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# JUDICIAL DEVELOPMENTS IN THE APPLICATION OF INTERNATIONAL LAW TO DOMESTIC VIOLENCE

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## INTRODUCTION

On June 9, 2009, the European Court of Human Rights delivered its judgment in the case of *Opuz v. Turkey*.<sup>1</sup> In *Opuz*, the applicant claimed that the Turkish government violated the European Convention on Human Rights by failing to adequately protect her and her mother from the domestic violence abuse—and eventually murder—perpetrated by the applicant’s former husband.<sup>2</sup> In particular, the applicant claimed violations of her right to life;<sup>3</sup> her right to be free from torture, inhuman and degrading treatment and punishment;<sup>4</sup> her right to obtain an effective remedy before a national authority;<sup>5</sup> and her right to be free from gender discrimination.<sup>6</sup> In its landmark decision, the European Court of Human Rights did indeed find that the Turkish government had violated the right to life with respect to the killing of the applicant’s mother committed by the applicant’s former husband. Moreover, the European Court of Human

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1. *Opuz v. Turkey*, App. No. 33401/02, Eur. Ct. H.R. ¶ 118-20 (2009), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92945>.

2. *Id.*

3. See Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Nov. 4, 1950, E.T.S. 005, 213 U.N.T.S. 221 [hereinafter European Convention] (entered into force on Sept. 3, 1953).

4. See *id.* art. 3.

5. See *id.* art. 13.

6. See *id.* art. 14.

Rights found that the Turkish authorities had violated the applicant's right to be free from torture by failing to protect her from domestic violence. Finally, it found that the Turkish government had also violated the applicant's right of non-discrimination based on sex, thereby significantly recognizing domestic violence as a form of gender discrimination that amounts to state responsibility.<sup>7</sup>

Similarly, in the recent landmark decision in *Jessica Lenahan (Gonzales) v. United States*, the Inter-American Commission on Human Rights (IACHR) held the United States accountable for failing to exercise due diligence to protect the applicant and her daughters from repetitive acts of domestic violence as well as for failing to enforce a mandatory protective order against the applicant's former husband which eventually led to the murder of the applicant's daughters.<sup>8</sup> Moreover, the IACHR recommended that the United States implement substantive changes to domestic violence law and policy.<sup>9</sup> In particular, the Commission's recommendations included, inter alia, that: the state should be responsible for conducting a proper investigation into the systemic failures that led to the under-enforcement of the applicant's protection order; the mandatory character of protection orders and other precautionary measures meant to protect women from imminent acts of violence should be legislatively reinforced; and, finally, effective implementation mechanisms should be developed.<sup>10</sup>

Traditionally, international law understood the concept of state accountability *only* in the context of human rights violations imputed to the government or any of its agents.<sup>11</sup> Because domestic violence is comprised of acts committed by private individuals, these crimes have long been deemed to fall outside the scope of state accountability.<sup>12</sup> More recently,

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7. See *Opuz*, App. No. 33401/02, ¶ 200 (holding that, regardless of the government's intention, Turkey is responsible for discrimination against women by failing to protect against gender-based violence).

8. *Lenahan v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶¶ 170, 177, 199 (2011).

9. See *id.* ¶ 201(4)-(7) (recommending reformation of existing laws regarding enforcement of protection orders, children protection policies, domestic violence, and other protocols affecting the family).

10. See *id.* ¶ 201(2), (4).

11. See Special Rapporteur on Violence Against Women, Its Causes and Consequences, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women—The Due Diligence Standard as a Tool for the Elimination of Violence Against Women*, Comm'n on Human Rights, U.N. Doc. E/CN.4/2006/61, ¶ 57 (Jan. 20, 2006) [hereinafter Special Rapporteur] (noting that the failure of international law to address the needs of women is due more to a narrow interpretation of rights within the international legal order than to human rights discourse itself); see also Dorothy Q. Thomas & Michele E. Beasley, *Domestic Violence as a Human Rights Issue*, 15 HUM. RTS. Q. 36, 41 (1993).

12. See Special Rapporteur, *supra* note 11, ¶¶ 59-60 (criticizing the "public/private dichotomy in international law" as being a primary barrier to the protection of women's rights and for normalizing domestic violence).

however, the concept of state accountability has been expanded to include not only state actions, but also—and more importantly—state omissions and failures to take appropriate steps to protect women from domestic violence.<sup>13</sup> Therefore, in addition to preventing through its own agents the commission of violence against women, the states are obligated to prevent acts of violence against women committed by private individuals. A state conforms to this obligation by duly investigating relevant allegations, prosecuting perpetrators, and providing adequate remedies for victims.

This Article analyzes judicial developments regarding a state's responsibility to prevent domestic violence focusing on recent decisions by international human rights judicial institutions. In particular, the Article examines the above-mentioned 2009 decision in *Opuz v. Turkey*, as well as earlier case law in the European Court of Human Rights.<sup>14</sup> Then, the article concludes by addressing the jurisprudence of the IACHR, including *Jessica Lenahan (Gonzales) v. United States* and the legislative and policy recommendations the Commission made regarding domestic violence.<sup>15</sup> By examining these decisions and the implications they have for the understanding of domestic violence under international law, this Article explains the development of a new judicial trend towards states' positive obligation to protect victims of domestic abuse.<sup>16</sup> This Article also investigates the standard of due diligence for state liability,<sup>17</sup> and suggests universal criteria according to which international law should apply to domestic violence as a human rights violation.<sup>18</sup>

## I. DOMESTIC VIOLENCE UNDER INTERNATIONAL LAW

A recent study by the World Health Organization (WHO) reported that domestic violence is the most prevalent—yet relatively hidden and ignored—form of violence in women's lives.<sup>19</sup> Although comprehensive statistics are hard to come by, the proportion of women in the countries surveyed who are victims of domestic violence ranged from 15% to 71%, with most countries falling between 29% and 62%.<sup>20</sup> Women in Japan

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13. *See id.* ¶ 61 (noting that the due diligence standard has held States responsible for failures to respond to the problem of domestic violence); *see also id.* ¶ 57 (observing that the work done by women's rights activists has paved the way in holding States responsible for violence against women by private actors).

14. *See infra* pp. 432-33.

15. *See infra* pp. 434-35.

16. *See infra* Part III.

17. *See infra* Part II.

18. *See infra* pp. 435-36.

19. *See generally* WORLD HEALTH ORG., MULTI-COUNTRY STUDY ON WOMEN'S HEALTH AND DOMESTIC VIOLENCE AGAINST WOMEN (2005).

20. *Id.* at 5.

were the least likely to have experienced intimate partner abuse, while the highest rate of violence was reported by women living in rural parts of Bangladesh, Ethiopia, Peru, and Tanzania.<sup>21</sup> Despite the systematic nature and rampant occurrence of domestic violence that affects women worldwide, it was only recently—and after considerable efforts—that the international community came to focus on human rights for women, classifying domestic abuse as a pervasive and specific form of violence that constitutes a per se human rights violation.<sup>22</sup>

The broad principle of non-discrimination was first generally recognized in the Charter of the United Nations adopted on June 26, 1945, providing for “the equal rights of men and women,”<sup>23</sup> and including the promotion and encouragement of respect for human rights and for fundamental freedoms for all without any distinction based on sex as a purpose of the United Nations itself.<sup>24</sup> Along the same lines, in 1948, the General Assembly of the United Nations adopted the Universal Declaration of Human Rights, which provided that all human beings are born free and equal in dignity and rights, without any distinctions based on gender.<sup>25</sup>

In 1979, following such general acknowledgment of the intrinsic value of any individual life, as well as the commitment to equal treatment and non-discrimination on the basis of sex, the United Nations General Assembly unanimously adopted the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which was the first comprehensive international instrument solely addressing gender equality and acknowledging women as victims of unique human rights violations.<sup>26</sup>

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21. *Id.*

22. See Special Rapporteur, *supra* note 11, ¶ 58 (noting the diversity of challenges to recognizing violence against women as a human rights issue, including the dichotomy between the public and private spheres and the resurgence of identity politics based on cultural specificity that challenges State authority); see also Committee on the Elimination of Discrimination Against Women, General Recommendation No. 19: Violence Against Women, 11th Sess., U.N. Doc. A/47/38, ¶ 23 (1993) [hereinafter General Recommendation 19] (stating that domestic violence is one of the most insidious forms of violence against women and is prevalent throughout all societies); Convention on the Elimination of All Forms of Discrimination Against Women, pmbl., Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW] (recognizing that violence against women is a human rights issue that various international instruments have failed to adequately address); Thomas & Beasley, *supra* note 11, at 57-58 (discussing various impediments to addressing human rights for women, including inadequate documentation and statistical information, lack of cooperation between women’s rights and human rights groups, and various methodological limitations, such as demonstrating systematic failures by States and addressing the underlying causes of domestic violence).

23. U.N. Charter pmbl.

24. *Id.* art. 1, ¶ 3; see also *id.* art. 13, ¶ 1(b); *id.* art. 55; *id.* art. 76.

25. Universal Declaration of Human Rights art. 1-2, G.A. Res. 217(III)A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

26. See generally CEDAW, *supra* note 22, pmbl. (listing numerous concerns and possible consequences of gender discrimination for women and society as a whole).

CEDAW did not explicitly address sexual violence, but rather condemned any form of *discrimination against women*, meaning any “distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women . . . of human rights and fundamental freedoms.”<sup>27</sup>

Signatory countries, hereinafter addressed as State Parties, committed themselves to condemn and eradicate discrimination against women in all of its forms by incorporating the principle of gender equality in their legal systems, and by adopting appropriate measures to modify or abolish existing laws, customs, and socio-cultural patterns which are based on the idea of inferiority or superiority or stereotypical gender roles of either sex.<sup>28</sup> Moreover, State Parties are committed to establishing judicial and other public institutions aimed at ensuring the effective protection of women against discrimination, and at eradicating any gender-based discriminatory action committed by persons or organizations.<sup>29</sup>

In order to achieve the aforementioned goals, Article 17 of CEDAW established a Committee on the Elimination of Discrimination Against Women (CEDAW Committee), which operates as a supervisory body responsible for monitoring—through review of their periodic reports—State Parties’ efforts and progress towards meeting their commitments under CEDAW.<sup>30</sup> Comprised of independent experts elected by the State Parties on the basis of their high moral standing and specific competence in women’s rights and gender equality,<sup>31</sup> the CEDAW Committee has the task of converting the process of reviewing reports submitted by State Parties into a constructive dialogue on relevant women’s issues, as well as drafting general recommendations.

The adoption of general recommendations by the CEDAW Committee represents an indispensable tool for interpreting the treaty regarding issues lying outside the gender discrimination framework, as well as for ensuring the correct application of the normative text to grave violations of women’s rights. Although these general recommendations are not legally binding, they help clarify State Parties’ obligations, which are not explicitly mentioned or adequately explained in the CEDAW’s text. In the case of violence against women, for instance, the lack of reference thereof in the treaty was subsequently supplemented by two general recommendations.

In particular, General Recommendation No. 12, issued by the CEDAW

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27. *Id.* arts. 1-2.

28. *See id.* arts. 2, 5 (describing goals and means of eliminating discrimination within society).

29. *See id.* art. 2.

30. *See id.* arts. 17-21.

31. *See id.* art. 17.

Committee in 1989, acknowledged State Parties' obligation to protect women against violence of any kind occurring within the family or in any other area of social life.<sup>32</sup> It also recommended State Parties include in their periodic reports any legislation in force to protect women from all kinds of violence and any other measures adopted to eradicate gender-based violence as well as relevant statistical data.<sup>33</sup> General Recommendation No. 19, adopted in January 1992, further addressed the issue, clarifying that "[g]ender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy equal rights and freedoms to those of men."<sup>34</sup> Indeed, it provided that the broad definition of *discrimination against women* also include any practice of gender-based violence—"that is, violence directed against a woman because she is a woman" or that affects women disproportionately.<sup>35</sup> General Recommendation No. 19 also stressed that cultural norms that regard women as inferior to men perpetuate a structure of subordination and generate patterns of gender-based violence in the society, which ultimately impair or nullify the women's enjoyment of human rights and fundamental freedoms.<sup>36</sup>

Furthermore, the text of General Recommendation No. 19 affirmed that CEDAW applies to acts of violence against women committed by public authorities.<sup>37</sup> However, it clarified that, under the treaty, gender discrimination does not only encompass actions perpetrated by state agents, but, according to general international law, governments may also be responsible for private acts if they fail to exercise due diligence to prevent violations of women's rights or to adequately investigate and punish acts of violence, and to provide compensation for the victims.<sup>38</sup> Finally, General Recommendation No. 19 recognized that domestic violence is one of the most insidious forms of gender-based violence, and that is prevalent in all societies.<sup>39</sup> Indeed, "[w]ithin family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated

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32. See Comm'n on the Elimination of Discrimination Against Women, General Recommendation No. 12: Violence Against Women, 8th Sess., U.N. Doc. A/44/38, pmb. (1989) [hereinafter General Recommendation 12] (charging the State Parties to protect against violence in the family and work life).

33. See *id.* ¶¶ 1-4 (listing the recommendations to the State Parties from the CEDAW Committee).

34. General Recommendation 19, *supra* note 22, ¶ 1.

35. *Id.* ¶ 6.

36. See *id.* ¶¶ 7, 11.

37. *Id.* ¶ 8.

38. *Id.* ¶ 9.

39. *Id.* ¶ 23.

by traditional attitudes . . . [t]hese forms of violence put women's health at risk and impair their ability to participate in family life and public life on a basis of equality."<sup>40</sup>

The provisions included in General Recommendation No. 19 became the basis for the Declaration on the Elimination of Violence Against Women (U.N. Declaration)—the first specific international instrument addressing gender-based violence, which was adopted by the United Nations General Assembly in 1993.<sup>41</sup> The U.N. Declaration defined "violence against women" as including "any act of gender-based violence which results in, or is likely to result in, physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."<sup>42</sup> According to the U.N. Declaration, violence against women includes, *inter alia*, sexual, physical or mental abuse of women occurring in the family, including battery, the sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation, and other traditional practices harmful to women.<sup>43</sup>

Furthermore, the U.N. Declaration provides that State Parties should denounce violence against women and adopt all appropriate means to eradicate practices of gender-based violence, including "exercise[ing] due diligence to prevent, investigate, and . . . punish acts of violence against women, whether those acts are perpetrated by the State or by private persons."<sup>44</sup> Finally, the UN Declaration encourages State Parties to promote research and carry out data collection and compilation of statistics concerning domestic abuse and the prevalence of different forms of violence against women.<sup>45</sup>

Following the principles of the Universal Declaration of Human Rights, on November 4, 1950, the governments of the European countries adopted the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), which took force on September 3,

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40. *Id.*

41. Compare U.N. Declaration on the Elimination of Violence Against Women G.A. Res. 48/104, U.N. GAOR, 48th Sess., U.N. Doc. A/47/38, art. 1 (1993) [hereinafter U.N. Declaration] (importing the term "gender-based violence" to describe violence against women that results in the deprivation of liberty), with CEDAW, *supra* note 22, ¶ 1 (introducing the term "gender-based violence" to describe violence against women that inhibits women's enjoyment of rights and freedoms).

42. U.N. Declaration, *supra* note 41, art. 1.

43. See *id.* art. 2 (including gender based abuses such as "battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation").

44. See *id.* art. 4.

45. See *id.* art. 4(k).



1953.<sup>46</sup> Article 14 of the European Convention sets forth that States must secure the enjoyment of rights and fundamental freedoms without any form of gender discrimination.<sup>47</sup> The European Convention also provides for the universal right to marry and establish a family,<sup>48</sup> as well as the right to respect for one's private and family life, home, and correspondence without any interference by a public authority except for reasons of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>49</sup> Furthermore, Protocol No. 7 to the European Convention recognizes spouses' equality of rights and responsibilities, both between themselves and in their relations with their children.<sup>50</sup>

In 1985, the Committee of Ministers of the Council of Europe passed Recommendation No. R(85)4 on Violence in the Family, encouraging member states to adopt preventive measures against domestic abuse and clarifying the powers of state intervention.<sup>51</sup> The passage of Recommendation No. R(85)4 was followed in 1990 by Recommendation No. R(90)2, providing specific social measures concerning violence within the family.<sup>52</sup> Finally, in 2002, the Parliamentary Assembly of the Council of Europe acknowledged that domestic abuse is the most common form of violence against women in all European countries, and that it is not limited to any particular social group or class.<sup>53</sup> It also stressed that domestic violence is the major cause of death and invalidity for women between 16 and 44 years of age—thus amounting to a violation of human rights, and a

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46. See European Convention, *supra* note 3, pmbl.

47. *Id.* art. 14.

48. *Id.* art. 12.

49. See *id.* art. 8, ¶¶ 1-2 (listing exceptions to the right to be free from government interference as including considerations of national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others).

50. *Id.* art. 5.

51. See Recommendation No. R(85)4 of the Committee of Ministers to Member States on Violence in the Family (1985) (adopted by the Committee of Ministers on Mar. 26, 1985, at the 382nd meeting of the Ministers' Deputies).

52. See generally Recommendation No. R(90)2 of the Committee of Ministers to Member States on Violence in the Family (1990) (adopted by the Committee of Ministers on Jan. 15, 1990, at the 432nd meeting of the Ministers' Deputies) (recommending specific policy changes that provide structural equity to men and women as equals in family matters, including education classes on gender equity and affirmative attempts to prevent situations where women may be exploited or subjects of abuse in domestic situations).

53. See Recommendation 1582 of the Parliamentary Assembly on Domestic Violence Against Women, ¶ 1 (2007) (adopted by the Assembly on Sept. 27, 2002, at the 32nd sitting).

political and public problem.<sup>54</sup> Furthermore, the recommendation recognized that acts of domestic violence are criminal acts, and thus, member states have an obligation to prevent, investigate, and punish them, as well as to provide adequate protection to the victims.<sup>55</sup>

Also in 2002, the Committee of Ministers of the Council of Europe produced another important initiative in the area, the Recommendation Rec(2002)5 on the Protection of Women Against Violence.<sup>56</sup> The recommendation affirms that member states have an obligation to exercise due diligence to prevent, investigate, and punish acts of violence against women—whether those acts are perpetrated by public authorities or private persons—and to provide protection to victims.<sup>57</sup> Moreover, it presents a detailed list of practical measures addressing violence against women, including, *inter alia*, services and legal remedies for victims of domestic violence, and in particular immigrant women; training programs for police, judicial, medical, and counseling personnel; and, finally, appropriate compensation for any pecuniary, physical, psychological, moral, and social damage suffered by domestic violence victims.<sup>58</sup>

In 2004, the Parliamentary Assembly of the Council of Europe further confirmed that member states have an obligation under international law to exercise due diligence in taking effective steps to eradicate violence against women both in the public and private domains, as well as to protect victims.<sup>59</sup> Under Recommendation 1681, member states themselves should be held accountable for acts of violence if they fail to take effective measures to prevent acts of violence and punish those who perpetrate them, as well as to protect the survivors.<sup>60</sup> Again in 2006, under Resolution 1512, the various European Parliaments united to combat domestic violence against women through a cooperative approach, which included, *inter alia*, appropriate legislative and budgetary measures.<sup>61</sup> Further, Resolution 1512 restates that domestic violence is a serious violation of human rights, which

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54. *See id.* ¶ 2.

55. *See id.* ¶ 4.

56. *See generally* Recommendation R(02)5 of the Committee of Ministers to Member States on The Protection of Women Against Violence (2002) (adopted by the Committee of Ministers on April 30, 2002, at the 794th meeting of the Ministers' Deputies).

57. *See id.* ¶ II.

58. *See id.* app., ¶¶ 8-11, 23-33, 36-40.

59. *See* Recommendation 1681 of the Parliamentary Assembly on the Campaign to Combat Domestic Violence Against Women in Europe, ¶ 2 (2004) (adopted by the Assembly on Oct. 8, 2004, at the 32nd sitting).

60. *Id.*

61. *See* Resolution 1512 of the Parliamentary Assembly on Parliaments United in Combating Domestic Violence Against Women, ¶¶ 4-6 (2006) (adopted by the Assembly on June 28, 2006, at the 20th sitting).

affects every single Council of Europe member state beyond any geographical boundaries, age limit, race, or social background.<sup>62</sup>

Lastly, this was followed by Recommendation 1759, which called on the Committee of Ministers to make the fight against domestic violence a priority activity in 2006-2008, and to allocate the necessary budgetary resources towards that goal by financing specific national and regional activities at the intergovernmental, parliamentary, local, and regional levels.<sup>63</sup> Despite the many legal instruments produced by the Parliamentary Assembly of the Council of Europe, the European Union has not yet issued a binding document on the protection of women against gender-based violence.<sup>64</sup> However, in 2009, the Secretary-General of the Council of Europe announced the preparation of a European convention on action against violence against women, which seeks to “create an international, legally binding framework for national legislation and policies based on the trademark Council of Europe approach—protect, prevent and prosecute.”<sup>65</sup>

As for the Inter-American System, in 1994 the Organization of American States (OAS) adopted the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (also known as the Convention of Belém do Pará), which declared that violence against women is any act or conduct, based on gender, which causes death or physical, sexual, or psychological harm or suffering to women—whether perpetrated by those in the public or the private spheres.<sup>66</sup> State Parties to the Convention of Belém do Pará acknowledge that violence against women is an offense against human dignity and a manifestation of the unequal power relations that have historically existed between women and men.<sup>67</sup>

Moreover, State Parties agree to pursue polices to prevent, punish, and eradicate such violence by all appropriate means. This includes a commitment to adopting fair and effective legislation and procedures to

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62. *See id.* ¶ 1.

63. Recommendation 1759 of the Parliamentary Assembly on Parliaments United in Combating Domestic Violence Against Women arts. 4, 7.1 (2006) (adopted by the Assembly on June 28, 2006, at the 20th sitting).

64. *See* Press Release, Terry Davis, Sec’y Gen., Council of Europe, Violence Against Women: The Council of Europe Takes Its Campaign to a New Level (June 4, 2009), available at <https://wcd.coe.int/ViewDoc.jsp?id=1428509>.

65. *Id.*

66. *See* Organization of American States, Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, Convention on the Prevention, Punishment and Eradication of Violence Against Women, “Convention of Belém do Pará”, arts. 1, 9 June 1994, 33 I.L.M. 1534 [hereinafter *Prevention, Punishment, and Eradication*].

67. *See id.* arts. 1, 5.

address the various forms of gender-based violence.<sup>68</sup> In particular, State Parties commit to refrain from engaging in any act or practice of gender-based violence and to ensure that their authorities, officials, personnel, agents, and institutions act in conformity with that obligation.<sup>69</sup> Finally, State Parties also undertake to apply due diligence to prevent, investigate, and impose penalties for acts of violence against women.<sup>70</sup>

## II. THE DUE DILIGENCE STANDARD

Categorizing domestic violence as a human rights issue under international law has important consequences. Acknowledging gender-based violence as a violation of human rights obliges member states to prevent, investigate, and prosecute acts of violence against women.<sup>71</sup> It also requires that States should be held accountable if they fail to comply with such commitments.<sup>72</sup> As mentioned above, the traditional concept of state responsibility has been understood under international law *only* in relation to acts of violence against women that could be imputed to public authorities.<sup>73</sup> On the other hand, given the private nature of domestic violence, such crimes have long been considered outside the government's responsibility.<sup>74</sup>

More recently, however, the concept of state accountability has been expanded to include, not only state actions, but, more importantly, omissions and failures in taking affirmative measures to adequately protect women from violence.<sup>75</sup> Therefore, in addition to being directly

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68. *Id.* art. 7.

69. *Id.*

70. *Id.*

71. *See, e.g., id.* art. 3 (discussing different ways State Parties are required to "condemn . . . prevent . . . punish . . . and eradicate" violence against women); Press Release, Terry Davis, Sec'y Gen., Council of Europe, *supra* note 64 (stating that the prevent, punish, and prosecute approach by the Council of Europe has become a standard approach that countries can model their own framework to follow).

72. *See, e.g.,* General Recommendation 12, *supra* note 32, ¶ 9 (explaining that States are responsible for portraying due diligence in investigating and prosecuting crimes of violence).

73. *See* Lenahan v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 118 (2011) (describing the State's responsibility to conform to principles under the American Declaration).

74. *See* Thomas & Beasley, *supra* note 11, at 40-41 (stating that four factors have led international human rights law to overlook domestic violence, including "(1) traditional concepts of state responsibility under international law and practice; (2) misconceptions about the nature and extent of domestic violence and states' responses to it; (3) the neglect of equality before and equal protection of the law without regard to sex as a governing human rights principle; and (4) the failure of states to recognize their affirmative obligation to provide remedies for domestic violence crimes").

75. *See* General Recommendation 12, *supra* note 32, ¶¶ 8, 9 (describing States' responsibilities in failing to prevent domestic violence due to a lack of due diligence).

accountable for acts of violence against women committed by their own agents, states must also fulfill the obligation to prevent private individuals from perpetrating gender-based violence.<sup>76</sup> States are further required to duly investigate and prosecute the perpetrators of violence against women, and provide adequate remedies for victims. Therefore, a state can be held accountable for domestic violence because “although the state does not actually commit the primary abuse, its failure to prosecute the abuse amounts to complicity in it.”<sup>77</sup>

The standard of *due diligence* that states are required to exercise in investigating and prosecuting acts of violence against women was first formulated in the aforementioned General Recommendation No. 19.<sup>78</sup> Indeed, according to its provisions, Parties may be held responsible for “private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”<sup>79</sup> States’ liability, therefore, should be construed on a case-by-case basis, through the criteria of reasonableness, based on the general principles of non-discrimination and good faith.<sup>80</sup> Thus, the standard of due diligence requires State Parties to use any appropriate measures at their disposal to address both individual acts of violence against women and structural causes so as to prevent future violations and punish the perpetrators.<sup>81</sup>

Governments also have the duty to adopt and revise domestic legislation for the protection of women, as well as to provide access to just and effective remedies and specialized assistance to victims of violence.<sup>82</sup> A “fundamental principle connected to the application of the *due diligence standard* is that of non-discrimination, which implies that states are required to use the same level of commitment in relation to prevention, investigation, punishment and provision of remedies for violence against

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76. See Thomas & Beasley, *supra* note 11, at 40-41 (stating that when a State fails to prosecute an instance of domestic violence, they become a collaborator in perpetuating the cycle of abuse).

77. *Id.*

78. See General Recommendation 19, *supra* note 22, ¶ 9 (describing States’ responsibility “for private acts if they fail to act with due diligence to prevent violations of rights”).

79. *Id.*

80. See U.N. Secretary-General, In-Depth Study on All Forms of Violence Against Women, ¶ 257 U.N. Doc. A/61/122/Add. 1 (July 6, 2006) (discussing the standard of a States’ responsibility and deciding that the State would not be held responsible for all violence against women, merely that which a good faith effort was not applied to prevent and prosecute).

81. *Id.* ¶ 35.

82. See, e.g., Special Rapporteur, *supra* note 11, ¶¶ 32, 38, 99 (describing Federal and States’ responsibilities through legislative action in response to domestic violence).

women as they do with regards to other forms of violence.”<sup>83</sup> In 1999, the United Nations Special Rapporteur on Violence Against Women developed a list of considerations to assess State compliance with the obligation of due diligence, including, *inter alia*:

ratification of international human rights instruments; constitutional guarantees of equality for women; the existence of national legislation and/or administrative sanctions providing adequate redress for women victims of violence; policies or plans of action that deal with the issue of violence against women; the gender-sensitivity of the criminal justice system and police; accessibility and availability of support services [for victims]; the existence of measures to raise awareness and modify discriminatory policies in the field of education and the media, and the collection of data and statistics concerning violence against women.<sup>84</sup>

Specific procedures to enhance state accountability for violence against women are also contained in the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (Optional Protocol).<sup>85</sup> In force since December 22, 2000, the Optional Protocol includes a complaint procedure, which allows victims to bring petitions or complaints about violations of rights under CEDAW before the CEDAW Committee.<sup>86</sup> The Optional Protocol also includes an inquiry procedure that enables the CEDAW Committee to conduct inquiries into serious and systematic abuses of women’s human rights occurring within States that are signatories to the Optional Protocol (State Parties).<sup>87</sup> Under the complaints procedure of the Optional Protocol, the CEDAW Committee is able to focus on individual cases and, thus, develop jurisprudence for any particular matter.<sup>88</sup> On the other hand, through the inquiry procedure the CEDAW Committee can investigate substantial abuses when individual communications and complaints have failed, address a broad range of issues in a particular country, and issue specific recommendations on the structural causes of violence.<sup>89</sup>

Only countries that have ratified the Optional Protocol are subject to the CEDAW Committee’s jurisdiction. It must be noted that to date, 187

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83. *Id.* ¶ 35.

84. *Id.* ¶ 32.

85. *See generally* Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Oct. 15, 1999, 2131 U.N.T.S. 83 (entered into force Dec. 22, 2000) [hereinafter *Optional Protocol*] (discussing the procedures for victims wishing to submit allegations of perceived violations of their rights).

86. *See id.* art. 8 ¶¶ 1-3 (describing the inquiry and investigation process).

87. *See id.*

88. *See id.* art. 2 (providing a clause addressing victims submissions of violations).

89. *See id.* art. 7 (stating that the Committee is required to report back to interested parties on its findings).

countries have either ratified or acceded to CEDAW, which equates to over ninety percent of the members of the United Nations.<sup>90</sup> However, only 79 countries assented to be parties to the Optional Protocol and to be bound by its improved, additional enforcement mechanisms for women's human rights.<sup>91</sup> Exhaustion of all available domestic remedies is a necessary condition for the admissibility of a communication. Additionally, in order for a communication to be admissible, there must also not be another international procedure of investigation or settlement underway on the same complaint.<sup>92</sup> When a communication has been found admissible, the CEDAW Committee will bring it to the attention of the relevant State Party, which has six months to provide a written response to the allegation.<sup>93</sup> Subsequent to receipt of the written response by the State Party, the CEDAW Committee examines all the information provided and makes its recommendations available to the complainant and respondents concerned.<sup>94</sup> From that point, the State Party then has six months in which to consider the views of the CEDAW Committee and to provide a written response, including the remedies adopted.<sup>95</sup>

Further inquiries and a confidential investigation may be initiated by the CEDAW Committee in case it has received reliable information of grave or systematic violations of established rights by the State Party.<sup>96</sup> With the consent of the State Party, the CEDAW Committee may also visit the territory of the state.<sup>97</sup> Any findings, comments, or recommendations will then be transmitted to the State Party concerned, which has six months to submit a written response to those findings or recommendations.<sup>98</sup>

Similarly to the Optional Protocol, the Convention of Belém do Pará provides specific procedures to improve state accountability for acts of violence against women. Indeed, Article 12 allows individuals, groups of persons, and non-governmental organizations to "lodge petitions with the

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90. See Ratifications and Accessions to the Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13, at 1 (entered into force Sept. 3, 1981).

91. *See id.*

92. *See* Optional Protocol, *supra* note 85, art. 4 (stating that the Committee cannot hear any allegations that have not exhausted all administrative remedies).

93. *See id.* art. 6 (providing that the Committee bring the allegation to the attention of the State confidentially).

94. *Id.* art. 7(1).

95. *See id.* art. 7 (stating that the State Party is required to review the information and make recommendations within six months).

96. *See id.* art. 8 (explaining that, if the Committee does find these violations, it may invite the State to assist and cooperate in its investigation).

97. *See id.* (describing the investigatory procedures subsequent to the finding of a violation).

98. *Id.*

Inter-American Commission on Human Rights containing denunciations or complaints of violations” of the rights and principles under the Convention of Belém do Pará by a State Party.<sup>99</sup>

### III. JUDICIAL DEVELOPMENTS AND POSITIVE STATE OBLIGATIONS

An increasing body of jurisprudence concerning violence against women has recently been produced by decisions of the CEDAW Committee under the Optional Protocol as well as by relevant bodies within the European and Inter-American human rights systems, constituting an important set of precedents for the applicability of international law to state and individual responsibility for practices of gender-based violence.<sup>100</sup> Following the examples of international human rights monitoring bodies like the CEDAW Committee, regional mechanisms are enhancing state accountability with respect to domestic violence and producing relevant jurisprudence in the field to serve as reference precedents for future cases.<sup>101</sup>

For instance, in the *A.T. v. Hungary* decision, the CEDAW Committee remarked that the lack of specific legislation addressing domestic violence itself constituted a violation of human rights and fundamental freedoms for women.<sup>102</sup> In this case, the victim lamented that she had been subjected to regular, severe domestic violence and death threats by her husband for four years.<sup>103</sup> She stated that she was not able to visit a shelter because no shelter in Hungary was equipped to provide assistance to her and her two children, one of whom was brain-damaged.<sup>104</sup> She also denounced the fact that no protection orders or restraining orders were available at the time under Hungarian law.<sup>105</sup>

In response to her complaint, the CEDAW Committee expressed concern for the lack of specific legislation and measures to combat domestic

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99. Prevention, Punishment, and Eradication, *supra* note 66, art. 12.

100. *See, e.g.*, *A.T. v. Hungary*, Comm. 2/2003, U.N. Doc. A/60/38, at 27 (2005) (considering the communication made by a woman under the Optional Protocol); *Bevacqua v. Bulgaria*, App. No. 71127/01, Eur. Ct. H.R. (2008), available at <http://www1.umn.edu/humanrts/research/bulgaria/BEVACQUA.pdf> (reviewing a Bulgarian woman’s claim of domestic abuse by her former husband); *Lenahan v. United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶ 3 (2011) (reviewing a petition against the United States Government alleging a failure to “exercise due diligence [and] to protect [the woman] and her daughters from acts of domestic violence perpetrated by the ex-husband” against whom the woman had a restraining order).

101. *See generally* *A.T.*, U.N. Doc. A/60/38; *Bevacqua*, App. No. 71127/01; *Lenahan*, Case 12.626, Report No. 80/11.

102. *See A.T.*, U.N. Doc. A/60/38, ¶ 9.3 (holding that the State failed to fulfill its obligations under the Convention).

103. *Id.* ¶ 2.1.

104. *Id.*

105. *Id.*



violence in the country, including protection orders or exclusion orders and shelters for victims.<sup>106</sup> The CEDAW Committee declared that the State Party's failure to comply with its obligations constituted a violation of the victim's human rights and, particularly, her right to security of person.<sup>107</sup> In its capacity as monitoring body of CEDAW, the CEDAW Committee recommended that the State Party provide the victim and her family with immediate and effective assistance, including a safe home, psychological and legal support, as well as "reparation proportionate to the physical and mental harm undergone and to the gravity of the violation of her rights."<sup>108</sup>

The State Party admitted that domestic violence is a problem affecting many Hungarian women, that the national legal system of remedies was incomplete, and that the effectiveness of the existing procedures was not sufficient.<sup>109</sup> As a result of the *A.T. v. Hungary* decision and interactions with the CEDAW Committee, the Hungarian Parliament adopted a resolution on the national strategy for the prevention and effective treatment of domestic violence, setting forth significant amendments to its existing laws as well as other practical measures, including, in particular, the introduction of restraining orders.<sup>110</sup>

Other decisions with respect to domestic violence issued by the CEDAW Committee included the *Goekce v. Austria*<sup>111</sup> and *Yildirim v. Austria* cases.<sup>112</sup> In the first case, the Vienna Intervention Centre Against Domestic Violence and the Association for Women's Access to Justice lodged a complaint on behalf of their client Goekce, who had been victim of continued domestic violence and was eventually killed by her husband.<sup>113</sup> The State Party argued that the ambivalence of the victim toward her husband's imprisonment and prosecution as well as her reluctance to end

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106. See *id.* ¶ 9.6 (making the recommendation that the State implement specific legislation protecting women and children from domestic abuse).

107. See *id.* ¶ 9.3 (claiming that this violation of human rights was specifically due to the lack of domestic violence and sexual harassment protections under Hungarian law).

108. *Id.* ¶ 9.6.

109. See *id.* ¶ 5.7 (claiming that the State is instituting a comprehensive plan of action to combat domestic violence).

110. See *id.* (considering multiple remedial efforts to address the issue of domestic violence).

111. See generally *Goekce v. Austria*, Comm. 5/2005, U.N. Doc. A/62/38, at 432 (2007).

112. See generally *Yildirim v. Austria*, Comm. 6/2005, U.N. Doc. C/39/D/6/2005 (2007).

113. See *Goekce*, U.N. Doc. A/62/38, ¶ 2.1-11 (reiterating in the facts that the victim's husband had threatened to kill her on multiple occasions, choked her, grabbed her by her hair and pressed her face to the floor, and threatened to shoot her and her family members).

the relationship prevented the police from protecting her.<sup>114</sup> In the second case against Austria, the Vienna Intervention Centre Against Domestic Violence and the Association for Women's Access to Justice submitted a petition on behalf of Fatma Yildirim and her family.<sup>115</sup> The victim and her children had been subject to repeated death threats, and she was eventually murdered by her husband.<sup>116</sup> In this case, in contrast to the *Goekce* case, the deceased had been consistent in reporting the aggressions and asking for the incarceration and prosecution of her husband.<sup>117</sup> However, the State Party claimed that, since detention constitutes a massive interference with a person's fundamental freedom, the decision of the police not to arrest her husband was in accordance with a proportionality assessment of his lack of criminal record and his cooperative behaviour with the police officers.<sup>118</sup>

In both decisions, the CEDAW Committee reaffirmed that under international law State Parties may be held accountable "for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation."<sup>119</sup> In both cases, the CEDAW Committee noted that the State Party was in breach of its due diligence obligation to protect the victims and promptly investigate and prosecute the offenders.<sup>120</sup> It also expressed its general view that in domestic violence crimes "the perpetrator's rights . . . [to freedom of movement and to a fair trial] . . . cannot supersede women's human rights to life and to physical and mental integrity."<sup>121</sup> Therefore, the CEDAW Committee recommended that the State Party strengthen the implementation and monitoring of its domestic violence legislation, vigilantly and speedily prosecute perpetrators of domestic violence, improve coordination between law enforcement and

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114. See *id.* ¶¶ 4.11, 4.13 (stating that the woman refused consent to prosecute and was unwilling to testify against her husband, playing down the incidents and denying that they were criminal).

115. See *Yildirim*, U.N. Doc. C/39/D/6/2005, ¶ 2.1-14 (describing the events leading up to the action, including numerous death threats to the woman and her children which ultimately ended in her death).

116. *Id.*

117. Compare *Goekce*, U.N. Doc. A/62/38, ¶ 2.1-11 (characterizing the claimant's actions here as "ambivalent where she did not consistently report the abuse or actively pursue prosecution and incarceration of her husband), with *Yildirim*, U.N. Doc. C/39/D/6/2005, ¶ 2.1-14 (describing that the victim contacted the police on multiple occasions and gave formal statements to pursue action against her abuser).

118. *Yildirim*, U.N. Doc. C/39/D/2005, ¶ 4.5.

119. *Goekce*, U.N. Doc. A/62/38, ¶ 12.1.1.

120. See *id.* ¶ 12.1.5 (utilizing the same language in *Goekce* and *Yildirim* in describing the failure to hold the woman's human rights at the same level as the perpetrator's rights); see also *Yildirim*, U.N. Doc. C/39/D/2005, ¶ 12.1.5.

121. *Goekce*, U.N. Doc. A/62/38, ¶ 12.1.5; *Yildirim*, U.N. Doc. C/39/D/2005, ¶ 12.1.5.

judicial officers, and strengthen training programs for law enforcement officials.<sup>122</sup>

Although the European human rights system has not yet adopted a specific legally binding instrument on the protection of women against gender-based violence, the European Court of Human Rights has issued some of the most progressive decisions in relation to state accountability for domestic violence.<sup>123</sup> For instance, in the case of *Bevacqua v. Bulgaria*, the European Court of Human Rights found state responsibility for domestic abuse suffered by the applicant and her son from her husband, grounding its decision in Article 8 (the right to respect for private and family life) of the European Convention.<sup>124</sup> The victim claimed that Bulgaria had failed to assist her in prosecuting her husband, had treated domestic violence as a trivial family matter, and had charged her with abduction of her son when she sought refuge with him in a shelter for abused women.<sup>125</sup>

In its decision, the European Court of Human Rights reaffirmed the State's positive obligations under Article 8 of the European Convention, which "may involve the adoption of measures in the sphere of the relations of individuals between themselves," especially for the effective protection of vulnerable people.<sup>126</sup> In conclusion, the Court found that the State Party's failure to adopt custody measures against the victim's husband as well as the lack of adequate sanctions by the authorities to prevent repeated incidents of domestic violence amounted to a refusal to provide the immediate assistance the applicants needed, and was contrary to the State's positive obligations under Article 8 of the European Convention "to secure respect for their private and family life."<sup>127</sup>

In *Kontrová v. Slovakia*, the applicant filed a criminal complaint against her husband after having suffered repeated psychological and physical violence over the course of their relationship.<sup>128</sup> Although the local police

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122. See *Goekce*, U.N. Doc. A/62/38, ¶ 12.3 (providing recommendations to the State); see also *Yildirim*, U.N. Doc. C/39/D/2005, ¶ 12.3.

123. See, e.g., *Bevacqua v. Bulgaria*, App. No. 71127/01, Eur. Ct. H.R., ¶ 19 (2008), available at <http://www1.umn.edu/humanrts/research/bulgaria/BEVACQUA.pdf> (holding the state responsible for domestic violence and ordering the state to pay damages to the respondent).

124. See *id.* ¶ 84 (holding that the State's failure to respond effectively to the complaints and the perpetrator's negative actions equates to a violation of her rights).

125. See *id.* ¶¶ 3, 63 (arguing that the courts also failed to rule in a timely manner).

126. *Id.* ¶ 64.

127. See *id.* ¶ 84 (holding the State in violation of positive obligations due to undue delay and a failure to protect the well being of the victims by recognizing the behavior of the perpetrator).

128. See *Kontrová v. Slovakia*, App. No. 7510/04, Eur. Ct. H.R. ¶ 8 (2007), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80696> (included in this abuse was assault and beating with an electric cable as well as

department was aware of this long history of abuse through reports and emergency telephone calls made by the victim, they failed to investigate the allegations and bring criminal charges.<sup>129</sup> Eventually, the applicant's husband shot their two children and himself.<sup>130</sup> The European Court of Human Rights reaffirmed the State Party's positive obligation to take appropriate steps to safeguard the lives of those within their jurisdictions, and their primary duty to secure the right to life by "putting in place effective criminal-law provisions to deter the commission of offenses against the person."<sup>131</sup>

In particular, the Court noted that the Slovakian police had failed to comply with a number of specific obligations, including accepting and registering the applicant's complaint, initiating a criminal investigation and action against the applicant's husband, keeping a proper record of the emergency telephone calls made by the victim, and "taking action in respect of the allegation that the applicant's husband had a shotgun and had made violent threats with it."<sup>132</sup> In conclusion, the Court found that this failure constituted violation of the right to life under Article 2 of the European Convention.<sup>133</sup>

Similarly, in *Tomašić v. Croatia*, the European Court of Human Rights reaffirmed the State Party's positive obligation to take appropriate measures to protect the right to life of the applicant and her daughter.<sup>134</sup> The victim filed criminal complaints against her husband accusing him of repeated death threats against her and their one-year old daughter.<sup>135</sup> Following her report, the applicant's husband was arrested and a criminal proceeding was initiated against him.<sup>136</sup> While in custody, he was diagnosed with a "profound personality disorder."<sup>137</sup> Upon his release from prison, he murdered his wife and daughter and killed himself.<sup>138</sup> Following its previous decision in *Kontrová v. Slovakia*, the Court reiterated that state

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multiple previous abuses).

129. *Id.* ¶ 3.

130. *Id.* ¶ 14.

131. *Id.* ¶ 49.

132. *Id.* ¶ 53.

133. *Id.* ¶ 55.

134. *See* *Tomašić v. Croatia*, App. No. 46598/06, Eur. Ct. H.R., ¶ 50 (2009), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=002-1695> (holding that these steps to safeguard the citizens' rights are primary and that the authorities have "a positive obligation . . . to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual").

135. *See id.* ¶ 6 (reporting that the abuse had persisted over a span of six months).

136. *See id.* ¶ 7 (the investigation included a psychiatric evaluation).

137. *Id.*

138. *See id.* ¶ 10 (recounting that the husband had been out of prison for merely a month when he committed the homicides).

authorities have the positive obligation to take measures within the scope of their power to prevent the “real and immediate risk to the life of an identified individual from the criminal acts of a third party.”<sup>139</sup> In particular, the Court found that the Croatian authorities had “failed to order and carry out a search of the premises and vehicle of the applicant’s husband” in the course of the investigation, and to adequately administer his psychiatric treatment while he was in prison, thus failing to evaluate his mental condition and to assess the risk for the lives of his wife and daughter prior to his release.<sup>140</sup>

Finally, with the recent landmark decision of *Opuz v. Turkey*, the European Court of Human Rights not only reiterated that states have enforceable positive obligations to protect individuals from domestic abuse, but it also held that domestic violence is a form of discrimination that States are required to eradicate and remedy.<sup>141</sup> In this case, the applicant, Nahide Opuz, claimed that Turkey had failed to protect her and her mother from acts of domestic violence perpetrated by the applicant’s husband, H.O., over a period of 12 years.<sup>142</sup> The alleged incidents of violence included physical assaults, death threats, and murder attempts.<sup>143</sup> Eventually, H.O. shot and killed the applicant’s mother.<sup>144</sup> In her complaint to the European Court, Nahide Opuz alleged that the Turkish authorities had violated the right to life (Art. 2) with respect to the death of her mother; the right to be free from torture, inhuman and degrading treatment or punishment (Art. 3) with respect to the failure to protect the applicant against domestic violence; and, finally, the right to non-discrimination on the basis of sex (Art. 14).<sup>145</sup>

The Court found that there had indeed been a violation of the right to life and held that the State has positive obligations to adopt “preventive operational measures to protect an individual whose life is at risk.”<sup>146</sup> In light of such obligation, the Turkish authorities should have taken “special

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139. *Id.* ¶ 51.

140. *Id.* ¶¶ 46, 56, 58.

141. *See Opuz v. Turkey*, App. No. 33401/02, Eur. Ct. H.R., ¶ 200 (2009), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92945> (holding the domestic abuse by the wife was gender-based violence, and thus a form of sex discrimination against women).

142. *See id.* ¶ 3 (recounting that the alleged domestic violence eventually resulted in the death of her mother and abuse to her).

143. *See id.* ¶ 9 (describing the abuse reported to the State’s Prosecutor’s Office).

144. *See id.* ¶ 54 (stating that the husband shot the mother when she was attempting to leave in a taxi cab).

145. *See id.* ¶¶ 118, 154, 177 (claiming the right to life in respect to the death of her mother and the right to be free from torture in respect to the failure to protect the applicant against domestic violence).

146. *Id.* ¶ 148.

measures consonant with the gravity of the situation” in order to effectively respond to the applicant’s mother’s repeated requests for protection.<sup>147</sup> Therefore, the European Court concluded that the national authorities had not displayed due diligence and had “failed in their positive obligation to protect the right to life of the applicant’s mother under Article 2 of the European Convention.”<sup>148</sup>

The Court also confirmed that there had been a violation of Article 3 of the European Convention as a result of the authorities’ failure to “take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including ill treatment administered by private individuals.”<sup>149</sup> It also upheld the applicant’s claim that the Turkish authorities’ failure to exercise sufficient due diligence to protect her from the ongoing violence made her feel “hopeless and vulnerable” and as “though the violence had been inflicted under state supervision.”<sup>150</sup>

The Court recognized that there had been violation of the right to non-discrimination on basis of sex as a result of the State’s failure to implement effective domestic violence legislation and to provide adequate protection and remedies for the victims.<sup>151</sup> It also noted that domestic abuse primarily affected women and “that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence.”<sup>152</sup> Thus, the Court concluded that the “State’s failure to protect women against domestic violence breaches their right to equal protection of the law” and enjoyment of the rights and freedoms set forth in the European Convention in accordance with Article 14 thereof.<sup>153</sup>

As for domestic violence jurisprudence within the Inter-American human rights system, in the case of *Maria da Penha Maia Fernandes v. Brazil*, the Inter-American Commission on Human Rights (Commission) declared that the State Party’s failure to prosecute and punish a perpetrator of domestic violence after more than 15 years of investigation “form[ed] a pattern of discrimination evidenced by the condoning of domestic violence against women in Brazil through ineffective judicial action.”<sup>154</sup> It also

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147. *Id.*

148. *Id.* ¶ 149.

149. *Id.* ¶ 159.

150. *Id.* ¶ 155.

151. *See id.* ¶ 201 (dismissing the Government’s objection to complainant’s allegation under Article 14 of the Convention by noting the lack of effective domestic remedies).

152. *Id.* ¶ 198.

153. *Id.* ¶ 191.

154. *Maria da Penha v. Brazil*, Case 12.051, Inter-Am. Comm’n H.R., Report No. 54/01, OEA/Ser.L/V/II.111 doc. 20 rev. ¶ 3 (2001).

stated that the State Party's failure to protect the victim from the ongoing violence contravened the member state's international commitments, and eventually revealed its tolerance and complicity in the violence inflicted.<sup>155</sup>

Given the fact that the violence suffered by Maria da Penha was "part of a general pattern of negligence and lack of effective action [by Brazilian authorities] in prosecuting and convicting aggressors," the Commission found that this case involved "not only failure to fulfil the obligation with respect to prosecut[ion] and convict[ion], but also the obligation to prevent these degrading practices."<sup>156</sup> Therefore, the Commission also characterised gender-based violence as a form of discrimination by virtue of the State Party's failure to exercise due diligence to prevent and investigate a domestic violence complaint.

More recently, the Commission issued its landmark decision in *Jessica Lenahan (Gonzales) v. United States*, holding that the United States of America was in violation of the 1948 American Declaration of the Rights and Duties of Man due to its failure to protect a victim of domestic violence and her children.<sup>157</sup> In this case, the American Civil Liberties Union filed a petition on behalf of their client, Jessica Lenahan, and her three deceased daughters.<sup>158</sup> The petitioners claimed that the United States had failed to "exercise due diligence" in protecting Jessica Lenahan and her daughters from acts of domestic violence perpetrated by her former husband.<sup>159</sup> They also argued that the public authorities in the state of Colorado had dismissed Ms. Lenahan's telephone calls reporting that her husband had abducted their three daughters, Rebecca, Katheryn, and Leslie, in violation of a domestic violence restraining order against him.<sup>160</sup> Eventually, Ms. Lenahan's husband arrived at the police station and began shooting.<sup>161</sup> The police officers returned fire, killing him.<sup>162</sup> The bodies of Ms. Lenahan's three daughters were later found shot to death in their father's truck.<sup>163</sup>

In its decision, the Commission found that the United States had failed to

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155. *See id.* ¶¶ 21, 60(4) (holding that the violation was a result of the government's own failure to act).

156. *Id.* ¶ 56.

157. *See Lenahan v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 199 (2011) (listing multiple violations and failures of affirmative responsibilities of the State).

158. *Id.* ¶ 1.

159. *See id.* ¶ 2 (reiterating that the mother held a restraining order against the father).

160. *See id.* (stating that the lack of enforcement of the restraining order ultimately ended in the children's deaths).

161. *Id.* ¶ 32.

162. *Id.*

163. *Id.*

exercise due diligence “to protect the victims from domestic violence by adequately and effectively implementing the restraining order at issue.”<sup>164</sup> It held that the current domestic violence legislation and policies are inadequate to protect women from domestic abuse, and thus encouraged the State Party to adopt a relevant comprehensive reform at the local, state, and federal levels.<sup>165</sup> Moreover, the Commission held that the state’s failure to offer a coordinated and effective response to the victims’ needs constituted an act of discrimination, a breach of its affirmative obligation to protect individuals from discriminatory violence, and a violation of their right to equality before the law under Article II of the American Declaration of the Rights and Duties of Man.<sup>166</sup> Finally, the Commission found that the United States’ failure to take reasonable measures to protect the life of Ms. Lenahan’s daughters constituted a violation of their right to life established in Article I of the American Declaration of the Rights and Duties of Men, in relation to their right to special protection contained in Article VII thereof.<sup>167</sup>

#### CONCLUSION

From the analysis of the jurisprudence on domestic violence produced by international human rights bodies, including the CEDAW Committee, the European Court of Human Rights, and the Inter-American Commission on Human Rights, this article shows that, under international law, states are now clearly accountable for acts of gender-based violence, whether those acts are perpetrated by public authorities or by private individuals.<sup>168</sup> In particular, the recent decisions of *Opuz v. Turkey* and *Jessica Lenahan (Gonzales) v. United States* by the European Court of Human Rights and the Inter-American Commission on Human Rights, respectively, represent the most recent judicial developments in relation to domestic violence and state responsibility.<sup>169</sup> These decisions solidify the principle that domestic

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164. *Id.* ¶ 160.

165. *See id.* ¶ 201 (recommending that said legislation “mak[e] mandatory the enforcement of protection orders and other precautionary measures to protect women from imminent acts of violence, and to create effective implementation mechanisms”).

166. *Id.* ¶ 160; *see* American Declaration of the Rights and Duties of Man, Res. XXX Final Act, Ninth Conference of American States, art. II (1948) [hereinafter American Declaration] (stating the principle of universal equality under the law).

167. *Lenahan*, Case 12.626, Report No. 80/11, ¶ 170; *see also* American Declaration, *supra* note 166, arts. I, VII (reciting the principles of the right to life under Article I and the right of all women to special protection under Article VII).

168. *See, e.g.,* *Goekce v. Austria*, Comm. 5/2005, U.N. Doc. A/62/38, ¶ 12.1.1 (2007) (commenting that states bear responsibility for the actions of private individuals).

169. *See Opuz v. Turkey*, App. No. 33401/02, Eur. Ct. H.R., ¶¶ 73, 148 (2009), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92945> (reiterating that states have a responsibility to affirmatively protect women from



violence is a violation of international law, and that States are liable for ensuring that they exercise due diligence in preventing and protecting women from this form of personal harm.<sup>170</sup>

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discrimination under international law); *Lenahan*, Case 12.626, Report No. 80/11 ¶ 126 (noting that a state incurs “international responsibility” for failing to protect women from domestic violence).

170. *See id.*