Legislation].

71. See, e.g., *id.* at 38 (discussing dual arrests); Manjoo Due Diligence Report, *supra* note 16, ¶ 5; CEDAW Comm., *Concluding Observations: Canada*, ¶¶ 29-30, U.N. Doc. CEDAW/C/CAN/CO/7 (Nov. 7, 2008) (expressing concern about "dual charging" and urging "primary aggressor" policies); Rochelle Braaf & Clare Sneddon, *Arresting Practices: Exploring Issues of Dual Arrest for Domestic Violence*, AUSTR. DOMESTIC AND FAMILY VIOLENCE CLEARINGHOUSE 1-2 (Dec., 2007), available at [http://www.adfvc.unsw.edu.au/PDF%20files/Stakeholder%20paper\\_%203.pdf](http://www.adfvc.unsw.edu.au/PDF%20files/Stakeholder%20paper_%203.pdf) (discussing concerns with dual arrests); *About Us*, NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN, <http://www.ncdbw.org/about.htm> (describing the advocacy and support of battered women charged with crimes related to their battering given by the organization).

72. See generally Cynthia L. Chewter, *Violence Against Women and Children: Some Legal Issues*, 20 CAN. J. FAM. L. 99, 140 (2003-2004) (explaining that although domestic violence can be used as evidence in divorce and custody proceedings in Canada, concerns exist that legislation does not require judges to take account of domestic violence when determining custody).

police for fear of harmful immigration-related ramifications.<sup>73</sup> Women who are part of racial or ethnic minority communities face police biases that influence which women are seen as “true” victims and which are not.<sup>74</sup> LGBT survivors may resist criminal justice interventions because of fears that law enforcement either will not respond, will arrest and criminalize both parties, or will respond with homophobic comments that further subject them to abuse.<sup>75</sup> Furthermore, in at least seventy-six countries, laws criminalize some form(s) of private, consensual, same-sex behavior.<sup>76</sup> For LGBT communities in these countries, using the criminal justice system to address gender violence is largely inconceivable.

Unchecked, the due diligence principle’s call for State responsiveness poses the risk of exacerbating these concerns. On its face, the due diligence principle’s enumeration of States’ obligations to “prosecute” and “punish” are invitations to expand criminal justice interventions.<sup>77</sup> Indeed, criminal justice-related reforms may be among the most common measures taken to meet international obligations under CEDAW.<sup>78</sup> Advocates may seek criminal justice responses, particularly in contexts where formal mechanisms do not punish, or where they condone, gender violence. In some places, however, inter-personal violence may not be seen as a local issue that can be addressed by law enforcement interventions.<sup>79</sup> In the case of Armenia, for example, locals interpreted the focus on criminal justice responses and accompanying State services (like shelters and hot-lines, for example), as a “Western” import, making it difficult to develop national support for addressing domestic violence.<sup>80</sup> While the decision whether to advocate for particular reforms can only be made in local contexts, the limits of criminal justice strategies should be part of the calculus.

The perils of State involvement surface when considering the other due diligence obligations as well. For example, in connection with “prevention,” States may tout prevention or education programs as meeting inter-

73. See, e.g., Leslye E. Orloff et al., *Battered Immigrant Women’s Willingness to Call for Help and Police Response*, 13 *UCLA WOMEN’S L.J.* 43, 60 (2003) (demonstrating battered immigrant women’s reluctance to call police).

74. See *THE INCITE! ANTHOLOGY*, *supra* note 56, at 38-40.

75. See, e.g., MOGUL, et al., *supra* note 67, at 132-40; Kae Greenberg, *Still Hidden in the Closet: Trans Women and Domestic Violence*, 27 *BERKELEY J. GENDER L. & JUST.* 198 (2012).

76. U.N. Office of the High Comm’r for Hum. Rts., Free & Equal, U.N. for LGBT Equality, *Fact Sheet: Criminalization*, available at [http://www.ohchr.org/Documents/Issues/Discrimination/LGBT/FactSheets/unfe-30-UN\\_Fact\\_Sheets\\_Criminalization\\_English.pdf](http://www.ohchr.org/Documents/Issues/Discrimination/LGBT/FactSheets/unfe-30-UN_Fact_Sheets_Criminalization_English.pdf).

77. See CEDAW Gen Rec. 19, *supra* note 1, ¶ 9.

78. See, e.g., Julie Goldscheid, *Domestic and Sexual Violence as Sex Discrimination: Comparing American and International Approaches*, 28 *T. JEFFERSON L. REV.* 355, 389 (2006) (reviewing country reports submitted to Special Rapporteur on Violence Against Women).

79. See, e.g., Armine Ishkanian, *En-gendering Civil Society and Democracy-Building: The Anti-Domestic Violence Campaign in Armenia*, 14(4) *SOC. POL.* 488, 492 (2007).

80. *Id.*



national obligations, but the programs may not address root causes.<sup>81</sup> States may authorize but fail to allocate adequate funding for these programs. Furthermore, States may laud programs that could be seen as meeting the obligation to “protect,” but access to these programs may be limited by lack of funding, inadequate publicity, or by other measures of accessibility, affordability, and suitability, such as physical location, accessibility for disabled women, and language access.<sup>82</sup> Government prevention programs may ostensibly adopt a “gender neutral” approach to gender violence, but doing so may serve to erase the ways gender violence disproportionately impacts women.<sup>83</sup> In addition, government’s role in prevention programs may have punitive attributes. For example, “protective” services may remove children from a non-abusive mother for “witnessing” domestic violence committed by an abuser.<sup>84</sup> States may cite victim compensation programs that can provide “redress,” but strict eligibility rules, publicity, and requirements of law enforcement involvement may effectively render redress unavailable.<sup>85</sup>

The question of how to advocate for State responsiveness in a manner that leverages the State’s role, resources, and power but does not further perpetuate discrimination, abuse, and inequality mirrors other “feminist” debates about how to locate and define the role of the State. For example, feminists have critiqued the hazards of State intrusions into women’s lives through policies criminalizing pregnant women based on HIV status and

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81. See, e.g., GOLDSCHIED & LIEBOWITZ, *supra* note 4, at 23 (discussing the concerns of New Zealand anti-violence advocates that the “Taskforce for Action on Violence within Families’ signature prevention effort—the ‘It’s not OK’ campaign—does not adequately tackle the root causes of violence experienced by migrant and refugee women.” Anti-violence advocates from Australia make a similar point about the government’s “Respectful Relationship” campaign that “seeks to reduce sexual assault and domestic and family violence by through educational institutions and curricula.”).

82. *Id.* at 18.

83. See, e.g., U.N. Comm. on the Elimination of Discrimination against Women, 52nd Session, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women, New Zealand*, U.N. Doc. CEDAW/C/NZL/CO/7, ¶ 9 (Aug. 6, 2012). The Committee raises this point with the government of New Zealand, noting

with concern a number of challenges that continue to impede the full implementation of the Convention in the State party, including the recourse to gender-neutral language with respect to gender-based violence, including domestic violence; . . . the status of vulnerable groups of women, including women with disabilities and minority women. *Id.*

84. See, e.g., *Nicholson v. Williams*, 203 F. Supp. 2d 153, 236 (E.D.N.Y. 2002) (finding the practice of removing children from non-offending battered mothers unconstitutional). See also GOLDSCHIED & LIEBOWITZ, *supra* note 4, at 35 (reporting concerns of advocates in Australia, Canada, New Zealand, and the United States that “failure to protect” laws were used against non-abusive mothers and resulted in women losing custody of their children as a result of an abusive partner’s conduct).

85. See, e.g., UN Handbook for Legislation, *supra* note 70, at 52–53 (discussing the importance of compensation programs); U.N. Comm. on the Elimination of Discrimination against Women, *supra* note 83, ¶¶ 9, 15, 16 (expressing concern about the New Zealand government’s cuts and changes to their legal aid system because of the particular impact these changes are expected to have on women, particularly low-income and indigenous women); Julie Goldscheid, *Crime Victim Compensation in a Post-9/11 World*, 79 TUL. L. REV. 167 186–95 (2004) (discussing program limitations).

drug use.<sup>86</sup> In a number of countries (for example Guinea, Guinea-Bissau, Mali, Sierra Leone, and Niger) a mother can be charged for failing to take the necessary anti-retroviral drugs designed to block HIV transmission to the fetus in utero and during labor, delivery, and subsequent breastfeeding.<sup>87</sup> Others debate the role of the State in the context of reforms that would allocate resources to support a more responsive State.<sup>88</sup> In still others, feminists interrogate the role of State power in considering the role of women and feminists in government and governmental bodies.<sup>89</sup>

### III. The Role of the State and Due Diligence: Emerging Interpretations

A growing body of international human rights reports and decisions from a range of adjudicatory entities form a body of authority confirming States' due diligence obligation to respond to gender violence. The following sections review those materials, which reflect both the promise of the broadly framed due diligence obligation, and the risk that the emerging doctrine legitimates State overreach and the potential to exacerbate gender and racial discrimination.

#### A. Guiding Normative Documents

Starting with the CEDAW Committee's 1992 General Recommendation 19,<sup>90</sup> and The Declaration on the Elimination of Violence against Women,<sup>91</sup> almost all major international documents addressing gender violence or violence against women have explicitly used the due diligence principle to frame and expound State obligations.<sup>92</sup> These documents emanate from a wide range of international and regional human rights sys-

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86. Aziza Ahmed, *HIV and Women: Incongruent Policies, Criminal Consequences*, 6 *YALE J. INT'L AFF.* 32, 32 (2011).

87. *Criminalization of HIV Transmission*, at <http://www.aidsfreeworld.org/PlanetAIDS/Transmission.aspx> (explaining that over sixty countries impose some criminal penalties for transmission of HIV, or failure to disclose positive HIV status to sexual partners, or both). For feminist critiques, see, e.g., CYNTHIA R. DANIELS, *AT WOMEN'S EXPENSE: STATE POWER AND THE POLITICS OF FETAL RIGHTS* (2009); Elizabeth J. Chen, *Restoring Rights for Reproductive Justice*, 22 *J. GENDER, SOC. POL'Y & L.* 281, 295-298 (2014) (discussing the practices of sterilizing women in prison and shackling during childbirth); Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 *UCLA L. REV.* 1474 (2012).

88. See, e.g., MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT AND AMERICA'S POLITICAL IDEALS* (2010); Martha A. Fineman, *The Vulnerable Subject and the Responsive State*, 60 *EMORY L.J.* 251 (2010); Nancy Fraser, *Feminism, Capitalism and the Cunning of History*, 56 *NEW LEFT REV.* 97 (2009).

89. See, e.g., Dianne Otto, *The Exile of Inclusion: Reflections on Gender Issues in International Law Over the Last Decade*, 10 *MELB. J. INT'L L.* 11 (2009) (suggesting that feminist successes in international law are more complicated than is often understood and could be characterized as "The Exile of Inclusion").

90. See CEDAW Gen. Rec. 19, *supra* note 1.

91. DEVAW, *supra* note 1, at art. 4(c).

92. The partial exception to this rule is the Maputo Protocol which incorporates the content of the due diligence obligation, and is based on other international agreements that explicitly embrace it, but itself does not use the term. On the incorporation of the due diligence obligation into the text of the Maputo Protocol, see Manjoo Due Diligence Report, *supra* note 16, ¶¶ 39-40.

tems and bodies, and provide a conceptual and legal underpinning for adjudicating individual claims. In addition to the decisions and interpretative jurisprudential statements of the treaty bodies, two regional treaties specifically on violence against women used due diligence to explain the scope of State obligation: The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará, 1994) and Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention, May 12, 2011).<sup>93</sup> The 1994 resolution establishing the mandate of the United Nations Special Rapporteur on Violence Against Women, Its Causes and Consequences, likewise emphasized that States have a due diligence obligation with regard to preventing, investigating, punishing, and providing redress for acts of violence against women.<sup>94</sup> Perhaps not surprisingly, each of the individuals who have served in this Special Rapporteur post have issued thematic reports that have further contributed to the development of the due diligence concept.<sup>95</sup> The United Nations Secretary-General's comprehensive study on violence against women and a number of United Nations General Assembly resolutions also affirm the due diligence obligation.<sup>96</sup>

Taken together, these guiding documents<sup>97</sup> situate gender violence in the human rights frame and, in so doing, have begun to provide meaning to States' due diligence obligation. They form a normative foundation upon which case law on State responsibility to address gender violence is form-

93. Istanbul Convention, *supra* note 12.

94. Commission on Human Rights Res. 1994/45, Question of Integrating the Rights of Women into the Human Rights Mechanisms of the United Nations and the Elimination of Violence Against Women, 50th Sess., Jan. 31-Mar. 11, 1994, ¶ 2 U.N. Doc. E/CN.4/RES/1994/45, (Mar. 4, 1994). The Commission explains:

[T]he duty of Governments to refrain from engaging in violence against women and to exercise due diligence to prevent, investigate and, in accordance with national legislation, to punish acts of violence against women and to take appropriate and effective action concerning acts of violence against women, whether those acts are perpetrated by the State or by private persons, and to provide access to just and effective remedies and specialized assistance to victims. *Id.*

95. See Manjoo Due Diligence Report, *supra* note 16, and Ertürk Due Diligence Report, *supra* note 10; Radihka Coomaraswamy, the first person to hold the position of Special Rapporteur on Violence Against Women, Its Causes and Consequences (1994-2003) did not focus the entirety of a report to the due diligence obligation but did address in it a key report. See Special Rapporteur on Violence Against Women, Its Causes and Consequences, *Violence Against Women in the Family*, ¶¶ 22-25, Commission on Human Rights, U.N. Doc. E/CN.4/1999/68ds (Mar. 10, 1999), available at <http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/72e640b38c51653b8025675300566722?Opendocument> [hereinafter Coomaraswamy 1999 Report].

96. See Secretary-General, *In Depth Study on All Forms of Violence Against Women*, U.N. Doc. A/61/122/Add.1 (July, 6 2006) [hereinafter Sec'y Gen. 2006 In-Depth Study]. See also G.A. Res. 61/143, ¶¶ 7, 8(h), U.N. Doc. A/RES/61/143 (Dec. 19, 2006), available at [http://www.un.org/womenwatch/daw/vaw/A\\_RES\\_61\\_143.pdf](http://www.un.org/womenwatch/daw/vaw/A_RES_61_143.pdf) [hereinafter G.A. Res. 61/143].

97. Here we are using the term "guiding document" or "guiding normative documents" broadly to refer to the material, unrelated to case law, produced by or in connection with the treaty bodies, human rights conventions, resolutions by key international organizations, and the reports of the UN Special Rapporteurs.

ing.<sup>98</sup> These guiding documents frame States' due diligence obligation with regard to gender violence in sweeping terms, explaining that a State's failure to respond to gender violence committed by non-State actors makes it "as guilty as the perpetrators."<sup>99</sup> These guiding documents generally reason that State "indifference or inaction provides a form of encouragement and/or de facto permission" for rights violations and that States must be held accountable for these failures under international law.<sup>100</sup> In her report on due diligence, Manjoo echoes the consensus that the obligation links State responsibility to non-State conduct in a comprehensive fashion:

International human rights law requires a state to take measures—such as by legislation and administrative practices—to control, regulate, investigate and prosecute actions by non-state actors that violate the human rights of those within the territory of that state. These actions by non-state actors do not have to be attributed to the state, rather this responsibility is part of the state's obligation to exercise due diligence to protect the rights of all persons in a state's territory.<sup>101</sup>

In addition to articulating broadly a link between State responsibility and the behavior of non-state actors, the guiding documents explain that a State must "exercise whatever diligence is due" in each case.<sup>102</sup> Although the guiding documents often include a list of relevant issues or specifications of the obligation, they all start by explaining that State responsibility includes the broadest range of anti-violence efforts.<sup>103</sup> The Convention of Belém do Pará explains that States must "apply due diligence to prevent, investigate and impose penalties for violence against women"<sup>104</sup> and that they must "take all appropriate measures . . . to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women . . . ."<sup>105</sup> In addition, the first of the Special Rapporteur's thematic reports dedicated to explaining the due diligence obligation indicates the need for States to intervene at the "individual, community, State and transnational" levels "in order to prevent, protect, prosecute and provide compensation with regard to violence against women . . . ."<sup>106</sup>

The United Nations Committee against Torture articulates a similarly broad frame for State obligation to address gender violence:

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98. See *infra* pt. III.B for a discussion of relevant case law.

99. Coomaraswamy 1999 Report, *supra* note 95, ¶ 39.

100. CAT Gen. Comment 2, *supra* note 9, ¶ 18. See generally Hessbruegge, *supra* note 25.

101. Manjoo Due Diligence Report, *supra* note 16, ¶ 14 (citing Robert McCorquodale & Penelope Simons, *Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law*, 70 MOD. L. REV. 598, 618 (2007)).

102. Monica Hakimi, *State Bystander Responsibility*, 21 EUR. J. INT'L L. 341, 372 (2010).

103. *Id.* at 372.

104. Convention of Belém do Pará, *supra* note 12, at art. 7(b).

105. *Id.* at art. 7(e).

106. Ertürk Due Diligence Report, *supra* note 10, ¶ 76.

When State officials “know or have reasonable grounds to believe” that non-State or private actors are committing acts of torture or ill-treatment and they “fail to exercise due diligence to prevent, investigate, prosecute and punish” these actors “the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible . . . for consenting to or acquiescing in such impermissible acts.”<sup>107</sup>

The sweep of this obligation is part and parcel of its potential and power. The obligation’s breadth makes it applicable to innumerable contexts and fact patterns, and potentially responsive to the diversity of individual experiences of gender violence. Indeed, the broad framing of the obligation is a product of the success of women’s rights and feminist advocacy at the national and international levels, and must be understood as a response to the history of indifference to gender violence by State actors in all corners of the globe.<sup>108</sup>

At the same time that this obligation presents real potential for holding States accountable for their failure to address gender violence, it also highlights three themes that illustrate how the obligation opens the door to inappropriate or potentially harmful State action. First, the invitation for greater State response is not paired with discussion about the appropriate limits of State action; as a result, the invitation opens the door to an over-emphasis on criminal justice responses to gender violence. Second, the comprehensive framing of the obligation directs commensurately wide-ranging remedies that may make it very difficult, if not impossible, to monitor or measure State implementation. Finally, while the documents do at times recognize that delegating the obligation to respond to gender violence is appropriate, they are not consistently careful about when or where this should happen. As a result, they tip the balance in favor of the State as the actor instigating, formulating, and executing the required remedies. Each of these themes is explored in greater depth below.

### 1. *Creating the Conditions for an Over-Emphasis on Criminal Justice Responses to Gender Violence*

The broad framing of the due diligence obligation is infused with a consistent call for use of the criminal justice system to address gender violence. This focus on criminal justice engagement is, in part, a response to historic and current State indifference to or complicity in gender violence. While most would agree that some criminal justice engagement to address gender violence is appropriate, the flip-side of the broad sweep of the obligation is that the guiding documents are not careful about the limits of State action.<sup>109</sup> As such they open the door to controversial forms of criminal justice intervention without problematizing those remedies. Illustrative

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107. CAT Gen. Comment 2, *supra* note 9, ¶ 18.

108. Stephanie Farrior, Research Workshop Report, Gerald R. Ford School of Public Policy, *The Due Diligence Standard, Private Actors and Domestic Violence* (Oct. 2010), available at <http://humanrightshistory.umich.edu/files/2012/10/Farrior1.pdf>.

109. See, e.g., CAT Gen. Comment 2, *supra* note 9, ¶ 18; see also Hessbruegge, *supra* note 25.

of this endorsement of mandatory criminal justice policies is a 2010 United Nations General Assembly resolution, which requires:

. . . taking effective measures to *prevent the victim's consent* from becoming an impediment to bringing perpetrators of violence against women and girls to justice, while ensuring that appropriate safeguards to protect the victim and adequate and comprehensive measures for the rehabilitation and reintegration of victims of violence into society are in place.<sup>110</sup>

The CEDAW Committee similarly interpreted State due diligence obligation in its 2010 General Recommendation, explaining that:

Where discrimination against women also constitutes an abuse of other human rights, such as the right to life and physical integrity in, for example, cases of domestic and other forms of violence, States parties are *obliged to initiate criminal proceedings*, to bring the perpetrator(s) to trial and to impose appropriate penal sanctions.<sup>111</sup>

These endorsements of mandatory criminal justice interventions in cases of gender violence do not acknowledge the contentious debate about whether removing discretion from women survivors of gender violence is a good way to deal with the inadequate treatment of interpersonal violence by law enforcement agencies.<sup>112</sup> This framing of the issue is particularly noteworthy given extensive feminist scholarship situating consent as central to sexual agency, bodily integrity, and human rights.<sup>113</sup>

While some feminist scholars and activists clearly support these types of mandatory interventions, there can be no question that they are extremely controversial. These documents, however, do not contextualize their support for mandatory interventions with a discussion of the potential problems of such an approach. Furthermore, they do not acknowledge the particularly fraught record of criminal justice interventions in minority communities.<sup>114</sup> Such unqualified support for mandatory criminal justice intervention assumes that the State is a beneficent actor, one whose actions to address gender violence are necessarily positive or benign. This frame ignores what anti-violence advocates know: State action, especially in its criminal justice manifestations, is frequently associated with problematic

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110. G.A. Res. 65/187, ¶ 16(m), U.N. Doc. A/RES/65/187 (Dec. 21, 2010) (emphasis added), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/523/76/PDF/N1052376.pdf?OpenElement>.

111. CEDAW, General Recommendation No. 28 on the Core Obligations of State Parties Under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, ¶ 34, U.N. Doc. CEDAW/C/GC/28 (Dec. 16, 2010) [hereinafter CEDAW Gen. Rec. 28] (emphasis added).

112. See, e.g., Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1 (2009); G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 276-77 (2005); Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1667-69.

113. See, e.g., Jennie E. Burnet, *Situating Sexual Violence in Rwanda (1990-2001): Sexual Agency, Sexual Consent, and the Political Economy of War*, 55 AFR. STUD. REV. 97 (2012).

114. See, e.g., ALEXANDER, *supra* note 68.

consequences. Indeed, the explicit framing of nearly all State action to address gender violence as desirable makes it difficult to address adequately and account for the uneven and checkered history of State engagement in this field.

## 2. *Measuring and Monitoring State Implementation*

Along with defining the scope of the due diligence obligation in the broadest of ways, the guiding documents also demand commensurately wide-ranging remedies from States. The Convention of Belém do Pará requires, for instance, that States “[i]nclude in their domestic legislation penal, civil, and administrative and any other type of provision that may be needed to prevent, punish and eradicate violence against women and to adopt appropriate administrative measures where necessary.”<sup>115</sup> The Istanbul Convention demands similarly comprehensive remedies, noting that “Parties shall take the necessary legislative and other measures to adopt and implement State-wide effective, comprehensive and coordinated politics encompassing all relevant measures to prevent and combat all forms of violence covered by the scope of this Convention and offer a holistic response to violence against women.”<sup>116</sup> The demand for comprehensive remedies across all fields opens up important space for political and legal action. It also provides the possibility of significant and transformative impact. At the same time, however, the all-encompassing framing of the obligation makes it difficult to define the actions necessary to fulfill, to monitor compliance of, or to limit appropriately State response.

Other policy statements elucidate a more specific set of required remedies, but these too are not paired with a concern or discussion of the appropriate limits of State action or how compliance might be measured. U.N. General Assembly resolution 61/143 on violence against women, for instance, requires that States provide “training and capacity-building on gender equality and women’s rights for . . . health workers, teachers, law enforcement personnel, military personnel, social workers, the judiciary, community leaders and the media.”<sup>117</sup> It also explains that States must “exercise due diligence to prevent all acts of violence against women, which may include improving the safety of public environments.”<sup>118</sup> The Istanbul Convention also invites a long list of remedies including “easily accessible shelters in sufficient numbers” (Article 23), “specialist women’s support services” (Article 22), and the ability to “claim compensation from perpetrators” (Article 30). It also includes the demand for a host of relatively specific remedies like “state-wide round-the-clock (24/7) telephone helplines free of charge” (Article 24) and “age-appropriate psychosocial counseling for child witnesses” (Article 26). The Istanbul Convention further explains that adequate remedies require substantive legal manifestations with regard to civil lawsuits and legal remedies (Article 29),

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115. Convention of Belém do Pará, *supra* note 12, at art. 7(c).

116. Istanbul Convention, *supra* note 12, at art. 7(1).

117. G.A. Res 61/143, *supra* note 96, ¶ 8(m).

118. *Id.* ¶ 8(h).

compensation for victims (Article 30), child custody and visitation (Article 31), and that the law must include adequate remedies for all forms of gender violence, including psychological (Article 33), stalking (Article 34), physical (Article 35), sexual (Article 36), forced marriage (Article 37), and sexual harassment (Article 40).<sup>119</sup>

These examples demonstrate the gamut of invited remedies, from the most vague and sweeping to those that specify a general need for programs or training for specific groups. The extremely broad scope of anticipated State obligation and action must be seen against the backdrop of historic State indifference to gender violence, and mark valuable recognition of the breadth of needed legal and service based responses. Yet, the scope of the obligation means that it is easier to identify when a State fails to do something than it is to define affirmatively the parameters of appropriate and sufficient State action. For example, one might be able to identify programs or policies that fail to “empower” women, but detailing what constitutes empowerment is considerably more difficult.<sup>120</sup> With regard to the scope of the due diligence obligation, it is easier to count shelter beds than it is to determine whether a shelter’s support services are attentive to issues of difference among women.

In the face of this unmediated call for State engagement, determining the point at which a remedy is sufficient, or what interventions are inappropriate or even harmful, is extremely difficult. The sweeping framework means that most actions, programs, and policies could indeed be framed as appropriate State responses. This problem of measurement is made even more complicated by the unqualified embrace of criminal justice responses. This is of particular concern when trying to determine whether the offered remedies appropriately address the needs of women in specific racial, ethnic, or immigrant communities, those who are disabled, or of sex workers, or trans people.

### 3. *State Agency and Accountability*

Some of the key norm-setting documents exhibit a tendency to frame the State as a knight in shining armor that should ride in on its anti-violence horse to prevent and prosecute gender violence. In so doing, these documents fail to recognize that the “knight,” in his clanking, militaristic garb may not be the most appropriate or desired “savior.” This framing of the State as the key, and in some cases the only, actor responding to gender violence makes it nearly impossible to recognize adequately the complexities of State action to address gender violence.

In some cases, the guiding documents articulate an all-encompassing and insufficiently nuanced understanding of State action. Along these lines, the CEDAW Committee’s General Recommendation 28 interprets the Convention as “impos[ing] a due diligence obligation on States parties to

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119. Istanbul Convention, *supra* note 12.

120. Ertürk Due Diligence Report, *supra* note 10, ¶¶ 79-80 (discussing “empowerment” as it relates to programming to address violence against women).



prevent discrimination by private actors.”<sup>121</sup> This key discussion of State obligation, in other words, suggests that States are responsible for *preventing* discrimination by private actors. This mandate is qualitatively different from one that obligates States to “take all appropriate measures” to prevent gender violence by private actors. The CEDAW Committee even obligates States to “ensure that private actors do not engage in discrimination against women . . . .”<sup>122</sup> While it is desirable to imagine a world where private actors do not discriminate, it is not possible or desirable to conceive of a State that has the power to “ensure” that this is the case. The framing of State obligation in this way assumes that the State will use its power benignly, and that its actions will unequivocally benefit women generally and survivors of violence in particular. This assumption is particularly troublesome when considering the power of the State as manifest in its criminal justice system. Furthermore, this framing of the State as savior is predicated on the erasure of the unevenness and problematic nature of State involvement in racial, ethnic, and religious communities.<sup>123</sup>

As discussed above, the due diligence obligation is explicit about the State’s obligation to take action to address gender violence perpetrated by non-State actors.<sup>124</sup> The guiding international documents reflect a tension and lack of clarity with respect to whether the State must be the actor meeting its obligations, or whether it may delegate the response to other actors such as NGOs.<sup>125</sup> On the one hand, a number of policy proclamations describe State responsibility in a way that contemplates either direct State response or delegation.<sup>126</sup> On the other hand, various statements, sometimes even in the same document, suggest that a State’s obligation to address gender violence requires agents of the State to engage directly in program development, service provision, and education efforts.<sup>127</sup> This formulation does not adequately distinguish between the State as duty holder and the State as preferred responder, a distinction that is crucial to trying to address and limit problematic or discriminatory actions perpetrated by agents of the State.

In the best cases, the guiding documents articulate States’ due diligence obligation in a way that holds them accountable for action without also suggesting that the State ought to be the sole or the preferred responder to gender violence. The Istanbul Convention employs language that is consistently careful in this regard, indicating that States’ parties should take “the necessary legislative and other measures”<sup>128</sup> to fulfill its obligations as enumerated in the Convention. The Convention of Belém do

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121. CEDAW Gen. Rec. 28, *supra* note 111, ¶ 13.

122. *Id.* (emphasis added).

123. See *supra* notes 67 to 76.

124. See Ertürk Due Diligence Report, *supra* note 10, ¶¶ 79-80.

125. See *id.* ¶ 69.

126. See Lee Hasselbacher, *State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, and International Legal Minimums of Protection*, 8 NW. J. INT’L HUM. RTS. 190 (2009).

127. See Ertürk Due Diligence Report, *supra* note 10, ¶ 44.

128. Istanbul Convention, *supra* note 12, at arts. 4, 5, 7.

Pará uses the phrase “by all appropriate means” to qualify a State’s obligation to act.<sup>129</sup> The Special Rapporteur on Violence Against Women specifies that States must “ensure” that victims of violence, for instance, have access to justice.<sup>130</sup> Language like this takes State accountability for gender violence seriously without articulating a preference for direct State response.

Many of the policy proclamations recognize the important role community-based organizations and NGOs play in addressing gender violence. For example, the Special Rapporteur went as far as declaring that “[s]helters are better operated by NGOs.”<sup>131</sup> However, she was careful to draw appropriately the lines of State accountability, explaining that the State is ultimately responsible for ensuring shelters’ “creation, maintenance and safety” as part of the State’s obligation to provide protection.<sup>132</sup> In other words, she frames the State as the duty holder under international law but recognizes that its direct agents are often less effective service providers than non-governmental, community-based resources.

In contrast, many of the same guiding international documents also use language that articulates a bias toward direct action by agents of the State, obfuscating the fact that State action has effective limitations. Demanding that States “undertake progressively specific measures, including programs” to promote awareness, modify social and cultural patterns, and promote education and training, the Convention of Belém do Pará focuses not on State accountability for action but on direct actions required of State agents.<sup>133</sup> Here, the State becomes both program initiator and actor. Likewise, CEDAW’s General Recommendation 28 explains that “States shall pay attention to the specific needs of (adolescent) girls by providing education on sexual and reproductive health and carrying out programmes that are aimed at the prevention of HIV/AIDS, sexual exploitation, and teenage pregnancy.”<sup>134</sup> In these cases, the State is the educator and service provider without equivocation.

It is important for these documents to acknowledge clearly and consistently that acting with diligence does not mean that the State assumes direct responsibility for private action, but rather that the State’s failure to respond to the situation with diligence creates an additional layer of harm for which the State is responsible. In the case of gender violence, it is important to retain the distinction between the violence committed by the non-State actor and the further harm created by the State’s failure to attempt to prevent or respond appropriately to the violence. We should expect the State to “take appropriate measures,” but not to be responsible for categorically preventing discrimination by private actors. The elision of this distinction charts an unrealistic concept of the State’s capacity, rests

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129. Convention of Belém do Pará, *supra* note 12, at art. 7(c).

130. See Ertürk Due Diligence Report, *supra* note 10, ¶ 82.

131. *Id.* ¶ 82.

132. *Id.* ¶ 83.

133. Convention of Belém do Pará, *supra* note 12, at art. 8.

134. CEDAW Gen. Rec. 28, *supra* note 111, ¶ 21 (emphasis added).

on an inappropriately intrusive role of the State, and implies that all State action with regard to addressing gender violence is constructive and desirable.

## B. Case Law

A growing body of decisions, issued by bodies including the European Court of Human Rights (ECHR), the Inter-American Court of Human Rights (IACHR), the Inter-American Commission on Human Rights, and the CEDAW Committee, as well as national courts, have held States accountable for failing to meet their obligations under various international human rights conventions with respect to claims concerning gender violence.<sup>135</sup> Although the cases have been decided under a number of different legal instruments, together they offer beginning insights into how courts and other adjudicatory bodies may define the role of the State in meeting its due diligence obligation.<sup>136</sup>

The following analysis highlights two themes that mirror the guiding normative documents. First, the decisions describe a strong, positive vision of State obligations.<sup>137</sup> This frame provides an enormously valuable tool to ensure accountability and challenge the root causes of abuse. It importantly facilitates judicial recognition of the way survivors' intersect-

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135. The discussion focuses on decisions by international adjudicatory bodies. Although it references some of the notable decisions from national courts, the formidable body of decisions interpreting country-specific laws is beyond the scope of this paper. It focuses on decisions brought by or on behalf of gender violence survivors in which States have been found liable for violating international human rights obligations. Other decisions, also beyond the scope of this paper, have rejected claims on the basis that they were inadmissible, and accordingly did not reach the claims on the merits, and still others have rejected claims on the merits. For further information on topics not covered in the scope of this Article, see generally HUDOC EUROPEAN COURT OF HUMAN RIGHTS, <http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#%7B%22documentcollectionid%22:%5B%22GRANDCHAMBER%22,%22CHAMBER%22%7D> (last visited July 22, 2015); ORGANIZATION OF AMERICAN STATES, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, <http://www.oas.org/en/iachr/decisions/cases.asp> (last visited July 22, 2015); *Optional Protocol to the Convention on the Elimination of Discrimination against Women—Jurisprudence*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www2.ohchr.org/english/law/jurisprudence.htm> (last visited July 22, 2015). In addition, because the cases do not distinguish among the respective “Ps” that comprise the due diligence obligation’s scope, this analysis cannot illuminate how adjudicatory bodies will interpret the respective obligations to prevent, protect, prosecute, punish, and provide redress on those terms.

136. For other discussions of the emerging case law, see, e.g., Farrior, *supra* note 52 (summarizing decisions); Cheryl Hanna, *Health, Human Rights, and Violence Against Women and Girls: Broadly Redefining Affirmative State Duties after Opuz v. Turkey*, 34 HASTINGS INT’L & COMP. L. REV. 127, 129–30 (2011) (arguing that the interest in preserving health requires positive state intervention); Hasselbacher, *supra* note 126; Love-day Hodson, *Women’s Rights and the Periphery: CEDAW’s Optional Protocol*, 25 EUR. J. INT’L L. 561 (2014) (also available at University of Leicester School of Law Legal Studies Research Paper Series, Research Paper No. 13-01, 2013) (evaluating the impact of cases decided under CEDAW optional protocol); Ronagh J.A. McQuigg, *The European Court of Human Rights and Domestic Violence: Valiuliene v. Lithuania*, 18 INT’L J. HUM. RTS. 756 (2014) (critiquing the ECHR’s inconsistent findings with respect to violations of Articles 3 and 8 of the European Convention).

137. See Hanna, *supra* note 136.

ing identities exacerbate their harm. At the same time that the decisions are to be applauded for holding the State to account, they employ reasoning that raises potential concerns. A number of decisions opine flatly that perpetrators' rights can never be elevated over victims' rights.<sup>138</sup> Given the risks associated with State intervention, this categorical judgment may prove problematic in other more difficult cases. Second, and also like the guiding international documents, the decisions require that the State adopt responses sufficiently wide-ranging to call into question whether the State could meaningfully be held to account for implementation.

### 1. *Ensuring Accountability: Positive Obligations Versus Balancing Rights*

#### a. States' Positive Obligation to Respond

Courts and the CEDAW Committee have analyzed the scope of a State's duty to respond to gender violence in claims brought under international human rights instruments, including Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention), the Convention of Belém do Pará, the American Declaration of the Rights and Duties of Man (the American Declaration), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Uniformly, the decisions describe a robust vision of the State's obligation to respond.<sup>139</sup>

The ECHR outlined a strong view of the State's obligations in one of the most detailed analyses of the scope of a State's duty to prevent the loss of life. In *Opuz v. Turkey*, the ECHR held that Turkey violated provisions of the European Convention, following a tragic history of an abuser's escalating violence, two victims' repeated requests for police protection, and eventually the abuser's shooting murder of one victim, his mother-in law.<sup>140</sup> The court stated the issue in terms of whether the local authorities "displayed due diligence" in the prevention of violence against the applicant (the abuser's wife) and her mother (whom the abuser had killed).<sup>141</sup> The court articulated a broad, positive view of the State's role, holding that the State's obligation to create effective criminal law provisions "extends in appropriate circumstances to a *positive obligation* on the authorities to take preventive operational measures to protect an individual whose life is at

138. See, e.g., *Yildirim v. Austria*, Communication No. 6/2005, U.N. Doc. CEDAW/C/39/D/6/2005, at ¶¶ 12.1.5, 12.3(b) (Oct. 1, 2007) (emphasis added), available at <http://www.bka.gov.at/DocView.axd?CobId=29081>.

139. See *Istanbul Convention*, *supra* note 12, at arts. 4, 5, 7; *Convention of Belém do Pará*, *supra* note 12, at art. 7; Ninth International Conference of American States, AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN (1948), available at <http://www.cidh.oas.org/Basicos/English/Basic2.american%20Declaration.htm>; CEDAW Gen. Rec. 28, *supra* note 111, ¶ 21.

140. *Opuz v. Turkey*, 2009-III Eur. Ct. H.R. 107, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92945>. The case also found violations of Turkey's obligation to prohibit inhuman or degrading treatment and guaranteeing equal protection of the law. *Id.*

141. *Id.* at para. 131.

risk from the criminal acts of another individual.”<sup>142</sup> At least in this context of a case involving the risk to a fundamental right such as the right to life, the court contemplated a robust, positive role for State intervention: “. . . it is sufficient for an applicant to show that the authorities did not do *all that could be reasonably expected of them* to avoid a real and immediate risk to life of which they have or ought to have knowledge.”<sup>143</sup>

The court recognized the difficulty of assigning responsibility to the State to act, and articulated considerations limiting State responsibility that have been reiterated in other cases. It stated:

Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the scope of the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities . . . . For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures . . . which, judged reasonably, might have been expected to avoid that risk.<sup>144</sup>

This court acknowledged additional considerations limiting State intervention, for example, recognizing that police should “exercise their powers . . . in a manner which fully respects the due process *and other guarantees* which legitimately place restraints on the scope of their action[s] . . . .”<sup>145</sup> The court recognized that the question of whether the authorities’ actions fell below this standard for determining negligence could only be answered in the context of the facts and circumstances of a particular case.<sup>146</sup> It

142. *Id.* at para. 128 (emphasis added) (citing *Osman v. United Kingdom*, 1998-VIII Eur. Ct. H.R. 101, para. 115, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58257>). Accord *Tomasic v. Croatia*, para. 50, HUDOC (Jan. 15, 2009), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90625>.

143. *Opuz*, 2009-III Eur. Ct. H.R. at ¶ 130; *Osman*, 1998-VIII Eur. Ct. H.R. at para. 116 (emphasis added).

144. *Opuz*, 2009-III Eur. Ct. H.R. at ¶ 129. Accord *Osman*, 1998-VIII Eur. Ct. H.R. at para. 116; *Tomasic v. Croatia*, paras. 50-51, HUDOC (Jan. 15, 2009), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90625>. The ECHR similarly recognized that the positive obligation of the State to respond must be interpreted in a way as not to impose “an excessive burden on the authorities” in connection with its obligation to take “reasonable steps” to prevent child sexual abuse in circumstances in which it had or ought to have had knowledge. *O’Keeffe v. Ireland*, ¶ 144, HUDOC (Jan. 28, 2014), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-140235>.

145. *Opuz*, 2009-III Eur. Ct. H.R. at para. 129 (emphasis added). Accord *Osman*, 1998-VIII Eur. Ct. H.R. at ¶ 116.

146. *Opuz*, 2009-III Eur. Ct. H.R. at para. 130; *Osman*, 1998-VIII Eur. Ct. H.R. at para. 116. Notably, a concurring opinion in *Valiuliene v. Lithuania* interpreted the due diligence standard even more strictly. Judge Pinto de Albuquerque opined that:

[a] more rigorous standard of diligence is especially necessary in the context of certain societies, like Lithuanian society, which are faced with a serious, long-lasting and widespread problem of domestic violence. Thus, the emerging due diligence standard in domestic violence cases is stricter than the classical *Osman* test, in as much as the duty to act arises for public authorities when the risk is already present, although not imminent. If a State knows or ought to know that a segment of its population, such as women, is subject to repeated

carefully examined the history of violence, which involved assaults, stabbings, physical injuries (some of which were life threatening), death threats, and an incident in which the abuser ran his car into his wife and her mother.<sup>147</sup> The history of serious, escalating violence, combined with the mother's final call for intervention shortly before the killing, warranted preventive measures and supported the conclusion that local authorities could have foreseen the lethal attack.<sup>148</sup> The court then took the State authorities to task for failing entirely to evaluate the threat posed by the abuser's conduct.<sup>149</sup> It enumerated the many steps the authorities could have taken under the existing legal framework, such as ordering authorized protective measures or issuing an injunction.<sup>150</sup> Instead, the authorities merely took statements and released the defendant, thereby failing to meet their "due diligence" obligation to protect the right to life.<sup>151</sup>

The ECHR similarly scoured the record of law enforcement responses to find a violation of the right to life under the European Convention in *Branko Tomasic v. Croatia*.<sup>152</sup> The court there considered claims that the State failed to prevent the deaths of a woman and her child by Ms. Tomasic's abusive ex-husband, whom psychiatrists had deemed dangerous, and who had been detained and subsequently released.<sup>153</sup> The combination of a history of severe violence—including threats to bomb his child on his first birthday, a psychiatric evaluation concluding that he was in need of compulsory psychiatric treatment, and findings that there was a danger that he would repeat acts of violence—established that the authorities knew of the threats and therefore should have taken "all reasonable steps" to protect the woman and her child from future violence.<sup>154</sup> The court reviewed the inadequacy of the psychiatric treatment the abuser had received before his release, the history of threats, and officials' recognition of the seriousness of the threats, and found violations because the authorities failed to take "all necessary and reasonable steps" to protect his wife and child.<sup>155</sup>

Other decisions in cases involving failed investigations and flawed procedures recognize the limits of the ECHR's authority, while still invok-

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violence and fails to prevent harm from befalling the members of that group of people when they face a present (but not yet imminent) risk, the State can be found responsible by omission for the resulting human rights violations.

*Valiuliene v. Lithuania*, para. 30, HUDOC (Mar. 26, 2013), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-117636>.

147. *Opuz*, 2009-III Eur. Ct. H.R. at ¶ 133(iv).

148. *Id.* at paras. 134, 136.

149. *Id.* at para. 147.

150. *Id.* at para. 148.

151. *Id.* at paras. 148-49.

152. *Tomasic v. Croatia*, HUDOC (Jan. 15, 2009), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90625>.

153. *Id.* at paras. 4-12 (notably, he killed himself as well during the shooting).

154. *Id.* at paras. 52-53.

155. *Id.* at paras. 53-61. In particular, the court noted the failure to search his premises and his vehicle and the failure to assess the abuser's condition immediately before he was released from prison. *Id.* at paras. 54, 58.

ing States' "positive obligations" and finding liability. For example, in a custody case involving allegations of abuse, the ECHR held Bulgaria accountable for violating the European Convention's obligation to secure respect for the parties' private and family life.<sup>156</sup> The court refused to find that the Convention required prosecution, reasoning that the ECHR could not "replace the national authorities[.]"<sup>157</sup> Nevertheless, it found violations based on Bulgaria's failure to adopt interim custody measures without delay, and its failure to take sufficient measures to ensure that the applicant's husband refrained from violence.<sup>158</sup> Similarly, in *Valiuliene v. Lithuania*, the ECHR took a close look at prosecutorial practices and found that the State had fallen short of its obligation when it failed to prosecute a domestic violence case involving multiple complaints, such that it eventually became time-barred.<sup>159</sup>

The IACHR articulated a similarly robust role for the State in enforcing the right to life, among others, in a case brought under the Convention of Belém do Pará: *González et al. (Cotton Field) v. Mexico*.<sup>160</sup> That case was brought on behalf of three young women who had disappeared and died in the context of circumstances in which hundreds of women had been murdered or had disappeared, and in which the State had failed to act.<sup>161</sup> The court grappled with the State's liability for the disappearances and murders. In analyzing the States' obligations, the court distinguished between the "moment" before the disappearances, when the State was aware of the general risk for women, but was not aware of a real and imminent danger for the victims in the case, and the "moment" before the discovery of the bodies.<sup>162</sup> The State failed to comply "in general" with its obligation of prevention when it was warned of the pattern of violence.<sup>163</sup> But the court concluded that an obligation of "strict due diligence" arose after the State was aware that there was a real and imminent risk that the victims in the case would be sexually abused, subjected to ill-treatment, and killed.<sup>164</sup> Here, Mexico did not act with the required due diligence; it carried out formalities and took statements, but officials taking those statements minimized family members' concerns, which led to unjustified

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156. *Bevacqua v. Bulgaria*, paras. 83-84, HUDOC (June 12, 2008), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-86875>. *Accord Valiuliene v. Lithuania*, paras. 76, 85, HUDOC (Mar. 26, 2013), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-117636>.

157. *Valiuliene*, at para. 82.

158. Decisions by the CEDAW Committee similarly have recognized international human rights bodies' limited jurisdiction to review local decisions. See, e.g., *infra*, notes 181 (discussing *V.K. v. Bulgaria*) and 179 (discussing *C.A.S. v. Romania*; *M.C. v. Bulgaria*).

159. *Valiuliene*, at paras. 85-86, HUDOC (Mar. 26, 2013), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-117636>.

160. *González et al. (Cotton Field) v. Mexico*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205 (Nov. 16, 2009).

161. See *id.* at paras. 4, 113-21.

162. *Id.* at paras. 281-83.

163. *Id.* at para. 282.

164. *Id.* at para. 283.

delays.<sup>165</sup> Although the court did not explicitly require the State to do “all” it reasonably could do (similar to the ECHR’s ruling), the court signaled a requirement of meaningful, rather than mere, response.<sup>166</sup>

Similarly, the Inter-American Commission on Human Rights engaged in a close review of State responses in *Lenahan v. United States* and concluded that the United States had violated its due diligence obligation to prevent violations of the right to life, among others, under the American Declaration.<sup>167</sup> Ms. Lenahan initially brought suit in an American court, claiming that law enforcement violated her constitutional right to procedural due process, and claiming that local law enforcement failed meaningfully to respond to her call for assistance after her abusive partner abducted her three children, who then were killed in a shootout at the police precinct later that evening.<sup>168</sup> The United States Supreme Court rejected her claim.<sup>169</sup> She then filed a complaint with the Inter-American Commission.<sup>170</sup>

The Commission took seriously the broad language of Ms. Lenahan’s protective order, and found that the police should have used “every reasonable means” to enforce the order after Ms. Lenahan put them on notice through multiple calls, expressing concern and imploring the police to intervene.<sup>171</sup> The Commission detailed the steps the police reasonably could have taken, and found the local police’s response “fragmented, uncoordinated and unprepared.”<sup>172</sup> The Commission catalogued a range of State failures, both in law enforcement’s response to Ms. Lenahan’s calls,<sup>173</sup> and in inadequate policies and procedures.<sup>174</sup> It made numerous recommendations for individual and systemic relief that would promote

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165. *Id.* at para. 284.

166. *See id.* at paras. 289-290.

167. Jessica Lenahan (Gonzales) et al. v. United States, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, OEA/Ser.L./V/II.142, doc. 11 (2011), available at <http://www.equalaccessadvocates.com/2011%20August%2008%20Petitioners%20-%20Report%20No%20%2080-11.pdf>.

168. *Id.* at paras. 24, 32, 37.

169. *Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005).

170. *See Lenahan*, Case 12.626, at para. 1.

171. *Id.* at paras. 141-147. For example, the restraining order directed law enforcement officials: “You shall use every reasonable means to enforce the restraining order. You shall arrest, or, if an arrest would be impractical, seek a warrant for the arrest of the restrained person . . . . You are authorized to use every reasonable effort to protect the alleged victim and the alleged victim’s children to prevent further violence.” *Id.* at para. 140 (citing language of protective order).

172. *Id.* at para. 150.

173. Noted failures included, for example, failing to review the restraining order to ascertain its terms; consistently asking Ms. Lenahan the same questions during each of her eight calls; failing to call the police department in the neighboring jurisdiction after Ms. Lenahan informed them that Mr. Gonzales had taken her children there; and failing to conduct a criminal background check of Mr. Gonzales. *Id.*

174. For example, the Commission detailed the lack of a protocol for how to respond to protective order violations involving missing children; inadequate training; failure to understand law enforcement’s responsibility for enforcing protective orders; and failing to implement a background check system for gun purchases, which tragically led the FBI to allow Mr. Gonzales to purchase a gun. *Id.* at paras. 152-59.



law enforcement accountability and equality.<sup>175</sup>

With respect to the duty to investigate and prosecute, the Inter-American Commission took a broad view of States' obligations and concluded that Brazil's failure to prosecute in Maria da Penha's case and other similar cases exacerbated the harm committed by her husband, and indicated that the State condones the violence.<sup>176</sup> The Commission found a "general pattern of negligence and lack of effective action" in prosecuting and convicting aggressors, which signaled a failure of the State's obligations to prosecute and convict, as well as to prevent future acts.<sup>177</sup> That Brazil had undertaken some positive steps to address the issue did not mitigate its obligations, given the ongoing "ineffective judicial action, impunity and the inability of victims to obtain compensation[.]"<sup>178</sup> This robust view of the duty to investigate mirrors that enumerated in the *Cotton Field* and *Lenahan* decisions discussed above. Decisions of other bodies similarly underscore States' positive obligations, for example, to conduct effective investigations of sexual assault that are in line with relevant modern standards, and that take all reasonable steps to secure evidence promptly and analyze testimony.<sup>179</sup> Specifically, the ECHR has acknowledged its limited role in reviewing national courts' determinations in criminal prosecutions, but has nevertheless found procedures and practices lacking when those courts have failed to comport with modern standards.<sup>180</sup>

The CEDAW Committee has also taken an expansive view of a State's obligations to provide meaningful access to legal redress. In *V.K. v. Bulgaria*, for example, the Committee recognized that the State had taken steps to address domestic violence through laws and special procedures, but ana-

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175. *Id.* at para. 201.

176. See *Maria da Penha v. Brazil*, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser.L/V/II.111 (2001), available at <http://www1.umn.edu/humanrts/cases/54-01.html>.

177. *Id.* at para. 56.

178. *Id.* at para. 57.

179. See, e.g., *C.K. v. Commissioner of Police*, Petition 8 of 2012, Kenya Law Reports, Republic of Kenya, High Court at Meru (2013) <http://ww3.lawschool.cornell.edu/AvonResources/CK%20v%20Commissioner%20of%20Police%20-%20Kenya.pdf> (discussing "defilement" of young women); *C.A.S. v. Romania*, HUDOC (Mar. 20, 2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109741> (discussing repeated sexual assault of seven year old boy); *M.C. v. Bulgaria*, 2003-XII Eur. Ct. H.R. 1, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61521> (discussing sexual assault of a fourteen-year-old young woman). *Accord Charmichele v. Minister of Safety and Security* 2001 (4) SA 938, at paras. 73, 74 (holding that the prosecutor might be liable for failing to bring information about a defendant's violent history or threats when defendant is subsequently released and causes the threatened harm); *Jane Doe v. Metropolitan Toronto Police* (1998), 39 O.R. 3d. 487, 160 D.L.R. 4th 698 (Ont. Ct. Gen Div.) (finding that police owed and violated duty of care to women in a neighborhood in which a series of stranger rapes had been reported by failing to warn them and failing to investigate the complaints).

180. C.A.S., paras. 73-83, HUDOC (Mar. 20, 2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109741>; *M.C.*, 2003-XII Eur. Ct. H.R. at para. 185. See also, e.g., *O'Keefe v. Ireland*, paras. 162-169, 173-173, HUDOC (Jan. 28, 2014), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-140235> (finding a failure of reporting mechanisms but not a failure to investigate, because the investigation was undertaken after a complaint had been made).

lyzed compliance by considering whether the applicant could “enjoy the practical realization” of the Convention’s promise of gender equality, human rights, and fundamental freedoms.<sup>181</sup> The Committee noted its limited jurisdiction to review local courts’ assessments of facts and evidence with respect to that court’s refusal to issue a protective order, unless the assessment was “arbitrary” or “otherwise discriminatory.”<sup>182</sup> Yet the Committee also emphasized the State’s broad obligation to modify or abolish discriminatory customs, practices, laws, and regulations, and that the State must take “all appropriate measures” to eliminate discrimination against women in marriage and family-related matters.<sup>183</sup> It concluded that the local court’s rejection of the applicant’s request for a protective order based on a restrictive reading of the statute “reflect[ed] a stereotyped and overly narrow concept of what constitutes domestic violence.”<sup>184</sup> Moreover, by failing to make shelters available, the State failed to fulfill its obligation to provide for the immediate protection of women from violence under CEDAW and its General Recommendation 19.<sup>185</sup>

This robust view of State obligations can counter historical biases and unresponsiveness, and may promote best practices. Indeed, this view of States’ obligations, drawing on the guiding documents’ direction to address root causes and intersectional discrimination, has the potential to advance transformative anti-subordination goals. Some decisions recognize how gender discrimination operates to deprive domestic violence survivors of meaningful remedies.<sup>186</sup> Others identify, enumerate, and condemn the operation of stereotypes. For example, the CEDAW Committee found violations based on stereotypes about survivors of rape codified both in statutory definitions and judicial interpretations.<sup>187</sup>

Importantly, this broad approach to State obligations also facilitates recognition of multiple and intersecting discrimination. For example, the Inter-American Commission found that the United States’ systemic failure to respond to Jessica Lenahan’s calls for intervention was particularly troubling because it “took place in a context where there ha[d] been a historical problem with the enforcement of protection orders”—specifically, those around ethnic and racial minorities, and low income women.<sup>188</sup> The CEDAW Committee has reached similar conclusions.<sup>189</sup> In *Jallow v. Bulgaria*, the Committee found that Bulgaria had violated its obligation to react

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181. *V.K. v. Bulgaria*, Comm. on the Elimination of Discrimination Against Women, No. 20/2008, ¶ 9.4, U.N. Doc. CEDAW/C/49/D/20/2008 (2011).

182. *Id.* at para. 9.6.

183. *Id.* at para. 9.11.

184. *Id.* at para. 9.12.

185. *Id.* at para. 9.13.

186. See, e.g., *id.* at para. 9.9.

187. *Vertido v. Philippines*, Comm. on the Elimination of Discrimination Against Women, No. 18/2008, ¶¶ 8.5–8.8, U.N. Doc. CEDAW/C/46/D/18/2008 (2010), available at [http://www.coe.int/t/dghl/standardsetting/convention-violence/caselaw/CEDAW%20C%2046%20DR%2018%202008\\_en%20Vertido%20v%20%20Philippines.pdf](http://www.coe.int/t/dghl/standardsetting/convention-violence/caselaw/CEDAW%20C%2046%20DR%2018%202008_en%20Vertido%20v%20%20Philippines.pdf).

188. Lenahan, Case 12.626, at para. 161.

189. See, e.g., *V.K. v. Bulgaria*, No. 20/2008, at ¶ 9.4.

“actively” to discrimination.<sup>190</sup> The prosecutor had refused to investigate allegations of abuse against the applicant’s husband and instead issued an emergency protection order against the applicant that separated her from her daughter. The Committee concluded that the State had violated its obligation to establish laws and procedures to ensure protection from discrimination, particularly because of the applicant’s vulnerable position as an “illiterate migrant woman” who did not speak Bulgarian, who lacked relatives in the State party, who had a young daughter to care for, and who was dependent on husband.<sup>191</sup> Similarly, the CEDAW Committee in *Kell v. Canada* recognized how a woman’s dual statuses as aboriginal and a survivor of domestic violence combined to violate her right to housing.<sup>192</sup> Other cases allowed for arguments that foregrounded how complainants’ experiences with multiple forms of subordination exacerbated their abuse.<sup>193</sup> Yet this broad approach also poses the risk of State overreach in more challenging cases.

#### b. Balancing Defendants’ and Victims’ Rights

By holding States accountable for meaningful intervention, these tribunals aim to secure actual reform, rather than mere responsive action. Yet ascribing such responsibility for State intervention may prove difficult when intervention risks infringement on a defendant’s rights or when State intervention contradicts the wishes of a survivor. These issues will arise most often in cases that analyze law enforcement officials’ determinations of whether to undertake criminal justice interventions. A few courts have addressed these competing concerns in decisions that analyze whether States failing to respond to requests for intervention have considered the difficult question of how to balance the rights of defendants and victims when their interests conflict. Recognizing this tension, the ECHR and the CEDAW Committee have articulated and invoked a broad and seemingly categorical principle stating that a “perpetrator’s rights cannot supersede victims’ human rights to life and to physical and mental integrity.”<sup>194</sup>

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190. See *Jallow v. Bulgaria*, Comm. on the Elimination of Discrimination Against Women, No. 32/2011, ¶ 8.4, U.N. Doc. CEDAW/C/52/D/32/2011 (2012).

191. *Id.* at paras. 8.2, 8.5.

192. *Kell v. Canada*, Comm. on the Elimination of Discrimination Against Women, No. 19/2008, ¶ 10.2 CEDAW/C/51/D/19/2008 (2012) (concerning an aboriginal domestic violence survivor who lost access to her home and was subjected to intersectional discrimination).

193. *E.g.*, *Goekce v. Austria*, Comm. on the Elimination of Discrimination Against Women, No. 5/2005, ¶ 3.7, U.N. Doc. CEDAW/C/39/D/5/2005 (2007) (asking for effective remedies, particularly for migrant women), available at [http://www.bayefsky.com/pdf/austria\\_cedaw\\_t5\\_5\\_2005.pdf](http://www.bayefsky.com/pdf/austria_cedaw_t5_5_2005.pdf); *Yildirim v. Austria*, Comm. on the Elimination of Discrimination Against Women, No. 6/2005, ¶ 3.7, U.N. Doc. CEDAW/C/39/D/6/2005 (2007), available at <http://www.bka.gv.at/DocView.axd?CobId=29081>.

194. *E.g.*, *Yildirim*, No. 6/2005 at paras. 12.1.5, 12.3(b) (emphasis added); *Goekce*, No. 5/2005 at paras. 12.1.5, 12.3(b); *A.T. v. Hungary*, Comm. on the Elimination of Discrimination Against Women, No. 2/2003, ¶ 9.3, U.N. Doc. CEDAW/C/32/D/2/2003 (2005), available at [http://www.bayefsky.com/pdf/hungary\\_t5\\_cedaw\\_2\\_2003.pdf](http://www.bayefsky.com/pdf/hungary_t5_cedaw_2_2003.pdf); *Opuz v. Turkey*, 2009-III Eur. Ct. H.R. 107, para. 147.

No doubt, this approach may be heralded by those concerned about the historical and ongoing under-enforcement of cases involving gender violence. This statement of principle is not surprising given the trajectory of advocacy encouraging State intervention and the historical backdrop of States' refusal to intervene. Yet it is easy to imagine that this general statement could be interpreted to authorize criminal intervention against perpetrators, seemingly without limitation, even in cases in which intervention contravenes the survivors' wishes or in cases with less egregious facts than those in the decisions reported to date.<sup>195</sup>

Each of the cases in which this principle was invoked involved severe histories of violence, apparently marginal responses from law enforcement, and victims who actively sought law enforcement intervention. For example, two early cases relied on this principle in holding Austria accountable for failing to respond adequately to a victim's calls for law enforcement assistance. In *Yildirim v. Austria*, the CEDAW Committee considered a claim on behalf of a woman killed by her abusive husband.<sup>196</sup> The abusive husband had subjected his wife to escalating acts of violence, which resulted in calls to the police and an injunction issued against him.<sup>197</sup> Moreover, the abusive husband had harassed his wife and made several threats to kill her, including threats issued at her workplace.<sup>198</sup> At various points, the police either declined Ms. Yildirim's requests that her husband be detained,<sup>199</sup> failed to report incidents of harassment,<sup>200</sup> or responded to the reports of his threats and harassment by speaking to him or passing the complaint on to other law enforcement officials.<sup>201</sup> After Ms. Yildirim filed a petition for divorce, Mr. Yildirim followed her home from work and fatally stabbed her.<sup>202</sup>

The Committee applied a negligence standard to determine that the Austrian authorities knew or should have known that the situation was "extremely dangerous," and accordingly should not have denied the requests to place Mr. Yildirim in detention.<sup>203</sup> It concluded that law enforcement's failure to detain him violated Austria's due diligence obligation to protect Ms. Yildirim.<sup>204</sup> The Committee implicitly acknowledged the difficulty of the judgment; it recognized Austria's argument that an arrest warrant seemed "disproportionately invasive" at the time of the

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195. In a decision addressing the related question of the respective rights of complainants and defendants at trial, the Constitutional Court of South Africa took into account the nuances raised in cases of intimate partner violence, but nevertheless struck a balance that would recognize the presumption of innocence and a defendant's right to a fair trial under South Africa's constitution. See *State v. Baloyi*, 1999 (3) SA 1 (CC) at 15 (S. Afr.).

196. *Yildirim*, No. 6/2005 at paras. 2.2-2.5.

197. *Id.*

198. *Id.* at paras. 2.6-2.8.

199. *Id.* at paras. 2.4, 2.10.

200. *Id.* at para. 2.6.

201. *Id.* at paras. 2.7-2.10.

202. *Id.* at paras. 2.11-2.14.

203. *Id.* at para. 12.1.4.

204. *Id.* at para. 12.1.5.

request for detention.<sup>205</sup> Nevertheless, the Committee invoked the statement elevating “women’s human rights” over the “perpetrators’ rights” and concluded that the scales tipped in favor of State intervention.<sup>206</sup>

The Committee referenced that same principle in another case in which it also concluded that Austria had violated CEDAW’s obligations for failing to respond to another victim’s calls for law enforcement assistance. The decision in *Goekce v. Austria* involved a similar history of escalating violence and threats over a three-year period: the case involved disturbances and disputes, including threats that Mr. Goecke would kill his wife, calls to the police, injunctions prohibiting Mr. Goecke’s return to the home, violations of those injunctions, and denials of requests that he be detained.<sup>207</sup> The police did not check whether a weapons prohibition was in effect against Mr. Goecke even though they apparently knew that he had a handgun, and even though Ms. Goecke’s father and brother had alerted the police to Mr. Goecke’s threats to kill her.<sup>208</sup> The prosecutor had stopped a prosecution against Mr. Goecke for causing bodily harm and making a criminal and dangerous threat on the grounds that there was insufficient reason to prosecute him.<sup>209</sup> Two days later, Mr. Goecke shot Ms. Goecke in front of their two daughters.<sup>210</sup> Ms. Goecke had called the emergency call service a few hours before she was killed, yet no patrol car was sent in response.<sup>211</sup>

As in *Yildirim*, the CEDAW Committee concluded that the police “knew or should have known” that Ms. Goecke was in serious danger, given the long record of disturbances and calls to the police, including the call immediately preceding the shooting.<sup>212</sup> The Committee similarly acknowledged the need to determine whether detention would unduly interfere with a perpetrators’ rights to freedom of movement and a fair trial, but deferred, without additional analysis, to the view stated above, that “the perpetrator’s rights cannot supersede women’s human rights to life and to physical and mental integrity.”<sup>213</sup> The Committee noted that Mr. Goecke had “crossed a high threshold of violence,” and that the prosecutor should not have denied requests to detain him, given its knowledge of that history.<sup>214</sup>

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205. *Id.*

206. *Id.*

207. See *Goekce v. Austria*, Comm. on the Elimination of Discrimination Against Women, No. 5/2005, ¶¶ 2.1–2.12, U.N. Doc. CEDAW/C/39/D/5/2005 (2007), available at [http://www.bayefsky.com/pdf/austria\\_cedaw\\_t5\\_5\\_2005.pdf](http://www.bayefsky.com/pdf/austria_cedaw_t5_5_2005.pdf).

208. *Id.* at para. 2.9.

209. *Id.* at para. 2.10.

210. *Id.* at para. 2.11.

211. *Id.* at para. 12.1.3.

212. *Id.* at para. 12.1.4.

213. *Id.* at para. 12.1.5.

214. *Id.*

The decision in *A.T. v. Hungary* likewise held the State accountable for failed law enforcement response to a survivor of domestic violence.<sup>215</sup> That case involved a four-year history of regular and severe domestic violence and threats by the petitioner's common law husband.<sup>216</sup> At the time, Hungary lacked procedures for protection or restraining orders, and no shelters were available to the petitioner because none were equipped to accommodate her as well as her children, one of whom was disabled.<sup>217</sup> The allegations enumerated a history of civil and criminal charges, none of which resulted in detention, and none of which were effective in barring her abuser from her apartment.<sup>218</sup> Subsequent to the initial events leading to the complaint, Hungary had instituted a set of reforms, but it admitted that the legal and institutional arrangements were not yet ready to assist survivors effectively.<sup>219</sup> The CEDAW Committee agreed, noting that domestic violence cases were not prioritized in court proceedings.<sup>220</sup> With respect to the balance between defendants' and victims' rights, it repeated the statement that "[w]omen's human rights to life and to physical and mental integrity cannot be superseded by other rights, including the right to property and the right to privacy."<sup>221</sup> The Committee was particularly concerned that no legislation had been enacted to address domestic violence and sexual harassment, and that no protection or exclusion orders or shelters exist for survivors' immediate protection.<sup>222</sup>

The ECHR explicitly grappled with the difficult question of how to balance defendants' with victims' rights in cases in which a victim drops charges. In *Opuz*, the government contended that it had been constrained to terminate criminal proceedings against the defendant because the victims had withdrawn their complaints, and the governing statutes accordingly prohibited them from pursuing prosecution.<sup>223</sup> The court invoked the categorical elevation of victims' over defendants' rights in the course of analyzing whether the authorities had displayed "due diligence" to prevent the killing.<sup>224</sup>

The resulting analysis presents the most detailed consideration in any of the reported cases about States' obligations with respect to mandatory law enforcement interventions. The court noted that there is no general consensus internationally about mandatory prosecution when the victim withdraws her complaints.<sup>225</sup> It enumerated a set of factors that should be

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215. *A.T. v. Hungary*, Comm. on the Elimination of Discrimination Against Women, No. 2/2003, U.N. Doc. CEDAW/C/32/D/2/2003 (2005), available at [http://www.bayefsky.com/pdf/hungary\\_t5\\_cedaw\\_2\\_2003.pdf](http://www.bayefsky.com/pdf/hungary_t5_cedaw_2_2003.pdf).

216. *Id.* at para. 2.1.

217. *Id.* at para. 2.1.

218. *Id.* at paras. 2.2-2.7, 9.4.

219. *Id.* at para. 9.3.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Opuz v. Turkey*, 2009-III Eur. Ct. H.R. 107, ¶ 144, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92945>.

224. *Id.* at para. 147.

225. *Id.* at para. 138.

taken into account in deciding whether to pursue the prosecution, including:

- “the seriousness of the offence;
- whether the victim’s injuries are physical or psychological;
- if the defendant used a weapon;
- if the defendant has made any threats since the attack;
- if the defendant planned the attack;
- the effect (including psychological on any children living in the household);
- the chances of the defendant offending again;
- the continuing threat to the health and safety of the victim or anyone else who was, or could become, involved;
- the current state of the victim’s relationship with the defendant;
- the effect on that relationship of continuing with the prosecution against the victim’s wishes;
- the history of the relationship, particularly if there had been any other violence in the past;
- and the defendant’s criminal history, particularly any previous violence.”<sup>226</sup>

Accordingly, the more serious the offense or the greater the risk of further offenses, the more likely the prosecution should continue even if the victim withdraws a complaint.<sup>227</sup> Applying the standard to the history of severe violence and ongoing complaints, and considering that the victims indicated that they had withdrawn their complaints because of the abuser’s death threats, the court concluded that the authorities did not adequately consider the enumerated factors.<sup>228</sup>

The *Opuz* court discussed the argument (propounded by the government) that it was precluded from interfering because doing so would violate the victims’ rights to family privacy (protected under Article 8 of the European Convention).<sup>229</sup> The court recognized the particular concerns that arise in domestic violence cases, and stated that interference with private or family life may sometimes be necessary in order to protect the life or health of others, or to prevent commission of future criminal acts.<sup>230</sup> But in issuing its conclusion, the court did not engage the factors it had articulated and seemingly tipped the scale in favor of intervention: “[O]nce the situation has been brought to their attention, the national authorities cannot rely on the victim’s attitude for their failure to take adequate measures which could prevent the likelihood of an aggressor carrying out his threats against the physical integrity of the victim.”<sup>231</sup> Without further

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226. *Id.* at para. 138.

227. *Id.* at para. 139.

228. *Id.* at para. 143.

229. This obligation can be invoked both to support intervention (to promote respectful family relations), and non-intervention (to promote privacy). As such, it may be the focus of important interpretation in future cases. See Stedman, *supra* note 15, at 12 (arguing that the ECHR decision in *Bevacqua*, declining to find that the Bulgarian Penal Code violated Article 8, could send “mixed signals and undermine the validity of justice” because it authorizes deviation from universal human rights principles).

230. *Opuz*, 2009-III Eur. Ct. H.R. at para. 144.

231. *Id.* at para. 153.

analysis, the court concluded that in this case, the seriousness of the risk to the abuser's mother-in-law, presumably reflected in the long history of severe violence, rendered such intervention necessary.<sup>232</sup>

For future applications, the factors enumerated in *Opuz* could provide a useful blueprint for evaluating the reasonableness of State intervention, particularly in cases in which a survivor or victim declined to pursue prosecution or dropped charges. Notably here, Ms. Opuz and her mother had dropped charges because they feared retaliation.<sup>233</sup> This makes the case for intervention easier than those in which the survivor no longer wants the police to intervene. Other cases may be less clear-cut. More explicit reasoning about how a court should weigh the reasonableness of State intervention in these difficult and contested cases would help guide future decisions. The factors enumerated in *Opuz* could prove useful for weighing a victims' autonomy and right to decline intervention versus a State's concern for safety.

## 2. *State's Obligation to Provide Redress*

Like the guiding documents,<sup>234</sup> the decisions recommend a breadth of remedies that could prove difficult to monitor and measure. The judgments and recommendations for compliance include concrete steps such as providing compensation to a survivor for out of pocket expenses, as well as broad aspirational goals such as ensuring that all rights are fully enforced, that fair legislation is enacted and accessible, and that officials are fully trained. As just one example, in the *Cotton Field* decision, the IACHR ordered reparations to the beneficiaries of the women who disappeared and were killed.<sup>235</sup> The court went on to define "full reparation" to include "all necessary judicial and administrative measures to complete the investigation, find, prosecute and punish the perpetrator or perpetrators and mastermind or masterminds and provide full information on the results."<sup>236</sup> It prescribed comprehensive responses, for example that "all factual or juridical obstacles" to a full investigation shall be removed,<sup>237</sup> that the remedial investigation "be conducted in accordance with protocols and manuals that comply" with the directives in the judgment,<sup>238</sup> and that

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232. *Id.* at paras. 143-44. The court then grappled with the argument that Turkey's then-applicable criminal code prevented pursuing the criminal investigation because the acts had "not resulted in sickness or unfitness for work for ten days or more." *Id.* at para. 145. The court was not constrained by that limitation: "[t]he legislative framework preventing effective protection for victims of domestic violence aside, the Court must also consider whether the local authorities displayed due diligence to protect the right to life of the applicant's mother *in other respects*." *Id.* at para. 146 (emphasis added).

233. *Id.* at paras. 18, 35.

234. See *supra* pt. III.A.

235. González et al. (*Cotton Field*) v. Mexico, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205 (Nov. 16, 2009), available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_205\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_205_ing.pdf) (reparations include financial remuneration, rehabilitation and costs).

236. *Id.* at para. 452.

237. *Id.* at para. 455(a).

238. *Id.* at para. 455(b).



the entities involved in the investigation “shall have the necessary human and material resources” to carry out their obligations.<sup>239</sup> The court set out a similarly broad mandate with respect to sanctioning the officials who committed irregularities leading to the murders<sup>240</sup> and in connection with irregularities in the investigation of the victims’ families’ complaints about harassment.<sup>241</sup> The court required the government to adopt a wide range of guarantees of non-repetition,<sup>242</sup> and to engage in public acts honoring the victims and commemorating the atrocities.<sup>243</sup> Additional remedies include standardizing protocols, federal investigation criteria, expert services, and provision of justice to combat the disappearances, murders, and other types of violence against women.<sup>244</sup> These prescriptions are wide-ranging and laudable, and they chart a comprehensive vision of meaningful response. Yet their very scope raises questions about how and whether compliance might be achieved or measured.

The IACHR is not alone in using sweeping language to describe States’ remedial obligations. The CEDAW decisions proscribe similarly broad relief in decisions under its optional protocol. For example, in *S.V.P. v. Bulgaria*, the CEDAW Committee found that Bulgaria had violated the CEDAW Convention’s provisions by failing to provide adequate support and protection to a child victim of rape.<sup>245</sup> After some delay, the charges had been resolved through a plea-bargain that provided for a suspended sentence and that did not award compensation for pain and suffering; the young woman had been unable to secure compensation under existing laws.<sup>246</sup> The CEDAW Committee found Bulgaria in violation for failing to adopt legislation that would “effectively punish rape and sexual violence.”<sup>247</sup> The CEDAW Committee also found that the lack of legislation providing compensation, including moral damages, violated CEDAW; among other things, the Committee recommended various types of legislative reform.<sup>248</sup>

Adopting legislation is a challenging goal that leaves many questions unanswered. For example, what are the parameters of acceptable legislation? That said, enacting legislation is a relatively concrete remedy in comparison to some of the other, more aspirational recommendations, which

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239. *Id.* at para. 455(c).

240. *See id.* at paras. 456-60.

241. *See id.* at paras. 461-63.

242. *See id.* at paras. 474-93.

243. *See id.* at paras. 464-73.

244. *See id.* at paras. 497-543.

245. *S.V.P. v. Bulgaria*, No. 31/2011, Comm. on the Elimination of All Forms of Discrimination Against Women, U.N. Doc. CEDAW/C/53/D/31/2011 (2012), <http://www.coe.int/t/dghl/standardsetting/convention-violence/caselaw/SVP%20v%20Bulgaria%20%28CEDAW%29.pdf>.

246. *Id.* at para. 9.2.

247. *Id.* at para. 9.5.

248. *See id.* at paras. 9.9, 9.11, 10(2)(a)-(e). For example, the Committee recommended legislative reform that would ensure that Bulgarian law on sexual violence against women and girls would be “defined in line with international standards.” *Id.* at para. 10(2)(a).

are even less readily susceptible to measurement and specification. For example, CEDAW Committee recommendations implore the State to take measures, for example, including requirements that States:

- (a) Strengthen implementation and monitoring of the Federal Act for the Protection against Violence within the Family and related criminal law, by acting with due diligence to prevent and respond to such violence against women and adequately providing for sanctions for the failure to do so;
- (b) Vigilantly and in a speedy manner prosecute perpetrators of domestic violence in order to convey to offenders and the public that society condemns domestic violence as well as ensure that criminal and civil remedies are utilized in cases where the perpetrator in a domestic violence situation poses a dangerous threat to the victim and also ensure that in all action taken to protect women from violence, due consideration is given to the safety of women, emphasizing that the perpetrator's rights cannot supersede women's human rights to life and to physical and mental integrity;
- (c) Ensure enhanced coordination among law enforcement and judicial officers, and also ensure that all levels of the criminal justice system (police, public prosecutors, judges) routinely cooperate with non-governmental organizations that work to protect and support women victims of gender-based violence;
- (d) Strengthen training programmes and education on domestic violence for judges, lawyers and law enforcement officials, including on the Convention on the Elimination of All Forms of Discrimination against Women, General Recommendation 19 of the Committee, and the Optional Protocol thereto.<sup>249</sup>

Similarly, the recommendations in *AT v. Hungary* sweep broadly. They include recommendations with respect to the applicant, which would have the State: "(a) [t]ake immediate and effective measures to guarantee the physical and mental integrity of A.T. and her family; and (b) [e]nsure that A.T. is given a safe home . . . appropriate child support and legal assistance as well as reparation."<sup>250</sup>

The recommendations also include general proscriptions, including aspirational goals such as taking steps to:

- [r]espect, protect, promote and fulfill women's human rights . . . ; assure victims of domestic violence the maximum protection of the law . . . ; [t]ake all necessary measures to ensure that the national strategy for the prevention and effective treatment of violence within the family is promptly implemented and evaluated . . . ; [and] take all necessary measures to provide regular training on [CEDAW].<sup>251</sup>

249. *Yildirim v. Austria*, Comm. on the Elimination of Discrimination Against Women, No. 6/2005, ¶ 12.3(a)-(d), U.N. Doc. CEDAW/C/39/D/6/2005(2007), available at <http://www.bka.gv.at/DocView.axd?CobId=29081>; *Goekce v. Austria*, Comm. on the Elimination of Discrimination Against Women, No. 5/2005, ¶ 12.3(a)-(d), U.N. Doc. CEDAW/C/39/D/5/2005 (2007), available at [http://www.bayefsky.com/pdf/austria\\_cedaw\\_t5\\_5\\_2005.pdf](http://www.bayefsky.com/pdf/austria_cedaw_t5_5_2005.pdf).

250. *A.T. v. Hungary*, Comm. on the Elimination of Discrimination Against Women, No. 2/2003, ¶ 9.6 (I)(a)-(b), U.N. Doc. CEDAW/C/32/D/2/2003 (2005), available at [http://www.bayefsky.com/pdf/hungary\\_t5\\_cedaw\\_2\\_2003.pdf](http://www.bayefsky.com/pdf/hungary_t5_cedaw_2_2003.pdf).

251. *Id.* at para. 9.6(II)(a)-(d).

The recommendations also call on Hungary to implement the CEDAW Committee's Concluding Observations, to investigate "all" allegations of domestic violence, and to "bring the offenders to justice in accordance with international standards; to provide victims with safe and prompt access to justice, and to provide offenders rehabilitation programs."<sup>252</sup>

The CEDAW Committee similarly recommended sweeping relief in *Vertido v. Philippines*, a case in which the president of the Chamber of Commerce raped a female employee.<sup>253</sup> The applicant's criminal complaint was initially dismissed for lack of probable cause; the prosecution proceeded after she successfully appealed that initial decision, but there were long delays in the time it took to affect the defendant's arrest and conduct the trial, and the defendant was ultimately acquitted.<sup>254</sup> The Committee detailed the ways in which applicable case law and the local court's adjudication reflected gender bias and stereotypes about rape.<sup>255</sup> It concluded that the eight-year period in which the case remained at the trial court violated the "right to a remedy" implied by CEDAW, and reasoned that for a remedy to be effective, adjudication must occur "in a fair impartial, timely and expeditious manner."<sup>256</sup> In addition to ordering "appropriate compensation," the Committee required the State, among other things, to "take effective measures" to ensure that adjudications involving rape proceed without delay, and to "ensure" that "all legal procedures" in rape and other sexual offense cases are "impartial and fair and not affected by prejudices or stereotypical gender notions."<sup>257</sup> The Committee also recognized that "a wide range of measures are needed," including legislative reform and training.<sup>258</sup>

Likewise, the Committee recommended that Belarus take measures to "ensure the protection" of the "dignity and privacy, as well as the physical and psychological safety" of women detainees, to "ensure access to gender-specific health care" for women detainees, and to "ensure" effective investigation, prosecution, and adequate punishment in response to allegations by women detainees about discriminatory, cruel, inhuman, or degrading treatment. These recommendations stemmed from a complaint by a woman journalist who was sexually harassed and subjected to degrading

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252. *Id.* at para. 9.6(II)(e)-(h).

253. *Vertido v. Philippines*, Comm. on the Elimination of Discrimination Against Women, No. 18/2008, U.N. Doc. CEDAW/C/46/D/18/2008 (2010), available at [http://www.coe.int/t/dghl/standardsetting/convention-violence/caselaw/CEDAW%20C%2046%20DR%2018%202008\\_en%20Vertido%20v%20%20Philippines.pdf](http://www.coe.int/t/dghl/standardsetting/convention-violence/caselaw/CEDAW%20C%2046%20DR%2018%202008_en%20Vertido%20v%20%20Philippines.pdf).

254. See *id.* at paras. 2.6-7, 2.9 (detailing, for example, that the defendant was arrested eighty days after issuance of an arrest warrant, and that the case remained at the trial court from 1997 to 2005).

255. See *id.* at paras. 8.5-7.

256. See *id.* at para. 8.3.

257. *Id.* at para. 8.9(b).

258. *Id.* Notably, a concurring opinion refused to opine whether the defendant would have been convicted absent gender myths and stereotypes, and emphasized that the Committee is not equipped to evaluate witness credibility. See *id.* at paras. 18-19 (Yoko Hayashi, concurring).

treatment while detained.<sup>259</sup> Additionally, the Committee recommended “adequate safeguards” to protect women detainees from “all forms of abuse,” training for personnel assigned to work with women detainees, and both policies and “comprehensive programmes” to “ensure the needs of women prisoners are met.”<sup>260</sup>

Broad remedial powers are among the advantages of international human rights enforcement. While these sweeping recommendations hold tremendous potential as advocacy tools, they may pose challenges in more traditional enforcement contexts. In the absence of any State intervention, calling for State action may seem like, and may in fact be, a good idea. At the same time, the enumeration of such a comprehensive list of remedies raises the specter that compliance may be reduced to checklists which, while useful, do not afford a means for evaluating the quality or effectiveness of a particular intervention. While the breadth of the asserted remedies constitutes a valuable tool for advocacy, mechanisms must be created to assess both the quality and effectiveness of interventions such as training, eradicating stereotypes, and other critical but broad measures. Absent nuanced assessment mechanisms, States will be able to tout their compliance within the language of the remedy without meaningfully addressing underlying concerns, and without ensuring that historic patterns of criminal justice bias are not simply strengthened by State responses to gender violence.

#### **IV. The Way Forward: Toward Accountability**

The preceding review of guiding normative documents and case law highlights both the promise and the challenges emerging as due diligence principles are applied to gender violence. The broad conception of States' positive obligation to respond can engender robust policy and programmatic advances. But inviting State responses also poses risks, particularly with respect to criminal justice interventions. At a minimum, the risks should be taken into account when advocates and policymakers consider a particular type of intervention in a particular context. This Part offers a few beginning suggestions.

First, advocates should critically consider how, why, and in what context State responsiveness should be sought before endorsing particular reforms. Calls for a robust role for the State may make most sense in contexts in which the State has not acted at all. For example, legislation proscribing acts of gender violence may be called for where there are no laws prohibiting gender violence or where the government affords no support for social services and prevention.

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259. *Abramova v. Belarus*, No. 23/2009, ¶ 7.9(2)(a)-(c), Comm. on the Elimination of All Forms of Discrimination Against Women, U.N. Doc. CEDAW/C/49/D/23/2009 (2011), [http://www.worldcourts.com/cedaw/eng/decisions/2011.07.25\\_Abramova\\_v\\_Belarus.pdf](http://www.worldcourts.com/cedaw/eng/decisions/2011.07.25_Abramova_v_Belarus.pdf).

260. *Id.* at para. 7.9(2)(d)-(f).

Second, interpretations of due diligence principles should take into account existing critiques of the role of the State. For example, policy-based and judicial interpretations can employ balancing tests that explicitly consider whether a particular decision triggers problems attendant either to over-responsiveness or to under-responsiveness.<sup>261</sup> Interpretations should consider the impact of any intervention on those at the margins, and should take into account the experiences and recommendations of both advocates and survivors.

Third, analyses of State responses that contemplate fulfilling any of the due diligence obligations should recognize that States may meet their obligations by exercising discretion not to respond or by delegating response to others. This may entail delegating the response to a community-based NGO.<sup>262</sup> In this context, it is more helpful to think of the State's obligation as State accountability, rather than State responsiveness.

Fourth, the due diligence principle should explicitly be interpreted in conjunction with other foundational human rights principles— including equality, autonomy, and dignity— which have been incorporated into recent decisions, reports, and commentary on gender violence. Many of the policy documents and recent decisions explicitly do so. Adjudicators of future complaints might explicitly invoke the factors enumerated in *Opuz* as a tool for balancing competing interests when evaluating the efficacy of law enforcement intervention in a particular case.<sup>263</sup> Future decision-makers can draw on the ways anti-discrimination concerns have been incorporated into prior decisions in future cases.<sup>264</sup>

Finally, it may be that the type of State response sought makes a difference. For example, the exercise of State power to punish or to coerce then triggers different concerns than the exercise of State power to distribute resources, or to ensure the comprehensive and accessible delivery of social and legal services. As Beth Richie has said, we might urge State intervention that is “caring, but not controlling.”<sup>265</sup> A different set of analyses may be called for in those dissimilar contexts.

The tensions inherent in seeking an enhanced role for the State raise critical questions about how to tap the potential of the due diligence obligation without replicating problems with State intervention. The cases and guiding international documents highlight the fact that it is much easier to

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261. See *Opuz v. Turkey*, 2009-III Eur. Ct. H.R. 107, ¶ 138, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92945>.

262. Of course, NGOs must receive adequate compensation for providing services. The challenging question of whether a State entity can or should fund particular services without, in turn, requiring particular approaches or methodologies, is beyond the scope of this paper.

263. See *Opuz*, 2009-III Eur. Ct. H.R. at para. 138.

264. See, e.g., *supra* pt. III.B.3 (discussing cases advancing anti-discrimination concerns).

265. Beth Richie, Director of the Institute for Research on Race and Public Policy and Professor of African American Studies and Criminology, Law and Justice at The University of Illinois at Chicago, Keynote Address at The University of Miami School of Law CONVERGE! Conference (Feb. 7, 2014).

identify failures of State responsibility than it is to be prescriptive in the first order about what the State ought to do.<sup>266</sup> The interpretations favoring State intervention make sense in light of the long history of State refusal and failure to respond to or to sanction intimate partner and sexual violence.<sup>267</sup> Yet, we need to be careful that in the push for State accountability, we do not romanticize the role of the State or the ability of the criminal justice system to address effectively the problem of gender violence. We also need to ensure that we construct policies, plans, services, and law enforcement measures that minimize and redress discrimination in minority communities, as opposed to exacerbating historic inequities. Thoughtful advocacy about how to balance these competing concerns can chart a course towards effective reforms.

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266. See *supra* pts. III.A-B.

267. See *supra* pt. III.B.1.a.

