

# Violence against Women as a Structural Risk: Responding through Prevention with Due Diligence<sup>1</sup>

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*Situations of crises such as the Covid–19 pandemic expose the fissures in society, both domestic and global. Using violence against women as an example, the paper shows how structural risks amplify during crises and how the concept of due diligence can be used to address these risks. By focusing on prevention, it analyses the existing approaches towards due diligence in the context of violence against women by the Inter-American Court of Human Rights, the European Court of Human Rights, the Committee on Elimination of Discrimination against Women and the Special Rapporteur on violence against women. The paper looks at how these mechanisms have considered the invocation and applicability of the duty of prevention with due diligence as well as the measures that states need to take to discharge such a duty. It concludes with a reflection on what can be done to further strengthen the arguments of the mechanisms analysed in this paper to utilise the full potential of due diligence concerning state obligations towards the prevention of violence against women.*

**Keywords:** violence against women, structural risks, prevention, due diligence

## Introduction

The purpose of this paper is to explore the interrelation between risk, due diligence in international human rights law (IHRL) and the state obligation to prevent violence against women. In a nutshell, the paper asserts that the state

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obligation to prevent human rights violations has to be carried out with a certain level of due diligence. Due diligence is, however, to a certain extent dependant on risk because only when risk attains a certain level or characteristic, the positive obligation to prevent further escalation of that risk and eventual harmful results by exercising a sufficient level of due diligence arises. Moreover, in IHRL due diligence is often intertwined with states' duty to prevent, because it serves to clarify and strengthen states' duties concerning prevention. The ultimate aim of the paper is to show that prevention through due diligence is a helpful tool to address structural risks such as violence against women.

The discussion begins by exploring why violence against women is a clear example of a structural risk, and how this has been disclosed by the Covid–19 pandemic. The paper then turns to the legal concept of due diligence, which has strengthened state obligation to prevent violations in the context of violence against women. Next, the paper examines the existing framework for the protection of violence against women, and how due diligence plays out therein. Finally, given that due diligence has been, at least to a certain extent, addressed through jurisprudence and documents issued by different human rights bodies, this paper briefly examines the approaches to due diligence adopted by the Inter-American Court of Human Rights (IACtHR), the European Court of Human Rights (ECtHR), the Committee on Elimination of Discrimination against Women (CEDAW Committee) and the Special Rapporteur on violence against women. It provides evidence on how these institutions have considered the duty of due diligence to arise out of the context of rights in which they have discussed the principle and what are the measures that states need to take in order to discharge the duty of due diligence. The paper concludes with a reflection on due diligence as a principle to combat structural risks and suggests what else could be done to strengthen the findings of the various institutions which aim to concretise state obligations to prevent violence against women.

### **Violence against women during the Covid–19 pandemic as a structural risk**

Risk in international law attracts attention because it relates to inherent problems that international law as a structure tends to perpetuate. Many such problems are revealed in extreme times, such was the case during the Covid–19 pandemic: for instance, while much attention was paid to the economic issues alongside healthcare worries relating the spread of the virus, there was an almost complete dismissal of violence against women in states' response. Different sources showed that the measures adopted to combat the pandemic led to a significant increase in violence against women throughout the world.<sup>4</sup> Economic insecurity and lockdowns led to frequent perpetration of domestic violence and decreased possibilities for women to escape it.<sup>5</sup>

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4 See, for example, Council of Europe 2020; UN Women 2021.

5 NTHUSANG 2020.

In some countries, measures chosen by governments created new opportunities for violence against women.<sup>6</sup>

In this sense, violence against women can be seen as a structural risk, which is often (at least indirectly) caused by states' failures to take measures to either prevent or to put an end to such violence. Women's rights or their lack thereof are, in fact, a pertinent example of structural risks that tend to amplify in situations of crises, potentially even more so if legal measures are enacted but not thoroughly planned. During the Covid-19 pandemic, violence against women was exacerbated despite measures taken to prevent the spread of Covid-19, because protecting women from violence was not necessarily in the policy-making imagination when planning required steps to prevent the transmission of the virus. As such, the issue was only considered when the primary measures worsened the problem of violent acts against women.

In reality, the experience of Covid-19 has only proven that despite significant advances in women's rights and the remarkable evolution of international law in this area, women's rights never make the initial cut for national emergency responses or allocation of funds in the face of a crisis. Women continue to experience high levels of violence globally and violent acts against women represent a continuous threat to society. Further, discrimination against women including violence against women is rather systemic.<sup>7</sup> Despite much work being done on the subject, achieving a gender balance remains a far cry from the ideal.<sup>8</sup>

Apart from the social and religious factors that contribute to the suppression of women in every society, one of the important factors is the male-oriented construction of the global order especially its economic orientation that places little value on the work done inside the home thus creating a public/private divide and substantially reducing the scope for state intervention within the "home". Within international law, this public/private divide is evident in the fact that women's rights were traditionally relegated to the domestic sphere and have more recently become an issue of international concern.<sup>9</sup>

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6 International Committee of the Red Cross 2020.

7 When these measures are upheld by government policies, they should engage state responsibility. See, in this sense, CHINKIN 1999: 393.

8 What the pandemic has done is that it has made starkly evident the structural deficiencies, such as the lack of attention paid to the women's issues, that have for long formed part of the international order.

9 Protection of rights in the private sphere has occurred through the adoption of different documents. Regarding women's rights, this has been achieved through the sources which focus entirely or partially on discrimination against women, a few examples are the Convention on the Political Rights of Women (adopted in 1953); the Convention on the Nationality of Married Women (adopted in 1957); the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (adopted in 1962) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (adopted in 1979), the Declaration on the Elimination of Violence against Women (adopted in 1993).

## Due diligence: the solution for addressing structural risks?

In a way, due diligence is the most natural response to structural risks. It suggests that the least a state can do is to take measures to the best of its ability to ensure that a perceived unwanted outcome does not materialise or is at least undermined.<sup>10</sup> Due diligence to states is what the duty of care is to independent actors, which “is the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or discharge an obligation”<sup>11</sup>

The field of human rights is one that has been very proactive in promoting a diverse view of due diligence in terms of preventing risk. For example, the UN Guiding Principles on Business and Human Rights use due diligence in a very specific way to ensure that businesses do not have an adverse impact on the human rights situation in the country in which they set shop.<sup>12</sup> At the same time, the UN Guiding Principles bring the responsibility of the state towards ensuring that this due diligence is being seriously conducted (due diligence of due diligence, so to speak).<sup>13</sup> Nevertheless, since due diligence has gained significant recognition in IHRL through jurisprudence and its use in this sphere is seen as different and innovative,<sup>14</sup> many questions still remain to be addressed, for instance, whether due diligence plays a role in all state obligations concerning individuals and whether the level of diligence required from states in IHRL compares equally with other subfields of international law, which have more experience in using this concept.<sup>15</sup>

Another way to describe due diligence is to call it an intermediate step between risk and harm. In the case of women’s rights, it would mean the efforts that states have to show when faced with a certain risk to prevent harmful consequences. In the context of women’s rights, the legal benefit that due diligence entails vis-à-vis the public/private divide is that it acts as a bridge between the state and private individuals. This is because state responsibility may arise due to the failure on part of the state to take all reasonable and necessary measures to ensure that women’s rights are respected by private actors. In fact, one may argue that due diligence was advanced precisely to expand the doctrine of state responsibility and increase chances to hold states responsible for their failure to prevent, investigate, punish and provide redress for acts of violence committed by private actors within the private sphere. At the heart of these advances lies the broader feminist agenda to challenge the public/private divide as a gendered structure that historically organised women’s relationship to the state and IHRL differently so as to prevent the recognition of domestic matters,

10 Such understanding of due diligence would correspond to what McDonald calls “due diligence carried out as a policy decision”. McDONALD 2019: 1049.

11 *Black’s Law Dictionary* 2006 as cited in KRYCZKA et al. 2012: 125.

12 UN General Assembly 2009: paras. 49–54.

13 See further BONNITCHA–MCCORQUODALE 2013.

14 ABI-MERSHED 2008: 129.

15 An appealing idea is that states should consider the importance of the interest which needs to be protected when deciding how to implement due diligence. PISILLO-MAZZESCHI 1992: 44.

including violence against women, as a relevant concern for states.<sup>16</sup> Throughout the years, the cases on violence against women addressed by the CEDAW Committee, the IACtHR and the ECtHR, among others, became sites where feminist actors were able to contest, negotiate, and redefine the relationship between women and the state.

### **Prevention of violence against women and due diligence**

The positive duty of states to prevent violence against women stands on a sound legal framework, and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),<sup>17</sup> the Inter-American Convention on the Prevention, Punishment and Eradication of Violence of Women (Convention of Belém do Pará)<sup>18</sup> and the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)<sup>19</sup> are among the documents which represent significant progress in establishing and clarifying the existence of such an obligation. In the view of some authors, positive obligations to prevent violations of, in that case, gender-based violence, have even attained status of customary international law.<sup>20</sup> Moreover, violence against women is a broader human rights issue and can be considered as a violation of various human rights, including the right to life, the prohibition of ill treatment, the right to private life and the prohibition of discrimination.<sup>21</sup> Thus, states' obligation to take active positive action concerning prevention can be further subsumed under other international and regional human rights treaties.<sup>22</sup>

While the binding obligation for states to prevent violence against women by taking concrete steps is uncontroversial, there is less clarity over the actual meaning and scope of this obligation under international law. In this regard, the principle of

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16 Positioning violence within the private sphere has compromised women's ability to legitimately make claims against the state. GARCÍA-DEL MORAL – DERSNAH 2014: 663.

17 Convention on the Elimination of All Forms of Discrimination against Women, adopted on 18 December 1979, 1249 U.N.T.S. 13. While it is unfortunate that this treaty does include direct prohibition and duty to prevent violence against women, this gap has been filled by the CEDAW Committee which explained that violence against women results in violation of arts. 2, 5, 11, 12 and 16 of CEDAW. CEDAW Committee, General Recommendation No. 12: Violence against Women, 1989.

18 Organization of American States, Inter-American Convention on the Prevention, Punishment and Eradication of Violence of Women, 1994, arts. 7 and 8.

19 Council of Europe 2011, Chapter III.

20 GRANS 2018: 735.

21 For discussion on which rights are violated by domestic violence, see SOUSA GANT 2002: 15–17.

22 In its General Comment No. 2, the Committee against Torture (hereinafter CAT Committee) defined state failure to comply with due diligence when preventing violence against women as a violation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. CAT Committee, General Comment No. 2, 2008, para. 18. Likewise, the Human Rights Committee stated that states parties to the International Covenant on Civil and Political Rights are under due diligence obligation to take positive measures to prevent violation of the right to life. Human Rights Committee, General Comment No. 36. Article 6: right to life, 2019, para. 21.

due diligence is supposed to assist in deciding on measures which could fall in the duty to prevent. In a nutshell, due diligence is obliging states to pursue “best efforts” in taking reasonable measures to prevent certain human rights violations. A state does not actually need to succeed in achieving such a goal. In this sense, due diligence is an obligation of means, and states may comply with due diligence even in cases where the violation that the state tries to prevent eventually occurs – if and when the measures adopted attain the standard of due diligence.<sup>23</sup>

One may believe that states’ compliance with due diligence standards has particular value in the context of violence against women because of the common lack of responses from states in the past.<sup>24</sup> This principle is therefore included in international and regional frameworks for the protection of women from violence.<sup>25</sup> In the view of some, due diligence has in the context of state obligations concerning violence against women achieved a status of customary international law.<sup>26</sup> Many international bodies, including the CEDAW Committee,<sup>27</sup> the Secretary-General<sup>28</sup> and the Council of Europe<sup>29</sup> as well as instruments, for instance, the Convention of Belém do Pará,<sup>30</sup> the Istanbul Convention<sup>31</sup> and the Declaration on the Elimination of Violence against Women<sup>32</sup> acknowledge due diligence as a standard that should be applied to states regarding their duties with respect to violence against women.<sup>33</sup> Further, due diligence is commonly referenced in discussions about states’ obligations concerning violence against women, in particular with respect to prevention.<sup>34</sup>

The weakness of various documents mentioned above is that they give a loose definition of due diligence (if any at all) and provide no guidance on how to interpret it in practice. What is more, they fail to clarify under which circumstances due diligence is triggered and how states’ compliance with this principle could be monitored. Consequently, exercising due diligence in the context of violence against women has

23 KOIVUROVA–SINGH 2010.

24 GOLDSCHIED–LIEBOWITZ 2015: 303.

25 For the list of existing standards on due diligence regarding states’ obligations to address violence against women see Human Rights Council (hereinafter HRC), Rep. of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, 2013, paras. 23–40.

26 Commission on Human Rights, Rep. of the Special Rapporteur on violence against women, its causes and consequences, Yakin Erktürk, 2006, para. 29; HASSELBACHER 2010: 198–200.

27 CEDAW Committee, General Recommendation No. 19: Violence against Women, 1992, para. 9. *Ending Violence against Women: From Words to Action. Study of the Secretary-General* 2006, 89–91.

28 United Nations 2006: 89–91.

29 Committee of Ministers 2002, Art. 4(II).

30 Art. 7(b).

31 Art. 5(2).

32 GA Res. 48/104, 1993, Art. 4(c).

33 While not all of the mentioned documents have a binding force, they have played a role in the establishment of due diligence as a legal standard through jurisprudence. See, in this sense, THILL 2014: 53.

34 For a detailed discussion on due diligence and prevention in the context of violence against women, see ABDUL AZIZ – MOUSSA 2016: 13–30.

been left to the discretion of states and other interpretations, including international jurisprudence. As we will see, the IHRL tribunals and bodies have provided slight guidance in concretising what measures should be taken by states to comply with the principle of due diligence. The exception is the Special Rapporteur on violence against women, which has been slightly more concrete.

## Triggering and discharging due diligence in practice

### *Inter-American Court of Human Rights*

Velásquez Rodríguez was the milestone case before the IACtHR in which the Court unequivocally acknowledged state obligation to take *active* steps to prevent violence against women.<sup>35</sup> The IACtHR highlighted that states need to comply with due diligence when discharging their positive obligations of prevention,<sup>36</sup> and that there is no need for the state to actually succeed in preventing violations as long as best efforts (and not just mere formalities) were made in adopting reasonable and effective measures.<sup>37</sup> It further confirmed the obligation to prevent that requires due diligence to be applicable to acts committed by private individuals,<sup>38</sup> which would include violence against women by these individuals in the private sphere.

When assessing the circumstances under which state obligation to exercise due diligence measures of prevention is triggered, the IACtHR turned to the concept of danger in some of its judgments.<sup>39</sup> It found that the state would have to react if the danger against an individual or a group of individuals is imminent and real. At the same time, the state would need to possess an awareness of such a danger in order for its obligation to adopt preventive measures to arise.<sup>40</sup> On the question of how should a state discharge due diligence in practice, the IACtHR said that a list of such obligations cannot be made in abstract and should be decided on a case-by-case basis.<sup>41</sup> It is however clear that some measures would aim towards more general prevention, such as the example of training officials in the judiciary and the specialised police.<sup>42</sup> Further, they would encompass educational programs for the general public to raise awareness on the violence against women, the creation of specialised institutions for assisting

35 IACtHR, Velásquez Rodríguez v. Honduras, 1998, paras. 174–175.

36 IACtHR, Velásquez Rodríguez v. Honduras, 1998, para. 172.

37 IACtHR, Velásquez Rodríguez v. Honduras, 1998, paras. 174; 177. See also IACtHR González et al. ('Cotton Field') v. Mexico, 2009, para. 252.

38 IACtHR, Velásquez Rodríguez v. Honduras, 1998, para. 172.

39 See, for example, IACtHR, Pueblo Bello Massacre v. Colombia, 2006, para. 123; IACtHR González et al. ('Cotton Field') v. Mexico, 2009, para. 280.

40 IACtHR, Pueblo Bello Massacre v. Colombia, 2006, paras. 123; 125; 151. In the case López Soto, IACtHR considered that in the context of widespread violence against women, the disappearance of a woman would be sufficient for obligation to act with due diligence to arise. IACtHR, López Soto v. Venezuela, 2018, para. 145.

41 IACtHR, Velásquez Rodríguez v. Honduras, 1998, para. 175.

42 IACHR, Access to Justice for Women Victims of Violence in the Americas, 2007, para 34.

women who suffered violence at home and efforts to increase the effectiveness of criminal justice processes. Next, there are some measures of prevention that states would have to adopt to comply with due diligence on a specific level, for instance, to conduct a genuine investigation in case of alleged violence against women.<sup>43</sup>

The IACtHR has classified non-compliance with due diligence by states in the context of violence against women as a violation of the prohibition of discrimination and the prohibition of torture, among others.<sup>44</sup> The IACtHR's finding that failing to comply with due diligence in adopting measures of prevention may amount to a violation of various human rights is noteworthy, because first, it puts greater pressure on states to raise measures of prevention to an appropriate standard. Second, such a conclusion underlines that preventive measures should be well planned and sufficiently detailed.

### *European Court of Human Rights*

Just as the IACtHR, the ECtHR has also addressed due diligence in the context of states' obligation with respect to violence against women. Nevertheless, the ECtHR case law which explicitly refers to due diligence is limited and it mostly concerns cases where the applicant claimed a violation of the principle.<sup>45</sup> By relying on risk assessment and the authorities' actual and putative knowledge of risk, the ECtHR in *Osman v. United Kingdom* first decided that a state was obliged to take preventive measures that could be reasonably expected.<sup>46</sup> In a different case, the Court then asserted that whenever a private individual commits an act of violence, the burden that lies on the state to prevent it should not be disproportionate.<sup>47</sup> State responsibility for violations by private individuals could be triggered if there is an immediate and real risk towards an individual of which authorities were aware/knew or ought to have known/should have been aware but failed to exercise their obligations with due diligence.<sup>48</sup>

In a case that was addressed by the ECtHR after *Osman v. United Kingdom*, the suggestion was made that the Osman test is not necessarily adequate for situations of domestic violence, because in such cases there is no need for the risk to be immediate.<sup>49</sup> Instead, one of the judges stated that it suffices for the risk to

43 In this regard, see especially art. 7(b) of the Convention of Belém do Pará. See also IACtHR, *Hacienda Brasil Verde Workers v. Brasil*, 2016, paras. 367; 378–379. The Court clarifies that opening and conducting effective investigation without delay is implied in the due diligence obligation.

44 IACHR, *Jessica Lenahan (Gonzales) et al v. United States*, 2011, paras. 111–112; IACtHR, *Women Victims of Sexual Torture in Atenco v. Mexico*, 2018, para. 180.

45 See, for example, ECtHR, *Mudrić v. The Republic of Moldova*, 2013, para. 60.

46 ECtHR, *Osman v. United Kingdom*, 1998, para. 116.

47 ECtHR, *Đorđević v. Croatia*, 2012, para. 139.

48 ECtHR, *Osman v. United Kingdom*, 1998, para. 116.

49 Sara De Vido suggests that the ECtHR's reasoning in the case *Talpis v. Italy* proves that the vulnerability of the victims in each specific case prevails over the strict requirement of the immediacy of risk. DE VIDO 2017: 7–8.

be simply “present” in order for the duty of due diligence of the public authorities to arise.<sup>50</sup> In the context of widespread abuse known to state authorities, there is the constructive duty to prevent and protect without any need for immediate risk. At the same time, the ECtHR established that such a general risk would only suffice if the applicant proves the existence of a link between the risk, lack of action by a state and the harm produced.<sup>51</sup>

The ECtHR has heard cases concerning due diligence in obligations concerning prevention of violence against women in the frame of the right to life, the prohibition of torture, the right to respect for private and family life and the prohibition of discrimination.<sup>52</sup> Importantly, both the ECtHR and the IACtHR have recognised failure by a state to exercise due diligence to protect women from violence as a gender-based discrimination.<sup>53</sup> On the question of what would be the appropriate measures to implement due diligence to prevent violence against women, the ECtHR’s reasoning remained always very general, for instance, the Court suggested the existence of a close link between due diligence and the obligation of criminal investigation, which must be conducted with a certain level of “special diligence”.<sup>54</sup>

### *Committee on Elimination of Discrimination against Women*

The Committee’s role in the endorsement of the due diligence principle with respect to state obligations concerning violence against women was first seen in General Recommendations No. 12 and No. 19. In the latter document, the Committee highlighted the need of states to adopt “appropriate and effective measures to overcome all forms of gender-based violence”.<sup>55</sup> It has also referred to due diligence in some of its individual communications where it instructed states on what due diligence meant in the context of preventive measures.<sup>56</sup> Examples referred to by the Committee are training of law enforcement professionals, coordination between non-governmental organisations, judicial authorities and other relevant bodies, as well as raising awareness.<sup>57</sup> An important observation of the Committee was that states’

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50 Concurring Opinion of Judge Pinto de Albuquerque in ECtHR, *Valiulienė v. Lithuania*, 2013.

51 For further discussion see *STOYANOVA* 2020: 615.

52 See, for example, ECtHR, *Osman v. United Kingdom*, 1998, para. 115 (right to life); ECtHR, *Mastromatteo v. Italy*, 2002, para. 67 (right to life); ECtHR, *Opuz v. Turkey*, 2009, para. 159 (prohibition of ill-treatment) and para. 198 (prohibition of discrimination); ECtHR, *Eremia v. The Republic of Moldova*, 2013, para. 85 (prohibition of discrimination); ECtHR, *T. M. and C. M. v. the Republic of Moldova*, 2014, para. 57 (prohibition of discrimination); ECtHR, *M. G. v. Turkey*, 2016, para. 115 (prohibition of discrimination); ECtHR, *Balsan v. Romania*, 2017, paras. 83–88 (prohibition of discrimination).

53 GRANS 2018: 746.

54 See, for instance, ECtHR, *Tërshana v. Albania*, 2020, paras. 157; 160.

55 CEDAW Committee, General Recommendation No. 19: Violence against Women, 1992, para. 24(a).

56 See, for example, CEDAW Committee, *A.T. v. Hungary*, 2005, para. 9.2.

57 CEDAW Committee, *Goekce v. Austria*, 2007, para. 12.3; CEDAW Committee, *Fatma Yildirim v. Austria*, 2007, para. 12.3; CEDAW Committee, *Angela González Carreño v. Spain*, 2014, para.

obligation to prevent violence against women is not conditional on the existence of immediate and real threat towards the victim.<sup>58</sup>

In its latest general comment on violence against women from 2017, the Committee referred to due diligence only in the context of states' obligation regarding acts or omissions by non-state actors.<sup>59</sup> Apart from providing some examples of what can due diligence mean in practice, it defined states' failure to take appropriate measures to prevent gender-based violence as de facto permission or encouragement of violent acts committed by non-state actors, which in itself is a human rights violation. The precondition for the state obligation to take appropriate measures arises if the authorities are aware or should have been aware of the risk of gender-based violence.

### *Special Rapporteur on violence against women*

In addition to jurisprudence, there have been other efforts to clarify what states have to do in order to discharge the obligation of due diligence. For example, according to the report from the Special Rapporteur on violence against women from 2009, states can comply with due diligence by establishing different preventive, educational programmes and special mechanisms such as ombudspersons for tackling the roots of the violence against women. Due diligence may also be exercised by raising awareness on the matter and collecting data on the reported cases of violence against women. Further, healthcare, psychological support and shelters for victims of domestic violence are examples of how states could comply with the standard of due diligence, as long as such interventions are monitored and evaluated carefully in order to ensure their effectiveness and adequacy to the existing situation.<sup>60</sup>

Importantly, the Special Rapporteur on violence against women concluded that states' obligation to act with due diligence should exist on systemic and individual levels.<sup>61</sup> One may consider that systemic due diligence is particularly important because it puts preventive measures at the heart of states' obligations concerning violence against women.<sup>62</sup> In order to assess state compliance with due diligence whose goal is to address systemic issues standards, the Special Rapporteur attempted to develop some factors, namely the existence of constitutional authority that guarantees equality for women and prohibits violence against women, the existence of national

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11. See also CEDAW Committee, Rep. on Mexico produced by the Committee on the Elimination of Discrimination against Women under art. 8 of the Optional Protocol to the Convention, and reply from the Government of Mexico, 2005, para. 276.

58 CEDAW Committee, *V. K. v. Bulgaria*, Communication No. 20/2008, 2011, para. 9.8.

59 CEDAW Committee, General Recommendation No. 35 on Gender-based Violence against Women, Updating General Recommendation No. 19, 2017, para. 24(2)(b).

60 OHCHR 2009: 25–26.

61 HRC, Rep. of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, 2013, paras. 20; 70.

62 HRC, Rep. of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, 2013, paras. 20; 70.

legislation and/or administrative sanctions that adequately remedy women victims of violence, the existence of policies or plans of action that deal with violence against women, the sensitivity of the criminal justice system to issues regarding violence against women, the existence of support systems for women victims of violence, education and awareness programmes on violence against women as a human rights violation and the collection of data and statistics on violence against women.

## Reflections

Violence against women is, as shown in this paper, a structural risk, which could be mediated through the obligation to prevent such violence with due diligence. By highlighting states' key role in addressing violence against women and other similar global risks, due diligence provides a promising opportunity to underpin the international legal order. Due diligence should be seen, on the one hand, as a way of facilitating the discharge of the positive obligation of prevention for states and on the other, as a concept that contributes to understanding what the positive obligation of prevention actually means.

Due diligence is intended to provide a flexible approach and leaves the final decision on the measures that need to be taken in the hands of states. This flexibility can be seen as positive because it can take into account the specificities of each case.<sup>63</sup> At the same time, IHRL bodies and other institutions dealing with violence against women should contribute towards a better understanding of how due diligence could be best implemented and what states are concretely required to do in order to prevent violence against women. For instance, regarding the nature of the measure taken, it is clear that the analysed IHRL bodies agree that efficiency and reasonableness are what matters most for states to comply with due diligence. Their decisions could, however, benefit from more clarity and preciseness.<sup>64</sup>

Although its implementation is not so clear-cut due to the ambiguity, the importance of due diligence lies in the fact that it allows to move away from a system that is not always built for the protection of women's rights. Indeed, states should take advantage of this principle's flexibility and be creative in adopting their measures of prevention. Moreover, they could follow the examples introduced by the Special Rapporteur on violence against women.<sup>65</sup> As a first step, they should engage with domestic violence in a systemic way, and condemn it in its entirety as this can prevent it from occurring. Whenever possible, states should consider the potential impact of any non-emergency or emergency responses (such is the case of Covid-19 measures)

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<sup>63</sup> ABI-MERSHED 2008: 129.

<sup>64</sup> For example, in the case of *Opuz v. Turkey* it is arguable whether the ECtHR has expanded the obligation of the state to take general preventive measures in cases where general risks of violence exist. Instead, it seems that the court required that a specific individual necessarily is at risk for the state obligation to take measures to arise. STOYANOVA 2020: 610.

<sup>65</sup> See the examples mentioned in OHCHR 2009.

before they adopt them. In the development and implementation of these responses, multiple voices and angles must be considered, including different gender-impact studies, research, and cooperation with organisation whose work can assist in making state responses more gender sensitive. At all times, the duty of due diligence should be understood as a responsibility of a state to design and implement responses that result in women's empowerment.

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