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# State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, And International Legal Minimums of Protection

Lee Hasselbacher\*

## I. INTRODUCTION

¶1 United Nations studies report that the most common form of violence experienced by women around the world is physical violence inflicted by an intimate partner.<sup>1</sup> As a global average, at least one in three women is beaten, coerced into sex, or otherwise abused by an intimate partner in the course of her lifetime.<sup>2</sup>

¶2 Domestic violence is defined by the U.S. Department of Justice as a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner.<sup>3</sup> It can consist of physical, sexual, emotional, economic, or psychological acts that serve to intimidate, manipulate, humiliate, isolate, coerce, threaten, or hurt someone.<sup>4</sup> It has a dramatically disproportionate impact on women worldwide,<sup>5</sup> but only recently has it been recognized as a legitimate human rights violation.

¶3 Over the last two decades, international human rights instruments, decisions, and dedicated advocates have advanced the understanding of domestic violence. Once considered a private act committed with widespread impunity, domestic violence is now viewed as a human rights violation that states have a responsibility to address. Part II of this paper will trace the history of this progression and the emergence of a “due diligence” standard to assess a state’s response to domestic violence. Part III will examine the recognition of the due diligence standard as a rule of

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<sup>1</sup> UNITED NATIONS DEP’T PUBLIC INFORMATION, U.N. SECRETARY-GENERAL’S CAMPAIGN, UNITE TO END VIOLENCE AGAINST WOMEN, FACTSHEET, DPI/2498 (Feb. 2008), *available at* <http://www.un.org/en/women/endviolence/pdf/VAW.pdf>.

<sup>2</sup> *Id.*

<sup>3</sup> U.S. Dep’t of Justice, Office on Violence Against Women, <http://www.ovw.usdoj.gov/ovw-fs.htm> (last visited Dec. 7, 2008).

<sup>4</sup> *Id.*

<sup>5</sup> U.N. Children’s Fund, *Domestic Violence Against Women and Girls*, 6 INNOCENTI DIGEST 1, 3-5 (2000), *available at* <http://www.unicef-irc.org/publications/pdf/digest6e.pdf> [hereinafter UNICEF]. This report observed that domestic violence is in most cases violence perpetrated by men against women and violence by women against men accounts for a small percentage of domestic violence. Some relevant statistics include: 29% of women in Canada (a nationally representative sample of 12,300 women) reported being physically assaulted by a current or former partner since the age of 16; 25% of women in the U.K. (a random sample of women from one district) had been punched or slapped by a partner or ex-partner in their lifetime; up to 45% of married men in India acknowledged physically abusing their wives, according to a 1996 survey of 6,902 men; 35% of women in Egypt (a nationally representative sample of women) reported being beaten by their husband at some point in their marriage; 41% of women in Uganda reported being beaten or physically harmed by a partner; 41% of men reported beating their partner (representative sample of women and their partners in two districts); 19% of 6,097 women surveyed in Colombia have been physically assaulted by their partner in their lifetime; 29% of women in Estonia aged 18-24 fear domestic violence, and “the share rises with age, affecting 52% of women 65 or older, according to a 1994 survey of 2,315 women.”

customary international law with increasingly defined state obligations. Part IV will analyze the evolution of the due diligence standard within the European Court of Human Rights (ECHR) and the application of the standard in two landmark cases, *Bevacqua and S. v. Bulgaria*<sup>6</sup> and *Opuz v. Turkey*<sup>7</sup>. Both cases held national governments responsible for failing to exercise due diligence to adequately protect individuals from domestic violence. The decisions in these cases not only affirm the use of the due diligence standard as a tool for assessment, but also they begin to clarify the practical obligations of protecting victims from domestic violence and preventing, investigating, and prosecuting such violence. In particular, the ECHR highlights the need for enforceable measures of protection and a legislative framework that enables criminal prosecutions of domestic violence in the public interest. Furthermore, the decision in *Opuz v. Turkey* recognizes that a State's *failure* to exercise due diligence to protect women against domestic violence is gender-based discrimination, violating women's right to equal protection of the law.<sup>8</sup>

## II. DOMESTIC VIOLENCE WITHIN INTERNATIONAL HUMAN RIGHTS LAW

### A. *Violations of Public and Private Rights*

¶4 As studies and statistics demonstrate, domestic violence is not confined to any one culture or region.<sup>9</sup> Instead, domestic violence exists in countries with varying social, political, economic, and cultural structures, and its pervasiveness “signifies that the problem does not originate with the pathology of an individual person.”<sup>10</sup> However, despite the widespread nature of the problem, it has long been considered a private matter best dealt with in the home, not an issue of public policy. Categorized as such, domestic violence went largely unaddressed within traditional international human rights discourse.

¶5 The human rights movement, dating back to the signing of the Universal Declaration of Human Rights and the founding of the United Nations, has placed heavy focus on civil and political violations that occur on the streets, in prisons, in the government, and in the press. Issues such as state-sponsored torture, extrajudicial execution, prisoners of conscience, and war crimes have received a high priority in human rights treaties and in the jurisprudence of international tribunals.<sup>11</sup>

¶6 Feminist critiques leveled at international human rights discourse have highlighted the “fragmented and individualistic language of the mainstream understanding of rights which are based upon a male model of what it means to be ‘human.’”<sup>12</sup> Subsequently, a focus on

<sup>6</sup> *Bevacqua v. Bulgaria*, App. No. 71127/01, Eur. Ct. H.R. (2008), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Bevacqua%20%7C%20%20%7C%20Bulgaria&sessionid=55485783&skin=hudoc-en>.

<sup>7</sup> *Opuz v. Turkey*, App. No. 33401/02, Eur. Ct. H.R. (2009), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=851046&portal=hbkm&source=externalbydo cnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

<sup>8</sup> *Id.* at ¶ 191.

<sup>9</sup> UNICEF, *supra* note 5, at 4-5.

<sup>10</sup> Subrata Paul, *Combating Domestic Violence Through Positive International Action in the International Community and in the United Kingdom, India, and Africa*, 7 CARDOZO J. INT'L & COMP. L. 227, 243 (1999).

<sup>11</sup> Examples include the International Covenant on Civil and Political Rights, the Convention Against Torture, the Geneva Conventions, and tribunals established to prosecute war crimes and crimes against humanity, often recognized in the context of conflict.

<sup>12</sup> The 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*

“classical” human rights violations occurring in the public sphere “systematically disadvantages women, since they are traditionally restricted to the private sphere (family, home).”<sup>13</sup> This public/private division historically correlated with the separate societal roles of women and men.<sup>14</sup> Since traditional gender roles grant more freedom to men to move and act within the public sphere (e.g., working outside the home, participating in government, and serving in the military), those roles also make violations committed against men more visible and easier to redress. Issues of concern to women (e.g., violence within the family, denial of education, and lack of economic freedom) escape notice. Although governments may deny gender bias in justice mechanisms, the public/private framework often influences the very structure of the system.<sup>15</sup>

¶17 A gendered perspective is also relevant when distinguishing between “negative” and “positive” rights. Traditionally, civil and political rights like freedom of speech place limits on the government’s ability to *interfere* with the individual’s enjoyment of these rights. These are “negative” rights because the government must refrain from infringing upon them. However, international jurisprudence now recognizes that “positive” obligations can flow from recognition of “negative” rights. For example, national and international courts acknowledge a state responsibility to protect and ensure the right to life, not merely refrain from violating it. Kenneth Roth, Director of Human Rights Watch, argues that “[w]hen a state makes little or no effort to stop a certain form of private violence, it tacitly condones that violence. This complicity transforms what would otherwise be wholly private conduct into a constructive act of the state.”<sup>16</sup> Thus, states can be held accountable for tolerating domestic violence perpetrated by non-state actors.<sup>17</sup>

### B. *Recognizing an International Problem*

¶18 The evolving concept of state responsibility for individual acts of violence and the subsequent recognition of domestic violence as a violation of human rights is a recent advance in international law. To understand the potential of the due diligence standard as a legal tool and appreciate the significance of recent decisions such as those in the ECHR, it is important to trace the history of this development.

¶19 In 1979, the Convention on the Elimination of Discrimination Against Women (CEDAW) was adopted by the United Nations General Assembly and heralded as the “international bill of rights for women,” containing provisions meant to end discrimination toward women.<sup>18</sup>

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*the Elimination of Violence Against Women*, ¶ 56, delivered to the Economic and Social Council and the Commission on Human Rights, U.N. Doc. E/CN.4/2006/61 (Jan. 20, 2006).

<sup>13</sup> Beate Rudolf & Andrea Eriksson, *Women’s Rights Under International Human Rights Treaties: Issues of Rape, Domestic Slavery, Abortion, and Domestic Violence*, 5 INT’L J. CONST. L. 507, 522-523 (2007).

<sup>14</sup> Bonita Meyersfeld, *Domestic Violence, Health, and International Law*, 22 EMORY INT’L L. REV. 61, 66 (2008).

<sup>15</sup> *Id.*

<sup>16</sup> Kenneth Roth, *Domestic Violence as an International Human Rights Issue*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 326, 330 (Rebecca J. Cook ed., 1994).

<sup>17</sup> Rudolf & Eriksson, *supra* note 13, at 523.

<sup>18</sup> See Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, at pt. 1, art. 1, U.N. GAOR, 34th Sess., 107th plen. mtg., U.N. Doc. A/RES/34/180 (Dec. 18, 1979) [hereinafter CEDAW] (defining “discrimination” as “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, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”). See also U.N. Div. for the Advancement of Women, Dep’t of Econ. & Soc. Affairs, <http://www.un.org/womenwatch/daw/cedaw/> (last visited Dec. 7, 2008) (referring to the Convention on the Elimination of All Forms of Discrimination Against Women as an international bill of rights for women).

Although it was a landmark treaty, CEDAW did not explicitly address the issue of violence against women.<sup>19</sup> It was not until several years later that international bodies began to acknowledge the connection between violence against women and discrimination.

¶10 In the mid-1980s, domestic violence grew more prominent as an issue of international concern. Statements and resolutions on violence in the family were issued by the U.N. Economic and Social Council, the U.N. General Assembly, and a U.N. Expert Group Meeting on Violence in the Family held in 1986.<sup>20</sup> These documents drew attention to the international character of the problem, asked states to develop action plans to address domestic violence, and led to further studies.<sup>21</sup>

¶11 In 1989, the U.N. released a report on Violence Against Women in the Family which argued that domestic violence is not random, but “associated with inequality between women and men.”<sup>22</sup> An additional General Assembly resolution called for nations to work together to develop strategies to prevent violence and protect victims.<sup>23</sup> In 1992, thirteen years after CEDAW’s adoption, the Committee on the Elimination of Discrimination Against Women (“CEDAW Committee”) incorporated violence against women into its reading of CEDAW by adopting General Recommendation 19. This recommendation established a robust definition of violence against women and mandated that “full implementation of the Convention required states to take positive measures to eliminate all forms of violence against women.”<sup>24</sup> Significantly, the document also identified the “due diligence” standard for determining whether states have fulfilled the objectives of the recommendation.<sup>25</sup> This standard, new to international law, suggested that CEDAW’s member states had particular obligations to ensure the elimination of violence against women.

### III. INTRODUCING THE DUE DILIGENCE STANDARD

¶12 The concept of “due diligence” regarding state responsibility for non-state acts was first developed in *Velasquez Rodriguez v. Honduras*, a case heard by the Inter-American Court of Human Rights (IACHR) in 1988.<sup>26</sup> For the first time, the Court considered state responsibility for enforced disappearances. Specifically, the case related to the abduction and disappearance of a graduate student, Angel Manfredo Velasquez Rodriguez. Relying on evidence that showed a

<sup>19</sup> See CEDAW, *supra* note 18.

<sup>20</sup> See, e.g., U.N. Econ & Soc. Council [ECOSOC] Res. 1984/14, 19<sup>th</sup> plen. mtg., U.N. Doc. E/RES/1984/14 (May 24, 1984); G.A. Res. 40/36, ¶¶ 1-7, U.N. Doc. A/RES/40/36 (Nov. 29, 1985).

<sup>21</sup> Meyersfeld, *supra* note 14, at 79.

<sup>22</sup> *Id.* at 80 (quoting Division for the Advancement of Women, The U.N. Work on Violence Against Women, available at <http://www.un.org/womenwatch/daw/news/unwvaw.html> (last visited Jan. 26, 2009)).

<sup>23</sup> *Id.* at 81.

<sup>24</sup> Commission on the Elimination of Discrimination Against Women, *General Recommendation No. 19: Violence Against Women*, 11th Sess., ¶ 4, U.N. Doc. A/47/38 (1993), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>; see also *id.* ¶ 7 (“Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention. These rights and freedoms include: (a) The right to life; (b) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment; (c) The right to equal protection according to humanitarian norms in time of international or internal armed conflict; (d) The right to liberty and security of person; (e) The right to equal protection under the law; (f) The right to equality in the family; (g) The right to the highest standard attainable of physical and mental health; (h) The right to just and favourable conditions of work”).

<sup>25</sup> Meyersfeld, *supra* note 14, at 82.

<sup>26</sup> *Velasquez Rodriguez v. Honduras*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172 (July 29, 1988).

pattern of similar disappearances tied to government suppression of dissidents, the Court found that Velasquez Rodriguez's disappearance was "carried out by agents who acted under cover of public authority."<sup>27</sup> Moreover, the Court went on to observe that even if that fact had not been proven, "the failure of the State apparatus to act, which is clearly proven, is a failure on the part of Honduras to fulfill the duties it assumed" under the American Convention on Human Rights.<sup>28</sup> These duties created a positive obligation to ensure Velasquez Rodriguez the "free and full exercise of his human rights."<sup>29</sup>

¶13 Expanding on this analysis, the Court found that an illegal act "which violates human rights and which is initially not directly imputable to a State . . . can lead to international responsibility of the State, not because of the act itself, but because of the lack of *due diligence* to prevent the violation or to respond to it as required by the [American Convention on Human Rights]."<sup>30</sup> In other words, where rights are guaranteed—in this case by the American Convention on Human Rights—the state is obligated to exercise "due diligence" to ensure their fulfillment.<sup>31</sup> As a consequence of this duty, the "States must prevent, investigate and punish any violation" of rights.<sup>32</sup> The *existence* of a legal system is not enough; the government must also "conduct itself so as to effectively ensure" the enjoyment of rights.<sup>33</sup> This language and legal framework provided the foundation for the due diligence standard, which spread beyond the Inter-American system and is now applied to non-state acts of domestic violence.

#### A. *Due Diligence in Responding to Domestic Violence*

¶14 In 1993, there were two major developments that furthered the application of the due diligence standard within the domestic violence context: the issuance of the Declaration on the Elimination of Violence Against Women (DEVAW) by the U.N. General Assembly and the appointment of a Special Rapporteur on Violence Against Women.<sup>34</sup> DEVAW incorporated the principles of General Recommendation 19 and formally adopted the "due diligence" standard as a tool to assess a State's obligations with regard to all forms of violence against women. In incorporating this standard, DEVAW declared that all U.N. member states have a duty to "pursue by all appropriate means and without delay a policy of eliminating violence against women," including "due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetuated by the State or by private persons."<sup>35</sup> DEVAW affirmed that violence against women constitutes a "violation of the rights and fundamental freedoms of women and impairs or nullifies their enjoyment of those rights and freedoms."<sup>36</sup> DEVAW represented significant consensus on the

<sup>27</sup> *Id.* ¶ 182.

<sup>28</sup> *Id.* ¶ 182.

<sup>29</sup> *Id.* ¶ 182.

<sup>30</sup> *Id.* ¶ 172 (emphasis added).

<sup>31</sup> *Id.* ¶¶ 180, 182; *see also* Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, pt. I, ch. I, art. 1, ¶ 1 (stating that "The States Parties to this Convention undertake to . . . ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms" enumerated in the document).

<sup>32</sup> Rodriguez, *supra* note 26, ¶ 166.

<sup>33</sup> *Id.* ¶ 167.

<sup>34</sup> Meyersfeld, *supra* note 14, at 82.

<sup>35</sup> Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, art. 4, U.N. Doc. A/RES/48/104 (Feb. 23, 1994) [hereinafter DEVAW].

<sup>36</sup> *Id.* ¶ 5.

principles for addressing violence against women. The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém Do Pará), passed in 1994 by the General Assembly of the Organization of American States, provided additional support for this consensus and provided early guidance for member states.<sup>37</sup>

Furthermore, the 1995 Fourth World Conference on Women in Beijing included elimination of all forms of violence against women as one of its twelve strategic objectives and listed concrete actions to be taken by governments, the United Nations, and international and nongovernmental organizations.

¶15 At the same time, the newly appointed Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, was actively investigating violence against women in the family. According to her 1996 report, “State-tolerated violence intended to control women in their so-called private lives has thus far not been accounted for” and that the public versus private rhetoric had “fundamentally affected perceptions of women’s rights.”<sup>38</sup> She went on to argue that “the role of State inaction in the perpetuation of the violence combined with the gender-specific nature of domestic violence require that domestic violence be classified and treated as a human rights concern rather than merely as a domestic criminal justice concern.”<sup>39</sup> Coomaraswamy’s report referenced the principles articulated in General Recommendation 19 and DEVAW, as well as the foundation for state responsibility established in *Velasquez Rodriguez v. Honduras*. She argued that “a State that does not act against crimes of violence against women is as guilty as the perpetrators.”<sup>40</sup> Coomaraswamy declared that states must exercise due diligence to ensure enforcement of laws if they wish to avoid such complicity.

¶16 In attempting to provide stronger practical guidance to states, Coomaraswamy’s report included suggestions for model domestic violence legislation. Coomaraswamy acknowledged that there is no single model that would lead to the eradication of violence against women in all societies, but she identified several key elements that should be adapted and included in any efforts.<sup>41</sup> These elements include effective responses from law enforcement, formal measures of protection, such as civil protection orders, and prosecution and punishment of perpetrators.

¶17 To this extent, the model legislation delineated the duties of police officers in preventing and responding to domestic violence. For example, their duties should include responding to every request for assistance and protection in cases of domestic violence,<sup>42</sup> assigning equal

<sup>37</sup> Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June 9, 1994, 33 I.L.M. 1534; *id.*, art. 7 (stating, inter alia, that “The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to: . . . b. apply due diligence to prevent, investigate and impose penalties for violence against women; . . . d. adopt legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman or using any method that harms or endangers her life or integrity, or damages her property; e. take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women; f. establish fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such procedures.”).

<sup>38</sup> U.N. Econ. & Soc. Council, Comm’n on Hum. Rts., Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, pt. II, ¶ 26, U.N. Doc. E/CN.4/1996/53 (Feb. 5, 1996) (*prepared by* Radhika Coomaraswamy, in accordance with Comm’n on Hum.Rts. Res. 1995/85) [hereinafter 1996 Report of the Special Rapporteur].

<sup>39</sup> *Id.* pt. III, ¶ 29.

<sup>40</sup> *Id.* pt. III, ¶ 39 (internal citation omitted).

<sup>41</sup> *Id.* ¶ 120.

<sup>42</sup> U.N. Economic & Social Council, Commission on Human Rights, Special Rapporteur on Violence Against Women, *Framework for Model Legislation on Domestic Violence*, ¶ 13, U.N. Doc. E/CN.4/1996/53/Add.2 (Feb. 2, 1996) (*prepared by* Radhika Coomaraswamy, in accordance with Commission on Human Rights Resolution

priority to calls concerning abuse by family and household members as to calls alleging similar abuse and violations by strangers,<sup>43</sup> providing protection to the reporter of violence, and arranging removal of the offender from the home or arresting the offender if the victim is in danger.<sup>44</sup> Coomaraswamy also discussed the necessity of official mechanisms to obtain protection orders. Such orders would generally forbid abusers from having any contact with the victim, exclude the abuser from a shared home, and provide police a mechanism for arrest if further violence occurs.<sup>45</sup> Coomaraswamy called for police and courts to monitor compliance with protection orders and treat violations of the orders as a crime punishable by fine or imprisonment.<sup>46</sup> Furthermore, Coomaraswamy called for a legal system that criminalizes domestic violence and effectively ensures that law enforcement and judicial officers actually investigate, prosecute, and punish perpetrators.<sup>47</sup>

¶18 This early effort by Special Rapporteur Coomaraswamy to define the obligations that demonstrate compliance with the due diligence standard provided an outline of legal minimums that would continue to take shape in international documents and jurisprudence.

#### B. *The Due Diligence Standard in the Inter-American Commission and the CEDAW Committee*

¶19 In the wake of the articulation of the due diligence standard, quasi-judicial and treaty-monitoring bodies began to grapple with interpreting the standard and giving it meaning in individual cases. Both the Inter-American Commission and the CEDAW Committee heard domestic violence complaints; the decisions of those bodies built upon the principles discussed above and highlighted the practical need for protective measures and effective prosecutions.

¶20 In 2001, the Inter-American Commission on Human Rights (“Commission”) heard a complaint from Maria da Pehna Maia Fernandes alleging that the Brazilian government had implicitly condoned the violence perpetrated against her by her husband, Heredia Viveiros, by failing to adequately protect her or punish Viveiros for his crimes.<sup>48</sup> The local public prosecutor had filed attempted murder charges against Viveiros, but the case had languished for eight years before the court filed a guilty verdict. In 1998, following appeals and a second trial that resulted in a guilty verdict, Mrs. Fernandes filed her complaint with the Commission. By that point, it had been more than 15 years since the attack, there had been no judicial resolution, and Viveiros had remained free the entire time.<sup>49</sup>

¶21 The Commission looked to several controlling documents in finding that Brazil had failed to exercise due diligence in responding to the plight of Mrs. Fernandes. Among other legal sources, the Commission relied on the American Declaration of the Rights and Duties of Man and the Convention of Belém Do Pará.<sup>50</sup> In its report, the Commission found that the violence suffered by Mrs. Fernandes was “part of a general pattern of negligence and lack of effective

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1995/85), available at

<http://193.194.138.190/Huridocda/Huridoca.nsf/TestFrame/0a7aa1c3f8de6f9a802566d700530914?Opendocument> [hereinafter *Framework for Model Legislation on Domestic Violence*].

<sup>43</sup> *Id.* ¶ 14.

<sup>44</sup> *Id.* ¶ 17.

<sup>45</sup> 1996 Report of the Special Rapporteur, *supra* note 38, ¶ 125.

<sup>46</sup> *Framework for Model Legislation on Domestic Violence*, *supra* note 42, ¶ 41.

<sup>47</sup> *Framework for Model Legislation on Domestic Violence*, *supra* note 42, ¶ 37.

<sup>48</sup> *Maria da Penha Maia Fernandes v. Brazil*, Case 12.051, Inter-Am. C.H.R., Report No. 54/01, OEA/Ser.L/V/II.111, doc. 20, rev. 16 (2000).

<sup>49</sup> *Id.* ¶¶ 1-20.

<sup>50</sup> *Id.*

action by the State in prosecuting and convicting aggressors” and that “general and discriminatory judicial ineffectiveness” creates a “climate that is conducive to domestic violence.”<sup>51</sup> Specifically, the Commission found Brazil to be in violation of Articles 8 and 25 of the American Convention, which guarantee rights to a fair trial and judicial protection.<sup>52</sup> The Commission reasoned that by allowing perpetrators of domestic violence to enjoy impunity with no threat of prosecution or punishment, Brazil was complicit.<sup>53</sup>

¶22 The Commission also found that Brazil’s failure to respond to domestic violence evidenced widespread gender discrimination. In reaching this finding, the Commission relied on Article 24 of the American Convention, which articulates the equal rights of all individuals before the law.<sup>54</sup> The Commission pointed to evidence from studies showing that in Brazil, women are affected by family violence in significantly disproportionate numbers to men and that complaints of domestic violence are often not fully investigated or prosecuted.<sup>55</sup> The Commission noted that 70% of the criminal complaints pertaining to domestic violence were put on hold without any conclusion being reached and that only 2% of criminal complaints of domestic violence against women lead to the conviction of the perpetrator.<sup>56</sup> According to the Commission, such a systematic failure on the part of a state to meet a due diligence standard in ensuring the right of women to be free from violence is tantamount to gender-based discrimination.

¶23 In 2005, the CEDAW Committee heard a similar complaint in *A.T. v. Hungary* and, like the Commission, found that the state had failed to act with due diligence in providing the maximum protection of the law to victims of domestic violence.<sup>57</sup> The petitioner described years of abuse from her former common law husband and argued that Hungarian authorities had failed to provide effective protection for her and her two children.<sup>58</sup>

¶24 At the time, Hungary had no legal mechanism for obtaining protection or restraining orders, and the criminal proceedings that had been initiated against her partner had been dragging for years while he remained free.<sup>59</sup> The petitioner could not leave her home because domestic violence shelters were not equipped to take in her disabled son. The petitioner alleged violations of Articles 2, 5, and 16 of CEDAW, which include the right to equality before the law, equality in marriage, and the duty of states to adopt measures to eliminate discrimination against women.<sup>60</sup> Finally, the petitioner alleged that these same violations affect many Hungarian women, and she called for the CEDAW Committee to recommend changes in the Hungarian legal system to protect and support victims of domestic violence.<sup>61</sup>

¶25 The CEDAW Committee determined that Hungary had indeed failed in its obligations under the articles cited by the petitioner.<sup>62</sup> The CEDAW Committee pointed to Hungary’s own

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<sup>51</sup> *Id.* ¶ 56.

<sup>52</sup> *Id.* ¶ 60(2).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* ¶¶ 45-50.

<sup>55</sup> *Id.* ¶ 47.

<sup>56</sup> *Id.* ¶ 49.

<sup>57</sup> *A.T. v. Hungary*, CEDAW Comm., No. 2/2003, ¶ 9.4, U.N. Doc. CEDAW/C/32/D/2/2003 (2005), available at <http://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/CEDAW%20Decision%20on%20AT%20vs%20Hungary%20English.pdf>.

<sup>58</sup> *Id.* ¶ 3.1.

<sup>59</sup> *Id.* ¶¶ 3.1-3.2.

<sup>60</sup> CEDAW, *supra* note 15, art. 2, 5, 16.

<sup>61</sup> *A.T.*, *supra* note 57, ¶ 3.4.

<sup>62</sup> *Id.* ¶¶ 9.2-9.3.

admissions that domestic violence cases do not enjoy high priority in court proceedings and that there was a lack of resources available to the petitioner, even at the time of her complaint to the CEDAW Committee.<sup>63</sup> The CEDAW Committee concluded that the state's inadequate response constituted a "violation of the author's human rights and fundamental freedoms, particularly her right to security of person."<sup>64</sup> Additionally, the CEDAW Committee commented that the state's failure to act in this case was emblematic of the general attitude in Hungary regarding victims of domestic violence. Referencing a CEDAW country report from 2002, the CEDAW Committee noted there was concern about the "persistence of entrenched traditional stereotypes regarding the role and responsibilities of women and men in the family" in Hungary and that such a concern was borne out in this case.<sup>65</sup>

¶26 The CEDAW Committee concluded by recommending that Hungary should immediately ensure that the petitioner and her two children will be secure and will receive services and support, including legal assistance, shelter, and potential reparations.<sup>66</sup> The CEDAW Committee also recommended that, *inter alia*, Hungary should "[a]ssure victims of domestic violence the maximum protection of the law by acting with due diligence to prevent and respond to such violence against women" and "[i]nvestigate promptly, thoroughly, impartially and seriously all allegations of domestic violence and bring the offenders to justice in accordance with international standards."<sup>67</sup> In addition, the CEDAW Committee called for Hungary to "[i]mplement expeditiously and without delay" a prior recommendation to introduce a specific law "prohibiting domestic violence against women, which would provide for protection and exclusion orders."<sup>68</sup> The opinions and recommendations in these cases repeated many of the same provisions of other human rights instruments. In doing so, they reflected a growing consensus on the due diligence standard with increasingly clear guidelines on ensuring access to protection orders and prosecution.

### C. *The Due Diligence Standard as Emerging Customary International Law*

¶27 In light of the growing coalescence of norms regarding violence against women, Secretary-General Kofi Annan came out with a strongly-worded report on domestic violence and officially endorsed the "due diligence" standard in 2006. He drew on the rights guaranteed to women under a range of human rights treaties and declared that "violence against women is a form of discrimination and a violation of human rights."<sup>69</sup> The result of unchecked impunity for perpetrators "is not only denial of justice to the individual victims/survivors, but also reinforcement of prevailing inequalities that affect other women and girls as well."<sup>70</sup>

¶28 Also in 2006, the second Special Rapporteur on Violence Against Women, Yakin Ertürk, issued an important report entitled "The Due Diligence Standard as a Tool for the Elimination of Violence Against Women," which provided firm guidance on using the due diligence standard as the means of judging the efforts of states in addressing domestic violence and achieving justice

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<sup>63</sup> *Id.* ¶ 9.3.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* ¶ 9.4.

<sup>66</sup> *Id.* ¶ I(a)(b).

<sup>67</sup> *Id.* ¶¶ II (a), (b), (f), (g).

<sup>68</sup> *Id.* ¶ II(e).

<sup>69</sup> THE SECRETARY-GENERAL, ENDING VIOLENCE AGAINST WOMEN: FROM WORDS TO ACTION, U.N. Sales No. E.06.IV.8 (2006), available at [http://www.un.org/womenwatch/daw/public/VAW\\_Study/VAWstudyE.pdf](http://www.un.org/womenwatch/daw/public/VAW_Study/VAWstudyE.pdf).

<sup>70</sup> *Id.* at 6-7.

for victims. In her report, Ertürk provided a comprehensive survey of international law, including many of the human rights documents and cases outlined above, as evidence that there is “a rule of customary international law that obliges States to prevent and respond to acts of violence against women with due diligence.”<sup>71</sup>

¶29 Ertürk echoed and reinforced the language of the due diligence standard, calling for states to “prevent, protect, prosecute and provide compensation and map out the parameters of responsibility for State and non-State actors alike in responding to violence.”<sup>72</sup> In surveying national laws and international recommendations, Ertürk concluded that these basic principles – prevent, protect, prosecute, and redress – define the standard, and certain essential practical reforms can give effect to these principles. In terms of prevention, Ertürk encouraged the empowerment of women through education, skills training, legal literacy, and access to community resources that would encourage women’s self-reliance and allow them to negotiate “the terms of their existence in public and private spheres.”<sup>73</sup>

¶30 The report also emphasized the importance of protective orders and noted that states are required to develop “appropriate legislative frameworks, policing systems and judicial procedures to provide adequate protection,” including “a safe and conducive environment for women to report acts of violence” and measures such as restraining or expulsion orders.<sup>74</sup> Ertürk explained that “protection” has consistently taken the form of providing services such as telephone hotlines, health care, counseling centers, legal assistance, shelters, and financial aid to victims of violence.<sup>75</sup>

¶31 Noting “major gaps in the enforcement of protective obligations,” Ertürk called for greater accountability and appropriate investigation and punishment of acts of violence against women.<sup>76</sup> As examples of meeting due diligence obligations, Ertürk pointed to states that have adopted specific legislation that articulates new criminal offenses and provides for the creation of special units for investigation and prosecution.<sup>77</sup> She also suggested that states reinforce the “capacities and powers of police, prosecutors and magistrates” to respond effectively.<sup>78</sup> In directly addressing the “punishment” facet of due diligence obligations, Ertürk noted that there are still “alarming numbers of instances of judges handing down reduced or inappropriate sentences for these crimes.”<sup>79</sup>

¶32 By declaring the establishment of a rule of customary international law, Special Rapporteur Ertürk concluded that the due diligence standard had reached such a level of international consensus that it should be universally recognized and applied. Her suggested

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<sup>71</sup> U.N. Econ. & Soc. Council, Comm’n on Human Rights, 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*, ¶ 29 (Jan. 20, 2006) (prepared by Yakin Ertürk in accordance with Commission on Human Rights Resolution 2005/41) [hereinafter 2006 Due Diligence Report].

<sup>72</sup> *Id.* ¶ 103 (“The due diligence obligation of protection requires States to ensure that women and girls who are victims or at risk of violence have access to justice as well as to health care and support services that respond to their immediate needs, protect against further harm and continue to address the ongoing consequences of violence for individual woman.”); *id.* ¶ 82.

<sup>73</sup> *Id.* ¶ 80.

<sup>74</sup> *Id.* ¶ 82.

<sup>75</sup> *Id.* ¶ 47.

<sup>76</sup> *Id.* ¶¶ 49, 50.

<sup>77</sup> *Id.* ¶ 50.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* ¶ 54.

provisions clarified the obligations of a state, but application of the due diligence standard in international tribunals will continue to shape the practical dimensions of these obligations.

#### IV. EVOLUTION OF THE DUE DILIGENCE STANDARD IN THE EUROPEAN COURT OF HUMAN RIGHTS

¶33 The European Court of Human Rights (ECHR) has incorporated the due diligence standard and issued several rulings that indicate authoritative minimums for compliance. This development began with the ECHR's recognition of state responsibility for non-state actors in meeting obligations under the European Convention on Human Rights. A decade later, the ECHR issued two landmark decisions, *Bevacqua and S. v. Bulgaria* and *Opuz v. Turkey*, which acknowledged and applied the emerging due diligence standard in the context of domestic violence.<sup>80</sup> In addition to establishing precedential standards for member states of the European Union, the ECHR's opinions have attained a high level of authority in international human rights law and have a major role in shaping emerging human rights norms. Thus, the recently-decided cases in the application of the due diligence standard not only reflect a consensus, but also will serve as a catalyst for further progress in the ECHR and beyond.

##### A. Formal Recognition of State Responsibility by the ECHR

¶34 In 1998, the ECHR formally recognized the potential of state responsibility for private acts in *Osman v. United Kingdom*.<sup>81</sup> Similar to the IACHR's decision in *Velasquez Rodriguez*, the ECHR explicitly acknowledged that a state's obligation "extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offenses against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions."<sup>82</sup> The Court established criteria for finding a violation of the positive obligation to protect life, noting that it must be shown that the authorities knew, or ought to have known at the time, of the existence of a "real and immediate risk" and that they failed to "take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."<sup>83</sup> This opinion joined those in the IACHR and the CEDAW Committee in finding that a state can be found complicit in human rights abuses perpetuated by non-state actors.

¶35 Several years later, the ECHR issued a ruling in *M.C. v. Bulgaria* that affirmed and strengthened the state responsibility standards it had set out in *Osman*.<sup>84</sup> In *M.C.*, a young woman filed a complaint with the police accusing two men of rape. A prosecutor authorized an initial investigation, but dropped the inquiry after finding that the use of force or threats in the commission of the rape had not been established beyond a reasonable doubt, as was required by law at the time.<sup>85</sup> In the victim's subsequent appeals, no weight was given to her argument that she was unwilling but unable to resist due to shock and fear.<sup>86</sup> Before the ECHR, the young woman alleged violations of several European Convention articles, including Article 3, which guarantees freedom from torture and inhuman or degrading treatment, Article 8, which states that

<sup>80</sup> *Bevacqua & S. v. Bulgaria*, App. No. 71127/01, Eur. Ct. H.R. (June 12, 2008); *Opuz*, *supra* note 7.

<sup>81</sup> *Osman v. United Kingdom*, 1998-VIII Eur. Ct. H.R. 3124.

<sup>82</sup> *Id.* ¶ 115.

<sup>83</sup> *Id.* ¶ 116.

<sup>84</sup> *M.C. v. Bulgaria*, 2003-XIII Eur. Ct. H.R. 1.

<sup>85</sup> *Id.* ¶¶ 61, 64.

<sup>86</sup> *Id.* ¶ 60.

every person “has the right to respect for his private and family life,” Article 13, which guarantees an effective remedy for those whose rights have been violated, and Article 14, which guarantees equal protection of rights enumerated in the Convention.<sup>87</sup>

¶36 The Court affirmed *Osman*’s holding that a state has a positive obligation to secure respect for private life under Article 8, here extending “respect for private life” to apply to the violations suffered by the young woman. The Court found that although “the choice of means to secure compliance ... is in principle within the State’s margin of appreciation, effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions.”<sup>88</sup> The Court found that Article 3 “gives rise to a positive obligation to conduct an official investigation” and that under Article 8, the Court may assess the effectiveness of such an investigation.<sup>89</sup>

¶37 Of particular relevance, the Court found that Bulgaria was in violation of Article 8 because the investigators and prosecutors failed in meeting their positive obligations as viewed “in light of the relevant modern standards in comparative and international law.”<sup>90</sup> Earlier in the opinion, when discussing how the definition of rape under international law no longer requires the victim to prove force or threats, the Court referenced the law of surrounding nations, case law from the ICTY and ICTR, the Recommendation Rec(2005)5 of the Committee of Ministers of the Council of Europe (“2002 Recommendation”), and General Recommendation 19.<sup>91</sup> In addition, the Court acknowledged that a state’s “margin of appreciation” is limited by the provisions of the European Convention and that the Court “must have regard to the changing conditions within Contracting States and respond, for example, to any evolving convergence as to the standards to be achieved.”<sup>92</sup> Thus, based on evidence of emerging standards, the Court found that states have a positive obligation to first enact criminal-law provisions that criminalize non-consensual sex and then “apply them in practice through investigation and prosecution.”<sup>93</sup> In this way, the Court affirmed its practice of considering the European Convention a “living” document to be read in light of emerging human rights norms – a practice which would be reflected in the Court’s decisions in *Bevacqua and S. v. Bulgaria* and *Opuz v. Turkey*.

#### B. Articulation of a Framework for Meeting the Due Diligence Standard in the ECHR

¶38 In 2002, prior to Special Rapporteur Ertürk’s landmark report codifying “due diligence” as a tool to assess a nation’s progress in addressing domestic violence, the Committee of Ministers of the Council of Europe<sup>94</sup> adopted a recommendation to its forty-seven member states

<sup>87</sup> *Id.* ¶¶ 3, 109-110; European Convention for the Protection of Human Rights and Fundamental Freedoms, Feb. 28, 1996, 213 U.N.T.S. 221, amended by Protocol 11 to The European Convention on Human Rights, 33 I.L.M. 943, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm> [hereinafter European Convention].

<sup>88</sup> M.C., *supra* note 84, ¶ 150.

<sup>89</sup> *Id.* ¶ 152, citing *Osman*, *supra* note 81.

<sup>90</sup> *Id.* ¶ 185.

<sup>91</sup> *Id.* ¶¶ 88-108. In citing General Recommendation 19, the Court quoted the language in paragraph 24 which encouraged states to ensure that laws against “abuse, rape, sexual assault, and other gender-based violence give adequate protection to all women, and respect their integrity and dignity.” *Id.* ¶ 108.

<sup>92</sup> *Id.* ¶ 155.

<sup>93</sup> *Id.* ¶ 153.

<sup>94</sup> Founded on May 5, 1949, by 10 countries, the Council of Europe seeks to develop throughout Europe common and democratic principles based on the European Convention on Human Rights and other reference texts on the protection of individuals. The Committee of Ministers is the Council of Europe’s decision-making body, comprised of the Foreign Affairs Ministers of all the member states, or their permanent diplomatic representatives in Strasbourg.

regarding the protection of women against violence. The 2002 Recommendation recognized the emerging due diligence standard and common practices used to combat violence against women in the family as a means of providing explicit guidance to member states.<sup>95</sup> The 2002 Recommendation incorporated the language and principles that had been evolving worldwide, including express references to DEVAW, CEDAW, the Convention on the Rights of the Child, and the International Criminal Court's recognition of gender-related war crimes and crimes against humanity.<sup>96</sup> Significantly, the 2002 Recommendation articulates the due diligence standard affirmed by the Special Rapporteur and others, noting that member states should "[r]ecognise that states have an obligation to exercise due diligence to prevent, investigate and punish acts of violence, whether those acts are perpetrated by the state or private persons, and provide protection to victims."<sup>97</sup>

¶39 The 2002 Recommendation articulates specific measures that member states ought to implement to exercise due diligence. Although it allows for implementation in a manner "appropriate in the light of national circumstances and preferences,"<sup>98</sup> the 2002 Recommendation identifies several "necessary" provisions, including public education, media training, treatment and assistance for victims, intervention for the perpetrators of violence, as well as particular reforms to criminal law, civil law, and judicial proceedings.<sup>99</sup> By further outlining explicit legal provisions, the 2002 Recommendation offers tangible benchmarks for Council of Europe member states to use in guiding national policy related to protection, investigation, and prosecution.

¶40 Protection provisions include timely and appropriate responses by specially-trained law enforcement officers to requests for assistance,<sup>100</sup> confidentiality in handling victim complaints, and mechanisms to obtain measures of protection. Specific guidance on the provision of protection orders calls for states to enable the judiciary to arrange interim measures to bar the perpetrator from "contacting, communicating with or approaching the victim [or] residing in or entering certain defined areas" and penalize "all breaches of the measures" imposed on perpetrators.<sup>101</sup> Furthermore, measures should be taken to protect victims against threats or revenge following complaints<sup>102</sup> and enable the police to enter residences to arrest perpetrators of violence.<sup>103</sup>

¶41 To better prosecute perpetrators, states should classify all forms of violence within the family as criminal offenses<sup>104</sup> and ensure that proceedings can be initiated by both the victim and the public prosecutor.<sup>105</sup> In addition to providing for public prosecution, the 2002 Recommendation encourages prosecutors to regard violence against women as an aggravating factor in deciding whether or not to prosecute in the public interest.<sup>106</sup> The Recommendation also

<sup>95</sup> Eur. Consult. Ass., *Recommendation Rec (2002)5 of the Committee of Ministers to member states on the protection of women against violence*, 794th Sess. (April 30, 2002), available at [http://www.coe.int/T/E/Human\\_Rights/Equality/PDF\\_Rec\(2002\)5\\_E.pdf](http://www.coe.int/T/E/Human_Rights/Equality/PDF_Rec(2002)5_E.pdf) [hereinafter 2002 Recommendation].

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* § II.

<sup>98</sup> *Id.* § VIII.

<sup>99</sup> *Id.* ¶¶ 6-49.

<sup>100</sup> *Id.* ¶ 29.

<sup>101</sup> *Id.* ¶ 58(b), (f).

<sup>102</sup> *Id.* ¶ 44.

<sup>103</sup> *Id.* ¶ 58(a).

<sup>104</sup> *Id.* ¶ 55.

<sup>105</sup> *Id.* ¶¶ 38, 39.

<sup>106</sup> *Id.* ¶ 44.

calls on governments to revise and increase penalties for deliberate assault and battery committed within the family as well as ensure punishment for all violence and killings in the name of “honor.”<sup>107</sup>

¶42 Lastly, the 2002 Recommendation suggests providing some form of compensation for damages suffered, based on degree of gravity,<sup>108</sup> and granting immigrant victims of domestic violence an independent right to residence so they can leave their abusers without having to leave their new home countries.<sup>109</sup> In addition to broader international recommendations, this Europe-centered instrument established a framework for judging compliance with the due diligence standard in cases arising out of the Council of Europe’s member states.

### C. Consequences for Failing to Meet the Due Diligence Standard

¶43 With this history as a context, the ECHR considered the cases of *Bevacqua and S. v. Bulgaria* and *Opuz v. Turkey*. Decided in 2008 and 2009, these two cases signify a turning point for the ECHR and international law. The Court’s decisions recognize and advance the due diligence standard in the context of domestic violence. Specifically, they enumerate several identifiable minimums which give practical substance to judging a state’s adherence to the principles of protection, investigation, and prosecution. These minimums include the existence of a judicial mechanism for obtaining protection measures, such as orders of protection, and the availability of prosecution in the public interest for all crimes of domestic violence. Furthermore, as declared in *Opuz v. Turkey*, the Court will recognize a state’s failure to exercise due diligence as gender-based discrimination.

#### 1. Bevacqua and S. v. Bulgaria

¶44 Although there are no official statistics on the prevalence of domestic violence in Bulgaria, the U.S. State Department reported in 2007 that police believed one out of every four women had been a victim.<sup>110</sup> Valentina Nickolaeva Bevacqua, the applicant in this case, was one such victim. She argued that Bulgarian government officials had violated her right to respect for private and family life as guaranteed by Article 8 of the European Convention by failing to take the necessary measures to provide an adequate legal framework that would protect her and her young son from the violent behavior of her former husband.<sup>111</sup> She also challenged the relevant Bulgarian law governing prosecution of crimes of bodily harm, its disproportionate and discriminatory impact on women, and its trivialization of domestic violence as a private family matter.<sup>112</sup> Valentina ultimately prevailed in her first claim, as the ECHR held that Bulgaria had not exercised due diligence to protect and investigate the violence against her.

<sup>107</sup> *Id.* ¶¶ 56, 80.

<sup>108</sup> *Id.* ¶ 36.

<sup>109</sup> *Id.* ¶ 59.

<sup>110</sup> COUNTRY REPORT ON HUMAN RIGHTS IN BULGARIA, U.S. DEPT. OF STATE: BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR (2007), available at <http://www.state.gov/g/drl/rls/hrrpt/2007/100552.htm>. Bulgaria is a country of nearly 7.8 million people, with 2.5 million women between the ages of 15 and 64. *Id.* However, in 2006, the courts reviewed only 2,092 domestic violence complaints. *Id.* This small number of complaints relative to the percentage of women likely experiencing abuse illustrates how infrequently domestic violence is even officially reported. See also 2008 BULGARIA REPORT, CENTRAL INTELLIGENCE AGENCY: THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/bu.html> (last visited Dec. 7, 2008).

<sup>111</sup> *Bevacqua*, *supra* note 6, ¶ 65.

<sup>112</sup> *Id.* ¶ 63.

*a) Facts of the Case*

¶45 Valentina filed for divorce from her husband, Mr. N., in March of 2000 and left her home with her young son. She alleged that her husband had abused her and filed a request for an interim custody order.<sup>113</sup> However, it was not until May of 2001 that Valentina was able to finalize her divorce and obtain a court determination of custody issues.<sup>114</sup> In the meantime, Valentina experienced multiple incidents of physical abuse at the hands of Mr. N., often when he forcibly removed their son from her home.<sup>115</sup> Following such incidents, Valentina obtained medical documentation, filed complaints with the prosecutor's office, and continued to file requests for interim custody measures for her son.<sup>116</sup> However, indifference and delay characterized the response of local law enforcement: police took more than a month to issue a warning to Mr. N. for the first instance of child abduction; the courts did not address Valentina's requests for interim measures and enforced a two-month "reconciliation period" prior to the divorce proceeding.<sup>117</sup> Furthermore, complaints to the Ministry of the Interior about the lack of police and judicial response to her safety concerns resulted only in a letter indicating that the Ministry had examined the matter and concluded that the police had exhausted all their options, and the remaining issues constituted a private dispute.<sup>118</sup>

¶46 When the divorce proceedings finally began, there were six months of delays based on such seemingly trivial matters as Mr. N.'s challenge to the registered status of the non-governmental organization where the applicant sought assistance and therapy.<sup>119</sup> In the end, the court found that both parties were responsible for the failed marriage and both were good parents, despite the testimony of a Social Care officer that the child was afraid of his father because he had battered his mother.<sup>120</sup> However, custody was granted to Valentina on the basis of the child's young age. Following an appeal by Mr. N., custody was confirmed in March of 2002, this time with recognition of evidence that Mr. N. had battered the applicant.

¶47 When Valentina and two friends went to collect belongings from Mr. N.'s apartment in June of 2002, he battered her once again. She visited a doctor who recorded evidence of bruises on her face, arm, and hip, and she again complained to prosecution authorities. However, local prosecutors issued no decisions until months later, when they refused to initiate criminal proceedings against Mr. N. The prosecutors noted that under Bulgarian law, it was open to the applicant to bring private prosecution proceedings since her injuries fell into the category of "light bodily injuries," as opposed to "serious" or "medium."<sup>121</sup>

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<sup>113</sup> *Id.* ¶ 7.

<sup>114</sup> *Id.* ¶¶ 33-34.

<sup>115</sup> *Id.* ¶¶ 11-18, 21, 22-23.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* Of particular relevance, the Bulgarian Supreme Court had previously held that no interim measures regarding custody should be ordered during a mandatory two-month reconciliation period unless the interest of the child requires it and where delay may adversely affect the child's development and upbringing. *Id.* ¶ 40.

<sup>118</sup> *Id.* ¶ 24.

<sup>119</sup> *Id.* ¶¶ 29-30.

<sup>120</sup> *Id.* ¶¶ 33-34.

<sup>121</sup> *Id.* ¶¶ 33-38. Under the guidelines of the Bulgarian Penal Code and Code of Criminal Procedure, criminal proceedings regarding bodily harm are divided into categories depending on the "serious", "medium" or "light" nature of the injury. The Penal Code provides specific definitions of each level. Bulgarian courts have held that facial bruises, a broken nose and head contusions without loss of consciousness are examples of light bodily harm. *Id.* ¶ 45 (citing Bulgarian Supreme Court interpretive circular IIIBC № 3, 27.11.1979). Serious bodily harm includes injuries which cause: mental disorder; continuous blindness of either or both eyes; permanent deafness; loss of speech; generative disability; disfigurement when it causes permanent disorder of the speech or of a sense organ;

¶48 According to the Bulgarian Penal Code at the time, when “medium bodily harm” or “light bodily harm” was inflicted by a spouse or other family member, criminal proceedings had to be initiated by the victim rather than a public prosecutor.<sup>122</sup> However, when “medium bodily harm” was inflicted by a stranger, the public prosecutor could to initiate proceedings. Where criminal proceedings are initiated by the victim, he or she acts as private prosecutor, and proceedings are discontinued if the victim fails to appear in court.<sup>123</sup> In this case, the applicant did not pursue private prosecution of Mr. N. beyond her initial complaints to prosecuting authorities.<sup>124</sup>

### b) The Court’s Judgment

¶49 Before the ECHR, Valentina argued that the Bulgarian authorities failed to intervene and assist her and her son pursuant to their obligations under Articles 3, 8, 13, and 14 of the European Convention. In addition, she argued that the Bulgarian Penal Code’s requirement that a spouse initiate criminal proceedings for light and medium bodily injury was incompatible with the rights guaranteed in these Articles.<sup>125</sup> In considering the case, the Court not only reviewed domestic law and ECHR case law, but also incorporated other supporting international material, including the Special Rapporteur’s report on using the due diligence standard as a tool. This inclusion not only indicates the report’s influence on the Court, but also the gives the report additional credibility as a universal legal standard.

¶50 In its review of Bulgarian law, the Court referenced the relevant provisions of the domestic Code of Civil Procedure, the Penal Code, and the Code of Criminal Procedure.<sup>126</sup> The Court also referred to a Child Protection Act passed in 2000 that created a State Child Protection Agency that, as of February 2001, was empowered to order protection measures for children in danger.<sup>127</sup>

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loss of one kidney, the spleen or a branch of the lung; loss or crippling of a leg or a hand; permanent general health disorder that endangers life. Penal Code, at art. 128, *reprinted in* DURZHAVEN VESTNIK [State Gazette] (2005) (Bulg.), *available at* [http://www.mvr.bg/NR/rdonlyres/330B548F-7504-433A-BE65-5686B7D7FCBB/0/04\\_Penal\\_Code\\_EN.pdf](http://www.mvr.bg/NR/rdonlyres/330B548F-7504-433A-BE65-5686B7D7FCBB/0/04_Penal_Code_EN.pdf) [hereinafter Penal Code]. Medium or “average” bodily harm includes injury which causes: a permanent weakening of sight or hearing; permanent speech difficulty, difficulty in moving limbs, the body or neck, impairment of the functions of the genitals without causing generative disability; breaking of the jaw or knocking out teeth where speech or chewing is then impeded, disfiguring of the face or other parts of the body; permanent health disorder that does not endanger life or a health disorder which temporarily endangers life; injuries penetrating the skull, the chest and the abdominal cavity. *Id.* at art. 129. Light bodily harm is defined as a resulting health disorder not covered by the above categories or, with a corresponding lesser criminal sentence, demonstrated pain and suffering without a health disorder. *Id.* at art. 130.

<sup>122</sup> Penal Code, *supra* note 121, at art. 161.

<sup>123</sup> Bevacqua, *supra* note 6, ¶¶ 44-46. *See also* Criminal Procedure Code, *reprinted in* DURZHAVEN VESTNIK [State Gazette] (2005) (Bulg.), *available at* [http://www.mjeli.government.bg/Npk/docs/CRIMINAL\\_PROCEDURE\\_CODE.pdf](http://www.mjeli.government.bg/Npk/docs/CRIMINAL_PROCEDURE_CODE.pdf).

<sup>124</sup> Bevacqua, *supra* note 6, ¶ 81. The applicant did report abuse to prosecution authorities, but this does not mean she had initiated criminal proceedings. In some cases, prosecutors become involved informally and issue warnings to the spouse and record the warning, but take no further action. These warnings, however, are not used as a basis for prosecution nor are they used as evidence against a batterer in court if the abuse continues. MINNESOTA ADVOCATES FOR HUMAN RIGHTS, DOMESTIC VIOLENCE IN BULGARIA 15 (1996), *available at*: <http://www.mnadvocates.org/sites/608a3887-dd53-4796-8904-997a0131ca54/uploads/bulgaria.PDF>.

<sup>125</sup> Bevacqua, *supra* note 6, ¶ 63. The applicant had also argued under Article 6 that the length of custody proceedings violated her and her son’s right to a hearing within a reasonable time. The Court’s final holding determined that the length of the custody proceedings, as a civil matter, did not violate Article 6 of the European Convention. *Id.* ¶ 93. According to the Court, Article 6 guarantees that everyone is entitled to a hearing within a “reasonable time” regarding civil rights and obligations. *Id.* ¶ 85. The Court reasoned that while they did take into account the length of proceedings with regard to the applicant’s Article 8 claims, in a purely civil custody dispute setting, the length was not unreasonable. *Id.* ¶¶ 91-93.

<sup>126</sup> *Id.* ¶¶ 39-46.

<sup>127</sup> *Id.* ¶ 47.

In addition, the Court considered the Protection Against Domestic Violence Act enacted in March 2005 whereby courts are now authorized to issue injunctions to remove a perpetrator from a common home, bar him from approaching a victim, and temporarily remove a child from his custody.<sup>128</sup>

¶51 Following its review of Bulgarian law, the Court turned immediately to documents and law that address the issue of domestic violence internationally and in Europe. Among the international materials it discussed were DEVAW and Special Rapporteur Ertürk's report of 2006. The Court referred to these documents in its discussion of the due diligence principle and its acknowledgement of the Rapporteur's conclusion that there exists a rule of customary international law that obliges states to prevent and respond to acts of violence against women.<sup>129</sup> The Court also referenced the developing case law, including *Osman v. the United Kingdom*, *Velasquez Rodriguez v. Honduras*, *Maria da Penha Maia Fernandes (Brazil)*, and *A.T. v. Hungary*.<sup>130</sup> In two brief paragraphs, the ECHR incorporated into its findings the extensive international foundation for due diligence obligations regarding domestic violence.

¶52 The Court relied heavily on the 2002 Recommendation.<sup>131</sup> It summarized several of the key points:

Member states should ensure that all victims of violence are able to institute proceedings, make provisions to ensure that criminal proceedings can be initiated by the public prosecutors, encourage prosecutors to regard violence against women as an aggravating or decisive factor in deciding whether or not to prosecute in the public interest, ensure where necessary that measures are taken to protect victims effectively against threats and possible acts of revenge and take specific measures to ensure that children's rights are protected during proceedings.<sup>132</sup>

¶53 The Court also referenced the recommendation that all states should take steps to ensure that the judiciary can authorize interim measures and protection orders that would be punishable by law if violated.<sup>133</sup>

¶54 Lastly, the Court turned to relevant law from the European Convention, focusing on Article 8 as the provision Bulgaria potentially violated. Article 8 guarantees the right to respect for private and family life without "interference by a public authority... except such as is in accordance with the law and is necessary in a democratic society in the interests 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>134</sup> The Court noted that Article 8 had previously been interpreted to encompass "positive obligations inherent in effective 'respect' for private and family life and these obligations may involve the adoption of measures in the sphere of the relations of individuals between themselves." Since the concept of "private life" includes a person's "physical and psychological

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<sup>128</sup> *Id.* ¶ 48.

<sup>129</sup> *Id.* ¶¶ 52, 53.

<sup>130</sup> *Id.* ¶ 53.

<sup>131</sup> *Id.* ¶¶ 49-51.

<sup>132</sup> *Id.* ¶ 50.

<sup>133</sup> *Id.* ¶ 51.

<sup>134</sup> European Convention, *supra* note 87, art. 8.

integrity,” these positive obligations may include a “duty to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals.”<sup>135</sup>

¶55 Upon its review, the Court held that “the authorities’ failure to impose sanctions or otherwise enforce Mr. N.’s obligation to refrain from unlawful acts was critical” in this case and it “amounted to a refusal to provide the immediate assistance the applicant needed.”<sup>136</sup> Measures to obtain protection such as those recommended by the Committee of Ministers or those recently introduced in Bulgaria’s 2005 Protection Against Domestic Violence Act would have been necessary to protect the personal integrity of the applicant and her son.<sup>137</sup> However, in this case, the Court did not find that the failure of the prosecutor to bring charges against Mr. N. was a violation of the European Convention.

#### i) Requiring Measures of Protection

¶56 In reviewing the facts of Mr. N.’s behavior, the Court found that the “measures taken by the police and prosecuting authorities on the basis of their general powers did not prove effective” and that improved administrative and policing measures like those later enunciated in the Bulgarian Domestic Violence Act of 2005 were necessary.<sup>138</sup> Specifically, the Act allows for emergency measures, an order to remove the abuser from the home, a traditional restraining order prohibiting contact, and temporary relocation of a child with the parent petitioner.<sup>139</sup> Thus, the Court’s decision establishes a particular mechanism—enforced protection orders—as a minimum requirement for compliance with due diligence obligations.

#### ii) Failing to Condemn the Lack of Public Prosecution

¶57 In arguing that the State had failed to address immediate threats to her and her son, Valentina asserted that the Penal Code, which places the burden on the victim of domestic violence to prosecute for “medium” and “light” bodily injury, was “incompatible with the State’s duty to provide protection against domestic violence and was discriminatory in that the law’s shortcomings impacted disproportionately on women.”<sup>140</sup> Essentially, the applicant argued that such a law continued to treat the issue of domestic violence as a “private” matter not worthy of public prosecution.<sup>141</sup>

¶58 In its decision, the Court did not find that the Penal Code’s requirement of a victim to act as private prosecutor was a violation of Convention rights under Article 8. Instead, the Court applied the “margin of appreciation” doctrine, which extends states some latitude for meeting the Convention’s requirements using preferred national policies and procedures.<sup>142</sup> Specifically, the Court held that “the choice of a means to secure compliance with Article 8 in the sphere of the relations of individuals between themselves is in principle a matter that falls within the domestic authorities’ margin of appreciation.”<sup>143</sup>

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<sup>135</sup> Bevacqua. *supra* note 6, ¶ 64.

<sup>136</sup> *Id.* ¶ 84.

<sup>137</sup> *Id.* ¶ 83.

<sup>138</sup> *Id.*

<sup>139</sup> Protection Against Domestic Violence Act § 5, *published in Durzhaven Vestnik* [State Gazette] (2005) (Bulg.).

<sup>140</sup> Bevacqua, *supra* note 6, ¶ 63.

<sup>141</sup> *Id.* ¶ 83.

<sup>142</sup> *Id.* ¶ 82.

<sup>143</sup> *Id.*

¶59 However, the Court suggested that this topic was not closed to future litigation. In its summary of the 2002 Recommendation, the Court had noted that it called for all member nations to “make provisions to ensure that criminal proceedings can be initiated by the public prosecutors.”<sup>144</sup> Here, the Court merely rejected the applicant’s argument that her Convention rights could be secured only with state-assisted prosecution and that such prosecution was required in all cases of domestic violence.<sup>145</sup> According to the most recent version of the Criminal Procedure Code, in “exceptional” cases, the prosecutor may initiate proceedings upon a finding that the complainant “cannot defend his or her rights and lawful interests due to [a] state of helplessness or dependency upon the perpetrator of the crime.”<sup>146</sup> Where the prosecutor initiates proceedings, the case will not be terminated if the victim fails to appear in court.<sup>147</sup> Since prosecutors can choose to step in for “exceptional” cases under Bulgarian law, the Court may have tried to limit its decision in this case. Still, the Court observed that despite its ruling, Bulgarian law “may be found, in certain circumstances, to raise an issue of compatibility with the Convention.”<sup>148</sup>

¶60 This is especially true given the reality of the process a victim of domestic violence must face if she wishes to prosecute her abuser on her own. In a report from 1996, the Minnesota Advocates for Human Rights found that in making her case, a victim of domestic violence in Bulgaria must obtain a medical certificate from the Department of Criminal Medicine documenting her injuries.<sup>149</sup> The reviewing physician must then categorize the injury as serious, medium, or light.<sup>150</sup> In this way, the physician makes a legal determination that influences the outcome of the criminal action before the victim ever goes to court. The victim must also find her own witnesses, and, although she can ask the state prosecutor or the judge to help, they are not obligated to do so.<sup>151</sup> The report also noted the observations of a Regional Court judge who explained that police officers frequently do not cooperate when the victim asks for their testimony.<sup>152</sup> This judge explained that she often must call police supervisors herself to request that the investigating officers cooperate as witnesses at the trials of perpetrators of domestic violence.<sup>153</sup> Additionally, the report found that even when a woman is able to obtain a conviction, the abuser likely receives little or no punishment.<sup>154</sup>

### iii) Failing to Consider Discrimination under Article 14

¶61 The Court did not address the applicant’s Article 14 claim regarding the discriminatory effects of the Criminal Code provisions on female victims of domestic violence.<sup>155</sup> As discussed

<sup>144</sup> *Id.* ¶ 50.

<sup>145</sup> *Id.*

<sup>146</sup> Code of Criminal Procedure, art. 49 (Bulg.).

<sup>147</sup> *Id.*

<sup>148</sup> Bevacqua, *supra* note 6, ¶ 82.

<sup>149</sup> MINNESOTA ADVOCATES FOR HUMAN RIGHTS, *supra* note 124, at 11.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 12.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> The ECHR also did not address the applicant’s Article 3 claim, which prohibits torture or inhuman or degrading treatment or punishment. European Convention, *supra* note 87, art. 3. This claim was likely based on the more recent movement to categorize systematic domestic violence as a violation of this prohibition. UNICEF, *supra* note 5, at 10. Special Rapporteur Radhika Coomaraswamy has articulated the emergence of the argument that domestic violence involves the four critical elements that constitute torture: “(a) it causes severe physical and or mental pain,

above, Article 14 guarantees that the rights enumerated in the European Convention “shall be secured without discrimination on any ground,” including gender.<sup>156</sup> In its survey of international law, the Court did not specifically point to the issue of gender-based discrimination in finding a violation of the Convention, despite the inclusion of Article 14 in the applicant’s complaint. However, one of the instruments the Court cited in its survey of laws was DEVAW, which recognizes domestic violence as “a manifestation of historically unequal power relationships between men and women” and condemns the violence as one of the “crucial social mechanisms by which women are forced into a subordinate position compared with men.”<sup>157</sup>

¶162 As it currently stands, the practical result of the Bulgarian Criminal Code is discrimination. If a woman is stabbed with a knife by a stranger on the street and is categorized as receiving “medium” bodily harm—harm that does not result in death or permanent injury—the state can prosecute the attacker. However, if the same woman is stabbed in her home by her husband and receives the same injuries, the state will prosecute in the public interest only in “exceptional” cases. In the words of a prosecutor interviewed in 1996, “a woman must decide for herself whether she wants to harm the family relationship through prosecution, the state will not damage the family by assisting her.”<sup>158</sup> Such a law yet again reflects the notion that violence in the family—violence that disproportionately impacts women—is a private issue, and prosecution is usually not in the “public” interest.

## 2. Opuz v. Turkey

¶163 Nahide Opuz, the applicant in this case, as well as her mother, endured years of physical abuse and threats from Nahide’s husband (“H.O.”), who eventually killed her mother. Nahide and her mother had complained to law enforcement authorities on numerous occasions, but the authorities had done little in response. Nahide argued that the ineffectiveness of the Turkish authorities had violated her mother’s right to life under Article 2 and her own right to be free from torture and ill-treatment under Article 3. She also contended that the inadequate response by law enforcement was a result of gender-based discrimination and thus a violation of Article 14. In deciding the case, the Court observed that “a crucial question... is whether the local authorities displayed due diligence to prevent violence against the applicant and her mother, in particular by pursuing criminal or other appropriate preventive measures against H.O. despite the withdrawal of complaints by the victims.”<sup>159</sup> The Court’s historic judgment found that there had indeed been violations and that Turkey had failed to exercise due diligence in providing effective protection measures and prosecution.

### *a) Facts of the Case*

¶164 Nahide’s mother married A.O., and Nahide started a relationship with A.O.’s son, H.O., in 1990. Nahide and H.O. had three children, and they were officially married in 1995. The Court’s opinion in the case describes numerous incidents of serious harassment, abuse, and violence perpetrated against Nahide and her mother by both A.O. and H.O., including the murder of

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it is (b) intentionally inflicted, (c) for specified purposes and (d) with some form of official involvement, whether active or passive.” *Id.*

<sup>156</sup> European Convention, *supra* note 87, art. 14.

<sup>157</sup> DEVAW, *supra* note 35.

<sup>158</sup> MINNESOTA ADVOCATES FOR HUMAN RIGHTS, *supra* note 124, at 11. The report also noted that “a representative of the National Police acknowledged that police do not pay much attention to ‘domestic disputes.’” *Id.* at 14.

<sup>159</sup> Opuz, *supra* note 7, ¶ 131.

Nahide's mother by H.O. in 2002. Even as the complaint was being heard in the ECHR, H.O. continued to threaten Nahide's safety.<sup>160</sup>

¶165 In its opinion, the Court reviewed the history of H.O.'s violent relationship with his wife and mother-in-law. In 1995, H.O. beat Nahide and threatened her with death.<sup>161</sup> She complained to the public prosecutor but later withdrew her complaint. According to the criminal code in place at the time, this removed the basis for the proceedings, and the case had to be dropped.<sup>162</sup> In 1996, H.O. beat Nahide, and the injuries were considered life-threatening; the public prosecutor filed charges, but after H.O. was released pending trial, Nahide withdrew her complaint. The magistrate's court found that the offense fell under the same criminal code provision as the previous injury and that the withdrawal of the victim's complaint required dismissal.<sup>163</sup> In 1998, H.O. threatened and injured Nahide with a knife, but in this case the public prosecutor cited insufficient evidence to prove a knife assault and determined there was no public interest in the case since the victim could pursue a private lawsuit for battery.<sup>164</sup> That same year, H.O. drove a car into Nahide and her mother, causing life-threatening injuries to her mother.<sup>165</sup> The public prosecutor initiated criminal proceedings while the applicant asked for protective measures and filed for divorce. After 25 days in jail, H.O. was released pending trial. The applicant and her mother subsequently dropped their complaints, and the applicant moved back in with H.O. Nonetheless, the prosecutor continued to pursue the case, and several months later H.O. was sentenced to three months imprisonment for causing serious injuries to his mother-in-law. However, his sentence was then commuted to a mere monetary fine.<sup>166</sup>

¶166 In 2001, H.O. stabbed Nahide seven times, turned himself in along with the knife used, and confessed.<sup>167</sup> He was released after giving his statement and, after considerable effort on the part of the Nahide's lawyer, the prosecutor charged him with knife assault. Six months later, he received as his penalty a fine that he could pay in eight installments.<sup>168</sup> Throughout 2001, Nahide and her mother complained to the prosecutor about death threats from H.O. and A.O. Nahide's mother alleged that H.O. wandered around her property with knives and guns.<sup>169</sup> After Nahide's mother pleaded to the prosecutor that her own life was in immediate danger from H.O., the prosecutor made a request for future phone records, but did nothing else.<sup>170</sup> Finally, in 2002, Nahide's mother made plans to move away with her daughter. As she climbed into a moving truck loaded with furniture, H.O. confronted her and shot her to death.<sup>171</sup>

¶167 Following the killing, the prosecutor filed an indictment, and H.O. was arrested. H.O. claimed he killed his mother-in-law for the sake of his honor and his children because she had induced his wife to lead an immoral life.<sup>172</sup> Six years later, in 2008, H.O. was convicted of murder and sentenced to life imprisonment; however, because the court found that he had committed the offense as a result of provocation, and he had conducted himself well during the

<sup>160</sup> *Id.* ¶¶ 65-69.

<sup>161</sup> *Id.* ¶ 9-10.

<sup>162</sup> *Id.* ¶ 11 (under Article 456, §4 of Bulgaria's Criminal Code).

<sup>163</sup> *Id.* ¶¶ 13-19.

<sup>164</sup> *Id.* ¶¶ 20-21.

<sup>165</sup> *Id.* ¶ 23.

<sup>166</sup> *Id.* ¶¶ 25-36.

<sup>167</sup> *Id.* ¶¶ 37-38.

<sup>168</sup> *Id.* ¶¶ 39-44.

<sup>169</sup> *Id.* ¶¶ 45-52.

<sup>170</sup> *Id.* ¶ 51.

<sup>171</sup> *Id.* ¶ 54.

<sup>172</sup> *Id.* ¶¶ 55-56.

trial, his sentence was reduced to 15 years and a fine. The court allowed him to be released pending his appeal.<sup>173</sup> After his release, Nahide again asked for protective measures, as H.O. stalked her and threatened her boyfriend.<sup>174</sup> Only with continued prodding by the ECHR were any protection measures implemented: the government distributed photos of H.O. to local police agencies with orders to arrest him if he was found near the applicant.

### *b) The Court's Judgment*

¶168 In reaching a judgment, the Court reviewed the relevant law, as it had in *Bevacqua*. The Court looked to the Turkish Criminal Code and the Family Protection Act (Law No. 4320) that was passed in 1998.<sup>175</sup> The Court also relied on relevant international and comparative law, including sources discussed throughout this paper and in the *Bevacqua* opinion.<sup>176</sup> Significantly, the Court again referenced Special Rapporteur Ertürk's 2006 report on the due diligence standard and quoted her conclusion that there is a rule of customary international law that "'obliges States to prevent and respond to acts of violence against women with due diligence.'"<sup>177</sup> Furthermore, in referencing the 2002 Recommendation, the Court used the same language as it had in *Bevacqua* to summarize and reinforce the suggested measures states should take in addressing violence against women.<sup>178</sup>

¶169 However, unlike in *Bevacqua*, the Court did not make its findings based on Article 8's protections of the right to personal integrity. Instead, the Court found that Turkey had violated Nahide's mother's right to life under Articles 2 and the applicant's right to be free from torture or ill-treatment under Article 3, and that the failure to exercise due diligence in securing these rights stemmed from gender-based discrimination in violation of Article 14. With these landmark holdings, the Court continued its work from *Bevacqua* in solidifying a state's obligation to enable victims of abuse to obtain protection orders and enable prosecutors to bring charges in the public interest.

### *i) Exercising Due Diligence in Protecting the Right to Life*

¶170 The Court first addressed Nahide's charge that Article 2 of the European Convention had been violated when Turkey failed to exercise due diligence in protecting the life of her mother. Article 2 provides that everyone's "right to life shall be protected by law,"<sup>179</sup> and the applicant argued that despite numerous complaints to the public prosecutor's office, no protective measures were taken for her or her mother, even after the Family Protection Act was in effect.<sup>180</sup> In assessing Turkey's responsibility, the Court recalled that positive obligations arise when it is established that authorities knew or ought to have known of a "real and immediate risk to the life of an identified individual" and that they failed to take measures within their powers that might

<sup>173</sup> *Id.* ¶ 57.

<sup>174</sup> *Id.* ¶¶ 59-60.

<sup>175</sup> *Id.* ¶¶ 70-71.

<sup>176</sup> *Id.* ¶¶ 72-90. Sources included CEDAW, the CEDAW Committee's General Recommendation 19, the *A.T. v. Hungary* opinion, DEVAW, jurisprudence in the Inter-American system and the Belém Do Pará Convention, comparative law from fellow member states of the Council of Europe, and the Recommendation Rec(2002)5 of the Council's Committee of Ministers. *Id.*

<sup>177</sup> *Id.* ¶ 79.

<sup>178</sup> *Id.* ¶¶ 80-82.

<sup>179</sup> *Id.* ¶ 118.

<sup>180</sup> *Id.* ¶ 119.

have avoided the risk.<sup>181</sup> Based on H.O.'s history, the Court found that it was "obvious" he posed a significant risk of further violence.<sup>182</sup> Furthermore, the Turkish criminal law system "did not have an adequate deterrent effect capable of ensuring the effective prevention of the unlawful acts committed by H.O."<sup>183</sup>

¶71 The Court criticized the fact that H.O. often escaped criminal prosecution and faced lenient sentences when he was convicted, including the lower court's sentence mitigation because he killed her mother to protect his honor.<sup>184</sup> Turkey's legislative framework at the time required official complaints by victims to pursue criminal investigations when criminal acts did not result in sickness or unfitness for work for ten days or more.<sup>185</sup> The Court found this legislative framework "fell short of the requirements inherent in the State's positive obligations to establish and apply effectively a system punishing all forms of domestic violence and providing sufficient safeguards for the victims."<sup>186</sup> Referring to comparative law material from other European states regarding the power of prosecutors to continue criminal proceedings, the Court observed that there were certain factors a prosecutor could consider when deciding to pursue prosecution in the public interest.<sup>187</sup> These factors include:

the seriousness of the offence; whether the victim's injuries are physical or psychological; if the defendant used a weapon; if the defendant has made any threats since the attack; if the defendant planned the attack; the effect (including psychological) on any children living in the household; the chances of the defendant offending again; the continuing threat to the health and safety of the victim or anyone else who was, or could become, involved; the current state of the victim's relationship with the defendant; the effect on that relationship of continuing with the prosecution against the victim's wishes; the history of the relationship, particularly if there had been any other violence in the past; and the defendant's criminal history, particularly any previous violence."<sup>188</sup>

¶72 Based on this comparative analysis, the Court inferred that the more serious the offense or the greater the risk of further offenses, the more likely it is that the prosecution will continue in the public interest, even in cases where the victims withdraw their complaints.<sup>189</sup> The Court noted that Nahide and her mother always withdrew their complaints when H.O. was at liberty or following his release from custody.<sup>190</sup> The Turkish government had argued that interfering with their wishes would have resulted in a violation of victim rights under Article 8. However, in response, the Court referred to the decisions in *Bevacqua* and reiterated that in some instances interference may be necessary to protect the health and rights of others or to prevent criminal acts. In this case, "[t]he seriousness of the risk to the applicant's mother rendered such

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<sup>181</sup> *Id.* ¶ 129.

<sup>182</sup> *Id.* ¶ 134.

<sup>183</sup> *Id.* ¶ 153.

<sup>184</sup> *Id.* ¶ 121.

<sup>185</sup> *Id.* ¶ 145 (citing Articles 456 § 4, 457 and 460 of Bulgaria's Criminal Code at the time).

<sup>186</sup> Opuz, *supra* note 7, ¶ 145.

<sup>187</sup> *Id.* ¶¶ 87, 138.

<sup>188</sup> *Id.* ¶ 138.

<sup>189</sup> *Id.* ¶ 139.

<sup>190</sup> *Id.* ¶ 143.

intervention by the authorities necessary.”<sup>191</sup> The Court observed that law enforcement officers could have responded more thoroughly, and judges could have ordered protective measures even if the victims had not requested them.<sup>192</sup>

¶73 Significantly, the Court concluded that, given the seriousness of H.O.’s crimes, the prosecuting authorities should have been able to pursue prosecution as a matter of public interest, even when the victims withdrew their complaints. Failure to do so before the applicant’s mother was killed deprived her of her life and safety,<sup>193</sup> and the Court suggested that the authorities’ failure to respond promptly to the killing after it happened created “the appearance of tolerance of unlawful acts.”<sup>194</sup> [Note that the Court did not actually connect “failure to respond promptly” to “the appearance of tolerance of unlawful acts” in paragraph 150.] In light of these failures, Turkish national authorities “cannot be considered to have displayed due diligence.”<sup>195</sup> The Court suggested that these failures could have been remedied with use of protection orders and prosecution in the public interest.

#### ii) Exercising Due Diligence in Preventing Torture and Ill-treatment

¶74 After finding the violation of Article 2, the Court also found a violation of Article 3, which articulates the right to be free from torture or degrading treatment or punishment.<sup>196</sup> The Court held that this violation resulted from “State authorities’ failure to take protective measures in the form of effective deterrence against serious breaches of the applicant’s personal integrity by her husband.”<sup>197</sup> Under Article 3, ill-treatment must reach a certain level of severity, but this minimum is relative to the circumstances of the case, the nature and context of the treatment, its duration, physical, and mental effects, and sometimes, the sex, age, and health of the victim.<sup>198</sup> In this instance, the Court concluded that the violence from which Nahide suffered, “in the form of physical injuries and psychological pressure,” was “sufficiently serious” to amount to ill-treatment, especially given the vulnerable situation of women in south-east Turkey.<sup>199</sup> Notably, in finding that domestic violence can rise to the level of ill-treatment, the Court looked for “consensus and common values emerging from the practices of European States and specialised international instruments,” such as CEDAW and the Convention of Belém Do Pará, which recognize the “evolution of norms and principles in international law” and specifically set out states’ duties relating to eradication of gender-based violence.<sup>200</sup>

¶75 Ultimately, the Court found that none of the meager measures taken by authorities were sufficient to stop H.O. from perpetrating further violence. Until January 1998, when the Family Protection Act was entered into force, Turkish law lacked a mechanism for obtaining protection orders or policing measures to protect individuals against domestic violence.<sup>201</sup> However, even once the Family Protection Act was in place, authorities did not exercise due diligence in implementing the relevant protection measures. As it did with regard to the Article 2 violations,

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<sup>191</sup> *Id.* ¶ 144.

<sup>192</sup> *Id.* ¶ 148.

<sup>193</sup> *Id.* ¶ 145.

<sup>194</sup> *Id.* ¶ 145, 150.

<sup>195</sup> *Id.* ¶149.

<sup>196</sup> European Convention, *supra* note 87, at art. 3.

<sup>197</sup> *Opuz v. Turkey*, *supra* note 7, ¶ 176.

<sup>198</sup> *Id.* ¶ 158.

<sup>199</sup> *Id.* ¶¶ 160, 161.

<sup>200</sup> *Id.* ¶ 164.

<sup>201</sup> *Id.* ¶ 171.

the Court found that the legislative framework should have enabled prosecuting authorities to pursue criminal investigations despite withdrawal of complaints.<sup>202</sup> The Court cataloged all the assaults and injuries and contrasted them with the lack of intervention and punishment. The Court was “particularly struck by the Diyarbakir Magistrate’s Court’s decision to impose merely a small fine, which could be paid by installments, on H.O. as punishment for stabbing the applicant seven times.”<sup>203</sup> The Court concluded that the local authorities failed to display “the required diligence to prevent the recurrence of violent attacks against the applicant” through protective measures, “since the applicant’s husband perpetrated them without hindrance” or criminal prosecution.<sup>204</sup>

### iii) Discrimination in Failing to Exercise Due Diligence

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Finally, the Court in *Opuz* made the historic finding that since domestic violence was shown to affect women far more than men and since Turkey had failed to exercise due diligence in providing protection from domestic violence, the state had violated Article 14 of the European Convention. In clarifying its standards for finding discrimination, the Court looked to *D.H. and Others v. Czech Republic* for the precedential holding that “[W]here an applicant is able to show, on the basis of undisputed official statistics, the existence of a prima facie indication that a specific rule – although formulated in a neutral manner – in fact affects a clearly higher percentage of women than men, it is for the respondent Government to show that this is the result of objective factors unrelated to any discrimination on the grounds of sex.”<sup>205</sup> Consequently, the Court in this case reviewed reports and statistics provided by a range of organizations, including the Purple Roof Women’s Shelter Foundation, the Women’s Rights Information and Implementation Centre of the Diyarbakir Bar Association (KA-MER), Amnesty International, Diyarbakir Bar Association’s Justice For All Project, and the Women’s Rights Information and Implementation Centre.<sup>206</sup> These reports found that women were the primary victims of domestic violence and that an attempt to address such violence would face significant obstacles. Requests for orders of protection were treated as divorce actions with delayed hearings, women saw limited success when they applied for protection orders, the police discouraged women from pursuing legal action and instead encouraged reconciliation, and perpetrators of honor crimes were granted leniency.<sup>207</sup> The Turkish government did not challenge these findings. In its analysis of the data, the Court found that the “highest number of reported victims of domestic violence is in Diyarbakir, where the applicant lived at the relevant time, and that the victims were all women who suffered mostly physical violence.”<sup>208</sup>

¶77

In addition to noting the statistical evidence, the Court acknowledged that it once again had looked to international legal instruments, decisions, and principles, such as the due diligence standard, in finding the existence of gender discrimination.<sup>209</sup> The Court concluded that “the State’s failure to protect women against domestic violence breaches their right to equal

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<sup>202</sup> *Id.* ¶ 168.

<sup>203</sup> *Id.* ¶ 169.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* ¶ 183, citing to *Hoogendijk v. the Netherlands*, App. No. 58461/00, Eur. Ct. H.R. (2005).

<sup>206</sup> *Opuz*, *supra* note 7, ¶¶ 91-106.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* ¶ 194.

<sup>209</sup> *Id.* ¶ 185.

protection of the law and that this failure does not need to be intentional.”<sup>210</sup> The Court welcomed Turkey’s recent legal reforms, but found serious problems with the implementation of the laws; police still treated domestic violence as a family dispute to be resolved privately, courts treated requests for protection as divorce actions rather than urgent requests for intervention, and authorities continued to tolerate domestic violence.<sup>211</sup> The Court concluded that the applicant was able to demonstrate that “domestic violence affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence.”<sup>212</sup> Furthermore, the violence suffered by Nahide and her mother “may be regarded as gender-based violence which is a form of discrimination against women.”<sup>213</sup>

## V. CONCLUSION

¶78 The opinions in *Bevacqua* and *Opuz* represent a significant progression in the articulation of the due diligence standard. Specifically, as the Court held in these cases, states party to the European Convention must provide individuals with the means to obtain some form of enforceable protective measure, such as an order of protection, a restraining order, or an expulsion order. Member states must also establish the legal framework to enable criminal prosecutions of domestic violence when it is in the public interest, even if the victim withdraws her complaint. Through the holdings in *Bevacqua* and *Opuz*, these basic standards have gained binding legal authority within the jurisdiction of the ECHR. Furthermore, using these standards as a reference point, all nations can now begin to measure their success in exercising due diligence to prevent domestic violence, protect victims, and investigate and prosecute perpetrators.

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<sup>210</sup> *Id.* ¶ 191.

<sup>211</sup> *Id.* ¶ 195.

<sup>212</sup> *Id.* ¶ 198.

<sup>213</sup> *Id.* ¶ 200.