

**A Feminist Theory of State Responsibility for  
Violence Against Women:  
Is the Due Diligence Standard an Appropriate  
Tool for Actualising Primary Prevention?**

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## Summary

Over the past forty years the transnational women's movement has worked to conceptualise and institutionalise the understanding of violence against women as a gendered human rights violation. Their efforts have led the response at the international level, and have shaped the (markedly feminist) international human rights law approach to violence against women.

Despite successes in conceptualising and institutionalising norms concerning the elimination of violence against women, there remain problems in implementing these norms and holding states accountable. As such, violence against women is still pandemic, affecting at least one in three women. An area worthy of additional research and attention is state responsibility for prevention – particularly primary prevention, aimed at the 'upstream' or 'root' causes of violence against women – and the use of the due diligence standard as a tool for actualising this obligation. The due diligence standard is a significant development of state responsibility, which, within the context of human rights protection, broadens notions of state responsibility to include instances where there is a failure to exercise due care to prevent or respond to violative acts or omissions of private or non-state actors. In the context of violence against women, this provides a 'juridical bridge' for addressing private violence, particularly domestic violence, as a human rights violation, for which the state can – and should – be held accountable. The evolution of 'systemic due diligence' – aimed at the broader level of human rights protection – has furthered this feminist theory of state responsibility.

The aim of this thesis is to deepen the understanding of violence against women as a gendered human rights violation and to discover how the due diligence standard can be better used as a tool to bring about its elimination; if, indeed, it is fit for this purpose.

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## Introduction

The transnational women's anti-violence movement is now at a mature stage of development. It is nearly 40 years since the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979) was signed into law, and over 25 years since the CEDAW Committee made General Recommendation no. 19 (1992) on violence against women and the world community united behind the Declaration for the Elimination of Violence Against Women (DEVAW, 1993). The transnational women's movement has worked across this time to conceptualise the understanding of 'violence against women'<sup>1</sup> as a specifically gendered human rights violation, and this has led efforts to institutionalise a response at the international level, particularly within the field of international human rights law.

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<sup>1</sup> Throughout my thesis I rely on the definition given in Article 1 of the Declaration for the Elimination of Violence Against Women and Beijing Platform for Action, as framed by the efforts of the transnational women's movement during the international conferences. This definition is used by women's organisations around the world. Violence against women is 'any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.' (United Nations, *Report Of The Fourth World Conference On Women: Beijing Declaration and Platform for Action*, paragraph 113 and General Assembly resolution 48/104, *Declaration for the Elimination of Violence Against Women*, A/RES/48/104 (20 December 1993), Article 1). In Chapter 2 I will explain more fully the history and development of the term 'violence against women' within the international human rights law discourse, as well as detailing the significance of its feminist conceptualisation and focusing on the importance of its framing as 'gender-based violence' (meaning violence that is gendered and discriminatory). For now it is enough to note the framing and jurisprudential roots of the term within the two primary international legal sources focused on violence against women: the DEVAW and General Recommendations nos. 19 and 35, clarifying the inclusion of violence against women under the Convention on the Elimination of Discrimination against Women. The DEVAW Preamble states that: 'violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.' (General Assembly resolution 48/104, *Declaration for the Elimination of Violence Against Women*, A/RES/48/104 (20 December 1993), Preamble, available from <http://undocs.org/A/RES/48/104>) The CEDAW Committee supports this definition by describing violence against women as: '[v]iolence that is directed against a woman because she is a woman, or that affects women disproportionately.' (Committee on the Elimination of Discrimination against Women, general recommendation No. 19, 11<sup>th</sup> session, A/47/38, (1992), paragraph 6, available from <http://undocs.org/A/47/38>) The CEDAW Committee further clarifies the definitions given by the DEVAW and General Recommendation no 19, and outlines the evolved understanding of this framing by offering further definitional clarity of the term: 'The concept of 'violence against women' in general recommendation No. 19 and other international instruments and documents has emphasised that this violence is gender-based. Accordingly, this document uses the expression 'gender-based violence against women', as a more precise term that makes explicit the gendered causes and impacts of the violence. This expression further strengthens the understanding of this violence as a social – rather than an individual – problem, requiring comprehensive responses, beyond specific events, individual perpetrators and victims/survivors.' (Committee on the Elimination of Discrimination against Women, general recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, CEDAW/C/GC/35, (2017), paragraph 9.)

Despite successes in conceptualising and institutionalising norms concerning the prevention and elimination of violence against women, there remain problems in implementing these norms and holding states accountable to their duties to prevent and eliminate violence against women. As such, violence against women is still pandemic, posing one of the greatest threats to the lives and wellbeing of women globally. Affecting at least one in three women, violence against women continues to have devastating impacts on women across all racial, religious and socioeconomic groups, and is worthy of further and greater efforts, involving innovative research and action, to bring about its elimination. An area worthy of additional research is state responsibility for prevention – particularly primary prevention, aimed at the ‘upstream’ or ‘root’ causes of violence against women – and the use of the due diligence standard as a tool for actualising this obligation. The due diligence standard is a significant development of state responsibility, which, within the context of human rights protection and fulfilment, expands state responsibility to include instances where there is a failure to exercise due care to prevent or respond to violative acts or omissions of private or non-state actors. In the context of violence against women, this provides a ‘juridical bridge’<sup>2</sup> for addressing private violence, particularly domestic violence, as a human rights violation, for which the state can – and should – be held accountable.

The aim of my thesis is to further the understanding of violence against women as a gendered human rights violation and to discover how the due diligence standard can be better used as a tool to bring about its elimination; if, indeed, it is fit for this purpose. My primary concern throughout is related to the conceptualisation, framing and understanding of violence against women, as good practice relies on sure methodological and theoretical foundations, and the institutionalisation of this framing. As such I will be examining: both the epistemological and methodological underpinnings of the feminist response to violence against women (Chapter 1); the framing and institutionalisation of violence against women as a human rights violation within the international setting (Chapter 2); the normative and legal development of primary prevention (Chapter 3); and, the effectiveness of the due diligence standard as

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<sup>2</sup> Elizabeth A. H. Abi-Mershed, “Due Diligence and the Fight Against Gender-Based Violence in the Inter- American System,” *In Due Diligence and its Application to Protect Women From Violence*, edited by Carin Benninger-Budel, (Leiden, The Netherlands: Martinus Nijhoff Publishers, 2008), 128.

a legal and sociopolitical tool for actualising a feminist account of state responsibility and accountability (Chapter 4).

My approach to these questions is framed by my own experience of the co-constitutive nature of feminist theory and practice, and what I argue to be the significance of theorised practice of, and in, the law. Attention is paid both to the institutional and discursive space – and the relationship between the two – crafted by feminist engagement with international human rights law; and, throughout, effort is made to draw out the richness and importance of the feminist underpinnings of both the international institutional and discursive response to violence against women. In part, this is in opposition to engagement with the international human rights law approach to violence against women that is untheorised, depoliticised and gender-neutral. In itself, maintaining the institutional gains and discursive space created by the transnational women's movement is a worthy and necessary task that runs throughout my thesis. Beyond this, I hope to build on this ground and push towards greater institutional and discursive space for women, and in particular women's experience of violence against women.

I plan to bring together sociopolitical and legal analysis of the international human rights law approach, with particular engagement with, and review of, the case law of the CEDAW Committee under the Optional Protocol, and the Inter-American Court and Commission of Human Rights, and the European Court of Human Rights. This will be underpinned by analysis of the theoretical and legal framing provided by feminist theorists, activists, lawyers, and practitioners, in the field of violence against women. Whilst reference to the case law of the regional bodies shapes my analysis of the due diligence standard, I have tried to focus, where possible, on the norms of the international community at the broadest level, as expressed through the many auspices of the United Nations – posed as they are, as representing a significant global consensus and universality. The varied workings and trappings of the UN fora make comparative analysis challenging, and I have chosen to highlight and focus on the work of the Special Rapporteur on violence against women, its causes and consequences, and the CEDAW Committee, in particular.

The scope of my thesis considers violence against women broadly, but there is undoubtedly a higher level of attention paid to the particular problem of domestic abuse. Whilst domestic abuse is only one form or manifestation of violence against women, it is by far the most common and most pervasive. It has also been heavily privatised until recent decades, and has, over the past five to ten years, become a contested issue again, as the inclusion of men's experience of domestic abuse raises fresh questions about the gendered conceptualisation of domestic abuse. Whilst domestic abuse is heavily focused on, it is not the sole focus of my research, and my intention is not to separate domestic abuse from other forms or manifestations of violence against women, other than to highlight it due to its pervasiveness. The gendered analysis of domestic violence provided in my thesis extends to violence against women more broadly.

Given that I'm taking a radical feminist approach to preventing violence against women, it is worth at the offset addressing the question of 'why international law?' Engagement with the law is not unproblematic or without challenges, and throughout the thesis these challenges are highlighted and negotiated (particularly in Chapter 1). Nor is engagement with the law presented as the sole response required, or indeed, necessarily, the most important response. This said, engagement as an activist and practitioner – with over a decade's experience working with disenfranchised and at-risk young people – has only served to bolster my belief in engagement with international law; so often characterised as distant and distinct from our daily, material experience. The state as a hegemonic cultural actor is the source of much of the framing, creation, and perpetuation, of the patriarchal norms that structure our society at the broadest level, but also that permeate levels more intimate to the individual. State responsibility for primary prevention engages the state at this level and seeks to challenge the state's role as a creator and curator of culture. Accountability at this level is required for accountability at the intimate level of the individual. International human rights law can (and does) serve as part of this challenge and reframing at the broadest level; and whilst beset with challenges – particularly the ongoing dominance of men in international law – remains one of the best ways of renegotiating the power of women's citizenship, and the power of the state. Engagement with the law throughout my thesis is premised on the hope of strengthening the transnational women's movement's leadership of the international response to violence against women, and



creating and claiming further space for women to renegotiate the shape of the social, political and legal society that shapes their lives.

## **Chapter 1 – Feminism as Method: Consciousness Raising, Positionality and Questioning**

To explore the international human rights law approach to violence against women, and to clarify and expand on the understanding and application of the due diligence obligation to prevent violence against women, I will be relying on theory and methodology rooted in radical feminism. The choice to use a radical feminist lens was not taken prior to engagement with the international human rights law approach to violence against women, but was determined by exposure to the theory and method of feminism, and specifically radical feminism, through interaction with the international human rights law approach to violence against women itself. As this approach has been established and shaped by feminism, likewise my chosen method has been established and shaped by engagement with the approach. The second chapter of my thesis elucidates on this experiential grounding in radical feminism, through exposure to the law, including exposition of the main tenets of the international human rights law approach to violence against women and their basis in this strand of feminism. Whilst it may seem obvious to those with awareness of the politics and methodologies of feminism, that the international human rights law approach to violence against women is feminist, this is not obvious to all, and indeed not obvious to all who participate in the discourse. Furthermore, the distinctive character of the international human rights law approach to violence against women as rooted in radical feminism, seems even less obvious. As I will explore in later chapters, the more recent use of non-feminist methodologies within the expounding of the approach can be contradictory to the purposes of the law when untheorised and lacking the correct understanding of its feminist character. Whilst the evolution of the women's movement continues to progress the understanding and methodologies of feminism, and to a lesser degree the jurisprudence surrounding the international human rights law approach to violence against women, the law itself has specific historicity and jurisprudential roots. Whilst one might expect these roots to be liberal in character, due to the law being liberal in nature, they are in fact not liberal. They are distinctly radical.

In Chapter 2 I will look at these roots, considering: substantive law, jurisprudence of the relevant international courts and treaty monitoring bodies, and the work of expert

bodies. However, the character of the international human rights law approach as feminist, and my own methodology, is not composed of substantive positions only. The theoretical and methodological character of feminism, as expounded by radical feminism, runs throughout, and lies beneath and beyond, these substantive positions, and creates its own discursive space within the international human rights law approach to violence against women. As such, I will clarify my use of radical feminism as a theoretical and methodological framework before considering the substantive positions within the international human rights law approach, which stem from this. Again, as will be shown in later chapters, methodologies or approaches that are sympathetic to, or incorporate, these substantive positions, but do not have beyond them a feminist methodology, underpinned by feminist epistemology, are ineffective in utilising the international human rights law approach to its proper purposes and ends.

As will be shown in Chapter 2, principal tenets of feminist thinking have led the international human rights law approach to violence against women – namely the problem of patriarchy and the understanding of violence against women as gendered and discriminatory. There is a clear theoretical and political framework for understanding violence against women. In this chapter I am interested in whether this theoretical framework works as a methodology for (legal) change or whether it is limited to critique or a list of substantive issue-based positions. Does feminism have a (legal) methodology? Or, is it a (legal) methodology? I believe it is a method and I will establish in this chapter how I intend to use it to analyse, interpret and expand upon the international human rights law approach to violence against women, and specifically the issues of prevention, due diligence and state responsibility.

My use of feminism as a methodology is heavily influenced by the work of Catherine MacKinnon and Katherine Bartlett, in particular, MacKinnon's work in *Feminism Unmodified* and *Toward a Feminist Theory of State*. More broadly I am influenced by other second wave thinkers, such as Sandra Harding, Andrea Dworkin, Gloria Steinman, Shelia Rowbotham, Nancy Hartsock, Kate Millet, and Susan Brownmiller. These voices are predominantly radical feminists, with the exception of Shelia Rowbotham and Nancy Hartsock. Whilst I reference Rowbotham and Hartsock's work on consciousness, as will be shown, I further extend their thinking to a radical feminist view of consciousness. My thinking on the methodologies of standpoint and

consciousness-raising is heavily shaped by the work of postcolonial feminists such as Chandra Talpade Mohanty and Lourdes Torres, and Black feminists such as Patricia Collins and Audre Lorde. My epistemological concerns with positionality and consciousness are perhaps best taken up by postcolonial queer feminist theorist, Gloria Anzaldúa, and I rely heavily on her work, *Borderlands/La Frontera: The New Mestiza* in drawing together my own thoughts. Whilst I will lean more on feminist international legal scholars during my review of international human rights treaty and customary law (Chapters 2 and 3) – predominantly Christine Chinkin and Hillary Charlesworth, but with reference also to Rashida Manjoo, Rebecca Cook, Charlotte Bunch, Sally Goldfarb, Rhonda Copelan, and Renée Römken – I want to look first at the foundations of feminist legal thinking more broadly to establish my methodology. Whilst my exposure to radical feminism was through international human rights law scholars, the methodology predates the work of Chinkin, Charlesworth and others, and I wish to deepen my own understanding of how the second wave established and shaped the international human rights law approach to violence against women. Whilst Bartlett, MacKinnon and Hartsock don't focus specifically on international human rights law and violence against women, I believe review of their work is necessary to understand the theoretical and methodological character of the substantive positions outlined in international human rights law and developed by the international human rights law scholars who followed, such as Chinkin and Charlesworth. In engaging with the theoretical, methodological, and epistemological roots of the feminist approach, I expect to come up against a key question: can radical feminism, as a legal methodology, lend itself to constructive/reconstructive – as well as critical/deconstructive – jurisprudence? If it can, I intend to explore how. If I conclude that it can't lend itself to constructive/reconstructive jurisprudence I will have to consider how this might affect any substantive positions I was expecting to take in clarifying prevention and establishing a feminist framework for systemic due diligence.

Before problematizing the application of (radical) feminist method to the deconstruction and reconstruction within the law, it is worth noting the relationship between the more broadly denoted 'feminist approaches to international law'<sup>3</sup> and (radical) feminist methodology. Whilst it was through Chinkin and Charlesworth's

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<sup>3</sup> Hilary Charlesworth, Christine Chinkin, and Shelley Wright, "Feminist Approaches to International Law," *American Journal of International Law*, 85(4), (1991): 613 – 645.

work that I became familiar with feminist approaches to international law – part of the broader critical international scholarship known as the ‘new approaches to international law’ (NAIL)<sup>4</sup> – it was evident in their appeal to deeply politicised understandings of gender and gendered issues of the law, that a more radical and wide-reaching methodology belied the international legal approach. Similarly, whilst ‘feminist jurisprudence’<sup>5</sup>, more broadly, speaks to ideas introduced (largely) by North American scholars such as Ann Scales, Catherine MacKinnon, Martha Fineman, Christina Brooks Whitman, Christine Littleton, Carol Smart, and Mary Mossman,<sup>6</sup> the scholarship finds deeper and wider roots in feminist political theory. Deeper in the sense that it builds on a critical approach already well established which looks beyond the law to fundamental issues of gender and power, and wider in the sense that it draws from a far broader critical spectrum of feminist input (from philosophy, history, and psychology) than the often liberal framing of legal theory, methodology and the study of jurisprudence. The predominantly legal theorists originating the work on feminist jurisprudence in the 1980s, and the feminist approaches to international law in the 1990s, regularly appealed to a deeper well of critical and radical methodology (rooted in second wave feminism) when grounding their own legal theorising and contributions on methodology, and drew broadly from critical race theory alongside feminist political theory.<sup>7</sup> For instance in her landmark essay, ‘The emergence of

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<sup>4</sup> José María Beneyto and David Kennedy, eds., *New Approaches to International Law: The European and the American Experiences*, (The Hague: T.M.C Asser Press, 2012); Thomas Skouteris, “Fin de NAIL: New Approaches to International Law and its Impact on Contemporary International Legal Scholarship,” *Leiden Journal of International Law*, 10, (1997): 415 – 420.

<sup>5</sup> First coined by Ann C. Scales in the 1970s.

<sup>6</sup> Ann C. Scales, “Towards a Feminist Jurisprudence,” *University of New Mexico School of Law*, 56(3), (Spring 1981): 375 – 444; Ann C. Scales, “The Emergence of Feminist Jurisprudence: An Essay,” *Yale Law Journal*, 95, (1986): 1373 – 1403; Ann Scales, “Feminist Legal Method: Not So Scary,” *UCLA Women’s Law Journal*, 2, (1992): 1 – 34; Catherine MacKinnon, “Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence,” *Signs*, 8(4), (1983): 638 – 639; Catherine MacKinnon, *Feminism Unmodified: Discourses On Life And Law*, (Cambridge: Harvard University Press, 1987); Catherine MacKinnon, *Toward a Feminist Theory of the State*, (Harvard: Harvard University Press, 1989); Catherine MacKinnon, “Toward Feminist Jurisprudence,” In *Feminist Jurisprudence*, Patricia Smith, ed., (New York: Oxford University Press, 1993); Martha Fineman and Nancy Sweet Thomadsen, *At the Boundaries of Law: Feminism and Legal Theory*, (New York: Routledge, 1991); Martha Fineman, “Feminist Theory in Law: The Difference It Makes,” *Columbia Journal of Gender and Law*, 2, (1992): 1 – 24; Christina Brooks Whitman, “Feminist Jurisprudence,” *Feminist Studies*, 17, (Fall 1991): 493 – 507; Christine Littleton, “In search of a Feminist Jurisprudence,” *Harvard Women’s Law Journal*, 10, (Spring 1987): 1 – 7; Carol Smart, *Feminism and the Power of Law*, (New York: Routledge, 1989); Mary Jane Mossman, “Feminism and Legal Method: The Difference it Makes,” *Wisconsin Women’s Law Journal*, 3 (1987): 147 – 168; Mary Jane Mossman, “Feminism and the Law: Challenges and Choices,” *Canadian Journal of Women and the Law*, 10, (1998): 1 – 16.

<sup>7</sup> Scales, “The Emergence of Feminist Jurisprudence: An Essay,” 1374; Angela P. Harris, “Race and Essentialism in Feminist Legal Theory,” *Stanford Law Review*, 42(3), (Feb 1990): 581 – 616; Elizabeth M.

feminist jurisprudence', legal scholar Ann C. Scales describes how radical political theorists challenged her formation in liberal legal theory and methodology, without which she says: 'I would probably have been trapped by legal education into believing the paeans to objectivity which are the target of my criticism.'<sup>8</sup> She goes on to say: '[f]ocusing primarily upon the work of Ludwig Wittgenstein, Carol Gilligan, Dorothy Dinnerstein, and Adrienne Rich, I arrive at an endorsement of Catharine MacKinnon's radical feminist legal theory.'<sup>9</sup>

The relationship between legal theory and jurisprudence and (radical) feminist theory sparked contention – both for lawyers and theorists: 'could such a feminist agenda be accommodated within the legal system?'<sup>10</sup> And '[i]n what sense can legal methods be 'feminist?''<sup>11</sup> A body of scholarship grew in the 1980s focused on these questions – particularly where the more radical ideas of feminist theory were integrated into critical legal analysis and methodologies.<sup>12</sup> Indeed debate continues as to whether radical feminism is concerned with issues too fundamental – and too closely entwined with the kind of power that the law upholds – to attempt to navigate or utilise the law as a tool for systemic change. More will be said on this later.

Beyond bringing a challenge to how legal systems address the lives of women – as liberal (feminist) legal methodologies might – radical feminism was concerned more fundamentally with the root causes of women's oppression, and how the law has been used to maintain this oppression. This marked a significant shift in approaches to the law as it questioned the objectivity of the law and presented a foundational 'challenge to the status quo.'<sup>13</sup> This shift symbolised a discontent with the legal methodologies available for interrogating the law as it concerned the lives of women – seen as they were as 'offer[ing] little opportunity for fundamental questioning'<sup>14</sup>. Legal scholars called for recourse to radical feminist political theory – and the work of 'non-legal'<sup>15</sup>

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Schneider, "The Dialectic of Rights and Politics: Perspectives from the Women's movement," *New York University Law Review*, 61, (1986): 589 – 652.

<sup>8</sup> Scales, "The Emergence of Feminist Jurisprudence: An Essay," 1374.

<sup>9</sup> Scales, "The Emergence of Feminist Jurisprudence: An Essay," 1374.

<sup>10</sup> Mossman, "Feminism and Legal Method: The Difference it Makes," 149.

<sup>11</sup> Bartlett, "Feminist Legal Matters," 830.

<sup>12</sup> Scales, "Law and Feminism: Together in Struggle," 291 – 296; Bartlett, "Feminist Legal Matters," 830.

<sup>13</sup> E. Langland and W. Gove, eds., *A Feminist Perspective in the Academy: The Difference It Makes*, (Chicago: University of Chicago Press, 1981), 3.

<sup>14</sup> Mossman, "Feminism and Legal Method: The Difference it Makes," 149.

<sup>15</sup> Scales, "The Emergence of Feminist Jurisprudence: An Essay," 1373.

theorists – as a necessary challenge to the ‘vocabulary, as well as the epistemology and political theory, of the law as it is.’<sup>16</sup> In particular, legal scholars utilised and applied the epistemology of feminist methods as it relates to consciousness-raising – a ‘way of knowing’<sup>17</sup> most commonly called on by radical feminists. This built on, but was distinct from, critical legal theory and its methodologies. More will be said on consciousness-raising and its importance to my approach later, but for now it is enough to note the role of radical feminist method as bringing not only a critical and political challenge to the law, but also to legal theory – questioning, as it did, conceptualisations of knowledge and power and how they inform the law and critical engagement with the law.

Returning now to my own approach and experience – which has been formed through mutually constitutive engagement within academic and activist fields – it is helpful to first clarify how feminism as a method differs from the common perception of feminism as an agenda (as found within campaigns for substantive legal provisions), and why it is imperative that the two be understood as distinct, as well as mutual.

Without an account of method feminism becomes limited as a legal tool for reform, as method ‘organises the apprehension of truth; it determines what counts as evidence and defines what is taken as verification.’<sup>18</sup> Catherine MacKinnon describes the significance of method aptly: ‘[t]heory appropriates reality in a certain way – its way is method – to make the world accessible to understanding and change.’<sup>19</sup> Katherine Bartlett makes a clear case for the need to understand feminism as a method:

Method matters [...] because without an understanding of feminist methods, feminist claims in the law will not be perceived as legitimate or ‘correct’. I suspect that many who dismiss feminism as trivial or inconsequential misunderstand it. Feminists have tended to focus on defending their various substantive positions or political agendas, even among themselves. Greater

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<sup>16</sup> Scales, “The Emergence of Feminist Jurisprudence: An Essay,” 1376.

<sup>17</sup> Mossman, “Feminism and Legal Method: The Difference it Makes,” 148; Katherine T. Bartlett, “Feminist Legal Matters,” *Harvard Law Review*, 103(4), (1990): 830; Scales, “The Emergence of Feminist Jurisprudence: An Essay,” 1401; Ann Scales, “Law and Feminism: Together in Struggle,” *University of Kansas Law Review*, 51, (2003): 293.

<sup>18</sup> MacKinnon, “Feminism, Marxism, Method, and the State: An Agenda for Theory,” 527.

<sup>19</sup> Catherine MacKinnon, *Are women human?*, (Harvard: Harvard University Press, 2007), 43.

attention to issues of method may help to anchor these defenses, to explain why feminist agendas often appear so radical (or not radical enough), and even to establish some common ground among feminists.<sup>20</sup>

In her influential piece, *Feminist Legal Methods*, Bartlett goes on to clarify that method is not valid because it holds no substantive positions – as no methodology is completely non-substantive – rather she argues that the validity of a method rests on its relationship to substantive law being ‘defensible.’<sup>21</sup>

Therefore, key to understanding feminist method is problematising and negotiating its relationship with substance. Attention is frequently given to substantive positions at the expense of understanding method. The common perception of feminism as a campaign of demands or ‘women’s issues’ limits feminist theory and overlooks the structural nature of feminism as method. Consequently it will also limit substantive change, as method is essential to achieving change. The outworking of feminism changes the lives of women in substantive ways that can be articulated in a clear and determined fashion: suffrage, reproductive rights, eliminating violence against women, equal pay, maternity leave, to name a few. However, the ghettoising of women’s rights as an issue-based agenda undermines feminism. These substantive rights are the fruit of feminism. Whilst the fruit is eagerly desired, attention focussed solely, or narrowly, on substantive positions can confuse the understanding of feminism as a method. Various groups further the misunderstanding of feminism as method in differing ways. Within the women’s movement feminists can foster this confusion by their understandable eagerness for substantive change. As Bartlett suggests, this can become divisive. Women are not connected by our ‘wants’ or ‘needs’, though we might connect around these, but rather we connect *in* our want – in the shared experience of both the deficit, oppression, or marginalisation, and in the resilience, opportunity, and community formed in response. We’re connected by who we are – our historically, materially, socially located identities. Defining us by what we want or need, or are perceived as wanting, is limiting. We may want different things. We may already have different things. The meeting point for feminists must remain method. When it

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<sup>20</sup> Bartlett, “Feminist Legal Matters,” 831.

<sup>21</sup> Bartlett, “Feminist Legal Matters,” 832.



becomes substantive positions we lose commonality and validity. We unite through method.

The blurring of method and substance is also furthered by voices outside the women's movement. A campaign of issue-based change is much more easily understood than a method for systemic change and transformation; especially from an audience who can't understand, or don't want to see happen, systemic change. Men may identify with a campaign based on a substantive list of demands, or 'wants', as this is how they regularly engage in community, society, law and the state. The system is established to hear and amplify their voice such that they need only express their desires. As the system is made in their image and set in their favour they need only articulate the change they wish to see. They need no method or theory; they have, instead, 'reality'. The unpicking of the system isn't on the agenda. In light of this, even men who may sympathise with feminism can most easily do so through substantive issue-based change. As a man, to join feminism as an issue-based campaign is to add your voice to a simple cry for 'more'. For men to add their voice to feminism as a methodology for systemic change becomes problematic if not altogether impossible. How can men, through their voice, object to the system that amplifies their voice without furthering the noise and feeding the system? This raises the question of who can be involved and how. If men can add their voice to a campaign for substantive change, they may well. Those who sympathise may see it as a way of supporting women. Those who fear more systemic change may do so to limit feminism to the issue at hand hoping to avoid greater change. Considering feminism as a methodology raises the old question: can men be feminist? (Or how can men be feminist?) In fact, if it is about substantive change only, does it matter if this is achieved through sympathetic men using their voice within the system? Feminism reduced to substantive demands may give room for men as feminists. Feminism as a methodology may not.

Whilst ruling men out as allies is not the aim here it is imperative to note the significance of voice and positionality when considering method and, more specifically, the application of feminist method. I would suggest that positionality, as lived in 'consciousness raising' and 'questioning', is the epistemological grounding of feminist methodology. When speaking of positionality, I purposely speak more loosely than feminist standpoint theory. One might question if there is a difference. Positionality and

consciousness-raising are arguably the foundations of standpoint theory, and so I will walk a close, if not interlacing path, with the theory. However, standpoint theory, has two major problems, which I wish to avoid; one of methodological importance and the other of symbolic understanding and application. Standpoint theory is linked most closely with Marxist feminist theory, and relies heavily on Marxist ideas of consciousness, running a parallel discourse about gender as it does about class struggle. Whilst, I would agree that there should be focus on intersections between gender and class, I do not agree that Marxism, and Marxist theory, should simply be applied to women, as feminism. Whilst Marxist feminism and radical feminism may (predominantly) take similar critical realist approaches to gender, I would understand them as differing in their epistemological apprehension of consciousness, in particular, the privileging of knowledge. This is borne out in understandings of standpoint and positionality.

My methodological approach will be based on positionality, consciousness-raising and what Bartlett terms 'asking the woman question'<sup>22</sup>. Whilst this reflects and forms part of standpoint theory, my understanding and application of these methods lacks adherence to the Marxian ideas of positionality and consciousness that are usually identified with standpoint theories, and in particular the implication of privileged knowledge. In *Signs*, Winter 1997, Susan Heckman questioned the underlying Marxist epistemology of Nancy Hartsock's Standpoint Theory. 'Truth and Method: Feminist Standpoint Theory Revisited' is a key piece in the wider debate surrounding Marxian epistemology and standpoint theory, prominent in the 1990s. Hekman questions the ability of standpoint theory to articulate and privilege truth given the theory operates within a 'social constructivist theory of the subject.'<sup>23</sup> In the same edition, Hartsock gives comment on Hekman's piece, arguing Hekman views standpoint theories through 'a kind of American pluralism that prefers to speak not about power or justice but, rather, about knowledge and epistemology.'<sup>24</sup> Instead, Hartsock restates the importance of standpoint theory in deconstructing and challenging the power relations

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<sup>22</sup> Bartlett, "Feminist Legal Matters," 837.

<sup>23</sup> Nancy Hartsock, "Comment on Hekman's "Truth and Method: Feminist Standpoint Theory Revisited": Truth or Justice?," *Signs*, 22(2), (Winter, 1997): 367.

<sup>24</sup> Hartsock, "Comment on Hekman's "Truth and Method: Feminist Standpoint Theory Revisited": Truth or Justice?," 367.

which structure knowledge and understanding arising from social locations.<sup>25</sup> Whilst I find Hartsock compelling, I am left with epistemological questions about standpoint theory. However, it is not my aim, and it is beyond my current apprehension, to resolve these here. Furthermore, whilst epistemological questions remain, there is consensus between Marxian, radical, and postcolonial feminists that feminist consciousness – whether closer to ‘reality’ or ‘truth’ (or not) – is closer to ‘a definition of less repressive society.’<sup>26</sup> In this way standpoint theories are to be understood as ‘counterhegemonic discourse’<sup>27</sup>. Further to this, I would align to Patricia Collins’ understanding of standpoint as offering ‘specific’ and ‘multiple’ knowledge rather than ‘privileged’ truth.<sup>28</sup> Collins challenges the implication that ‘the more subordinated the group the more power the vision available to them.’<sup>29</sup> She suggests this reflects the ‘binary thinking’<sup>30</sup> of standpoint’s Western, Marxian origins, and is an ‘additive analyses’<sup>31</sup> of standpoint theories. This consensus and adherence to positionality and consciousness-raising as the chosen methodology of feminism is cross-wave and cross-theory, and so epistemological questions surrounding standpoint theory are not detrimental to my methodological approach.

Whilst my initial concern with the characterisation of my methodology as standpoint theory is based upon ongoing epistemological debate, my secondary concern, linked to the first, regards the status and symbolism of standpoint theory within the feminist movement. This is more troubling to me than the epistemological questions – if standpoint theory, an attempt to foreground the lived experience of women, is seen as exclusive or essentialist by the voices it seeks to advance, then it really lacks merit. Again, I will not seek to give any kind of full answers to this debate, other than to find again, what is still seen as relevant and representative by the wide cross-section of the women’s movement. Whilst standpoint theory was increasingly criticised as universalist and essentialist, third wave feminism (influenced heavily by Black feminism, Black post-

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<sup>25</sup> Hartsock, “Comment on Hekman’s “Truth and Method: Feminist Standpoint Theory Revisited”: Truth or Justice?,” 367.

<sup>26</sup> Susan Heckman, “Truth and Method: Feminist Standpoint Theory Revisited”, *Signs*, 22(2), (Winter, 1997): 345.

<sup>27</sup> Hartsock, “Comment on Hekman’s “Truth and Method: Feminist Standpoint Theory Revisited”: Truth or Justice?,” 367.

<sup>28</sup> Patricia Hill Collins, *Black Feminist Thought*, 2<sup>nd</sup> ed. (London: Routledge, 2009): 289.

<sup>29</sup> Collins, *Black Feminist Thought*, 289.

<sup>30</sup> Collins, *Black Feminist Thought*, 289.

<sup>31</sup> Collins, *Black Feminist Thought*, 289.

structural feminism, post-colonial feminism, and transnational feminism)<sup>32</sup>, still forefronts the lived experience of women and advocates consciousness-raising as method.<sup>33</sup> In so doing, third-wave feminists also maintain the significance of group consciousness. Whilst some post-structuralists, like Hekman, appear to argue that groups are merely 'aggregates of individuals'<sup>34</sup>, the appreciation of the group as a collective voice – as constituted through construction and reconstruction by way of consciousness-raising – is still common in third wave theory and practice.

Although third wave feminists tend not to utilize the small group format for consciousness-raising, personal stories continue to play an important role in helping people recognize that their experiences of oppression or discrimination are not isolated. In the third wave, these stories are still very much a part of consciousness-raising, except that these personal stories tend to appear in public venues like anthologies, books, and feminist magazines such as *Bitch* and *Bust*. Furthermore, these stories function as a major rhetorical component of consciousness-raising due to the diversity of texts available. Women may engage in consciousness-raising with their female friends and colleagues, but these books allow their readers to engage with a number of ideas they may not encounter in their personal or professional lives.<sup>35</sup>

Third wave feminism has broadened the understanding of positionality and standpoint theory, and brought further questions regarding epistemology and truth, but I would argue that the ongoing advancement of positionality and consciousness-raising legitimises the overarching methodological character of standpoint theory. I believe the issues of essentialism and exclusion, as taken up by the third wave, lie in Marxian over-

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<sup>32</sup> bell hooks, "Postmodern Blackness," *Postmodern Culture*, 1(1), (1990); bell hooks, *Yearning: Race, Gender, and Cultural Politics*, (Toronto: Between-the-Lines, 1990); Jennifer Baumgardner and Amy Richards, *Manifesta: Young Women, Feminism, and the Future* (New York: Farrar, Straus and Giroux, 2000); Rebecca Walker, *To Be Real: Telling the Truth and Changing the Face of Feminism* (New York: Anchor, 1995); Rebecca Walker, "Becoming the Third Wave". *Ms. Magazine*, 11(2), (2000) p. 39–4; Collins, *Black Feminist Thought*; Chandra Talpade Mohanty, Ann Russo, and Lourdes Torres, *Third World Women and the Politics of Feminism*, (Bloomington, Indiana: Indiana University Press, 1991); Chandra Talpade Mohanty, *Feminism Without Borders*, (Durham, NC: Duke University, 2003).

<sup>33</sup> Stacey. K. Sowards and Valerie. R. Renegar, "The Rhetorical Function of Consciousness-Raising in the Third Wave," *Communications Studies*, 55(4), (Winter, 2004): 535 – 552.

<sup>34</sup> Hartsock, "Comment on Hekman's "Truth and Method: Feminist Standpoint Theory Revisited": Truth or Justice?", 372.

<sup>35</sup> Sowards and Renegar, "The Rhetorical Function of Consciousness-Raising in the Third Wave," 541 – 542.

emphasis on the 'macroprocesses of power'<sup>36</sup>, commonly found in standpoint theories. Inclusion of intersections with race, sexuality, class, and disability is to be welcomed and is not, as some fear, the widening of feminist collective consciousness to the point of subjectivity.<sup>37</sup> The voices widening the understanding of consciousness, positionality and experience within feminism, have commonly been misunderstood to be more epistemologically divergent than is the case. Intersectionality has broadened the methodologies of radical feminism, and has 'rooted and shifted'<sup>38</sup> the locus to intersections of race, nation, sexuality, and class, but rather than challenging the epistemological character of (radical) feminism, it has, in fact, further established it as materialist, post-positivist, and critical realist. Its focus on collective standpoint, experience and location is 'antithetical to that of post-modernist relativism.'<sup>39</sup> Chandra Talpade Mohanty takes up the issue of intersectionality and subjectivity, in *Feminism Without Borders*, where she revisits her 1986 essay, 'Under Western Eyes'<sup>40</sup>, and defends it against misappropriation by Western post-modern political thought. Her work 'draws on historical materialism and centralizes racialized gender'<sup>41</sup>; emphasising difference and multiply-mediated intersections of oppression, including: gender, race, (hetero)sexuality, class, and nation. She argues her work has been misread by post-modernists and interpreted 'as being against all forms of generalization and as arguing difference over commonalities.'<sup>42</sup> Mohanty argues that while Western post-modernism 'privileges multiplicity in the abstract'<sup>43</sup>, post-colonial feminism recognises that differences, rooted in material, social, historical and geographical locations, are never 'just "differences."' <sup>44</sup> This is not to underestimate or undermine the contribution of post-modernist feminist scholarship to the third wave<sup>45</sup>, nor to suggest that my own

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<sup>36</sup> Hartsock, "Comment on Hekman's "Truth and Method: Feminist Standpoint Theory Revisited": Truth or Justice?," 371.

<sup>37</sup> Hartsock is right to suggest: '[t]o claim we can understand the totality of social relations from a single perspective is as futile an effort as to claim that we can see everything from nowhere.' Hartsock, "Comment on Hekman's "Truth and Method: Feminist Standpoint Theory Revisited": Truth or Justice?," 371.

<sup>38</sup> Nira Yuval-Davis, *Gender and Nation* (London: Sage Publications, 1997): 130 –131.

<sup>39</sup> Mohanty, *Feminism Without Borders*, 231.

<sup>40</sup> Chandra Talpade Mohanty, "Under Western Eyes: Feminist Scholarship and Colonial Discourses," *Feminist Review*, 30, (1988): 61 – 88.

<sup>41</sup> Mohanty, *Feminism Without Borders*, 231.

<sup>42</sup> Mohanty, *Feminism Without Borders*, 231.

<sup>43</sup> Chandra Talpade Mohanty, "Cartographies of Struggle Third World Women and the Politics of Feminism" In Mohanty, Torres, and Russo, eds., *Third World Women and the Politics of Feminism*, 37.

<sup>44</sup> Mohanty, *Feminism Without Borders*, 226.

<sup>45</sup> Walker, *To Be Real: Telling the Truth and Changing the Face of Feminism*; Walker, "Becoming the Third Wave". *Ms. Magazine*; Leslie Heywood and Jennifer Drake, *Third Wave Agenda: Being Feminist, Doing Feminism*, (Minnesota: University of Minnesota Press, 1997); bell hooks, "Postmodern Blackness,"

understanding and approach, or the approach formed within the international legal response to violence against women, is not informed by post-modernist thought and its challenge to the radical roots of the second wave. This said, I agree with Mohanty's defence of her work on the key issue of collective consciousness and group identity, and – as it relates specifically to the chapter at hand – the use of 'the collective' as a source of knowledge and wisdom. More will be said on the role of community as it relates to constructing new knowledge and progressing change, but at this point it is important to reflect on Mohanty's characterisation of her work as 'antithetical to post-modernist relativism', and to recognise that the same critique applies to my appreciation of positionality and the widening of standpoint theory to become more fully intersectional. From this critical stance it would be wrong, however, to reason that post-modernist approaches to standpoint must be wholly abandoned, or that my approach is opposed to post-modernist feminism. Rather, I align with Mohanty's understanding of the conflict between materialist, critical realist appreciations of identity, consciousness-raising and the collective, and the Western third wave emphasis on the individual as separate from the other and from the collective. Again, this is not to negate the reality or the role of difference, or the move towards anti-essentialism, the politics of difference, or claims to the 'decentred'<sup>46</sup> or 'reconstituted' subject<sup>47</sup> – all notable post-modernist contributions of the third wave<sup>48</sup>. Rather, the critique offered by Mohanty, which I uphold in my own emphasis on collectivity, is simply to argue that 'differences constitute rather than undermine collectivity'.<sup>49</sup> In this sense, the calls for intersectionality to be integrated into feminist theory and praxis during the later half of the second wave<sup>50</sup> are further reinforced by third wave post-modernist emphasis on

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Heckman, "Truth and Method: Feminist Standpoint Theory Revisited"; Linda Nicholson, *Feminism/Postmodernism*, (New York: Routledge, 1990); Stacy Gillis and Rebecca Munford, "Genealogies and generations: the politics and praxis of third wave feminism," *Women's History Review*, 13(2), (2004), 165 – 182.

<sup>46</sup> See the *Thinking Gender* series edited by Linda Nicholson – in particular Judith Butler's work on identity: Judith P. Butler, *Gender Trouble: Feminism and the Subversion of Identity*, (New York: Routledge, 1990).

<sup>47</sup> Heckman, "Truth and Method: Feminist Standpoint Theory Revisited", 345.

<sup>48</sup> Nicholson, *Feminism/Postmodernism*.

<sup>49</sup> MacKinnon, *Toward a Feminist Theory of the State*, 86. Whilst feminists speak to the particular tension with regard the individual and the group caused by post-modernism, this sits in a far-wider project to redeem constructivist and progressive politics from 'modernism's dusk', with Hutchinson arguing that 'there is no contradiction between continuing loyalty to postmodern strategy and the practical realization of a radical political agenda.' Allan C. Hutchinson, "Review: Inessentially Speaking (Is There Politics after Postmodernism?)" *Michigan Law Review*, 89(6), (1991), 1549 – 1573, 1550.

<sup>50</sup> Kimberle Crenshaw was first to use the term intersectionality, which provided a critical political framework for feminism to more fully appreciate the overlapping connections, oppressions, and identities defined by race, sexuality, nation, and disability. This term became a framework for the efforts

multiplicity<sup>51</sup>, but this multiplicity does not necessarily elevate individuation and separateness over collectivity. This will be looked at later in this chapter when I consider the role of community and difference in forming knowledge and reconstructive politics.

Returning now to the issue of standpoint, we see in the broadening of the understanding of consciousness and positionality – brought about by the third wave – the expansion of ‘standpoints’. Whilst the label and trappings of Marxian standpoint theory have been questioned and consequently disregarded by many groups, the significance of positionality – as both constructed and counterhegemonic – remains, and the methods of consciousness-raising and questioning persist.

Whilst it might seem strange then to ‘revert’ to second wave thought, I believe the essentials of standpoint theory, as agreed upon by the third wave, are well (although not fully) articulated by radical feminists, such as MacKinnon, who have always advanced the positionality of women as both (at least partly) constructed (and reconstructed) and at the same time counterhegemonic. In this way I believe MacKinnon articulates a view of consciousness and positionality that resonates with the third wave critique of her Marxian contemporaries. MacKinnon gives the following characterisation of the positionality of feminist consciousness:

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of a number of key critical race theorists who had challenged the whiteness of second wave feminism during the 1980s. Kimberle Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color,” *Stanford Law Review*, 43(6), (July 1991): 1241 – 1299; Kimberle Crenshaw, “Race, Reform and Retrenchment: Transformation and Legitimation in Anti Discrimination Law,” *Harvard Law Review*, 101, (1988): 1331 – 1387; Kimberle Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,” *University of Chicago Legal Forum*, (1989): 139 – 167; bell hooks, *Yearning: Race, Gender, and Cultural Politics*; Gloria T. Hull, Patricia Bell Scott, and Barbara Smith, *But Some of Us are Brave*, (New York: Feminist Press, 1982); Gloria E. Anzaldúa and Cherríe Moraga, eds., *This Bridge Called My Back: Writings by Radical Women of Color*, (Watertown, MA: Persephone Press, 1981); Patricia Collins and Simra Bilge, *Intersectionality*, (Malden: Polity Press, 2016);

<sup>51</sup> In her analysis of third wave anthologies from 1995 – 2006, Meredith Evans highlighted four key themes: ‘inclusion, multiplicity, contradiction, and everyday feminism.’ Meredith A. Evans and Chris Bobel, “I am a Contradiction: Feminism and Feminist Identity in the Third Wave,” *New England Journal of Public Policy*, 22(1), (2007): 207. These same themes are highlighted in similar anthologies and analysis of Third Wave themes: Mary P. Sheridan-Rabideau, *Girls, Feminism, and Grassroots Literacies: Activism in the GirlZone*, (Albany: State University of New York Press, 2008); Hokulani Aikau, Karla Erickson, Wendy Leo Moore, “Three Women Writing/Riding Feminism’s Third Wave”, *Qualitative Sociology*, 26(3), (September 2003): 397 – 425; R. Claire Snyder, “What is Third-Wave Feminism? A New Directions Essay,” *Signs*, 34(1), (Autumn 2008): 175 – 196; Stacy Gillis, Gillian Howie, and Rebecca Munford, eds., *Third Wave Feminism: a critical exploration*, 2<sup>nd</sup> Ed., (Basingstoke: Palgrave Macmillan, 2007).

The practice of a politics of all women in the face of its theoretical impossibility is creating a new process of theorising and a new form of theory. Although feminism emerges from women's particular experience, it is not subjective or partial, for no interior ground and few if any aspects of life are free of male power. [...] Feminism does not begin with the premise that it is unpremiered. It does not aspire to persuade an unpriemered audience because there is no such audience. Its project is to uncover and claim as valid the experience of women, the major content of which is the devalidation of women's experience.<sup>52</sup>

She further explains the context of male dominance:

Its point of view is the standard for point-of-viewlessness, its particularity the meaning of universality. Its force is exercised as consent, its authority as participation, its supremacy as the paradigm of order, its control as the definition of legitimacy. Feminism claims the voice of women's silence, the sexuality of our eroticized desexualization, the fullness of "lack", the centrality of our marginality and exclusion, the public nature of privacy, the presence of our absence.<sup>53</sup>

Unlike standpoint theories, rooted in Marxian ideas of consciousness and truth, MacKinnon doesn't base the validity of feminist consciousness on its proximity to 'truth' or 'reality'. The marginalisation and subordination of this positionality are part of its significance, but are not privileged, commoditised, or objectified. Its project is not to articulate substantive change from an unpriemered position but from that position to question the premise. It is distinct from any other substantive agenda – liberal, cultural, Marxist – and is simply feminist, or 'feminism unpriemered'.<sup>54</sup> In claiming as valid the lived experience of women it challenges the dominance of men and the subordination of women. In this way critique, question and deconstruction operate as method.

Likewise, feminism as a method has been talked about by Bartlett as "asking the woman question," which is designed to identify the gender implications of rules and

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<sup>52</sup> MacKinnon, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence," 638.

<sup>53</sup> MacKinnon, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence," 638 – 639.

<sup>54</sup> Catherine MacKinnon, *Feminism Unmodified*.



practice which might otherwise appear neutral or objective.<sup>55</sup> As she explains, 'a question becomes a method when it is regularly asked.'<sup>56</sup> In the case of 'the woman question', feminists ask this regularly across many disciplines. In fact the 'woman question' is many questions, for instance: 'have women been left out of consideration? If so, in what way; how might that omission be corrected? What difference would it make to do so?'<sup>57</sup> Identifying how standards, practices and the law are framed in a specific male sense to the disadvantage and disempowerment of women, feminism works as a method for developing substantive norms. In this way feminism asked the 'woman question' of violence against women and identified it as gendered and discriminatory – not arbitrary in any sense, but oppressive, and a cause and consequence of disadvantage and discrimination (see Chapter 2). The continuing of feminist method within the human rights discourse, asking further questions, has developed substantive norms around the prevention and elimination of violence against women, in particular: addressing root causes, gender specificity, and empowerment. These substantive norms are not subjectively chosen but they are the outworking of legal method. Without method we would choose substance indefensibly, whereas method works to 'provide an appropriate constraint upon the application of substantive rules.'<sup>58</sup>

The deconstruction of the partial and the construction of substantive feminist positions is rooted in the lived experience of women. The ability to ask the 'woman question' in an authentic way is the primacy of positionality and consciousness-raising. Through consciousness-raising women are able to engage with their own lives, and as they live them, to question their own situation, and to determine collectively where that question lies in the world and how it might be answered.

The technique explores the social world each woman inhabits through her speaking of it, through comparison with other women's experience, and through women's experience of each other in the group itself.<sup>59</sup>

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<sup>55</sup> Bartlett, "Feminist Legal Matters," 837.

<sup>56</sup> Bartlett, "Feminist Legal Matters," 837.

<sup>57</sup> Bartlett, "Feminist Legal Matters," 837.

<sup>58</sup> Bartlett, "Feminist Legal Matters," 832.

<sup>59</sup> Catherine MacKinnon, *Toward a Feminist Theory of the State*, 86.

Consciousness-raising is perhaps the most unifying methodological approach of feminist theory. It runs throughout Marxist, liberal and radical feminism, and has spanned the first, second and third waves. Whilst questioning by third wave feminists of the second wave's approach to 'asking the woman question', has shone light on the need to expand the collective voice, it has maintained the method of consciousness-raising: 'Consciousness among women is what caused this, and consciousness, one's ability to open their mind to the fact that male domination does affect the women of our generation, is what we need...' <sup>60</sup> albeit a '[c]onsciousness that acknowledges the complexities of crosscutting relations of race, gender, class, and sexuality.' <sup>61</sup> Consciousness-raising works as an 'interactive and collaborative process' <sup>62</sup> to reveal which of a woman's individual experiences share meaning and resonate with the wider experience of women. Elizabeth Schneider explains that the methodological character of consciousness-raising functions to reveal 'the social dimension of individual experience and the individual dimension of social experience' <sup>63</sup>. In this way consciousness-raising understands the personal as political and raises broad and public awareness of the oppression(s) of women. <sup>64</sup> Consciousness-raising as a methodological tool serves to keep the relationship between feminist epistemology, theory and substance defensible. MacKinnon asserts: 'The key to feminist theory consists in its way of knowing. Consciousness-raising is that way.' <sup>65</sup> Consciousness-raising works as verification <sup>66</sup> and 'meta-method' <sup>67</sup>, where it 'provides a substructure for other feminist methods [...] by enabling feminists to draw insights and perceptions from their own experiences and those of other women and to use these insights to challenge dominant versions of social reality.' <sup>68</sup> As a meta-method, consciousness-raising challenges the dominant 'truth', but more fundamentally, it 'challenges the concept of knowledge' <sup>69</sup>. Positionality as revealing counterhegemonic wisdom is grounded in the meta-method of consciousness-raising.

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<sup>60</sup> Baumgardner and Richards, *Manifesta*, 11.

<sup>61</sup> Collins, *Black Feminist Thought*, 122 – 132.

<sup>62</sup> Bartlett, "Feminist Legal Matters," 863.

<sup>63</sup> Schneider, "The Dialectic of Rights and Politics: Perspectives from the Women's Movement," 603.

<sup>64</sup> Adrienne Rich, *On Lies, Secrets, and Silence: Selected Prose, 1966 – 1978* (New York: Norton, 1979), 44; Pamela Allen, *Free Space: A Perspective on the Small Group in Women's Liberation* (New York: Time Changes Press, 1970), 27; MacKinnon, *Toward a Feminist Theory of the State*, 95.

<sup>65</sup> MacKinnon, *Toward a Feminist Theory of the State*, 84.

<sup>66</sup> MacKinnon, *Toward a Feminist Theory of the State*, 87.

<sup>67</sup> Bartlett, "Feminist Legal Matters," 866.

<sup>68</sup> Bartlett, "Feminist Legal Matters," 866.

<sup>69</sup> Bartlett, "Feminist Legal Matters," 867

Positionality is undoubtedly key to deconstruction as method. Women are uniquely placed to ask the deconstructive questions of '(how) have women been left out?' Deconstruction is the bedrock of feminist method. However, women are also uniquely placed to ask: 'how might that omission be corrected?' This is a more complex question as it comes with the weight of constructing something different, and without thorough recourse to method, it carries the potential to 'recreate the illegitimate power structure [they suggest they are] trying to identify and undermine.'<sup>70</sup> This method of asking the woman question can be seen in Chapter 2. The theoretical framework for the human rights approach to violence against women and primary prevention has been reached by feminist method – exposing those social practices, rules and laws that disadvantage women. To assess the due diligence standard and systemic prevention I will continue to ask the woman question as a method to see what it exposes and to consider how it can be incorporated as a methodological tool into the conceptualisation of state responsibility itself.

Further to this though, Bartlett suggests part of this method is to 'suggest how they [oppressive social practices, rules or laws] might be corrected.'<sup>71</sup> It is at this point that feminism as a methodology goes from questioning, critique and deconstruction to suggesting substantive change and construction. I wish to explore this further as I believe it raises questions about the relationship between methodology and substance.

As I develop my thesis I expect my methodology to have a relationship to substantive law – namely prevention, State responsibility and systemic due diligence – but I must retain a defensible relationship between my methodology and any evaluation and clarified outline of due diligence. However, I keep in mind the goal of change and also the arguably male evaluation of method and theory. Moira McConnell questions the use of 'theory' and 'method' as litmus tests to challenging the status quo. She suggests that critics of the establishment are often accused of having weak theory or the opposite, having 'just theory', by those defending the established position. Mohanty suggests that 'epistemological questions arise through the politicisation of consciousness'<sup>72</sup>– spurred on by the need to negotiate the connections between

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<sup>70</sup> Joseph Singer, "Should lawyers care about philosophy?" *Duke Law Journal*, 38(6), (1989), 1753.

<sup>71</sup> Bartlett, "Feminist Legal Matters," 837.

<sup>72</sup> Mohanty, "Cartographies of Struggle Third World Women and the Politics of Feminism," 39.

'collective consciousness [and] historical and institutional questions.'<sup>73</sup> McConnell contends that the 'designation 'theory' [is] a political statement as to the existence of some non-theory position [...] imagined by the men who have dominated the world's power structures.'<sup>74</sup> I will seek to remain epistemologically and methodologically consistent and defensible of my relationship between theory, method and substance whilst also keenly pursuing a substantive change to the 'non-theory position' or 'reality' defined and dominated by men; recognising questions of 'truth' and 'knowledge' are also questions of ethics and power.

## Part 2: Constructing Knowledge

Again, to understand the nature of feminist constructive method is to understand the primacy of consciousness-raising and positionality to feminist epistemology. The second part to Bartlett's 'woman question', to ask how the exclusion and oppression of women 'might be corrected'<sup>75</sup>, is rooted in positionality, and more specifically in the epistemological difference between knowledge and wisdom.<sup>76</sup> As Chandra Talpade Mohanty explains, it is the 'lived relations' that are the 'basis of knowledge'<sup>77</sup> for women and the crucible of change. It is from that place that women understand their creation and construction as women, and reconstruct and recreate themselves, and in the process define alternative futures; offering instead: 'what might be'. Mohanty offers a similar arrangement to Bartlett's two-part 'questioning', when she describes the discursive space created by testimonials and group consciousness. Mohanty calls out the centrality of 'remembering and rewriting' to feminist analysis.<sup>78</sup> Remembering acts with deconstructive purpose: 'correcting the gaps, erasures and misunderstandings'<sup>79</sup>. Rewriting works with constitutive and constructive effect, leading to the 'formation of a politicised consciousness and self-identity'<sup>80</sup>. It is worth stressing again that it is the 'politicisation of consciousness' that provokes such scrutiny and examination of the

<sup>73</sup> Mohanty, "Cartographies of Struggle Third World Women and the Politics of Feminism," 39.

<sup>74</sup> Moira McConnell, "Feminist theory as the Embodiment of Marginalisation," *In Reconceiving Reality: Women in International Law*, edited by Dorinda. D. Dallmeyer, Studies in Transnational Legal Policy No. 25. (Washington, DC: The American Society of International Law, 1993), 63.

<sup>75</sup> Bartlett, "Feminist Legal Matters," 837.

<sup>76</sup> Collins, *Black Feminist Thought*, 275 – 6.

<sup>77</sup> Mohanty, "Cartographies of Struggle Third World Women and the Politics of Feminism," 35.

<sup>78</sup> Mohanty, "Cartographies of Struggle Third World Women and the Politics of Feminism," 34.

<sup>79</sup> Mohanty, "Cartographies of Struggle Third World Women and the Politics of Feminism," 34.

<sup>80</sup> Mohanty, "Cartographies of Struggle Third World Women and the Politics of Feminism," 34.

epistemological grounds of feminism. Indeed it is because of this that I query with much more rigour the potential feminist method has to offer constructive direction, over the widely-held acceptance that feminism works with effective deconstructive purpose. This politicisation raises sensitivities from activism to academia, and obliges feminists to defend their purposes as constructive in and – most importantly – of the world. The politicisation of consciousness and consciousness-raising is indeed a reflection that feminist method is a 'struggle and contestation about reality itself.'<sup>81</sup> It is useful to remember this when seeking to defend feminism's constructive purposes. Returning now to how this is done, I will focus on three key characteristics of politicised consciousness; each finding their roots in the feminist ontology of becoming, and collectively shaping the contributions of feminist constructivism. These characteristics are: empowerment, community, and liberation; and together they shape the epistemological character of radical feminist constructivism. These characteristics are further clarified by third wave, Black and post-colonial feminism. I will explore these further below, beginning with empowerment.

### *Empowerment*

To articulate the significance of empowerment within feminist consciousness and constructivism, I will rely on the work of Patricia Collins who writes at length on this in *Black Feminist Thought*, particularly in her chapter 'Towards a Politics of Empowerment'. Specifically, I wish to highlight what she calls the 'special contribution' of US Black Feminist thought: 'the importance of knowledge for empowerment.'<sup>82</sup> To do so, I will begin by quoting at length her introduction to the dual character of empowerment within Black feminist constructivism:

In their efforts to rearticulate the standpoint of African American women as a group, Black feminist thinkers potentially offer individual African American women the conceptual tools to resist oppression. Empowerment in this context is twofold: Gaining the critical consciousness to unpack hegemonic ideologies is empowering... But while criticising hegemonic ideologies remains necessary, such critiques are basically reactive. Thus the second dimension of

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<sup>81</sup> Mohanty, "Cartographies of Struggle Third World Women and the Politics of Feminism," 34.

<sup>82</sup> Collins, *Black Feminist Thought*, 291.

empowerment within the hegemonic domain of power consists of *constructing new knowledge*. In this regard, the core themes, interpretive frameworks, and epistemological approaches of Black feminist thought can be highly empowering because they provide alternatives to the way things are supposed to be.<sup>83</sup>

The contestation for reality, and the process of self-definition act to empower women. Indeed, Collins suggests, that when it comes to empowerment, 'the act of insisting on Black female self-definition validates Black women's power as human subjects... [r]egardless of the actual content of Black women's self-definition.'<sup>84</sup> *The act itself is empowering*. Indeed, as Collins suggests, the content following from the act of self-definition may well be kept 'hidden' from the 'prying eyes of dominant groups.'<sup>85</sup> Whilst the content is known internally or privately, consciousness remains a source of empowerment for women and, perhaps, her only, 'sphere of freedom.'<sup>86</sup> As Marita O. Bonner suggests the conscious woman may be '[m]otionless on the outside. But inside?'<sup>87</sup>

The development of discursive spaces provide sites for the contestation of '(self) knowledge'<sup>88</sup> and for 'constructing new knowledge'. The creation of new (self) knowledge allows women to 'cope with and transcend intersecting oppressions.'<sup>89</sup> Collins highlights the power of this process in her analysis of Black women's literature, music and art. As she suggests, much of the output of discursive creative spaces is self-knowledge and that self-knowledge often represents a 'journey from internalised oppression to the "free mind"'<sup>90</sup>. In this sense 'reclaiming the "power of a free mind"' constitutes an important act of resistance.<sup>91</sup> Akin to Mohanty's emphasis on 'rewriting', Collins talks of self-definition as 'rearticulation'<sup>92</sup>, including: 'the significance of self-valuation and respect, the necessity of self-reliance and independence and the

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<sup>83</sup> Collins, *Black Feminist Thought*, 305. [Emphasis mine.]

<sup>84</sup> Collins, *Black Feminist Thought*, 126.

<sup>85</sup> Collins, *Black Feminist Thought*, 107.

<sup>86</sup> Collins, *Black Feminist Thought*, 122.

<sup>87</sup> Marita Bonner, "On Being Young—A Woman—And Colored." In *Double Take: A Revolutionist Harlem Renaissance Anthology*, edited by Venetria K. Patton and Maureen Honey, (New Brunswick, NJ: Rutgers University Press, 2001), 112.

<sup>88</sup> Mohanty, "Cartographies of Struggle Third World Women and the Politics of Feminism," 34.

<sup>89</sup> Collins, *Black Feminist Thought*, 108.

<sup>90</sup> Collins, *Black Feminist Thought*, 123.

<sup>91</sup> Collins, *Black Feminist Thought*, 304.

<sup>92</sup> Collins, *Black Feminist Thought*, 130.

centrality of a changed self to personal empowerment.<sup>93</sup> As it is rooted in the real and historically located lives of women, the crafting of alternative knowledge might be better understood as uncovering and exposing, rather than creating 'new' knowledge, as such. Indeed, it is imperative that we 'rethink, remember and utilize our lived relations as a basis of knowledge'<sup>94</sup> and understand that 'the lived experience of women acts as the criterion of meaning'<sup>95</sup>. This knowledge is, therefore, always 'grounded in and informed by the material experience of everyday life.'<sup>96</sup> These self-definitions are not free of historicity or materiality, rather they expose and redefine a material life that has been narrated primarily, if not solely (from the outside perspective, at least), by the powerful and the oppressor, and thereby partly constructed by the oppressor.<sup>97</sup> In this sense there remains a 'creative tension' between the social conditions that influence the lived experience of women, and how the empowerment of women through exposing positional truth and clarifying standpoints, strengthens women 'to shape those same social conditions.'<sup>98</sup> It is exactly the contestation over the creation and authorship of this material life that makes self-knowledge so political and potentially empowering. Indeed this contestation works to empower at a very basic level: survival. As Collins explains, 'not only does a self-defined, group-derived Black woman's standpoint exist, but [...] its presence has been essential to US Black woman's survival.'<sup>99</sup> By taking the lived experience of women as the 'criterion of meaning', self-definition acts to empower; challenging 'who is believed and why'<sup>100</sup>. Womanist consciousness recognises and negotiates the nature of knowledge as power, and in so doing empowers women through the (re-)creation and (re-)claiming of self-knowledge.

Key to the empowerment experienced by women through consciousness raising and self-definition is its collective character. Radical, Black, Third World, and intersectional feminism all emphasise the communal character of consciousness and consciousness-

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<sup>93</sup> Collins, *Black Feminist Thought*, 131.

<sup>94</sup> Mohanty, "Cartographies of Struggle Third World Women and the Politics of Feminism," 34 – 35.

<sup>95</sup> Collins, *Black Feminist Thought*, 275.

<sup>96</sup> Mohanty, *Feminism Without Borders*, 53.

<sup>97</sup> Understanding the importance and power of language with regard to empowerment, Barbra Harlow talks of the use of storytelling in the face of oppression as 'narratives of resistance, which write ... selfhood, consciousness and identity back into daily life.' Mohanty, "Cartographies of Struggle Third World Women and the Politics of Feminism," 35.

<sup>98</sup> Collins, *Black Feminist Thought*, 288.

<sup>99</sup> Collins, *Black Feminist Thought*, 109.

<sup>100</sup> Collins, *Black Feminist Thought*, 270.

raising activities. This is true also of self-knowledge and self-definition and its consequences in the world. Again, Collins explains: '[w]hile individual empowerment is key, only collective action can effectively generate the lasting institutional transformation required for social justice.'<sup>101</sup> Feminist consciousness and the constructed knowledge of self – or self-definition – illustrate the collectivist and communal nature of feminist positionality (or standpoint). Feminist epistemology makes bold claims about the significance of community as both a place of identity and discovering (or uncovering) identity. In this way the act of self-definition is deeply rooted in community.

### *Community*

Community as a location for positional truth, functions to provide both clarity and contradiction within feminist epistemology; which are, together, welcomed as they benefit and strengthen the constructive purposes of feminist theory (and activism). I will consider first the clarity, and then the contradictions, brought about by collective knowledge.

Finding a way to express a communal positionality, or standpoint, is an essential and core theme of feminist theory, and a platform from which to construct alternatives. The collective character of feminist ontology, epistemology and methodology is fundamental. (Or if we are to consider instead standpoint(s) as numerous ontologies, epistemologies, and methodologies, then collectivity, or community, is perhaps the unifying premise.) As has been touched on at numerous points in this chapter, positionality does not just value the lived experience of women, but the materiality of that experience, which is 'of course inextricably both natural and social'<sup>102</sup>. But further to this, and as Collins suggests of Black feminist epistemology (and I would extend to intersectional radical feminist epistemology<sup>103</sup>), experiential, material wisdom, is based

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<sup>101</sup> Collins, *Black Feminist Thought*, 308.

<sup>102</sup> As Hartsock makes clear of standpoint theory, the basis of the materiality of women's experience is always 'socially mediated interaction with nature...' Nancy Hartsock, 'The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism' In *Feminist Perspectives on Epistemology, Metaphysics, Methodology, and Philosophy of Science* edited by Sandra G. Harding and Merrill B. Hintikka, (Dordrecht, Netherlands: Reidel, 1983), 283 – 284.

<sup>103</sup> Collins, without rejecting the 'value' white women place on connectedness, suggests that 'African American women may find it easier than others to recognise connectedness as a primary way of



on a communal way of knowing and verifying, 'namely, collective experiences...' <sup>104</sup> Belonging as an individual to a group is not in itself 'sufficient ground to assume a politicised oppositional identity.' <sup>105</sup> Instead it is the collective nature of feminist consciousness that counts. This theorisation is aided by the privileging of 'wisdom' over knowledge, as a criterion of meaning within feminist epistemology. <sup>106</sup> Wisdom – lived experience – is shared through the medium of dialogue and the 'genre of testimonials' <sup>107</sup>, which, opposed to autobiographies, are 'constitutively public and collective' <sup>108</sup>. This distinctly feminist way of knowing makes the 'epistemological assumption [...] that connectedness rather than separateness is an essential component of the knowledge process' <sup>109</sup>, and, in doing so, further validates a move toward connection rather than individuation. Self-knowledge, and the process of self-definition, is thereby 'for and of the people.' <sup>110</sup> Rather than identity and self-hood as individualised, or 'defined as the increased autonomy gained by separating oneself from others' <sup>111</sup>, the self is defined in community, in 'the ability to recognise ones continuity with the larger community.' <sup>112</sup> Community, in this sense, serves to bring greater clarity to, and strengthen, feminism's way of knowing and constructing knowledge. Community also serves to provide contradiction – not just collectivity and contradiction *across* women but collectivity and contradiction *within* women. This, too, strengthens feminism's way of knowing and constructing knowledge, and comes from feminists' unique way of encountering and problematising difference and intersectionality within community.

Difference and intersectionality do not give way to subjectivism, as understood by post-modernism, or negate commonality, but rather they inform connection and commonality. From 'knowing differences and particularities we can better see connections ... because no border or boundary is ever complete or rigidly

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knowing simply because we have more opportunities to do so and must rely on it more heavily than others.' Collins, *Black Feminist Thought*, 279.

<sup>104</sup> Collins, *Black Feminist Thought*, 274.

<sup>105</sup> Mohanty, "Cartographies of Struggle Third World Women and the Politics of Feminism," 33.

<sup>106</sup> Collins, *Black Feminist Thought*, 274 – 275.

<sup>107</sup> Mohanty, "Cartographies of Struggle Third World Women and the Politics of Feminism," 34.

<sup>108</sup> Mohanty, "Cartographies of Struggle Third World Women and the Politics of Feminism," 34.

<sup>109</sup> Collins, *Black Feminist Thought*, 279.

<sup>110</sup> Mohanty, "Cartographies of Struggle Third World Women and the Politics of Feminism," 34.

<sup>111</sup> Collins, *Black Feminist Thought*, 124.

<sup>112</sup> Mary Helen Washington, "I Sign My Mother's Name: Alice Walker, Dorothy West, Paule Marshal," In *Mothering the Mind: Twelve Studies on Writers and Their Silent Partners*, edited by Ruth Perry and Martine Watson Broroney (New York: Holmes & Meier, 1984): 159.

determining.<sup>113</sup> As Audre Lorde suggests: '[i]t is not our differences that divide us [but] our inability to recognize, accept, and celebrate those differences.'<sup>114</sup> In her famous essay, 'The Master's Tools Will Never Dismantle the Master's House', Lorde talks about the dialectic spark caused by engaging with our differences, and the importance of seeing difference as necessary, not just tolerable, within the constructive purposes of womanism.

Within the interdependence of mutual (nondominant) differences lies that security which enables us to descend into the chaos of knowledge and return with true visions of our future, along with the concomitant power to effect those changes which can bring that future into being. Difference is that raw and powerful connection from which our personal power is forged. [...] As women, we have been taught either to ignore our differences, or to view them as causes for separation and suspicion rather than as forces for change. Without community there is no liberation, only the most vulnerable and temporary armistice between an individual and her oppression. But community must not mean a shedding of our differences, nor the pathetic pretence that these differences do not exist.<sup>115</sup>

In regard to positionality and consciousness we consider then, that 'differences constitute rather than undermine collectivity',<sup>116</sup> and so the challenge is not difference but to 'see how differences allow us to explain the connections and border crossings better and more accurately [and] how specifying difference allows us to theorise universal concerns more fully.'<sup>117</sup> However, as Gloria Anzaldúa explores in her crucial work on the new Mestiza (a consciousness of the border(lands))<sup>118</sup>, the formulation of consciousness, is not just conceptualised of differences, but often also of contradictions. Problematising difference where it leads to contradiction caused Anzaldúa to further strengthen the epistemic importance of positionality. Rather than undermining the importance of positionality and collective consciousness, Anzaldúa's

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<sup>113</sup> Mohanty, *Feminism Without Borders*, 226.

<sup>114</sup> Audre Lorde, *Our Dead Behind Us: Poems*. (New York: Norton, 1986).

<sup>115</sup> Audre Lorde, "The Master's Tools Will Never Dismantle the Master's House," *In Sister Outsider: Essays and Speeches*, Audre Lorde, ed., (Berkeley, CA: The Crossing Press, 1984), 112.

<sup>116</sup> MacKinnon, *Toward a Feminist Theory of the State*, 86.

<sup>117</sup> Mohanty, *Feminism Without Borders*, 226.

<sup>118</sup> Gloria Anzaldúa, *Borderlands/La Frontera: The New Mestiza*, 4<sup>th</sup> ed. (Aunt Lute Books, 2012).

work opened the door for feminist standpoint theories that are 'both/and', non-binary, and non-dual<sup>119</sup> – providing grounds, not to transcend difference, but to transcend duality, and in doing so provide a new and broader way of collectivising consciousness:

At some point, on our way to a new consciousness, we will have to leave the opposite bank, the split between the two mortal combatants somehow healed so that we are on both shores at once [...] The work of the Mestiza consciousness is to break down the subject-object duality that keeps her a prisoner and to show in the flesh and through the images in her work how duality is transcended.<sup>120</sup>

Mestiza consciousness rests on a 'conceptualisation of agency which is multiple and often contradictory but always anchored in the history of specific struggles.'<sup>121</sup> It does not give in to the 'splintering of the subject'<sup>122</sup>, advanced by post-structuralist notions of agency, but, as a 'theorisation of the materiality and politics of the everyday struggles of Chicanas'<sup>123</sup>, restates the importance of collective – *non-dual* – consciousness.

### *Liberation*

If community is the means of seeing alternative futures, then liberation – *collective* liberation – is the lens through which that vision is focused. Liberation is the lens then that both colours the imagined futures of women, and their collective way of seeing. The lens of liberation is not only counter-hegemonic, it is emancipatory. It is of foundational – and utmost – importance that the lens of liberation not be mistaken for equality. Equality is a measure which can only be understood in terms of subject-object materiality; whether this be formal equality or substantive equality. It can only be seen in light of what is, rather than what could be, and in this sense equality is not a lens by

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<sup>119</sup> The growth of transversal politics brings with it a rejection of 'the origins of standpoint approaches in Marxist social theory [which reflect] the binary thinking of its western origins'. Collins, *Black Feminist Thought*, 288; 'Viewing the world through a both/and conceptual lens of the simultaneity of race, class, and gender oppression and of the need for a humanist vision of community creates new possibilities for an empowering Afrocentric feminist knowledge. Many Black feminist intellectuals have long thought about the world in this way because this is the way we experience the world.' Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (New York: Routledge, 1990): 221.

<sup>120</sup> Anzaldúa, *Borderlands/La Frontera*, 80.

<sup>121</sup> Mohanty, "Cartographies of Struggle Third World Women and the Politics of Feminism," 34.

<sup>122</sup> Mohanty, "Cartographies of Struggle Third World Women and the Politics of Feminism," 37.

<sup>123</sup> Mohanty, "Cartographies of Struggle Third World Women and the Politics of Feminism," 37.

which to focus with at all.<sup>124</sup> Equality is a reordering of the pieces as they currently lie, to try and make them a little less offensive; but liberation allows women to prophesy beyond what can be seen and construct with free imagination. It's throwing off of oppression goes beyond reordering to *dis-ordering* the system. It goes beyond remembering, to re-writing. It is distinctly constitutive; calling out 'what could be', unrestrained by 'what is'. In this way, consciousness-raising and positionality work such as to wake disorder where it is needed. In places this can seem like reordering, and can appear as demands for 'equality', but we would be better off understanding equality as being brought into focus by the lens of liberation, rather than the means by which to achieve liberation. Again, this is not simply, liberty, as liberalism would have us believe; a reordering, or extending, of the freedoms enjoyed by some, but a transformation and dis-formation of the systems that exist to share such 'freedom' out as if it were merely object-subject matter to be weighted out. Radical feminism, Black feminism, post-colonial feminism, intersectional feminism, do not exist as methods to bring about the equality of women with men (what other standard exists in this scenario?) but to achieve their liberation from oppression; yes from male oppression, but from all intersecting oppression(s) that impact upon women.<sup>125</sup> There is no way to 'weigh out' equality, which fully addresses or successfully challenges the oppression of women. Here post-colonial feminism is quite clear: calls for mere 'gender equality' lack the intersectionality to achieve collective liberation, as 'gender discrimination is not the sole or primary locus of oppression of third world women.'<sup>126</sup> Again, this difference can be seen in the early – pre-liberal – radical feminist movement, which was inescapably linked to political liberation movements. As Cheryl Johnson-Odim explains, 'the early radical feminism of the 1960s was, in fact, broadly defined as being antiracist and antiimperialist, but much of that movement has been displaced by the far more popular liberal feminism which has not sufficiently defined racism and imperialism as major feminist issues.'<sup>127</sup> Johnson-Odim explains how the International Conferences (Mexico, Wellesley, and Copenhagen) were a site of dissonance between radical and liberal feminists, with third world women making feminism 'fundamentally political' and

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<sup>124</sup> But perhaps equality could be understood to be brought into focus by the lens of liberation.

<sup>125</sup> At this point, it is important to make clear that this discussion bears no parallels to the equality feminism vs. difference feminism debate. It offers a third non-dual path.

<sup>126</sup> Cheryl Johnson-Odim, "Common Themes, Different Contexts; Third World Women and Feminism," *In Third World Women and the Politics of Feminism*, edited by Chandre Talpade Mohanty, Ann Russo, and Lourdes Torres, (Bloomington, Indiana: Indiana University Press, 1991): 314.

<sup>127</sup> Johnson-Odim, "Common Themes, Different Contexts; Third World Women and Feminism," 316.

committed to the struggle for their liberation', and (more liberal) delegations from first world countries 'attempting to depoliticise the conferences and implicitly construct a women's movement and a feminism which confines itself to the issue of gender discrimination.'<sup>128</sup> Again, it is important to understand intersectionality as representing social locations of identity, oppression and resilience that are truly intersecting, rather than simply multiplied. As such the idea of seeing any kind of intersecting oppression as 'double discrimination' isn't wholly useful. Rather the fundamentally political basis of constitutive consciousness and women's liberation – considered as liberation of the whole person – must be taken seriously within the legal framework. Again, when we come to the international human rights law approach to violence against women the political character of its roots must be understood. Whilst the overthrowing and ending of oppression of women, and specifically violence against women, will result in substantive positions and norms that look very much like the call for gender equality, liberation is not limited to these positions and is not (necessarily) the mere combination of these efforts. In fact, it is the limited framework created by liberalist emphases on equality, that stop short the efforts to imagine and determine what a truly alternative future could look like. It is a much simpler task to define standards of 'equal treatment', be they formal or substantive, than to risk the task of liberation, with its many ontological uncertainties and visceral politicisation.<sup>129</sup> Yet this is the task of feminist method, rather than substantive (or issue-based) feminist campaigning. As its work for collective liberation does away with the duality caused by determining 'equal treatment', and instead opts for a non-dual, both/and alternative, feminist method is the place of unity and togetherness between women. Whilst the historicity of groups as created and constructed is appreciated as constituting the collective voice, these boundaries are, as Mohnaty argues, not seen as wholly fixed.<sup>130</sup> Rather than binary thinking, coalition building around women's liberation can be built by bridging from materially located identities to self-defined futures, via consciousness-raising. The lens of liberation allows this collective action to move forward, whereas efforts solely

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<sup>128</sup> Johnson-Odim, "Common Themes, Different Contexts; Third World Women and Feminism," 317.

<sup>129</sup> The lens of liberation and the task of consciousness-raising carries with it the same mystery, wonder, and risk, as the task of 'hope', as described by Walter Brueggemann in his influential work 'The Prophetic Imagination': 'Hope, on one hand, is an absurdity too embarrassing to speak about, for it flies in the face of all those claims we have been told are facts. Hope is the refusal to accept the reading of reality which is the majority opinion; and one does that only at great political and existential risk. On the other hand, hope is subversive, for it limits the grandiose pretension of the present, daring to announce that the present to which we have all made commitments is now called into question.' Walter Brueggemann, *The Prophetic Imagination*, 2 ed. (Minneapolis: Fortress Press, 2001): 65.

<sup>130</sup> Mohanty, *Feminism Without Borders*, 226.

focused by – or on – gender equality, and challenging gender discrimination, can serve to further binary thinking and division between women.

The lens of liberation – and the task of emancipatory imagination – serve as a challenge to the narrow vision of gender equality, and the liberal way of seeing discrimination and equality more broadly. Throughout my engagement with, and analysis of, the international human rights law approach, the challenge of liberation will be evident in the development of substantive norms and the discursive framing encompassing the feminist approach to violence against women. At an advocacy and praxis level, the liberative lens of feminism acts as a continuing means of resistance, challenging the limitations that are common, if not inherent, in the use of international law as a tool to end violence against women. Whilst engagement with the law is commonly viewed as pragmatic – especially by feminists working within the discourse who are fully aware of its limitations<sup>131</sup> – the utilisation of international human rights law as a means to eliminating violence against women has proven a site of major conceptual, discursive, and material advancement of the cause of women. This hinges on readings of human rights and international human rights law that are framed by the lives of women, articulated by women, re-written by women, and told by women. Without such framing engagement with international law – and the state – risks further compounding the oppression(s) of women.

### *Engagement with the state*

Before turning to the international legal approach to violence against women, it is worth attending to the issue – fundamental to much feminist theorising<sup>132</sup> – of *how* to engage with the state, and whether feminists *should* seek to engage with the state as a proposed agent of gender-transformative change, radical democracy, or liberation. This

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<sup>131</sup> 'Although feminist strategies of inclusion have been necessary as well as symbolically powerful for women [...] they also carry their own problems and limitations, prevent a more radical transformation of the human rights system, and ultimately reinforce the unequal position of women under international law.' Alice Edwards, *Violence Against Women Under International Human Rights Law*, (Cambridge: Cambridge University Press, 2011): ii.

<sup>132</sup> Much has been said on whether a feminist theory of the state exists or is possible: Judith Allen, "Does Feminism Need a Theory of 'the State'?", in *Playing the State: Australian Feminist Interventions*, Sophie Watson, ed., (London: Verso, 1990); MacKinnon, *Toward a Feminist Theory of the State*; John Hoffman, "Is there a case for a feminist critique of the state?" *Contemporary Politics*, 4(2), (1998): 161 – 176; Sandra Lilburn, "Ask Not 'Does Feminism Need a Theory of the State?' but Rather, Do Theorists of the State Need Feminism?", *Australian Feminist Studies*, 15, (2000): 107 – 110.

debate is rich with questions that I touch on throughout my review and analysis of – what I argue to be – the feminist-led international human rights law approach to violence against women. Much has been said on these concerns<sup>133</sup>, which include: the relationship between the law and the state<sup>134</sup>; the question of whether the state is an *intrinsically* or *contingently* patriarchal actor<sup>135</sup> (and therefore whether there is hope for it to be utilised by the women's movement for deconstructive and reconstructive purpose); the challenges and contradictions inherent in enlisting a hegemonic (patriarchal) actor as a 'protector'<sup>136</sup> of women and women's rights<sup>137</sup>; and the on-going negotiation of the divide between the 'private' and 'public' domains. I will briefly speak to these concerns and their impact on my engagement with international human rights law below, with particular appeal to Wendy Brown's problematisation of 'the man in the state'<sup>138</sup>.

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<sup>133</sup> Wendy Brown, "Finding the Man in the State," *Feminist Studies*, 18(1), (Spring 1992): 7 – 34; Wendy Brown, *States of Injury: Power and Freedom in Late Modernity*, (Princeton, NJ: Princeton University Press, 1995); Allen, "Does Feminism Need a Theory of 'the State'?"; MacKinnon, *Toward a Feminist Theory of the State*; Hoffman, "Is there a case for a feminist critique of the state?"; V. Spike Peterson, ed., *Gendered States: Feminist (Re)Visions of International Relations Theory*, (Boulder, CO: Lynne Rienner Publishers, 1992); Anne Phillips, ed., *Feminism and Politics*, (Oxford: Oxford University Press, 1998).

<sup>134</sup> Smart, *Feminism and the Power of Law*; Lisa D. Brush, "The Curious Courtship of Feminist Jurisprudence and Feminist State Theory: Smart on the Power of Law", *Law and Social Inquiry*, 19(4), (Autumn, 1994), 1059 – 1077; Shirin M. Rai and Georgina Waylen, *Global Governance: Feminist Perspectives*, (New York: Palgrave Macmillan, 2008).

<sup>135</sup> Hoffman, "Is there a case for a feminist critique of the state?" 162; Drude Dahlerup, "Confusing Concepts – Confusing Reality: A Theoretical Discussion of the Patriarchal State," *In Women and the State*, Anne Showstack Sassonn, ed., (London: Harper Collins Publishers, 1987); Barbara Marshall, *Engendering Modernity: Feminism Social Theory and Social Change*, (Cambridge: Polity Press, 1994), 125.

<sup>136</sup> Wendy Brown describes the 'legal and thereby ontologising ... construction of ... female powerlessness' through the politics of sexual protection. I discuss this problem when considering the role of Men and Boys' Organisations in the praxis of human rights intervention and gender transformative work around violence against women (chapter 3). Brown, "Finding the Man in the State," 9.

<sup>137</sup> A particular body of work has developed around the challenges of feminist engagement (theoretical and political) with the Welfare state, with some feminists arguing the welfare state offers opportunities to empower women as clients and agents of the state (sometimes termed state feminism), whilst others argue that the state – particularly through regulation – perpetuates and produces the subordination of women. Key works include: Barbara Ehrenreich and Frances Fox Piven, "Women and the Welfare State," *In Alternatives: Proposals for America from the Democratic Left*, Irving Howe, (New York: Pantheon, 1983); Mimi Abramovitz, *Regulating Women*, (Boston: South End Press, 1988); Nancy Fraser, "Struggle Over needs", *In Women, the State, and Welfare*, Linda Gordon, ed., (Madison: University of Wisconsin Press, 1990); Frances Fox Piven, "Ideology and the State: Women, Power, and the Welfare State," *In Women, the State, and Welfare*, Linda Gordon, ed., (Madison: University of Wisconsin Press, 1990); Frances Fox Piven and Richard A. Cloward, "The Contemporary Relief Debate," *In The Mean Season: The Attack on the Welfare State*, Fred Block, Richard A. Cloward, Barbara Ehrenreich, Frances Fox Piven, eds. (New York: Pantheon, 1987); Helga Hernes, *Welfare State and Woman Power: Essays in State Feminism*, (Oslo: Norwegian University Press, 1987); M. Harrington, "What Exactly is Wrong with the Liberal State as an Agent of Change?" *In Gendered States: Feminist (Re)Visions of International Relations Theory*, V. Spike Peterson, ed., (Boulder, CO: Lynne Rienner Publishers, 1992);

<sup>138</sup> Brown, "Finding the Man in the State."

With regard the relationship between the law and the state, feminist critique has come to bear on a fundamental ontological question: *what is the state?* Is 'the law' separate to 'the state'? And if it is, does it matter? – aren't they still both widely considered as patriarchal actors? As Wendy Brown contends, the state is not a monolithic 'entity or unity'<sup>139</sup> (of which the law is just one face of 'its power'); in fact 'the state' is not an 'it'<sup>140</sup> at all. Rather, as Brown suggests, the state is multiple sites and modalities, operating, expressing and engendering quite 'different kinds of power'<sup>141</sup>. This impacts upon feminist engagement with the state and feminist theorising about engagement with the state.<sup>142</sup> If the state is many things – Brown outlines four modalities: juridical-legislative, capitalist, prerogative, and bureaucratic<sup>143</sup> – are these multiplicities all patriarchal? Is the state just the sum of these separate patriarchal institutions, politics and discursive spaces coming to bear on women's lives (and thereby negating ontological claims to a patriarchal state that exists distinctly from its incumbent parts)?<sup>144</sup> Or are these multiple modalities shaped by a wider patriarchal conceptualisation of the state as replacing the original patriarchy of the (pre-civil society) father/husband?<sup>145</sup> These questions have been investigated extensively and particular attention has been paid by feminists to the juridical-legislative modality of the state, and 'the law', as touched on earlier in this chapter.<sup>146</sup> However, it is important to recognise at the offset that the law remains tightly bound up in the broad feminist problematisation of the state as a patriarchal actor – however one considers the ontological relationship between the two. As such, whilst advocating for engagement with the law I am aware that the negotiation of the state as patriarchal remains a key

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<sup>139</sup> Wendy Brown, "Finding the Man in the State,"; Lilburn, "Ask Not 'Does Feminism Need a Theory of the State?' but Rather, Do Theorists of the State Need Feminism?", 107.

<sup>140</sup> Brown, "Finding the Man in the State," 12.

<sup>141</sup> Brown, "Finding the Man in the State," 13.

<sup>142</sup> Women's groups continue to gather around this issue. Problematizing their engagement with the state remains a key part of the work of grassroots women's organisations: On 13<sup>th</sup> April 2019 leading UK women's organisations hosted 'Feminist Responses to State Violence', a day for women's organisations focused on austerity, deportation, and the criminalisation of sex work, to 'think and reflect on the methods feminists use to resist the harm caused by state governance'. *Feminist Responses to State Violence*, SOAS University of London, Centre for Gender Studies, accessed January 13<sup>th</sup>, 2020, <https://blogs.soas.ac.uk/gender-studies/2019/05/29/feminist-responses-to-state-violence/>

<sup>143</sup> Brown, "Finding the Man in the State," 13.

<sup>144</sup> Allen, "Does Feminism Need a Theory of 'the State'?", 22.

<sup>145</sup> Carole Pateman, *The Sexual Contract*, (Stanford, CA: Stanford University Press, 1988).

<sup>146</sup> See earlier comments on Feminist Jurisprudence *supra* note 5, alongside: Smart, *Feminism and the Power of Law*; Zillah R. Eisenstein, *The Female Body and the Law*, (Berkeley and Los Angeles, CA: University of California Press, 1988). This will be further considered when looking specifically at the relationship between patriarchy and the law in Chapter 2.



concern and is ever-present when appraising the 'political opportunity structures'<sup>147</sup> offered by the international legal discourse for women to (re)negotiate the terms of their citizenship, democratic participation, and civilly defined social identity (whether viewed as private or public, personal or political). I don't claim to settle, or directly address, all of these concerns in full through the course of my thesis. However, a deep awareness of these concerns has shaped my approach to international human rights law – and I would argue shapes the politics and praxis of the transnational women's movement within the discourse. Feminist engagement with the law is fraught with tension, suspicion, and at times hostility, and this is evident at a praxis level in the negotiations between the transnational women's movement, the institutions of the international community, and other non-state actors. This said, there is a strategic-political – and not just a pragmatic – choice behind advocating for engagement with international law.

Feminist engagement with, and theorising of, international law, whilst informed by the concerns raised above, is also premised on the contention that international law – and international human rights law particularly – provides unique opportunities for women to redefine their relationship with the state – and indeed, to redefine the state 'itself.' This is of particular interest to me precisely because of the concerns outlined above. In the specific case of state responsibility for violence against women – as will be seen in detail in chapter 4 – international human rights law and the general international legal principle of due diligence, has been appropriated by feminist legal theorists and activists and utilised to expand the demands that women can make on the state.<sup>148</sup> As such, Paulina García-Del Moral and Megan Alexandra Dersnah argue that this has fundamentally changed the claims to citizenship that women can make.<sup>149</sup> A broader claim to the 'gendered development of democracy'<sup>150</sup> through international legal spaces, has been argued as evident by feminist international legal scholars and practitioners. In particular, the transnational women's movement's engagement with

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<sup>147</sup> Vicky Randall, "Gender and Power: Women Engage the State," In *Gender, Politics and the State*, Vicky Randall and Georgina Waylen, eds., (London and New York: Routledge, 1998), 194.

<sup>148</sup> Paulina García-Del Moral and Megan Alexandra Dersnah, "A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship," *Citizenship Studies*, 18 (6-7), (2014): 661.

<sup>149</sup> García-Del Moral and Dersnah, "A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship," 664.

<sup>150</sup> Elisabeth J. Friedman, *Unfinished Transitions: Women and the Gendered Development of Democracy in Venezuela*, (University Park, PA: The Pennsylvania State University Press, 2000).

international law, and its surrounding discursive spaces, such as the international conferences on women have offered opportunities for women's groups to expand on – and in some places subvert – their otherwise restricted roles as citizens and agents of the state.<sup>151</sup> As Vicky Randall suggests, in reference to feminist theorising of the state:

Yet a further modification to a focus simply on 'the state' is required ... political opportunities for women have been created by the interaction of numerous states... [T]he momentum originally generated by the UN Commission for the Status of Women which led to the holding of a succession of international conferences, culminating in the meeting in Beijing in 1995, has significantly helped to legitimate women's demands within the confines of the nation state.<sup>152</sup>

Whilst appeals to the normative importance of the human rights discourse (as the 'dominant progressive moral philosophy operating at the global level'<sup>153</sup>) are made by feminist scholars, perhaps of more importance is the discursive and institutional space created around the state, from which women's groups have been able to expand political agency and cement international institutionalised feminist presence as a site of resistance. This allows for unique engagement with the state in a manner which renegotiates the terms of that engagement. As Jackie Jones and former Special Rapporteur Rhadhika Coomaraswamy suggest, the inclusion and expansion of women's rights have 'altered the substance and the procedure of international law'<sup>154</sup>,

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<sup>151</sup> Elisabeth Jay Friedman, "Gendering the Agenda: The Impact of the Transnational Women's Rights Movement at the UN Conferences of the 1990s," *Women's Studies International Forum*, 26 (4), (2003), 313 – 331; Jude Howell, "Women's Organizations and Civil Society in China," *International Feminist Journal of Politics*, 5(2), (2003), 191 – 215; Jude Howell, "Gender, civil society and the state in China," *In Gender, Politics and the State*, Vicky Randall and Georgina Waylen, eds., (London and New York: Routledge, 1998), 166 – 184; Dorothy McBride Stetson and Amy Mazur, eds., *Comparative State Feminism*, (Thousand Oaks, CA: Sage Publications, 1995); Valerie Sperling, "Gender, Politics and the State during Russia's Transition Period," *In Gender, Politics and the State*, Vicky Randall and Georgina Waylen, eds., (London and New York: Routledge, 1998), 143 – 165.

<sup>152</sup> Randall, "Gender and Power: Women Engage the State," 196.

<sup>153</sup> Hilary Charlesworth, "The Mid-Life Crises of the Universal Declaration of Human Rights," *Washington & Lee Law Review*, 55, (1998), 781 – 796, 795; Charlesworth and Chinkin, *The Boundaries of International Law: A Feminist Analysis*, 212.

<sup>154</sup> Jackie Jones, "The Importance of International Law and Institutions," *In The Legal Protection From Violence: Normative Gaps in International Human Rights Law*, edited by Rashida Manjoo and Jackie Jones, (Abingdon, Oxon: Routledge, 2018), 10.

including 'piercing the veil of state sovereignty'<sup>155</sup>. To this end there is broad – although not universal – agreement amongst feminists 'that international law is needed as a weapon against systemic oppression'.<sup>156</sup> It is from this perspective that my thesis proceeds, albeit cautiously.

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<sup>155</sup> Rhadika Coomaraswamy, "Women and Children: The Cutting Edge of International Law," *American University International Law Review*, 30, (2015), 9.

<sup>156</sup> Jones, "The Importance of International Law and Institutions," 10; Kwong-Leung Tang and Jacqueline Tak-York Cheung, "Realizing Women's Human Rights in Asia: The UN Women's Convention and the Optional Protocol," *Asian Journal of Women's Studies*, 9(4), (2003): 13; Ineke Boerefijin, "A Human Rights Based Approach of Violence against Women," *International Studies Journal*, 4, (2007): 187 – 189.

## Chapter 2 – Violence Against Women and International Human Rights Law: The Development of an International Legal Paradigm rooted in the Radical Feminist Theory of Positionality.

In the outline of my methodological position in Chapter 1, I have tried to address some of the challenges of utilising feminism – particularly radical feminism – as a theoretical framework for my research. In particular, these challenges include: negotiating intersecting, and sometimes contradictory, locations of positional knowledge and wisdom; constructing counter-hegemonic alternative knowledge and wisdom; and, maintaining a defensible relationship between theory positions and substantive positions i.e. the importance to feminism of problematising method. I will now look to clarify how (radical) feminism has shaped the *conceptualisation* of violence against women and surrounding *substantive norms* within the international human rights law approach, and how it has shaped the *normative approach* itself. (Again, in this way it remains important to investigate feminism's relationship with the law and surrounding discursive space, and to continue problematising liberation as both 'the medium and the message' of feminist engagement with the law.) Through exploration of the conceptualisation of violence against women within the international human rights law approach, I intend to further draw out the feminist emphases on: the epistemic significance of positionality and collective wisdom; and the ontological significance of community, empowerment, and liberation. By exploring the feminist problematisation of violence against women, I hope to further the understanding of violence against women as a *human rights violation* and the feminist character of the international human rights law response (and theorised practice of the law). This will enable me to draw together a framework outlining state responsibility with regard violence against women, that is consistent and cohesive with feminist theorising within the law, and which contributes further to the uniquely feminist human rights approach to *preventing* violence against women.

In this chapter I also plan to touch upon questions of application and theorised (and untheorised) practice, although more will be said on this as I consider preventative strategies and norms within the international human rights law approach to violence against women, in later chapters.

In this chapter I will provide an overview of violence against women and international human rights law and consider how the understanding of violence against women has developed through the women's movement's leading of the international human rights discourse.<sup>157</sup> In particular, I will delineate and highlight key substantive principles and characteristics of an international legal approach that I argue is rooted in the radical feminist theory of positionality, outlined in Chapter I. From this, I will go on to consider the international human rights law approach to primary prevention and due diligence, specifically; outlining, again, its (radical) feminist character and theoretical underpinnings. *Through this I will trace the conceptual development of violence against women as a human rights violation.* It is important to note that, again, these principles were not picked to defend a theory position, as such, but engagement with these principles – as developed within the international human rights law approach – introduced me to radical feminist political theory, and specifically the primacy of positionality, as outlined in Chapter I. For the sake of advancing my thesis and clarifying the due diligence obligation to prevent violence against women, I have presented my theory position in advance of my legal review, however, in reality, it was engagement with the law that began the process of theorising, and educated me as to the significance of (radical) feminist theory to this specific area of law.

Whilst my exposure to political thought within an academic setting predates my engagement with the law, it was only through the study of international law, and the research and activism that followed, that I became more fully versed in feminist political theory and aware of its impact in the world and in my own life. Introduction to the work of Christine Chinkin and Hillary Charlesworth was the first time my own learning and critical engagement was given a specifically feminist lens. This introduction to feminist approaches to international law, and following that Third World Approaches to International Law (TWAIL), was a catalytic moment in understanding my own positionality with regard the law as a European, white, cisgendered woman from a working class background. These schools of legal politics and praxis crystallised

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<sup>157</sup> Elisabeth Jay Friedman, "Gendering the Agenda: The Impact of the Transnational Women's Rights Movement at the UN Conferences of the 1990s," *Women's Studies International Forum*, 26 (4), (2003), 313 – 331; Charlotte Bunch and Niamh Reilly, *Demanding Accountability: The Global Campaign and Vienna Tribunal for Women's Human Rights*. (New Brunswick, NJ : Center for Women's Global Leadership /United Nations Development Fund for Women, 1994); Farrior, Stephanie. "The Due Diligence Standard, Private Actors and Domestic Violence," *In Human Rights: From Practice to Policy Proceedings of a Research Workshop Gerald R. Ford School of Public Policy University of Michigan October 2010*, edited by Carrie Booth Walling, Susan Waltz, Michigan: University of Michigan, 2011.

my own thinking with regard the role and significance of critical theory and the role law plays as a political and normative actor and institution. Finding myself at home within the critical approaches to international law, I soon became engaged with research and activism that coupled my interest in the law with my passion for social justice. Working on the fringes of the lobbying efforts for a new Welsh Bill addressing violence against women, I saw first hand the relationship between international human rights law and the women's movement. During this time (2011 – 2012) I volunteered for the Welsh Office of Amnesty International who operated as a key partner in the Wales Violence Against Women Action Group<sup>158</sup> (a coalition of leading Welsh women's organisations operating under feminist principles, such as Welsh Women's Aid, BAWSO, and Wales Assembly of Women). As part of my role I provided research briefs and in-depth reports supporting the coalition's call for the Welsh Bill to take the feminist approach to violence against women outlined in the DEVAW, namely that 'violence against women is a manifestation of historically unequal power relations between men and women'<sup>159</sup>; and that outlined a holistic and feminist understanding of state responsibility. With regard the international legal response to violence against women it was clear that the international human rights community and the women's movements had a symbiotic relationship, with the transnational women's movement acting as a key voice in pushing for the normative standards that shaped the DEVAW and the Beijing Platform for Action, and the existence of those standards becoming the orthodox tools of grassroots women's organisations in national contexts, such as in the case of the Welsh Bill.<sup>160</sup> The role of the women's movement as a fundamental sociopolitical and demosprudential<sup>161</sup> actor making 'legal conclusions not just more likely, but for all intents and purposes, inevitable'<sup>162</sup> seemed evident in the shape of the international human rights law response to violence against women, in the make-up of the international legal landscape<sup>163</sup>, and in the dynamic relationship between non-elite groups and international law. Yet there was also a

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<sup>158</sup> <http://www.walesvawgroup.co.uk> accessed 9<sup>th</sup> January 2020.

<sup>159</sup> General Assembly resolution 48/104, *Declaration for the Elimination of Violence Against Women*, A/RES/48/104 (20 December 1993), Preamble, available from <http://undocs.org/A/RES/48/104>

<sup>160</sup> Hannah Austin, *VAW: Priorities for the Violence Against Women (Wales) Bill*, (Cardiff: Wales Violence Against Women Action Group, 2013), available at <http://www.walesvawgroup.co.uk/wp-content/uploads/2012/10/vaw-priorities-for-vaw-wales-bill.pdf>.

<sup>161</sup> More will be said on this role in the case law review in chapter 4.

<sup>162</sup> Lani Guinier and Gerald Torres, "Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements," *The Yale Law Journal*, 123(8), 2014, 2740 – 2804, 2740.

<sup>163</sup> Guinier and Torres, "Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements," 2749 – 2750.

dissonance between the feminist norms that inhered in the international human rights law response, and the ability of women's groups to fully utilise those norms for political progress at the national level. As non-elite groups their engagement was afforded international institutional orthodoxy, but this was limited by engagement with state actors that weren't versed in, or informed by, those norms or orthodoxy. Despite these challenges – which are touched on in later chapters – my experience as a student of international law, a researcher, and activist all compounded an understanding of the international human rights response to violence against women as a fundamental tool of the women's movement, and as being deeply rooted and shaped by feminist political thought and activism. To this end, I believe the use of international law as a sociocultural and political – as well as a legal – tool to develop the concept and practice of state responsibility for violence against women cannot be underestimated. The orthodoxy and institution of international human rights law have played an important role in creating discursive space and providing opportunities to concretise otherwise fragile gains made by the women's movement. However, institutionalising these gains brings with it its own challenges. This dichotomy will be touched on across the following chapters.

### **The international human rights law response to violence against women<sup>164</sup>**

In order to appraise the successes, and highlight the ongoing challenges, which impact upon the implementation of a feminist international human rights law approach to violence against women, it is first necessary to situate it in the context of more general developments in international human rights law and the jurisprudence governing understandings of, and responses to, violence against women.

Prior to, and during, the United Nations Decade for Women (1975 – 1985), the issue of violence against women in general, and more specifically domestic violence, was high on the agenda of women's rights activists. Advocacy at the World Conferences

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<sup>164</sup> The overview of international legal developments provided in this section was shaped by a research memo I prepared with Dr. Claire Malcolm for UN Women as part of the 20 year review of the Beijing Platform for Action (Beijing+20 available at <http://beijing20.unwomen.org/en>). The research memo was developed at the request of then UN Special Rapporteur on Violence Against Women, Rashida Manjoo, and focused on developments within the United Nations, as well as continuing gaps and challenges.

on Women served as a catalyst for the adoption of General Assembly resolution 40/36 on domestic violence in 1985. The Third World Conference on Women and the Expert Group meeting on violence in the family, held in Vienna in 1986, further highlighted the global nature and concern regarding violence against women. In May 1991, the Economic and Social Council (hereafter, ECOSOC) adopted resolution 1991/18 on violence against women in all its forms, in which it recommended the development of a framework for an international instrument that would explicitly address the issue of violence against women. The Council also urged member states to adopt, strengthen and enforce legislation prohibiting violence against women and to take appropriate administrative, social and educational measures to protect women from all forms of physical and mental violence.

The UN explicitly recognised violence against women as a human rights violation at the World Conference on Human Rights, held in Vienna in 1993. The Vienna Declaration and Programme of Action, adopted by the Conference, noted that 'the human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights'.<sup>165</sup> Emphasising that the elimination of violence against women in all areas of life, both public and private, was central to the attainment of women's human rights, the Conference called on governments and the UN to take the steps necessary for the realisation of this goal, including by integrating the human rights of women 'into the mainstream of United Nations system-wide activity',<sup>166</sup> through the activities of the treaty bodies and relevant mechanisms, including the promotion of how to make effective use of existing procedures, and the adoption of new procedures to 'strengthen implementation of the commitment to women's equality and the human rights of women'.<sup>167</sup> Furthermore, in 1993, the General Assembly adopted the Declaration on the Elimination of Violence against Women (resolution 48/104), as recommended by the ECOSOC, and in 1994, the Commission on Human Rights adopted resolution 1994/45, establishing the mandate of the United Nations Special Rapporteur on violence against women, its causes and consequences (hereafter Special Rapporteur).

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<sup>165</sup> United Nations, *Vienna Declaration and Programme of Action*, Vienna, 25 June 1993, part I, paragraph 18, available from <http://undocs.org/A/CONF.157/23>

<sup>166</sup> United Nations, *Vienna Declaration*, part II, paragraph 37.

<sup>167</sup> United Nations, *Vienna Declaration*, part II, paragraph 40.



One of the most significant moments regarding the elimination of violence against women at the international level was the 1995 Beijing Platform for Action (PFA). The PFA followed General Recommendation no. 19 by the Committee on the Elimination of Discrimination against Women (hereafter CEDAW Committee) and the 1993 Declaration on the Elimination of Violence against Women (DEVAW (resolution 48/104)). The PFA distilled two decades of advocacy and awareness-raising of the issue of violence against women at the UN. However, it was arguably the DEVAW that marked the establishment of an international human rights law approach to the elimination of violence against women. Whilst the Declaration is non-binding, it goes towards customary law and marks a significant global consensus. The DEVAW remains, perhaps, the primary international legal instrument with reference to eliminating violence against women.

The Fourth World Conference on Women, in Beijing, reiterated the strides taken under the auspices of the Vienna Declaration, making violence against women the centrepiece of its Platform for Action and cementing the issue within the human rights discourse. In so doing, it reinforced the legal and normative foundations, developed not only at Vienna but also through General Recommendation No. 12 (1989) and General Recommendation No. 19 (1992) of the CEDAW Committee and the DEVAW.

Consolidating the understanding developed through earlier World Conferences, these elements of international human rights law emphasise and articulate the scope of violence against women and affirm that this definition incorporates physical, sexual and psychological violence. The PFA elaborates on various manifestations of violence against women, such as murder, systematic rape and forced pregnancy during armed conflict, as well as sexual slavery, forced sterilization, forced abortion, female infanticide and prenatal sex selection.<sup>168</sup> Likewise General Recommendation no. 19 and the DEVAW are explicit in their elucidation of the systemic and structural nature of violence against women. The DEVAW, in particular, offered a critical development with regard to characterising violence against women as a human rights violation and was fundamental to the PFA.

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<sup>168</sup> United Nations, *Report Of The Fourth World Conference On Women: Beijing Declaration and Platform for Action*, Chap. I, resolution I, annex II, paras. 114 and 115, available at <http://undocs.org/A/CONF.177/20>

The DEVAW also provided a comprehensive framework in terms of definition, scope, state responsibility, and the role of the UN. The PFA purposefully used the same definition of root causes of violence against women as that provided by the DEVAW; specifically:

**violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.**<sup>169</sup>

In so doing, it further elaborates on the gendered and discriminatory nature of violence against women. The CEDAW Committee furthers this definition by explaining violence against women as:

**[v]iolence that is directed against a woman because she is a woman, or that affects women disproportionately.**<sup>170</sup>

The PFA and DEVAW marked milestones on the 'gender equality agenda' of the UN and represented a transition in the acknowledgment of violence against women from a so-called 'private matter', to a public human rights concern. Whilst progress was made during the UN Decade for Women, particularly at the World Conference in Nairobi, the term *violence against women* was only formally outlined in Article I of the DEVAW (and the PFA), which defined it as:

**any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including**

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<sup>169</sup> General Assembly resolution 48/104, *Declaration for the Elimination of Violence Against Women*, A/RES/48/104 (20 December 1993), Preamble, available from <http://undocs.org/A/RES/48/104>

<sup>170</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 19, 11<sup>th</sup> session, A/47/38, (1992), paragraph 6, available from <http://undocs.org/A/47/38>

**threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.<sup>171</sup>**

During the decade following the DEVAW, there were two main areas of progress at the international level – awareness raising and standard-setting – that took root at the national level, through the enactment of legislation. In particular, the increased consciousness of the scope of violence against women and its varying manifestations was steadily highlighted across the UN. A core component of awareness-raising was the establishment of the mandate of the Special Rapporteur.<sup>172</sup> A key part of the mandate of the Special Rapporteur is to seek and receive information on violence against women, a directive that reflects the second strategic objective of the PFA – ‘Study the causes and consequences of violence against women and the effectiveness of preventive measures.’<sup>173</sup>

Before the establishment of the office of the Special Rapporteur, and the DEVAW and PFA, violence against women was widespread and unchallenged. The international women's movement fought to place on the international agenda a range of manifestations of violence against women, including: violence which targets women during armed conflict and/or which is perpetrated directly by the state; violence in the family, such as domestic violence, or violence linked with cultural practices; and violence in the community, such as rape, sexual harassment, religious extremism and trafficking. All these concerns were incorporated into the mandate of the Special Rapporteur. During the tenure of the first mandate holder, Radhika Coomaraswamy, this broad scope proved invaluable in increasing understanding of forms and manifestations of violence against women. The Special Rapporteur recommended that states criminalise and prosecute all manifestations of violence against women, including violence perpetrated under the guise of cultural practices.<sup>174</sup> There was a notable

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<sup>171</sup> United Nations, *Report Of The Fourth World Conference On Women: Beijing Declaration and Platform for Action*, paragraph 113 and General Assembly resolution 48/104, *Declaration for the Elimination of Violence Against Women*, A/RES/48/104 (20 December 1993), Article 1.

<sup>172</sup> Commission on Human Rights resolution 1994/45, *Question of integrating the rights of women into the human rights mechanisms of the United Nations and the elimination of violence against women*, RES/1994/45, available from <http://undocs.org/E/CN.4/1994/45>

<sup>173</sup> United Nations, *Report Of The Fourth World Conference On Women: Beijing Declaration and Platform for Action*, Chap. I, resolution 1, annex II, D.2

<sup>174</sup> United Nations, *Cultural practices in the family that are violent towards women: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy*, E/CN.4/2002/83, (31 January 2002), available at <http://undocs.org/E/CN.4/2002/83>

increase in awareness and understanding of violence against women as expressed, in particular, within domestic violence, marital rape, female genital mutilation (FGM), trafficking, and violence against women in armed conflict.

In 1993 the crime of domestic violence was hidden behind deference to the so-called 'private sphere'; rarely prevented or prosecuted. Laws and criminal justice procedures did not recognise domestic violence as a specific crime, and prosecutions had to be brought under the general law of assault. Since the DEVAW and PFA, a great deal has occurred at the standard-setting level with regard to domestic violence. 'In terms of legislation, domestic violence is undoubtedly the area in which many countries have made progress'<sup>175</sup> over the past 20 years. The development of national legislation was promoted and advanced by the model legislation on domestic violence released in 1996. At that time, the Special Rapporteur issued a report, 'Further Promotion and Encouragement of Human Rights and Fundamental Freedoms', submitted in accordance with the Commission on Human Rights resolution 1995/85.<sup>176</sup> The addendum to the report included a framework for model legislation on domestic violence, 'to serve as a drafting guide to legislatures and organizations committed to lobbying their legislatures for comprehensive legislation on domestic violence.'<sup>177</sup> The model legislation includes a definition of domestic violence, a declaration of purpose and both civil and criminal provisions. It includes requirements for police officers, judges and prosecutors. Importantly, the legislation highlights the significance of victim safety throughout criminal and civil proceedings. The model law was thorough in ensuring protection for victims of domestic violence, covering guidance on responding to domestic violence, ensuring safety during criminal procedures, and advising on protection orders and restraining orders. In Section VII, the model law directs states to provide emergency and long-term services to domestic violence victims and to train legal professionals and social service providers in the complicated dynamics of

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<sup>175</sup> United Nations, *Cultural practices in the family that are violent towards women: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Radhika Coomaraswamy, E/CN.4/2002/83, (31 January 2002), paragraph 28.

<sup>176</sup> United Nations, *Violence in the family and domestic violence: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Radhika Coomaraswamy, E/CN.4/1996/53, (5 February 1996), available from <http://undocs.org/E/CN.4/1996/53>

<sup>177</sup> United Nations: *A framework for model legislation on domestic violence: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Radhika Coomaraswamy, E/CN.4/1996/53/Add.2 (2 February 1996), available from <http://undocs.org/E/CN.4/1996/53/Add.2>

domestic violence.<sup>178</sup> In 1997, as an annex to General Assembly resolution 52/86, on crime prevention and criminal justice measures to eliminate violence against women, the General Assembly adopted model strategies and practical measures on the elimination of violence against women in the field of crime prevention and criminal justice.

The strengthening of legislation has more recently been furthered by the 'UN Handbook for Legislation on Violence Against Women'<sup>179</sup>, published in 2009, and the Secretary-General's database on violence against women<sup>180</sup>. These followed a 2008 report by UN Women and the United Nations Office on Drugs and Crime, 'Good practices in Legislation on Violence Against Women.'<sup>181</sup> The Expert Group Meeting followed on from the Secretary-General's 2006 in-depth study on all forms of violence against women, and General Assembly resolution 61/143, on the 'Intensification of Efforts to Eliminate all forms of Violence Against Women'<sup>182</sup>. The UN Handbook contains a new framework for legislation on violence against women, which addresses implementation, monitoring and evaluation, definitions of violence against women, prevention, protection, investigations and legal proceedings, protection orders, sentencing, family law cases involving violence against women, civil lawsuits, and violence against women and asylum law. Under international law, states must now address violence against women, including through the passing of legislation and a great many appear to have heeded this. In fact, by 2011, domestic violence had been outlawed by 125 states.

Initiatives to develop model approaches in addressing violence against women have also been undertaken by the Caribbean Community Secretariat (CARICOM); the Pan-

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<sup>178</sup> United Nations: *A framework for model legislation on domestic violence: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy*, E/CN.4/1996/53/Add.2 (2 February 1996), Section VII, available from <http://undocs.org/E/CN.4/1996/53/Add.2>

<sup>179</sup> United Nations Department of Economic and Social Affairs/Division for the Advancement of Women, *Handbook for Legislation on Violence Against Women*, (New York: UN, 2010)

<sup>180</sup> "Secretary-General's database on violence against women", accessed 21 May 2015. <http://sgdatabase.unwomen.org>

<sup>181</sup> United Nations, *Good practices in legislation on violence against women: Report of the expert group meeting organized by United Nations Division for the Advancement of Women United Nations Office on Drugs and Crime, Vienna, Austria, 26 to 28 May 2008*, available at [https://www.un.org/womenwatch/daw/egm/vaw\\_legislation\\_2008/Report%20EGMGPLVAW%20\(final%2011.11.08\).pdf](https://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/Report%20EGMGPLVAW%20(final%2011.11.08).pdf)

<sup>182</sup> General Assembly resolution 61/143, *Intensification of efforts to eliminate all forms of violence against women*, A/RES/61/143 (19 December 2006), available from <http://undocs.org/A/RES/61/143>

American Health Organization (PAHO), a regional office of the World Health Organization (WHO), in coordination with the Inter-American Commission of Women (CIMI/OAS), the United Nations Population Fund (UNFPA), and the United Nations Development Fund for Women (UNIFEM).

Given the erstwhile 'invisibility' of violence against women – and particularly domestic violence – in international and national legislation, the development of this model law must be considered as a notable success, albeit one which remains somewhat constrained by limitations concerning implementation and enforcement.

During the decade following the DEVAW and PFA, awareness-raising and standard-setting around the varying forms and manifestations of violence against women also informed an expanding international legal framework, including:

- The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (The Palermo Protocol, 2000);
- The Rome Statute of the International Criminal Court (1998);
- The Optional Protocol to the CEDAW (2000); enabling the CEDAW committee to consider petitions from individual women or groups of women who have exhausted national remedies. It also entitles the Committee to conduct enquiries into grave or systematic violations of the Convention; and,
- UN Security Council Resolution 1325 (2000), which called for special measures to protect women and girls from violence against women in armed conflict.

At the advent of the DEVAW there was no effective international legal framework for addressing either the rights of women, or violence against women during armed conflict. The reality of this latter phenomenon, in particular the use of rape within warfare, had been highlighted after the war in Bosnia Herzegovina, the genocide in Rwanda, and the conflict in East Timor. The Rome Statute of the International Criminal Court, marked one of the most significant achievements in addressing violence against women during armed conflict. The statute specifically defines rape and other forms of violence against women as constituent acts of crimes against humanity and war crimes.

Much of this can be traced back to the landmark case *Kadic v Karadžić* (2000), where rape as an act of genocide was first recognised. Catherine Mackinnon, with co-counsel, won a damage award of \$745 million, representing Bosnian women survivors of Serbian genocidal sexual atrocities. Mackinnon went on to further her concept of 'gender crime' as the first special gender adviser to the prosecutor of the International Criminal Court (The Hague) from 2008 to 2012, influencing the implementation of this concept. Explicit language now prohibits all types of sexual violence against women during wartime (whether international or internal), including rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or other forms of sexual violence of comparable gravity. The statute also recognises the crime of enslavement<sup>183</sup>, including trafficking in women and children. Gender is recognised as an independent basis of persecution as it pertains to crimes against humanity<sup>184</sup> and the definition of torture is broad enough to include acts by private actors<sup>185</sup>.

The adoption by the Security Council of resolution 1325 has been invaluable in recognising the vital role of women in promoting peace. The resolution calls for an increased use of women's expertise in conflict resolution and through all stages of peacemaking and peace-building. This was further supported by the report of the Secretary-General on 'Women, Peace and Security'<sup>186</sup>, which contains recommendations to assist in the implementation of resolution 1325.

Alongside these individuated responses at the international level, there were also regional legal developments that sought to address violence against women; most significantly the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (the Convention of Belém do Pará, 1994), which marked the first binding treaty at the international level which specifically addressed violence against women. This was followed by the African Union Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in

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<sup>183</sup> *Rome Statute of the International Criminal Court*, Rome, 17 July 1998, in force on 1 July 2002, *United Nations, Treaty Series*, vol. 2187, No. 38544, Article (7)(2)(c), available from [treaties.un.org](http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf). available at: [http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf)

<sup>184</sup> *Rome Statute of the International Criminal Court*, Rome, 17 July 1998, in force on 1 July 2002, *United Nations, Treaty Series*, vol. 2187, No. 38544, Article (7)(1)(h).

<sup>185</sup> *Rome Statute of the International Criminal Court*, Rome, 17 July 1998, in force on 1 July 2002, *United Nations, Treaty Series*, vol. 2187, No. 38544, Article (7)(2)(e).

<sup>186</sup> United Nations Security Council, *Report of the Secretary-General on women, peace and security*, S/2002/1154 (16 October 2002), available from <http://undocs.org/S/2002/1154>

Africa (The Maputo Protocol, 2003), and the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention, 2011). It should be noted that the above-mentioned declarations and resolutions serve as consensus statements by member states, and are of persuasive value in influencing international norms with regard to the elimination of violence against women and in providing normative standards for states to follow at the national level.

Most recently, in 2017, the CEDAW Committee drew together the developments of the past two decades and reaffirmed the norms of General Recommendation no. 19 in 'General Recommendation no. 35 on gender-based violence against women, updating general recommendation No. 19'. Of particular note, is the pronouncement of customary law status by the Committee which states:

**For over 25 years, the practice of States parties has endorsed the Committee's interpretation. The *opinio juris* and State practice suggest that the prohibition of gender-based violence against women has evolved into a principle of customary international law. General recommendation No. 19 has been a key catalyst for this process.<sup>187</sup>**

General Recommendation no. 35 also furthered the approach of the DEVAW and General Recommendation no. 19, by framing violence against women as gender-based and rooted in discrimination and inequality:

**The Committee regards gender-based violence against women to be rooted in gender-related factors such as the ideology of men's entitlement and privilege over women, social norms regarding masculinity, the need to assert male control or power, enforce gender roles, or prevent, discourage or punish what is considered to be unacceptable female behaviour. These factors also contribute to the explicit or implicit social acceptance of**

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<sup>187</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, CEDAW/C/GC/35, (2017), paragraph 2, available from <http://undocs.org/CEDAW/C/GC/35>



**gender-based violence against women, often still considered as a private matter, and to the widespread impunity for it.<sup>188</sup>**

As General Recommendation no. 35 is widely seen as an affirmation of the norms contained in General Recommendation no. 19, I will refer primarily to General Recommendation no. 19 unless there is reason to specifically refer to General Recommendation no. 35 – such as the framing of customary law. As General Recommendation no. 35 is a recent addition it has not been part of the discursive framing, or development, of violence against women as a human rights violation, but it does aptly summarise the dominant framing that has evolved.

The definitions outlined above are found in international human rights law and are the basis of a feminist human rights approach to violence against women – vastly different to a criminal approach which sees only isolated incidences of violence – that is now at the forefront of anti-violence against women efforts, internationally, regionally, and nationally. However, this understanding was not always so evident in international human rights law and is unquestionably the fruit of feminist efforts not simply to raise consciousness of violence against women within the discourse but to develop an understanding of violence against women as a human rights violation. This approach focuses international human rights law on the root causes of violence against women – moving from a ‘welfarist’ response to violence against women, to a rights-based, empowerment model of preventing and eliminating violence against women.

Mirroring the methodological approach of (radical) feminist theory, consciousness-raising in and through the law displays the same ability to challenge hegemony and offer ‘alternative wisdom’; in this context as international legal norms. It can be seen that feminism shapes international human rights law and the wider rights discourse in two primary ways. Firstly, it serves as a challenge to the male dominance within local, national and global communities, and the discursive spaces therein. Men have dominated the political and legal world for centuries and as such the male experience of life, and the issues that are of concern to men, have come to be understood as

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<sup>188</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, CEDAW/C/GC/35, (2017), paragraph 19.

'general human concerns'<sup>189</sup> and have encompassed the focus of international human rights law. Feminism functions as a deconstructive tool<sup>190</sup> by which to reveal the 'partial and partisan instead of the [seemingly] universal or representative position'<sup>191</sup> of international human rights law. In short, feminism acts to highlight the patriarchal nature of society and the state – extending to, and including, of course, the law – and to challenge the male domination of the human rights discourse, specifically. Secondly, feminism serves as a voice for the female life experience. It is a platform from which to articulate a more comprehensive view of the female experience and the issues that are unique to the lives of women. Serving both of these functions, feminism acts with deconstructive and constructive purpose with regard the development of an international human rights law approach to violence against women, and international human rights law more generally.

When it comes to delineating this deconstructive and constructive purpose, several substantive principles, rooted in (radical) feminist theory, can be identified:

- the persistence and resilience of patriarchy; its relationship to violence against women, and the importance, thereby, of focusing on the 'root causes' of violence against women;
- the understanding of violence against women as gendered and discriminatory; and the problematising of a societal and systemic aetiology of violence against women;
- the public/private dichotomy and how it interplays with the dominant conceptualisation of violence against women, and consequently, how the state and society respond to violence against women;
- and, finally, the conceptualisation of violence against women as a human rights violation, leading to an holistic, rights-based – rather than an essentialist and welfarist – conceptualisation of elimination.

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<sup>189</sup> Hilary Charlesworth, Christine Chinkin, and Shelley Wright, "Feminist Approaches to International Law," *American Journal of International Law*, 85(4), (1991), 613 – 645, 613.

<sup>190</sup> Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, (Manchester: Manchester University Press, 2000), 60.

<sup>191</sup> Elizabeth Gross, "What is feminist theory?" In *Feminist Challenges: Social and Political Theory*, edited by Carole Pateman & Elizabeth Gross, (Sydney, London and Boston: Allen & Unwin, 1986), 197.

These will now be considered in some depth, with case studies of theorised (or untheorised) practice and application highlighted to emphasise the feminist roots of the legal paradigm and their importance.

## **Key principles underpinning the development of a radical feminist international human rights law approach to violence against women**

### *Patriarchy*

Underlying violence against women is ‘the most pernicious of patriarchal myths’: that ‘the domination of women is a natural right.’<sup>192</sup> Whilst the manifestation of patriarchy may display nuanced differences from country to country it is still the measure of the Nation State.<sup>193</sup> As Carole Pateman suggests in her work on the Social Contract theorists, the development of civil society, and the delineation of the public and private spheres, marks a move from the *paternal* to the *fraternal* – in its literal sense – and reflects an augmentation of patriarchy from *patria potestas* – the rule of fathers – to the rule of men, or ‘brothers’, as more widely defined: ‘The transition from the traditional to the modern world [...] involved a change from a traditional (paternal) form of patriarchy to a new *specifically modern* (or fraternal) form: patriarchal civil society.’<sup>194</sup> With the gendered underpinnings of neoliberalism and ‘Economic Man’<sup>195</sup>, we also see patriarchal civil society imbricated within and bolstered by a *specifically modern* (to use Pateman’s emphasis) form of patriarchal economic society. With these civil and economic foundations, what we find is the ‘extraordinary durability of patriarchy’<sup>196</sup> across, and throughout, modern society, and the Nation State. In fact,

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<sup>192</sup> Ann C. Scales, “The Emergence of Feminist Jurisprudence: An Essay,” *Yale Law Journal*, 95, (1986): 1378.

<sup>193</sup> Carole Pateman, *The Disorder of Women*, (Cambridge: Polity Press, 1989); Carole Pateman, *The Sexual Contract*, (Stanford, CA: Stanford University Press, 1988); Catherine MacKinnon, *Toward a Feminist Theory of the State*, (Harvard: Harvard University Press, 1989).

<sup>194</sup> Pateman, *The Disorder of Women*, 35.

<sup>195</sup> Virginia Held, *Feminist Morality: Transforming Culture, Society, and Politics*, (Chicago: University of Chicago Press, 1993); ‘Virginia Held (1993) coined the term “economic man” to link two problematic points: the exclusive modelling of political life on economic life; and the deeply gendered presumptions underlying such modelling, the legacy of domesticity.’ Ann Mongoven, *Just Love: Transforming Civic Virtue*, (Bloomington, Indiana: Indiana University Press, 2009), 148.

<sup>196</sup> Rhonda Copelon, “Intimate Terror: Understanding Domestic Violence as Torture,” *In Human Rights of Women: National and International Perspectives*, edited by Rebecca Cook, ed., (Philadelphia: University of Pennsylvania Press, 1994): 121.

most of the research and evidence on violence against women and patriarchy comes from Western societies, 'where the traditional patriarchal arrangements are thought to have been most challenged'<sup>197</sup>. So ubiquitous is the subordination of women that it has come to be considered as ordinary; hidden in plain sight. As MacKinnon describes: '[i]n male supremacist societies, the male standpoint dominates civil society in the form of the objective standard – that standpoint which, because it dominates in the world, does not appear to function as a standpoint at all.'<sup>198</sup> This 'objective standpoint' has been the basis of law, and particular to this study, international human rights law. This serves to further reinforce the position of men by giving their dominance legal legitimacy and establishing in our consciousness that that which is legal must be right: 'Through legal mediation, male dominance is made to seem a feature of life, not a one-sided construct imposed by force for the advantage of a dominant group.'<sup>199</sup> In this manner, patriarchy is a threat to women in two main ways. Firstly, and most importantly, patriarchy is a source of direct harm to women – it has an immediate and direct causal relationship with violence against women. I will consider this relationship and how it has shaped the human rights approach in some depth across this chapter. Secondly, because the law is based on the male standpoint it does not represent women or provide adequate attention to issues unique to women, such as violence against women. I will therefore explore the relationship between patriarchy and law, and how this impacts upon violence against women and efforts to combat violence against women – in some cases openly sanctioning violence against women and in others acquiescing to it.

Following the below sub-paragraphs on 'patriarchy and violence against women' and 'patriarchy and the law', patriarchy will be further problematised as I consider the other substantive principles outlined above. Patriarchy is not so much one factor contributing to violence against women, as it is a system that structures, underlies, and intersects with many factors contributing to violence against women.

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<sup>197</sup> Copelon, "Intimate Terror: Understanding Domestic Violence as Torture," 120.

<sup>198</sup> Catherine MacKinnon, "Toward Feminist Jurisprudence," *In Feminist Jurisprudence*, edited by Patricia Smith, (New York: Oxford University Press, 1993): 610.

<sup>199</sup> MacKinnon, "Toward Feminist Jurisprudence," 610.

The history of patriarchy is the politics and logic of the dominance of men, and the consequent subordination and subjugation of women: 'the ordering of society under which standards – political, economic, legal, social – are set by, and fixed in the interests of, men.'<sup>200</sup> Take as a simple, but profound example, the label 'woman'<sup>201</sup>. The label comes from 'wif' and 'man,' meaning wifeman<sup>202</sup>: '[w]oman's very identity is thus indistinct from her status as a wife.'<sup>203</sup> As Bullough suggests, 'the implication seems to be that there is no such thing as a woman separate from wifehood.'<sup>204</sup> This subordination is borne of man's need to dominate, which is itself the subject of extensive study – with arguments ranging from man's 'fears and antagonisms over sexual and reproductive matters'<sup>205</sup> to divine will, reinforced through creation stories and more general religious teaching.<sup>206</sup> Dominating human history, it becomes difficult to define clearly the origins of patriarchy: 'from the very earliest twilight of human society, every woman ... was found in a state of bondage to some man.'<sup>207</sup> This said, we can chart its development and see how it has shaped society and the state, and,

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<sup>200</sup> John G. Riddall, *Jurisprudence*, 2<sup>nd</sup> ed. (Oxford: OUP, 1999), 272.

<sup>201</sup> In the early 1970s a significant part of creating discursive and normative space around gendered power, was the symbolic act of forming new language – particularly, names and descriptors. This has had a resurgence, particularly within the Trans Movement and collectivised action following the Women's March 2017. Womxn or womyn are two increasingly used frames for negotiating the gendered roots of the descriptor 'woman'. *Wymen Creating Consciousness Collectively*, a student organising group of Michigan State University, describe this act of redefinition and its significance: "By taking the "men" and "man" out of the words "woman" and "women" we are symbolically saying that we do not need men to be "complete". We, as womyn, are not a sub-category of men. We are not included in many of the history books, studies and statistics that are done in male dominated societies, thus they do not apply to us, for in these items we do not exist. In these societies men are the "norm" and women the "particular," a mere sub-category of the "norm," of men. The re-spelling of the word "woman" is a statement that we refused to be defined by men. We are womyn and only we have the right to define our relationships with ourselves, society, with other womyn and men. These re-spellings work as a symbolic act of looking at and defining ourselves as we really are, not how men and society view us, but through our own female views of ourselves, as self-defined womyn." "Woman, Womyn, Wimyn, Womin, and Wimmin: Why the alternatives spellings?" *Wymen Creating Consciousness Collectively*, accessed 8 December 2018, <https://msu.edu/~womyn/alternative.html>

<sup>202</sup> T.F Hoad, *Oxford Dictionary of English Etymology*, (Oxford: OUP, 1986), 544.

<sup>203</sup> Sophie Cubbon, "The Dismantling of Patriarchy," *UCL Jurisprudence Review*, (2000): 255.

<sup>204</sup> Vern L. Bullough, *The Subordinate Sex: A History of Attitudes Toward Women* (New York: Penguin, 1974).

<sup>205</sup> Mildred Daley Pagelow, *Family Violence* (New York: Springer Publications, 1984), 270; "30% of domestic violence starts in pregnancy." Gwyneth Lewis, ed., *The Confidential Enquiry into Maternal and Child Health (CEMACH). Saving Mothers' Lives: reviewing maternal deaths to make motherhood safer - 2003-2005. The Seventh Report on Confidential Enquiries into Maternal Deaths in the United Kingdom*. (London: CEMACH, 2007), 174.

<sup>206</sup> Terry Davidson, 'Wife beating: A Recurring Phenomenon Throughout History', in *Battered Women*, edited by Maria Roy (New York: Van Nostrand Reinhold, 1977), 7.

<sup>207</sup> John Mill, *On liberty; Representative government; The subjection of women; three essays by John Stuart Mill, with an introduction by Millicent Garrett Fawcett*, (London: Oxford University Press, 1912), 432.

over the past centuries, national laws and international human rights law. Patriarchy has created and reinforced the belief that women are inferior to men and that they can be objectified, controlled and chastised; and indeed they must be if men are to retain their position. As Eva Figes boldly asserts: 'in a patriarchal society male dominance must be maintained at all costs because the person who dominates cannot conceive of any alternative but to be dominated in turn.'<sup>208</sup> As such, violence is used as a means of social control and is exercised where this control seems threatened.<sup>209</sup> Women's capacity or power, be it real or perceived, is a 'trigger' for violence against women; 'whether it be pregnancy, mothering, beauty or the offer of intimacy; competence at wage-earning work; social relations, or household management; or actual "rebellions" small and large.'<sup>210</sup> These are threats to the gender hierarchy and must be denied and destroyed through the use of violence. Acts of violence against women 'express and actualize the distinctive power of men over women in society.'<sup>211</sup> This goes some way to explaining why women are more likely to suffer violence, sexual assault and death at the hands of a partner or family member than a stranger. Indeed intimate-partner relationships are 'the primary sources of women's exposure to violent crime.'<sup>212</sup> The CEDAW's General Recommendation no. 35 (2017) summarises this intrinsic relationship between patriarchy and violence against women:

The Committee regards gender-based violence against women to be rooted in gender-related factors such as the ideology of men's entitlement and privilege over women, social norms regarding masculinity, the need to assert male control or power, enforce gender roles, or prevent, discourage or punish what is considered to be unacceptable female behaviour.<sup>213</sup>

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<sup>208</sup> Eva Figes, *Patriarchal Attitudes: Women in Society*, (London: Persea Books, 1972), 52; Esther Fuchs, *Sexual Politics in the Biblical Narrative: Reading the Hebrew Bible as a Woman* (Sheffield: Sheffield Academic Press, 2000); Kate Millet, *Sexual Politics*, (New York: Ballantine Books, 1969); Danna Nolan Fewell and David M. Gunn, *Gender, Power, and Promise: The Subject of the Bible's First Story*, (Nashville, TN: Abingdon Press, 1993).

<sup>209</sup> Sally Goldfarb, "Violence Against Women and the Persistence of Privacy," *Ohio State Law Journal*, 61, (2000): 16.

<sup>210</sup> Copelon, "Intimate Terror: Understanding Domestic Violence as Torture," 121.

<sup>211</sup> MacKinnon, *Towards a feminist theory of the state*, 127.

<sup>212</sup> Goldfarb, "Violence Against Women and the Persistence of Privacy," 14.

<sup>213</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, CEDAW/C/GC/35, (2017), paragraph 19.

Sally Goldfarb expands on this and explains that violence against women as patriarchal or gendered violence 'is particularly harmful to its victims, who suffer not only the physical and emotional injury of the crime itself but also the added psychic injury of knowing they were victimized because of their group identity.'<sup>214</sup> In this way violence against women serves a 'terroristic function'; intimidating not only the victim but also the wider population of women.<sup>215</sup> Whilst international human rights law came to define violence against women as a gender-based and discriminatory violation – stating that 'violence against women is a manifestation of historically unequal power relations between men and women'<sup>216</sup> – this was only after many years of tireless advocacy by feminist scholars such as Christine Chinkin, Hillary Charlesworth, Shelley Wright, Catherine MacKinnon, Rhonda Copelon and Charlotte Bunch, and some 20 years after radical feminist authors such as Susan Brownmiller<sup>217</sup> and Kate Millet<sup>218</sup>. That violence against women is a 'manifestation of unequal power relations' is of vital importance to feminist framing and jurisprudence interpreting international human rights law, and to any efforts to further clarify the human rights approach. From the international to local level, understanding of the gendered and patriarchal roots of violence against women must inform any response. The international human rights law response to the feminist problematisation of patriarchy and violence against women will be considered in some depth in this chapter, after looking at the second way patriarchy inheres in women's experience of violence against women: through dominance of the law.

### *Patriarchy and law*

When it comes to patriarchy and the law we see two dynamics manifest: firstly, the law is used as a tool to actively maintain male privilege and power; and, secondly, through male dominance of the legal arena, the law has come to represent a limited male norm of how citizens relate to each other, to society, and to the state, which fails to represent women.

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<sup>214</sup> Goldfarb, "Violence Against Women and the Persistence of Privacy," 16.

<sup>215</sup> Goldfarb, "Violence Against Women and the Persistence of Privacy," 16; This also echoes Susan Brownmiller's famous explanation on the use of rape as a weapon, claiming it is 'nothing more or less than a conscious process of intimidation by which *all men* keep *all women* in a state of fear.' Susan Brownmiller, *Against Our Will: Men, Women and Rape*, (New York: Simon and Schuster, 1975), 13.

<sup>216</sup> General Assembly resolution 48/104, *Declaration for the Elimination of Violence Against Women*, A/RES/48/104 (20 December 1993), Preamble

<sup>217</sup> Brownmiller, *Against Our Will: men, women and rape*.

<sup>218</sup> Millett, *Sexual Politics*.

The law has long provided the legitimacy for men to subjugate women. It is ironic that the representation and acknowledgement of women by the law is so poor that moves to change this often seem so radical and transformative; with often the smallest progress receiving harsh backlash. Their 'long-term domination of all bodies wielding political power nationally and internationally'<sup>219</sup> has enabled men to use the law to preserve their position. We have seen this over centuries in national civil and criminal law – notably through laws governing marriage, reproduction, suffrage, and employment. Two well-referenced examples in domestic criminal law are: criminalisation (or exemption from criminalisation) of marital rape; and, the jurisprudence concerning self-defense as a mitigating justification for the unlawful use of force (i.e. assault or murder). In the case of marital rape, we see the preservation of man's dominion over, and domination of, 'his wife'. It is only over recent decades that the majority of states have moved to criminalise marital rape. Before then a wealth of patriarchal thinking prevailed, revolving around the logical and legal impossibility of marital rape – how can a woman be raped by a man she has consented to marry; a man she is beholden to? In 1997, four years after the DEVAW established marital rape as a human rights violation, UNICEF published that only 17 states had criminalised marital rape. As of 2012 only 52 countries have laws criminalising marital rape.<sup>220</sup> Whilst a growing number of states have criminal laws on rape some still contain special exemptions or immunity for rape within marriage. For example, the Indian Penal Code Section 375 (which defines rape) makes an 'exception' for marital rape, where: 'Sexual intercourse or sexual acts by a man with his own wife, the wife not being under 15 years of age, is not rape.'<sup>221</sup> In 2017, NGO RIT Foundation, All India Democratic Women's Association and a marital rape victim challenged the IPC Section 375(d), claiming it was unconstitutional. The Indian government responded to pushes to change the law, by saying that criminalising marital rape 'may destabilise the institution of marriage'.<sup>222</sup> Even where the law has been changed to criminalise marital rape there can still be situations where application and interpretation of the law is subject to

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<sup>219</sup> Charlesworth, Chinkin, and Wright, "Feminist Approaches to International Law," 613.

<sup>220</sup> UN Women, *Progress of the World's Women 2011: In Pursuit of Justice*, (UN Women, 2011), 17, available from <http://www.unwomen.org/en/digital-library/progress-of-the-worlds-women>

<sup>221</sup> In 2013 The Indian Penal Code was amended. The only amendment to the exception for marital rape was the age on 'the wife'. The 2013 amendment raised the age from 13 to 15 years of age. The Indian Penal Code, 1860, act no 45, Section 375 (d), available from <https://indiacode.nic.in/bitstream/123456789/2263/3/a1860-45.pdf>

<sup>222</sup> Benjamin Kentish, 'Indian government files legal papers to try to stop marital rape being outlawed', *The Independent*, September 1, 2017, <https://www.independent.co.uk/news/world/asia/india-marital-rape-ban-fight-legal-papers-file-parliament-law-change-marriage-a7924106.html>.



patriarchal jurisprudence and reasoning within the judiciary. In a case before the London Court of Protection in April 2019, social services requested the Judge, Justice Anthony Hayden, enact a court order to prevent a man from having sex with his wife because her mental capacity had deteriorated such that they believed she may no longer be able to consent. In response the Judge said: 'I cannot think of any more obviously fundamental human right than the right of a man to have sex with his wife – and the right of the state to monitor that.'<sup>223</sup> From this example we can see the use of law to maintain patriarchal interests – man's complete right over 'his wife', including his right to rape his wife.

In the second example, self-defence, we see male dominance in law has led to a standpoint and jurisprudence that excludes the lived experience of women and thereby endangers women.

#### *Case Study: Self-defence*

A clear example of the impact of male dominance on the law is the jurisprudence around self-defence as a mitigating defence in the case of manslaughter. There is a body of literature addressing the phenomenon of 'battered women who kill'<sup>224</sup>, which seeks to question jurisprudence in cases where victims of violence against women have killed their abusers in acts of self-defence, but have been charged with murder. There is a clear pattern of sentencing in cases of murder or manslaughter where perpetrators claim self-defence: harsher sentences are given for women who kill their partners than men who kill their partners.<sup>225</sup> Whilst much more could be drawn from

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<sup>223</sup> Owen Bowcott, 'English judge says man having sex with wife is "fundamental human right"', 3<sup>rd</sup> April 2019, *The Guardian*, accessed 9 May 2019, at <https://www.theguardian.com/law/2019/apr/03/english-judge-says-man-having-sex-with-wife-is-fundamental-human-right>

<sup>224</sup> Robbin S. Ogle and Susan Jacobs, *Self-Defense and Battered Women Who Kill: A New Framework*, (Westport, CT: Praeger, 2002); Aileen McColgan, 'In Defence of Battered Women Who Kill,' *Oxford Journal of Legal Studies*, 13(4), (Winter, 1993); Katherine O'Donovan, 'Defences for Battered Women Who Kill,' *Journal of Law and Society*, 18(2), (Summer, 1991); Elizabeth A. Sheehy, *Defending Battered Women on Trial*, (Vancouver: UBC Press, 2014); Lenore E. Walker, *Terrifying love: why battered women kill and how society responds*, (New York: Harper & Row, 1989); Ann Jones, *Women Who Kill*, (New York: The Feminist Press, 2009); Elizabeth M. Schneider, *Battered Women & Feminist Lawmaking*, (Yale: Yale University Press, 2000); Elizabeth Ann Dermody Leonard, *Convicted Survivors: The Imprisonment of Battered Women Who Kill*, (New York: The State University of New York Press, 2002); Charles Patrick Ewing, *Battered Women Who Kill: Psychological Self-Defense as Legal Justification*, (New York: Lexington Books, 1987).

<sup>225</sup> Along with judicial bias, 'the law itself provides stiffer sentences for women.' In an analysis of State Law in the United States, Ann Jones found that '[s]everal states provide by statute that women must be sentenced to the maximum term for their crimes while men may be given lighter sentences.' Jones,

the example of self-defence, particularly around ideas of femininity and violence, and the oft drawn conclusion that women who kill their abusers must be 'insane'<sup>226</sup>; there are two clear ways that the male norm has shaped the law of self-defence (and led to the bias in sentencing):

- the understanding of *necessity and immediacy*,
- and the measure of *force and proportionality*.

Necessity in self-defence is considered from the viewpoint of men, where the threat of violence comes largely from other men, usually unknown to the victim. The law frames necessity in light of this such that self-defence would only be necessary in an instance of immediate threat to life. The reality for women is not the same: women are most at threat by men who are known to them, particularly intimate partners, and particularly in their home; and necessity is not by reason of immediate threat of death, but often as a means of escape from eventual<sup>227</sup> death.<sup>228</sup> As Aileen McColgan, amongst

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*Women Who Kill*, 34; The average prison sentence of men who kill their partners is two to six years. Women who kill their partners are sentenced on average to 15 years, despite the fact that most women who kill do so in self-defense. (First recorded by the National Coalition Against Domestic Violence in 1989, "Words From Prison - Did You Know?" ACLU, accessed 1 May, 2019, <https://www.aclu.org/other/words-prison-did-you-know>; Elizabeth C. Wells, "'But Most of All, They Fought Together': Judicial Attributions for Sentences in Convicting Battered Women Who Kill," *Psychology of Women Quarterly*, 36: 3, (2012).

<sup>226</sup> Donald Downs, "Battered Woman Syndrome: Tool of Justice or False Hope in Defense Cases?" In *Current Controversies on Family Violence*, edited by Donileen Loseke, Richard Gelles, and Mary Cavanaugh, (Lexington: Sage Publications, 2005); Bess Rothenberg, "'We Don't have Time for Social Change' Cultural Compromise and the Battered Woman Syndrome." *Gender & Society*, 17(5), (2003); Marianne Noh, and Celia Lo, "Medicalization of the Battered Woman: A Historical-Social Construction of the Battered Woman Syndrome," (paper presented at the annual meeting of the American Sociological Association, Atlanta Hilton Hotel, Atlanta, GA, Aug 16, 2003). [http://www.allacademic.com/meta/p107922\\_index.html](http://www.allacademic.com/meta/p107922_index.html)

<sup>227</sup> "Rather than being a new form of violence, gender-related killings are the extreme manifestation of existing forms of violence against women. *Such killings are not isolated incidents that arise suddenly and unexpectedly, but are rather the ultimate act of violence which is experienced in a continuum of violence.*" United Nations, *Gender-related Killings: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Rashida Manjoo, A/HRC/20/16, (23 May 2012), 4, available at <http://undocs.org/A/HRC/20/16>

<sup>228</sup> On average two women a week are killed by a male partner or former partner in the UK: this constitutes around one-third of all female homicide victims. David Povey, ed., *Crime in England and Wales 2003/2004; Supplementary Volume 1: Homicide and Gun Crime. Home Office Statistical Bulletin No. 02/05*. (London: Home Office; Department of Health, 2005); Partner violence accounts for a high proportion of homicides of women internationally: between 40% -70% of female murder victims (depending on the country) were killed by their partners/former partners, whereas the comparable figure for men is 4% - 8%. Etienne Krug, Linda Dahlberg, James Mercy, Anthony Zwi, and Rafael Lozano, eds., *World report on violence and health*, (Geneva: World Health Organisation, 2002), 93.

others<sup>229</sup>, suggests, self-defence in cases of violence against women is 'equivalent to [the] justifiability of a hostage to kill captors to avoid a non imminent death'.<sup>230</sup> Many victims of violence against women who kill their partners do so because escape could not be achieved by any other means. Likewise, where immediate escape is possible, victims of violence against women kill in self-defence where they know their escape is not secure and where they are part of a wider trap – economic, social, and cultural – or know there is insufficient protection available to secure their ongoing freedom from their torturer. Many victims of violence against women face revictimisation<sup>231</sup> or fear retribution<sup>232</sup> towards them, and their children if they are mothers, which keeps them captive, and they are often right in their belief that the state offers limited protection.

Similarly, proportionality is framed from the same male scenario. Therefore use of a weapon would display premeditation and would also be unnecessary in an 'even-matched' fight for life between two men. However, victims of violence against women often use weapons, as premeditation and force are almost always necessary to escape. As victims of violence against women do not meet the standards of immediacy and proportionality set by men, they are often unable to use self-defence as a mitigation to put in a plea of manslaughter, and therefore receive harsher sentences. (Even when women are charged with manslaughter rather than murder they still receive harsher

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<sup>229</sup> McColgan, "In Defence of Battered Women Who Kill,"; Jones, *Women Who Kill*; Leonard, *Convicted Survivors*; Ogle and Jacobs, *Self-Defense and Battered Women Who Kill*; O'Donovan, "Defences for Battered Women Who Kill."

<sup>230</sup> McColgan, "In Defence of Battered Women Who Kill," 508.

<sup>231</sup> Repeat victimisation is common. 44% are victimised more than once, and almost one in five (18%) are victimised three or more times. Tricia Dodd, Sian Nicholas, David Povey, Alison Walker, *Crime in England and Wales 2003-2004*, (London: Home Office, 2004), 16. An earlier British Crime Survey found even higher rates of repeat victimisation: 57%. Jon Simmons, *Crime in England and Wales 2001/2002*, (London: Home Office, 2002), Appendix 1, Table 3.03.

<sup>232</sup> Women are at greatest risk of homicide at the point of separation or after leaving a violent partner. Sue Lees, "Marital rape and marital murder," in *Home Truths about Domestic Violence: Feminist Influences on Policy and Practice: A Reader*, edited by Jalna Hanmer and Catherine Itzin, (London: Routledge, 2000). In a study commissioned by Women's Aid, 76% of separated women suffered post-separation violence. Of these women:

- 76% were subjected to continued verbal and emotional abuse;
- 41% were subjected to serious threats towards themselves or their children;
- 23% were subjected to physical violence;
- 6% were subjected to sexual violence;
- 36% stated that this violence was ongoing.

In addition to this, more than half of those with post-separation child contact arrangements with an abusive ex-partner continued to have serious, ongoing problems with this contact. Cathy Humphreys and Ravi Thiara, *Routes to Safety: Protection issues facing abused women and children and the role of outreach services*, (Bristol: Women's Aid Federation of England, 2002.)

sentences than men who are tried under the same charge for killing their female partners<sup>233</sup>.)

### *The male norm in human rights law*

In a similar way to the example of self-defence within domestic criminal law settings, the male norm, and the standpoint of men, dominates international human rights law – giving it shape and establishing its parameters. Whilst the development of international human rights law was not directly (or, necessarily, deliberately) set in the interest of men, it has been shaped by their dominance so that ‘issues traditionally of concern to men become seen as *general human concerns*.’<sup>234</sup> (As MacKinnon suggests, this is how the male standpoint operates: ‘[i]ts point of view is the standard for point-of-viewlessness, its particularity the meaning of universality.’<sup>235</sup>) Thus ‘the legal system is [based on] life experiences typical to empowered white males.’<sup>236</sup> Not only have men established and shaped international law, ‘they have interpreted it and given it meaning consistent with their understandings of the world and of people “other” than them. As the men of law have defined law in their own image, law has excluded or marginalised the voices and meanings of these “others”.’<sup>237</sup> Since the first wave of decolonisation in the 1960s, international human rights law has been challenged to accommodate ‘othered’ voices from the Global South and socialist nations.<sup>238</sup> However, this ‘broadening’ of the discourse is not complete – for any group outside of the white

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<sup>233</sup> Further to the difference in sentencing between women who kill their male partners, and men who kill their female partners, men also get lesser sentences for killing women who are their partners compared to men who kill women who aren’t their partners. In a 2017 report by Women’s Aid, analysis of sentencing in Ireland showed: ‘On average, current or former intimate partners convicted of manslaughter are sentenced to 2.8 years less than other men convicted of manslaughter of women.’ ‘Femicide Watch 2017: Republic of Ireland,’ Women’s Aid, accessed June 4, 2018, [https://www.womensaid.ie/download/pdf/womens\\_aid\\_femicide\\_watch\\_2017.pdf](https://www.womensaid.ie/download/pdf/womens_aid_femicide_watch_2017.pdf)

<sup>234</sup> Charlesworth, Chinkin, & Wright, “Feminist Approaches to International Law,” 613.

<sup>235</sup> Catherine MacKinnon, “Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence,” *Signs*, 8(4), (1983): 638 – 639.

<sup>236</sup> Lucinda M. Finley, “Breaking Women’s Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning,” 64 *Notre Dame L. Rev.*, (1989): 893.

<sup>237</sup> Finley, “Breaking Women’s Silence in Law,” 893.

<sup>238</sup> James Thuo Gathii, “TWAIL: A Brief History of its Origins, its Decentralized Network and a Tentative Bibliography,” *Trade, Law and Development*, 3 (1), (2011); B.S. Chimni, “Third World Approaches to international Law: Manifesto,” *International Community Law Review* 8, (2006); Makau Mutua, “What is TWAIL?”, *Proceedings of the 94th Annual Meeting of the American Society of International Law*, 5–8 April 2000, 31–40; Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005)

male norm – and women (Simone DeBeauvoir's original 'other'<sup>239</sup>) remain largely excluded from, or marginalised within, the fora and discourse concerning international human rights law, and international law more generally. As a result women remain un(der)represented (or misrepresented) within international human rights law. Whilst international human rights law is 'not a monolithic force for the oppression of women and the advantage of men it offers only a partial, and often contradictory and inconsistent, response to women's oppression.'<sup>240</sup> Hilary Charlesworth and Christine Chinkin, have described international human rights law, as failing to be 'truly human in composition', and note that the 'orthodox face' of international human rights law would be markedly different if the discourse and its institutions were representative of men and women.<sup>241</sup> An example of this, set at the heart of international human rights law, is, of course, the dichotomy between civil and political rights (CPRs) and economic, social and cultural rights (ESCRs). Whilst the split between CPRs and ESCRs, manifest in the two international conventions, is due largely to cold war politics<sup>242</sup>, how it has since developed displays the ongoing priorities of men and how these priorities dominate the legal arena. The hierarchy between CPRs and ESCRs is distinctly gendered (as well as being shaped by racial, national and economic power). This hierarchy reflects the arena in which men consider themselves to live out their lives – and thereby the areas of life that are most important. Men fear threats made to their civil and political existence, with little consideration of ESCRs, which impinge massively on the lives on women.<sup>243</sup> This hierarchy is rooted in the public/private divide – with CPRs representing the public sphere (where there is competition and threat from other men) and ESCRs representing the private sphere (where there is limited competition or threat from other men, and where the notion of privacy itself enshrines the dominion of men). It is only recently that ESCRs have started to be considered as human rights proper. Although a range of actors still uphold this hierarchy, including academics, such as Robert Nozick, holding that the only existing

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<sup>239</sup> Simone de Beauvoir, *The Second Sex*, translated and edited by H. Parshley (London: Pan Books, 1988).

<sup>240</sup> Charlesworth and Chinkin, *The Boundaries of International Law: A Feminist Analysis*, 60.

<sup>241</sup> Charlesworth, Chinkin, and Wright, "Feminist Approaches to International Law," 622.

<sup>242</sup> "Frequently Asked Questions on Economic, Social and Cultural Rights, Fact Sheet 33," Office of the United Nations High Commissioner for Human Rights, 9, accessed September 9, 2018, <https://www.ohchr.org/Documents/Issues/ESCR/FAQ%20on%20ESCR-en.pdf>.

<sup>243</sup> Charlesworth, Chinkin, and Wright, "Feminist Approaches to International Law," 635.

rights are civil by nature<sup>244</sup>. This even exists amongst NGOs focused on human rights, with Human Rights Watch only recently widening their work to include ESCRs.<sup>245</sup>

Without including women, much like third world nation and socialist nation representation, international human rights law does not represent, and therefore protect, the lives of all individuals across society. Along with their dominance of the broader human rights discourse – elevating CPRs over ESCRs – we can see the impact of the male norm in relation to violence against women specifically. As men are ‘generally not victims of sex discrimination, domestic violence and sexual degradation and violence these matters can be consigned to a separate sphere and tend to be ignored.’<sup>246</sup> These issues are ignored altogether, considered outside of the purview of the law, or understood and legislated on from the male standpoint. I will consider this when I look at the public/private dichotomy; but more generally, where the international human rights discourse has broken its silence on the rights of women it has been voiced through the male estimation of female life. Therefore, where women are accounted for they are viewed in an extremely limited way: ‘chiefly as victims, particularly as mothers, or potential mothers, and accordingly in need of protection.’<sup>247</sup> Robin West goes further to state: ‘women are not constructed as human [...] but we are nevertheless constructed as something else: as valueless, as objects, as children or as invisible.’<sup>248</sup> As Lucinda Finley explains, it is ‘women refracted through the male eye – rather than women’s own definitions, that has informed law.’<sup>249</sup> Where there has been mainstream support for including violence against women within the human rights paradigm it has been through a welfarist lens. It has been much harder to conceptualise and develop concrete gains addressing violence against women as a justice or rights-based issue. Where this has happened – such as the conceptualisation of violence against women in the DEVAW as a ‘manifestation of historically unequal power relations between men and women’ – these gains need to be understood for what they are and this understanding protected. Welfarist concerns with violence against women are rooted in conceptualisations of women’s inherent or innate

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<sup>244</sup> Robert Nozick, *Anarchy, State, and Utopia*, (Oxford: Blackwell, 1975).

<sup>245</sup> Kenneth Roth, “Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization,” *H.R.Q.* 26(1), (2004).

<sup>246</sup> Charlesworth, Chinkin, and Wright, “Feminist Approaches to International Law,” 613.

<sup>247</sup> Charlesworth and Chinkin, *The Boundaries of International Law: A Feminist Analysis*, 48.

<sup>248</sup> Robin West, “Jurisprudence and Gender,” *University of Chicago Law Review*, 55(1), (1988): 67.

<sup>249</sup> Finley, “Breaking Women’s Silence in Law,” 1136.

vulnerability, victimhood, weakness, purity and chastity: woman as the 'perpetual victim'<sup>250</sup>. This conceptualisation is particularly dominant in the international *humanitarian* law response to violence against women and women in conflict<sup>251</sup>, where the dignity of female life has been conflated with the social construct of feminine honour<sup>252</sup>. This welfarist concern with violence against women and women in conflict (as developed within mainstream humanitarian law) has proven a difficult backdrop from which to conceptualise violence against women as a rights-based issue concerned with justice and liberation. Conversely to the welfarist approach, a feminist understanding of violence against women is rooted in politicised conceptualisations of gender and male power, that are not concerned with women's 'innate vulnerability' to violence against women, but with women's social, legal, economic and cultural disempowerment – as the cause and consequence of violence against women. (This will be considered in more detail when I look at the indivisibility of rights as it relates to violence against women.) This feminist understanding is distinctly justice oriented – seeing violence against women as a human rights violation (legal and broader) framed by concerns for justice, liberation, entitlement and empowerment; rather than a welfare issue, framed by paternalistic notions of morality, compassion and charity.

The resistance to truly rights-based (rather than welfarist) conceptualisations of violence against women, is perhaps telling in that there is still no binding international treaty on violence against women despite many decades of attention within the discourse. Whilst CEDAW is binding it does not directly address violence against women, and there is contention over the legal nature of its general recommendations on violence against women.<sup>253</sup> It has been over 20 years since the women's movement brought violence against women into the human rights discourse. Awareness has risen

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<sup>250</sup> Ratna Kapur, "The Tragedy of Victimization Rhetoric: Resurrecting the 'Native' Subject in International/Post-Colonial Feminist Legal Politics," *Harvard Human Rights Journal*, 15, (2002).

<sup>251</sup> Judith Gail Gardam and Michelle Jarvis, *Women, Armed Conflict and International Law*, (London: Springer, 2001).

<sup>252</sup> In "'All the regard due to their sex': Women in the Geneva Conventions of 1949", Anna Crowe outlines and interrogates 'the gendered concepts of women that emerge from the texts of the Geneva Conventions of 1949, especially the concept of "honor and modesty."' "'All the regard due to their sex': Women in the Geneva Conventions of 1949, Human Rights Program Research Working Paper Series December 2016," Anna Crowe, accessed 9 May, 2018, [http://hrp.law.harvard.edu/wp-content/uploads/2016/12/Anna-Crowe\\_HRP-16\\_001.pdf](http://hrp.law.harvard.edu/wp-content/uploads/2016/12/Anna-Crowe_HRP-16_001.pdf).

<sup>253</sup> Rashida Manjoo, "Normative Developments on Violence Against Women in the United Nations System," In *The Legal Protection From Violence: Normative Gaps in International Human Rights Law*, Rashida Manjoo and Jackie Jones, eds., (Abingdon, Oxon: Routledge, 2018), 74; Ronagh J. A. McQuigg, "Is it time for a UN treaty on violence against women?" *The International Journal of Human Rights*, 22(3), (2018): 309.

significantly – the former United Nations Secretary General, Ban Ki Moon, has asserted that violence against women, affecting one in three women, is the largest and most prevalent human rights abuse in the world<sup>254</sup> – and yet there is still no binding or unified international response. In Chapter 4, I will consider in more detail the legal gaps and the significance of a binding international instrument focused solely on violence against women. Suffice to say however, it illustrates the dominance of the male norm within international human rights law, and the subsequent absence of the female life experience.

### *The Public/Private Dichotomy*

U.S. Supreme Court Justice Louis Brandeis said of privacy that ‘the right to be let alone is the most comprehensive of rights and the right most valued by civilized men’<sup>255</sup>. In a provocative quip addressing the Justice’s famous words, and addressing the danger of the public/private dichotomy, Catherine MacKinnon responded: ‘the right to privacy is a right of men “to be let alone” to oppress women one at a time.’<sup>256</sup>

As touched on above, the patriarchal nature of society and the state creates a legal system whereby the supremacist position of men is legitimised and reinforced. A key way in which it does this is by marginalising issues that affect women and relegating them to the private sphere outside the purview of the law, or, indeed, society. This serves to preserve the power of the fraternal state and the patriarchal household: ‘separation of spheres [...] has served for selective penetration of public state hegemony while allowing some autonomous space for the hegemony of the male head of the household.’<sup>257</sup> Hence, dismantling the public/private dichotomy is of key importance to establishing violence against women as a human rights violation and addressing it within the international legal framework. As Carole Pateman suggests, ‘[t]he dichotomy between the private and the public is central to almost two centuries

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<sup>254</sup> United Nations, “Statement by UN Secretary-General Ban Ki-moon for the International Day for the Elimination of Violence against Women 2007,” accessed June 8, 2017, <https://www.un.org/press/en/2007/sgsm11289.doc.htm>

<sup>255</sup> *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Justice Brandeis, dissenting.)

<sup>256</sup> Catherine MacKinnon, *Feminism unmodified: discourses on life and law*, (Cambridge: Harvard University Press, 1987), 102.

<sup>257</sup> Yakin Ertürk, “The Due Diligence Standard: What Does It Entail for Women’s Rights?” In *Due Diligence and Its Application to Protect Women from Violence*, Carin Benninger-Budel, ed. (Leiden, The Netherlands: Martinus Nijhoff Publishers, 2008), 32.



of feminist writing and struggle; it is, ultimately, what the feminist movement is about.<sup>258</sup> The public/private dichotomy raises many questions that shape our understanding of violence against women as a human rights violation. For a start, what is 'public' and what is 'private'? Feminists have long maintained the political nature of what is considered the private sphere<sup>259</sup> and have successfully challenged the ability to categorise actions as strictly private or public. As Francis Olsen states, "[p]rivate" is not a natural attribute nor descriptive in a factual sense, but rather is a political and contestable designation.<sup>260</sup> Many other questions surround the idea of privacy. If we accept the notion of 'the private', is the private sphere free from state and legal intervention? Or should it be? The state is very much involved in our 'private life', through taxation, health care, education, marriage, welfare and child protection laws, and as such it is a 'myth that law doesn't control the private sphere.'<sup>261</sup> Indeed the 'public/private dichotomy in international human rights law which is conventionally premised on the liberal, minimalist conception of the state [...] clouds the fact that the domestic arena is itself created by the political realm, where the state reserves the right to choose intervention.'<sup>262</sup> It is likewise untrue to suggest that non-intervention in the 'private sphere' is a neutral approach. The apparent restraint and neutrality of the law is rooted in historical context: '[t]he laws that facilitate the injury of one person by another seem like state action when they seem unjust, but go unnoticed or are treated as a neutral background of law to those who support the rules.'<sup>263</sup> An example of this is Article 16 (3) of the United Nations Universal Declaration of Human Rights (UDHR), which states 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.'<sup>264</sup> This seemingly neutral

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<sup>258</sup> Pateman, *The Disorder of Women*, 118.

<sup>259</sup> "The personal is political" is the central message of feminist critiques of the public/domestic dichotomy.' Susan Moller Okin, *Justice, Gender and the Family*, (New York: Basic Books, 1989), 124; Carol Hanisch, "The Personal is Political," *In Notes from the second year: women's liberation: major writings of the radical feminists*, edited by Shulamith Firestone and Anne Koedt, (New York: Radical Feminism, 1970); Combahee River Collective, "A Black Feminist Statement," *In Capitalist Patriarchy and the Case for Socialist Feminism*, edited by Zilla R. Eisenstein, (New York: Monthly Review Press, 1978); Audre Lorde, "The Master's Tools Will Never Dismantle the Master's House," *In Sister Outsider: Essays and Speeches*, edited by Audre Lorde, (Berkeley, CA: The Crossing Press, 1984). Gloria E. Anzaldúa and Cherríe Moraga, eds., *This Bridge Called My Back: Writings by Radical Women of Color*, (Watertown, MA: Persephone Press, 1981).

<sup>260</sup> Frances Olsen, "Constitutional Law: Feminist Critiques of the Public/Private Distinction," *Constitutional Commentary*, 10, (1993): 319.

<sup>261</sup> Charlesworth, Chinkin, and Wright, "Feminist Approaches to International Law," 627.

<sup>262</sup> Ertürk, "The Due Diligence Standard: What Does It Entail for Women's Rights?" 32.

<sup>263</sup> Olsen, "Constitutional Law: Feminist Critiques of the Public/Private Distinction," 324 – 325.

<sup>264</sup> United Nations, *Universal Declaration on Human Rights*, 10 December, 1948, Article 16 paragraph 3, available from <https://www.un.org/en/universal-declaration-human-rights/>

approach, reiterated in the international covenants, supports the position of men by reinforcing normative ideals of the family that are often unparalleled by the realities of life. It has meant that 'the family has been the focus of very little scrutiny under international law.'<sup>265</sup> As the former Special Rapporteur, Radhika Coomaraswamy, has described, whilst the family may be the natural unit of society – and can be a rich source of nurture, love and provision – for many women it is 'a social institution where labor is exploited, where male sexual power is violently expressed and where a certain type of socialization disempowers women.'<sup>266</sup>

When one looks closely and critically, there is, of course, no clear demarcation between the private and public. Furthermore, there is no neutral way to make this division. As such, it is the right of the powerful to *choose* what is public and what is private. Olsen asks, '[w]hat does the person who wields power gain by successfully characterising his power as "private"?'<sup>267</sup> And to this end, what role does the law play? When the private remains outside of the purview of the law, power operating in this sphere remains unscrutinised and abuse occurs with impunity; but when the law advances on the private, what advantage is left for the abuser by maintaining the characterisation of his actions as private? Michael Freeman argues that the deep-rooted patriarchal acceptance of private violence as legitimate, indeed necessary, means that '[i]t is not necessary [for men] to have formal rights such as to chastise their wives. That they once had this right and exercised it is sufficient. It helped to form and reinforce an ideology of subordination and control of women. The ideology remains imbricated in the legal system.'<sup>268</sup> Therefore, whilst a man may not be assured a legal 'right to privacy', he is nonetheless 'able to discourage state action that would inhibit his use of power, on the basis that domestic life *should* remain more free of government regulation than other aspects of life.'<sup>269</sup> It is this much more nuanced notion of privacy that threatens the human rights approach to violence against women. Where the law ignores private violence, feminists are able to campaign for legal

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<sup>265</sup> United Nations, *Violence against women in the family: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Radhika Coomaraswamy, E/CN.4/1999/68 (March 10, 1999), 4 paragraph 6, available at <http://undocs.org/E/CN.4/1999/68>.

<sup>266</sup> United Nations, *Preliminary Report: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Radhika Coomaraswamy, E/CN.4/195/42, (November 22, 1994), 11 paragraph 54, available at <http://undocs.org/E/CN.4/195/42>.

<sup>267</sup> Olsen, "Constitutional Law: Feminist Critiques of the Public/Private Distinction," 319.

<sup>268</sup> Michael D. A. Freeman, *The State, the Law, and the Family*, (London: Sweet and Maxwell, 1984), 72.

<sup>269</sup> Olsen, "Constitutional Law: Feminist Critiques of the Public/Private Distinction," 323.

transformation to protect women. A more complicated question is how to tackle the patriarchal acceptance of private violence that is still, as Freeman says, 'imbricated in the legal system.' This will be an important focus of my law review in Chapter 4 as the due diligence standard is the key to understanding the state's responsibilities with relation to 'private' acts of violence against women, and 'private' actors as perpetrators of violence against women. The imbricated notion of the 'right to privacy' hinders the understanding of due diligence obligations. The discourse should voice opposition to those who would characterise failure to act with due diligence as invoking 'indirect' state responsibility. Actors that use this terminology do so to suggest a lesser degree of culpability. There are no 'shades of culpability'<sup>270</sup> and it must be reinforced that failing to act with due diligence to the detriment of a woman's safety is no less a violation than directly causing her suffering. It is imperative that the discourse does not elevate state violence, which disproportionately affects men, over 'private' violence, which disproportionately affects women.

The relationship between the public/private dichotomy and violence against women is further evidence of the gendered nature of violence against women – it is inherently linked to violence against women as a continuum of violence that exists in the context of gender discrimination and women's disempowerment.

#### *Violence against women as gendered and discriminatory*

The understanding of patriarchy as harmful to women (as discussed so far in our investigation of patriarchy and the law and the public/private dichotomy) is at the heart of the international human rights law approach to violence against women and to feminist jurisprudence, and as touched on above, informs the corollary conceptualisation of violence against women as *gendered* and *discriminatory*.

The understanding of patriarchy as a systemic and material manifestation of hegemonic power is of significant ontological meaning to radical feminist theory, and so it is, consequently, intrinsic to the feminist problematising of violence against women. It is fundamental that violence against woman is addressed in a way that deals directly with

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<sup>270</sup> Gordon Christenson, "Attributing Acts of Omission to the State," *Michigan Journal of International Law*, (12), (1991): 350.

the systemic and gendered nature of the violence experienced by women. Again, this is a case of emphasising feminist politics and theorising within the international human rights law approach that has become hidden in plain sight.

Take for instance the very term ‘violence against women’ or ‘VAW’. Violence against women is not simply violence that ‘happens to women’. The term does not simply consider the ‘sex’ of the victim, but the ‘gendered’ nature of the violence. The early definitions of violence against women within the discourse are clear on this – describing violence against women as gender-based and rooted in historic and material dynamics of patriarchal power. Whilst the terminology has developed with a sense of very specific meaning and discursive framing, ‘violence against women’ has been used interchangeably with ‘domestic violence’, ‘family violence’, ‘intimate partner violence’ and simply ‘violence’. This has further been the case as the categorisation of ‘family violence’ or ‘domestic violence’ has broadened to include violence experienced by men. The lack of clarity as to how gender – or sex – intersects with violence in the domestic setting once men are included in the framing has led to the gendered conceptualisation of violence against women being eroded. This will be focused on in more detail in the following chapter when I consider the gender-neutral approach to domestic violence and prevention, with a focus on the Istanbul Treaty. Given the broader issue of definitional contestation, ‘violence’ becomes the primary substantive violation – the undisputed abuse at issue – and the simultaneous gender discrimination experienced by women is evaded or intentionally sidelined. Responses in this vein focus on the ‘*violence*’ present in ‘VAW’ in such a limited way as to ignore the significance of ‘*against women*’. This has been the historic criminal law approach to violence against women, making very little account of the gendered and discriminatory abuse encompassed in violence against women. (Again, this reflects the welfarist lens rather than the justice lens.) The criminal law approach reacts – if at all – to the violence present in violence against women. Yet, it is *fundamentally* and *simultaneously* an act of *violence* and *gender discrimination*. It is the intersection of violence and discrimination that characterises *violence against women*.

Responding to the violence women suffer, without responding to gender discrimination at an individual or systemic level is not an appropriate response to violence against women. (As will be seen in Chapter 3, this also opens the

international human rights law approach to practice based on gender-neutrality or de-politicised notions of gender.) Again, the dominance of the welfarist lens, and its construct of women's innate victimhood, acts to distract from the question of why women are experiencing violence, particularly and specifically. If women are just innately vulnerable then questions of gender don't need to go beyond sex, to investigate power. The welfarist lens considers the sex of the 'victim' in its most limited and essentialist sense, but doesn't consider politicised notions of *gender* and the gendered nature of the 'victimising'. A feminist rights-based approach conceptualises violence against women as fundamentally gendered and inherently discriminatory. The international human rights law approach to violence against women, state responsibility and due diligence must not rely on the welfarist approach or approaches that are unconcerned with questioning the aetiology of violence against women. In the context of violence against women, and in particular, prevention of violence against women, the questions of 'why?' must be asked. Furthermore the question of 'why?' must be asked in fullness. If prevention asks the 'why?' question only of '*violence*' and not of '*against women*' it leaves intact patriarchy and gender discrimination. Instead prevention must apply to the full framing, manifestation and experience of violence against women.

Responses that ignore the fundamentally gendered and discriminatory nature of violence against women, take a gender-neutral approach, focusing simply on violence. This constitutes a schismatic approach, which addresses itself separately to violence and gender discrimination, or primarily to violence and secondarily to gender discrimination. This approach privileges the former over the latter, creating a stark hierarchy of rights in which gender discrimination need not be taken seriously. In itself this hierarchy is inherently gendered and patriarchal; privileging the abuse men more readily face and therefore fear – violence – over the abuse they more rarely face and do not fear – gender discrimination. Furthering the public-private dichotomy in this way, the schismatic approach addresses the violence present in violence against women in a public way, acknowledging the role of the state, whilst maintaining and strengthening the private nature of gender discrimination; leaving it outside of the law and the public sphere.

Within the international human rights law discourse, it must be remembered that violence against women has already been established as a cause, consequence, and manifestation of discrimination. In fact the only binding international treaty for addressing violence against women is the Convention for the Elimination of all forms of *Discrimination* against Women. This remains the dominant frame for understanding and responding to violence against women as a human rights violation. As established above, in General Recommendation no. 19, the CEDAW Committee considers violence against women as a gender-based and discriminatory practice: ‘violence that affects a woman because she is a woman.’ This was reinforced through *A.T v Hungary*<sup>271</sup>, and subsequent CEDAW-OP cases. *A.T. v Hungary* also influenced the ECHR ruling in *Opuz v Turkey*<sup>272</sup>, where the Court held – for the first time – that violence against women constituted discrimination under the European Convention. Other regional support for this position is found in: the preamble to the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention); Article 2 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol); and, Article 6(a) of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará). Recognising the significance – and fragility – of the understanding of violence against women as gendered and discriminatory, the CEDAW Committee sought to strengthen this conceptualisation in ‘General Recommendation no. 35 on gender-based violence against women, updating general recommendation no. 19’. General Recommendation no. 35, as previously quoted, explicitly restates the framing of violence against women as gendered and discriminatory:

The Committee regards gender-based violence against women to be rooted in gender-related factors such as the ideology of men’s entitlement and privilege over women, social norms regarding masculinity, the need to assert male control or power, enforce gender roles, or prevent, discourage or punish what is considered to be unacceptable female behaviour. These factors also contribute to the explicit or implicit social acceptance of gender-based violence

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<sup>271</sup> *A.T. v. Hungary*, Committee on the Elimination of Discrimination against Women, (comm. 2/2003), (2005).

<sup>272</sup> *Opuz v. Turkey*, ECHR, Application No. 33401/02, (Judgment of 9 June 2009).

against women, often still considered as a private matter, and to the widespread impunity for it.<sup>273</sup>

The Committee went on to emphasise the norms at play behind the ‘definitional issues’<sup>274</sup> concerning ‘violence against women’; and problematise the full meaning of the term’s framing:

The concept of ‘violence against women’ in general recommendation No. 19 and other international instruments and documents has emphasised that this violence is gender-based. Accordingly, this document uses the expression ‘gender-based violence against women’, as a more precise term that makes explicit the gendered causes and impacts of the violence. This expression further strengthens the understanding of this violence as a social – rather than an individual – problem, requiring comprehensive responses, beyond specific events, individual perpetrators and victims/survivors.<sup>275</sup>

As a gendered and discriminatory practice violence against women constitutes a violation of human rights law, distinct from other experiences of violence. The identification of violence against women as a human rights violation, established in the CEDAW-OP and subsequent cases, has been further recognised in the regional treaties, most notably in the Inter-American system, where the Convention of Belém do Pará affirms that ‘violence against women constitutes a violation of their human rights and fundamental freedoms’<sup>276</sup> and stipulates the substantive right of women to live free from violence (Article 3). This categorisation of human rights abuse is reserved for violence against women as gendered, discriminatory, and distinct from other forms of violence.

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<sup>273</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, CEDAW/C/GC/35, (2017), paragraph 19.

<sup>274</sup> Ronagh J. A. McQuigg, “What potential does the Council of Europe Convention on Violence against Women hold as regards domestic violence?” *The International Journal of Human Rights*, 16(7), (2012): 948.

<sup>275</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, CEDAW/C/GC/35, (2017), paragraph 9.

<sup>276</sup> The Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11 May 2011, CETS No.210, Article 3, available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210>

If violence against women is stripped of its gendered meaning it loses its meaning within international human rights law. It becomes simply violence, which it is not. Jurisprudence around due diligence and state responsibility to prevent violence against women becomes near meaningless if it is limited to state responsibility for violence. The understanding of violence against women and the clarification of state responsibility for violence against women must be made within the context of international human rights law – argued here to be truly feminist in approach – and so must understand violence against women as fundamentally gendered. As will be seen in Chapter 3, the loss of a gendered understanding is a threat to this clarification. It is also a threat to efforts to combat violence against women. Countries that have taken a gender-neutral approach to violence against women have fundamentally misunderstood violence against women and are failing to combat violence against women. Given the framing of violence against women under the CEDAW, they are also failing to fulfil their duties as they are outlined in international human rights law. It is impossible to fully respond to violence against women as a human rights abuse without it being understood as a gendered and discriminatory abuse.

It is due to this understanding, and feminist problematising of violence against women, that states have an obligation to address the root causes of violence against women. This is a principle established in the DEVAW, Article 5 of the CEDAW, and General Recommendation no. 19, paragraph 11. The regional treaties have leaned heavily on the international understanding with the most recent treaty, the Istanbul Convention, reaffirming the DEVAW in its recognition of violence against women as both a ‘cause and consequence of discrimination and patriarchal dominance.’ The CEDAW Committee also made decisions under the CEDAW-OP reaffirming the duties states have to tackle root causes, such as sex stereotyping and harmful attitudes, as a matter of prevention and protection. Through individual cases the Committee makes broader recommendations, emphasising the duty of all states to tackle patriarchy and the root causes of violence against women. This is reiterated in the regional treaties. Article 3(2) of the Maputo Protocol and Article 8(b) of the Istanbul Convention affirm the duty of states to ‘modify social and cultural patterns of conduct of men and women, including the development of formal and informal educational programmes appropriate to every level of the educational process, to counteract prejudices, customs and all other practices which are based on the idea of the inferiority or



superiority of either of the sexes or on the stereotyped roles for men and women which legitimise or exacerbate violence against women.<sup>277</sup> The need to consider gender specificity (over gender-neutrality) will be looked at in more depth in Chapter 3, when I outline prevention as understood within the feminist human rights approach; and the role of the state at the sociocultural level will be further considered when I look at systemic due diligence in Chapter 4.

I will consider the understanding and acceptance of this framing further when I look at the normative gap (lack of a binding treaty) and the different jurisprudential contributions offered (primarily) by the regional courts and the cases of the CEDAW-OP, in Chapter 4. I will consider how a future approach needs to outline freedom from violence against women as a right in itself, whilst also conceptualising violence against women as a cause, consequence, and form of gender discrimination. Whilst the discriminatory nature of violence against women is not of lone importance to the legal standing of violence against women within the human rights discourse, it frames appropriately the fundamentally gendered nature of the violation, and shapes how we respond legally and otherwise to prevent violence against women.

As a frame for the terminology of my thesis I rely on the complementary definitions given by the DEVAW and the CEDAW, laid out above. I most regularly use the term 'violence against women', but also use the term 'gender-based violence against women', or simply 'gender-based violence' (when directly referencing the experience of women), to mean the same thing. This interchangeable use is consistent with the definitions and descriptions given above. My preference for the term 'violence against women', is not to negate the framing of violence against women as fundamentally gendered, but to avoid any unintentional overemphasis on the 'gender-based' nature of violence against women in a manner that curtails an intersectional appreciation of violence against women as also being based in racial and socioeconomic oppression. The emphasis on gender, however, does not preclude intersectional analysis, and is not an intended interpretation of the new definition by the CEDAW. As discussed above, the use of 'gender-based violence against women' by the CEDAW in General Recommendation no. 35, and by other actors in the discourse, does not serve to

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<sup>277</sup> The Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11 May 2011, CETS No.210, Article 8(b), available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210>

create new meaning but to reinforce the original framing of the terminology, and to emphasise the legal and ontologising significance of the term 'violence against women' as signifying gendered discrimination.

Where I do appeal to the term 'gender-based violence' this is largely to emphasise meaning in a context where the term 'violence against women' has not been sufficiently understood or accepted as holding that same meaning, or has been directly challenged as holding that same meaning. This is particularly the case when referring to the framing of violence against women as gendered and discriminatory. In the following chapter, where I negotiate the gender-neutral and depoliticised application of international standards to domestic abuse, I make particular recourse to the term 'violence against women' or 'gender-based violence', when seeking to emphasise the meaning that is being eroded by oppositional use of the alternate term. For example, where 'gender-based violence' is used in an attempt to apply international standards to men and women (as if gender simply meant 'men and women'), I emphasize the framing of these standards in terms of 'violence against women' as understood as 'rooted in gender-related factors such as the ideology of men's entitlement and privilege over women'. At times, however, I simply use the terms interchangeably when referencing women's organisations who use both terms, or younger organisations who utilise the fuller definitional framing of General Recommendation no. 35 alongside older organisations who might refer more commonly to 'violence against women'. On rare occasions, mostly in relation to the engagement of Men and Boys' groups in violence prevention, I refer to 'men's violence against women'. Whilst men make up the vast majority of perpetrators of violence against women<sup>278</sup>, they are not the sole perpetrators<sup>279</sup>, and as such this more restricted term is only used when applied to a restricted context. However, it's worth noting that whilst gender-based violence against women can be perpetrated by women, this is largely within a context

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<sup>278</sup> In the UK the most pervasive form of violence against women is domestic abuse. In 2017 – 2018 92% of defendants in domestic abuse-related prosecutions were men. Office for National Statistics, *Domestic abuse in England and Wales: year ending March 2018*, (ONS, 2018) 33, available at <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandandwales/yearendingmarch2018>

<sup>279</sup> Perhaps most notably the practice of FGM, which is almost solely perpetrated by women on girls. Janice Rymer, "Female genital mutilation: everyone's problem," *British Journal of General Practice*, 63, (October 2013): 515 – 516.

of enforced gender roles, still framed by violence against women<sup>280</sup>, and the use of 'men's violence against women' can be used to emphasise the importance of problematising masculinity particularly as it links to violence against women.

The use of multiple terms opens up discourse and has helped evolving and intersectional understandings of what constitutes violence against women. It has also created contested discursive sites, particularly around the understanding of gender and sex. Whilst this is by no means an unimportant debate, my use of terminology falls within the majority approach, and in line with a number of radical feminist scholars who understand the term 'violence against women' as being inclusive and anti-essentialist, and refuse to take reductive readings of sex, gender and sexuality<sup>281</sup> (particularly those that would seek to exclude the experience of trans women, who are one of the most at-risk groups of gender-based violence)<sup>282</sup>. At the same time as rejecting essentialist readings of 'violence against women', I would also argue against neutralised readings of 'gender-based violence' that strip gender of its deeply political and politicised meaning. This will be touched on in more depth in the following chapter as I problematise the framing of domestic violence. Whilst 'gender-based violence' includes violence that goes beyond 'men's violence against women', a negotiation of gender operating at a material and political level – as well as a relational level – must permeate understanding and application of the term. 'Gender-based violence' no more means just 'men's violence against women', than 'violence against women' means 'any violence against women'. One term does not erode the ontologising impact of the other within the human rights discourse, and their use should be seen as mutually reinforcing the same frame, as outlined above, rather than

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<sup>280</sup> As in the case of FGM perpetrated by women – often mothers or grandmothers – but under the wider framing of patriarchal control of female sexuality.

<sup>281</sup> Whilst there is a history of fraught relationships and at times outright hostility between some radical feminists and the trans community, I would align with radical feminist thought and engagement with the law that seeks to combat the exclusion of trans women from the movement. Against increased attention on this division, a story is also being told of the 'trans inclusive history of radical feminism.' Cristan Williams, "Radical Inclusion: Recounting the Trans Inclusive History of Radical Feminism," *Transgender Studies Quarterly*, 3(1 – 2), (2016): 254 – 258. I would align with Catherine MacKinnon and Andrea Dworkin who were trans-affirming in their analysis of gender, sex, and power, particularly as it related to violence against women. Cleis Abeni, "New History Project Unearths Radical Feminism's Trans-Affirming Roots," *The Advocate*, 3 February 2016, <https://www.advocate.com/think-trans/2016/2/03/new-history-project-unearths-radical-feminisms-trans-affirming-roots>

<sup>282</sup> Gender non-conforming people and trans women (particularly trans women of colour) are at high risk of gender-based violence. Human Rights Campaign, Violence Against the Transgender Community in 2019, accessed on 14 January, 2020, available at: <https://www.hrc.org/resources/violence-against-the-transgender-community-in-2019>

providing competing meanings. Together they hold together a frame of violence against women as gendered, discriminatory and a violation of human rights law.

*Violence against women as a systemic abuse operating at a societal level*

Whilst patriarchy – and resultant wide-spread gender inequality – have come to be understood as root causes of violence against women there is still some debate over the degree to which individual cases of violence against women can be attributed to systemic factors and societally held beliefs. This debate over the relationship between patriarchy and violence against women has limited an effective and consistent human rights response to violence against women. Lori Heise, however, has been influential in developing a model of the aetiology of violence against women that has empowered those acting in the human rights discourse to better understand violence against women and work towards its elimination. I will be using Heises' 'Social Ecology'<sup>283</sup> model as a basis for my thesis' understanding of violence against women. She explains that in our nested 'social ecology' there are four environments that influence our behavior, and contribute to violence against women. Across the four environments we are exposed to elements that can increase women's risk of – or resilience against – experiencing gender-based violence. Firstly, the individual environment which accounts for our early cognitive and personal development. Secondly, the microsystem, or our specific context, for example, a marriage or relationship. Thirdly, the exosystem, made up of formal and informal structures, such as economic relations, education and media, and our legal systems. Fourthly, our macrosystem, which is the 'broad set of cultural values and beliefs that permeate and inform the other three layers.'<sup>284</sup> Heise's model is highly regarded by academics and stakeholders alike, and thoroughly accounts for the breadth of contributing risk factors.<sup>285</sup> For example, the model includes our adolescent experience of violence (individual environment), or whether our legal system

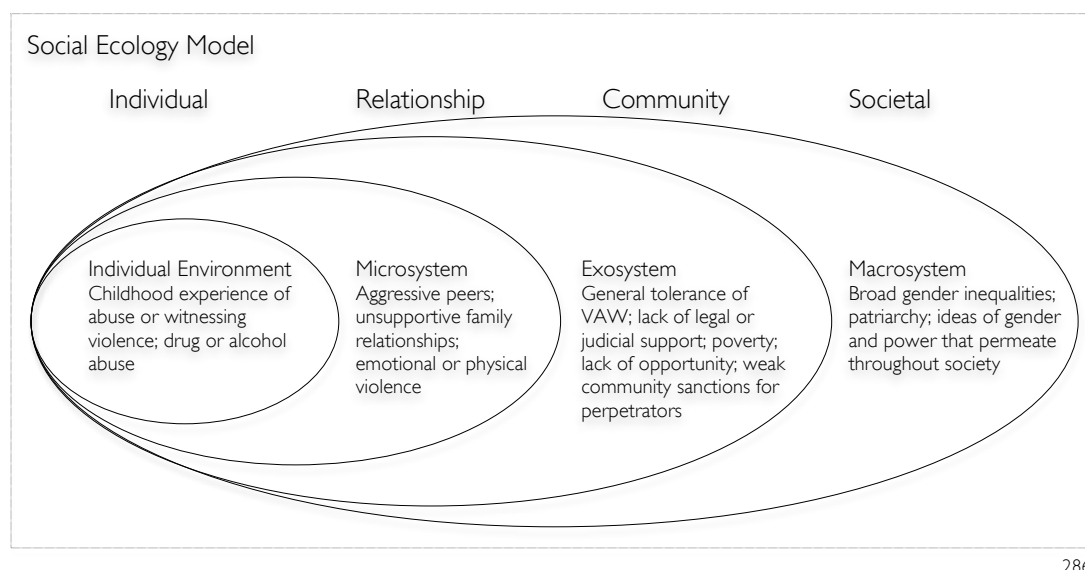
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<sup>283</sup> Lori Heise, "Violence Against Women: An Integrated, Ecological Framework," *Violence Against Women*, (4), (June, 1998); Heise's 'nested' model is rooted in *ecological systems theory* or *human ecology theory*, developed by eminent psychologist Urie Bronfenbrenner. Bronfenbrenner helped in the formation of the Head Start programme in the United States in 1965, and pioneered work considering the environmental and societal influences on child development, which went on to change markedly the perspective of developmental psychology and social action responses to child development. Urie Bronfenbrenner, *The Ecology of Human Development: Experiments by Nature and Design*, (Cambridge, MA: Harvard University Press, 1979).

<sup>284</sup> Heise, "Violence Against Women: An Integrated, Ecological Framework," 277.

<sup>285</sup> Conversely, the nested social ecology also frames the different ways, and social spaces, in and through which resilience and protective factors can be built up.

criminalises marital rape (exosystem), whilst also maintaining the significance feminists have placed on the impact of the wider societal, patriarchal values on all three layers.



Heise's model brings together two disciplines – feminist political thought and psychology – which have jarred with regard the understanding of violence against women. Feminists have long questioned psychological factors described as contributing to violence against women; wary of their use to justify abuse or to minimise the understanding of the scale of violence against women.<sup>287</sup> They have criticised psychologists for ignoring the gendered nature of violence against women and individualizing and pathologising incidents of violence against women so that they appear to have no societal character, and so that women's 'victimisation' has no systemic nature. In particular they have questioned why men who are abused as children would often go on to be disproportionately abusive in adult life whereas women who are abused as children often go on to face revictimisation in adult life. Conversely, feminists have been criticised for offering no explanation as to why some men are violent and others aren't. If patriarchy fuels, or at least acquiesces to violence against women, and violence against women operates at a societal level, then why aren't all men violent?<sup>288</sup> Heise's model takes both approaches into account and offers

<sup>286</sup> Heise, "Violence Against Women: An Integrated, Ecological Framework," 262 – 290.

<sup>287</sup> Patrizia Romito, *A Deafening Silence: Hidden violence against women and children*, (Bristol: Policy Press, 2008).

<sup>288</sup> As a contemporary example of this dilemma: within the context of online activism, feminist claims of systemic male violence are routinely met with retorts of #notallmen as a way of silencing the critique of gendered power.

a complex but comprehensive aetiology for violence against women. For example, a man and woman might suffer similar abuse in childhood, contributing to factors in their 'individual environment' that inform violence. They could then have similar 'microsystems' even. Surrounding that is more likely an 'exosystem' that would reinforce the man's position of power but not the woman's – whether this is an economic system that devalues women's labour and leaves many women, particularly mothers, financially tied to men, or whether it is penal codes and criminal laws that offer no protection from marital rape. Then at the macrosystem, informing all other factors, we have the patriarchal gender hierarchies that would reinforce violence against women. In this way Heise's model offers answers to the questions left by psychologists and feminists and draws on knowledge from both.

It is important to note that Heise does not expect the delineation of ecologies within the framework to be definitive, and believes that 'considerable room exists for interpretation as to exactly where a particular factor most appropriately fits into the framework'; however 'more important than the location of any single factor is the dynamic interplay between factors operating at multiple levels.'<sup>289</sup> Heise's social ecology framework is critical to efforts navigating the relationship between the psychological, situational and sociocultural factors contributing to violence against women, as the 'nested ecological framework explicitly emphasises the interaction of these factors in the etiology of abuse.'<sup>290</sup> It also gives room for a multifaceted approach to tackling violence against women operating at different levels. Heise's framework recognises the need to work with perpetrators, thereby addressing the individual environment, whether through perpetrator courses or drugs and alcohol rehabilitation; as well as addressing structural issues around violence against women, improving the exosystem, whether through legal aid, special courts for violence against women, or providing refuges; whilst maintaining the overarching need to tackle root causes by addressing the macrosystem and violence against women at a societal level. Indeed Heise recognises the focus feminist theory puts on 'macrosystem factors such as patriarchy' and 'acknowledges the centrality and importance of macrolevel factors like male domination'<sup>291</sup>. Whilst the nested ecological approach 'emphasises the interrelationship of patriarchal beliefs and values with other factors elsewhere in the

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<sup>289</sup> Heise, "Violence Against Women: An Integrated, Ecological Framework," 266.

<sup>290</sup> Heise, "Violence Against Women: An Integrated, Ecological Framework," 266.

<sup>291</sup> Heise, "Violence Against Women: An Integrated, Ecological Framework," 277.

framework', Heise is keen to point out that much of the 'evidence from the cross-cultural literature [used in the development of the model] substantiates many of the major tenets of feminist theory on male violence.'<sup>292</sup> In this sense I consider Heise's nested ecological model to provide a feminist aetiology of violence against women for my thesis.

Understanding violence against women as aetiologically societal is vital to my thesis as 'the ways in which violence is conceptualised acts as a fulcrum for effective policy and practice on eliminating violence against women.'<sup>293</sup> For the focus of my thesis, effective prevention strategies hinge upon effectively understanding violence against women. How a state understands violence against women (and how the law frames violence against women) impacts upon how it responds to violence against women and how fruitful that response is. Understandings of violence against women that have focused predominantly, or solely, on factors at an individual level have led to individual-led responses, normally utilising domestic criminal law, and have failed to impact upon violence against women as a broader phenomenon. This lack of understanding also explains why various criminal law developments have made so few inroads into eliminating violence against women. If violence against women is a societal problem there needs to be discussion about what constitutes an appropriate response to societal problems. International human rights law is in a good position to contribute to a response as it is primarily concerned with the relationship between the state and the individual, and not solely with the individual. (The state is of primary importance as an actor *contributing* to societal aetiologies of violence against women, and as an actor well placed to combat societal aetiologies of violence against women, should it wish to.) Again, international human rights law (as shaped by feminist theory and activism) highlights the root causes of violence against women – the gendered and discriminatory nature of violence against women. For this reason governments (influenced by lobbying from national women's groups and NGOs) are increasingly turning to international human rights law and considering a human rights approach to legislation, seeing how it addresses violence against women more comprehensively than criminal law. For instance the Welsh Violence Against Women Action Group, formed to consult on the drafting process of the Violence against Women, Domestic

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<sup>292</sup> Heise, "Violence Against Women: An Integrated, Ecological Framework," 277.

<sup>293</sup> Yakin Ertürk and Bandana Purkayastha, "Linking research, policy and action: A look at the work of the special rapporteur on violence against women," *Current Sociology*, 60(2), (2012): 146.

Abuse and Sexual Violence (Wales) Act 2015, advocated an explicitly feminist human rights approach, encouraging the use of the DEVAW as a foundational document. Likewise, the Action Group insisted that “[t]he Welsh Government strategy and action plan to end Violence against Women must include a clear definition of Violence against Women, preferably that adopted by the UN.”<sup>294</sup> Whilst the use of a human rights approach is to be welcomed, it should be cautioned however, that the human rights approach must be accompanied by theorised (feminist) engagement with, and practice of, the law. Furthermore, that approach must not be limited to merely enacting legislation, as ‘legal instruments do not themselves denote change’<sup>295</sup>. Rather, as Christine Chinkin explains, legal instruments must be accompanied by the ‘internalisation of a human rights culture.’<sup>296</sup> Legislation can build on or compound societal change but it is limited where societally held beliefs are still strongly in opposition to the change legislation seeks to make. This does not mean that substantive law does not play a constitutive role but rather that it cannot act in isolation. Laura Hebert further comments that to ‘reduce human rights to legal rights is to overstate the ability of legal change to translate into a transformation of the deeply held beliefs and values that often underlie gendered human rights violations.’<sup>297</sup> A holistic response is required and there must therefore be a variety of approaches, legal and non-legal. The patriarchal values that are imbricated in society, informing violence against women, are not wholly transformed by legislation. On the contrary, much anti-violence against women legislation is built on very poor cultural and social foundations for eliminating violence against women. Therefore, the path to preventing violence against women, at a societal level, should not be mere legal change alone, but rather discovering methods to internalise a women’s rights culture that rejects violence against women. A new due diligence framework needs to be set within an improved understanding of violence against women that emphasises the societal and systemic nature of violence against women and requires from states an appropriate response.

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<sup>294</sup> “Steps to Safety”, Wales Violence Against Women Action Group, accessed January 12, 2017, <http://walesvawgroup.co.uk/wp-content/uploads/2012/10/steps-to-safety.pdf>.

<sup>295</sup> Christine Chinkin, “Women’s Rights in the 21st Century,” *Interights Bulletin*, 14(4), (2004): 141.

<sup>296</sup> Chinkin, “Women’s Rights in the 21st Century,” 141.

<sup>297</sup> Laura Hebert, ““Go Back and Give Him What He Wants’: The Limits of a Legal Rights Approach to Gendered Human Rights Violations,” *International Journal of Human Rights*, 12(4), (2008): 483.



In her 2013 report the Special Rapporteur outlines the dual obligations of *individual due diligence* and *systemic due diligence*.<sup>298</sup> My research is focused on the latter: systemic due diligence and prevention. A systemic approach must move away from the two common approaches of: normalising certain manifestations of violence against women, such as domestic violence and rape; and essentialising other manifestations, such as FGM or forced marriage. In the one instance, actors normalise the domestic violence suffered by one in four women in the UK – asserting that there is no wider culture or systemic patriarchy that at best acquiesces to violence against women and at worst promotes it. In the other instance, actors essentialise what is often called ‘cultural violence’, such as FGM, and target elements of culture or manifestations of violence but again leave intact the underlying patriarchal system. In so doing they stigmatise cultures and victims and leave women vulnerable to revictimisation through new manifestations.

#### *Case-study: Harmful traditional practices?*

Over the past 15 years particular attention has been given to manifestations of violence against women that are linked to specific traditions or cultures. Perhaps most notably is the attention given to FGM. Efforts to raise awareness have been rightly welcomed. This said, the language around particular forms of violence against women such as FGM, Sati, breast ironing, honour killings, and forced marriages, have created a dichotomy within the human rights discourse where forms of violence against women more closely identified with religious, ‘non-Western’, or minority ethnic groups are considered ‘cultural’ whereas more general forms – intimate partner violence, rape, stalking, and sexual harassment – are not. Whilst increased attention on specific forms of violence against women has advanced the general understanding, it has also ‘reinforced the notion that metropolitan centers of the West contain no “tradition” or “culture” harmful to women, and that the violence which does exist is idiosyncratic and individualised rather than culturally condoned.’<sup>299</sup> A 1995 UN Report on Harmful Practices didn’t help understanding as it directly juxtaposed traditional practices with

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<sup>298</sup> United Nations, *State responsibility for eliminating violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Rashida Manjoo, A/HRC/23/49* (May 14, 2013), paragraph 71, available at <http://undocs.org/A/HRC/23/49>.

<sup>299</sup> Bronwyn Winter, Denise Thompson and Sheila Jeffreys, “The UN Approach to Harmful Traditional Practices,” *International Feminist Journal of Politics*, 4(1), (2002): 72.

'non-traditional practices, such as rape and domestic violence'<sup>300</sup>. As Special Rapporteur Yakin Ertürk noted in her 2007 report, this is not only deceptive, as all violence against women exists within a culture, it is also ineffective, as isolating specific traditions fails to affect the wider societally held beliefs. For example, in Cameroon, campaigns specifically aimed at FGM were successful in reducing that form of violence against women, but subsequently, and arguably consequently, breast-ironing increased. Whilst the specific tradition was challenged the wider issue of controlling female sexuality continued and manifested in a different guise.<sup>301</sup>

Viewing violence against women as a societal problem does not deny differing forms of violence against women present in different cultures but considers them as manifestations of the broader culture – patriarchy. Throughout this study 'culture' and 'societal values' will refer to a universal patriarchy, operating macrosystemically (as per Heise's model), and where this manifests in particular form, culture or tradition, it will be said so. This dichotomy between 'cultural violence' and violence against women that is not seen as 'cultural', or perhaps even seen as diverging from cultural rules, is doubtless born from colonial and racial privileging of Western culture, and the concurrent stigmatisation and demonisation of 'other' cultures. This example of white privilege and colonialism highlights the need for a truly intersectional understanding of, and approach to, violence against women.

Understanding violence against women as systemic and operating at a societal level, must not be reduced to essentialist versions of Heise's social ecology. Likewise, a new due diligence framework needs to establish the obligation to prevent violence against women at a systemic level in a holistic and comprehensive manner. At the root of this is the obligation to transform patriarchal gender structures – this needs to be clearly outlined in a framework so states know their systemic due diligence obligation to prevent, and NGOs, non-state actors and individuals can hold them accountable.

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<sup>300</sup> "Fact Sheet No.23, Harmful Traditional Practices Affecting the Health of Women and Children," OHCHR, accessed June 8, 2016, <https://www.ohchr.org/Documents/Publications/FactSheet23en.pdf>.

<sup>301</sup> United Nations, *Intersections between culture and violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Yakin Ertürk, A/HRC/4/34* (17 January, 2007) paragraph 34, available at <http://undocs.org/A/HRC/4/34>.

### *The indivisibility of human rights and the holistic approach to violence against women*

Attention to the macrosystemic aetiology and root causes of violence against women, 'challenges the notion that gender violence is a phenomenon distinct from the wider field of gender equality and women's rights.'<sup>302</sup> Taking a rights-based approach to violence against women takes seriously the maxim: 'All human rights are universal, indivisible and interdependent and interrelated.'<sup>303</sup> Violence against women is a manifestation of many intersecting factors that go far beyond the individual (as outlined above), and as such a response must be holistic; challenging the root causes of violence against women and reacting to the realities of women's lives. An holistic, rights-based response to violence against women requires:

- negotiating the interrelation and indivisibility of women's rights;
- the inclusion of violence against women under existing human rights treaties and the mainstreaming of gender perspectives on torture and bodily integrity; and,
- the framing of, and response to, violence against women as an issue of justice and empowerment, in contrast to a 'victimisation-approach'.

Gender inequality, as the primary root cause of violence against women<sup>304</sup>, manifests in multiple and varied ways to impact and shape women's experience of, and resilience against, gender-based violence. This can manifest at different strata of the social ecology, whether it be forced economic dependency, discriminatory legislation, or patriarchal gender roles. Taking just one of these examples, the feminisation of

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<sup>302</sup> Julie Goldscheid and Debra Liebowitz, "Due Diligence and Gender Violence: Parsing its Power and its Perils," *Cornell International Law Journal*, 48, (2015): 309. p.301 – 345, p. 309

<sup>303</sup> United Nations, *Vienna Declaration*, paragraph 5.

<sup>304</sup> This understanding is supported by the expertise of women's organisations, who when surveyed as part of a global assessment of the due diligence standard, 'cited gender inequality as the risk factor that most increased the prevalence of VAW.' Zarizana Abdul Aziz and Janine Moussa, *Due Diligence Framework: State Accountability Framework for Eliminating Violence against Women*. (International Human Rights Initiative, 2016), 17, available at [www.duediligenceproject.org/ewExternalFiles/Due%20Diligence%20Framework%20Report%20Z.pdf](http://www.duediligenceproject.org/ewExternalFiles/Due%20Diligence%20Framework%20Report%20Z.pdf); 'The strongest factors correlating with higher levels of violence against women and their children have therefore been found to lie in socio-structural and relationship-level gender inequalities, as well as attitudes and norms supporting violence and rigid gender roles. These factors have been termed 'determinants' of violence, as they are considered significant enough to determine the likelihood of violence occurring at population levels.' "Policy Brief: International Evidence on the Effectiveness of Prevention Initiatives," Our Watch, accessed 2 November, 2018, [www.ourwatch.org.au/getmedia/50e1f9de-9d7b-4236-a300-91087d3eb9e6/Accessible\\_Policy\\_Brief\\_3\\_International\\_Evidence\\_Base.pdf.aspx?ext=.pdf](http://www.ourwatch.org.au/getmedia/50e1f9de-9d7b-4236-a300-91087d3eb9e6/Accessible_Policy_Brief_3_International_Evidence_Base.pdf.aspx?ext=.pdf).

poverty<sup>305</sup>, we can see the need to look at wider inequality and consider human rights indivisibly, and international human rights law holistically. The economic disempowerment of women, and their increased likelihood of economic dependency, should lay rest to the claim that women who suffer gender-based violence in the domestic setting have full freedom to escape the situation. Economic dependency will factor into a woman's ability to leave a violent partner, where she, and possibly her children, can seek refuge, and if she will be able to seek prosecution, and divorce (if she is married).<sup>306</sup> A common lack of gender-budgeting alongside tax and benefit cuts that disproportionately disadvantage women<sup>307</sup>, also impact on women's ability to escape gender-based violence, and the availability of refuges and protective services to go to. A comprehensive approach to violence against women would require looking at the wider issues around gender-based violence and accepting that it is 'part of a larger socioeconomic web that entraps women.'<sup>308</sup> As discussed above the hierarchy between CPRs and ESCRs is set in favour of men, with women suffering from the low regard paid to ESCRs. Violence against women is wrapped up in a causal and symptomatic relationship with the protection of women's human rights more generally. Whilst it is hoped that freedom from violence will open the door to other freedoms, it is, at the same time, necessary to engage with wider human rights issues to tackle violence against women. Given an intersectional reading of violence against women, this requires emphasising the protection of rights of marginalised women, and interrogating the way multiple forms of discrimination interact with and inform gender inequality. International human rights law should display innovative jurisprudence that

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<sup>305</sup> 'The majority of the 1.5 billion people living on 1 dollar a day or less are women. In addition, the gap between women and men caught in the cycle of poverty has continued to widen in the past decade, a phenomenon commonly referred to as "the feminization of poverty". Worldwide, women earn on average slightly more than 50 per cent of what men earn.' United Nations, *Review and Appraisal of the Implementation of the Beijing Platform for Action: Report of the Secretary-General*, E/CN.6/2000/PC/2 (15 December, 2014), available at <http://undocs.org/E/CN.6/2000/PC/2>.

<sup>306</sup> In a study by Shelter, 40% of all homeless women stated that domestic violence was a contributor to their homelessness. Domestic violence was found to be 'the single most quoted reason for becoming homeless.' Helen Cramer and Mary Carter, *Homelessness: what's gender got to do with it?*, (London: Shelter, 2002).

<sup>307</sup> In the UK context, women are disproportionately bearing the burden of austerity 'with 86% of savings from tax and benefit measures coming from women's pockets.' Single mothers and the elderly have been made increasingly financially vulnerable under the UK government's policy of austerity: By 2020, female lone parents and single female pensioners will, on average, have seen their living standards fall by 20% compared with what would have happened had these policy measures not been introduced.' Rebecca Omonira-Oyekanmi and Polly Trenow, eds., *The impact on women of the 2016 Budget: Women paying for the Chancellor's tax cuts*, (UK Women's Budget Group, 2016), p. 3, accessed May 13, 2017, at [http://wbg.org.uk/wp-content/uploads/2016/11/WBG\\_2016Budget\\_FINAL\\_Apr16-1.pdf](http://wbg.org.uk/wp-content/uploads/2016/11/WBG_2016Budget_FINAL_Apr16-1.pdf)

<sup>308</sup> Charlotte Bunch, "Women's Rights as Human Rights: Towards a Re-Vision of Human Rights," *HRQ*, 12(4), (1990): 488.

reinforces the interdependency of human rights. Standards of state responsibility and due diligence should be developed in an holistic way, with a full view of the issues surrounding violence against women. When I look further at prevention and the due diligence standard I will consider the relationship between preventing violence against women, so called 'positive rights', and duties under Article 5 of the CEDAW, which deals broadly with anti-discrimination and holistic protection and fulfilment of women's human rights at the sociocultural level. Again, the understanding of violence against women as fundamentally and simultaneously an act of violence and gender discrimination bears on the issues of protection and fulfilment, and how the indivisibility of rights is made manifest in application with regard violence against women by states, courts and treaty monitoring bodies.

Underlying an holistic approach to international human rights law and violence against women is the fundamental principle that 'women's rights are human rights'. This has been a campaign of the women's movement for several decades.<sup>309</sup> Initially combating the exclusivity of the UDHR and international covenants, feminists argued that human rights were formulated from a 'normative male model' and 'applied to women as an afterthought, if at all.'<sup>310</sup> We can see the existence of the normative male model, when considering the understanding and jurisprudence surrounding the prohibition of torture as found under Article 5 of the UDHR, Article 7 of the ICCPR, the Convention against Torture, and a number of the core international human rights treaties. This norm is accepted as rule of customary international law and is widely considered to have *ius cogens* status. It is one of the most established human rights norms, yet its framing and application lack true universality.

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<sup>309</sup> This traces back to the mid 1800s with authors such as Sarah Moore Grimké writing 'I know nothing of man's rights, or woman's rights; human rights are all that I recognize'. Sarah Moore Grimké, *Letters on the Equality of the Sexes* (Boston: Isaac Knapp, 1838. Reprinted by Forgotten Books, 2012). However, the phrase 'women's rights are human rights' became prominent throughout the UN Decade on Women, and was most notably adopted by then First Lady of the United States, Hillary Clinton, in her speech to United Nations Fourth World Conference on Women in Beijing in 1995; Getrude Fester, "Women's Rights Are Human Rights," *Agenda: Empowering Women for Gender Equity*, 20(10), (1994): 76 – 79.

<sup>310</sup> Julie Peters and Andrea Wolper, *Women's Rights as Human Rights: international feminist perspectives*, (New York: Routledge, 1995), 2.

There are two dominant frames that have emerged from the feminist leading of the human rights law response to violence against women<sup>311</sup>, or, as Alice Edwards suggests, 'two main pragmatic strategies to include violence against women within the existing human rights framework.'<sup>312</sup> The first, as touched on above, is the establishment of violence against women as a form of gender discrimination, the second is the gendered interpretation and expansion of the norm of the prohibition of torture to include violence against women. Whilst my research focuses more attention on the first frame, the second should be seen as complementing rather than competing with the first. It still demands a gendered reading of the violence experienced by women, but rather than seeking to conceptualise and establish violence against women as a 'new' human rights violation, it 'creatively reinterpret[s] existing human rights provisions so that they apply to the experiences of women.'<sup>313</sup> There is pragmatic benefit and symbolic significance in taking this approach, touched on below.

Historically, the prohibition of torture has tended to be state centric and focused on the male experience of cruel, inhuman, or degrading treatment or punishment. However, the provision has been widely expanded in international law to include state responsibility for acts of torture by private actors. Perhaps the definitive moment in developing state responsibility for private violence was the 1988 Inter-American Court of Human Rights decision in *Velásquez Rodríguez v. Honduras*. The Court held that Honduras was responsible for the torture suffered by Angel Manfredo Velásquez Rodríguez by private actors because it had failed to prevent his disappearance and punish the perpetrators.<sup>314</sup> The Court went on to clarify the general application of state responsibility for private violence by saying '[t]he same is true [that the State has failed in its duties] when the state allows private persons to act freely and with

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<sup>311</sup> Alice Edwards, *Violence Against Women Under International Human Rights Law*, (Cambridge: Cambridge University Press, 2011), xi; Paulina García-Del Moral, & Alexandra Megan Dersnah, "A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship," *Citizenship Studies*, 18(6 – 7), (2014): 662.; McQuigg, "Is it time for a UN treaty on violence against women?" 317– 318; Bunch and Reilly, *Demanding Accountability: The Global Campaign and Vienna Tribunal for Women's Human Rights*.

<sup>312</sup> Edwards, *Violence Against Women Under International Human Rights Law*, xi.

<sup>313</sup> Edwards, *Violence Against Women Under International Human Rights Law*, xi.

<sup>314</sup> *Velásquez Rodríguez v. Honduras*, IACtHR, Series C No. 4, Judgment of 29 July 1988.

impunity to the detriment of rights recognized in the American Convention on Human Rights.<sup>315</sup> Likewise, the Human Rights Committee took the approach in 1982 that Article 7 also conferred a duty on 'public authorities to ensure protection by the law against such treatment even when committed by persons acting outside or without any official authority.'<sup>316</sup> This was further expanded in its 1992 general comment on Article 7: 'It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by Article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.'<sup>317</sup> Furthermore, '[t]hose who violate article 7, whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible.'<sup>318</sup>

Whilst the particular importance of the *Velásquez Rodríguez* case with regard the interpretation of due diligence will be explored in more detail later, the framing of torture by private actors as violative opened the door to the conceptualisation of violence against women, and in particular domestic violence, as a form of torture. Rhonda Copelon, advances a very convincing argument as to why violence against women, or as she calls it 'intimate terror'<sup>319</sup>, should be understood as torture. The Human Rights Committee has made clear that there is no definitive list of what constitutes torture or cruel treatment; rather it depends on the 'nature, purpose and severity of the treatment applied.'<sup>320</sup> In this vein Copelon argues that the 'process, purposes and consequences [of violence against women] are startlingly similar [...] to the international legal understanding of torture.'<sup>321</sup> She argues that the physical and psychological tools of official torture and violence against women are much the same.

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<sup>315</sup> *Velásquez Rodríguez v. Honduras*, paragraph 176.

<sup>316</sup> CCPR general comment No. 7: Article 7 (Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment), Adopted at the Sixteenth Session of the Human Rights Committee, 30 May, 1982, paragraph 2, available from

<https://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx>

<sup>317</sup> CCPR general comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), Adopted at the Fourth Session 1992, paragraph 2, available from <https://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx>

<sup>318</sup> CCPR general comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), Adopted at the Fourth Session 1992, paragraph 13, available from <https://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx>

<sup>319</sup> Copelon, "Intimate Terror: Understanding Domestic Violence as Torture," 116.

<sup>320</sup> CCPR general comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), Adopted at the Fourth Session 1992, paragraph 4, available from <https://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx>

<sup>321</sup> Copelon, "Intimate Terror: Understanding Domestic Violence as Torture," 117.

Indeed, the 'most common forms of torture involve no special equipment'<sup>322</sup> and resemble closely the tools of intimate terror, including 'beating, burning, scalding, strangling, stabbing and drowning.'<sup>323</sup> With regard the relationship between the physical and psychological elements of torture Copelon highlights that 'both in the domestic and official context, rape and sexual abuse, which may do less physical damage than beatings, are often experienced by women as the gravest violation.'<sup>324</sup> It is at this point that there is a dichotomy between the male and female perspective on torture. Whilst the Human Rights Committee upholds the male interpretation of torture, putting greater emphasis on brutality and severity, Copelon argues that the most 'insidious forms of torture are those that do not involve overt brutality.'<sup>325</sup> Some methods may be wholly psychological; 'threats to kill, isolation, arbitrary and unpredictable punishments and intermittent rewards.'<sup>326</sup> Brutality is not as effective as psychological torture in manipulating dependency and exhausting endurance: '[t]orture is a context and process of domination and not simply or necessarily a set of brutal acts.'<sup>327</sup> As for those who argue that victims of violence against women are 'free to leave', whereas those who suffer torture are detained, it is worth considering the large body of work strongly linking the position of victims of violence against women with prisoners of war<sup>328</sup> and terrorist hostages<sup>329</sup>; and, of course, the socioeconomic factors as touched on above. Arguably, then, Article 7 is a very real way that violence against women could be brought under the purview of the Human Rights Committee and considered within the supposedly gender-neutral human rights framework. As Charlesworth and Chinkin suggest, the major strategic advantage of international human rights law is its universal vocabulary. However, this must 'extend beyond a limited male view'<sup>330</sup> of universality.

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<sup>322</sup> Copelon, "Intimate Terror: Understanding Domestic Violence as Torture," 122.

<sup>323</sup> Copelon, "Intimate Terror: Understanding Domestic Violence as Torture," 123.

<sup>324</sup> Copelon, "Intimate Terror: Understanding Domestic Violence as Torture," 123.

<sup>325</sup> Copelon, "Intimate Terror: Understanding Domestic Violence as Torture," 123.

<sup>326</sup> Copelon, "Intimate Terror: Understanding Domestic Violence as Torture," 124.

<sup>327</sup> Copelon, "Intimate Terror: Understanding Domestic Violence as Torture," 124.

<sup>328</sup> Albert Biderman's Framework of Coercion is a tool developed to explain the methods used to break the will or brainwash a prisoner of war. Domestic violence experts believe that abusers use these same techniques, including 'isolation, monopolization of perception, induced debility and exhaustion, threats, occasional indulgences, demonstrating 'omnipotence', enforcing trivial demands, and degradation.' It is commonly used by health providers and frontline protective services. "Biderman's chart of coercion," National Centre on Domestic and Sexual Violence, accessed at 2 March 2015, <http://www.ncdsv.org/images/Chart%20of%20Coercion1.pdf>; See also: Albert Biderman and Herbert Zimmer, eds., *The Manipulation of Human Behaviour*, (Oxford, England: Wiley, 1961).

<sup>329</sup> McColgan, "In Defence of Battered Women Who Kill," 508.

<sup>330</sup> Charlesworth and Chinkin, *The Boundaries of International Law: A Feminist Analysis*, 60.



There has been some progress in institutionalising this frame. Both the Human Rights Committee and Committee against Torture have made moves towards engendering the interpretation of the prohibition of torture so as to include violence against women and have broadened their approach to torture by private actors to include domestic violence, in particular.<sup>331</sup> This reflects the 'UN's "gender mainstreaming" agenda', which has 'made interpretative inclusion rather than textual amendments the preferred practice' for responding to violence against women.<sup>332</sup> However, the framing of violence against women as torture is more than a pragmatic strategy; it is also an insistence that women's rights be seen truly as human rights. This frame holds considerable symbolic importance and works to engender the discursive space surrounding the powerful norms prohibiting torture. By working for universality, and mainstreaming a gendered reading of torture, cruel, inhuman, or degrading treatment or punishment, the frame acts to avoid ghettoization of women's rights, and to challenge the interpretation of 'women's rights' as a supplementary or lesser category of human rights. Whilst I focus more heavily on the frame of gender discrimination, I believe the two act co-constitutively, rather than independently, within the discourse, even whilst institutionalising distinct understandings of violence against women.

Whilst the plea for 'women's rights as human rights' was originally for inclusion and true universality it has also developed to challenge the 'ghettoisation' of women's rights as 'women's issues.' The adoption of separate instruments and specialised machinery, such as the CEDAW, have been crucial to furthering the protection of women; however, it can be argued that these instruments have narrowed the global human rights perspective and relegated women's rights to a separate sphere – again reinforcing the public/private dichotomy. There is a frustration that these

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<sup>331</sup> 'To assess compliance with article 7 of the Covenant, as well as with article 24, which mandates special protection for children, the Committee needs to be provided information on national laws and practice with regard to domestic and other types of violence against women, including rape.' CCPR general comment No. 28 - Article 3 (The equality of rights between men and women) (Replaces general comment No. 4), CCPR/C/21/Rev.1/Add.10, (29 March 2000) paragraph. 11, available from <https://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx>; 'Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or *de facto* permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.' Committee against Torture general comment No. 2, Implementation of article 2 by States parties, CAT/C/GC/2 (24 January 2008), paragraph 18, available from <http://undocs.org/CAT/C/GC/2>

<sup>332</sup> Edwards, *Violence Against Women Under International Human Rights Law*, xi.

developments have created a dualism between human rights and women's rights – where one is normative and the other merely ideological. To this end, Laura Reanda suggests use of the term 'human rights of women' rather than 'women's rights' to emphasise the 'globality and indivisibility of human rights, and their full applicability to women as human beings.'<sup>333</sup>

Feminist efforts to conceptualise violence against women as a human rights abuse – and resist 'ghettoisation' – also act to resist the historic and dominant framing of violence against women within the 'welfare/humanitarian paradigm'<sup>334</sup>. Welfarist conceptualisations of violence against women are rooted in what the former Special Rapporteur, Yakin Ertürk, and Bandana Purkayastha call: the 'victimization approach'<sup>335</sup>. The victimisation approach narrowly focuses on 'harm done' and redress 'after the fact'; and conceptualises violence against women in a way that furthers gendered notions of vulnerability, in particular playing up the female/victim, male/rescuer narrative. The glorification and legitimisation of hypermasculinity, and the promotion of femininity (read here as weakness, purity, honour, etc.) serves to continue the disempowerment of women and the acquiescence towards male power that, in reality, leads to violence against women. The welfare/humanitarian paradigm not only fails to address violence against women successfully, it lacks the understanding of violence against women – 'the raced/gendered/classed/sexualized nature of violence'<sup>336</sup> – needed to respond holistically and with a focus on elimination/prevention. The conceptualisation of violence against women as gendered and discriminatory demands violence against women be understood within the international human rights discourse through an entitlement/empowerment paradigm that prioritises prevention and focuses on empowerment. Feminists have fought for this discursive space and for violence against women to be problematised and understood within it.

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<sup>333</sup> Laura Reanda, "Human rights and women's rights: The UN approach," 3 *HRQ* (Spring, 1981): 11.

<sup>334</sup> Ertürk and Purkayastha, "Linking research, policy and action: A look at the work of the special rapporteur on violence against women," 146.

<sup>335</sup> Ertürk and Purkayastha, "Linking research, policy and action: A look at the work of the special rapporteur on violence against women," 155.

<sup>336</sup> Ertürk and Purkayastha, "Linking research, policy and action: A look at the work of the special rapporteur on violence against women," 145.

## Summary of the radical feminist human rights approach to violence against women

Feminist groups have worked tirelessly to establish jurisprudence which connects violence against women with understandings of the political character and ramifications of gender, and with the pervasiveness of patriarchy. The emphasis on tackling the root causes of violence against women, the acknowledgement that the problem is (macro)systemic not individuated or idiosyncratic, and the promotion of gender-specific measures to tackle violence against women as a gender-specific human rights violation, are all hard fought gains which need to be consolidated, rather than retreated from.

Through international treaty law, case law, and under the auspices of treaty monitoring bodies, state reporting, and the recommendations of UN agencies, international human rights law and the surrounding discourse has established and reinforced a foundational approach: violence against women is gender-based and discriminatory and consequently violence against women is a human rights violation. These corollary positions are the hidden-in-plain-sight feminist foundations of jurisprudence and norms that encompass the human rights approach. This has been established in General Recommendation no. 19, in which the CEDAW Committee established violence against women as a gender-based and discriminatory practice – ‘violence that affects a woman because she is a woman’ – and further reinforced through the jurisprudence in *A.T v. Hungary*, and subsequent CEDAW-OP cases and regional cases. Other regional support for this position is found in the Istanbul Convention, Maputo Protocol, and in the Convention of Belém do Pará. It bears repeating that this categorisation of human rights abuse is reserved for violence against women as gendered, discriminatory, and distinct from other forms of violence. In response, states have been urged to address the root causes of violence against women. This is established in the DEVAW, Article 5 of the CEDAW, and General Recommendation no. 19, paragraph 11. The regional treaties have leaned heavily on the international understanding with the most recent treaty, the Istanbul Convention, reaffirming the DEVAW in its recognition of violence against women as both a cause and consequence of discrimination and patriarchal dominance.

In light of the root causes of violence against women, international human rights law considers violence against women to be a specific and systemic abuse. This has been most recently and effectively outlined in the 2013 annual report by the UN Special Rapporteur on Violence Against Women. In the preamble of the Istanbul Convention the framers recognise 'the structural nature of violence against women as gender-based violence, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.' The gendered, discriminatory and systemic nature of violence against women has been defined and emphasised within the discourse.

This understanding, developed through the women's movement and feminist jurisprudence, and coordinated primarily through the auspices of the UN, has led to an holistic approach to violence against women, shaped by the key principle of gender specificity, which I will consider in depth in the following chapter.

However, it must be recognised that success in bringing violence against women into the international human rights discourse has been hampered by the lack of a single binding international mechanism focused on violence against women. The above definitions are sourced from soft law, declarations, and general recommendations. Whilst this all contributes to international human rights law and customary law (although there is some debate as to the legal nature of general recommendations) there is no clear mechanism for states to understand their obligations, or for non-state actors and NGOs to hold states accountable. There is also no specific instrument focused on violence against women apart from the DEVAW. I will consider this more fully when looking specifically at the due diligence standard. However, the norms collected in this chapter all shape the international human rights law approach to violence against women, and are the bedrock for the principles discussed in the following chapter: *the development of a radical feminist human rights approach to preventing violence against women*.

### Chapter 3 – A Feminist Theory of State Responsibility, Part I: The Conceptualisation of Primary Prevention within International Human Rights Law, and the Problematisation of Theorised Practice therein.

Along with the understanding and conceptualisation of violence against women as a human rights abuse and the development of international mechanisms and instruments addressing the elimination of violence against women, feminist theory has also, specifically, shaped the international human rights law approach to state responsibility for *preventing* violence against women (and related obligations under the due diligence principle)<sup>337</sup>. In particular feminist jurisprudence has expanded upon the understanding of state responsibility to include primary prevention (or systemic prevention) and acts of violence against women by non-state actors. Over the next two chapters I will consider the conceptualisation and development of norms and substantive provisions within international human rights law concerning violence against women and primary prevention, and the development of law and jurisprudence around the due diligence principle as it relates to violence against women and primary prevention. I will argue that these developments form part of, and are rooted in, a feminist theory of state responsibility. The investigation of these developments will follow on from the previous chapter, which frames the conceptualisation of violence against women as a human rights abuse, and will further contribute towards an analysis of theorised (and untheorised) practice of the international human rights law approach to preventing violence against women.

In this chapter, I will focus on and interrogate the feminist roots of the conceptualisation of primary prevention of violence against women, before looking at systemic due diligence in the next chapter. As part of this chapter, I will consider the competition for discursive space within the ongoing problematisation of primary prevention in international human rights law. In particular, I will provide a case study of one of the more contentious strategies under the umbrella of primary prevention that has gained attention and support over the past five years: the engagement of men and

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<sup>337</sup> Including the development of state responsibility to: protect women from violence; prosecute and investigate instances of violence against women; punish perpetrators of violence against women; and, provide redress to victims/survivors of violence against women. More at "5 P's of Due Diligence to Eliminate Violence Against Women," Due Diligence Project, accessed 29 February 2017, [www.duediligenceproject.org/5-ps.html](http://www.duediligenceproject.org/5-ps.html)

boys. Through this case study I hope to illustrate the ways in which practice rooted in the feminist theory of primary prevention is essential, and how the competition for, and the fragility of, discursive space within international human rights law remains an issue for feminists in the field, and a danger for those experiencing violence against women (and, therefore, a danger for women generally). Before considering the developments around due diligence and systemic prevention, I hope focusing on the conceptualisation of primary prevention will flesh out the parameters of state responsibility, giving further context to the jurisprudence of how this is measured and made actionable through the due diligence principle and systemic due diligence particularly.

### **The development of a feminist international human rights law approach to primary prevention**

Whilst prevention is the first of the three objectives focused on violence against women that are outlined in the Beijing Platform for Action – ‘take integrated measures to prevent and eliminate violence against women’<sup>338</sup> – efforts focused on prevention have typically been lacking over the past 30 years. Instead, states have put significantly more resources into protecting victims of violence against women and prosecuting perpetrators. The former Special Rapporteur, Yakin Ertürk, in her 2006 report, placed emphasis on expanding the due diligence principle with regard to prevention, noting that: ‘States have sought to discharge their due diligence obligations of prevention of violence against women through the adoption of specific legislation’.<sup>339</sup> This has ‘concentrated on legislative reform, access to justice and the provision of services [...whilst] relatively little work [has been] done on the more general obligation of prevention, including the duty to transform patriarchal gender structures.’<sup>340</sup> This was picked up again by the former Special Rapporteur, Rashida Manjoo, in her 2013 report on state responsibility. This exclusively legislative approach, concentrated on protective

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<sup>338</sup> United Nations, *Report Of The Fourth World Conference On Women: Beijing Declaration and Platform for Action*, Strategic Objective D.I, available at <http://undocs.org/A/CONF.177/20>.

<sup>339</sup> United Nations, *The due diligence standard as a tool for the elimination of violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Yakin Erturk, E/CN.4/2006/61, (20 January 2006), paragraph 38, available at <http://undocs.org/E/CN.4/2006/61>.

<sup>340</sup> United Nations, *The due diligence standard as a tool for the elimination of violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Yakin Erturk, E/CN.4/2006/61, (20 January 2006), paragraph 19.

and punitive measures, has not been appropriate for overturning the patriarchy and gender inequality that fuels violence against women, and has largely omitted or neglected the focus on 'prevention and elimination' outlined from the origins of the international human rights approach.

This said, over the past five to ten years there have been some notable (but isolated) moves toward prevention initiatives at the state level – albeit still at the legislative level. In 2009, UN Women described the 'adoption by a number of States of comprehensive laws on violence against women that incorporate measures related to the prevention of violence' as 'one of the most exciting developments since 2000.'<sup>341</sup> This has been further supported by the state-reporting process to the CEDAW Committee, wherein the Committee has used its concluding remarks to 'systematically and comprehensively'<sup>342</sup> monitor actions to prevent violence against women. Prevention of violence against women was the focus of a discussion on women's human rights held at the 17th session of the UN Human Rights Council, in 2011.<sup>343</sup> During this session the then UN High Commissioner for Human Rights, Navanethem Pillay, reaffirmed that prevention 'must be central to any strategy to eliminate violence against women.'<sup>344</sup> In particular, she emphasised the need for prevention aimed at the root causes of violence against women such as gender inequality.<sup>345</sup> This decade has seen some move towards prevention at the state level, and this has been led by the feminist characterisation of prevention, outlined in international human rights law.

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<sup>341</sup> United Nations, *Review of the implementation of the Beijing Platform for Action and the outcome document of the special session of the General Assembly entitled Women 2000: gender equality, development and peace for the twenty-first century: Report of the Secretary General*, E/CN.6/2005/2, (6 December 2004), 41, available at <http://undocs.org/E/CN.6/2005/2>.

<sup>342</sup> United Nations, *Review of the implementation of the Beijing Platform for Action and the outcome document of the special session of the General Assembly entitled Women 2000: gender equality, development and peace for the twenty-first century: Report of the Secretary General*, E/CN.6/2005/2, (6 December 2004), 42.

<sup>343</sup> United Nations, Report of the Human Rights Council on its 17th session, A/HRC/17/2, (24 May 2012), available at <http://undocs.org/A/HRC/17/2>.

<sup>344</sup> Prevention is key to ending violence against women," News report on OHCHR 5 July, 2011, accessed 29 June 2015, <http://www.ohchr.org/EN/NewsEvents/Pages/PreventionViolenceAgainstWomen.aspx>.

<sup>345</sup> "Prevention is key to ending violence against women," News report on OHCHR 5 July, 2011, accessed 29 June 2015, <http://www.ohchr.org/EN/NewsEvents/Pages/PreventionViolenceAgainstWomen.aspx>.

In this chapter the focus will be on 'primary prevention'<sup>346</sup>, or what the former UN Special Rapporteurs, Yakin Ertürk and Rashida Manjoo, called systemic prevention in their 2006 and 2013 reports, respectively. Whilst prevention at the individual level is obviously needed (and forms part of the due diligence duty to prevent violence against women), prevention aimed at individual instances of violence against women, often focuses on violence *as it occurs* and in isolation to the root causes of violence. Conversely, '[p]rimary prevention aims to stop violence against women *before it starts* by addressing the underlying gendered drivers of violence.'<sup>347</sup> Where I touch on prevention at an individual level in this chapter, it will be in relation to norms and strategies concerning primary prevention. All mention of prevention from this point will refer to primary prevention unless otherwise stated.

The conceptualisation of primary prevention is framed by the feminist understanding of violence against women as being societal and systemic, and the aetiological focus on root causes, as outlined in Chapter 2. The development of primary prevention within international human rights law again reflects the feminist leading of the approach, and gives further clarity to the duty of states to *respect, protect and fulfil* human rights with regard to violence against women. The *elimination* of violence against women is given fuller meaning when primary prevention is included in the understanding of human rights fulfilment. The duty to eliminate violence against women does not simply mean preventing individual incidents such that women are 'spared' violence that would otherwise befall them, but, to prevent violence from happening. Rather than looking to remove women from the path of violence, primary prevention looks to tear up the road. Or as the commonly taught public health illustration describes, rather than just

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<sup>346</sup> Some organisations use the term 'general prevention'. Its use and meaning are interchangeable with primary prevention. I prefer the public health term 'primary prevention' as it denotes the focus on proximity to root causes, and therefore infers not just a broadening of duties – as 'general' might – but a more strategic approach, and more specified duties vis-à-vis prevention. This said, it is worth noting that the term can lend focus to narrow epidemiological and medical models that can, as Pease suggests, lack 'theoretical coherence'. Along with use of Heise's ecological model, the language of primary prevention, can lack the focus on gendered power that is inherent in the feminist understanding. As ecological and bio-medical models have been 'given more space than feminist approaches', it is important to maintain the feminist conceptualisation of violence against women, and engage with primary prevention in a way that recognises the 'social and political dimensions of men's violence'. Bob Pease, "Engaging men in men's violence prevention: exploring the tensions, dilemmas and possibilities," *Australian domestic & family violence clearinghouse*, 17, (August 2008): 13 – 14; Loretta Pyles and Judy Postmus, "Addressing domestic violence: How far have we come?" *Affilia*, (19), (2004): 376 – 87; L. Mulder, "Preventing violence against women," paper presented at the Interdisciplinary Conference on Women, Tromsø, Norway, 1999.

<sup>347</sup> Jasmin Chen, *Intersectionality Matters: A Guide to engaging immigrant and refugee communities in Australia*, (Melbourne: Multicultural Centre for Women's Health, 2017), 2.



pulling people out of the stream to prevent drowning, we need to move ‘upstream’ to see why people are being swept away, and take preventative action there: ‘Taking action upstream to prevent intimate partner violence and sexual violence involves understanding and intervening against those factors that place people at risk for becoming victims and perpetrators of such violence.’<sup>348</sup> Primary prevention ‘contrasts with other prevention efforts that seek to reduce the harmful consequences of an act of violence after it has occurred, or to prevent further acts of violence from occurring once violence has been identified.’<sup>349</sup> Elimination – from a primary prevention perspective – is therefore focused on the societal phenomenon of violence against women and hones in on the aetiology and root causes of violence against women. Speaking at the 17<sup>th</sup> session of the UN Human Rights Council, focused on the prevention of violence against women, Michelle Bachelet, then Executive Director of UN Women, and current UN High Commissioner for Human Rights, described primary prevention as: ‘a new frontier in the field of violence against women... [and] a long-term project that involves transforming gender relations.’<sup>350</sup> Bachelet went on to further emphasise the significance of primary prevention in relation to how violence against women is conceptualised (and vice versa), explaining that primary prevention re-enforces the ‘critical, and somewhat revolutionary notion that violence against women is not inevitable, [and] can be systematically addressed, reduced and, with persistence, eliminated’<sup>351</sup>. This understanding of primary prevention and elimination has implications for how state responsibility applies to violence against women by private actors, and the scope of that responsibility. It is of significance to our understanding of state responsibility that violence against women is framed as preventable in this manner – it affirms the feminist characterisation of root causes as outlined in the DEVAW and broader conceptualisation of violence against women as gendered. It gives effect to claims that violence against women is gendered and is a cause and consequence of inequality and discrimination. Violence against women is not

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<sup>348</sup> Alison Harvey, Claudia Garcia-Moreno and Alexander Butchart, *Primary prevention of intimate-partner violence and sexual violence: Background paper for WHO expert meeting May 2–3, 2007*, (Geneva: World Health Organisation, 2007), 5.

<sup>349</sup> Harvey, Garcia-Moreno and Butchart, *Primary prevention of intimate-partner violence and sexual violence*, 5.

<sup>350</sup> “Prevention is key to ending violence against women,” News report on OHCHR 5 July, 2011, accessed 29 June 2015,

<http://www.ohchr.org/EN/NewsEvents/Pages/PreventionViolenceAgainstWomen.aspx>.

<sup>351</sup> “Prevention is key to ending violence against women,” News report on OHCHR 5 July, 2011, accessed 29 June 2015,

<http://www.ohchr.org/EN/NewsEvents/Pages/PreventionViolenceAgainstWomen.aspx>.

arbitrary or idiosyncratic, but systemic and structural, and therefore preventable. Elimination is not simply framed as stopping the experience of violence against women but stopping the potential to experience violence against women. This is of no small import for how state responsibility is framed: elimination – as understood alongside primary prevention – draws out significantly the duties and responsibilities of the state. Regardless, even, of the specific norms and ideas that frame primary prevention; the inclusion of primary prevention within the international human rights law approach to violence against women reframes elimination and, therefore, state responsibility. More will be said on this when I consider the due diligence principle and systemic prevention, but for now it is worth noting the co-constitutive relationship between the feminist conceptualisation of violence against women as gendered and the development of primary prevention with regard the duty of the state in fulfilling its human rights obligations.

Before looking in more detail at state responsibility to prevent violence against women at a systemic level, and the due diligence standard specifically, I will consider, as mentioned above, the norms, underlying principles, and surrounding debates, relevant in the feminist approach to primary prevention more generally. These will expand further on the substantive positions and legal provisions included in the feminist conceptualisation of violence against women outlined in Chapter 2, and will include:

- the instrumental relationship between gender equality and preventing violence against women; including:
  - o mainstreaming gender perspectives; and,
  - o pursuing gender specificity – over gender-neutrality – as a legal and policy approach to gender-based violence;
- the conceptualisation and actualisation of intersectionality as it relates to understandings of root cause aetiologies of violence against women and primary prevention;
- the engagement of women's organisations as leaders in primary prevention; and,
- the fundamentality of empowerment (rooted in a rights-based rather than welfare-based approach) to primary prevention strategies.

The international human rights law approach to primary prevention is underpinned by radical feminist theory and consequently relies on a politicised understanding of gender and gender discrimination as they relate to violence against women; addressing the systemic nature of patriarchy and gender(ed) inequality, as outlined in Chapter 2. The delay in bringing violence against women into the international human rights law discourse was due to the characterisation of violence against women as a 'private matter, a matter of unwanted behaviour of some men and/or a matter of some backward or primitive cultures.'<sup>352</sup> The long awaited success of the transnational women's movement within the discourse was to gain mainstream acceptance that violence against women was 'part of the structure of the universal patriarchal culture.'<sup>353</sup> This structure shapes the economic, social, and cultural relations of intra- and inter-state society, such that women are discriminated against and disadvantaged, and such that this discrimination is seen as legitimate. It is also widely accepted – again, thanks to the women's anti-violence movement – that this structural inequality and its manifest socioeconomic and cultural practices 'reflect culturally dominant gender stereotypes.'<sup>354</sup> For this reason '[b]anishing gender stereotypes ... is one of the main, general mechanisms to prevent violence against women.'<sup>355</sup> This has required a 'shift from focusing on stereotypes as a problem of mentality to stereotypes as a source of structural discrimination.'<sup>356</sup> As such, the focus on gender equality within primary prevention work is intrinsically connected to the feminist conceptualisation of violence against women within international human rights law.

As well as being a consequence of violence against women, gender inequality and gender stereotyping are identified as 'upstream' causes of, or contributing risk factors for, violence against women. Gender norms – as shaped by patriarchy – affect all layers

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<sup>352</sup> Rikki Holtmaat, "Preventing Violence Against Women: The Due Dilligence Standard and Article 5(a) of the CEDAW Convention," *In Due Dilligence and Its Application to Protect Women from Violence*, edited by Carin Benninger-Budel, (Leiden, The Netherlands: Martinus Nijhoff Publishers, 2008), 63.

<sup>353</sup> Holtmaat, "Preventing Violence Against Women: The Due Dilligence Standard and Article 5(a) of the CEDAW Convention," 63.

<sup>354</sup> Holtmaat, "Preventing Violence Against Women: The Due Dilligence Standard and Article 5(a) of the CEDAW Convention," 63.

<sup>355</sup> Holtmaat, "Preventing Violence Against Women: The Due Dilligence Standard and Article 5(a) of the CEDAW Convention," 64.

<sup>356</sup> Holtmaat, "Preventing Violence Against Women: The Due Dilligence Standard and Article 5(a) of the CEDAW Convention," 78.

of the social ecology and are a dominant part of our macro-level environment, or culture, as outlined in Chapter 2. The development and widely-held acceptance of Heise's ecological model for understanding violence against women marked a significant moment of collaboration within the anti-violence movement, and was a pivotal moment in framing prevention and anti-violence work. Heise's social ecology brought together research and expertise from feminist, public health, and psychosocial fields, and offered a model that synergised the evidence bases of these widely differing disciplines and emphasised the significance of theorising and problematising violence against women as a societal phenomenon.

Any effort to prevent partner violence is based on an implicit theory of what leads particular men to abuse their partners. Thus research and theory on what increases risk of partner violence is highly relevant to the design and evaluation of programmes aimed at reducing partner violence.<sup>357</sup>

Whilst the ecological framework incorporates varying disciplines, it is worth noting that the macrosystemic level – which influences the other levels and contributory factors – focuses on culture and norms, and particularly gender norms: affirming the significance of feminist theory to conceptualising primary prevention. Heise's model 'noted the role of individual experiences and beliefs, but theorised them as coloured, confirmed or reinforced by gender inequalities and norms of male dominance at community and social levels.'<sup>358</sup> Alongside the emphasis on theorisation, it is, arguably, the macrosystemic level that has the strongest evidence base for establishing the causal relationship of factors contributing to violence against women – or perhaps the strongest aetiological basis.<sup>359</sup> Heise's own appraisal of the model in 2011 highlighted

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<sup>357</sup> Lori Heise, *What works to prevent partner violence: An evidence overview*. (London: STRIVE Research Consortium, 2011), 5 – 6.

<sup>358</sup> "Policy Brief: International Evidence on the Effectiveness of Prevention Initiatives," Our Watch, 5, accessed 4 September 2018, [www.ourwatch.org.au/getmedia/50e1f9de-9d7b-4236-a300-91087d3eb9e6/Accessible\\_Policy\\_Brief\\_3\\_International\\_Evidence\\_Base.pdf.aspx?ext=.pdf](http://www.ourwatch.org.au/getmedia/50e1f9de-9d7b-4236-a300-91087d3eb9e6/Accessible_Policy_Brief_3_International_Evidence_Base.pdf.aspx?ext=.pdf)

<sup>359</sup> '... countries with greater equality between women and men tend to have lower levels of violence against women...' : "Investing in Gender Equality: Ending Violence against Women," UN Women, 3, accessed 4 July 2016, [http://www.endvawnow.org/uploads/browser/files/genderequality\\_vaw\\_leaflet\\_en\\_web.pdf](http://www.endvawnow.org/uploads/browser/files/genderequality_vaw_leaflet_en_web.pdf); C. L. Yodanis, "Gender Inequality, Violence Against Women, and Fear: A Cross-National Test of the Feminist Theory of Violence Against Women," *Journal of Interpersonal Violence*, 19(6), (2004): 655 – 675; Policy Brief: International Evidence on the Effectiveness of Prevention Initiatives," Our Watch, accessed 4 September 2018, [www.ourwatch.org.au/getmedia/50e1f9de-9d7b-4236-a300-91087d3eb9e6/Accessible\\_Policy\\_Brief\\_3\\_International\\_Evidence\\_Base.pdf.aspx?ext=.pdf](http://www.ourwatch.org.au/getmedia/50e1f9de-9d7b-4236-a300-91087d3eb9e6/Accessible_Policy_Brief_3_International_Evidence_Base.pdf.aspx?ext=.pdf)

the differing strengths of the evidence bases for factors across the ecological levels, and concluded that 'ecological studies demonstrate a strong link between the level of partner violence and various gender-related norms at the country level.'<sup>360</sup> To this end, research and literature around the social ecology model and primary prevention increasingly presents distinctions between 'contributory factors' and 'determinants':

The strongest factors correlating with higher levels of violence against women and their children have therefore been found to lie in socio-structural and relationship-level gender inequalities, as well as attitudes and norms supporting violence and rigid gender roles. These factors have been termed 'determinants' of violence, as they are considered significant enough to *determine* the likelihood of violence occurring at population levels.<sup>361</sup>

This is not to undermine the significance of contributory factors, but to offer credence as to why the macrosystemic level and the role of gender norms have been so heavily focused on within primary prevention models and have gained prominence within the international human rights approach. This understanding is supported by the expertise of women's organisations, who when surveyed as part of a global assessment of the due diligence standard, 'cited gender inequality as the risk factor that most increased the prevalence of VAW.'<sup>362</sup> For these reasons, working for gender equality, particularly through challenging gender norms and stereotypes, is a significant part of primary prevention. The focus on addressing gender norms is established in the DEVAW, which explicitly links violence against women to patriarchy and calls on states to address root causes; and is given further legal character by the CEDAW, an anti-discrimination treaty. The need to address gender norms as root causes has been persistently called for by the CEDAW Committee within its concluding remarks and recommendations through the state reporting system, and within specific and general recommendations made to states in cases under the Optional Protocol. In particular the CEDAW Committee has given guidance on gender equality and gender norms, as

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<sup>360</sup> Heise, *What works to prevent partner violence: An evidence overview*, Executive Summary, xii.

<sup>361</sup> Policy Brief: International Evidence on the Effectiveness of Prevention Initiatives," Our Watch, 7, accessed 4 September 2018, [www.ourwatch.org.au/getmedia/50e1f9de-9d7b-4236-a300-91087d3eb9e6/Accessible\\_Policy\\_Brief\\_3\\_International\\_Evidence\\_Base.pdf.aspx?ext=.pdf](http://www.ourwatch.org.au/getmedia/50e1f9de-9d7b-4236-a300-91087d3eb9e6/Accessible_Policy_Brief_3_International_Evidence_Base.pdf.aspx?ext=.pdf)

<sup>362</sup> Abdul Aziz, Zarizana. and Moussa, Janine. *Due Diligence Framework: State Accountability Framework for Eliminating Violence against Women*. International Human Rights Initiative, 2016, 17, available at [www.duediligenceproject.org/ewExternalFiles/Due%20Diligence%20Framework%20Report%20Z.pdf](http://www.duediligenceproject.org/ewExternalFiles/Due%20Diligence%20Framework%20Report%20Z.pdf).

they relate to violence against women and primary prevention, under Article 2(e)-(f) and 5(a) of the treaty and General Recommendation no. 19(11). Article 5(a) acts as the primary frame of this approach and is widely understood as 'the expression of the (acknowledged) need for a transformation of society so that structural barriers which stand in the way of 'real' equality are overcome.'<sup>363</sup>

#### Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

[...]

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women

#### Article 5

States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

#### General Recommendation No. 19 (1992) Violence against women

11. Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them the equal enjoyment, exercise and knowledge of

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<sup>363</sup> Holtmaat, "Preventing Violence Against Women: The Due Dilligence Standard and Article 5(a) of the CEDAW Convention," 79.

human rights and fundamental freedoms. While this comment addresses mainly actual or threatened violence the underlying consequences of these forms of gender-based violence help to maintain women in subordinate roles and contribute to the low level of political participation and to their lower level of education, skills and work opportunities.

Norms of primary prevention have been further clarified by the Committee in General Recommendation no. 35 (34 – 35):

General Recommendation No. 35 (2017) Violence against women  
Prevention

34. Adopt and implement effective legislative and other appropriate preventive measures to address the underlying causes of gender-based violence against women, including patriarchal attitudes and stereotypes, inequality in the family and the neglect or denial of women's civil, political, economic, social and cultural rights, as well as to promote women's empowerment, agency and voice.

35. Develop and implement effective measures, with the active participation of all relevant stakeholders, such as women's organisations and those representing marginalised groups of women and girls, to address and eradicate the stereotypes, prejudices, customs and practices, laid out in article 5 of the Convention, that condone or promote gender-based violence against women and underpin structural inequality of women with men.

In the first case regarding violence against women under the Optional Protocol, *A.T. v. Hungary* (2005), the Committee found that the state had breached its obligations under Article 5(a) as they related to the prevention of violence against women: '...the facts of the communication reveal aspects of the relationships between the sexes and attitudes towards women that the Committee recognised vis-à-vis the country as a whole.'<sup>364</sup> This has been reiterated in following cases, and most recently in *X and Y v.*

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<sup>364</sup> *A.T. v. Hungary*, Committee on the Elimination of Discrimination against Women, (comm. 2/2003), (2005), paragraph 9.4.

*Georgia* (2015), where the Committee held that the facts of the case showed 'a failure by the State party in its duty to take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices that are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.'<sup>365</sup> This mirrors its guidance in the state reporting process, where the Committee regularly makes recommendations on the state's obligations under Article 5(a) with regard preventing violence against women. In fact, in *A.T. v. Hungary*, the Committee reminds the state of this fact:

It [the Committee] has stated on many occasions that traditional attitudes by which women are regarded as subordinate to men contribute to violence against them. The Committee recognized those very attitudes when it considered the combined fourth and fifth periodic report of Hungary in 2002. At that time it was concerned about the "persistence of entrenched traditional stereotypes regarding the role and responsibilities of women and men in the family..."<sup>366</sup>

The regional treaties have leaned heavily on this understanding with the most recent treaty, the Istanbul Convention, reaffirming the DEVAW in its recognition of violence against women as both a cause and consequence of discrimination and patriarchal dominance. Article 3(2) of the Maputo Protocol and Article 8(b) of the Convention of Belém do Pará both mirror Article 5(a), with the Convention of Belém do Pará, leaning on the *lex specialis* of Article 10(c)<sup>367</sup> of the CEDAW, to make clear the role of education:

States Parties agree to ... modify social and cultural patterns of conduct of men and women, including the development of formal and informal

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<sup>365</sup> *X and Y v. Georgia*, Committee on the Elimination of Discrimination against Women (comm. 24/2009), (2015), paragraph 9.7.

<sup>366</sup> *A.T. v. Hungary*, Committee on the Elimination of Discrimination against Women, (comm. 2/2003), (2005), paragraph 9.4.

<sup>367</sup> '(c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;' United Nations, *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, Article 10(c), available at <https://www.un.org/womenwatch/daw/cedaw/cedaw.htm>.



educational programmes appropriate to every level of the educational process, to counteract prejudices, customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women which legitimise or exacerbate violence against women.<sup>368</sup>

The most recent regional treaty, the Istanbul Convention, further reinforces Article 5(a), and specifically outlines the obligation to tackle gender norms as a preventative measure, including it in 'Chapter III – Prevention, Article 12 – General Obligations', requiring states parties to 'take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men.'<sup>369</sup>

The focus on gender equality and challenging gender norms – as they relate to primary prevention – has been further shaped by the following principles: gender mainstreaming and gender specificity. Exploring these will give further understanding to both the conceptualisation of gender equality, and to means of addressing it within primary prevention initiatives.

### *Gender mainstreaming*

The focus on violence against women as gendered, and gender as political, led to the call for the implications of gender to be understood, interrogated and responded to, across all areas of the international community. This has commonly been called *gender mainstreaming*. Gender mainstreaming is at the heart of the Beijing Platform for Action (one of the foremost responses to violence against women at the international level), and remains a key strategy in achieving gender equality and eliminating violence against women. The Beijing Platform for Action and DEVAW place violence against women firmly within the human rights discourse and, by implication, argue that awareness of

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<sup>368</sup> Organization of American States (OAS), *The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women*, Belém do Pará, 9 June, 1994, Article 8(b), available at <https://www.oas.org/en/mesecvi/convention.asp>.

<sup>369</sup> The Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11 May 2011, CETS No.210, Article 12(1), available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210>.

the impact of gender ought to be foregrounded in all policies and activities within the international community. Gender mainstreaming, as originally envisaged, entails the imperative for gender, and in particular the institutionalised subordination of women, to be treated as a central consideration in all forms of policy-making. In the context of violence against women, this reinforces and is reinforced by, an holistic approach, which situates understandings of the issue into a broader appreciation of gendered power relations and the marginalisation of women. Gender mainstreaming is maintained as an essential strategy for eliminating violence against women; addressing the root cause aetiology of violence against women, and operating at a systemic level to prevent violence against women.

Gender mainstreaming entered the international institutional discourse through the development agenda. During the UN Decade for Women and World Conference in Mexico, the linguistic shift from 'women in development' (WID) to 'gender and development' (GAD) within the development discourse, marked the move from a narrow accommodation of women as a 'special interest group' to a much broader and politicised understanding of women and gender that sought to change practices and institutions, within the development arena, that had failed to account for women or had done so inadequately.<sup>370</sup> The vision of mainstreaming then transitioned into UN policy through the Forward-Looking Strategies for the Advancement of Women, adopted at the Third World Conference on Women, in Nairobi in 1985. The growth of the term was cemented in the Beijing Platform for Action which makes extensive comment on gender mainstreaming, calling on 'governments and other actors'<sup>371</sup> throughout 12 areas of concern, including violence against women, to 'promote an active and visible policy of mainstreaming a gender perspective in all policies and programs so that before decisions are taken an analysis may be made of their effects on women and men, respectively.'<sup>372</sup> The commitment to gender mainstreaming, as advocated throughout the Beijing Platform for Action, was quickly advanced by the Commission on the Status of Women, the Secretary-General, and ECOSOC. In 1997, ECOSOC organised a High-Level Panel discussion on gender mainstreaming where it

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<sup>370</sup> Hilary Charlesworth, "Not waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations," *Harvard Human Rights Journal*, 18(1), (2005): 1.

<sup>371</sup> United Nations, *Report Of The Fourth World Conference On Women: Beijing Declaration and Platform for Action*, Chap. I, resolution I, annex II, paragraph 123, available at <http://undocs.org/A/CONF.177/20>.

<sup>372</sup> United Nations, *Report Of The Fourth World Conference On Women: Beijing Declaration and Platform for Action*, Chap. I, resolution I, annex II, paragraph 123.

encouraged all UN agencies, committees and bodies to 'mainstream a gender perspective into all areas of their work.'<sup>373</sup> Most of the subsequent efforts to do so within the international human rights discourse have drawn on the definition of gender mainstreaming advanced by ECOSOC in 1997.

In a 2004 review of the ECOSOC report, the Secretary-General endorsed the ECOSOC definition and framework and urged more 'active and visible use of gender mainstreaming.'<sup>374</sup> The commitment to gender mainstreaming in the Beijing Platform for Action has informed numerous bodies and committees in their work to eradicate violence against women, and has become a foundational part of the international human rights approach – again, emphasising feminist jurisprudence around tackling macro-systemic male dominance as an imperative to preventing and eliminating violence against women. This understanding has since influenced the Rome Statute and UN Security Council Resolution 1325. It has also informed the work of various treaty-monitoring committees in their efforts to address and eliminate violence against women. In particular, in response to General Comment No. 28, which amended reporting guidelines to request information on the position of women<sup>375</sup>, the Human Rights Committee has increasingly taken a gender perspective in its Concluding Observations during state-reporting. Furthermore, the Special Rapporteur dedicated her 2003 report to the 'Integration of the Human Rights of Women and the Gender Perspective.'<sup>376</sup> This followed reports by the Office of the High Commissioner for Human Rights<sup>377</sup> and Division for the Advancement of Women<sup>378</sup>, on efforts to integrate gender into human rights' activities. Gender mainstreaming has been widely

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<sup>373</sup> United Nations, *Provisional Summary Record of the 20<sup>th</sup> Meeting, Economic and Social Council, Substantive Session of 1997*, E/1997/SR.20 (16 September 1997), available at <http://undocs.org/E/1997/SR.20>.

<sup>374</sup> United Nations, *Review and Appraisal of the System-Wide Implementation of the Economic and Social Council's Agree Conclusions on Mainstreaming a Gender Perspective Into All Policies and Programmes in the United Nations System: Report of the Secretary General*, E/2004/59, (5 May 2004), paragraph 80, available at <http://undocs.org/E/2004/59>.

<sup>375</sup> CCPR general comment No. 28 - Article 3 (The equality of rights between men and women) (Replaces general comment No. 4), CCPR/C/21/Rev.1/Add.10, (29 March 2000), available from <https://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx>.

<sup>376</sup> United Nations, *Integration of the human rights of women and the gender perspective: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Yakin Erturk, E/CN.4/2003/75, (6 January 2003), available at <http://undocs.org/E/CN.4/2003/75>.

<sup>377</sup> United Nations, *The question of integrating the human rights of women throughout the United Nations system: Report of the Secretary-General*, E/CN.4/1998/49, (25 March 1998), available at <https://undocs.org/E/CN.4/1998/49>.

<sup>378</sup> United Nations, *Expert group meeting on the development of guidelines for the integration of gender perspectives into human rights activities and programmes: Note by the Secretariat*, E/CN.4/1996/105, (20 November 1995), available at <https://undocs.org/E/CN.4/1996/105>.

adopted across UN fora, including the Human Rights Committee, General Assembly, ECOSOC, UN Security Council, and Department for Peacekeeping Operations.

Whilst substantial groundwork has been laid at the international level for states, and other international non-state actors, to take seriously the mainstreaming of a gendered approach to preventing and eliminating violence against women – one of the key successes of the women's transnational movement over the past 20 years – there remain issues with truly grasping the politicised nature of the work needed. Gender mainstreaming as an approach to gender inequality is at its most effective when coupled with a correct understanding of patriarchy and gendered power as a system which oppresses women and entrenches masculine privilege, and of violence against women as gendered and discriminatory. However, as Hillary Charlesworth argues, there are questions over the 'bland and bureaucratic acceptance of the method of gender mainstreaming in the international institutions.'<sup>379</sup> This is particularly true where gender mainstreaming is essentially reduced to collecting gender disaggregated data and gender-specific aspects of human rights. Elizabeth Harrison gave examples of this in her study of 'Translating "Gender" through different Institutions in the Development Process'<sup>380</sup>, where she argues that gender mainstreaming has commonly become a simple case of counting the number of women involved.<sup>381</sup> Charlesworth further claims that the strategy has been deployed in a very limited manner, which 'has allowed the mainstream to tame and deradicalise claims to equality'<sup>382</sup>. In part this is due to the proliferation of mainstreaming, which, whilst being a success of the transnational women's movement, also, by nature of its broad reach, 'implies collaboration with institutions that are not unequivocally wedded to the feminist message, which positions domestic violence [and violence against women more broadly] as a form of violent discrimination against women.'<sup>383</sup> As Renée Römken goes on to say '[t]his inevitably means that in the process of mainstreaming, both on the level of state

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<sup>379</sup> Charlesworth, "Not waving but Drowning," 2.

<sup>380</sup> Elizabeth Harrison, "Fish, Feminists and the FAO: Translating 'Gender' Through Different Institutions in the Development Process," In *Getting institutions right for women in development*, edited by Anne Marie Goetz. (London, England, Zed Books, 1997).

<sup>381</sup> Harrison, "Fish, Feminists and the FAO: Translating 'Gender' Through Different Institutions in the Development Process."

<sup>382</sup> Charlesworth, "Not waving but Drowning," 2.

<sup>383</sup> Renée Römken, "Gender revisited: Global concerns. Reflections on domestic violence as gender-based violence in European legal developments," In *Family Ambiguity and Domestic Violence in Asia. Concepts, law, and process*, edited by Maznah Mohamad and Saskia Wieringa, (Brighton/Portland/Toronto: Sussex Academic Press, 2013), 196.

policies and in its implementation in the field, the original feminist analysis has become diluted.<sup>384</sup> As such, implementation of gender mainstreaming lacks depth, doing very little to tackle the 'root causes' of violence against women.

This approach to gender mainstreaming is a clear case of the disjuncture between the implementation of technical understanding and normative understanding (or theorised understanding) within the international human rights discourse. Gender mainstreaming operates at the macrosystemic level; it operates where power – specifically patriarchy – is most systematised and 'public'. But without a full appreciation of the normative understanding of mainstreaming, and a cogent appreciation of the politicisation of gender, the implementation of gender mainstreaming fails to operate as a strategy for primary prevention – the very thing it sets out to do. In some cases, mainstreaming appears to have emerged as little more than a bureaucratic exercise, which fails to achieve its purpose and leads to institutional fatigue.<sup>385</sup> Whilst gender mainstreaming is intended to address issues of gendered power, when the feminist analysis is lost the application 'does not capture the relational nature of gender, the role of power relations, and the way that structures of subordination are reproduced.'<sup>386</sup> Whilst the language of gender mainstreaming is prolific, the application lacks bite. As Charlesworth concludes, it is necessary to pursue 'less bureaucratic strategies to respond to inequality between men and women.'<sup>387</sup>

Over the past 20 years the understanding of violence against women, as a gendered and discriminatory abuse, steeped in unequal power relations, has steadily developed, as has awareness of the fact that tackling it requires addressing discrimination and gender inequality. However, misreadings of gender have the potential to undermine this progress. UN Women stipulate that gender mainstreaming 'is not an end in itself but a strategy, an approach, a means to achieve the goal of gender equality.'<sup>388</sup> Gender mainstreaming has become omnipresent within the human rights discourse on violence against women. However, its breadth is not accompanied by depth and its understanding of gender and gender discrimination is not fully realised in its application.

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<sup>384</sup> Römken, "Gender revisited: Global concerns," 196.

<sup>385</sup> Charlesworth, "Not waving but Drowning," 1.

<sup>386</sup> Charlesworth, "Not waving but Drowning," 15.

<sup>387</sup> Charlesworth, "Not waving but Drowning," 18.

<sup>388</sup> "Gender mainstreaming," UN Women, accessed 3 June 2019, <http://www.un.org/womenwatch/osagi/gendermainstreaming.htm>.

Whilst its impact is currently limited, or null, the potential of gender mainstreaming is still great, if the normative and theorised understanding – rooted in a deeply political (feminist) problematisation of gender – could be fully implemented. With regard to violence against women, it remains one of the most important – but un(der)explored – strategies for preventing violence against women at a macrosystemic level.

### *Gender Specificity*

The lack of consistency in the interpretation and application of gender and gender mainstreaming also leaves scope for the reconceptualisation of some of the most basic norms upon which the violence against women discourse is based. A particularly pressing challenge which results from this, concerns the shift away from gender specificity to a form of 'gender-neutrality'. Whilst the need for gender specific measures to address violence against women as a gendered and discriminatory human rights violation has been articulated and reinforced throughout international human rights law, interpretations of precisely what the term 'gender' denotes or how best to effect recognition of it, remain subject to conflicting rationales. As above, gender mainstreaming, as a principle, was designed to ensure that gendered power relations were identified and problematised wherever they were manifest. However, in recent years, a 'gender-neutral' reading of mainstreaming has emerged as a challenge to calls for gender specificity. At the state level, this has meant a reversion to readings of gender equality which are formal, rather than substantive and, worryingly, this has impacted upon the ability of organisations to respond to women's rights and cater specifically to their needs. One of the most significant examples of this is the reconceptualisation of domestic violence: states have begun to draw a distinction between violence against women and domestic violence, arguing that the latter is something to which men are also vulnerable and from which they too need to be protected, and so it follows that responses to domestic violence should be gender-neutral. This move to gender-neutral readings of domestic violence or intimate partner violence, is mirrored in the Istanbul Convention and is a source of contention<sup>389</sup>, with

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<sup>389</sup> Römken, "Gender revisited: Global concerns," 192 – 209; Jackie Jones, "The European Convention on Human Rights (ECHR) and the Council of Europe Convention on Violence Against Women and Domestic Violence (Istanbul Convention)," In *The Legal Protection From Violence: Normative Gaps in International Human Rights Law*, edited by Rashida Manjoo and Jackie Jones (Abingdon, Oxon: Routledge, 2018), 139 – 142; Ronagh J. A. McQuigg, "What potential does the Council of Europe Convention on

feminists concerned that the reconceptualisation of domestic violence as gender-neutral depoliticises gender and fails to appropriately respond to women's experience of domestic violence. As intimate partner violence remains by far the most common and wide scale manifestation of violence against women<sup>390</sup>, this represents a major reconceptualisation. (See Appendix I.)

The issue at hand is not whether men experience domestic violence/intimate partner violence, which they do – although much could be said on how the experiences of men and women differ at an individual and population level, both in severity and nature<sup>391</sup> – but how/or if this relates to violence against women, as understood as a gendered human rights abuse. Whilst men are victims of intimate partner violence, when gender-based violence is reconceptualised to include the male experience within the discourse – and within the law – the gains made by the transnational women's movement to conceptualise, address and eliminate violence against women are jeopardised. (As the male experience is so commonly (mis)taken as the 'human experience', this conflation becomes even more damaging, quickly opening the door to erosion of well established norms.) As outlined in Chapter 2, violence against women

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Violence against Women hold as regards domestic violence?" *The International Journal of Human Rights*, 16(7), (2012): 948.

<sup>390</sup> Claudia García-Moreno, Henrica A.F.M. Jansen, Mary Ellsberg, Lori Heise, Charlotte Watts, *Multi-country Study of Domestic Violence and Women's Health*, (Geneva: World Health Organisation, 2005); Heise, *What works to prevent partner violence*, 2 – 3.

<sup>391</sup> Whilst men experience intimate partner violence, and both men and women use violence in relationships, the experience and characterization of violence experienced by men and women differ widely. Christine Chinkin, Scientific expert to the *Council of Europe Ad Hoc Committee on Preventing and Combating Violence against Women and Domestic Violence* argues that, 'while men also experience domestic violence, it is more frequently inflicted upon women and has disparate economic and social consequences.' : Christine Chinkin, "Addressing Violence against Women in the Commonwealth Within States' Obligations under International Law," *Commonwealth Law Bulletin*, 40 (2014): 475. As such, leading criminologists Dobash and Dobash argue for the prioritisation of policies which address men's violence against women: Russell Dobash, and Rebecca Dobash, "Women's Violence to Men in Intimate Relationships: Working on a Puzzle," *British Journal of Criminology*, 44, (2004): 424 349. Beyond the gendered nature of domestic violence against women, there are also discrepancies in how domestic violence against men is 'counted' and included in the data : See also Ronagh J. A. McQuigg, "Is it time for a UN treaty on violence against women?" *The International Journal of Human Rights*, 22(3),(2018): 314. 305 – 324. Often data used fails to differentiate between reports of domestic violence where the incident is isolated or repeated. Where data shows a pattern of domestic violence (four or more incidents) women account for 89% of the cases. Similarly, women are six times more likely to require medical attention. The data fails to distinguish between aggression and self-defence – where 75% of violence by women is done in self-defence. Sylvia Walby and Jonathon Allen, *Domestic violence, sexual assault and stalking: Findings from the British Crime Survey* (London: Home Office; Development and Statistics Directorate, 2004). When it comes to the 'continuum of violence', women are far more likely to be killed by their partner: 40% - 70% of female murder victims were killed by their partners/former partners, whereas the comparable figure for men is 4% - 8%. Etienne Krug, Linda Dahlberg, James Mercy, Anthony Zwi, and Rafael Lozano, eds. *World report on violence and health*, (Geneva: World Health Organisation, 2002.)

is framed within international law as gender discrimination: violence against women is *gender-based violence*. The male experience of intimate partner violence, however, is not a 'cause and consequence' of discrimination ('a manifestation of historically unequal power relations between men and women'<sup>392</sup>), nor is it considered 'violence that is directed against a woman because she is a woman or that affects women disproportionately'<sup>393</sup>. As such, the same conceptualisation of domestic violence as gender-based violence – as understood within international law – does not apply to men. The gendered nature of violence against women is the foundation of its inclusion and conceptualisation within international human rights law. As the transnational women's movement has secured the understanding of violence against women as gendered and discriminatory, inclusion of the male experience of domestic violence risks eroding the understanding of violence against women as a human rights violation. Whilst it may seem extreme to suggest the inclusion of domestic violence experienced by men could threaten the position of violence against women within the law, it is worth remembering that there is still no binding international treaty on violence against women, and the conceptualisation of violence against women as a human rights abuse, while broadly held, is incredibly fragile. With regard state responsibility for preventing violence against women, a gender-neutral understanding of domestic violence and violence against women has concrete impacts upon primary prevention. The focus on gender equality as an 'upstream' strategy would not have gained prominence, or perhaps emerged at all, if the transnational women's movement hadn't successfully conceptualised and secured the fundamental understanding that violence against women is gendered and discriminatory, and therefore requires responses aimed at gender inequality and discrimination.

In her 2013 article, *Reflections on Domestic Violence as Gender-Based Violence in European Legal Developments*, Renée Römkens, scientific member to the Committee for the Council of Europe's Istanbul Convention (2009 – 2011), suggests that the gender analysis which forms the bedrock of the feminist perspective on violence against women is 'under siege'<sup>394</sup> at the state and international levels. The dilution of

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<sup>392</sup> General Assembly resolution 48/104, *Declaration for the Elimination of Violence Against Women*, A/RES/48/104 (20 December 1993), Preamble, available from <http://undocs.org/A/RES/48/104>.

<sup>393</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 19, 11<sup>th</sup> session, A/47/38, (1992), paragraph 6, available from <http://undocs.org/A/47/38>.

<sup>394</sup> Römkens, "Gender revisited: Global concerns," 196.



mainstreaming and the movement towards gender-neutralisation and the depoliticisation of domestic violence reflect 'post- and anti-feminist critique' which, Römken argues, is 'currently directed against the feminist analysis of domestic violence as a gendered phenomenon.'<sup>395</sup> Instead, domestic violence is treated separately to violence against women as a human rights concern, and 'increasingly positioned as a criminal, legal, and more generally, a social or moral concern.'<sup>396</sup> As Römken points out, the 'success' of mainstreaming domestic violence has come at a cost, where the shift from a gendered, human rights based understanding to a broadly 'moral rejection' has 'paradoxically fostered a renewed privatization'<sup>397</sup>. This is a disjuncture that lies at the heart of the Istanbul Convention, with the 'hybrid conceptualisation'<sup>398</sup> of violence against women as gendered and domestic violence as gender-neutral, framing the scope of the treaty, titled: 'The Council of Europe Convention on prevention and combatting violence against women *and* domestic violence'. Significantly, the task force established to explore the development of a new binding legal instrument was initially called 'Task Force on Violence against Women, *including* Domestic Violence'. Domestic violence was framed as distinct, largely due to its profound scale, affecting one in four women in Europe, but still included within the framing of violence against women as a gendered phenomenon. By the time the bill came to pass a shift had taken place to separate domestic violence from the wider concept of violence against women – 'replacing the "including" with "and".'<sup>399</sup> This is far more than a semantic shift, it represents a journey away from the standards and norms laid down in the Beijing Platform for Action, the DEVAW, CEDAW Recommendations no.19 and 35, and the Maputo Protocol and Belém do Pará. The 'and' of the Istanbul treaty represents a major reconceptualisation of domestic violence as gender-neutral and – *therefore* – not gender discriminatory. Given intimate partner violence is by far the most common and dominant form of violence against women, the hybridisation of the bill presents a dangerous erosion of the understanding key to eliminating violence against women. In Article 2 the treaty 'simultaneously positions domestic violence as a gender-neutral phenomenon, while acknowledging that domestic violence affects women disproportionately'<sup>400</sup>:

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<sup>395</sup> Römken, "Gender revisited: Global concerns," 197.

<sup>396</sup> Römken, "Gender revisited: Global concerns," 197.

<sup>397</sup> Römken, "Gender revisited: Global concerns," 195.

<sup>398</sup> Römken, "Gender revisited: Global concerns," 202.

<sup>399</sup> Römken, "Gender revisited: Global concerns," 202.

<sup>400</sup> Römken, "Gender revisited: Global concerns," 202.

## Article 2 – Scope of the Convention

(1) This Convention shall apply to all forms of violence against women, including domestic violence, which affects women disproportionately.

(2) Parties are encouraged to apply this Convention to all victims of domestic violence. Parties shall pay particular attention to women victims of gender-based violence in implementing the provisions of this Convention.

This is in direct conflict with international definitions of gender-based violence – particularly those given by the CEDAW Committee, which reflect the nature of the CEDAW as an anti-discrimination treaty. As well as eroding international norms the hybridisation presents a number of internal inconsistencies within the treaty, with Article 18(3) calling for measures pursuant to the chapter to ‘be based on a gendered understanding of violence against women and domestic violence [and to] focus on the human rights and safety of the victim.’ This hybrid conceptualisation of domestic violence opens up questions as to the normative and legal foundations of the treaty, and the dissonance this creates within the text itself further endangers the standing and efficacy of the Convention in practice. As Römken argues:

Since discrimination of women in the context of inequality in power relations between men and women is one of the constitutive elements of the convention, it is internally contradictory, and from an international human rights law perspective illogical and without legal ground, to position domestic violence against men within its realm.<sup>401</sup>

The internal inconsistencies, and the wider erosion of norms, that are borne of this hybridisation, is especially troubling given that in the absence of a binding international treaty, the Istanbul Convention serves as the most high-level instrument for effecting protection against, and prevention and elimination of, violence against women in Europe.

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<sup>401</sup> Römken, “Gender revisited: Global concerns,” 195.

Rhonda McQuigg (charitably) describes the above inconsistencies as 'definitional issues'<sup>402</sup>, and is keen to emphasise that the Istanbul treaty maintains the emphasis on violence against women:

Very importantly, the language of the convention is that states are 'encouraged' to apply the convention to male victims of domestic violence, however, there is no actual obligation on states to do so. The focus of the convention therefore remains primarily on the prevention of violence against women in its various forms, including violence against women taking place in the home.<sup>403</sup>

She describes the separation of domestic violence from violence against women as serving 'two purposes':

First, it emphasises the importance which the convention accords to combating the specific problem of domestic violence, an objective which is certainly to be applauded given the particular prevalence of this form of violence. Second, it is recognised in the convention that men may also be victims of domestic violence.<sup>404</sup>

Whilst these were both factors in the eventual framing of the convention, McQuigg doesn't go on to directly question the incompatibility (or conflict) between these purposes. It is problematic – perhaps impossible – to highlight domestic violence as particularly important for the scope of the treaty and then to separate it from the gendered framing of violence against women. By allowing for a gender-neutral reading of domestic violence, the treaty undermines efforts to raise awareness and consciousness of violence against women as gendered and systemic, and domestic violence as its most prevalent and pervasive manifestation: 'nullifying the meaning of the very term violence against women and the rationale for the treaty in the first

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<sup>402</sup> McQuigg, "What potential does the Council of Europe Convention on Violence against Women hold as regards domestic violence?" 948.

<sup>403</sup> McQuigg, "What potential does the Council of Europe Convention on Violence against Women hold as regards domestic violence?" 948.

<sup>404</sup> McQuigg, "What potential does the Council of Europe Convention on Violence against Women hold as regards domestic violence?" 948.

place.<sup>405</sup> Jackie Jones further argues that the separation of domestic violence from the gendered framing of the treaty 'demonstrat[es] the climate of compromise prevalent in relation to women's human rights – specifically for the most prevalent form of violence against women in the world at present – domestic violence.'<sup>406</sup> Jones goes on to highlight the conceptual confusion and norm erosion caused by the hybrid approach, and the opposition to this within the transnational women's movement:

Separating out domestic violence from other types of violence against women has drawn criticisms, including from the European Women's Lobby which has pointed out that it runs the risk of not placing domestic violence within the structural problems of all forms of violence against women and therefore "weakening the gender approach to the structural phenomenon of male violence against women."<sup>407</sup>

Whilst the Istanbul Convention includes – to date – the most comprehensive outline on state responsibility for prevention (Chapter 4), the convention erodes the normative and theorised underpinning of violence against women as a human rights abuse, by neutralising, depoliticising and reconceptualising domestic violence. It has also contributed towards gender-neutral framings of anti-violence against women legislation at the state level. A stark example of this is the *Violence against Women, Domestic Abuse and Sexual Violence (Wales) Act 2015*, which mirrors the approach of the Istanbul Convention by separating violence against women from domestic violence. Again the Act's title takes the 'and' approach to domestic violence, promoting the same hybrid conceptualisation of domestic violence as gender-neutral and violence against women as gender-based. In fact, the Welsh Bill goes further than the Istanbul Convention in not only separating domestic violence from violence against women, but in offering and applying a bizarre account of domestic violence as somehow *both* gender-neutral and gender-based. In 2018 the Welsh Government gave guidance for local strategies for implementing the Act, which tried to hold in tension both the gender-neutral and proposed gender-based nature of the legislation:

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<sup>405</sup> Jones, "The European Convention on Human Rights (ECHR) and the Council of Europe Convention on Violence Against Women and Domestic Violence (Istanbul Convention)," 139.

<sup>406</sup> Jones, "The European Convention on Human Rights (ECHR) and the Council of Europe Convention on Violence Against Women and Domestic Violence (Istanbul Convention)," 141.

<sup>407</sup> Jones, "The European Convention on Human Rights (ECHR) and the Council of Europe Convention on Violence Against Women and Domestic Violence (Istanbul Convention)," 140.

The Act covers all forms of gender based violence in recognition that both men and women are victims of violence; threats of violence or harassment arising directly or indirectly from values, beliefs or customs relating to gender or sexual orientation; and also forced marriage. The guidance reflects that and whilst the guidance refers to “violence against women”, this should be read as also including male victims of gender-based violence (GBV) unless the context suggests otherwise.<sup>408</sup>

From this explanation it is difficult to understand what is meant by gender-based violence in the context of the Welsh Bill. It is hard not to conclude that the Act contributes to erosion of the feminist concept of gender-based violence – a framework that was advocated for throughout the drafting process.<sup>409</sup> The bill was initially announced as the ‘Domestic Violence (Wales) Bill 2011’. In 2012 this was broadened to include all forms of violence against women and retitled ‘Violence Against Women (Wales) Bill’, reflecting the Welsh Government’s ‘Right to be Safe’ strategy, which looked more widely at the multiple manifestations of violence against women. During drafting and consulting the Wales Violence Against Women Action Group, consisting of leading Welsh Women’s Groups, including: Welsh Women’s Aid, BAWSO, and Rape Crisis England and Wales, published a paper called ‘Priorities for the Violence Against Women (Wales) Bill’, which outlined concerns about how violence against women should be conceptualised in the bill, echoing the international human rights approach:

The structural nature of violence against women as gender-based violence is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men. It is vital that a shared understanding of the links between all forms of VAW, as well as its causes and consequences, informs the legislation. This must include the Bills’ title, which must not separate domestic abuse from the broader VAW agenda, given that domestic

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<sup>408</sup> “The Violence against Women, Domestic Abuse and Sexual Violence (Wales) Act 2015: Guidance for Local Strategies,” Welsh Government, 4, accessed 5 September 2018, <https://gov.wales/docs/dsjlg/publications/commsafety/180317-guidance-for-local-strategies-en.pdf>

<sup>409</sup> Hannah Austin, *VAW: Priorities for the Violence Against Women (Wales) Bill*, (Cardiff: Wales Violence Against Women Action Group, 2013), available at <http://www.walesvawgroup.co.uk/wp-content/uploads/2012/10/vaw-priorities-for-vaw-wales-bill.pdf>.

abuse is in fact the most prevalent form of VAW in Wales and is as profoundly gendered as other forms of VAW.<sup>410</sup>

In response to what then became the Violence against Women, Domestic Abuse and Sexual Violence (Wales) Act, the Wales Violence Against Women Action Group, further explained the ramifications of the gender-neutral approach to violence against women:

The current name is also disappointing as it is cumbersome, divisive and unclear. This lack of clarity has led to a conceptual confusion about what exactly it is that we are trying to tackle (and how) when we talk about violence against women and girls and its various forms, which has negative ramifications for policy and practice.<sup>411</sup>

Like the Istanbul Convention, the Violence against Women, Domestic Abuse and Sexual Violence (Wales) Act represents a departure from international jurisprudence, as well as deviating from the advice of feminist expertise provided throughout the bill's consultation period<sup>412</sup>; evidencing the fragility of the norms held at the international level. Whilst norms inherent in the international human rights law approach appeared to be broadly-held, the wave of gender-neutral and depoliticised legislation at the European and state levels, show how precariously positioned the feminist conceptualisation of violence against women really is. It also represents a broader challenge to international human rights law, where norms can be taken for their ideological utility over – and, perhaps, against – their legal significance. Römken is again astute in assessing how this competition for discursive space presents a threat to

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<sup>410</sup> Hannah Austin, *VAW: Priorities for the Violence Against Women (Wales) Bill*, (Cardiff: Wales Violence Against Women Action Group, 2013), 6, available at <http://www.walesvawgroup.co.uk/wp-content/uploads/2012/10/vaw-priorities-for-vaw-wales-bill.pdf>.

<sup>411</sup> "Gender-based Violence, Domestic Abuse and Sexual Violence (Wales) Bill Stage 1 Response from Wales Violence Against Women Action Group: Submission to the Communities, Equality and Local Government Committee," Wales Violence Against Women Action Group, 3 – 4, accessed at 2 June 2019, <http://www.senedd.assembly.wales/documents/s30394/GBV%2089%20-%20Wales%20Violence%20Against%20Women%20Action%20Group.pdf>.

<sup>412</sup> 'There has been very limited discussion with the sector about the content of the Bill since the publication of the White Paper in 2012, and we feel as an Action Group that there has not been any opportunity to justify why we called for these specific recommendations, as nearly all of them have not been included in the Bill.' "Gender-based Violence, Domestic Abuse and Sexual Violence (Wales) Bill Stage 1 Response from Wales Violence Against Women Action Group: Submission to the Communities, Equality and Local Government Committee," Wales Violence Against Women Action Group, 3.

the feminist gains made within the international human rights discourse to frame and address violence against women:

Human rights are no longer the exclusive domain of international public law. The human rights perspective is increasingly embraced worldwide to frame the political and legal battles of violence against women. It demonstrates that law is a living thing, subject to interpretation and not only of legal experts. This politicisation may have fostered a different consequence: the weakening of international legal standards. Vigilance is, therefore, required.<sup>413</sup>

Despite the established UN approach and regional treaty law, many states continue to emphasise gender-neutrality in their response to violence against women, particularly domestic violence. In some cases states have alternated between approaches; developing a gender-specific approach and then moving back to gender-neutrality. Through the state-reporting process, the CEDAW Committee has criticised states that have returned to the gender-neutral approach, including the Netherlands (2007)<sup>414</sup>, Poland (2007)<sup>415</sup>, Finland (2008)<sup>416</sup> and the United Kingdom (2008)<sup>417</sup>. In the case of Finland, the Committee expressed its concern that ‘the policy on violence against women is couched in gender-neutral language, which undermines the notion that such violence is a clear manifestation of discrimination against women’<sup>418</sup>. Likewise the Committee restated in its General Recommendation no. 35 on violence against women that states should ‘[e]xamine gender-neutral laws and policies to ensure that they do not create or perpetuate existing inequalities and repeal or modify them if

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<sup>413</sup> Römken, “Gender revisited: Global concerns,” 205.

<sup>414</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Report of the Committee on the Elimination of Discrimination against Women: Thirty-seventh session (15 January-2 February 2007), Thirty-eighth session (14 May-1 June 2007), Thirty-ninth session (23 July-10 August 2007)*, A/62/38, (2007), 61, available at <https://undocs.org/A/62/38>.

<sup>415</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Report of the Committee on the Elimination of Discrimination against Women: Thirty-seventh session (15 January-2 February 2007), Thirty-eighth session (14 May-1 June 2007), Thirty-ninth session (23 July-10 August 2007)*, A/62/38, (2007), 68.

<sup>416</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Report of the Committee on the Elimination of Discrimination against Women, 40th session (14 January - 1 February 2008), 41st session (30 June-18 July 2008)*, A/63/38(SUPP), (2008), 125, available at [https://undocs.org/A/63/38\(SUPP\)](https://undocs.org/A/63/38(SUPP)).

<sup>417</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Report of the Committee on the Elimination of Discrimination against Women, 40th session (14 January - 1 February 2008), 41st session (30 June-18 July 2008)*, A/63/38(SUPP), (2008), 142.

<sup>418</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Report of the Committee on the Elimination of Discrimination against Women, 40th session (14 January - 1 February 2008), 41st session (30 June-18 July 2008)*, A/63/38(SUPP), (2008), 128.

they do so.<sup>419</sup> This would seem to indicate a disjuncture between the shift to gender-neutrality and the existing legal framework currently governing violence against women. In the case of the CEDAW, Rebecca Cook outlines the foundational framing of specificity in the Convention, distinguishing between the normative parameters of 'eliminating discrimination' and achieving 'sex neutrality':

In agreeing "to pursue, by all appropriate means and without delay, a policy of eliminating discrimination against women...", states parties are obligated to address the particular nature of each discrimination. The Women's Convention clearly reinforces sexual non-discrimination, but its purpose is not simply to achieve gender-neutrality. In contrast to previous human rights treaties, the Women's Convention frames the legal norm as the elimination of all forms of discrimination against women, as distinct from opposing sex discrimination *per se*. That is, it *develops the legal norm from a sex neutrality norm that requires equal treatment of men and women*, usually measured by how men are treated, to recognize that *the distinctive characteristics of women and their vulnerabilities to discrimination merit a specific legal response*.<sup>420</sup>

Rikki Holtmaat likewise emphasises the same framing of specificity inherent in the duty of eliminating discrimination, explaining that the CEDAW goes beyond legal protection against discrimination, to requiring positive action to address the causes of discrimination, which 'not only requires the same or identical rights for women but also the development of different law and public policy'.<sup>421</sup>

At the praxis level, the reconceptualisation of gender has also seen funding diverted from organisations which refuse to extend their service provision to men. This poses a significant challenge to the substantive norms and jurisprudence surrounding violence against women, as it suggests that:

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<sup>419</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, CEDAW/C/GC/35, (2017), paragraph 32, available from <http://undocs.org/CEDAW/C/GC/35>.

<sup>420</sup> Rebecca J. Cook, "Accountability in International Law for Violations of Women's Rights by Non-State Actors," *Studies in Transnational Legal Policy*, (25), (1993): 105. 93 – 116.

<sup>421</sup> Holtmaat, "Preventing Violence Against Women: The Due Dilligence Standard and Article 5(a) of the CEDAW Convention," 79.



[m]ale victims of violence require, and deserve, comparable resources to those afforded to female victims, thereby ignoring the reality that violence against men does not occur as a result of pervasive inequality and discrimination, and also that it is neither systemic nor pandemic in the way that violence against women indisputably is.<sup>422</sup>

In her 2014 report, the Special Rapporteur stated that:

[a]ttempts to synthesize all forms of violence into a “gender neutral” framework, tend to result in a depoliticised or diluted discourse, which abandons the *transformative agenda*. A different set of normative and practical measures is required to respond to and prevent violence against women and equally importantly to achieve the international law obligation of substantive equality, as opposed to formal equality.<sup>423</sup>

This concern was also expressed by the CEDAW Committee in 2013, when it observed, as part of its state-reporting on the United Kingdom that:

[a] law, policy, program or practice [may appear] to be neutral insofar as it relates to men and women, but has a discriminatory effect in practice on women because pre-existing inequalities are not addressed by the apparently neutral measure.<sup>424</sup>

This is the difference between formal and substantive equality and it is this understanding which needs to inform attempts at gender mainstreaming and readings of the concept of gender, more generally.

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<sup>422</sup> United Nations, *Violence against women: Twenty years of developments to combat violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Rashida Manjoo, A/HRC/26/38 (May 28, 2014), paragraph 61, available at <http://undocs.org/A/HRC/26/38>.

<sup>423</sup> United Nations, *Violence against women: Twenty years of developments to combat violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Rashida Manjoo, A/HRC/26/38 (May 28, 2014), paragraph 61.

<sup>424</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 28 on Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, A/47/38 (October 19, 2010), paragraph 5, available from <http://undocs.org/A/47/38>.

*Gender specificity as framed by gender equality:*

*From formal equality to substantive equality to transformative equality.*

Key to understanding and applying gender specificity is the interpretation of gender equality. As outlined in Chapter I, the tension between liberal characterisations of gender equality and radical calls for women's liberation is at play when understanding the framing of gender equality and gender specificity in the international human rights law approach to violence against women. The lens of liberation – and the task of emancipatory imagination – serve as a challenge to the narrow vision of gender equality, and the liberal way of seeing discrimination and equality more broadly. The work of the liberationist lens can be seen in the feminist refining of the discourse's call for gender equality; progressing from formal equality, to substantive equality, to transformative equality.

Over the past decade in particular, there has been an emphasis on substantive equality. Again, this has helped elucidate and consolidate the provisions of the CEDAW, DEVAW and the Beijing Platform for Action as they relate to gender equality. Under Article 2 of the CEDAW, states have an obligation to pursue a policy of eliminating discrimination against women, and must, in their efforts to achieve this, focus on formal, *de jure*, and substantive, *de facto*, equality. The Istanbul Convention further promotes the significance of substantive equality as it relates to primary prevention, recognising 'that the realization of *de jure* and *de facto* equality between women and men is a key element in the prevention of violence against women.'<sup>425</sup> This duty is reiterated in Article 2(1)(d) of the Maputo Protocol and, again, in Article 1(b) of the Istanbul Convention, which outlines the purpose of the convention as being to 'contribute to the elimination of all forms of discrimination against women and promote substantive equality between women and men, including by empowering women.'<sup>426</sup>

Substantive equality is distinct from equity and must be achieved through gender specificity. Article 4 of the Istanbul Convention affirms that, 'Fundamental rights,

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<sup>425</sup> The Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11 May 2011, CETS No.210. available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210>

<sup>426</sup> The Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11 May 2011, CETS No.210. Article 1(b).

equality and non-discrimination',<sup>427</sup> require gender specificity pursuant to achieving equality, and makes clear the difference between equality, equity and neutrality: 'Special measures that are necessary to prevent and protect women from gender-based violence shall not be considered discrimination under the terms of this Convention.'<sup>428</sup> (This is obviously in contrast to its gender-neutral approach to domestic violence, which seems ghettoised from the Convention's otherwise comprehensive account of substantive equality.) In 2013, after highlighting substantive equality in its 2006, 2007 and 2011 annual reports, the CEDAW Committee stated that it had 'consistently concluded that the elimination of discrimination against women requires state parties to provide for substantive as well as formal equality.'<sup>429</sup>

With this in mind, the Special Rapporteur emphasised, in her 2011 report, the need to adopt a 'twin-track approach of both mainstreaming and specificity, which take into account women's inter- and intra- gender equality and non-discrimination rights, and also the right to be free of all forms of violence, both public and private.'<sup>430</sup> Gender specificity in anti-violence against women legislation is recommended in the UN Handbook on Legislation on Violence Against Women. Gender specific legislation and policies are called for in Article 2(1)(c) of the Maputo Protocol<sup>431</sup> and Article 6 of the Istanbul Convention. Gender specificity is required across the range of state duties from prevention to reparations, and is rooted in a reading of gender that requires substantive equality. International human rights law and UN bodies place particular emphasis on gender specificity and the position of women's groups to lead this approach. In fact, the UN Handbook explicitly encourages this. Whilst maintaining the duty of states to fund efforts to address violence against women, the UN Handbook advocates:

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<sup>427</sup> The Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11 May 2011, CETS No.210. Article 4(4).

<sup>428</sup> The Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11 May 2011, CETS No.210. Article 4(4).

<sup>429</sup> UN Committee on the Elimination of Discrimination against Women, *Report of the Committee on the Elimination of Discrimination against Women Fifty-second session (9-27 July 2012), Fifty-third session (1-19 October 2012), Fifty-fourth session (11 February-1 March 2013)*, (A/68/38), (2013), Annex I, paragraph 8, available at <https://undocs.org/A/68/38>

<sup>430</sup> United Nations, *Multiple and intersecting forms of discrimination and violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Rashida Manjoo, A/HRC/17/26 (2 May 2011), available at <http://undocs.org/A/HRC/17/26>.

<sup>431</sup> African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, Maputo, 11 July 2003, Article 2(1)(c), available at <http://www.achpr.org/instruments/women-protocol/>

Where possible, services should be run by independent and experienced women's non-governmental organizations providing gender-specific, empowering and comprehensive support to women survivors of violence, *based on feminist principles*.<sup>432</sup>

The drive for substantive equality has fuelled the promotion and advancement of gender specificity. As UN Women suggest, substantive equality requires 'that, due to the existence of entrenched discrimination in society, achieving equality might require different or unequal treatment in favour of a disadvantaged group in order to achieve equality of outcome.'<sup>433</sup>

The understanding of substantive equality, and the significance it holds in the discourse, has been further built upon and strengthened by the concept of 'transformative remedies'<sup>434</sup>, and what the Special Rapporteur has called the 'transformative agenda'<sup>435</sup>. This marks further elucidation of gender equality as not only substantive but transformative. This is in keeping with the framing of the CEDAW, with Holtmaat describing the anti-discrimination treaty as conceptualising 'equality as transformation', rather than 'equality as sameness'.<sup>436</sup> The treaty goes beyond achieving sex-neutrality to 'demand[ing] that attention be paid to the structural causes of discrimination.'<sup>437</sup> This reflects the liberationist aims of the transnational women's movement and is far removed from formal readings of equality; further reinforcing gender specificity as an

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<sup>432</sup> United Nations Division for the Advancement of Women, *Handbook for Legislation on Violence Against Women*, (New York: United Nations, 2010), 31, available at <https://www.un.org/womenwatch/daw/vaw/v-handbook.htm>

<sup>433</sup> United Nations Women, *A Transformative Stand-Alone Goal On Achieving Gender Equality, Women's Rights And Women's Empowerment: Imperatives And Key Components*, (New York: United Nations, 2013) 17, available at <http://www.unwomen.org/en/what-we-do/~media/AC04A69BF6AE48C1A23DECAEED24A452.ashx>

<sup>434</sup> Rashida Manjoo, "Introduction: reflections on the concept and implementation of transformative reparations," *The International Journal of Human Rights*, 21(9), (2017): 1193 – 1203; United Nations, *Reparations to women who have been subjected to violence: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Rashida Manjoo, A/HRC/14/22* (23 April 2010), available at <http://undocs.org/A/HRC/14/22>; General Assembly resolution 60/147, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, A/RES/60/147, (16 December 2005), Article 23 'Guarantees of non-repetition', available at <http://undocs.org/A/RES/60/147>.

<sup>435</sup> United Nations, *Violence against women: Twenty years of developments to combat violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Rashida Manjoo, A/HRC/26/38* (May 28, 2014).

<sup>436</sup> Holtmaat, "Preventing Violence Against Women: The Due Dilligence Standard and Article 5(a) of the CEDAW Convention," 78.

<sup>437</sup> Holtmaat, "Preventing Violence Against Women: The Due Dilligence Standard and Article 5(a) of the CEDAW Convention," 79.

approach to primary prevention. As Holtmaat concludes ‘the Convention not only expresses the principle of equality, but also the principle of diversity or freedom.’<sup>438</sup> Again, this relies on a radically politicised understanding of gender as the frame for implementing preventative work. Within this understanding, the response to the individual is linked to the systemic, as it considers how remedial and preventative measures must work together for the individual and for gender equality more generally. Transformative remedies and the transformative agenda look holistically at the prevention of violence against women, and consider the indivisibility of rights as they relate to gender equality and gender discrimination. As the Special Rapporteur affirms:

Transformative remedies require that the problem of violence against women is acknowledged as systemic and not individual; and that this requires specific measures to address it as a gender-specific human rights violation [...] Responses in laws, policies and programs require that the historical, current and future realities of the lives of women be taken into account through a lens of indivisibility and interdependency of rights.<sup>439</sup>

Similarly, in her 2010 report, the Special Rapporteur explained that

adequate reparations for women cannot simply be about returning them to where they were before the individual instance of violence, but instead should strive to have a *transformative potential*.<sup>440</sup>

This radically links the *protective/remedial duties* with the *preventive duties* of the state, and considers the transformative potential of redress and reparation to prevent re-victimisation of the individual concerned, as well as the systemic – upstream – preventative agenda. This deeply political, and feminist reading of gender, takes note of the collective and communal identity of women, and how that identity relates to their

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<sup>438</sup> Holtmaat, “Preventing Violence Against Women: The Due Dilligence Standard and Article 5(a) of the CEDAW Convention,” 79.

<sup>439</sup> United Nations, *Violence against women: Twenty years of developments to combat violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Rashida Manjoo*, A/HRC/26/38 (May 28, 2014) paragraph 65.

<sup>440</sup> United Nations, *Reparations to women who have been subjected to violence: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Rashida Manjoo*, A/HRC/14/22 (23 April 2010), paragraph 31.

experiences of violence. Transformative remedies embody the personal as political, and cut against individualised and privatised readings of violence against women. This also takes into account that the lack of transformative remedies breeds impunity for perpetrators, which leads to (re)victimisation: when isolating individuals from the wider system of violence against women, gender inequality and patriarchy go unchallenged, which perpetuates the system, and, in turn, the threat to the individual.<sup>441</sup> The Special Rapporteur explains the concept of ‘engendering reparations’<sup>442</sup>, which underlies and frames transformative remedies:

[A]cts of violence against women are part of a larger system of gender hierarchy that can only be fully grasped when seen in the broader structural context. Therefore, adequate reparations should aspire to the extent possible, to subvert, instead of reinforce, pre-existing structural inequality that may be at the root causes of the violence the women experience [...]<sup>443</sup>

The conceptual shift to consider reparations as part of a ‘transformative agenda’ came from the expansion of rights of remedy to include ‘guarantees of non-repetition’. The guarantee of non-repetition, as outlined in General Assembly resolution 60/147 ‘Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’, linked the individual to the structural by including primary prevention within its scope:

Guarantees of non-repetition offer the greatest potential for transforming gender relations. In promising to ensure non-recurrence, [they] trigger a

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<sup>441</sup> Ruth Rubio-Marín, ed., *The Gender of Reparations: Unsettling Sexual Hierarchies while Redressing Human Rights Violations*, (Cambridge: Cambridge University Press, 2009); Margaret Urban Walker, “Transformative Reparations? A Critical Look at a Current Trend in Thinking about Gender-Just Reparations,” *International Journal of Transitional Justice* 10(1), (2016): 108–125.

<sup>442</sup> United Nations, *Reparations to women who have been subjected to violence: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Rashida Manjoo, A/HRC/14/22* (23 April 2010), paragraph 30; Rubio- Marín, *The Gender of Reparations: Unsettling Sexual Hierarchies while Redressing Human Rights Violations*; Urban Walker, “Transformative Reparations?”; Andrea Durbach, Louise Chappell and Sarah Williams, “Foreword: special issue on ‘transformative reparations for sexual violence post-conflict: prospects and problems,’” *The International Journal of Human Rights*, 21(9), (2017): 1185 – 1192.

<sup>443</sup> United Nations, *Reparations to women who have been subjected to violence: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Rashida Manjoo, A/HRC/14/22* (23 April 2010), paragraph 31.

discussion about the underlying structural causes of the violence and their gendered manifestations and . . . about the broader institutional or legal reforms that might be called for to ensure non-repetition.<sup>444</sup>

The framing of reparations as transformative in this manner has been applied – to some degree – within the jurisprudence of the International Criminal Court, most notably in *The Prosecutor v. Thomas Lubanga Dyilo*<sup>445</sup>. The ICC became a focus for transnational activism after the ad hoc tribunals in Rwanda and former Yugoslavia left out rights and duties regarding reparation. The Rome Statute corrected this omission and has been seen as a site of jurisprudential consolidation with respect to the right to reparation – particularly with the establishment of the victims' trust fund. During the reparations hearing of the *Lubanga* case the Women's Initiatives for Gender Justice and the ICC's Trust Fund for Victims 'urged the court to consider developing principles for transformative reparations applicable to all victims in the case, including women and girl victims of sexual violence...' <sup>446</sup> The call on the court to consider the transformative potential of reparations was strengthened by the Guidance Note of the UN Secretary-General *Reparations for Conflict-Related Sexual Violence* (2014), which asserts that reparations should 'not reinforce pre-existing patterns of gender-based discriminations, but rather *strive to transform* them.'<sup>447</sup> The Guidance Note goes on to call for reparations to be 'empowering and transformative' with remedies providing the 'potential of unsettling patriarchal and sexual hierarchies and customs...' <sup>448</sup> In particular, the Guidance Note affirmed the significance of guarantees of non-repetition, claiming: 'Guarantees of non-repetition also have an important potential for being transformative, in that they imply the need for structural and institutional reforms.'<sup>449</sup>

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<sup>444</sup> United Nations, *Reparations to women who have been subjected to violence: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Rashida Manjoo*, A/HRC/14/22 (23 April 2010), paragraph 62.

<sup>445</sup> *Prosecutor v. Lubanga*, ICC Doc. No. ICC-01/04-01/06 [2012] ICC; The Women's Initiatives for Gender Justice, *Prosecutor v. Lubanga, Observations of the Women's Initiatives for Gender Justice on Reparations*, ICC Doc. No. ICC-01/04-01/06-286, (10 May 2012), available at [https://www.icc-cpi.int/CourtRecords/CR2012\\_05520.PDF](https://www.icc-cpi.int/CourtRecords/CR2012_05520.PDF)

<sup>446</sup> Durbach, Chappell, and Williams, "Foreword: special issue on 'transformative reparations for sexual violence post-conflict: prospects and problems,'" 1185.

<sup>447</sup> United Nations, *Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence*, (June 2014), available at <http://www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf>.

<sup>448</sup> United Nations, *Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence*, 9.

<sup>449</sup> United Nations, *Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence*, 9.

This Guidance Note references evidence of the transformative approach in the Sierra Leone Truth and Reconciliation Commission, which called for 'reparations that were comprehensive in nature and have the potential to be transformative in women's and children's lives.'<sup>450</sup> The Commission's recommendations included an extensive list of reparative economic, social and health measures, alongside calls for institutional and structural reform to address gender-discrimination and inequality. 'As a direct result of the truth commission's recommendations, three women's rights bills were passed by Parliament addressing key aspects of gender inequality.'<sup>451</sup> The transformative potential of reparations relies upon a substantive reading of gender equality, and demonstrates the 'twin-track approach of gender-mainstreaming and gender-specificity'.

As the Special Rapporteur has said, the transnational women's movement saw the establishment of guarantees of non-repetition 'as being central to the "transformative" potential of reparations [...] given its focus on preventative measures and addressing the more structural impediments to eliminating violence against women.'<sup>452</sup> As Margarate Urban Walker suggests, reparations should be 'gender-just' and should 'evade, contest or subvert patriarchal norms that disempower or disadvantage women.'<sup>453</sup> This requires an approach that works for 'structural changes that contribute to dismantling sex oppression and inequality.'<sup>454</sup> It takes a transformative reading of gender equality – as it frames primary prevention – and relates it to the rights of the individual; closing the circle on systemic and individual prevention. State responsibility to provide redress will be picked up in the next chapter (as it relates to duties to prevent), but in relation to the scope of primary prevention, reparations, and specifically, 'guarantees of non-repetition', provide transformative potential, and as a duty of both redress and prevention link the individual and the systemic. This gives further meaning to the approaches of gender mainstreaming and gender specificity as relying on readings of gender equality that are substantive and politicised – tackling the root causes – rather than formal.

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<sup>450</sup> United Nations, *Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence*, 9.

<sup>451</sup> United Nations, *Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence*, 9.

<sup>452</sup> Manjoo, "Introduction: reflections on the concept and implementation of transformative reparations," 1195.

<sup>453</sup> Urban Walker, "Transformative Reparations?" 109.

<sup>454</sup> Urban Walker, "Transformative Reparations?" 109.



The emergence of transformative remedies and guarantees of non-repetition, has given further credence to readings of gender equality as substantive and transformative. To this end, over the past five years gender equality has increasingly been conceptualised as 'transformative equality'. Transformative equality further strengthens the well-bedded concept of substantive equality, suggesting preventative work should not just be gender specific, but gender transformative. Approaches that are gender transformative 'address the causes of gender-based inequalities and work to transform harmful gender roles, norms and relations.'<sup>455</sup> They are rooted in Article 5(a) of the CEDAW, challenging 'both normative and structural inequality'<sup>456</sup>, and build on the CEDAW Committee's jurisprudence concerning substantive equality, particularly General Comment No 28:

The position of women will not be improved as long as the underlying causes of discrimination against women, and of their inequality, are not effectively addressed. The lives of women and men must be considered in a contextual way, and measures adopted towards a real *transformation* of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns.<sup>457</sup>

Transformative equality was first framed by Sandra Fredman in her four-dimensional model addressing gender and international development:

This multidimensional model pursues four overlapping aims, which are to (1) break the cycle of disadvantage, (2) promote respect for dignity and worth, (3) accommodate difference by achieving structural change, and (4) promote political and social inclusion.<sup>458</sup>

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<sup>455</sup> "Putting prevention into practice: How to change the story," Our Watch, 47, accessed 4 September 2018, [www.ourwatch.org.au/getmedia/a8d9dc3d-2291-48a6-82f8-68f1a955ce24/Putting-prevention-into-practice-AA-web.pdf.aspx](http://www.ourwatch.org.au/getmedia/a8d9dc3d-2291-48a6-82f8-68f1a955ce24/Putting-prevention-into-practice-AA-web.pdf.aspx)

<sup>456</sup> "Putting prevention into practice: How to change the story," Our Watch, 47.

<sup>457</sup> Committee on the Elimination of Discrimination Against Women, general recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, A/47/38 (2004) paragraph 10, available from <http://undocs.org/A/47/38>; see also paragraphs 7 and 8.

<sup>458</sup> Sandra Fredman, Jaako Kuosmanen and Meghan Campbell, "Transformative Equality: Making the Sustainable Development Goals Work for Women," *Ethics and International Affairs*, (30)(2), (2016): 180.

Breaking the cycle of disadvantage acknowledges suffering and recognises that 'positive measures are required to redress this imbalance.'<sup>459</sup> The 'dignity dimension' recognises how this discrimination manifests in 'harassment, prejudice, stereotypes, stigmas, negative cultural attitudes, and humiliation.'<sup>460</sup> Structural change requires 'a redistribution of power and resources and a change in the institutional structures that perpetuate women's subordination.'<sup>461</sup> The fourth dimension requires women's participation and leadership to frame inclusion in all levels of decision-making: private, public, social and political.<sup>462</sup> Fredman argues that 'transformative equality provides a helpful framework for comprehending the *content* of substantive equality.'<sup>463</sup>

Transformative equality is not just concerned that gender specificity frames primary prevention, but that the work is actively gender transformative. Not only should primary prevention account for the lived experience of women in its engagement with gender discrimination (going beyond formal and *de jure* readings of equality), it should look to eliminate gender discrimination by challenging the way gender shapes norms and structures. Transformative equality builds on but differs from transformative remedies. Rather than a reparative approach to transforming gender – as posed by transformative remedies – transformative equality emphasises the stand-alone, positive duties of states to achieve equality. This is rooted in a politicised reading of Article 5(a), which calls on the state to 'modify the social and cultural patterns of conduct of men and women' with a view to challenging discrimination and realising gender equality. The two approaches – right to remedy and positive rights – represent the same conceptualisation of gender equality – as substantive, requiring specificity, and demanding gender transformation – but differ in how the state relates to its duty to prevent violence against women. Whilst the goal is the same, the jurisprudence around remedies and positive duties is very different and arguably shapes the relationship between moral responsibility and legal responsibility for addressing gender equality and

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<sup>459</sup> Fredman, Kuosmanen, and Campbell, "Transformative Equality: Making the Sustainable Development Goals Work for Women," 180.

<sup>460</sup> Fredman, Kuosmanen, and Campbell, "Transformative Equality: Making the Sustainable Development Goals Work for Women," 180.

<sup>461</sup> Sandra Fredman, "Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights," In *Temporary Special Measures: Accelerating de facto equality of women under Article 4(1) UN Convention on the Elimination of All Forms of Discriminations Against Women*, edited by Ineke Boerefijn et al., eds., (Belgium: Intersentia, 2003), 115.

<sup>462</sup> Fredman, Kuosmanen, and Campbell, "Transformative Equality: Making the Sustainable Development Goals Work for Women," 181.

<sup>463</sup> Fredman, Kuosmanen, and Campbell, "Transformative Equality: Making the Sustainable Development Goals Work for Women," 180.

violence against women. This will be investigated in the following chapter, as it raises important questions about how norms are actualised and further shaped by the law. It is a question of theorised practice and norm construction, as well as policy, to consider: should gender transformation be achieved through remedial duties (which are 'individualized, retrospective, and passive'<sup>464</sup> in how they conceptualise state responsibility) or positive duties (which are far-reaching, pre-emptive and proactive)? This will be considered further, but for now the emergence of transformative equality gives further credence to the feminist conceptualisation of gender and gender-based violence, and frames primary prevention as needing to be gender-transformative, not just gender-specific, to tackle gender inequality as a root cause of violence against women. Leading practitioner, Our Watch, outline the significance of gender transformation, and problematises the differences between primary prevention work that is gender blind (gender-neutral), gender specific and gender transformative, and how these approaches exist on a continuum 'from unhelpful approaches that might even be harmful, to approaches that can create positive social change'<sup>465</sup>. (See Appendix 2.)

As Our Watch explain:

Not all positive actions to prevention of violence against women will be gender transformative, but they must at least be gender-specific. Initiatives that will likely cause harm as they are in the 'gender exploitative' or 'gender blind' categories run counter to efforts to prevent violence against women and those that are merely 'gender sensitive' might avoid harm, but will not contribute to prevention of violence against women on their own.<sup>466</sup>

#### *Gender equality as framed by holism and intersectionality*

As outlined in Chapter 2, an intersectional understanding of violence against women, and an holistic reading of rights, requires states and non-state actors to consider the *lived reality of women*. In the same way as intersectionality shapes the feminist conceptualisation of violence against women, it also informs primary prevention

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<sup>464</sup> Sandra Fredman, *Discrimination Law*, (Oxford: Oxford University Press, 2002), 176.

<sup>465</sup> "Putting prevention into practice: How to change the story," Our Watch, 46.

<sup>466</sup> "Putting prevention into practice: How to change the story," Our Watch, 46.

strategies aimed at eliminating the root causes of violence against women. As discussed above, readings of gender are becoming increasingly narrow, as the feminist conceptualisation of gender is eroded by depoliticised, neutral and *de jure* readings of equality. Similarly, readings that fail to account for the identity of women, and their experience of violence, as being shaped by multiple, and multiply-mediated, oppressions and inequalities, are lacking, and provide an inadequate conceptual foundation for primary prevention strategies. As violence against women is '[r]ooted in multiple and intersecting forms of discrimination and inequalities'<sup>467</sup>, efforts to prevent violence against women by tackling the 'root causes' must be comprehensive. As outlined above, and as runs throughout this thesis, gender inequality is highlighted as one of the most pervasive and significant root causes of violence against women. However, the focus on gender, should not be read so narrowly as to leave out the wider liberationist task of the transnational women's movement with regard eliminating violence against women. In its report, *Intersectionality Matters*, the Multicultural Centre for Women's Health explains how gender equality must be pursued with an intersectional understanding:

An intersectional approach doesn't ask us to stop using a gendered lens. It asks us to see gender as always interacting and intersecting with other forms of discrimination, institutional policies and political forces in ways that impact on:

- how we experience gender;
- the wider social/political consequences of our work; and
- our understanding and perceptions of ourselves and other people, including our perceptions about gender.<sup>468</sup>

The call for intersectional understandings of gender equality – rooted in an understanding of gender that is shaped by difference as well as commonality – requires prevention strategies to be shaped by the leadership of women, and the 'centering [of] marginalized experiences, voices and leadership, wherever possible.'<sup>469</sup> Efforts aimed at gender equality must be framed by women's own understandings of how gender

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<sup>467</sup> United Nations, *Continuum of violence against women from the home to the transnational sphere: the challenges of effective redress: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Rashida Manjoo, A/66/215 (1 August 2011), paragraph 12, available at <http://undocs.org/A/66/215>

<sup>468</sup> Chen, *Intersectionality Matters: A Guide to engaging immigrant and refugee communities in Australia*, 6.

<sup>469</sup> Chen, *Intersectionality Matters: A Guide to engaging immigrant and refugee communities in Australia*, 6.

inequality manifests, and in particular, how it relates to their experience of violence. This 'framing' must contain space for varying experiences of gender. Again, placing the emphasis on women's experiences and definitions, creates a far more political definition of equality, than formal readings, or conceptualisations of gender that merely count and compare women to men. Taking into account how gender operates as power (or, perhaps more aptly, as power operates as gender), and engaging with how gendered power intersects with other manifestations of power, intersectionality further consolidates the feminist understanding of gender as constitutively public and political in nature. Rather than negating the collective and public nature of gender – by reading difference as individualising – intersectionality reinforces the significance of group identities; all be they multiple and intersecting, rather than essentialising or universalising. In understanding women, and their experience of violence, as political and structurally shaped, the intersectional approach to gender equality has further 'blurred the distinction between violence in the public and the private spheres'<sup>470</sup>; echoing the call for primary prevention strategies to hold together the co-constitutive relationship between the macrosystemic and the individual as they relate to violence against women. As the Special Rapporteur expressed in her 2011 report, intersectionality has furthered the understanding of violence against women as structural and public, requiring a response that tackles root causes:

[T]he United Nations discourse regarding violence against women hinges on three principles: first, violence against women and girls is addressed as a matter of equality and non-discrimination between women and men; second, multiple and intersecting forms of discrimination are recognized as increasing the risk that some women will experience targeted, compounded or structural discrimination; and third, the interdependence of human rights is reflected in efforts such as those that seek to address the causes of violence against women related to the civil, cultural, economic, political and social spheres.<sup>471</sup>

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<sup>470</sup> United Nations, *Continuum of violence against women from the home to the transnational sphere: the challenges of effective redress: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Rashida Manjoo, A/66/215 (1 August 2011), paragraph 13

<sup>471</sup> United Nations, *Continuum of violence against women from the home to the transnational sphere: the challenges of effective redress: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Rashida Manjoo, A/66/215 (1 August 2011), paragraph 20

Whilst intersectionality promotes primary prevention strategies aimed at achieving gender equality and operating at the sociocultural and normative level, it also works against strategies that narrate universalising accounts of violence against women at the macrosystemic level. Due to the epidemic scale of violence against women and the public and structural nature of violence against women, there is a lure towards universalist readings of primary prevention: '[m]any prevention programmes aim to be as general or 'universal' as possible so that they reach the largest group of people... [relying on] "a one size fits all" approach.'<sup>472</sup> Whilst intersectionality still looks at the universal and structural nature of patriarchy, it considers the different ways this manifests and interacts with women in differing social locations, affected by a variety of marginalising and oppressive forces. 'This marks a departure from the flat narratives of gender-based violence that tend to homogenise the diverse experiences of women, as well as from approaches that tend to fragment the experience of each individual woman.'<sup>473</sup> As Marai Larasi suggests:

If we are to end violence against women and girls, and create a truly equal world, we need to start to create seismic shifts across our social norms. This is not just about transforming belief systems and behaviours in terms of gender; it also means addressing other norms – for example, around ethnicity, class and disability – all of which contribute to holding other oppressive systems in place.<sup>474</sup>

Whilst intersectionality has increasingly shaped the CEDAW Committee's comments on gender equality and prevention in state-reporting, and has been the focus of multiple thematic reports by the Special Rapporteur<sup>475</sup>, this understanding is yet to be

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<sup>472</sup> Chen, *Intersectionality Matters: A Guide to engaging immigrant and refugee communities in Australia*, 22.

<sup>473</sup> United Nations, *15 Years Of The United Nations Special Rapporteur On Violence Against Women, Its Causes And Consequences (1994-2009) - A Critical Review: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms Yakin Erturk, A/HRC/11/6/Add.5* (27 May 2009), paragraph 107, available at <http://undocs.org/A/HRC/11/6/Add.5>

<sup>474</sup> "In the words of Marai Larasi: "If we are to end violence against women and girls, we need to create seismic shifts across our social norms." UN Women, accessed January 4, 2019, <http://www.unwomen.org/en/news/stories/2018/1/in-the-words-of-marai-larasi> accessed January 4 2019

<sup>475</sup> The Special Rapporteur has considered intersectionality at a conceptual and normative level, as well as focusing on specific intersections between gender inequality and other locations of identity and manifestations of oppression. Including: United Nations, *Intersections between culture and violence against women: the challenges of effective redress: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Yakin Erturk, A/HRC/4/34* (17 January 2007); United Nations, *Political economy of women's human rights: the challenges of effective redress: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Yakin*

fully captured by the law. Again, the lack of a binding instrument means much of the jurisprudence and institutional understanding around intersectional readings of gender equality is obscured or fragmented and located across varying sites. This is problematic for cementing the conceptual and legal gains made in the development of primary prevention.

In the beginning of this chapter, I used the definition of primary prevention given by the Multicultural Centre for Women's Health: 'Primary Prevention aims to stop violence against women before it starts by addressing the underlying *gendered* drivers of violence.' In its report, *Intersectionality Matters*, the MCWH go on to describe primary prevention of violence against women as 'working together towards gender equality: essentially, it is feminism in action.'<sup>476</sup> It is intriguing that in a report on intersectionality the outline of root causes and the description of primary prevention is still couched narrowly in terms of gender. Of course, the report outlines that tackling 'gendered drivers' relies on an intersectional understanding of gender inequality, but the definitions do little to demonstrate this. Whilst the concept of intersectionality is essential and has shaped more recent efforts to conceptualise gender equality and primary prevention, the discourse seems to have little language for how it is actualised in duties and rights, and how it is drafted into domestic legislation and policies. Intersectionality should be included in definitions of primary prevention, rather than included through secondary contextualisation or commentary. Whilst the Human Rights Council confirmed 'intersectionality as a mandatory prism for human rights analysis'<sup>477</sup> in its Resolution 7/24, the legal discourse still lacks the language for more broadly and cohesively liberationist work. Whilst intersectional understandings of gender and violence against women consider women holistically, this remains problematic for the human rights law approach which still tends to fragment the person into civil, political, social, cultural, and economic identities. This impacts upon the discursive space of women's organisations working in primary prevention, whose

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Erturk, A/HRC/11/6 (2009); United Nations, *Multiple and intersecting forms of discrimination and violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Rashida Manjoo, A/HRC/17/26 (2 May 2011); United Nations, *Violence against women with disabilities: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Rashida Manjoo, A/67/227 (3 August 2012).

<sup>476</sup> Chen, *Intersectionality Matters: A Guide to engaging immigrant and refugee communities in Australia*, 6.

<sup>477</sup> United Nations, *15 Years Of The United Nations Special Rapporteur On Violence Against Women, Its Causes And Consequences (1994-2009) - A Critical Review: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms Yaking Erturk, A/HRC/11/6/Add.5 (27 May 2009), 49.

practice, whilst rooted in intersectionality, lacks appropriate legal language to describe it. As such, the efforts of feminist organisations committed to intersectional readings of primary prevention and working for the liberation of women, are often conceived of in a limited manner, and their work reduced down to narrow (and often liberal) readings of gender equality. However, the intersectional approach promotes primary prevention strategies that look at the indivisibility of rights and require broad-reaching and political solutions to human rights abuses; a task that cannot be neutralised or narrowed, but that comprehends of the complexity of women's oppression(s) and holds the fullness of women's emancipation. Whilst the legal language is limited, primary prevention where focused on gender equality, must read women in a non-binary way, and in a way where men are not the standard to be measured against. It is hard to know if the international human rights discourse holds enough space for such 'prophetic imagination'<sup>478</sup>, and for such broad and political readings of women's liberation; or if the discourse leaves space for those with such imagination. Gender as reduced to 'men and women' constrains wider, intersectional understandings of gender equality, and must be worked against. Intersectionality – including its politicised understanding of the multiple factors shaping the social location of women, such as race, sexuality, class, ability, indigeneity, and religion – further promotes a politicised reading of gender, and has the potential to 'enhance the analytical capacity of gender analysis'<sup>479</sup>; emphasizing the multiple forms of discrimination contributing to violence against women and, in doing so, 'signalling an erosion of the public/private sphere dichotomy used for so long to exclude violence against women from public concern and scrutiny.'<sup>480</sup> This further focuses the call for state responsibility for primary prevention of violence against, and shapes the politicised work needed at the macrosystemic level.

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<sup>478</sup> Walter Brueggemann speaks of the prophetic imagination as vision that 'not only embraces the pain of the people but creates an energy and amazement based on the new thing'. Brueggemann speaks of radical and liberated consciousness as the place of vision, and warns against coopted consciousness: 'We need to ask not whether it is realistic or practical or viable but whether it is imaginable. We need to ask if our consciousness and imagination have been so assaulted and co-opted by the royal consciousness [the hegemonic power of the day] that we have been robbed of the courage or power to think an alternative thought.' Walter Brueggemann, *The Prophetic Imagination*, 2<sup>nd</sup> ed. (Minneapolis: Fortress Press, 2001), 39.

<sup>479</sup> United Nations, Integration of the human rights of women and the gender perspective: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Yakin Ertürk, E/CN.4/2004/66 (26 February 2006), paragraph 73 (f)

<sup>480</sup> United Nations, *Addendum - Report on Communications sent to States and replies received: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Yakin Ertürk*, A/HRC/4/34/Add.1 (19 March 2007), paragraph 8, available at <http://undocs.org/A/HRC/4/34/Add.1>



At the state level the relationship between intersectional readings of gender equality and the primary prevention of violence against women has often been misunderstood. There is a tendency of state actors to underestimate, or misrepresent, the interrelationship between violence against women and key issues pertaining to culture and socioeconomic deprivation, particularly. (This was touched on briefly in Chapter 2, where ‘cultural’ violence was problematised within the wider conceptualisation of violence against women as societal and macrosystemic; and essentialist readings of culture and violence against women were rejected.) Whilst an intersectional approach to primary prevention requires negotiating the different ways gender inequality interacts with diverse social locations – in this instance culture – intersectionality is not a negation of the focus feminists have put on the universal patriarchal culture. Whilst refusing to give in to the *universalising of women’s experience* of violence, intersectionality still maintains the problematisation of patriarchy as universal and systemic. As Leti Volpp explains, all cultures are patriarchal ‘– not more or less so, but differently patriarchal.’<sup>481</sup> Unfortunately, although international human rights law, (perhaps most notably, the Beijing Platform for Action) calls on states to ‘study the causes and consequences of violence against women’ as part of its efforts to prevent, this has often taken the form of isolating particular types of abuse from one another, or creating a hierarchy between various manifestations of violence against women, rather than acknowledging and analysing the interconnections which they share with one another. It is common to consider intersecting oppressions as ‘layers’ of discrimination, rather than as ‘interacting and dynamic forms of discrimination that collectively impact the lives of women.’<sup>482</sup> The Special Rapporteur has noted a ‘continuing lack of response to multiple and intersecting forms of discrimination, both inter- and intra- gender, and its nexus with violence.’<sup>483</sup> An holistic, and less individuated approach is required. Primary prevention must take into account the structural and individual intersections of gender with other forms of discrimination. The holistic approach to women’s rights clearly highlights the need to address intersections of violence against women with economic, social and cultural discrimination against women. To that end, the transnational women’s movement has reiterated the

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<sup>481</sup> Leti Volpp, “Feminism versus Multiculturalism,” *Columbia Law Review*, 101(5), (2001): 1217.

<sup>482</sup> Chen, *Intersectionality Matters: A Guide to engaging immigrant and refugee communities in Australia*, 17.

<sup>483</sup> United Nations, *Violence against women: Twenty years of developments to combat violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Rashida Manjoo, A/HRC/26/38 (May 28, 2014), paragraph 58.

economic and social empowerment of women at individual and structural levels as imperative in the prevention of violence against women. The focus on gender equality as intersectional and transformative, is therefore grounded in the practice of empowerment. Whilst gender operates at the cultural and normative level, it is the institutions that shape the macrosystemic level that actualise and 'define beliefs and norms about violence and structure women's options for escaping violence.'<sup>484</sup> Primary prevention must distinguish between and address the gendered norms and roles that create and fuel gender inequality, and the material inequalities that shape institutions and formal structures. Primary prevention must focus on the norms that inform gendered inequality, as well as the material and structural ways that inequality manifests.<sup>485</sup> As such, empowerment is fundamental to eliminating violence against women.

#### *Empowerment and primary prevention*

The human rights approach to primary prevention of violence against women, is distinct from humanitarian and public health approaches to primary prevention. It is rooted in an understanding that violence against women is not just a health or welfare issue, or a 'social or moral concern', but a violation of women's human rights. In their review of the work of the Special Rapporteur, Yakin Ertürk and Bandana Purkayastha, focus on the paradigm shift that the violence against women agenda brought to the human rights discourse. Ertürk and Purkayastha highlight the paradigmatic significance of the DEVAW with regard prevention:

The Declaration clearly links violence experienced by women to their systemic subordination and the historically rooted inequality between women and men, thus, qualifying the problem as one of a human rights issue... therefore, the 'violence against women agenda' intrinsically challenges the conventional focus on individual perpetrators and victims in private life to a focus on complex social, economic and political structures that instigate violence; therefore, its elimination necessitates a shift of focus from the victimization-oriented

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<sup>484</sup> Heise, *What works to prevent partner violence: An evidence overview*, vi.

<sup>485</sup> Chen, *Intersectionality Matters: A Guide to engaging immigrant and refugee communities in Australia*, 16.

approach to one of empowerment, i.e. enabling women to resist and escape abusive relations.<sup>486</sup>

The focus on empowerment at the praxis and policy level is grounded at the paradigmatic level. This said, it is only over the past decade, since state responsibility for primary prevention has been more fully conceptualised, that empowerment as praxis has gained ground. Over the past decade there has been progress in articulating and promoting the empowerment of women as a key facet of prevention. Alongside tackling patriarchy and subordination at social, structural and individual levels, the empowerment of women through the promotion of substantive and transformative equality serves to unpack gendered power relations and move toward gender equality. This approach has been adopted across multiple UN entities and has been incorporated into the body of substantive norms and jurisprudence through regional treaties – the Istanbul Convention outlines empowerment as one of its substantive goals and as a frame for interpreting the treaty. This reflects the framing of the Beijing Platform for Action, with former Special Rapporteur Ertürk, describing empowerment as ‘the basic principle inspiring the Platform’<sup>487</sup>. Likewise, UN Women identify empowerment in their Framework to End Violence against Women and Girls, 10-Point Checklist. The UNIFEM Strategy, ‘A Life Free of Violence: Unleashing the Power of Women’s Empowerment and Gender Equality’, calls for empowerment as a guiding principle in anti-violence against women efforts. The strategy explains that ‘women need equal access to resources and opportunities so that they can control their choices and destinies—including avoidance of and escape from abusive relationships and situations.’<sup>488</sup> In 2011, then Executive Director of UN Women, and current UN High Commissioner for Human Rights, Michelle Bachelet called for empowerment as a primary prevention strategy, including:

[e]nsuring that girls complete secondary education, delaying the age of marriage, furthering women’s reproductive health and rights, ensuring women’s

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<sup>486</sup> Yakin Ertürk and Bandana Purkayastha, “Linking research, policy and action: A look at the work of the special rapporteur on violence against women,” *Current Sociology*, 60(2), (2012): 144.

<sup>487</sup> United Nations, *The due diligence standard as a tool for the elimination of violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Yakin Ertürk*, E/CN.4/2006/61, (20 January 2006), paragraph 78.

<sup>488</sup> “Guiding Principles,” UN Women, 4, accessed 1 August 2014, [http://www.unwomen.org/~media/Headquarters/Media/Publications/UNIFEM/EVAWkit\\_03\\_UNIFEMstrategy\\_en.pdf](http://www.unwomen.org/~media/Headquarters/Media/Publications/UNIFEM/EVAWkit_03_UNIFEMstrategy_en.pdf)

economic autonomy and security, and increasing women's participation in decision-making positions and political power, in order to influence policies and institutional practices that perpetuate impunity and tolerance for violence against women.<sup>489</sup>

In this way empowerment has the double impact of improving gender equality at a systemic level – addressing the root causes of violence – whilst also enabling individual women to evade violence against women. In a statement after the 17<sup>th</sup> session of the UN Human Rights Council, urging governments to promote and support women's empowerment, the former Special Rapporteur explained that when women are empowered they 'understand that they are not destined to subordination and violence; they resist oppression; and they develop their capabilities as autonomous beings and they increasingly question the terms of their existence in both public and private spheres.'<sup>490</sup> This understanding was recently displayed by the General Assembly in the 2015 agreement of the Sustainable Development Goals (as part of the 2030 Agenda for Sustainable Development), with Goal Five being: 'Achieve gender equality and empower all women and girls'<sup>491</sup>.

Empowerment is essential to prevention – and its articulation marks a significant development and notable progress within the international human rights law approach to violence against women. However, it sits most vulnerably within normative developments over the past 20 years. Whilst a seemingly intuitive response to gender inequality, even identifying empowerment as not only relevant but critical to eliminating violence against women has been a hard fought battle. Although it is now established in regional treaty law, with the Istanbul Convention calling for state parties to 'take the necessary measures to promote programmes and activities for the empowerment of women' under its articles on prevention<sup>492</sup>, empowerment

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<sup>489</sup> "Prevention is key to ending violence against women," News report on OHCHR 5 July, 2011, accessed 29 June 2015, <http://www.ohchr.org/EN/NewsEvents/Pages/PreventionViolenceAgainstWomen.aspx>.

<sup>490</sup> "Prevention is key to ending violence against women," News report on OHCHR 5 July, 2011, accessed 29 June 2015, <http://www.ohchr.org/EN/NewsEvents/Pages/PreventionViolenceAgainstWomen.aspx>.

<sup>491</sup> General Assembly resolution 70/1, *Transforming our World: The 2030 Agenda for Sustainable Development*, A/RES/70/1, (21 October 2015), available at <http://undocs.org/A/RES/70/1>

<sup>492</sup> The Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11 May 2011, CETS No.210. Article 12(6). The convention also calls for the empowerment of women in Articles Article 1(b), 6, and 18(3).

represents one of the most significant gaps between the normative and legal framework at the international level. Further efforts to conceptualise and realise state responsibility for primary prevention relies on embedding women's empowerment and agency as essential to eliminating violence against women.

**Case study: Problematising theorised practice and the engagement of men and boys in primary prevention.<sup>493</sup>**

The conceptualisations of primary prevention, and state responsibility for prevention, rely on feminist readings of violence against women. The principles of this reading, as outlined above, call for a focus on gender equality, with gender understood as political and public in nature, and equality conceptualised as substantive and transformative. A rights-based approach rejects victimisation-oriented narratives of violence against women and focuses on empowerment and agency. This reading requires the foregrounding of the lived experience of women – as differently and commonly accounting for gender, gender inequality and experiences of violence; and centres marginalised voices in a bid to narrate more wholly the impact of oppression(s). In this way, the leadership of women inheres in primary prevention at paradigmatic, policy and praxis levels. The primacy of women's leadership – particularly in the delivery of protective and preventative services – is well established in the human rights approach to violence against women, and is outlined in the UN Handbook for Legislation on Violence Against Women<sup>494</sup>. This understanding of primary prevention, whilst broadly articulated, is fragile, and vulnerable to erosion. This is particularly evident in the shift to engage men and boys in primary prevention strategies – an agenda that has dominated at the international level over the past five to ten years. The message was (deceptively) simple, 'men listen to men', so the most effective way to counter

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<sup>493</sup> This case study is taken from a contributing report delivered to the UN Special Rapporteur on Violence Against Women for her 2014 report to the Human Right Council considering the continuing and emerging challenges facing efforts at the international level to eliminate violence against women. The contributing report was written by Helen Griffiths and Dr. Claire Malcolm, and considered case studies of men's groups in the UK, regional and international context. United Nations, *Violence against women: Twenty years of developments to combat violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Rashida Manjoo*, A/HRC/26/38 (May 28, 2014), paragraphs 70 – 75.

<sup>494</sup> United Nations Division for the Advancement of Women, *Handbook for Legislation on Violence Against Women*, (New York: United Nations, 2010), Section 3.6.I, available at <https://www.un.org/womenwatch/daw/vaw/v-handbook.htm>

violence against women must be to engage those men who do not abuse women, and are sympathetic to the feminist cause, to challenge and change the behaviours of those whose own negative experiences of masculinity have caused them to resort to violence. This argument secured enormous and rapid resonance with donors and some international agencies and, within only a few short years, had moved from the periphery of discussions concerning violence against women prevention, to the centre of debate. Through the 'UNITE to end Violence Against Women' programme, the influence of the 'Men and boys agenda' has now even extended to an advisory role to the UN Secretary General. However, an array of limitations impact upon the proposition that men can, and should, take a leading role in eliminating violence against women; not the least of which is its contradictory relationship with the existing international human rights law approach to violence against women.

Whilst the engagement of men and boys in challenging gender norms and gender inequality, has long been called for by women's groups leading anti-violence work, this has always been articulated in a manner that stresses women's leadership, collaboration and partnership, and the underpinning of feminist theory. From a pragmatic point of view, the argument goes: if men constitute the vast majority of the abusers and perpetrators of violence against women, then engaging them in discussions about how to overcome patterns of violence is an obvious step towards eliminating violence against women. Similarly, if patriarchy presents a barrier to gender equality, engaging men in challenging their own attitudes towards, and investment in, patriarchy is essential. Whilst this relationship is premised as partnership, in practice, the engagement of men and boys in primary prevention has led to a burgeoning of standalone male-led initiatives that lack women's leadership, partnership, and accountability, and present prevention strategies that are not (consistently) underpinned by feminist theory, or characterised by feminist methods, and, consequently, represent an erosion of hard-fought feminist gains at the paradigmatic, policy and praxis levels.

Whilst the network of Men and Boys' organisations (Men and Boys' Network, henceforth) differs widely from the expressly anti-feminist Men's Rights Movement, or Men's Rights Activism, in both its understanding of gender and its relationship to the transnational women's movement, this seemingly intuitive approach to primary

prevention has still raised pressing questions about how men and boys are to be involved, and has simultaneously highlighted the importance of theorised practice and the vulnerability of feminist theory within the discourse. Below I will explore the development of the Men and Boys' Network and some of the limitations and challenges it presents to the feminist conceptualisation of primary prevention outlined above.

Over the past decade (and in particular since the 2009 'Global Symposium on Engaging Men and Boys on Achieving Gender Equality') there has been a move away from the understanding of 'gender', as defined by women's groups, to one which is wholly less politicised in nature. Specifically, and as outlined above, gender-neutrality has read domestic violence as affecting men and women in the same way, stripping domestic violence against women of its gendered and political nature, and operating as a gateway for an expanded (and eroded) conceptualisation of violence against women within international human rights law. Alongside a rejection of politicised notions of gender, some groups have outright attacked the gendered analysis of domestic violence, claiming it to be outdated. Mark Brooks OBE, Chairman of ManKind Initiative<sup>495</sup>, a leading UK charity supporting male victims of domestic abuse, called for organisations to 'reject the gendered analysis that so many in the domestic violence establishment still pursue, that the primary focus should be female victims. Each victim should be seen as an individual and helped accordingly.'<sup>496</sup> As a consequence of this at the policy and praxis level, men's organisations have grown to fill the 'gap' left by women's organisations. As Shamim Meer explains:

Gender, stripped of ideas of male privilege and female subordination, came to mean that women and men suffered equally the costs of the existing gender order. Women's organisations were increasingly asked 'if you are working on gender, then where are the men?' and they were increasingly pressurized (particularly by donors) to include men. On the heels of this pressure, a new

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<sup>495</sup> ManKind are a leading UK charity supporting male victims of domestic abuse. Whilst they reject gender specific approaches to, and gendered analysis of, domestic violence, they are part of the UK Men and Boys Coalition which is 'committed to taking action on the gender-specific issues that affect men and boys.' "About," Men and Boys Coalition, accessed February 12, 2019, <http://www.menandboyscoalition.org.uk/about/>

<sup>496</sup> Denis Campbell, "More than 40% of domestic violence victims are male, report reveals," *The Guardian*, September 5, 2010, <https://www.theguardian.com/society/2010/sep/05/men-victims-domestic-violence>

[...] actor came into focus – men's organisations. The existence of already weakened women's organisations was now further threatened, and feminist attempts at movement building faced additional challenges.<sup>497</sup>

In essence, if the experience of violence is not considered to be gender-specific, a gendered response to it is no longer justifiable and there is no obvious reason that women should take a leading role in exploring and defining responses to the issue. As such men's organisations have grown in response to the widening of discursive space surrounding gender-based violence. Conceptually distinct from 'domestic violence against men', but practically reinforced by the paradigmatic stretching it has produced, the Men and Boys' Network has also formed and grown around the engagement of men and boys in the primary prevention of violence against women. The emergence and expansion of the Men and Boys' Network has, arguably, paradoxically relied on both the gender-neutral reading of domestic violence (men are equally impacted by gender, and domestic violence is experienced by men as it is by women) and the gendered, and gender specific, reading of violence against women (violence against women is rooted in unequal power relations between men and women, and so men should be involved in renegotiating gendered power and challenging patriarchy). In this way, the development of the Men and Boys' Network mandate has mirrored the schism happening at the regional and national levels, and we can see directly the consequences at the advocacy and practitioner level of the renegotiation and problematisation of gender-based violence offered by the Istanbul convention, and its national legislative counterparts. Whilst the Men and Boys' Network has developed around this hybrid or schismatic conceptualisation – with groups regularly outlining both purposes in their mission statements<sup>498</sup> – little attention over the past decade has been given to the conceptual dissonance at the heart of the Men and Boys' Network, or the knock-on effects their contradictory mandate has on the work delivered at the

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<sup>497</sup> Shamim Meer, *Struggles for Gender Equality: Reflections on the place of men and men's organisations*, (South Africa: Open Society Initiative for Southern Africa January 2012), 4, available at [http://www.osisa.org/sites/default/files/sup\\_files/open\\_debate\\_2\\_-\\_reflections\\_on\\_the\\_place\\_of\\_men\\_and\\_mens\\_organisations\\_in\\_the\\_struggle\\_for\\_gender\\_equality.pdf](http://www.osisa.org/sites/default/files/sup_files/open_debate_2_-_reflections_on_the_place_of_men_and_mens_organisations_in_the_struggle_for_gender_equality.pdf)

<sup>498</sup> This dual purpose is outlined in the Rio Declaration, which became the framing document for over 400 leading organizations within the Men and Boys' Network, such as Promundo, Sonke, White Ribbon Campaign. The Rio declaration came out of the 2009 Global Symposium on Engaging Men and Boys on Achieving Gender Equality: "The Rio de Janeiro MenEngage Declaration Global Symposium on Engaging Men and Boys on Achieving Gender Equality, Rio de Janeiro March 29 – April 3, 2009," MenEngage, accessed April 9 2018, <http://menengage.org/rio-declaration/>



policy and praxis level. However, there are a range of reasons that this mandate is flawed and, arguably damaging, at the conceptual and praxis level. These include:

- a) The reaffirmation of patriarchal norms of men as 'protectors' (and, by extension, women as 'victims');
- b) The reinstatement of the family as the principal referent for analysis;
- c) The move from inherent responsibility to 'socially constructed reinforcement'<sup>499</sup> as a basis for engagement;
- d) The depoliticisation of violence against women and the reinforcement of the public/private dichotomy;
- e) The impact of conceptual confusion stemming from men and masculinities scholarship, and the undermining of discursive space created by feminist accounts of violence against women; and,
- f) The promotion of male leadership against recommendations of partnership with, and accountability to, women's organisations.

*a) The reaffirmation of patriarchal norms of men as 'protectors' (and, by extension, women as 'victims')*

One limitation impacting upon the agenda to engage men and boys in primary prevention of violence against women relates to concerns about the consolidation of patriarchal norms, which cast women as victims, in need of 'protection'. Such protection can only be provided by male 'rescuers'. Feminist international relations theorist Iris Marion Young has argued extensively that the masculinist logic of protection denies the agency and autonomy of women and serves to maintain gender inequality: 'In this patriarchal logic, the role of the masculine protector puts those protected, paradigmatically women and children, in a subordinate position of dependence and obedience'<sup>500</sup>. This reinforces notions of women's inherent or innate vulnerability or victimhood. This approach also marks a departure from the international human rights approach – which the Men and Boys' Network argue underpins their mandate. The international human rights law approach prompted a

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<sup>499</sup> Claire V. Crooks, George R. Goodall, Ray Hughes, Peter G. Jaffe, Linda L. Baker, "Engaging Men and Boys in Preventing Violence Against Women: Applying a Cognitive – Behavioral Model," *Violence Against Women*, (13), (2007): 232.

<sup>500</sup> Iris Marion Young, "The Logic of Masculinist Protection: Reflections on the Current Security State," *Signs: Journal of Women in Culture and Society*, 29(1), (2003): 2.

moved away from victimisation-oriented readings of violence against women, to an empowerment and rights-based understanding. However, the Men and Boys' Network promote strategies that reassert the rescuer narrative and the 'perpetual victim'<sup>501</sup> trope – a narrative that disempowers women and perpetuates norms that fuel violence against women. As Chimamanda Ngozi Adichie suggests, primary prevention strategies should '[t]each them [men and boys] about the full autonomy of women [...] and that it is also not their job to protect women *because they are women*.'<sup>502</sup>

In the case of violence against women this logic appears to be even more self-defeating because it empowers the group to which abusers belong, to offer 'protection' from abuse; something which could only be justifiable if the premise that 'the vast majority of men are non-violent' is accepted. Sadly, the statistics do not bear out such an assumption.<sup>503</sup> As Bob Pease recounts: '[w]e are often reminded that most men are not physically violent to their partners. However, most men are likely to have engaged in psychological or verbal abuse at some stage in their lives.'<sup>504</sup> Men's groups have a tendency to argue both that the majority of men are not implicated in abuse, and that all men suffer the consequences of being socialised into dominant perceptions of hypermasculinity, which account in part for the recourse to violence. It seems illogical for such groups to posit that the two thirds of men who are not guilty of

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<sup>501</sup> Ratna Kapur, "The Tragedy of Victimization Rhetoric: Resurrecting the 'Native' Subject in International/Post-Colonial Feminist Legal Politics," *Harvard Human Rights Journal*, 15, (2002): 1—38

<sup>502</sup> Chimamanda Ngozi Adichie, *We Should All Be Feminists*, (New York: Anchor Books, 2015).

<sup>503</sup> 'According to a 2013 global review of available data, 35 per cent of women worldwide have experienced either physical and/or sexual intimate partner violence or non-partner sexual violence. However, some national violence studies show that up to 70 per cent of women have experienced physical and/or sexual violence in their lifetime from an intimate partner': "UN Facts and Figures: Ending Violence against Women," UN Women, accessed 23 June 2014, <http://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures>; 'From 2010 to 2013, over 10,000 men in six countries across Asia and the Pacific were interviewed using the UN Multi-country Study on Men and Violence household survey on men's perpetration and experiences of violence, as well as men's other life experiences. The countries included were Bangladesh, Cambodia, China, Indonesia, Sri Lanka and Papua New Guinea. The study was a collaborative effort involving partners from academia, research institutes, civil society, the United Nations family and governments around the globe. The regional analysis found that overall nearly half of those men interviewed reported using physical and/or sexual violence against a female partner, ranging from 26 percent to 80 percent across the sites. Nearly a quarter of men interviewed reported perpetrating rape against a woman or girl, ranging from 10 percent to 62 percent across the sites.': "The UN Multi-Country Study On Men And Violence In Asia And The Pacific," Partners4Prevention, accessed 9 June 2015, <http://www.partners4prevention.org/about-prevention/research/men-and-violence-study>; See also: E. Fulu, X. Warner, S. Miedema, R. Jewkes, T. Roselli, and J. Lang, *Why Do Some Men Use Violence Against Women and How Can We Prevent It? Quantitative Findings from the United Nations Multi-country Study on Men and Violence in Asia and the Pacific*. (Bangkok: UNDP, UNFPA, UN Women and UNV, 2013).

<sup>504</sup> Pease, "Engaging men in men's violence prevention: exploring the tensions, dilemmas and possibilities," 4.

abuse might educate the one third who are, in how best to 'protect' women, whilst simultaneously maintaining that societal structures and psychological conditioning compromise men's ability to see beyond patriarchal constraints. Perhaps this accounts for the tendency of men's groups to associate the elimination of violence against women with the integrity of the family unit, a move that promotes regressive readings of the personhood of women. As feminist international legal scholars have persuasively argued, the discourse continually characterises women 'chiefly as victims, particularly mothers, or potential mothers, and accordingly in need of protection'<sup>505</sup>. The Men and Boys' Network perpetuate this disempowering and dangerous characterisation. As former Special Rapporteur Ertürk warns, 'interventions, whether supported by the state, multilateral or bilateral donors, must avoid modalities and conditionality's that would disempower women'<sup>506</sup>; and where the focus is on engaging men and boys 'efforts must not lead to a deviation from the commitment to support women's empowerment and the diversion of resources from women's programmes.'<sup>507</sup>

*b) The reinstatement of the family as the principal referent for analysis*

This speaks to the more general issue of women, who have been subjected to violence, being collapsed into the conceptual category of the family, rather than having their needs, rights and experiences assessed on their own terms. One of the strategies associated with the engagement of men and boys is to appeal to the idea that women deserve respect as mothers, sisters, wives, etc. Emphasising personal relationships is said to make it easier for men and boys to understand the consequences of violence against women; making them 'more able to feel the issue in their hearts and not just intellectualize it in their heads.'<sup>508</sup> This is also seen as an effective strategy in overtly patriarchal societies in which calls to consider women as rights-bearing individuals (irrespective of their marital status) are considered too radical to attract support, even amongst women themselves. The logic and narratives of the Men and Boys' Network informs a wider movement of men, looking to engage with violence against women.

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<sup>505</sup> Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, (Manchester: Manchester University Press, 2000), 48.

<sup>506</sup> Yakin Ertürk, "The Due Diligence Standard: What Does It Entail for Women's Rights?" *Due Diligence and Its Application to Protect Women from Violence*, edited by Carin Benninger-Budel, (Leiden, The Netherlands: Martinus Nijhoff Publishers, 2008), 39.

<sup>507</sup> Ertürk, "The Due Diligence Standard: What Does It Entail for Women's Rights?" 39 – 41.

<sup>508</sup> Pease, "Engaging men in men's violence prevention: exploring the tensions, dilemmas and possibilities," 4.

This can be seen in the rhetoric of political leaders who (unsurprisingly) look to and listen more attentively to the Men and Boys' Network than the transnational women's movement – even on issues that affect women. At the launch of Makkal Needhi Maiam (People's Centre for Justice), in February 2018, founder Kamal Haasan, exemplifying this rationale, gave the following characterisation of primary prevention and violence against women. Priyanka Thirumurthy recounts her exchange with Haasan at the launch event:

"I ask you with a lot of concern: What is the solution to the atrocities against women?"

Kamal Haasan did not hesitate for a moment before he said, "I am the solution."

By 'I', he probably was speaking on behalf of men, who are often the perpetrators of gender-based violence. The newbie politician did well to recognize that the solution to such violence lies not with the victims but with those who assault them. However, he followed this up with a problematic statement,

"It is not enough if you just talk about love and bravery. You have to think about your elder sister, your mother. You have to think about the younger sister you have to get married. You have to think about your daughter. If you think about all this and your heart melts, there will be no crimes against women[...]"

With this statement, Kamal Haasan unfortunately showed that his understanding of gender-based violence is deeply flawed [...] From rightly identifying that the problem was with men, Kamal went to elevating himself (and other men) to the position of women's 'saviours'.<sup>509</sup>

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<sup>509</sup> Priyanka Thirumurthy, "'Think of women as moms and sisters': Why Kamal's view on gender violence is troubling," *The News Minute*, 24 February, 2018, <https://www.thenewsminute.com/article/think-women-moms-and-sisters-why-kamals-view-gender-violence-troubling-76964>

At the launch of his 'Network of Men Leaders' on the 10th anniversary of the International Day for the Elimination of Violence against Women, the UN Secretary General similarly framed the engagement of men and boys on the basis of their leadership within families and communities, and unfortunately characterised the importance of women's rights based on his own relationship to women.

My commitment to this issue stems not just from my position as UN Secretary-General, but also as a son, husband, father and grandfather [...] Men have a crucial role to play in ending such violence – as fathers, friends, decision makers, and community and opinion leaders.<sup>510</sup>

The implicit suggestion that a response to violence against women should take the family unit as its primary referent of analysis is one which distorts the issue and renders regard for the rights of women contingent on their status as wives or mothers. This seemingly neutral approach supports the position of men by reinforcing normative ideals of the family that are often unparalleled by the realities of life. As the former Special Rapporteur, Radhika Coomaraswamy, has described, whilst the family may be the 'natural unit of society', for many women it is 'a social institution where labor is exploited, where male sexual power is violently expressed and where a certain type of socialization disempowers women.'<sup>511</sup> Calls to end violence against women that rely on conceptualisations of women refracted through the lens of the nuclear family assert heteropatriarchal values that perpetuate gender norms and gender inequality, rather than challenge them. This approach also furthers the normative primacy of the family unit and notions of privacy that accompany it, strengthening the public/private dichotomy. In this way, primary prevention strategies that define women as wives, mother and sisters, rely on conceptualisation of women that centre the lives and social location of men. To address violence against women without problematising its relationship to familial and patriarchal power within the heteronuclear family unity, marks a step back and a step away from the human rights approach which recognises

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<sup>510</sup> "Ban launches new Network of Men Leaders to combat violence against women," UN News, accessed 11 March, 2016, <https://news.un.org/en/story/2009/11/322382>

<sup>511</sup> United Nations, *Preliminary Report: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy*, E/CN.4/1995/42, (November 22, 1994), 11 paragraph 54, available at <http://undocs.org/E/CN.4/1995/42>.

the rights of woman as inherent to her humanity, rather than dependent on her relative value or utility within the family or community.

c) *The move from inherent responsibility to 'socially constructed reinforcement' as a basis for engagement*

As Bob Pease suggests, 'many of the approaches to working with men on violence prevention stress the importance of decreasing men's defensiveness by focusing on the positive benefits for men of their greater involvement in this work.'<sup>512</sup> Michael Flood has argued that 'strategies of blame and attack are ineffective'<sup>513</sup> in engaging men and boys, and instead organisations should motivate men by appealing to what they *have to offer* primary prevention and what they *have to gain* by being involved. As James Lang suggests, 'men respond much better when you begin with the positive ... rather than approaching them with deficit models.'<sup>514</sup> As such, there is a move away from responsibility and accountability as the basis for engaging men and boys, towards strategies that promote 'win-win' accounts of gender equality<sup>515</sup> and engagement as a positive experience<sup>516</sup>: '[m]en and boys need to be reinforced for involvement, but they also need the expectation that being involved will lead to a desired outcome.'<sup>517</sup> But, as Bob Pease asks, '[i]f it is not a win-win situation for men, will they play a role in violence prevention against women?'<sup>518</sup>

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<sup>512</sup> Pease, "Engaging men in men's violence prevention: exploring the tensions, dilemmas and possibilities," 12.

<sup>513</sup> Michael Flood, "Changing Men: Best practice in sexual violence education," *Violence Against Women*, 18, (2005/2006): 32.

<sup>514</sup> James Lang, *Gender is everyone's business: Programming with men to achieve gender equality*, Workshop report, 10–12 June, (Oxford: Oxfam, 2002), 17.

<sup>515</sup> James Lang, "Men, masculinities and violence," paper presented at the international Conference on eradicating Violence Against Women and Girls – strengthening Human Rights, Berlin, Germany, 2–4 December, 2002; Anne Coles, "Men, women and organisational culture: Perspectives from donors," *In Men's involvement in gender and development policy and practice: Beyond rhetoric*, edited by Caroline Sweetman, (Oxford: Oxfam, 2001); Sandy Ruxton, ed., *Gender equality and men: Learning from practice*, (Oxford: Oxfam, 2004); Michael Flood, "Harmful traditional and cultural practices related to violence against women: successful strategies to eliminate such practices – Working with men" paper presented at the United Nations Economic and Social Commission for Asia and the Pacific Expert Group Meeting – Strategies for Implementing the Recommendations from the Secretary-General's Study on Violence Against Women with Particular Emphasis on the Role of National Machineries, Bangkok, Thailand, 25-27 April, 2007, available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.581.3370&rep=rep1&type=pdf>

<sup>516</sup> Crooks, et al., "Engaging Men and Boys in Preventing Violence Against Women: Applying a Cognitive –Behavioral Model," 232.

<sup>517</sup> Crooks, et al., "Engaging Men and Boys in Preventing Violence Against Women: Applying a Cognitive –Behavioral Model," 232.

<sup>518</sup> Pease, "Engaging men in men's violence prevention: exploring the tensions, dilemmas and possibilities," 7.

Win-win strategies vary from crude promotions of the economic benefits of reducing violence against women, to more complex accounts of masculinities, where leading activists, such as Flood, Pease, Connell, and Kaufmann, argue that the 'source of men's privilege and power is also a source of emotional alienation'<sup>519</sup>, and so gender equality is in men's 'emancipatory interests'<sup>520</sup>. Kaufmann suggests that men's experience of power is contradictory<sup>521</sup> and leaves men feeling powerless. He claims men have more to gain than to lose by reckoning with patriarchy and their investment in it:

Yes it demands that men let go of their unfair privileges, but this is a small price to pay for the promise of more trusting, honest, pleasurable and fair relations with women and children.<sup>522</sup>

Whilst these arguments are pragmatic in their manner of appeal, and are founded on robust scholarship concerning the harm to men of masculinities; at a paradigmatic and praxis level they also make contingent the rights of women on the basis that men will find gender equality beneficial and their lives more 'pleasurable'. Further to the commodification of women's rights, win-win scenarios can also open the door to backlash against women's rights:

When we talk about men's interests in terms of the disadvantages suffered by men under patriarchy, we are in danger of lending support to men's rights advocates, who aim to refute feminist claims of men's privilege.<sup>523</sup>

Primary prevention strategies that commoditise women's rights are not centred on the experience of women but on the experience of men.

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<sup>519</sup> Pease, "Engaging men in men's violence prevention: exploring the tensions, dilemmas and possibilities," 7.

<sup>520</sup> Bob Pease, "Reconstructing men's interests," *Men and Masculinities*, 5(2), (2002): 165–77.

<sup>521</sup> Michael Kaufman, "Men, Feminism, and Men's Contradictory Experiences of Power," *In Men and Power*, edited by Joseph A. Kuypers, (Halifax: Fernwood Books, 1999).

<sup>522</sup> Michael Flood, "Men's roles in achieving gender justice," paper presented at the Inaugural National Women's Conference: Australian Women Speak, Commonwealth Office of the status of Women, Canberra, 29 August, 2001, 5, available at <http://xyonline.net/content/mens-roles-achieving-gender-justice>.

<sup>523</sup> Pease, "Engaging men in men's violence prevention: exploring the tensions, dilemmas and possibilities," 10.

The emotional and normative commoditisation of women is mirrored by the economic commoditisation of women, where primary prevention strategies stress the negative financial impact of violence against women on society (whether outlining the direct cost or the cost due to the loss of workforce<sup>524</sup>) as an incentive towards elimination. In his 2012 article for The Guardian, 'Violence against women is an issue for men too', Michael Kaufman, founder of the White Ribbon Movement, begins his argument for engaging men in primary prevention by appealing to this financial motivation:

For too long women have stood alone. When it comes to violence against women, too many of us still think it's "just" a women's issue. In particular, it is about time MPs took this seriously. *Here's why.*

Sexual and physical violence at the hands of a man affects a staggering 45% of women in England and Wales sometime in their lives. That's one-quarter of British voters. Voters. People who give our politicians their jobs.

Men's violence against women hits people's pockets, too: the direct costs to taxpayers of medical care, police responding to violence, courts, prisons, social workers, and refuges is £5.8bn per year. (The total cost to the economy of violence against women and girls including lost work time is estimated at £40bn per year.) Taxpayers can probably think of ways they'd rather spend that money.<sup>525</sup>

Primary prevention strategies that commoditise the rights of women as relationally/materially improving the lives of men, reassert notions of the patriarchal family unit and economic man, that have been problematised and deemed as root causes of violence against women. When women are conceptualised as part of a

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<sup>524</sup> At the launch of Voices Against Violence, a partnership between the US State Department and Promundo, John Sullivan (Deputy Secretary of State) appealed to the economic benefit of eliminating violence, describing violence against women as causing 'a chain reaction, further contributing to the cycles of poverty and instability we witness in so many countries, impacting not only individuals, but entire societies. Whether it occurs inside or outside of the workplace, violence against women can limit women's ability to fully participate in the economy.' "Remarks at the Engaging Men and Boys in Preventing Violence Against Women and Children Event, 4<sup>th</sup> December, 2017," US Department of State, accessed on 3 February 2019, <https://www.state.gov/s/d/17/276221.htm>

<sup>525</sup> Michael Kaufman, "Violence against women is an issue for men too," 26 March 2012, *The Guardian*, <https://www.theguardian.com/commentisfree/2012/mar/26/domestic-violence-against-women>



consequentialist calculation, their right to be free from violence is reframed instead as a strategic economic priority or win-win scenario, rather than an inalienable human right. This reading may be more reasonable, palatable, or even more attractive to men and boys, but it abandons normative arguments for women to be afforded respect by dint of their personhood alone. Whilst blame may be ineffective, strategies that do not frame men's engagement in primary prevention as rooted in responsibility and accountability, fail to centre the rights of women. As well as failing to recognise women's rights as the primary motivator for engaging men in prevention, the lack of responsibility – in favour of 'socially construct[ing] engagement as a positive experience'<sup>526</sup> – also serves to aid impunity. Whilst strategies aimed at gender equality do not need to 'attack men', it must be recognised that 'holding someone responsible for their behaviour, which is the literal definition of blame, is an important part of any strategy that affirms moral standards to influence people's behaviour.'<sup>527</sup> Whilst men call for 'ownership of the problem'<sup>528</sup>, this must be understood as ownership – and responsibility – for the causes of the problem, rather than ownership of the strategies to prevent.

The commoditisation of women's rights in relation to primary prevention, relates to the dilemma of how to engage men. Whilst there are important questions about how to successfully engage men in primary prevention this must not be simplified down to pragmatic solutions that erode paradigmatic gains. Strategies that promote win-win, or merely male gains, as a reason for eliminating violence against women act to dehumanise women, and cut against the individual and collectively-constituted identity of women – a political and normative identity that roots and makes possible the human rights approach to violence against women.

*d) The depoliticisation of violence against women and the reinforcement of the public/private dichotomy*

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<sup>526</sup> Crooks, et al., "Engaging Men and Boys in Preventing Violence Against Women: Applying a Cognitive –Behavioral Model," 232.

<sup>527</sup> Pease, "Engaging men in men's violence prevention: exploring the tensions, dilemmas and possibilities," 7.

<sup>528</sup> Michael Kaufman, "Building a Movement of Men Working to end Violence Against Women," *Development*, 44(3), (2001): 111; Todd H. Minerson, H. Carolo, T. Dinner, C Jones, *Issue Brief: Engaging Men and Boys to Reduce and Prevent Gender-Based Violence*, (Canada: Status of Women, 2011).

An associated consequence of this denial of female agency and politicised identity is the insidious reinforcement of the public/private dichotomy. Where women are viewed through the lens of the family, their experience of violence once again becomes a matter of private concern and the role of masculine privilege in building and sustaining unequal power relations between men and women is overlooked. The response becomes a pragmatic one based on what Meer refers to as 'women's practical gender needs'<sup>529</sup> (in this case, the cessation of individual violent acts), rather than 'women's strategic gender needs'<sup>530</sup> which require a transformative approach to overturn gendered power relations and challenge the underlying assumption that women, in general, are suitable targets for abuse.

Similarly, the perspective advanced by the Men and Boys' Network overly individualises men's experience of, and participation in, patriarchy and violence against women, by focusing on 'transforming gender relations and men's beliefs and attitudes as individuals within families'<sup>531</sup> as fathers and husbands etc. Primary prevention strategies that overly individualise men and individuate instances of violence against women, depoliticise gender and take inadequate account of violence against women as a systemic and societal issue. Troublingly, this seems to be a strategic reframing, not just a by-product of a pragmatic attempt at engaging men. Pease suggests that programmes commonly 'focus on developing boys' self-esteem and communication skills, rather than on feminist understanding of masculinity, power and privileged status of boys in gender relations. Thus the cause of men's violence is located in the developmental and psychological aspects of the individual perpetrator.'<sup>532</sup> Whilst Pease suggests 'concerns about the tendency of these programs to individualise and pathologise men's violence [...] have faded from public debates [...] in recent years', he also argues 'that these concerns have not been fully addressed by many of these programs.'<sup>533</sup> In particular there is a lack of structural analysis and consideration of the systems and institutions that individual men operate within, dominate, and benefit from. As Pease concludes:

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<sup>529</sup> Meer, "Struggles for Gender Equality: Reflections on the place of men and men's organisations," 13.

<sup>530</sup> Meer, "Struggles for Gender Equality: Reflections on the place of men and men's organisations," 13.

<sup>531</sup> Pease, "Engaging men in men's violence prevention: exploring the tensions, dilemmas and possibilities," 4.

<sup>532</sup> Pease, "Engaging men in men's violence prevention: exploring the tensions, dilemmas and possibilities," 3.

<sup>533</sup> Pease, "Engaging men in men's violence prevention: exploring the tensions, dilemmas and possibilities," 2.

preventing men's violence against women has to move beyond changing individuals to transforming the system that reproduces and sustains violence... challenging patriarchy man by man is neither a practical project nor a necessary precondition for gender equality. What we need are strategies for structural interventions in unequal gender relations that address the policy and cultural context of men's violence...<sup>534</sup>

The research on men and masculinities, which grounds the work of the Men and Boys' Network, largely mirrors feminist understanding about the toxic effects of hypermasculinity, and the oppressive nature of patriarchy. However, masculinities scholarship is notably less political than its feminist counterpart, and more focused on the sociopsychological effects on the individual.

[F]ew pro-feminist men's organisations over the past decade seem to have gone beyond consciousness-raising and a focus on individual men. Larger questions about power and men's relationships were missing from much of the work done with men, and little was done to address gender regimes of power and oppression. The conservative politics of much of the masculinity discourse hid from view the structural and institutional power and injustice behind the emphasis on men's personal gender trouble.<sup>535</sup>

In a bid to conceptualise men alongside women as 'victims' of patriarchy – or toxic masculinities, as masculinities scholars prefer to speak of – there seemed to follow a need to individualise subjects to include them in the discourse.<sup>536</sup> To bypass the conversation about 'women' as a collective political group, the masculinities literature, and the programmes based on it, spoke instead of *individuals*; not women, not men, but individuals. This is evident in the framing of victims of violence, as per Mark Brooks' statement above (abandoning gender-analysis in favour of a gender-neutral and individualised approach), and in the framing of preventing violence against women. Karin Attia has questioned the lack of gender-analysis and feminist understanding within the Men and Boys' Network in this regard. In particular, Attia raised concerns

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<sup>534</sup> Pease, "Engaging men in men's violence prevention: exploring the tensions, dilemmas and possibilities," 14.

<sup>535</sup> Meer, "Struggles for Gender Equality: Reflections on the place of men and men's organisations," 21.

<sup>536</sup> Meer, "Struggles for Gender Equality: Reflections on the place of men and men's organisations," 23.

about the understanding shown and language used around gender and primary prevention by the Men and Boys' Network at the 60th session of the UN Commission on the Status of Women, where engaging men and boys was high on the agenda. At the MenEngage event, "It takes two to tango", a discussion about masculinities, gender norms and violence prevention, Attia questioned the panel, asking 'if it is important to involve women in these efforts to work with men?'<sup>537</sup> Attia recounts: 'responses were noncommittal: "sometimes yes, sometimes no", or "it's the individual and what they are capable of rather than just the sex."' <sup>538</sup> This narrative was evident in other comments at the CSW60, such as the panel on the 'New Paradigm of Gender Equality Post- 2015: Girls and Boys Go Together'. As Attia recounts: 'a civil society presenter stated: "we need to stop saying feminist and start saying humanist. We don't want to be against the world, we are all humans."' Surprisingly, this statement was met with a round of applause, suggesting that misperceptions about feminism are widely shared.'<sup>539</sup>

Even where gender is considered beyond the more narrow confines of biological sex, it lacks an analysis of power. The HeForShe movement describes gender as 'the socially constructed roles, behaviours, activities, and attributes that a given society considers appropriate for men and women.'<sup>540</sup> This definition comes from Programme HMD, a Promundo Global project 'engaging young people to achieve gender equality', and operating in 25 countries.<sup>541</sup> Whilst engaging, to some degree, a normative characterisation of gender, it fails to give a feminist or political account of gender. Throughout Promundo's theoretical framework and glossary of key terms, gender is outlined as distinct from sex, but without any account for hierarchies of masculinities and femininities, and the outworking of 'socially constructed roles' on the position of men and women. The approach engages with gender norms as being as limiting and damaging for men as they are for women. As Emily Esplen and Alan Greig suggest, as the Men and Boys' Network fails to go 'beyond the personal', the problem of

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<sup>537</sup> Karin Attia, "UN CSW: engaging men and boys in ending violence against women as allies not protectors," *Open Democracy*, March 31, 2016, <https://www.opendemocracy.net/en/5050/how-do-we-engage-men-and-boys-as-allies-in-ending-violence-against-women/>

<sup>538</sup> Attia, "UN CSW: engaging men and boys in ending violence against women as allies not protectors."

<sup>539</sup> Attia, "UN CSW: engaging men and boys in ending violence against women as allies not protectors."

<sup>540</sup> HeForShe, accessed May 11, 2018, <https://www.heforshe.org/en>

<sup>541</sup> "Program HMD: A Toolkit for Action," Promundo, accessed February 28, 2017, <https://promundoglobal.org/resources/program-hmd-a-toolkit-for-action/>

'masculine privilege remains unproblematised'.<sup>542</sup> Worryingly, HeForShe, perhaps UN Women's most well known work over the past decade, relies on the glossary and conceptualisation of gender offered by Programme HMD in their toolkit for 'Mobilizing Men and Boys for Gender Equality'.<sup>543</sup> As Kari Attia suggests, 'enthusiasm for recruiting men to the women's rights struggle masks considerable confusion about precisely how to engage them as allies and on whose terms are they really being engaged'.<sup>544</sup>

The erosion of the political identity of women, and the feminist analysis of gender and violence against women, and the concurrent resurgence of the public/private dichotomy, is underpinned by both a praxis and paradigmatic shift: the development of the Men and Boys' Network, and the centring of masculinities scholarship in the field of preventing violence against women. Masculinities scholarship shapes the language, understanding, and practice of the Men and Boys' Network, and presents a seemingly subtle, but incredibly significant challenge to the feminist underpinnings of the human rights approach, that had previously conceptualised violence against women at the international level.

*e) The impact of conceptual confusion stemming from men and masculinities scholarship, and the undermining of discursive space created by feminist accounts of violence against women*

The origins of the Men and Boys' Network can be traced to the emergence of a discourse surrounding 'men and masculinities'; and its leading voice R. W. Connell<sup>545</sup>. Whilst feminism had interrogated the hegemonic and toxic nature of patriarchy, it had done so through the centred perspective of women's lived experience; primarily concerning itself with the impact of patriarchy on women's lives, manifest as oppression, marginalisation, and violence. R.W. Connell was one of the first voices to propose that masculinities ought also to be interrogated for their effects on men who

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<sup>542</sup> Emily Esplen and Alan Greig, *Politicising Masculinities: Beyond the Personal, workshop report from Politicising Masculinities Symposium, Dakar, 15-18 October, 2007*, (Institute of Development Studies, 2007), available at <https://www.ids.ac.uk/files/dmfile/Masculinities.pdf>

<sup>543</sup> "Barbershop Toolkit, Mobilizing Men and Boys for Gender Equality," HeForShe, accessed November 12, 2018, [https://www.heforshe.org/sites/default/files/2018-10/toolbox\\_allinone\\_v2.pdf](https://www.heforshe.org/sites/default/files/2018-10/toolbox_allinone_v2.pdf)

<sup>544</sup> Attia, "UN CSW: engaging men and boys in ending violence against women as allies not protectors."

<sup>545</sup> R. W. Connell, "The Big Picture: Masculinities in Recent World History," *Theory and Society*, 2(5), (1993): 597 – 623.

are conditioned, through processes of socialisation, to demonstrate and expect certain behaviours and to view women in functionalist or misogynist terms.

Whilst this aligns to feminist understandings of patriarchy in its assessment of the way in which hypermasculinity threatens and damages lives, the masculinities perspective centres the experience of men, and fails to give attention to the disproportionate effect on women; arguing, if anything, that men equally experience and suffer under patriarchy. Lamenting the fact that 'gender issues have been widely regarded as women's business and of little concern to men and boys'<sup>546</sup>, Connell suggested that the time had come to 'raise issues about men's and boy's interests, problems or differences'<sup>547</sup>. Connell also claimed that the gendered advantages experienced by men are 'linked [to] a pattern of disadvantages or toxicity'<sup>548</sup>, or what Michael Kaufman calls men's 'contradictory experience of power'. In support of this position are arguments such as: 'men collectively receive the bulk of income in the money economy and occupy most of the managerial positions. But men also provide the workforce for the most dangerous occupations, suffer most industrial injuries, pay most of the taxation, and are under heavier social pressure to remain employed'<sup>549</sup>. In their crudest forms, these ideas uphold the growth of the Men's Rights Movement. In a far more subtle manner the same logic inheres in the Men and Boys' Network. Whilst the masculinities scholarship is by no means an 'attack' on feminist theory, they are divergent approaches, representing (at times) conflicting priorities, which, when conflated, can lead to dissonance within primary prevention strategies. As Michael Messner notes<sup>550</sup>, while masculinities theory has opened new perspectives, there are also problems with the way it conflicts with the feminist understanding of gender, including:

the limitation of depoliticising gender oppression as something faced by men and women equally [which masks] men's privilege [and] women's oppression. Secondly, while men in consciousness-raising groups examined their personal

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<sup>546</sup> R. W. Connell, "Change among the Gatekeepers: Men, Masculinities and Gender Equality in the Global Arena," *Signs*, 30(3), (2005): 1805.

<sup>547</sup> Connell, "Change among the Gatekeepers: Men, Masculinities and Gender Equality in the Global Arena," 1805.

<sup>548</sup> Connell, "Change among the Gatekeepers: Men, Masculinities and Gender Equality in the Global Arena," 1808; See also: R. W. Connell, "Men, Gender and the State," *In Among Men: Moulding Masculinities*, edited by Soren Ervo and Thomas Johansson, (Aldershot: Ashgate, 2003).

<sup>549</sup> Connell, "Change among the Gatekeepers: Men, Masculinities and Gender Equality in the Global Arena," 1808 – 1809.

<sup>550</sup> Michael Messner, *Politics of Masculinities: Men in Movements*, (New York: AltaMira Press, 2000).

experiences in the light of the feminist call that the personal is political, they lacked an analytical framework, and discussions took the form of guilty personal interrogation rather than critical social analysis.<sup>551</sup>

Led by Connell, the masculinities commentary went on to explore potential mechanisms for educating and supporting young men in exploring alternative forms of masculinity, which were not premised on misogynist understandings of women and girls. It is this proposition which has exercised a profound influence over the formation and practices of the Men and Boys Network, and in particular their efforts to engage men and boys in the prevention of violence against women. Organisations such as MenEngage developed Connell's arguments into a manifesto of sorts, based on a number of key pillars, specifically: the notion of gender as 'relational'; the vulnerabilities of men; men as victims of patriarchy; and men as allies against violence against women.<sup>552</sup> MenEngage asserted: 'the Alliance believes that men, along with women, should be engaged in achieving gender equality [...] the Alliance is dedicated to engaging men and boys to end violence against women and in questioning or challenging violent versions of manhood'<sup>553</sup>.

The link between the masculinities scholarship and advocacy is evident in the work of leading organisations and figures within the Men and Boys' Network, most notably Michael Kaufman, who argued that men should be encouraged to 'feel a sense of "ownership for the problem"' of violence against women<sup>554</sup>. Likewise, the Men's Resource Center proudly declared: 'We call on all men to reject the masculine culture of violence and to work with us to create a culture of connection, of cooperation and of safety for women, for men and for children'<sup>555</sup>. Parallels were even drawn to the role of allies in the LGBTQ community, or to the civil rights movement and the suggestion that, to counter racism, its members had had to reach out to, and to

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<sup>551</sup> Meer, "Struggles for Gender Equality: Reflections on the place of men and men's organisations," 16.

<sup>552</sup> "Our Core Principles," MenEngage, accessed January 18, 2014, <http://menengage.org/about-us/our-core-principles>

<sup>553</sup> "Our Core Principles," MenEngage, accessed January 18, 2014, <http://menengage.org/about-us/our-core-principles>

<sup>554</sup> Kaufman, "Building a Movement of Men Working to end Violence Against Women," 11.

<sup>555</sup> See Michael Flood, "Men's Collective Anti-Violence Activism and the Struggle for Gender Justice," *Development*, 44:3 (2001): 42.

engage with, White elites who (however regrettably) had the power to effect substantive change.<sup>556</sup>

The centring of masculinities scholarship over feminist theory is problematic, leading to the issues outlined above. The focus on gender as relational and socially constructed, but lacking analysis of power and patriarchy leads to individualistic and depoliticised gender analysis. The centring of the male experience – and the decentring of women's experience – leads to erosion of women's personhood as the grounding of women's rights. The framing of masculinities as equally damaging to men contributes to 'win-win' narratives of gender equality that inadequately challenge, or leave unchallenged, the patriarchal dividend. The lack of feminist theorising leaves ungrounded the appeals made to the norms and politics of the international human rights law approach to violence against women. As well as the deficient account of violence against women and gender equality the centring of masculinities scholarship and the male experience, has led to one of the most obviously incongruous approaches of the Men and Boys' Network: the lack of women's leadership and the undermining of feminist expertise.

*f) The promotion of men's leadership against recommendations of partnership with, and accountability to, women's organisations*

Feminist organisations have long called for the engagement of men and boys in primary prevention strategies for eliminating violence against women, and the wider work of gender equality.<sup>557</sup> This has always been framed as a partnership shaped by women's leadership and grounded in feminist expertise. The recognition of feminist theory and the centring of women's lived experience made it an obvious and non-negotiable premise that women's leadership should frame the engagement of men and boys. The wider human rights approach – grounded in a feminist understanding of violence against women as gendered and discriminatory – reinforces this position, recognising primary prevention must be gender transformative and based on women's empowerment and agency. The leadership and expertise of feminist organisations and the transnational women's movement is directly called for within the international

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<sup>556</sup> Colin Walker, "I'm a man running a girls' rights campaign. So what?" *The Guardian*, November 18, 2014, [www.theguardian.com/global-development-professionals-network/2014/nov/18/im-a-man-running-a-girls-rights-campaign-so-what](http://www.theguardian.com/global-development-professionals-network/2014/nov/18/im-a-man-running-a-girls-rights-campaign-so-what)

<sup>557</sup> Meer, "Struggles for Gender Equality: Reflections on the place of men and men's organisations," 16.



human rights approach. Whilst the Men and Boys' Network also espouse the importance of underpinning feminist theory to their programmes, and the necessity of accountability to the transnational women's movement, in practice this is not wholly evident and can appear as lip-service, with men increasingly taking leadership roles. In this regard, the UN Special Rapporteur has highlighted the shift from men as 'allies' to men as leaders:

The feminist approach has commonly considered men as allies and targets of education in the quest for gender transformation. In recent years, many men's groups have moved from being targets of engagement and allies, to being leaders of initiatives on gender equality, especially through the setting up of specialized men's organizations to engage men and boys. The logic of the shift in focus appears to be self-defeating because it empowers the group to which perpetrators belong — and which overwhelmingly continues to maintain economic, political and societal structures of power, privilege and opportunity — to offer protection from violence and discrimination.<sup>558</sup>

At best, the pragmatism of 'men listen to men' could be to blame for the growth of these male-led, male-centred approaches to primary prevention. At worst, the Men and Boys' Network could be seen as the continuation, and evolution, of men's domination of the international legal discourse, and – in keeping with the DEVAW's characterisation of root causes – the 'historically unequal power relations between men and women, which have led to domination over and discrimination against women by men...' This development has been supported by UN Women, the UN Secretary General, NGOs, and international donors. Notable initiatives include: the HeForShe<sup>559</sup> initiative, the UN Secretary General's 'Network of Men Leaders'<sup>560</sup>, and the Men's Only 'Barbershop' Conferences on Violence Against Women<sup>561</sup>.

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<sup>558</sup> United Nations, *Violence against women: Twenty years of developments to combat violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Rashida Manjoo*, A/HRC/26/38 (May 28, 2014), paragraph 72.

<sup>559</sup> HeForShe, accessed May 11, 2018, <https://www.heforshe.org/en>

<sup>560</sup> "Ban launches new Network of Men Leaders to combat violence against women," UN News, accessed 11 March, 2016, <https://news.un.org/en/story/2009/11/322382>

<sup>561</sup> Most notably 2015 Barbershop Conference in Iceland: "Statement by H.E. Mr. Gunnar Bragi Sveinsson, Minister for Foreign Affairs and External Trade, During the General Debate of the 69th Session of the General Assembly of the United Nations, New York, 29 September 2014," United Nations, accessed March 28, 2016, [http://www.un.org/en/ga/69/meetings/gadebate/pdf/IS\\_en.pdf](http://www.un.org/en/ga/69/meetings/gadebate/pdf/IS_en.pdf)

The development of men's leadership, following the call to 'engage men and boys', seemed to move quickly. As one commentator noted: the HeForShe campaign – founded on 20<sup>th</sup> September 2014 – had only just begun promoting the *inclusion of men in the conversation* 'before this was quickly followed by the suggestion that *men should be the only ones in the room*'<sup>562</sup>; with the first International Men's Only Conference announced nine days later on 29<sup>th</sup> September 2014 and to be held in the following January. In one of the most prominent Barbershop Conferences, the Icelandic government, along with the Surinamese government, convened a men-only conference, explaining it to be a space 'where men will discuss gender equality with other men, with a special focus on addressing violence against women.'<sup>563</sup> The conference was supported by the UN Secretary General and the HeForShe campaign. In its statement announcing the conference, the Icelandic government lauded its own record on gender equality:

In Iceland and the other Nordic Countries the revolution in women's education and the high level of female participation in the labour market have been the basis of welfare and economic prosperity. Without the full and equal participation of women in all spheres of society, including in decision-making it will be impossible to make real and lasting progress in addressing sustainable development challenges.<sup>564</sup>

Whilst recognising the importance of empowerment and the 'full and equal participation of women in all spheres of society, including in decision-making', the Icelandic government went on to call for a men's only discussion on violence against women:

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<sup>562</sup> Erica Buist, "A men-only UN conference on gender equality? If only it was a joke," *The Guardian*, October 6, 2014, <https://www.theguardian.com/lifeandstyle/womens-blog/2014/oct/06/men-only-un-conference-gender-equality-if-only-it-was-a-joke>

<sup>563</sup> "Statement by H.E. Mr. Gunnar Bragi Sveinsson, Minister for Foreign Affairs and External Trade, During the General Debate of the 69th Session of the General Assembly of the United Nations, New York, 29 September 2014," United Nations, accessed March 28 2016, [http://www.un.org/en/ga/69/meetings/gadebate/pdf/IS\\_en.pdf](http://www.un.org/en/ga/69/meetings/gadebate/pdf/IS_en.pdf)

<sup>564</sup> "Statement by H.E. Mr. Gunnar Bragi Sveinsson, Minister for Foreign Affairs and External Trade, During the General Debate of the 69th Session of the General Assembly of the United Nations, New York, 29 September 2014," United Nations, accessed March 28 2016, [http://www.un.org/en/ga/69/meetings/gadebate/pdf/IS\\_en.pdf](http://www.un.org/en/ga/69/meetings/gadebate/pdf/IS_en.pdf)

This will be a unique conference as it will be the first time at the United Nations that we bring together only men leaders to discuss gender equality. It will be an exceptional contribution to the Beijing+20 and #HeforShe campaigns.<sup>565</sup>

The Icelandic government explained this decision by saying: 'we want to bring men and boys to the table on gender equality in a *positive way*.'<sup>566</sup> This seemed a familiar nod to the win-win narrative of the Men and Boys' Network that seeks to encourage men to use their male privilege and power for gender equality, rather than seeking to challenge it as an obstacle to gender equality; obscuring the need to disrupt patriarchy, power and the profits inherent in them. As Meer explains, this barefaced rejection of the principle of women's leadership, empowerment, and agency, represents a seismic shift in how men have traditionally been engaged in primary prevention:

donor attention to men's organizations seems to signify a shift of support away from women's empowerment and women's leadership, and a handing over of the reins in the struggle for gender equality to men. Men are once more in charge – only this time, they are in charge of women's liberation struggles.<sup>567</sup>

Again, masculinities scholarship, plays a role in the growth of the Men and Boys' Network, and the emphasis on male leadership. There is a tendency within the Men and Boys' Network to lean on masculinities and feminist scholarship and advocacy interchangeably, conflating the two theories' differing approaches to gender. Whilst both feminist theory and masculinities scholarship give accounts of gender, as outlined above, there are important differences. A significant factor in the divergence between feminist- and masculinities- based primary prevention strategies is the lack of a commonly defined goal. Claire Crooks et al. have raised questions about the lack of a

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<sup>565</sup> "Statement by H.E. Mr. Gunnar Bragi Sveinsson, Minister for Foreign Affairs and External Trade, During the General Debate of the 69th Session of the General Assembly of the United Nations, New York, 29 September 2014," United Nations, accessed March 28 2016, [http://www.un.org/en/ga/69/meetings/gadebate/pdf/IS\\_en.pdf](http://www.un.org/en/ga/69/meetings/gadebate/pdf/IS_en.pdf)

<sup>566</sup> "Statement by H.E. Mr. Gunnar Bragi Sveinsson, Minister for Foreign Affairs and External Trade, During the General Debate of the 69th Session of the General Assembly of the United Nations, New York, 29 September 2014," United Nations, accessed March 28 2016, [http://www.un.org/en/ga/69/meetings/gadebate/pdf/IS\\_en.pdf](http://www.un.org/en/ga/69/meetings/gadebate/pdf/IS_en.pdf)

<sup>567</sup> Meer, "Struggles for Gender Equality: Reflections on the place of men and men's organisations," 3.

clear framework for addressing 'incentives or resistance to join this movement.'<sup>568</sup> In 'addressing the issue of involving nonviolent men to be an active part of the solution against violence'<sup>569</sup>, Crooks highlights 'the lack of an identifiable end state of intervention and a lack of small steps for making change'<sup>570</sup>, and the challenges that gives rise to. Crooks et al. explain the relationship between pathologising and theorising violence against women (or the absence of this theorisation) and the framing of men and boys' engagement in primary prevention:

The position of most men with respect to violence against women – passivity – can hardly be considered a condition. Lack of engagement in violence prevention is not a pathology – it cannot be diagnosed, it is not illegal, nor is it even socially frowned upon in most circles. Unlike an eating disorder or depression, the failure to engage in anti-violence discourse or even recognize the existence of violence against women is not a clinical manifestation. Indeed, this lack of recognition may do more to define normalcy than deviancy from societal expectations. Without the discursive tension provided by an identified clinical condition, it becomes difficult to define and set goals.

The end goal for violence prevention has typically been defined at the societal level: the cessation of all violence against women and girls and the establishment of full gender equality. At the individual level, it is much harder to identify the end state toward which we hope men and boys will progress. Are we simply looking for all men to commit to nonviolence? Are we looking for all men to renounce male privilege and commit to gender equality? Are we looking for men to organize rallies and marches? Without this clear end goal in mind, prevention initiatives are often constrained to the absence of violence perpetration. The expanded notion of violence prevention in terms of

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<sup>568</sup> Crooks, et al., "Engaging Men and Boys in Preventing Violence Against Women: Applying a Cognitive –Behavioral Model," 218.

<sup>569</sup> Crooks, et al., "Engaging Men and Boys in Preventing Violence Against Women: Applying a Cognitive –Behavioral Model," 217.

<sup>570</sup> Crooks, et al., "Engaging Men and Boys in Preventing Violence Against Women: Applying a Cognitive –Behavioral Model," 221.

advocacy and personal commitment to being part of the solution is relegated.<sup>571</sup>

The absence of this clear end goal has resulted in the lauding of programmes and initiatives by the Men and Boys' Network that aren't much more than a commitment to not commit violence against women, or to not commit violence against women *again*. A well known example of this, of course, is the White Ribbon Campaign. Despite its growth to become a global leading voice in primary prevention, its purpose remains the same since its inception: 'since 1991 men have worn white ribbons as a pledge to never commit, condone or remain silent about violence against women and girls.'<sup>572</sup> As Michael Flood admits: '[t]here are few, if any, evaluations of White Ribbon Campaigns' actual impact on the norms and relations of gender', and 'its television and print materials [...] did little to engage men in violence prevention and attracted negative publicity'.<sup>573</sup> (Despite this, the Welsh Government chose the White Ribbon Campaign as its lead partner for the 2018 United Nations International Day for the Elimination of Violence Against Women and Girls, and in fact, used the name 'White Ribbon Day' – as encouraged by the White Ribbon Campaign – to advertise and raise awareness of the day.<sup>574</sup>)

Crooks et al. question the level to which we are expecting men and boys to engage:

One testimonial that caught our attention was from a student who enthused about the workshop and concluded by saying, "I will never rape anyone again." Although the author of this quote clearly enjoyed the program and felt that it had a big impact on him, and the developers of the program felt that the quote was worthy of inclusion in the manual, we would argue that his sentiments are hardly indicative of a male who has been truly engaged in preventing violence.<sup>575</sup>

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<sup>571</sup> Crooks, et al., "Engaging Men and Boys in Preventing Violence Against Women: Applying a Cognitive –Behavioral Model," 221.

<sup>572</sup> "Homepage", White Ribbon, accessed March 15, 2019, <https://www.whiteribbon.ca>

<sup>573</sup> Michael Flood, "Involving Men in Efforts to End Violence Against Women," *Men and Masculinities*, 14(3), (2011): 369.

<sup>574</sup> "Cardiff backs White Ribbon Day: November 25th 2018," Cardiff News Room, accessed June 10, 2019, <https://www.cardiffnewsroom.co.uk/releases/c25/20303.html>

<sup>575</sup> Crooks, et al., "Engaging Men and Boys in Preventing Violence Against Women: Applying a Cognitive –Behavioral Model," 221 – 222.

The lack of commonly defined engagement is problematic. Bob Pease – a leading anti-violence advocate and academic – similarly calls out the lack of ‘mutual understanding between men and women about what the goals of this work are.’<sup>576</sup> Differing as they do, and lacking a common ‘well defined end state’<sup>577</sup>, it becomes problematic for the Men and Boys’ Network to rely on and reference the two theories interchangeably. In fact, the espousing of both theories by the Men and Boys’ Network – unlike the Men’s Rights Movement which relies solely on the logic of masculinities scholarship, and is overtly critical of feminism – works to mask a more subtle erosion or rejection of feminist theory. The favouring of male leadership and male ownership is hidden under appeal to the primacy of feminist theory – albeit largely recognition of the *historic* work of feminists<sup>578</sup>, paving the way for the current work (and leadership?) of the Men and Boys’ Network.

Whilst maintaining the appeal to women’s leadership, empowerment and agency – the feminist approach – the Men and Boys’ Network also promote the ‘men listen to men’ strategy of the masculinities approach, arguing in favour of male leadership and ownership of responses to violence against women. Leading groups, such as Promundo, Sonke, MenEngage, and White Ribbon Campaign, all espouse the importance of accountability to, and leadership by, feminist organisations, yet in reality these groups operate independently and under the leadership of masculinities scholars and advocates. In particular the centring of women’s leadership is undermined, with these independent organisations being led by men who adhere to masculinities theory rather than feminist theory.

There appear to be varying degrees of awareness within the Men and Boys’ Network of the problem this entails. The majority appear blind to the issues raised by male leadership within primary prevention; or where they show awareness of the potential

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<sup>576</sup> Pease, “Engaging men in men’s violence prevention: exploring the tensions, dilemmas and possibilities,” 16.

<sup>577</sup> Crooks, et al., “Engaging Men and Boys in Preventing Violence Against Women: Applying a Cognitive –Behavioral Model,” 221.

<sup>578</sup> Notably, individuals and organizations pay homage to the women’s movement in an historical context. Framing the leadership of women as having ‘paved the way’, or providing foundations for the Men and Boys’ Network to build on. Women’s leadership is nearly always spoken of in the past participle, as an introduction for men’s leadership in the present: ‘We [the Network of Men Leaders] must build on the efforts of so many women and women’s organizations who have worked tirelessly to address this epidemic.’ The implication is often that men need to finish the work that women have started. “Ban launches new Network of Men Leaders to combat violence against women,” UN News, accessed 11 March, 2016, <https://news.un.org/en/story/2009/11/322382>

problems they quickly brush them off in favour of the 'benefits' of male leadership. As Colin Walker, manager of Plan UK's global campaign 'Because I am a Girl', wrote in *The Guardian*: 'I'm a man running a girls' rights campaign. So what?'<sup>579</sup> In the article Walker touches on the challenges of leading an anti-FGM campaign and girls' rights programme, asking: 'can I really understand the implications of this sort of abuse?'<sup>580</sup> Walker moves on from what quickly appears to have been a rhetorical question (seemingly just paying lip service to the issue of positionality and women's leadership), to suggest his concerns are probably just self-doubt rather than anything more critical, and in fact his position as a male leader could be beneficial:

Could there even be benefits of being a male in the role? Certainly, encouraging men and boys to engage with the issues we are talking about is important, and if being asked to sign a petition in support of girls' rights by a man gives more guys cause to reflect, then that's a good thing.<sup>581</sup>

Again, the 'men listen to men' narrative trumps any critical reflection – personal, professional or organisational – about the conflict male leadership raises with women's empowerment and agency. He finishes the article by, paradoxically given the article's title, calling for women's leadership and men's support for that leadership:

It's vital – of course – that *women and girls themselves are at the forefront* of the fight for equality, identifying the problems they face and the solutions needed. My belief is that it's powerful for boys and men to *support* girls and women in this struggle. Just as a heterosexual can fight for gay rights, or someone without a disability can campaign for the equality of those with disabilities.<sup>582</sup>

The conflict between men supporting women's leadership (who 'of course' should be 'at the forefront') and men's leadership (men displacing women from the forefront) seems lost on Walker, who calls for both in his article – although, arguably, practicing the latter over the former. He seems to conflate his capacity to engage with the issues, with his capacity to lead on the issue: '[m]y gender doesn't prevent me feeling angry

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<sup>579</sup> Walker, "I'm a man running a girls' rights campaign. So what?"

<sup>580</sup> Walker, "I'm a man running a girls' rights campaign. So what?"

<sup>581</sup> Walker, "I'm a man running a girls' rights campaign. So what?"

<sup>582</sup> Walker, "I'm a man running a girls' rights campaign. So what?"

that girls around the world continue to face systemic discrimination and widespread violence simply because they are girls.<sup>583</sup> Whilst Walker's gender might not prevent him 'feeling angry' about discrimination, it does impact upon (and arguably negate) his capacity to lead responses to that discrimination – in which he intimately and institutionally participates, whether knowingly or not. The lack of critical engagement with power by male leaders is a product of the lack of politicised, feminist gender-analysis within the primary prevention strategies of the Men and Boys' Network. Masculinities theory does not do enough to equip advocates or practitioners to critically engage with their own gendered power, and as such men lead girls rights programmes and anti-violence programmes, without any serious questioning of the conflict this poses with the goals they propose to pursue: the empowerment of women. Colin Walker starts his article with an admission of the lack of this consciousness: 'When I took the job as the UK manager of a global campaign for girls' rights, around a year ago, I didn't think much of my being a bloke.'<sup>584</sup> Whilst nodding to the issue of female leadership, he goes on to ultimately dismiss it, showing the same consciousness as he began the article with: 'so what?'

Where a small minority do show increasing awareness and critical engagement with their roles as male leaders in primary prevention, the degree of consciousness and understanding still varies. Bob Pease, has questioned the ethics and efficacy of male leadership within primary prevention, and has lamented the troubling lack of 'consensus among men about respecting women's leadership in violence prevention.'<sup>585</sup> He emphasises the importance 'of ensuring that men's anti-violence work is accountable to feminist women.'<sup>586</sup> More subtly, there have been moves by actors such as Michael Kaufman to characterise their work, and the work of the Men and Boys' Network, as 'pro-feminist' rather than feminist: 'Feminism is also about women's voices and experiences—so in that sense, over the years I've often referred to myself

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<sup>583</sup> Walker, "I'm a man running a girls' rights campaign. So what?"

<sup>584</sup> Walker, "I'm a man running a girls' rights campaign. So what?"

<sup>585</sup> Pease, "Engaging men in men's violence prevention: exploring the tensions, dilemmas and possibilities," 16.

<sup>586</sup> Pease, "Engaging men in men's violence prevention: exploring the tensions, dilemmas and possibilities," 16.



as pro-feminist rather than a feminist.<sup>587</sup> Shamim Meer highlights the significance of men and men's organisations characterising themselves as pro-feminist:

The very term pro-feminist was coined precisely to make clear that while men could support feminism, only women themselves could be feminists. Men who support feminist demands need to ensure that their institutional privilege (and their taking for granted of this privilege) does not get in the way of a true partnership with women in struggles for gender equality. Difficult as it may be they need to accept women's leadership of gender equality struggles. Even the best of men need to guard against their institutional privilege acting out in ways that unwittingly reproduce unequal gender relations...<sup>588</sup>

The increasing use of 'pro-feminism' to describe the work of men's groups shows a welcome recognition and deeper understanding of how positionality and the lived experience of women are essential to feminist theorising, advocacy and expert practice. However, the use of this language is still limited in its effect on how men organise and lead, or their choice to do so; with men's leadership continually privileged and lauded over women's, even on primary prevention. As Michael Flood admits, men are often rewarded for doing less, or for doing anything, towards eliminating violence against women, despite the burden of responsibility for the problem of violence against women resting with men: 'men acting for gender justice receive praise and credit [...] which is often out of proportion to their efforts'.<sup>589</sup> Flood also recognises that '[when] men involve themselves in anti-violence efforts, the nature of their participation and the ways in which they are received are themselves shaped by patriarchal privilege'.<sup>590</sup> He notes that, Men's groups 'receive greater media attention and interest than similar groups of women'<sup>591</sup> something which is, in part, a 'function of the status and cultural legitimacy granted to men's voices in general'.<sup>592</sup>

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<sup>587</sup> Leah Fessler, "Patriarchy ruins men: Canadian gender activist Michael Kaufman thinks feminism is the greatest gift to men," *Quartz*, October 30, 2018, <https://qz.com/work/1422387/why-canadas-top-psychologist-thinks-feminism-is-the-greatest-gift-to-men/>

<sup>588</sup> Meer, "Struggles for Gender Equality: Reflections on the place of men and men's organisations," 31.

<sup>589</sup> Flood, "Men's Collective Anti-Violence Activism and the Struggle for Gender Justice," 46.

<sup>590</sup> Flood, "Men's Collective Anti-Violence Activism and the Struggle for Gender Justice," 46.

<sup>591</sup> Flood, "Men's Collective Anti-Violence Activism and the Struggle for Gender Justice," 46.

<sup>592</sup> Flood, "Men's Collective Anti-Violence Activism and the Struggle for Gender Justice," 46.

Patriarchy and male privilege work directly, as Flood describes above, to amplify and 'legitimise' the voice and discursive power of the Men and Boys' Network. It is precisely because male leadership is privileged that men can lead in the area of gender equality – something that seems so conceptually problematic, is, it appears, held in high regard in practice; lauded as a 'silver bullet' even<sup>593</sup>. Not only does the privileging of male leadership obscure the conceptual difficulties it presents (which knock-on to the policy and praxis level), it also hides the limited expertise, and evidence of results<sup>594</sup>, within the Men and Boys' Network. As one might expect, a degree of masculinist posturing within the Men and Boys' Network, helps in this regard, disguising the reality of a small – but vocal – leadership. As the Special Rapporteur suggests, we should be concerned:

that the dominant voices on engaging men and boys, whether through reporting, United Nations meetings or connection with the wider public through the press and popular culture, belong to a very small group of men who are linked to the most prominent organisations associated with the men and boys agenda. This raises numerous questions, including in respect of legitimacy and accountability.<sup>595</sup>

It appears that a relatively small group of men seem to dominate the Men and Boys' Network. In contrast to the transnational women's movement, which is known for its combination of disseminated, diverse – and famously divergent – voices, the Men and Boys' Network seem to sing as if with one voice; arguably, the alliance group,

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<sup>593</sup> Meer, "Struggles for Gender Equality: Reflections on the place of men and men's organisations," 14.

<sup>594</sup> Pease, amongst others, questions the efficacy of engagement programmes, noting how little evaluation of the Men and Boys' Network there has been: 'While there have been some evaluations of men's violence intervention campaigns, to date such evaluations have not addressed the impact that men's involvement has had on reducing violence or challenging patriarchal gender relations.' Pease, "Engaging men in men's violence prevention: exploring the tensions, dilemmas and possibilities," 16; Similarly, Flood says 'there has been very little evaluation of primary prevention strategies' (361) used by the Men and Boys' Network. As an example, he cites the White Ribbon Campaign stating '[t]here are few, if any, evaluations of White Ribbon Campaigns' actual impact on the norms and relations of gender.' (369) He also suggests: '[w]hen evaluations have been undertaken, they show that not all educational interventions are effective, the magnitude of change in attitudes often is small, changes often decay or "rebound" to preintervention levels one or two months after the intervention and some even become worse, and improvements in men's violence-supportive attitudes do not necessarily lead to reductions in their perpetration of violence'. (364) Flood, "Involving Men in Efforts to End Violence Against Women."

<sup>595</sup> United Nations, *Violence against women: Twenty years of developments to combat violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Rashida Manjoo, A/HRC/26/38 (May 28, 2014), paragraph 72.

MenEngage. MenEngage are an umbrella organisation who describe their purpose as below:

Activities of the alliance include information-sharing, joint training activities and national, regional and international advocacy. We develop joint statements of action on specific areas of engaging men, carry out advocacy campaigns and seek to act as a collective voice to promote a global movement of men and boys engaged in and working toward gender equality and questioning violence and non-equitable versions of manhood.<sup>596</sup>

The 'collective front' of MenEngage works to further strengthen the voice of the Men and Boys' Network – operating as a megaphone of sorts, and working effectively to gain widespread attention and support. This is problematic for the transnational women's movement, which has both organically and intentionally articulated itself in a decentralised, counterhegemonic manner.

The dominant voices promoting the Men and Boys' Network belong to Gary Barker and Dean Peacock, who are leading figures in almost all of the most prominent organisations associated with the Men and Boys' Network. Their voices dominate at a policy and popular culture level, with *The Guardian's* coverage of the International Day for the Elimination of Violence Against Women headlined by Gary Barker: 'We must enlist men and boys in the fight to end violence against women'<sup>597</sup>. Peacock, in partnership with Gary Barker, runs or is affiliated with a vast array of interrelated Men and Boys Groups including but not exclusive to: 'Men as Partners'; 'Engender Health'; 'Promundo'; and the 'Sonke Gender Justice Network'.<sup>598</sup>

There is considerable overlap between the MenEngage network and Promundo, Sonke, and EngenderHealth, sharing donors and key personnel, as outlined above. Likewise, there is similar overlap between EngenderHealth and Sonke. MenEngage,

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<sup>596</sup> "What we do," MenEngage, accessed December 27, 2013,

[http://www.menengage.org/index.php?option=com\\_content&view=article&id=11&Itemid=9](http://www.menengage.org/index.php?option=com_content&view=article&id=11&Itemid=9)

<sup>597</sup> Gary Barker and Michael Kaufman, "We must enlist men and boys in the fight to end violence against women," *The Guardian*, November 25, 2013,

<https://www.theguardian.com/commentisfree/2013/nov/25/boys-men-end-violence-women-clares-law>

<sup>598</sup> "Expert Bios," MenCare, accessed January 20, 2019, <https://men-care.org/about-mencare/press-and-media/>

Promundo and Sonke share primary donors, including the Swedish International Development Agency (SIDA) and the Oak Foundation.<sup>599</sup> There is a similar overlap of management, with Gary Barker and Dean Peacock, president and CEO of Promundo and Sonke, respectively, also co-founding and co-chairing MenEngage. It is rare for these groups to explicitly state in their literature that they belong to the same extended network but they regularly cross-pollinate one another's Executive Boards and cite one another's research. For instance, on a webpage advertising the '2nd MenEngage Global Symposium 2014'<sup>600</sup>, Peacock describes himself as the 'co-founder and co-chair of the MenEngage Alliance'<sup>601</sup>. However, this same source lists Gary Barker as 'International Director of Promundo-DC'<sup>602</sup>, without acknowledging the crucial role which Peacock also plays in the latter organisation. Additional interrelationships of interest, in this respect, include: 'Men Care', 'Men + Gender Equality Project', the 'International Centre for Research on Women' and, perhaps most significantly, the United Nations Secretary General's Campaign 'UNITE to end Violence against Women', in which Peacock features amongst the 'Network of Men Leaders'.<sup>603</sup> Whilst it could be expected that expertise would be concentrated and coordinated, there is sufficient overlap to call into question the consensus and representation documented by these organisations.

The rationale, evidence base and advocacy for engaging men and boys relies on this connectedness. It appears as though MenEngage rely heavily on Promundo for evidence base, recycling many of Promundo's reports and materials, and Promundo frequently cite MenEngage to give the appearance of wider consensus. For example, the Global Symposium, whilst well attended, was organised by MenEngage and Promundo, both chaired by the same personnel, and reflects the agenda articulated by Promundo prior to the symposium. The Rio Declaration came from the 2009 Global Symposium on Engaging Men and Boys in Gender Equality, and serves to solidify and advance the

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<sup>599</sup> According to the Oak Foundation grant database Promundo has received \$2,687,245 and Sonke has received \$1,086,407 in support, "Oak Foundation Grant Database", Oak Foundation, accessed 30th December 2013, <http://www.oakfnd.org/node/3m>

<sup>600</sup> "Executive Committee," Men and Boys For Gender Justice, accessed June 15, 2014, <http://menengagedilli2014.net/executive-committee>

<sup>601</sup> "Executive Committee," Men and Boys For Gender Justice, accessed June 15, 2014, <http://menengagedilli2014.net/executive-committee>

<sup>602</sup> "Executive Committee," Men and Boys For Gender Justice, accessed June 15, 2014, <http://menengagedilli2014.net/executive-committee>

<sup>603</sup> "UNITE to End Violence Against Women: Network of Men Leaders," United Nations, accessed 15 June 2014, <http://www.un.org/en/women/endviolence/DeanPeacock.shtml>

emerging focus on engaging men and boys. It is comprehensive in its inclusion of the core principles already outlined by MenEngage – gender as relational, men as allies, and men as victims of patriarchy – and further emphasises men as jointly suffering from gender inequality and gender-based violence:

As we acknowledge the harm done to too many women and girls at the hands of men, we also recognize the costs to boys and men from the ways our societies have defined men's power and raised boys to be men.

Too many men suffer because our male-dominated world is not only one of power men have over women, but of some groups of men over others.

Too many men carry deep scars of trying to live up to the impossible demands of manhood and find solace in risk-taking, violence, self-destruction or alcohol and drug use.<sup>604</sup>

It outlines an obligation on states, UN agencies and donors, to promote the agenda of engaging men and boys, and advocates the allocation of resources to further the work. Worryingly, the Rio Declaration is increasingly being referred to alongside international and UN commitments within the discourse on engaging men and boys, yet it does not share comparable status in legal terms and has, in fact, 'been developed and promoted by the very men's groups it provides for and strengthens.'<sup>605</sup> The Declaration is being employed to give weight to a distinct way of viewing gender equality and engaging men to prevent violence against women.

Such conflating of United Nations commitments with an NGO declaration has resulted in the mushrooming of independent men's groups and organizations, separate from the women's movement, many of which have redefined

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<sup>604</sup> "The Rio de Janeiro MenEngage Declaration Global Symposium on Engaging Men and Boys on Achieving Gender Equality, Rio de Janeiro March 29 – April 3, 2009," MenEngage, accessed April 9 2018, <http://menengage.org/rio-declaration/>

<sup>605</sup> United Nations, *Violence against women: Twenty years of developments to combat violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Rashida Manjoo, A/HRC/26/38 (May 28, 2014), paragraph 71.

engagement with men and boys, in male terms.<sup>606</sup>

This is particularly worrying as much of the rationale and conceptualisation of engaging men and boys is done by a far narrower group than is actually active in the work.

Whilst MenEngage 'have over 700 members across 70 countries'<sup>607</sup> representing 'some of the key organizations working to engage men and boys in women's rights and gender justice'<sup>608</sup>, the leadership is incredibly narrow, as evidenced in the MenCare 'Expert Bio's':

Gary Barker is President and CEO of Promundo. He has conducted extensive global research and program development around engaging men and boys in gender equality and violence prevention, and is a leading voice for the worldwide effort to establish positive, healthy dynamics between men and women. Gary is the co-founder of MenCare ... and co-founder of MenEngage ... He coordinates IMAGES (the International Men and Gender Equality Survey)... He is a member of the UN Secretary General's Men's Leaders Network ...

Dean Peacock is Co-Founder and Executive Director of Sonke Gender Justice, MenCare's co-coordinator. His work and activism over the last 25 years has focused on issues related to gender equality, gender-based violence, men and constructions of masculinities, HIV and AIDS, human rights, and social justice. He is also co-founder and co-chair of MenEngage, a global alliance with networks in over thirty countries across the world... Dean is a member of many advisory councils, including the United Nations Secretary General's Network of Men Leaders formed to advise UN Secretary General Ban Ki-moon on gender based violence prevention and of the Nobel Women's Advisory Committee on ending sexual violence in conflict settings...<sup>609</sup>

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<sup>606</sup> United Nations, *Violence against women: Twenty years of developments to combat violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Rashida Manjoo, A/HRC/26/38 (May 28, 2014), paragraph 71.

<sup>607</sup> "Homepage," MenEngage, accessed January 20, 2019, <http://menengage.org>

<sup>608</sup> "Homepage," MenEngage, accessed January 20, 2019, <http://menengage.org>

<sup>609</sup> "Expert Bios," MenCare, accessed January 20, 2019, <https://men-care.org/about-mencare/press-and-media/>

It is unclear how widely the rationale of the Rio Declaration, as outlined by this smaller group, is upheld across all of the men's groups but what is clear is that the 'consensus' it informs is less well established than a cursory analysis might suggest.

Similarly the Men + Gender Equality Policy Project (MGEPP), a multi-year study to build the evidence base on how to engage men and boys, is again coordinated by Promundo, in collaboration with International Centre for Research on Women. MGEPP and its subsidiary project, the International Men and Gender Equality Survey, has been significant in cementing the rationale behind engaging men and boys. Again, there is significant overlap in the reports and material delivered through MenEngage, Promundo, and MGEPP.<sup>610</sup> As such, it is difficult to determine the real breadth and depth of the evidence base.

This pattern is replicated in academic commentary<sup>611</sup> in which a group of men including Michael Flood, Michael Messner, Jeff Hearn, Alan Berkowitz, and Michael Kimmel cite themselves, or one another, with noticeable regularity whilst also, in the cases of commentators such as Jackson Katz and Michael Kaufmann (founders of the 'Mentors in Violence Prevention' Project<sup>612</sup> and the 'White Ribbon Campaign', respectively), using one another's evidence to promote their own Men and Boys' Groups.

Disseminating virtually identical arguments and initiatives under the auspices of 'separate' organisations (consciously) creates the impression that the consensus surrounding the engagement of Men and Boys is significantly broader than deeper analysis reveals it to be, and this serves to silence objections to the trend and compel women's organisations to 'follow the funding'. Tactics such as this lead to a vicious circle (or virtuous circle from the point of view of MenEngage) and ultimately ensure that the Network's grandiose claims become something of a self-fulfilling prophecy, as more and more (women's) organisation feel compelled, for strategic reasons, to

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<sup>610</sup> "Men and Gender Equality Policy Project," International Centre for Research on Women, accessed January 20, 2019, <https://www.icrw.org/research-programs/men-and-gender-equality-policy-project/>

<sup>611</sup> Molly M. King, Carl T. Bergstrom, Shelley J. Correll, Jennifer Jacquet, Jevin D. West, "Men Set Their Own Cites High: Gender and Self-citation across Fields and over Time," *Socius*, 3, (2017): 1 – 22.

<sup>612</sup> Jackson Katz, "Reconstructing Masculinity in the Locker Room: The Mentors in Violence Prevention Project," *Harvard Educational Review*, 65(2), (1995): 163 – 175.

reinforce and assimilate the message that primary prevention necessitates not just the engagement of men and boys – but the leadership of the Men and Boys' Network.

Working with men and men's organisations was now latched onto (in particular by UN agencies and bilateral donors) as a way of addressing gender equality concerns...

This support for men's organisations took place at a time when feminists were struggling against the effects of the depoliticisation and co-option of their demands for gender equality. Feminists were faced not only with the withdrawal of support for women's movement building, but also with the emergence of a new constituency seemingly advanced to do the work of achieving gender equality.<sup>613</sup>

### *Case Study Summary*

The leadership of men and boys within primary prevention undermines the epistemological and methodological importance placed on positionality within feminist theory. As has already been argued, feminism asked the 'woman question'<sup>614</sup> of violence against women and identified it as gendered and discriminatory – not arbitrary in any sense, but a cause and consequence of disadvantage and discrimination. The continuing of feminist method within the human rights discourse, asking further questions, has developed substantive norms around primary prevention, in particular: addressing root causes, gender specificity, and empowerment. These substantive norms are not arbitrarily chosen but they are the outworking of method. Without method we would choose substance indefensibly. As such, positionality – as outlined in Chapter 1 – is at the heart of feminist method and underpins the international human rights approach to violence against women. This perhaps explains the disjuncture between the Men and Boys' Network (keen to argue that gendered power relations equally disadvantage men) and feminist method (which is premised on the opposite argument), and this in turn accounts for the conflict between the Men and Boys' Network and the substantive norms within the international human rights

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<sup>613</sup> Meer, "Struggles for Gender Equality: Reflections on the place of men and men's organisations," 14.

<sup>614</sup> Katherine Bartlett, "Feminist Legal Matters," *Harvard Law Review*, 103(4), (1990): 829.



approach to violence against women. Without applying feminist method, men's groups are unable to hold a defensible relationship to substance. Moreover, without applying a different methodology (consistently) they will, intentionally, or not, 'recreate the illegitimate power structure [they suggest they are] trying to identify and undermine.'<sup>615</sup> If this is not verboten the human rights approach to violence against women will become decoupled from feminist method. Without understanding and upholding feminist method men's groups can wantonly oscillate on key substantive positions and are given license to indefensibly reconceptualise and create new norms. We see this most keenly in the reconceptualisation of gender. In so doing men's groups threaten to undermine positionality and method as essential to the conceptualisation and construction of norms and substantive law, undoing decades of work and progress at the highest levels.

It is clear, in both conceptual and legal terms (deviating as it does from the feminist underpinnings of international human rights law), that the shift to the 'Men and Boys agenda' is fraught with difficulty and yet it appears to have attracted a great deal of funding, recognition and political support. Whilst a closer examination of the network of organisations associated with the engagement of men and boys is warranted it is not within the scope of this case study to provide that. However, suffice to say it presents an interesting case study with regard the importance – and fragility – of feminist theorised practice of the law with regard violence against women and primary prevention. The growth of the Men and Boys' Network – despite the limited extent of its expertise and evidence base – also supports the position that the feminist character of the international human rights law approach is vulnerable and needs further delineation and strengthening.

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<sup>615</sup> Joseph W. Singer, "Should lawyers care about philosophy?" *Duke Law Journal*, 38(6), (1989): 1753. 1752 – 3503.

## Chapter 4 – A Feminist Theory of State Responsibility, Part 2: How Effectively Does the Due Diligence Standard Actualise the Feminist Conceptualisation of State Responsibility for Primary Prevention?

The development of norms around primary prevention has been framed by the feminist conceptualisation of violence against women, gender equality and gender more broadly. As outlined in the previous chapter this has led to particular policy and praxis developments that require the state to operate at the macrosystemic level to challenge and transform gender norms. This particular framing of primary prevention – developed within the international human rights discourse – is underpinned by feminist method and epistemology. Where this is lacking, as outlined in the ‘Men and Boys’ case study, the knock-on effect is divergent strategies at the policy and praxis levels. The duty the state has to prevent violence against women at the primary level has been further developed within the jurisprudence and ‘demosprudence’<sup>616</sup> surrounding the due diligence standard. The use of the due diligence standard is not specific to preventing violence against women, but as the majority of violence experienced by women is perpetrated by non-state actors, the standard has been called on and developed by groups looking to actualise and define the contents of the state’s responsibility to prevent violence perpetrated by private individuals; and, as such, has become a focus for activists seeking to hold the state accountable to its international legal obligations. The due diligence standard has proved pivotal in framing the violence of a non-state actor as a human rights abuse, and problematising the state’s role in eliminating private acts of violence against women, particularly domestic violence. Further to this, the development of systemic prevention and transformative remedies under the due diligence standard has also sought to bridge the gap between the social locations of the individual and group and make sense of the mutually constitutive relationship between violence against women and patriarchy.

In this chapter I will consider the development of the due diligence standard within international law, and international human rights law, specifically, as it relates to preventing violence against women; and consider the legal and normative gaps it

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<sup>616</sup> Lani Guinier, “Courting the People: Demosprudence and the Law/Politics Divide,” *Harvard Law Review*, 127(1), (2013): 437 – 444; Lani Guinier and Gerald Torres, “Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements,” *The Yale Law Journal*, 123(8), (2014): 2740 – 2804.

bridges in tackling violence against women. While considering the development of due diligence through international and regional case law, I will highlight key norms relating to primary prevention that have emerged or have been strengthened through the expansion of the legal concept of due diligence. Following this I will look at the utility and efficacy of the standard, considering how useful the concept is for actualising accountability and responsibility for violence against women, both as a legal concept and as a sociopolitical tool and rally point for advocacy and action. Finally I will consider the legal and normative gaps that remain, considering the due diligence standard in the wider context of the international human rights law response to violence against women. In particular, I will question the capacity and legitimacy inherent in the due diligence standard to create or enforce state responsibility, as well as the normative questions that arise from framing primary prevention as a due diligence obligation (implying a secondary form of culpability and responsibility for women's rights), rather than as a positive duty in its own sense, perhaps best considered under Article 2 and Article 5 of the CEDAW. To strengthen the international human rights law approach to violence against women – be it via expansion of the due diligence standard, or not – I will finally consider if there is a need for a new binding international instrument focused on violence against women to make actionable and accountable the state's responsibility to prevent.

In the previous chapter I focused on the conceptualisation of primary prevention, in this chapter I will consider how feminist theory has also shaped jurisprudence regarding due diligence, and specifically due diligence and systemic prevention, and how these further (or not) the norms considered in the earlier outline of primary prevention. In particular I am interested in the interplay between jurisprudence and what Lani Guinier has termed 'demosprudence', and the two-way discourse between the courts and third party interveners and social movements (in the broadest sense), as it relates to the norm-creation of the courts, case law, and legislation. The nature of demosprudence – the process of the courts 'courting the people'<sup>617</sup> in efforts to catalyse legal change – blurs the legal/political divide (or perhaps just highlights the blurriness that already exists) and makes the claim that 'social movements' can be –

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<sup>617</sup> Guinier, "Courting the People: Demosprudence and the Law/Politics Divide," 439.

and are – ‘sources of law’<sup>618</sup>. Lani Guinier and Gerald Torres make this claim in light of the role of social movements in the civil rights era and argue that ‘non-elite actors in the civil rights and social justice movements ... made some legal conclusions not just more likely, but for all intents and purposes, inevitable.’<sup>619</sup> A thorough investigation of the role of demosprudence as it relates to state responsibility for violence against women is not my intention here, but the concept neatly highlights the significance that this chapter places on the discursive, political and politicised nature of norm creation, and the role of the transnational women’s movement in moving forward the legal conceptualisation of primary prevention and state responsibility through the courts. As will be shown in the evolution of regional and international case law and standards, the work of feminist theorising and practice within the movement (supported by third party interveners), is called on and ‘courted’ by the courts and relevant mandate holders, such as the Special Rapporteur. This political discourse weaves through the iterative development of the case law across the regional human rights systems.A

*The development of the due diligence standard within international law – key concepts and jurisprudence*

The due diligence standard is widely considered one of the most significant developments of state responsibility with regard the protection of human rights, incorporating, as it does, the acts of private individuals in its purview. It has become a rallying point for activists as it is arguably ‘one of the key mechanisms which ensures accountability for adherence to human rights standards.’<sup>620</sup> It provides a unique account of state responsibility, furthering the standards and principles defined in the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (hereafter, ‘Draft Articles’) by the International Law Commission in 2001. As outlined in Article 1 of the Draft Articles: ‘Every internationally wrongful act of a State entails the international responsibility of that State.’ However, as Article 2 makes clear in its definition of wrongful acts: ‘There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) *is attributable to the State under*

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<sup>618</sup> Guinier and Torres, “Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements,” 2740.

<sup>619</sup> Guinier and Torres, “Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements,” 2740.

<sup>620</sup> Brooke Stedman, “The Leap from Theory to Practice: Snapshot of Women’s Rights Through a Legal Lens,” *Merkourios Utrecht Journal of International and European Law*, 29 (77), (2013): 8.

*international law*; and (b) constitutes a breach of an international obligation of the State.’ As a general rule, then, state responsibility is based on acts or omissions committed either by state actors or by actors whose actions are attributable to the state, and results from the general legal personality of the state as the chief bearer of obligations under international law. The due diligence standard, therefore, expands state responsibility for instances where there is a failure to exercise due diligence (sometimes termed ‘due care’, ‘vigilance’, or ‘all appropriate measures’), to prevent or respond to certain *acts or omissions of private or non-state actors that are not directly attributable to the state*. This principle significantly widens the scope and reach of state responsibility. Whilst its application within international human rights law is relatively new, due diligence has long been accepted as a standard – or even a general principle<sup>621</sup> – of international law. The concept of due diligence dates back to 17<sup>th</sup> century legal thinkers such as Hugo Grotius, Richard Zouche and Samuel Pufendorf,<sup>622</sup> and early Roman ideas of diplomatic protection<sup>623</sup>; and was first applied within international law in the *Alabama Arbitration case*<sup>624</sup>. However, as the International Tribunal for the Law of the Sea (ITLOS) suggested in its *Seabed Mining Advisory Opinion*, the content of the obligation of due diligence remains unclear:

The content of “due diligence” obligations may not easily be described in precise terms. Among the factors that make such a description difficult is the fact that “due diligence” is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough...<sup>625</sup>

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<sup>621</sup> Katja L. H. Samuel, “The Legal Character of Due Diligence: Standards, Obligations or Both?” *I Central Asian Yearbook of International Law*, (2018/2019 forthcoming): 15.

<sup>622</sup> Joanna Bourke-Martignoni, “The history and development of the due diligence standard in international law and its role in the protection of women against violence,” *In Due Diligence and Its Application to Protect Women from Violence*, edited by Carin Benninger-Budel, (Leiden, The Netherlands: Martinus Nijhoff Publishers, 2008), 48. p. 47 – 62, p. 48

<sup>623</sup> See ILA citing Max Huber in *British Property in Spanish Morocco case*: ILA, *ILA Study Group on Due Diligence in International Law: Second Report, July 2016*, (ILA, 2016), 10 – 11, available at <http://www.ila-hq.org/index.php/study-groups>

<sup>624</sup> Thomas Bingham, “The Alabama Claims Arbitration,” *International and Comparative Law Quarterly*, 50(1), reprinted in Thomas Bingham, *Lives of the Law: Selected Essays and Speeches 2000-2010*, (Oxford: Oxford University, 2011), 13 – 40.

<sup>625</sup> *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, (2011), ITLOS case no. 17, ILM 458, paragraph 117, hereafter ‘*Seabed Mining Advisory Opinion*’.

This said, it is rightly held that ‘difficulty in defining the standard does not imply that the obligation to act in due diligence has no content.’<sup>626</sup> Whilst there still remains a lack of clarity about the legal character of due diligence (is it a standard, or an obligation?<sup>627</sup>), as well as the degree to which the principle varies from case-to-case (is it completely subjective, or does it entail legal minimums?<sup>628</sup>), there are some generally accepted characteristics that hail from the *Alabama Arbitration case* and continue to be evident in contemporary understanding and application of due diligence. The *Alabama Arbitration case*’s framing of ‘reasonableness’ (as determined by international law rather than domestic law) still marks definitions by leading academics such as Ian Brownlie<sup>629</sup>, as well as the judgements of the International Court of Justice (ICJ)<sup>630</sup>. The ILA explain, that:

[a]t its heart, due diligence is concerned with supplying a standard of care against which fault can be assessed. It is a standard of reasonableness, of reasonable care, that seeks to take account of the consequences of wrongful conduct and the extent to which such consequences could feasibly have been avoided by the State or international organisation that either commissioned the relevant act or which omitted to prevent its occurrence.<sup>631</sup>

Timo Koivurova suggests that ‘reasonableness’, whilst context-specific, is understood by the ‘majority opinion’ to be an ‘international minimum standard’ for due diligence, and could be read as ‘what a “reasonable” or “good” government would do in a

<sup>626</sup> ILA, *ILA Study Group on Due Diligence in International Law: Second Report, July 2016*, 7.

<sup>627</sup> Samuel, “The Legal Character of Due Diligence: Standards, Obligations or Both?” 15.

<sup>628</sup> Lee Hasselbacher, “State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, And International Legal Minimums of Protection,” *Northwestern Journal of International Human Rights*, 8(2), (Spring, 2010): 190 – 215; Timo Koivurova, *Due Diligence*, (Max Planck Encyclopaedia of Public International Law, 2012), available at <https://opil.ouplaw.com/abstract/10.1093/law:epil/9780199231690/law-9780199231690-e1034?rskey=qvtmm1&result=1&prd=EPIL>

<sup>629</sup> “[r]easonableness” is a golden thread in determining which measures State should take to act in a duly diligence manner’, Ian Brownlie, *Principles of Public International Law*, 7<sup>th</sup> ed., (Oxford: OUP, 2008), 526.

<sup>630</sup> ‘Even in the instance of preventing a gross violation of international law from occurring, such as the commission of genocide, the standard articulated by the ICJ in order to incur international responsibility was that a State “manifestly failed to take all measures” that were “within its power” to take.’ ILA, *ILA Study Group on Due Diligence in International Law: Second Report, July 2016*, (ILA, 2016), 7; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, [2007] ICJ Rep 43, para 430. (emphasis added), hereafter ‘Genocide case’.

<sup>631</sup> ILA, *ILA Study Group on Due Diligence in International Law: Second Report, July 2016*, 2.

specific situation<sup>632</sup>. Or as the ILA suggest: 'one might describe a due diligence obligation as an obligation for the State to take *all measures it could reasonably be expected to take*.'<sup>633</sup> As the ILA Study Group report on Due Diligence in International Law concludes, when it comes to assessing the content and operationalisation of due diligence, 'reasonableness' is the 'overarching standard'<sup>634</sup>.

Whilst reasonableness is determined by international law, it is, as has already been mentioned, specific to the context of the primary rule or obligation at hand, and widely argued to be an 'obligation of conduct and not result'<sup>635</sup>: focusing 'primarily on the behaviour of States rather than the outcomes of that behaviour.'<sup>636</sup> In this way it differs from the standards regarding breaches of state responsibility as commonly conceived of in the Draft Articles. Reasonable conduct 'implies an evaluation of the measure taken by reference to what could be expected from a State.'<sup>637</sup> The ICJ in the *Bosnia Genocide case*, stated that investigating due diligence 'calls for an assessment *in concreto*', which takes into account the '[v]arious parameters [that] operate when assessing whether a State has duly discharged the obligation concerned.'<sup>638</sup> Conduct, whilst needing to meet internationally recognised minimum standards – rather than those determined by the state – is still context specific, and can be influenced by the capacity of the state. As outlined in the ILA report<sup>639</sup>, reasonable conduct is impacted by:

- capacity, control of territory, and the 'power to influence'<sup>640</sup> (as legally permitted);
- the degree of risk: 'due diligence requirements increase in situations in which the risks of harm are known to be particularly significant'<sup>641</sup>; and;

<sup>632</sup> Koivurova, *Due Diligence*, paragraph 16.

<sup>633</sup> ILA, *ILA Study Group on Due Diligence in International Law: Second Report*, July 2016, 8.

<sup>634</sup> ILA, *ILA Study Group on Due Diligence in International Law: Second Report*, July 2016, 7.

<sup>635</sup> Riccardo Pisillo-Mazzeschi, "The Due Diligence Rule and the Nature of the International Responsibility of States," 35 *German Year Book of International Law*, 9, (1992): 22 – 41; Koivurova, *Due Diligence*, paragraph 1; Samuel, "The Legal Character of Due Diligence: Standards, Obligations or Both?" 24.

<sup>636</sup> ILA, *ILA Study Group on Due Diligence in International Law: Second Report*, July 2016, 2.

<sup>637</sup> ILA, *ILA Study Group on Due Diligence in International Law: Second Report*, July 2016, 9.

<sup>638</sup> *Genocide case*, Judgment, [2007] ICJ Rep 43, para 430.

<sup>639</sup> ILA, *ILA Study Group on Due Diligence in International Law: Second Report*, July 2016, 11 – 13.

<sup>640</sup> ILA, *ILA Study Group on Due Diligence in International Law: Second Report*, July 2016, 11; *Genocide case*, Judgment, [2007] ICJ Rep 43, para 403.

<sup>641</sup> ILA, *ILA Study Group on Due Diligence in International Law: Second Report*, July 2016, 12; *Seabed Mining Advisory Opinion*, (2011) ITLOS, Case no. 17, ILM 458, paragraph 117.

- knowledge of an activity or potential risk.<sup>642</sup>

Whilst due diligence exists as a general principle or an obligation of customary international law<sup>643</sup>, the degree of due diligence expected is most influenced by the primary rule or obligation it refers to. Due diligence is 'context specific and [...] dependent on the substantive international legal rule at issue.'<sup>644</sup> For instance,

[w]hat is considered to be reasonable in exercising diligence to prevent genocide (a violation of a norm of *ius cogens*) will obviously be more demanding than that which is expected for the prevention of harm to property or financial interests. In this case, the degree of diligence varies according to the importance of the interest requiring protection.<sup>645</sup>

This will obviously relate to the standards laid out for preventing violence against women when we come to consider it, and the way violence against women is conceptualised. A further relevant factor in the conceptualisation of due diligence is the development of progressive application. For example, a 'broad due diligence obligation may be an initial strategy to promote participation', but then, as participation increases, 'the strictness of the applicable standard can be enhanced and mature into a more demanding system of legal accountability.'<sup>646</sup> In the *Pulp Mills case*, the ICJ expanded the expectation to act with due diligence to include more stringent environmental impact assessment.<sup>647</sup> This reflected the increased understanding and appreciation of the environmental risk at hand. Further to this, where the understanding of the risk of harm – and the potential for that harm to be irreversible – increases, so does the expectation to exercise due diligence<sup>648</sup>. The conceptualisation – politically and legally – of the primary rule at hand has massive bearing on the content of due diligence obligations, and the conduct, thereby, considered reasonable

<sup>642</sup> ILA, *ILA Study Group on Due Diligence in International Law: Second Report*, July 2016, 12.

<sup>643</sup> Samuel, "The Legal Character of Due Diligence: Standards, Obligations or Both?" 15.

<sup>644</sup> United Nations, *The due diligence standard as a tool for the elimination of violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Yakin Erturk, E/CN.4/2006/61, (20 January 2006), paragraph 12, available at <http://undocs.org/E/CN.4/2006/61>.

<sup>645</sup> ILA, *ILA Study Group on Due Diligence in International Law: Second Report*, July 2016, 20 – 21.

<sup>646</sup> ILA, *ILA Study Group on Due Diligence in International Law: Second Report*, July 2016, 3.

<sup>647</sup> *Pulp Mills on the River Uruguay, Case Concerning (Argentina v. Uruguay)*, [2010] ICJ Rep 14. hereafter the '*Pulp Mills Case*'; See also *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* proceedings joined with *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgement [2015] ICJ Rep 65 and the Separate Opinion of Judge Donoghue.

<sup>648</sup> ILA, *ILA Study Group on Due Diligence in International Law: Second Report*, July 2016, 3.



by the state in response. Again, this highlights how significant the conceptualisation of violence against women is in determining the measure of due diligence expected with regard primary prevention.

The complexities of what constitutes due diligence are somewhat cleared up when the obligation is formulated alongside core substantive principles such as the obligation to prevent, protect, investigate, punish and ensure redress; often referred to as the PPIPR obligations.<sup>649</sup> In reference to state responsibility for violence against women, these have commonly been called the 5Ps<sup>650</sup>, which include the obligations of (1) prevention, (2) protection, (3) prosecution, (4) punishment, and (5) provision of redress. There have been recent calls to expand this to the 7Ps to include the 'promotion of awareness-raising and adherence to non-discrimination and no vow' and 'probing' (read as investigation)<sup>651</sup>. The existence of PPIPR/5P obligations further strengthens the concept of due diligence, due to the 'inherent relationship'<sup>652</sup> between the two. Whilst it is particularly unusual to have international treaty language that specifies the term 'due diligence'<sup>653</sup>, the conventions, declarations, and general comments relating to violence against women often directly call for 'due diligence' and do so alongside the PPIPR/5P formulation. This formulation is part of the thickening of international human rights law with regard to the state's role to *respect, protect, and fulfil*, which 'means that a state has to take measures to prevent and repress violations, irrespective of whether they are committed by state or non-state actors, and provide adequate remedies in case of breach.'<sup>654</sup> In the context of prevention this correlation is well established, as

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<sup>649</sup> Samuel, "The Legal Character of Due Diligence: Standards, Obligations or Both?" 24.

<sup>650</sup> United Nations, *The due diligence standard as a tool for the elimination of violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Yakin Erturk*, E/CN.4/2006/61, (20 January 2006); "5 P's of Due Diligence to Eliminate Violence Against Women," Due Diligence Project, accessed 29 February 2017, [www.duediligenceproject.org/5-ps.html](http://www.duediligenceproject.org/5-ps.html).

<sup>651</sup> Jeremy Sarkin, "A Methodology to Ensure that States Adequately Apply Due Diligence Standards and Processes to Significantly Impact Levels of Violence Against Women Around the World," *Human Rights Quarterly*, (40) (1), (2018): 2. 1 – 36.

<sup>652</sup> Samuel, "The Legal Character of Due Diligence: Standards, Obligations or Both?" 39.

<sup>653</sup> In fact the International Law Association Study Group on Due Diligence highlight The Council of Europe Convention on Preventing and Combating Violence against Women as a 'notable' exception to the general absence of the term in treaty language: ILA, *ILA Study Group on Due Diligence in International Law: Second Report, July 2016*, 6; Samuel, "The Legal Character of Due Diligence: Standards, Obligations or Both?" 23.

<sup>654</sup> Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice*, (Cambridge: Cambridge University Press, 2013), 76.

prevention is considered both a 'parallel obligation'<sup>655</sup> to due diligence, and the essence of due diligence itself. As the ICJ observed in the *Pulp Mills case*: 'the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a state in its territory.'<sup>656</sup> I will consider this relationship further in relation to primary prevention of violence against women and systemic due diligence.

As will be shown, due diligence is heavily utilised in the international human rights law approach to violence against women, and is interpreted with specific meaning. However, it is important to recognise its general standing in international law as a standard, rather than an obligation, and as a measure of conduct not result, as outlined above. This is important as due diligence, as a legal tool and as a sociopolitical tool, or 'rallying point' for action against violence against women, will be perceived within, and appreciated against, this broader context and jurisprudence. As will be seen below, due diligence is now well established as a framework for accountability within international human rights law, particularly under the CEDAW-OP, European Court of Human Rights (ECtHR) and Inter-American Court and Commission of Human Rights (IACtHR/IACHR). A closer look will consider how norms of primary prevention have emerged through this jurisprudence.

### **The development of due diligence within international human rights law and its application to violence against women**

The obligation to act with due diligence in response to violence against women is most clearly laid out at the international level in the DEVAW (1993) in Article 4(c), where states are urged to 'exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.'<sup>657</sup> This built on the CEDAW Committee's General Recommendation no. 19 on violence against women, that stated: 'under general international law ... States may also be responsible for

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<sup>655</sup> Samuel, "The Legal Character of Due Diligence: Standards, Obligations or Both?" 26; James R. Crawford, *International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, (Cambridge: Cambridge University Press, 2002), 227 – 228.

<sup>656</sup> *Pulp Mills case*, Judgment, paragraph 101.

<sup>657</sup> General Assembly resolution 48/104, *Declaration for the Elimination of Violence Against Women*, A/RES/48/104 (20 December 1993), Article 4 (c), available from <http://undocs.org/A/RES/48/104>.

private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence.<sup>658</sup> As referenced in Chapter 2, this principle was established in the landmark IACtHR case *Velásquez Rodríguez v. Honduras* in 1988, which provided the first framework for addressing private violence as a human rights abuse.<sup>659</sup> The case dealt with the abduction and forced disappearance of Angel Manfredo Velásquez Rodríguez by armed men in civilian attire, who the state argued were non-state actors. In *Velásquez Rodríguez v. Honduras* the IACtHR established the principle that states can be held responsible for actions that are not directly attributable to them:

An illegal act which violates human rights and which is initially not directly imputable to a State (e.g., because it is the act of a private person or because the person responsible has not been identified) 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 Convention.*<sup>660</sup>

In its judgement the Court also made clear that whilst it found that the disappearance of Velásquez Rodríguez was ‘carried out by agents who acted under the cover of public authority’, had this not been the case, it would still stand that ‘the failure of the State apparatus to act, which is clearly proved, is a failure on the part of Honduras to fulfil the duties it assumed’<sup>661</sup>. In this regard the due diligence standard opened up a ‘juridical bridge between precepts of international law focused on the relationship between the state, its agents and its subjects and the role the state may have with respect to the conduct of and relations between private subjects.’<sup>662</sup> The Court made clear that the relationship between the state and perpetrator is not the decisive factor in establishing state responsibility:

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<sup>658</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 19, 11<sup>th</sup> session, A/47/38, (1992), paragraph 9, available from <http://undocs.org/A/47/38>.

<sup>659</sup> *Velásquez Rodríguez v. Honduras*, [1988] Series C No. 4, Inter-American Court of Human Rights (IACtHR).

<sup>660</sup> *Velásquez Rodríguez v. Honduras*, Judgement [1988] Series C No. 4, IACHR, paragraph 172.

<sup>661</sup> *Velásquez Rodríguez v. Honduras*, Judgement [1988] Series C No. 4, IACHR, paragraph 182.

<sup>662</sup> Elizabeth A. H. Abi-Mershed, “Due Diligence and the Fight Against Gender-Based Violence in the Inter- American System,” *In Due Diligence and its Application to Protect Women From Violence*, edited by Carin Benninger-Budel, (Leiden, The Netherlands: Martinus Nijhoff Publishers, 2008), 128.

the violation can be established even if the identity of the individual perpetrator is unknown. What is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible. Thus, the Court's task is to determine whether the violation is the result of a State's failure to fulfill its duty to respect and guarantee those rights [...]<sup>663</sup>

Regardless, therefore of the 'motivation' of the perpetrator, and whether the state was directly imputable in the violation, the state was still responsible for its lack of due diligence. In the same manner the Court pronounced on the thickening of positive rights and state responsibility with regards human rights, explaining that beyond legislative provisions, the state must 'conduct itself so as to effectively ensure'<sup>664</sup> the 'free and full exercise of ... rights and freedoms.'<sup>665</sup> In keeping with this conceptualisation of due diligence, the Court explained:

The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.

[The duties of prevention and investigation ...] must be undertaken in a serious manner and not as a mere formality preordained to be ineffective ... This is true regardless of what agent is eventually found responsible for the violation. Where the acts of private parties that violate the Convention are not

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<sup>663</sup> *Velásquez Rodríguez v. Honduras*, Judgement [1988] Series C No. 4, IACHR, paragraph 173.

<sup>664</sup> *Velásquez Rodríguez v. Honduras*, Judgement, paragraph 167.

<sup>665</sup> *Velásquez Rodríguez v. Honduras*, Judgement, paragraph 182.

seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.<sup>666</sup>

As was then capitalised on by the CEDAW Committee, the IACtHR extended the state's 'obligations beyond the public sphere of its own machinery to private actors over which it may have no direct control.'<sup>667</sup> This paralleled to violence against women by non-state actors, with particular significance for the conceptualisation of state responsibility for domestic violence. Along with the foundations of Article 2(e)-(f) and Article 5(a) of the CEDAW, which, unusually, allow for some regulation of the 'private sphere', the CEDAW Committee used the precedent set in *Velásquez Rodríguez v. Honduras* to apply the same notion of due diligence to violence against women by private actors, including the IACtHR's conceptualisation of the four obligations of prevention, investigation, punishment and redress/compensation. The 'feminist appropriation of the legal principle of due diligence'<sup>668</sup> through the CEDAW Committee's General Recommendation no. 19 allowed for the institutionalisation of 'broader notions of state responsibility for violence against women'<sup>669</sup>. This was quickly picked up by the transnational women's movement who were pushing for a new international instrument on violence against women. As Stephanie Farrior describes, 'the due diligence standard was very much on their mind'<sup>670</sup>, and so it is unsurprising that the CEDAW Committee's framing of the due standard was included in Article 4(c) of the DEVAW. General Recommendation no. 19 is widely considered the most important of all the Committee's recommendations<sup>671</sup>, and has been followed up by General Recommendation no. 35 in 2017, which argues that the norms within General Recommendation no. 19, including the due diligence standard, are now considered customary international law.<sup>672</sup> Evidence of this can be seen in the jurisprudence of the

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<sup>666</sup> *Velásquez Rodríguez v. Honduras*, Judgement, paragraph 176, 177.

<sup>667</sup> Samuel, "The Legal Character of Due Diligence: Standards, Obligations or Both?" 42.

<sup>668</sup> Paulina García-Del Moral and Megan Alexandra Dersnah, "A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship," *Citizenship Studies*, 18 (6-7), (2014): 661.

<sup>669</sup> García-Del Moral and Dersnah, "A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship," 661.

<sup>670</sup> Stephanie Farrior, "The Due Diligence Standard, Private Actors and Domestic Violence," In *Human Rights: From Practice to Policy - Proceedings of a Research Workshop Gerald R. Ford School of Public Policy University of Michigan October 2010*, edited by Carrie Booth Walling and Susan Waltz, (Michigan: University of Michigan, 2011), 3.

<sup>671</sup> Dubravka Šimonović, "Global and Regional Standards on Violence against Women: The Evolution and Synergy of the CEDAW and Istanbul Conventions," *Human Rights Quarterly*, 36, (2014): 601.

<sup>672</sup> This is further supported by Special Rapporteur Ertürk's assessment of the due diligence standard in 2006, where she argued there was evidence that 'a rule of customary law that obliges States to prevent

CEDAW-OP, ECtHR and IACHR/IACtHR cases below. Alongside the cases under these bodies, the UN Special Rapporteur has given two thematic reports on due diligence that have built on and been used as part of a 'recursive and iterative'<sup>673</sup> process of institutionalising the feminist conceptualisation of the standard. This will now be considered in some depth.

#### *CEDAW-OP cases and the due diligence standard*

In 1999 the UN General Assembly adopted the Optional Protocol to the CEDAW, allowing the CEDAW Committee to receive individual complaints and to inquire into 'grave or systematic violations'. Shortly after it came into force in 2000, the Committee made three landmark judgements in response to individual complaints involving domestic violence. The first of these, *A.T. v. Hungary*, was brought in 2005 by the survivor, and the second and third, *Goekce (deceased) v. Austria*, and *Yildirim (deceased) v. Austria*, were brought in 2007 by an NGO that had supported both victims whilst they were alive. These cases have been significant in reinforcing domestic violence as a human rights violation and developing state responsibility for private violence. In all three of the original cases the CEDAW Committee used its judgements to make wider recommendations to all states. Through these cases the Committee expanded on the understanding of due diligence included in General Recommendation no. 19, elaborated on the exhaustion of local remedies, and advised on the conflict between the victim's rights and the abuser's right to privacy. The recommendations in *A.T.*, *Goecke* and *Yildirim* built on the jurisprudence of the 2001 IACHR decision in *Maria da Penha Maia Fernandes v. Brazil*, and went on to be highly influential in the ECHR case, *Opuz v. Turkey* (2009), which marked a significant shift in the European Court's approach to due diligence and violence against women as discrimination. These regional cases, which will be considered in turn, provided 'discursive opportunity structures'<sup>674</sup> for what Paulina García-Del Moral and Megan Dersnah describe as the 'recursive dialogue between the Inter-American institutions, [the European

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and respond to acts of violence against women with due diligence.' United Nations, *The due diligence standard as a tool for the elimination of violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Yakin Erturk, E/CN.4/2006/61, (20 January 2006), paragraph 29, available at <http://undocs.org/E/CN.4/2006/61>.

<sup>673</sup> García-Del Moral and Dersnah, "A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship," 671.

<sup>674</sup> García-Del Moral and Dersnah, "A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship," 668.

institutions,] the CEDAW Committee, and the SRVAW to strengthen the due diligence principle and to challenge the depoliticisation of violence against women.<sup>1675</sup> Whilst the regional Courts are able to make decisions binding on member states, the non-binding judgements of the CEDAW Committee recommendations still represent the clearest *international* jurisprudence concerning the due diligence standard and state responsibility to prevent violence against women, and contributed to the binding regional decisions.

*A. T. v. Hungary*<sup>676</sup>

In October 2003 A.T. submitted a communication to the CEDAW Committee on the grounds that she had suffered severe domestic violence since 1998 and the state had failed in its obligations to prevent, protect against, and punish domestic violence. A.T. stated that she had been subject to violence by her husband, L.F., since 1998 and during that time had received ten medical certifications substantiating her claims and demonstrating severe physical abuse. This abuse continued even after L.F. had left the family residence in 1999. Prior to submitting her communication A.T. had sought protection from the authorities and the courts through criminal and civil proceedings. Although criminal proceedings were brought against L.F. between 1999 and 2001, L.F. was not detained and A.T. was offered no protection. In 2003 the Budapest Regional Court granted L.F. access to the family home despite efforts to restrict his access. The court found that there was a lack of substantiation of A.T.'s claims and the court could not deny L.F.'s right to property. Whilst appealing this judgement with the supreme court, A.T. submitted her communication to the CEDAW Committee on the grounds that Hungary had violated Articles 2(a), (b) and (e), 5(a), and 16.

In this case the CEDAW Committee used the 'prohibition of gender discrimination as the essential legal basis for a State's obligation to combat domestic violence.'<sup>677</sup> It is the

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<sup>675</sup> García-Del Moral and Dersnah, "A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship," 668; This 'recursive dialogue' can be further see in the IACHR report discussing jurisprudence of the CEDAW Committee, IACHR, *Access To Justice For Women Victims Of Sexual Violence In Mesoamerica*, (OAS/IACHR, 2011) available at [www.oas.org/en/iachr/women/docs/pdf/WOMEN%20MESOAMERICA%20ENG.pdf](http://www.oas.org/en/iachr/women/docs/pdf/WOMEN%20MESOAMERICA%20ENG.pdf)

<sup>676</sup> *A.T. v. Hungary*, Committee on the Elimination of Discrimination against Women, (comm. 2/2003), (2005).

first international human rights decision to equate domestic violence with gender discrimination and is a landmark in the CEDAW Committee's campaign to conceptualise domestic violence as a human rights violation. It relied heavily on General Recommendation no. 19 – reading domestic violence as 'private acts' for the conceptualisation of responsibility: '...States may also be responsible for private acts if they fail to act with due diligence to prevent violations...' <sup>678</sup> This creative interpretation of due diligence was used in this instance to 'extend the substantive scope' of the CEDAW and 'its normative parameters' to include the 'private sphere'. <sup>679</sup> In this sense, the due diligence principle was not only the measure used to determine state responsibility, but it was the crux of conceptualising what had happened to A.T. as a violation of her human rights, and establishing domestic violence, more broadly, as a human rights abuse. As Andrew Byrnes and Eleanor Bath argue, the jurisprudence regarding 'the due diligence standard in relation to violence, particular in the family context', is the 'major substantive contribution thus far of the Committee under the individual complaints procedure' <sup>680</sup>. *A. T. v. Hungary* was the first time domestic violence was considered a human rights violation at the international level, and marked a concretising moment in the feminist conceptualisation of violence against women and state responsibility.

In relation to Article 2 the Committee referred to the state's own admission that the remedies pursued by A.T. 'were not capable of providing immediate protection to her against ill-treatment by her former partner'. <sup>681</sup> With regard the denied detainment of L.F., the Committee emphasised the primacy of a woman's rights to life and security, stating that they 'cannot be superseded by other rights, including the right to property and the right to privacy'. <sup>682</sup> Whilst this is certainly true, Jim Murdoch voices concern that such a simple assertion 'seems to suggest a lack of appreciation of the content of

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<sup>677</sup> Beate Rudolph and Andrea Eriksson, "Women's rights under international human rights treaties: Issues of rape, domestic slavery, abortion and domestic violence," *International Journal of Constitutional Law*, 5(3), (2007): 507.

<sup>678</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 19, 11<sup>th</sup> session, A/47/38, (1992), paragraph 9.

<sup>679</sup> Samuel, "The Legal Character of Due Diligence: Standards, Obligations or Both?" 16.

<sup>680</sup> Andrew Byrnes and Eleanor Bath, "Violence Against Women, the Obligation of Due Diligence, and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women – Recent Developments," *Human Rights Law Review*, 8(3), (2008): 533.

<sup>681</sup> *A.T. v. Hungary*, paragraph 5.6.

<sup>682</sup> *A.T. v. Hungary*, paragraph 9.3.



the obligation to protect against arbitrary deprivation of liberty'<sup>683</sup>, on behalf of the Committee. The concept of 'competing rights' is a great obstacle to domestic violence prevention and it is disappointing that the Committee didn't elaborate further on its position. With regard Articles 5 and 16 the Committee pointed to the facts of the case, that A.T. was abused for four years and failed to be either protected, or offered redress, by the state, through criminal and civil proceedings, and the fact that there were inadequate means for her to escape this situation revealed 'aspects of the relationships between the sexes and attitudes towards women that the Committee recognised vis-à-vis the country as a whole.'<sup>684</sup> This significant appeal to the macrosystemic aetiology of violence against women in Hungary – calling out the widespread gender stereotyping and subordination of women – was one of the first international jurisprudential building blocks, for what would later be termed the duty of 'systemic due diligence', by Special Rapporteur Manjoo<sup>685</sup>. In the same manner, the Committee also referenced its past recommendations to Hungary during the state reporting process, three years prior to the case; further emphasising the duties states have under Articles 2(e)-(f) and 5(a) and General Recommendations no. 19(11 – 12) and no. 35 (34 – 35) to transform attitudes and practices that are prejudicial and contribute at the macrosystemic level to violence against women:

It [the Committee] has stated on many occasions that traditional attitudes by which women are regarded as subordinate to men contribute to violence against them. The Committee recognized those very attitudes when it considered the combined fourth and fifth periodic report of Hungary in 2002. At that time it was concerned about the “persistence of entrenched traditional stereotypes regarding the role and responsibilities of women and men in the family ...”<sup>686</sup>

The Committee found that Hungary had violated articles 2(a), (b) and (e), 5(a), and 16 and concluded that the state should 'take immediate and effective measures to

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<sup>683</sup> Jim Murdoch, "Unfulfilled expectations: the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women," *European Human Rights Law Review*, 1, (2010): 34.

<sup>684</sup> *A.T. v. Hungary*, paragraph 9.4.

<sup>685</sup> United Nations, *State responsibility for eliminating violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Rashida Manjoo*, A/HRC/23/49 (May 14, 2013), available at <http://undocs.org/A/HRC/23/49>.

<sup>686</sup> *A.T. v. Hungary*, paragraph 9.4.

guarantee the physical and mental integrity of A. T. and her family,<sup>687</sup> including providing a home for A.T. and her family. It then went on to make general recommendations on the state's responsibility to '[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.'<sup>688</sup> Whilst it is disappointing that the Committee didn't make a general recommendation on eliminating harmful stereotypes or traditional attitudes that perpetuate, or are tolerant of, domestic violence, *A.T. v. Hungary* was a landmark case that had the effect of concretising the due diligence obligation to prevent violence against women. Perhaps most significantly, with regard to the development of norms, it went on to provide the basis of the ECtHR's decision in *Opuz v. Turkey*.

*Goekce (deceased) v. Austria*<sup>689</sup> and *Yildirim (deceased) v. Austria*<sup>690</sup>

*Goekce (deceased) v. Austria* and *Yildirim (deceased) v. Austria* are very similar cases. Both women were killed by their husbands after a lengthy period of abuse, despite efforts by both women to seek assistance through the authorities and the courts. Both cases were brought by a non-governmental organisation that the victims had been clients of. Only the details of *Goekce* are considered below, as the Committee's findings in *Yildirim* were 'near identical'<sup>691</sup>.

The applicants stated that the mental and physical abuse Sahide Goekce suffered began in 1999. On 2<sup>nd</sup> December Mustafa Goekce choked Sahide Goekce and threatened to kill her. The next day she reported this to the police who ordered a ten-day expulsion order prohibiting Mustafa from returning to the apartment. Mustafa was charged with bodily harm but was later acquitted. The violence continued and in 2000 the police ordered another ten-day expulsion and requested the Public Prosecutor permit detaining Mustafa for 'aggravated coercion' on the basis of making a

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<sup>687</sup> *A.T. v. Hungary*, paragraph 9.6.I(a).

<sup>688</sup> *A.T. v. Hungary*, paragraph 9.6 (II) General (b).

<sup>689</sup> *Goekce (deceased) v Austria*, Committee on the Elimination of Discrimination against Women, (comm. 2/2005) (2007)

<sup>690</sup> *Yildirim (deceased) v Austria*, Committee on the Elimination of Discrimination against Women, (comm. 6/2005) (2007)

<sup>691</sup> Byrnes and Bath, "Violence Against Women, the Obligation of Due Dilligence, and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women – Recent Developments," 526.

death threat to Sahide. This was denied. The police were repeatedly called out to the Goekce apartment to answer reports of 'battering' over the next two years and on the 8<sup>th</sup> October 2002 the police gave Mustafa a third expulsion order. Sahide pressed charges for causing bodily harm and the police again requested the Public Prosecutor permit detaining Mustafa but were again denied. On the 22<sup>nd</sup> October 2002 the district court gave an interim injunction prohibiting Mustafa to return to the Goekce apartment for three months. Mustafa violated this injunction and both Sahide's brother and father reported his threats to kill Sahide to the police, although no record was kept of their statements. On the 5<sup>th</sup> December 2002 the Public Prosecutor stopped prosecutions against Mustafa for causing bodily harm on the grounds of insufficient evidence. On the 7<sup>th</sup> December Mustafa shot and killed Sahide in their family home in front of their two daughters. The applicants state that the authorities had been informed that Mustafa had a gun even though he was prohibited from having a gun but that this was not looked into. The applicants claim that Austria had violated article 1, 2, 3 and 5 of the covenant and failed to fulfil its obligations under General Recommendation no. 19.

Austria claimed the communication was inadmissible. Sahide had withdrawn claims, refused to testify, and failed to challenge the Public Prosecutor at the Constitutional Court. The CEDAW Committee held the communication as admissible, explaining that the purpose of the exhaustion of domestic remedies rule was to provide a state with the opportunity to remedy an alleged violation. The Committee also considered the relationship between the allegations made by the complainant and the need to exhaust domestic remedies:

The Committee considered that the allegations made relating to the obligation of the State party to have exercised due diligence to protect Sahide Goekce were at the heart of the communication and were of great relevance to the heirs. Thus, the question as to whether domestic remedies had been exhausted in accordance with article 4, paragraph 1, of the Optional Protocol must be examined in relation to these allegations.<sup>692</sup>

Austria appealed this decision and gave further grounds for inadmissibility. It argued

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<sup>692</sup> *Goekce (deceased) v Austria*, paragraph 7.4.

that Sahide 'as a private individual, would have been free to bring an action, known as "associated prosecution" against her husband after the Public Prosecutor decided to drop the charges against him'<sup>693</sup> and in failing to do so she had not exhausted local remedies. Again the Committee denied claims of inadmissibility. Most importantly the Committee held that 'in a situation of protracted domestic violence and threats of violence'<sup>694</sup> this provision was not a realistic remedy to Sahide. The Committee's position on exhaustion of domestic remedies has been praised; and is in keeping with readings of due diligence that require *effective* and *de facto* protection of rights.

Similarly, on the merits of the case the Committee highlighted that whilst Austria had fulfilled obligations under Article 2 and General Recommendation no.19 through comprehensive legal and political measures, the *de facto* enjoyment of those rights were missing and the fulfilment of those rights comprise an obligation of due diligence on the state. The Committee explained that this obligation is incumbent on all state actors:

[T]o enjoy the practical realization of the principle of equality of men and women and of her human rights and fundamental freedoms, the political will that is expressed in the aforementioned comprehensive system of Austria must be supported by State actors, who adhere to the State party's due diligence obligations.<sup>695</sup>

This is an encouraging affirmation of the state's due diligence responsibilities across the range of its actors. Despite three expulsion orders and two requests for detainment orders, the statements of Sahide, her father, and her brother, the threats made against Sahide's life were not taken seriously and investigated. This all evidences a failure on the part of the Austrian authorities to act with due diligence. The position of the Committee also reinforces the importance of substantive and transformative equality, rather than mere *de jure* equality, as outlined in the norms of primary prevention in Chapter 3. In this way the Goekce decision echoes the IACtHR decision in *Velásquez Rodríguez v. Honduras* where the Court found on the state's responsibility to 'ensure

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<sup>693</sup> *Goekce (deceased) v Austria*, paragraph 11.3.

<sup>694</sup> *Goekce (deceased) v Austria*, paragraph 11.3.

<sup>695</sup> *Goekce (deceased) v Austria*, paragraph 12.1.2, this was common to *Yildirim (deceased) v Austria*, paragraph 12.1.2.

and fulfil' human rights, as outlined above, and the positive duties this entails on the state. Whilst the Committee didn't feel it necessary to make findings on Article 5 it did recognise that there were 'linkages between traditional attitudes by which women are regarded as subordinate and domestic violence.'<sup>696</sup> It is disappointing, however, that the Committee didn't expand further on this and make explicit findings on Article 5 as it is highly likely that these 'traditional attitudes' contributed to the gap between the *de jure* provisions that outlaw domestic violence and the *de facto* protection that was afforded Sahide and contributed to her death.

As well as clarifying the state's duty to act with due diligence, the Committee also went on to consider the conflict of rights that occurs when advocating detainment. It is disappointing, however, that in its explanation it only cited its position in *A.T. v. Hungary*, that 'the perpetrator's rights cannot supersede the women's rights to life and to physical and mental integrity', and didn't expand on this at all. This said, the Committee's position has been influential in other cases dealing with domestic violence and the right to privacy. For example, in *Opuz v. Turkey*<sup>697</sup> the opinion of the Committee on the supremacy of women's rights to physical and mental integrity influenced the ECHR's position on detainment and the perpetrator's right to privacy.<sup>698</sup>

The Committee held that whilst Austria punished Mustafa to the full extent of the law for the murder of Sahide, the state had violated Article 2 (a) and (c) through (f) and Article 3 in conjunction with Article 1 and General Recommendation no. 19. This case shows clearly the separate elements of the due diligence obligation. It is not simply the duty of state's to make domestic violence illegal and punishable; it has a separate legal human rights obligation to prevent it. In its recommendations the Committee once more emphasised the importance of implementation, alongside legislation and national action plans, and stressed the state's responsibility to prevent violence against women, calling on the state to:

Strengthen implementation and monitoring of the Federal Act for the Protection

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<sup>696</sup> *Goekce (deceased) v Austria*, paragraph 12.2.

<sup>697</sup> *Opuz v. Turkey*, Application No. 33401/02, [2009], ECHR.

<sup>698</sup> Patricia Londono, "Developing human rights principles in cases of gender-based violence: *Opuz v. Turkey* in the European Court of Human Rights," *Human Rights Law Review*, 9(4), (2009): 663. 657 – 667.

against Violence within the Family and related criminal law, by acting with due diligence to prevent and respond to such violence against women and adequately providing for sanctions for the failure to do so...<sup>699</sup>

The CEDAW Committee has further affirmed the due diligence obligation to prevent in a number of key cases, and has regularly linked its conceptualisation of violence against women in General Recommendation no. 19 with duties under Article 5(a) to modify and transform culture. In this way the application of due diligence within the CEDAW-OP cases help further establish norms concerning primary prevention. This jurisprudence went on to shape the recommendations in *Karen Tayag Vertido v. the Philippines* (2010), *V.K. v. Bulgaria* (2011), *V.P.P. v. Bulgaria* (2012), *Caselsatou Jallow v. Bulgaria* (2012), *Cecilia Kell v. Canada* (2012), *Angela González Carreño v. Spain* (2014), *R.P.B. v. The Philippines* (2014), and *X and Y v. Georgia* (2015). In one of the Committee's most recent complaints, *X and Y v. Georgia*, the authors argued:

that there exists a sociocultural pattern of conduct in the State party that accords greater weight to the word of a man and that accepts a level of physical violence and sexual touching as being within the realms of acceptable parenting for a man. Customs and social patterns also perpetuate discrimination and prejudices based on the idea of inferiority or superiority. The authors add that the State party did not contest those discriminatory practices, social and cultural patterns of conduct and prejudices outlined in the communication, nor provide evidence indicating steps to modify or eliminate them.<sup>700</sup>

In response the Committee concluded that the state had failed in its duty:

to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; and to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women. It also considers that the above-mentioned facts show a failure by the State party in its duty to take all appropriate measures to modify the social and cultural patterns of conduct of

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<sup>699</sup> *Goekce (deceased) v Austria*, CEDAW (comm. 2/2005) (2007) paragraph 12.3(a).

<sup>700</sup> *X and Y v Georgia*, Committee on the Elimination of Discrimination against Women, (comm. 24/2009) (2015) paragraph 8.7.

men and women, with a view to achieving the elimination of prejudices and customary and all other practices that are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.<sup>701</sup>

The jurisprudence of the CEDAW Committee has served to establish the due diligence obligation to prevent, and by linking this to the positive obligations of the state under Article 5(a), has furthered the feminist appropriation of the due diligence standard. The approach of the CEDAW committee has been further bolstered and expanded by the 2006 and 2013 thematic reports of the Special Rapporteur on violence against women. In fact, García-Del Moral and Dersnah argue that 'the active framing efforts of the CEDAW Committee to institutionalise due diligence within the UN were concretised chiefly through the work of the Special Rapporteur on Violence against Women.'<sup>702</sup> In their reports, Special Rapporteurs Ertürk and Manjoo look at the broader preventative duties of the state, and establish state responsibility within a normative context that understands violence against women as a continuum operating across multiple social locations. The thematic reports built on the first Rapporteur's approach to due diligence, who said of state responsibility that 'a State that does not act against crimes of violence against women is as guilty as the perpetrators.'<sup>703</sup> In her 1999 report on domestic violence, Special Rapporteur Coomaraswamy also developed a list of measures that are incumbent upon states in their compliance with their due diligence obligation to prevent. As a starting point for her 2006 report, Special Rapporteur Ertürk recalls this list:

ratification of international human rights instruments; constitutional guarantees of equality for women; the existence of national legislation and/or administrative sanctions providing adequate redress for women victims of violence; policies or plans of action that deal with the issue of violence against women; the gender-sensitivity of the criminal justice system and police; accessibility and availability of support services; the existence of measures to raise awareness and modify

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<sup>701</sup> *X and Y v Georgia*, paragraph 8.7.

<sup>702</sup> García-Del Moral and Dersnah, "A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship," 666.

<sup>703</sup> United Nations, *Violence in the family and domestic violence: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy*, E/CN.4/1996/53, (5 February 1996), paragraph 26, available from <http://undocs.org/E/CN.4/1996/53>

discriminatory policies in the field of education and the media, and the collection of data and statistics concerning violence against women.<sup>704</sup>

The 2006 and 2013 thematic reports sort to expand on the concept and negotiate its legal and sociopolitical framing within international human rights law. Arguably, the work of the Special Rapporteur has proven 'instrumental ... in adapting the due diligence standard from a feminist intersectional perspective.'<sup>705</sup>

#### *The expansion of the standard through the work of the Special Rapporteur*

In her 2006 report, Special Rapporteur Ertürk characterised the concept of due diligence as 'a yardstick to determine whether a state has met or failed to meet its obligations in combating violence against women.'<sup>706</sup> The report considered the jurisprudence of the regional courts and the development of standards through the UN fora, concluding that, on the basis of the *opinio juris* outlined in the report, '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>707</sup> This pronouncement of customary international law status went on to affect the case law of the European and Inter-American Courts<sup>708</sup> and was used as a conclusive factor in determining admissibility in the landmark domestic violence case, *Jessica Lenahan (Gonzales) v. United States* (2011). The Special Rapporteur argued that the concept was well established but there remained 'a lack of clarity concerning its scope and content'<sup>709</sup>. Consequently, she argued, '[t]he application of [the] due diligence standard, to date, has tended to be State-centric and limited to responding to violence when it occurs, largely neglecting

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<sup>704</sup> United Nations, *The due diligence standard as a tool for the elimination of violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Yakin Ertürk, E/CN.4/2006/61, (20 January 2006), paragraph 32.

<sup>705</sup> García-Del Moral and Dersnah, "A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship," 666.

<sup>706</sup> United Nations, *The due diligence standard as a tool for the elimination of violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Yakin Ertürk, E/CN.4/2006/61, (20 January 2006), paragraph 14.

<sup>707</sup> United Nations, *The due diligence standard as a tool for the elimination of violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Yakin Ertürk, E/CN.4/2006/61, (20 January 2006), paragraph 29.

<sup>708</sup> *Opuz v. Turkey*, paragraph 79

<sup>709</sup> United Nations, *The due diligence standard as a tool for the elimination of violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Yakin Ertürk, E/CN.4/2006/61, (20 January 2006), paragraph 14.



the obligation to prevent and compensate and the responsibility of non-State actors.<sup>710</sup> With regard to prevention the Special Rapporteur noted that states have 'concentrated on legislative reform access to justice and the provision of services... [whilst] relatively little work [has been] done on the more general obligation of prevention, including the duty to transform patriarchal gender structures.'<sup>711</sup> Further to understanding the scope of prevention required, the Special Rapporteur also stressed that due diligence obligations must be implemented in good faith. This is a general principle of international law and means due diligence should be result-based and effective. With the intended effect being prevention of violence against women, approaches that merely criminalise violence against women, without any wider preventative strategy, obviously don't meet the criteria of a good faith implementation. Similarly, due diligence must hold up to the fundamental rules of international human rights law, including non-discrimination. It is important to resist actors who would characterise failure to act with due diligence as invoking 'indirect' state responsibility. This terminology is used to suggest a lesser degree of culpability. There are no 'shades of culpability'<sup>712</sup> and it must be reinforced that failing to act with due diligence to the detriment of a women's freedom from gender-based violence is no less a violation of her rights than causing her suffering. As has previously been stated, it is vital that the discourse does not elevate state violence, which disproportionately affects men, over private violence, which disproportionately affects women. As such, 'States are required to use the same level of commitment in relation to prevention, investigation, punishment and provision of remedies for violence against women as they do with regards to the other forms of violence.'<sup>713</sup> Whilst the capacity of the State is taken into account when determining reasonableness, '[i]nadequate resources are not a valid excuse for failing to act with diligence because State resources "must be allocated on a non-discriminatory basis."<sup>714</sup> With the application of good faith and non-discrimination,

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<sup>710</sup> United Nations, *The due diligence standard as a tool for the elimination of violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Yakin Erturk*, E/CN.4/2006/61, (20 January 2006), paragraph 15.

<sup>711</sup> United Nations, *The due diligence standard as a tool for the elimination of violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Yakin Erturk*, E/CN.4/2006/61, (20 January 2006), paragraph 15.

<sup>712</sup> Gordon. Christenson, "Attributing Acts of Omission to the State," *Michigan Journal of International Law*, (12), (1991): 350.

<sup>713</sup> United Nations, *The due diligence standard as a tool for the elimination of violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Yakin Erturk*, E/CN.4/2006/61, (20 January 2006), paragraph 35.

<sup>714</sup> Julie Goldscheid and Debra Liebowitz, "Due Diligence and Gender Violence: Parsing its Power and its Perils," *Cornell International Law Journal*, 48, (2015): 311.

the measures included in the due diligence obligation to prevent stretch to issues of gender-budgeting as well as legislation and policy. However, the Special Rapporteur noted a far more limited appreciation of the standard by states:

As a general rule, States have sought to discharge their due diligence obligations of prevention of violence against women through the adoption of specific legislation, the development of awareness-raising campaigns and the provision of training for specified professional groups [...] These programmes tend to view violence against women as a stand-alone issue and there are relatively few examples of linkages being made between violence and other systems of oppression.<sup>715</sup>

Whilst some state had preventative programmes in place, the Special Rapporteur noted that there was little attention to primary prevention and the positive obligations of the state under Article 2(e)-(f) and 5(a) or General Recommendation no. 19, paragraphs 11 and 12. The Special Rapporteur concluded that there was a lack of 'State engagement in overall societal transformation to demystify prevailing gender biases or to provide support to civil society initiatives in this regard.'<sup>716</sup> The Special Rapporteur characterised this blindness to structural inequality as a consequence of the ongoing public/private dichotomy operating in the international human rights law discourse.<sup>717</sup> The dominance of individualist, masculinist portrayals of human rights have meant that responsibility for prevention, as understood by the state, has lacked appreciation of the 'complex and intersecting relations of power in the public and private spheres of life that lie at the heart of sex discrimination.'<sup>718</sup> The Special Rapporteur argued that this was down to the 'narrow interpretation'<sup>719</sup> of the law

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<sup>715</sup> United Nations, *The due diligence standard as a tool for the elimination of violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Yakin Erturk, E/CN.4/2006/61, (20 January 2006), paragraph 38.

<sup>716</sup> United Nations, *The due diligence standard as a tool for the elimination of violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Yakin Erturk, E/CN.4/2006/61, (20 January 2006), paragraph 46.

<sup>717</sup> United Nations, *The due diligence standard as a tool for the elimination of violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Yakin Erturk, E/CN.4/2006/61, (20 January 2006), paragraph 56.

<sup>718</sup> United Nations, *The due diligence standard as a tool for the elimination of violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Yakin Erturk, E/CN.4/2006/61, (20 January 2006), paragraph 56.

<sup>719</sup> United Nations, *The due diligence standard as a tool for the elimination of violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Yakin Erturk, E/CN.4/2006/61, (20 January 2006), paragraph 57.

rather than the discourse itself, and that what was needed was to 're-imagine the [due diligence] standard so that it responds more effectively to violence against women.'<sup>720</sup>

Special Rapporteur Manjoo continued this work of 're-imagining', and picked up on the themes of prevention and gender transformation at the sociocultural level in her 2013 report on state responsibility for eliminating violence against women.<sup>721</sup> The report highlighted the importance of the due diligence standard for rights holders in contexts where a violation is based on a state's failure to fulfil rights. The Special Rapporteur argued that the standard is 'especially important where the potential infringement comes through a State's failure to act, as it can be difficult for rights bearers to assess if an omission constituted a violation of their rights, in the absence of a normative basis for the appraisal.'<sup>722</sup> The report highlighted the precedent set in *Velásquez Rodríguez*, and the jurisprudence concerning the state's positive obligations to ensure rights. The report also reiterated the wider norms and principles that must inform the application of the standard, including: 'universality, inalienability, equality, non-discrimination, indivisibility, interdependence and interrelatedness; and the principles related to the *respect, protect and fulfil* goals of human rights.'<sup>723</sup> In the context of prevention this 'entails the use of all means of a legal, political, administrative and cultural nature to promote the protection of human rights'<sup>724</sup>.

Special Rapporteur Manjoo recalled the 2006 report by Special Rapporteur Ertürk, which 'highlighted the lack of State accountability for social structural deficiencies, such as ongoing gender discrimination, that create environments that are conducive to acts

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<sup>720</sup> United Nations, *The due diligence standard as a tool for the elimination of violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Yakin Ertürk*, E/CN.4/2006/61, (20 January 2006), paragraph 74.

<sup>721</sup> United Nations, *State responsibility for eliminating violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Rashida Manjoo*, A/HRC/23/49 (May 14, 2013).

<sup>722</sup> United Nations, *State responsibility for eliminating violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Rashida Manjoo*, A/HRC/23/49 (May 14, 2013), paragraph 13.

<sup>723</sup> United Nations, *State responsibility for eliminating violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Rashida Manjoo*, A/HRC/23/49 (May 14, 2013), paragraph 76.

<sup>724</sup> United Nations, *State responsibility for eliminating violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Rashida Manjoo*, A/HRC/23/49 (May 14, 2013), paragraph 15.

of violence against women.<sup>725</sup> From this perspective, the Special Rapporteur went on to consider the relationship between the conceptualisation of violence against women as structural and systemic and the framing of due diligence prevention. Mirroring Heise's social ecology model the Special Rapporteur argued that violence against women needs to be understood as 'underpinned by a complex interplay of individual, family, community, economic and social factors'<sup>726</sup>, and as such preventative measures must reflect the duties of the state at the individual and systemic levels. This means:

recognizing that State responsibility to act with due diligence is both a *systemic-level responsibility*, i.e. the responsibility of States to create good and effective systems and structures that address the root causes and consequences of violence against women; and also an *individual-level responsibility*, i.e., the responsibility of States to provide each victim with effective measures of prevention, protection, punishment and reparation.<sup>727</sup>

The report goes on to recommend a new framework for due diligence that separates the 'standard into two categories: individual due diligence and systemic due diligence.'<sup>728</sup> The delineation of this concept allows for greater accountability, particularly at the systemic level, where the public/private dichotomy has worked to obscure the state's role and responsibility. It makes clear that the state has a duty to the individual, but also emphasises the framing of the DEVAW, Beijing Platform, and General Recommendation no. 19, by highlighting the state's obligations beyond the individual level, 'to create a functioning system to eliminate violence against women.'<sup>729</sup> The report introduced the terminology 'systemic due diligence', which acted to institutionalise the concept of primary prevention within the discourse surrounding

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<sup>725</sup> United Nations, *State responsibility for eliminating violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Rashida Manjoo, A/HRC/23/49 (May 14, 2013), paragraph 20.

<sup>726</sup> United Nations, *State responsibility for eliminating violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Rashida Manjoo, A/HRC/23/49 (May 14, 2013), paragraph 20.

<sup>727</sup> United Nations, *State responsibility for eliminating violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Rashida Manjoo, A/HRC/23/49 (May 14, 2013), paragraph 20.

<sup>728</sup> United Nations, *State responsibility for eliminating violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Rashida Manjoo, A/HRC/23/49 (May 14, 2013), paragraph 70.

<sup>729</sup> United Nations, *State responsibility for eliminating violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Rashida Manjoo, A/HRC/23/49 (May 14, 2013), paragraph 70.

state responsibility. This further concretised the feminist appropriation of the standard as applied by the CEDAW Committee and regional Courts. Special Rapporteur Manjoo outlined the duty of systemic due diligence as:

the obligations States must take to ensure a holistic and sustained model of prevention, protection, punishment and reparations for acts of violence against women. At a systemic level, States can meet their responsibility to protect, prevent and punish by, among other things, adopting or modifying legislation; developing strategies, action plans and awareness-raising campaigns and providing services; reinforcing the capacities and power of police, prosecutors and judges; adequately resourcing transformative change initiatives; and holding accountable those who fail to protect and prevent, as well as those who perpetrate violations of human rights of women. Also, States have to be involved more concretely in overall societal transformation to address structural and systemic gender inequality and discrimination.<sup>730</sup>

The focus on societal transformation picked up on the jurisprudence of the regional courts both in its decisions on prevention and reparations. As well as being involved in 'societal transformation' as a systemic due diligence obligation of prevention, the standard applied to redress and reinforced the evolving norm of transformative remedies:

The due diligence obligation in respect of remedies cannot be just about returning women to the situation they were in before the individual instance of violence, but instead should strive to have a transformative potential. This implies that remedies should aspire, to the extent possible, to subvert instead of reinforce pre-existing patterns of cross-cutting structural subordination, gender hierarchies, systemic marginalization and structural inequalities that may be at the root cause of the violence that women experience ... [T]he notion of a right to reparation is located within the framework of the law of remedies and can serve

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<sup>730</sup> United Nations, *State responsibility for eliminating violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Rashida Manjoo, A/HRC/23/49* (May 14, 2013), paragraph 71.

both individual and societal goals [...]<sup>731</sup>

Whilst reparations are not a preventative measure, the framing of the standard to include the root causes and systemic nature of violence against women, furthers the norms and principles of primary prevention, and strengthens the duty of systemic due diligence as it applies to prevention. Systemic due diligence challenges the state's 'dominant focus on protection and prosecution'<sup>732</sup> by centring the feminist conceptualisation of violence against women as gendered and discriminatory, and spotlighting the state's responsibility to eliminate, rather than just respond to, violence against women. In calling for 'the combatting of gender stereotypes, tackling gendered economic inequalities, and providing access to political empowerment and decision-making'<sup>733</sup>, the standard of systemic due diligence 'challenges the notion that gender violence is a phenomenon distinct from the wider field of gender equality and women's rights.'<sup>734</sup> The conceptualisation of the standard of systemic due diligence is intimately connected with the norms of primary prevention, as outlined in Chapter 3, and the framing of violence against women as gendered, discriminatory, and systemic, as outlined in Chapter 2. The expansion of the due diligence obligation to prevent violence against women is in keeping with the broader understanding of the standard as evolutionary and context-specific by nature: 'the degree of diligence pivots on the primary rules [therefore...] changes to the primary rules will also affect the standard of care expected.'<sup>735</sup> As outlined above, the understanding of reasonableness and appropriate means (the agreed framing of the standard) can evolve as the understanding of risk becomes clearer; as the methods of prevention become more obvious; and, as the primary rule itself becomes more widely accepted. As violence against women has moved from being understood as a 'private matter' to a 'pandemic human rights violation', so has the understanding of reasonableness and responsibility. Likewise, as evidence has grown to support the link between the systemic and the individual, and between gender inequality and violence, so has the understanding of

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<sup>731</sup> United Nations, *State responsibility for eliminating violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Rashida Manjoo, A/HRC/23/49* (May 14, 2013), paragraph 75.

<sup>732</sup> Goldscheid and Liebowitz, "Due Diligence and Gender Violence: Parsing its Power and its Perils," 308.

<sup>733</sup> Goldscheid and Liebowitz, "Due Diligence and Gender Violence: Parsing its Power and its Perils," 309.

<sup>734</sup> Goldscheid and Liebowitz, "Due Diligence and Gender Violence: Parsing its Power and its Perils," 309.

<sup>735</sup> ILA, *ILA Study Group on Due Diligence in International Law: Second Report, July 2016*, 21.

what constitutes 'all appropriate means'. As outlined in the introduction to the due diligence standard, the measures deemed appropriate are also subject to scientific and technical developments in the field of the primary rule:

Advances in scientific understanding [...] can also increase the degree of care required *over time*. The extent of risk or advances in scientific knowledge that allow us to *perceive* more accurately the extent of risk (either higher or lower) will also influence the degree of diligence required.<sup>736</sup>

In the field of violence against women and primary prevention, the research has developed a strong consensus that gender inequality is a causal risk; not just a 'contributory factor' but a 'determinant' of violence against women.<sup>737</sup> This understanding is supported by the expertise of women's organisations, who when surveyed as part of a global assessment of the due diligence standard, 'cited gender inequality as the risk factor that most increased the prevalence of VAW'.<sup>738</sup> Our perception of risk – of both its nature and extent – as it relates to violence against women has evolved and influenced the 'degree of diligence required'. 'Systemic due diligence' articulates this increased diligence, and gives the evolution of the standard orthodoxy within the discourse.

This evolution is picked up in the 2016 framework for prevention outlined by the 'Due Diligence Project'.<sup>739</sup> It covers ten measure that should shape prevention programmes as states look to fulfil their obligations of due diligence. Leading amongst the recommendations are measures aimed at the systemic or primary level:

#### I. Targeting Underlying Causes of VAW

Effective preventive strategies address underlying causes of VAW and seek to eliminate tolerance and acceptance of VAW while incorporating a human rights

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<sup>736</sup> ILA, *ILA Study Group on Due Diligence in International Law: Second Report*, July 2016, 21.

<sup>737</sup> "Policy Brief: International Evidence on the Effectiveness of Prevention Initiatives," Our Watch, 7, accessed November 9, 2018, [www.ourwatch.org.au/getmedia/50e1f9de-9d7b-4236-a300-91087d3eb9e6/Accessible\\_Policy\\_Brief\\_3\\_International\\_Evidence\\_Base.pdf.aspx?ext=.pdf](http://www.ourwatch.org.au/getmedia/50e1f9de-9d7b-4236-a300-91087d3eb9e6/Accessible_Policy_Brief_3_International_Evidence_Base.pdf.aspx?ext=.pdf)

<sup>738</sup> Zarizana Abdul Aziz and Janine Moussa, *Due Diligence Framework: State Accountability Framework for Eliminating Violence against Women*, (International Human Rights Initiative, 2016), 17, available at [www.duediligenceproject.org/ewExternalFiles/Due%20Diligence%20Framework%20Report%20Z.pdf](http://www.duediligenceproject.org/ewExternalFiles/Due%20Diligence%20Framework%20Report%20Z.pdf).

<sup>739</sup> Zarizana Abdul Aziz and Janine Moussa, *Due Diligence Framework: State Accountability Framework for Eliminating Violence against Women*, (International Human Rights Initiative, 2016).

framework, exposing the relationship between gender inequality and VAW.

## 2. Transforming Society: Changing Mindsets and Modifying Behaviour

Effective preventive measures not only specifically target VAW but also aim to transform social perceptions, attitudes and behaviours that cause, support and tolerate VAW. They must be aimed at changing mindsets and modifying behaviour to reject VAW, its justifications and excuses. These are embedded in gender inequality, gender discrimination and negative socio-cultural-religious perceptions of women that reinforce hegemonic notions of masculinity and femininity and the institutions that propagate them.

## 3. Eliminating Risk Factors

Preventive programmes must challenge negative socio-cultural norms and those that support male authority and control over women and sanction or condone VAW. Strengthening women's economic and legal rights and eliminating gender inequalities in access to formal wage employment and secondary education would lay concrete foundations in preventing VAW.<sup>740</sup>

In García-Del Moral and Dersnah's analysis of the due diligence standard as it applies to violence against women, they outlined 'three key moments'<sup>741</sup> that institutionalised and anchored the 'feminist appropriation' of the standard. These were 'the explicit incorporation of the so-called private sphere into notions of violence by private actors, the split between systemic and individual due diligence, and the framing of due diligence as customary international law.'<sup>742</sup> The work of the Special Rapporteur has been pivotal in all three moments. However, the work of the Special Rapporteur, and the jurisprudence of the CEDAW Committee, has been part of a wider 'dialogical

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<sup>740</sup> Zarizana Abdul Aziz and Janine Moussa, *Due Diligence Framework: State Accountability Framework for Eliminating Violence against Women*, (International Human Rights Initiative, 2016), 79 – 80: Measures 4 – 10 include: Providing Outreach and Ending Isolation; Broadening the Scope of VAW Programmes; Formulating Comprehensive Laws and Constitutional Guarantees; Collecting Data and Designing Programmes; Incorporating Intersectionality and Providing for At-risk Groups; Maintaining a Sustained Strategy; Collaborating with Women's/Feminist Organizations.

<sup>741</sup> García-Del Moral and Dersnah, "A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship," 671.

<sup>742</sup> García-Del Moral and Dersnah, "A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship," 671.



process<sup>743</sup>, which includes the case law of the regional human rights bodies. This understanding of due diligence and prevention has been further defined and strengthened through the Inter-American Commission and Court on Human Rights, the African Commission on Human and Peoples' Rights<sup>744</sup> and the European Court of Human Rights. The expansion of the standard is also evident in treaties at the regional level. An in-depth look at the case law of the European and Inter-American systems will highlight this evolution. Whilst the obligations of individual and systemic responsibility are not as clearly delineated in the language of the regional bodies' case law, evidence of the norms of primary prevention and systemic due diligence are clear in their decisions and recommendations on prevention and reparations.

#### *The European Court of Human Rights and the due diligence obligation to prevent*

*The Council of Europe Convention on preventing and combating violence against women and domestic violence*, also known as the Istanbul Convention, was adopted in 2011 and came into force in 2014. As discussed in the previous chapters, it marks a significant leap forward in terms of conceptualising prevention and state responsibility. Whilst problems may arise because of its gender-neutral approach to domestic violence<sup>745</sup>, it is arguably 'the most comprehensive victim supporting regional treaty that currently exists.'<sup>746</sup> The Istanbul Convention frames violence against women as both a human rights violation and a form of discrimination, and encompasses a substantive equality approach to prevention and elimination of violence against women: 'Recognising that the realisation of *de jure* and *de facto* equality between

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<sup>743</sup> García-Del Moral and Dersnah, "A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship," 667.

<sup>744</sup> *Zimbabwe Human Rights NGO Forum v. Zimbabwe* Communication no. 245/02 [2006] ACHPR, paragraph 143:

The ACmHPR states that 'Human rights standards do not contain merely limitations on State's authority or organs of State. They also impose positive obligations on States to prevent and sanction private violations of human rights. Indeed, human rights law imposes obligations on States to protect citizens or individuals under their jurisdiction from the harmful acts of others. Thus, an act by a private individual and therefore not directly imputable to a State can generate responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or for not taking the necessary steps to provide the victims with reparation.' *Zimbabwe Human Rights NGO Forum v. Zimbabwe* Communication no. 245/02 [2006] ACHPR, paragraph 143

<sup>745</sup> See Chapter 3 on gender specificity.

<sup>746</sup> Jackie Jones, "The European Convention on Human Rights (ECHR) and the Council of Europe Convention on Violence Against Women and Domestic Violence (Istanbul Convention)," In *The Legal Protection From Violence: Normative Gaps in International Human Rights Law*, Rashida Manjoo and Jackie Jones, (Abingdon, Oxon: Routledge, 2018): 140.

women and men is a key element in the prevention of violence against women'<sup>747</sup>.

Article 5 outlines the due diligence principle, in line with General Recommendation no. 19 and the DEVAW Art 4(c):

Article 5 – State obligations and due diligence

Parties shall refrain from engaging in any act of violence against women and ensure that State authorities, officials, agents, institutions and other actors acting on behalf of the State act in conformity with this obligation.

Parties shall take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors.

Article 12 (General obligations) further outlines what is included in the obligation to prevent violence against women, including the transformation of 'social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men' (Article 12 (1)); and taking the 'necessary measures to promote programmes and activities for the empowerment of women' (Article 12 (6)). The Convention also outlines preventative measures in Article 13 (Awareness-raising), Article 14 (Education), Article 15 (Training professionals), Article 16 (Preventive intervention and treatment programmes), and Article 17 (Participation of the private sector and the media). The Convention builds on jurisprudence concerning due diligence and prevention established in the European system, 'codifying some of the most important cases from the ECtHR'<sup>748</sup>.

In *Airey v. Ireland* (1979) the European Court of Human Rights first 'established that in certain circumstances the state has a duty to provide resources to individuals to

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<sup>747</sup> The Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11 May 2011, CETS No.210. Preamble, available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210>

<sup>748</sup> Jones, "The European Convention on Human Rights (ECHR) and the Council of Europe Convention on Violence Against Women and Domestic Violence (Istanbul Convention)," 161.

prevent violations of their rights.<sup>749</sup> The Court didn't go so far as to say that the state has an obligation to provide victims of domestic violence with specific support, but it did recognise that due diligence was not merely a duty to respect human rights but implied an obligation of 'positive action on the part of the State.'<sup>750</sup> The Court built on this in *Osman v. United Kingdom* (1998), where the Court applied a similar standard of due diligence to the *Velásquez Rodríguez* ruling, recognising that a state's international responsibility 'extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions.'<sup>751</sup> The Court suggested that state responsibility 'may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.'<sup>752</sup> The Court went on to expand this approach in cases relating to violence against women, in *M.C. v. Bulgaria*, *Kontrova v. Slovakia*, *Bevacqua and S v. Bulgaria*, *Opuz v. Turkey*, *E.S. and Others v. Slovakia*, and *A v. Croatia*. The Court's approach to violence against women has:

- emphasised the positive obligations of the state (as in *Kontrova*<sup>753</sup>);
- rejected notions of the public/private dichotomy (as in *Bevacqua and S v. Bulgaria* where the Court dismissed the state's characterisation of domestic violence as a 'private matter'<sup>754</sup>); and,
- challenged the burden of proof in cases of rape and domestic violence (as in *M.C. v. Bulgaria* where the Court eliminated the requirement of force from any definition of rape<sup>755</sup>).

However, there have been 'discrepancies' in the Court's case law, 'established in part through use of the margin of appreciation.'<sup>756</sup> Brooke Stedman argues there has been

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<sup>749</sup> Ronagh McQuigg, "What potential does the Council of Europe Convention on Violence against Women hold as regards domestic violence?" *The International Journal of Human Rights*, 16(7), (2012): 957.

<sup>750</sup> *Airey v Ireland*, Series A, No 32 [1979] ECHR, paragraph 25 – 26.

<sup>751</sup> *Osman v United Kingdom*, Reports 1998-VIII 87/1997/871/1083 [1998] ECHR, paragraph 115.

<sup>752</sup> *Osman v United Kingdom*, paragraph 115.

<sup>753</sup> *Kontrova v Slovakia*, Application no. 7510/04 [2006] ECHR, paragraph 50.

<sup>754</sup> *Bevacqua and S. v Bulgaria*, Application no. 71127/01 [2008] ECHR, paragraph 65.

<sup>755</sup> *M.C. v. Bulgaria*, Application no. 39272/98 [2003] ECHR.

<sup>756</sup> Stedman, "The Leap from Theory to Practice: Snapshot of Women's Rights Through a Legal Lens," 12.

an element of cultural relativism in the Court's application of universal human rights standards to cases of domestic violence, with the result being 'inconsistent judgments and varying perceptions of the norms regarding women's rights.'<sup>757</sup> Similarly, Patricia Londono argues that whilst the Court has developed the notions of positive obligations in cases dealing with violence against women, the 'articulation of these issues as inequality issues' has been 'missing'<sup>758</sup>. The Court has on numerous occasions failed to find violations under Article 14 – the prohibition of discrimination – when considering cases of violence against women. Londono goes on to say: 'the absence of this discrimination component is conspicuous.'<sup>759</sup> Certainly in its early cases, the Court's inconsistent and gender-blind jurisprudence is evident. However, this changed markedly with *Opuz v. Turkey* (2009), where the ECtHR, impacted by the 'interpretive widening and thickening'<sup>760</sup> at the international level (*A.T v. Hungary*, CEDAW 2005) and in the Inter-American system (*Maria da Penha Maia Fernandes v. Brazil*, IACHR 2001), went on to establish domestic violence as a human rights abuse rooted in gender discrimination. The impact of the 'normative environment'<sup>761</sup> surrounding the ECtHR, and the feminist conceptualisation of the due diligence standard, can clearly be seen in this landmark case.

### *Opuz v. Turkey*

The case involved a man, Huseyin Opuz (H.O.), who had repeatedly threatened, and subjected his wife and mother-in-law to serious physical violence, including driving a car into them. He had beaten Nahide, his wife, for the entirety of their marriage, and had stabbed Nahide with a knife seven times, resulting in life-threatening wounds and hospitalisation. The authorities decided not to prosecute as they believed there was insufficient evidence, and the Prosecutor believed there was 'no public interest in

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<sup>757</sup> Stedman, "The Leap from Theory to Practice: Snapshot of Women's Rights Through a Legal Lens," 12.

<sup>758</sup> Londono, "Developing human rights principles in cases of gender-based violence: *Opuz v. Turkey* in the European Court of Human Rights," 657.

<sup>759</sup> Londono, "Developing human rights principles in cases of gender-based violence: *Opuz v. Turkey* in the European Court of Human Rights," 658.

<sup>760</sup> Vibeke Blaker Strand, "Interpreting the ECHR in its normative environment: interaction between the ECHR, the UN convention on the elimination of all forms of discrimination against women and the UN convention on the rights of the child," *The International Journal of Human Rights*, (2019): 3.

<sup>761</sup> Blaker Strand, "Interpreting the ECHR in its normative environment: interaction between the ECHR, the UN convention on the elimination of all forms of discrimination against women and the UN convention on the rights of the child," 4.

pursuing the case'<sup>762</sup>. H.O. repeatedly issued death threats to Nahide and her mother. After each assault H.O. was only temporarily detained by the police. Nahide and her mother filed complaints with the Prosecutor but were later coerced into withdrawing them. Following Turkish legislation, when the complaints were withdrawn the Prosecutor stopped proceedings. In their dealings with Nahide and her mother, the police characterised the violence as a 'private matter', despite Nahide's mother's insistence 'that her life was in immediate danger'<sup>763</sup>. In 2002, a month after Nahide had contacted the police again, H.O. shot and killed Nahide's mother. H.O. received a life sentence for the murder of Nahide's mother, but was released from custody pending an appeal, claiming he killed Nahide's mother 'for the sake of his honour and children.'<sup>764</sup> The police dropped the protection order that Nahide had taken out against H.O. and he continued to threaten Nahide. The authorities only began to act once Nahide had put an application into the Court. Nahide argued that the state had violated her rights under Article 3 (prohibition of torture) in combination with Article 14 (prohibition of discrimination), and violated her mother's rights under Article 2 (right to life) in combination with Article 14. Interights acted as a third-party intervener.

The Court confirmed its approach in *Osman*, that under Article 2, the state has positive duties to take preventative action<sup>765</sup>. Utilising its decision in *E v. United Kingdom*, and affirming that due diligence is an obligation of means not result, 'the Court held that, whilst it could not be predicted with accuracy that the outcome would have been different'<sup>766</sup> had the state acted differently, 'failure to take reasonable measures which could have had a real prospect of altering the outcome or mitigating harm is sufficient to engage the responsibility of the State.'<sup>767</sup> The Court referenced *A.T. v. Turkey*, *Yildirim (deceased) v. Austria*, General Recommendation no. 19, and Article 4(c) of the DEVAW in support of its decision that the state had failed in its duty of due diligence to prevent violence against women<sup>768</sup>. Of particular significance, is the Court's reference to Special Rapporteur Ertürk's 2006 report, wherein she argues

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<sup>762</sup> *Opuz v. Turkey*, paragraph 21.

<sup>763</sup> *Opuz v. Turkey*, paragraph 51.

<sup>764</sup> *Opuz v. Turkey*, paragraph 51.

<sup>765</sup> *Osman v United Kingdom*, paragraph 115.

<sup>766</sup> Londono, "Developing human rights principles in cases of gender-based violence: *Opuz v. Turkey* in the European Court of Human Rights," 661.

<sup>767</sup> *Opuz v. Turkey*, paragraph 136.

<sup>768</sup> *Opuz v. Turkey*, paragraph 149.

‘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>769</sup>

In assessing the state’s alleged failure to act with due diligence, the Court considered the state’s claim that ‘any attempt by the authorities to separate the applicant and her husband would have amounted to a breach of their right to family life [Article 8]’<sup>770</sup>. The Court – referencing the CEDAW Committee’s findings in *A.T. v. Hungary* and *Yildirim (deceased) v. Austria* – found that “‘the authorities’” view that no assistance was required as the dispute concerned a “private matter” was incompatible with their positive obligations to secure the enjoyment of the applicants’ rights’<sup>771</sup>, and that ‘in domestic violence cases perpetrators’ rights cannot supersede victims’ human rights to life and to physical and mental integrity.’<sup>772</sup>

In reference to the state’s discontinuation of enforcement and prosecution after Nahide withdrew her complaints, Interights submitted that ‘the national authorities failed to act with due diligence to prevent violence against women.’<sup>773</sup> They further claimed that ‘the *jus cogens* nature of the right to freedom from torture and the right to life required *exemplary diligence* on the part of the State [...]’<sup>774</sup> As in the precedent set by *Yildirim*, Interights further emphasised ‘that the due diligence obligation to prevent must go beyond legislation’ to ‘ensure effective implementation.’<sup>775</sup> The Court agreed with the standard set in *Yildirim*, stating that, ‘aside’ from the state’s legislative framework, the Court’s judgement ‘must also consider whether the local authorities displayed due diligence to protect the right to life of the applicant’s mother in other respects.’<sup>776</sup> It also claimed that the ‘State’s positive obligation to take preventive operational measures’ should have been ‘consonant with the gravity of the situation’<sup>777</sup>. Mirroring broader norms around due diligence and the severity of harm in question, the Court held that the ‘seriousness of the risk to the applicant’s mother rendered

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<sup>769</sup> *Opuz v. Turkey*, paragraph 79.

<sup>770</sup> *Opuz v. Turkey*, paragraph 140.

<sup>771</sup> *Opuz v. Turkey*, paragraph 144.

<sup>772</sup> *Opuz v. Turkey*, paragraph 147.

<sup>773</sup> *Opuz v. Turkey*, paragraph 125.

<sup>774</sup> *Opuz v. Turkey*, paragraph 125.

<sup>775</sup> *Opuz v. Turkey*, paragraph 127.

<sup>776</sup> *Opuz v. Turkey*, paragraph 146.

<sup>777</sup> *Opuz v. Turkey*, paragraph 146.

such intervention by the authorities necessary.<sup>778</sup> As such the Court found the state's preventative measures were 'manifestly inadequate to the gravity of the offences in question.'<sup>779</sup>

Reflecting the jurisprudence of the Inter-American system, the Court also linked impunity and the culture of tolerance to the state's due diligence obligations, concluding that the state had failed to act with the 'required diligence to prevent the recurrence of violent attacks against the applicant, since the applicant's husband perpetrated them without hindrance and with impunity to the detriment of the rights recognised by the Convention.'<sup>780</sup> It went on to speak to the wider context of violence against women, and the failings of the state at the structural and sociocultural levels: 'the judicial decisions in this case reveal a lack of efficacy and a certain degree of tolerance, and had no noticeable preventive or deterrent effect on the conduct of H.O.'<sup>781</sup> Linking the individual case to the systemic nature of violence against women, the Court concluded that the 'general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence.'<sup>782</sup>

The Court's appreciation of the wider context of gender-based violence and discrimination led to its first finding of violations under Article 14 (equality provision) in a domestic violence case. Utilising the *Maria da Penha Maia Fernandes* case, the Court held that domestic violence was a form of gender-discrimination, and that the state's failure to prevent domestic violence was also gender-discrimination: 'the State's failure to protect women against domestic violence breaches their right to equal protection of the law and that this failure does not need to be intentional.'<sup>783</sup> The Court also found that the 'discrimination at issue was not based on the legislation *per se* but rather resulted from the general attitude of the local authorities.'<sup>784</sup> The interpretive shift and gender-transformative jurisprudence of the *Opuz* decision is widely 'considered a milestone in the Court's jurisprudence on domestic violence as it

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<sup>778</sup> *Opuz v. Turkey*, paragraph 144.

<sup>779</sup> *Opuz v. Turkey*, paragraph 170.

<sup>780</sup> *Opuz v. Turkey*, paragraph 169.

<sup>781</sup> *Opuz v. Turkey*, paragraph 170.

<sup>782</sup> *Opuz v. Turkey*, paragraph 198.

<sup>783</sup> *Opuz v. Turkey*, paragraph 191.

<sup>784</sup> *Opuz v. Turkey*, paragraph 198.

brought the ECHR in line with other international law.<sup>785</sup> *Opuz* represented a significant shift in the way the ECtHR applied the due diligence standard and the way it conceptualised violence against women as gender-based violence and discrimination. The ECtHR had previously been 'reluctant to define violence against women as an expression of systemic gender inequality'<sup>786</sup>, so the *Opuz* decision was welcomed by the transnational women's movement who saw it as the institutionalisation of their 'active efforts to frame due diligence in feminist terms'<sup>787</sup>. The Court went on to cement this approach in *A v. Croatia* (2010), *M.G. v. Turkey* (2014), and *Talpis v. Italy* (2017).

### *Talpis v. Italy*

The *Talpis* case concerned the alleged failure of the state to prevent or provide protection and support to the applicant who suffered years of domestic violence by her husband. Following the escalation of violence, the applicant's husband murdered her son and attempted to murder her. In keeping with the *Opuz* judgement, the Court found in favour of the applicant. Notably, the ECtHR furthered its approach in *Opuz* to systemic gender discrimination and due diligence prevention. Sara De Vito argues the Court held the state to a 'stricter due diligence standard'<sup>788</sup> by applying the norms of the Istanbul Convention, in line with the interpretive principles of Article 31(3)(c) of the Vienna Convention on the Law of Treaties. The application of a 'stricter' standard was in keeping with the Court's development of due diligence, and the broader interpretive understanding (as outlined in the *Seabed Mining* case) that the standard of conduct deemed 'diligent' may change as the understanding of what preventative action is 'necessary' evolves. As Judge Ziemele outlined in *O'Keeffe v. Ireland*, 'the nature of obligations is by definition an evolving concept, precisely in conjunction with the evolution of understanding and of means.'<sup>789</sup> However, Judges Spano and Eicke

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<sup>785</sup> Blaker Strand, "Interpreting the ECHR in its normative environment: interaction between the ECHR, the UN convention on the elimination of all forms of discrimination against women and the UN convention on the rights of the child," 6.

<sup>786</sup> García-Del Moral and Dersnah, "A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship," 669.

<sup>787</sup> García-Del Moral and Dersnah, "A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship," 669.

<sup>788</sup> Sara De Vito, "States' Positive Obligations to Eradicate Domestic Violence: The Politics of Relevance in the Interpretation of the European Convention on Human Rights," *ESIL Reflections*, 6 (6), (2017): 2.

<sup>789</sup> *O' Keeffe v. Ireland*, Application No. 35810/09 [2014] ECHR, Concurring Opinion of Judge Ziemele, paragraph 10.



gave partially dissenting opinions based on the Court's evolving application of the due diligence standard; particularly in reference to its finding of systemic gender discrimination under Article 14. They argued there was insufficient evidence to determine a wider pattern of discrimination from the case. Judge Spano also dissented on the findings under Article 2 (right to life), arguing that the Court had not met the standards of reasonableness defined in *Osman* and *Opuz* with regard the application of the due diligence obligation to prevent.<sup>790</sup> In particular, the Judge argued that due to the 'lapses of time' between the attacks the Court – in keeping with *Osman* – should have found that there wasn't evidence of an 'immediate risk'.<sup>791</sup> The Judge finally argued that:

the doctrine of positive obligations cannot remedy all human rights violations occurring in the private sphere if due process considerations, also worthy of Convention protection, are not to be rendered obsolete. In other words, it is true that the States are under a Convention-based positive obligation effectively to combat domestic violence. But that fight, like any other campaign by Government to safeguard the lives and protect the physical integrity of its citizens, must be fought within the boundaries of the law, not outside them.

[... It] is all too easy to review tragic circumstances with the benefit of hindsight and impute responsibility where, on an objective and dispassionate analysis, there can be none. There is a limit on how far positive obligations under Article 2 can extend to shield victims from unforeseen attacks without imposing unrealistic obligations on the police accurately to forecast human behaviour and to act on those prognostications by unduly restricting other Convention rights. Although it may be tempting to dilute legal concepts such as the *Osman* test when faced with heart-rending facts and give solace to individuals in situations such as that of the applicant, there are reasons why the threshold under the Convention is set high, and, in my view, why it must

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<sup>790</sup> The Judge argued that to determine a failure to act with due diligence to prevent 'it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a *real and immediate risk* to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, *judged reasonably*, might have been expected to avoid that risk.' *Talpis v. Italy*, Application No. 41237/14 [2017] ECHR, Partly Dissenting Opinion Of Judge Spano, paragraph 2

<sup>791</sup> *Talpis v. Italy*, Application No. 41237/14 [2017] ECHR, Partly Dissenting Opinion Of Judge Spano, paragraph 5.

continue to remain so. Even in the field of domestic violence the ends cannot justify the means in a democratic society governed by the rule of law.<sup>792</sup>

Aside from the masculinist and paternalistic language used in his characterisation of the law and its application to domestic violence<sup>793</sup>, the grounds of Judge Spano's dissent show a troubling misunderstanding of violence against women:

Judge Spano employs a so-called incident-based understanding of domestic violence, an understanding that overlooks the continuum of fear, intimidation and abuse in which the violence takes place and instead looks at each (reported) incident of violence as a separate event.<sup>794</sup>

Whilst the dissenting opinions of the Judges are out of turn with the direction of the Court, and international jurisprudence more generally, the opinion of Judge Spano shows the vulnerability of the conceptualisation of violence against women as gendered and discriminatory, and the fragility of the institutionalisation of the state's responsibility to prevent violence against women, particularly domestic violence.

Whilst the development of the due diligence obligation to prevent has evolved through the European system, it is arguably the Inter-American system that had led the way in progressing gender-transformative interpretations of the standard.

#### *The Inter-American system and the due diligence obligation to prevent*

The Inter-American human rights system – including the Inter-American Court of Human Rights (IACtHR), the Inter-American Commission of Human Rights (IACHR), the Inter-American Commission of Women, and the Rapporteur on the Rights of Women – was the first region to adopt a specific instrument on violence against women. *The Inter-American Convention on the Prevention, Punishment, and Eradication of*

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<sup>792</sup> *Talpis v. Italy*, Partly Dissenting Opinion Of Judge Spano, paragraph 16.

<sup>793</sup> The reading of 'objective and dispassionate analysis' as gender-neutrality, and the characterisation of gender-sensitivity and specificity as appealing to 'the heart-rending facts of the case', rather than a normative approach, all form a narrative that disregards feminist accounts of the law, and women as subjects rather than objects of the law.

<sup>794</sup> Fleur van Leeuwen, "The 'limits of human rights law': dissenting androcentric voices in *Talpis v. Italy*," *Strasbourg Observers*, May 30, 2017, <https://strasbourgobservers.com/2017/05/30/the-limits-of-human-rights-law-dissenting-androcentric-voices-in-talpis-v-italy/>

*Violence against Women (Convention of Belém do Pará)* was adopted in 1994 in Belém do Pará, and became the first binding treaty at the international or regional level to directly address violence against women. Significantly the Convention is framed by the duty to *prevent and eradicate* violence against women, and not just to *respond* to violence against women. In Article 7 the Convention outlines the state parties' condemnation of violence against women, and their agreement to 'pursue by all appropriate means and without delay, policies to prevent, punish and eradicate such violence.' In itself the language of 'all appropriate means' indicates a due diligence framing of prevention, but the Convention goes on to specify the standard in Article 7(b), making clear the obligations incumbent on states to: 'apply due diligence to prevent, investigate and impose penalties for violence against women'. Article 8 outlines measures in line with CEDAW Article 5(a) and General Recommendation no. 19, paragraph 11 and 12, making clear the link between prevention and the 'social and cultural patterns of conduct of men and women'. Whilst Article 8 is framed in terms of 'progressively specific measures', Article 6 is explicit in stating women have an immediate right to live free of violence and discrimination:

#### Article 6

The right of every woman to be free from violence includes, among others:

- a. The right of women to be free from all forms of discrimination; and
- b. The right of women to be valued and educated free of stereotyped patterns of behaviour and social and cultural practices based on concepts of inferiority or subordination.

The Convention led the way in articulating freedom from violence against women as a right in and of itself (Article 3), whilst also maintaining the feminist characterisation of violence against women as a form of discrimination (Article 6). In Article 3, the Convention mirrors General Recommendation no. 19 in its articulation of due diligence for private actors, specifying that: 'Every woman has the right to be free from violence in both the public and private spheres.' In this way the Convention also mirrors the earlier jurisprudence of the IACtHR in *Velásquez Rodríguez*, through which due diligence (especially for private violence) 'entered the general consciousness of

human rights activists.<sup>795</sup> Beginning with the *Maria da Penha Maia Fernandes v. Brazil* case, and building on the IACtHR's decision in *Velásquez Rodríguez*, the IACHR and IACtHR have developed robust norms around due diligence in relation to private violence and have developed and strengthened the understanding of state responsibility for preventing violence against women at an individual and systemic/primary level.

*Maria da Penha Maia Fernandes v. Brazil*<sup>796</sup>

Over a sustained period of years Maria da Penha Maia Fernandes was abused by her husband, Marco Antonio Heredia Viveiros. In May 1983, he shot her in the head while she slept and attempted to murder her. After undergoing life saving surgery Maria da Penha returned home. Two weeks after the shooting he tried to electrocute her while she bathed. Whilst she survived the attacks, she was left with paraplegia and severe physical and psychological trauma. Maria da Penha sought legal separation after the attacks. A year later criminal charges were brought against Viveiros and in 1991 – seven years later – he was sentenced to 15 years imprisonment. In 1994 the sentence was overruled by an Appeal Court. A second trial then took place in 1996 in which Viveiros was condemned to ten years. The Court again agreed to hear a second appeal. In 1998 – 15 years later – Maria da Penha filed her submission with the Inter-American Commission of Human Rights. At this point Viveiros was still free. In 2001 – seventeen years later – Viveiros was sentenced to six years imprisonment but only served two.

Maria da Penha submitted a petition before the IACHR claiming violations of Articles 3, 4(a), (b), (c), (d), (e), (f), and (g), and 5 and 7 of the Convention of Belém do Pará, as well as provisions under the American Declaration of the Rights and Duties of Man. She argued that the state had 'condoned the situation'<sup>797</sup> for more than 15 years and had failed to 'take preventive action, in accordance with its international

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<sup>795</sup> Farrior, "The Due Diligence Standard, Private Actors and Domestic Violence", 2.

<sup>796</sup> *Maria da Penha Maia Fernandes v. Brazil*, Case 12.051, [2001] IACmHR, Report No. 54/01, OEA/Ser./L/V/II.111 Doc. 20 rev.

<sup>797</sup> *Maria da Penha Maia Fernandes v. Brazil*, paragraph 2.

commitments<sup>798</sup>, and to act with due diligence to prevent, respond to, or provide redress for the violence she suffered.

Maria da Penha also claimed that the abuse she suffered was part of a wider culture of tolerance for violence against women and impunity: 'this complaint does not represent an isolated situation in Brazil; rather, it is an example of a pattern of impunity in cases of domestic violence against women in Brazil.'<sup>799</sup> She went on to refer to the Commission's early comments to Brazil in its 1997 Report, which outlined the duty the state has to prevent violence against women, whether by a state or non-state actor:

the State has an obligation under Article I (1) of the American Convention and Article 7.b of the Convention of Belém do Pará to exercise due diligence to prevent human rights violations. This means that, even where conduct may not initially be directly imputable to a state (for example, because the actor is unidentified or not a state agent), a violative act may lead to state responsibility not because of the act itself, but because of the lack of due diligence to prevent the violation or respond to it as the Convention requires.<sup>800</sup>

Dealing with the impunity and lack of redress in the case, the Commission cited *Velásquez Rodríguez* in finding that Brazil had not acted with due diligence to respond to the abuse Maria da Penha suffered:

If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction.<sup>801</sup>

Referencing the effectiveness of protective and remedial measures the Commission concluded that 'initiatives have been implemented on a limited basis in relation to the

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<sup>798</sup> *Maria da Penha Maia Fernandes v. Brazil*, paragraph 22.

<sup>799</sup> *Maria da Penha Maia Fernandes v. Brazil*, paragraph 20.

<sup>800</sup> *Maria da Penha Maia Fernandes v. Brazil*, paragraph 20, quoting from Report on the Situation of Human Rights in Brazil, 1997, Chapter VIII.

<sup>801</sup> *Maria da Penha Maia Fernandes v. Brazil*, paragraph 42, citing *Velásquez Rodríguez case*, paragraph 176; and Inter-American Court of Human Rights, *Godínez Cruz and ors v Honduras*, Series C no 10, [1990] IACHR, paragraph 187.

scope and urgency of the problem [...] In this case, which stands as a symbol, these initiatives have not had any effect whatsoever.<sup>802</sup>

In response to Maria da Penha's argument that her case represented a wider pattern and culture of violence against women, the Commission spoke to the state's responsibility to tackle root causes – including impunity, prejudice and discrimination – as a duty of primary prevention:

Furthermore, as has been demonstrated earlier, that tolerance by the State organs is not limited to this case; rather, it is a pattern. The condoning of this situation by the entire system only serves to perpetuate the psychological, social, and historical roots and factors that sustain and encourage violence against women.

Given the fact that the violence suffered by Maria da Penha is part of a general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors, it is the view of the Commission that this case involves not only failure to fulfill the obligation with respect to prosecute and convict, but also the obligation to prevent these degrading practices. That general and discriminatory judicial ineffectiveness also creates a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts.<sup>803</sup>

In a searing indictment of the state, the Commission found that Brazil had failed to exercise its duties to prevent (at the primary level) the abuse Maria da Penha suffered, and, arguably, contributed to her suffering by allowing the impunity of her husband, as well as a wider culture of impunity that fuelled violence against women in the country. The Commission argued that the case 'represents the tip of the iceberg' and provided 'an example of the lack of commitment to take appropriate action to address domestic violence.'<sup>804</sup> In summarising the state's failure to act with due diligence to prevent domestic violence, the Commission said: 'Article 7 of the Convention of

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<sup>802</sup> *Maria da Penha Maia Fernandes v. Brazil*, paragraph 50

<sup>803</sup> *Maria da Penha Maia Fernandes v. Brazil*, paragraph 55, 56

<sup>804</sup> *Maria da Penha Maia Fernandes v. Brazil*, paragraph 57

Belém do Pará seems to represent a list of commitments that the Brazilian State has failed to meet.<sup>805</sup> It went on to find that '[t]he State has violated the rights of Mrs. Fernandes and failed to carry out its duty assumed under Article 7 of the Convention of Belém do Pará [...] as a result of its own failure to act and tolerance of the violence inflicted.'<sup>806</sup> In response it recommended comprehensive legislative and policy reform aimed at the wider culture of violence against women, and specific remedial measures for Maria da Penha. In particular, the Commission made recommendations aimed at the macrosystemic level 'in an attempt to place greater emphasis on steps the State could take to prevent the cycle of violence against women.'<sup>807</sup>

In response to the findings of the Commission, Brazil adopted the 'Maria da Penha Law on Domestic and Family Violence' (the 'Maria da Penha Act', 2006) which offered new mechanisms for prevention, protection, investigation, compensation and redress. In accordance with UN guidance for legislation on violence against women<sup>808</sup>, it provided for specialist protective services and outlined prevention strategies. Within the five years following the adoption of the act 'more than 331,000 cases of domestic violence were prosecuted, with 110,000 resulting in final judgements, and the national call centre received nearly 2,000,000 calls.'<sup>809</sup>

*The 'first generation of Inter-American cases'<sup>810</sup>: 'blindspots and subsequent trailblazing on vaw.'*<sup>811</sup>

Despite the jurisprudence of the Commission in the *Maria da Penha* case, it was some time before due diligence for private actors was consistently applied by the Inter-American Court of Human Rights in cases dealing with violence against women, and

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<sup>805</sup> *Maria da Penha Maia Fernandes v. Brazil*, paragraph 57

<sup>806</sup> *Maria da Penha Maia Fernandes v. Brazil*, paragraph 60.4

<sup>807</sup> Stedman, "The Leap from Theory to Practice: Snapshot of Women's Rights Through a Legal Lens," 9.

<sup>808</sup> United Nations Department of Economic and Social Affairs/Division for the Advancement of Women, *Handbook for Legislation on Violence Against Women*, (New York: UN, 2010).

<sup>809</sup> Caroline Bettinger-Lopez, "Violence Against Women: Normative Developments in the Inter-American Human Rights System," *In The Legal Protection From Violence: Normative Gaps in International Human Rights Law*, edited by Rashida Manjoo and Jackie Jones, (Abingdon, Oxon: Routledge, 2018), 177.

<sup>810</sup> Bettinger-Lopez, "Violence Against Women: Normative Developments in the Inter-American Human Rights System," 176.

<sup>811</sup> Bettinger-Lopez, "Violence Against Women: Normative Developments in the Inter-American Human Rights System," 178.

domestic violence particularly.<sup>812</sup> Whilst the Inter-American system brought 'private acts' under the purview of due diligence and state responsibility, this was still largely conceptualised as private acts within the public sphere – such as the disappearances in the *Velásquez Rodríguez* and *Godínez Cruz* cases. Domestic violence, however, lacked that 'public' element – being the violative act of a non-state actor within the private sphere – and was therefore doubly conceptualised as outside of the scope of international law.<sup>813</sup> As such Caroline Bettinger-Lopez characterises the IACtHR's case law on violence against women as an 'anomaly both because it was nearly non-existent until the twenty-first century, and second because the Court has, in general, been a trailblazer amongst international human rights bodies with regard to the State's obligation to protect the rights of vulnerable groups.'<sup>814</sup> Bettinger-Lopez calls the years following the *Velásquez Rodríguez* case, but preceding the *Maria da Penha* case, the 'first generation of Inter-American cases', wherein the Court, in particular, displayed a patchy, or non-existent gender-jurisprudence on violence against women. Brooke Stedman similarly claims that '[d]espite the IACtHR's recognition of positive State obligations in relation to individual human rights, the Court consistently failed to uphold these ideals in cases of violence and discrimination against women following the *Velásquez* ruling.'<sup>815</sup> Stedman goes on to outline the Court's gender-blindness with regard state responsibility for preventing violence against women. In *Caballero Delgado and Santana v. Colombia* (1995), a case dealing with detainment, the Court 'ignored the sexual violence dimension of nudity'<sup>816</sup>. The Court again failed to recognise the gendered elements of human rights abuses in *María Elena Loayza-Tamayo v. Peru* (1997), where Loayza-Tamayo claimed she was tortured, raped, threatened and mistreated while detained. The Court found violations of Loayza-Tamayo's rights 'for all of the incidents except the rape.'<sup>817</sup> In *Maritza Urrutia v. Guatemala* (2003), a case concerning detainment, the Court again 'failed to recognise... the gendered elements of the crime', in particular 'threats of rape as a form of sexual violence that could affect

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<sup>812</sup> Stedman, "The Leap from Theory to Practice: Snapshot of Women's Rights Through a Legal Lens," 8.

<sup>813</sup> Bettinger-Lopez, "Violence Against Women: Normative Developments in the Inter-American Human Rights System," 177.

<sup>814</sup> Bettinger-Lopez, "Violence Against Women: Normative Developments in the Inter-American Human Rights System," 178.

<sup>815</sup> Stedman, "The Leap from Theory to Practice: Snapshot of Women's Rights Through a Legal Lens," 8.

<sup>816</sup> Stedman, "The Leap from Theory to Practice: Snapshot of Women's Rights Through a Legal Lens," 8.

<sup>817</sup> Bettinger-Lopez, "Violence Against Women: Normative Developments in the Inter-American Human Rights System," 179.



women distinctively from men.<sup>818</sup> The 'gendered stereotypes'<sup>819</sup> at play in these cases were kept in place by the public/private dichotomy. Whilst the conceptualisation of due diligence cuts at the heart of this gendered conceptualisation of human rights, it wasn't until the IACHR's decision in *Maria da Penha Maia Fernandes v. Brazil*, that the IACtHR began to actually apply a consistent gender perspective that allowed due diligence to be applied to violence against women. This was evident in the *Plan de Sánchez Massacre v. Guatemala* and *Miguel Castro Castro Prison v. Peru* cases, which both involved gendered-violence, and 'marked a significant turning point in the Court's gender analysis.'<sup>820</sup> In particular, the latter case marked the first time the Court recognised violence against women as a form of discrimination, adopting the definition contained in CEDAW Committee's General Recommendation no. 19. Further to this, and again for the first time, the Court found violations of Article 7(b) of the Convention of Belém do Pará, which obliges states to 'apply due diligence to prevent, investigate and impose penalties for violence against women.'<sup>821</sup> The integration of gendered analysis into *Plan de Sánchez* and *Miguel Castro Castro* 'laid the groundwork for a series of landmark decisions by the Inter-American Court and Commission that expanded and deepened the due diligence principle in the context of both State-sponsored and private acts of VAW'<sup>822</sup>

### *The Second Generation Cases*

#### *Claudia Ivette González et al. ("Cotton Field") v. Mexico*

The first of the 'second generation'<sup>823</sup> cases was *Claudia Ivette González et al. ("Cotton Field") v. Mexico* (2009), which concerned the disappearances and deaths of Claudia Ivette González (age 20), and minor children, Laura Berenice Ramos Monárrez (age

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<sup>818</sup> Stedman, "The Leap from Theory to Practice: Snapshot of Women's Rights Through a Legal Lens," 8.

<sup>819</sup> Bettinger-Lopez, "Violence Against Women: Normative Developments in the Inter-American Human Rights System," 179.

<sup>820</sup> Bettinger-Lopez, "Violence Against Women: Normative Developments in the Inter-American Human Rights System," 179.

<sup>821</sup> Organization of American States (OAS), *The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women*, Belém do Pará, 9 June, 1994, Article 7(b), available at <https://www.oas.org/en/mesecvi/convention.asp>.

<sup>822</sup> Bettinger-Lopez, "Violence Against Women: Normative Developments in the Inter-American Human Rights System," 182.

<sup>823</sup> Bettinger-Lopez, "Violence Against Women: Normative Developments in the Inter-American Human Rights System," 182.

17), and Esmeralda Herrera Monreal (age 15). The women were reported as missing on 11<sup>th</sup> October 2001, 29<sup>th</sup> October 2001, and 25<sup>th</sup> September 2001, respectively.

The three women were living in Ciudad Juárez when they disappeared on their way home from work. When the families contacted the police, officers dismissed their concerns, saying that the women had probably 'run away with their boyfriends.'<sup>824</sup> On 6<sup>th</sup> November 2001, Claudia, Esmeralda and Laura's bodies, alongside the bodies of five other young women, were discovered in the cotton fields of Ciudad Juárez, which is why the case is often referred to as the 'Campo Algodonero' or 'Cotton Field' case. All of the women's bodies displayed evidence of intense violence, including evidence of rape and other kinds of sexual abuse, torture and mutilation. The multiple wounds and forms of violence made it difficult to establish the exact causes of death. The investigations that followed were perfunctory and incomplete. The police failed to collect evidence and record what they had found. The families of the women conducted a two-day search and found clothing, bones, blood remains, hair and other evidence. The police arrested two innocent men who were coerced and tortured to confess. The men hired a lawyer who was then (allegedly) shot and killed by the police. Autopsies of Claudia, Esmeralda and Laura's bodies were inconsistent and did not document many of the violations they had suffered, including the sexual abuse. Despite receiving threats from police and Ciudad Juárez officials, the mothers of Claudia, Esmeralda and Laura brought their case to the IACHR, where it was referred on to the IACtHR.

The mothers, alongside civil society organisations, presented evidence and data that showed 4,456 women were reported missing between 1993 and 2005, most of them aged between 15 and 25. The application argued that the systemic pattern of violence against women was imputable to the state, who failed in its duties to ensure the rights of women under Article 1 of the American Convention on Human Rights, and to act with due diligence to prevent violence against women under Article 7 of the Convention of Belém do Pará:

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<sup>824</sup> *Claudia Ivette González et al. ("Cotton Field") v. Mexico*, (Preliminary Objection, Merits, Reparations, and Costs Judgment) Series C No. 205 [2009] IACHR, paragraph 400.

The State is considered responsible for “the lack of measures for the protection of the victims, two of whom were minor children, the lack of prevention of these crimes, in spite of full awareness of the existence of a pattern of gender-related violence that had resulted in hundreds of women and girls murdered, the lack of response of the authorities to the disappearance [...]; the lack of due diligence in the investigation of the homicides [...], as well as the denial of justice and the lack of an adequate reparation.”<sup>825</sup>

The petitioners made clear that they believed ‘their family members’ disappearances and killings were gender-based, not only because they targeted women and girls specifically, but also because they took place in the context of a culture of discrimination against women.’<sup>826</sup>

The *Cotton Field* decision was a ‘watershed moment in the Inter-American system’<sup>827</sup>, where – for the first time – the Court found that acts of private violence confer an obligation on states under Article 7 of the Convention of Belém do Pará. The Court concluded that the state had failed within its duty to prevent. The Court was clear in its appeal to the due diligence obligation to prevent, with Judge Medina Quiroga stating in her concurring opinion: ‘I need not repeat what the Court has stated in numerous judgments and reiterates in this: that the obligation to guarantee requires the duty to prevent.’<sup>828</sup> The Court also went on to establish ‘two moments at which the State failed to comply fully with this obligation.’<sup>829</sup> It outlined the first, more ‘general’ obligation to prevent, arose *before the women went missing*. The Court held that whilst it ‘would be disproportionate’<sup>830</sup> to expect the state to have prevented the three women being abducted, ‘[w]hat could be claimed is that, as soon as the State was officially (not to mention unofficially) aware [of] the existence of a pattern of violence

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<sup>825</sup> *Claudia Ivette González et al. (“Cotton Field”) v. Mexico*, (Preliminary Objection, Merits, Reparations, and Costs Judgment) Series C No. 205 [2009] IACHR, paragraph 2.

<sup>826</sup> Bettinger-Lopez, “Violence Against Women: Normative Developments in the Inter-American Human Rights System,” 182.

<sup>827</sup> Bettinger-Lopez, “Violence Against Women: Normative Developments in the Inter-American Human Rights System,” 182.

<sup>828</sup> *Claudia Ivette González et al. (“Cotton Field”) v. Mexico*, Concurring Opinion Of Judge Cecilia Medina Quiroga, paragraph 19.

<sup>829</sup> *Claudia Ivette González et al. (“Cotton Field”) v. Mexico*, Concurring Opinion Of Judge Cecilia Medina Quiroga, paragraph 18.

<sup>830</sup> *Claudia Ivette González et al. (“Cotton Field”) v. Mexico*, Concurring Opinion Of Judge Cecilia Medina Quiroga, paragraph 18.

against women in Ciudad Juárez, there was an absence of policies designed to try and revert the situation.<sup>831</sup> The Court went on to note ‘that the absence of a general policy which could have been initiated at least in 1998 – when the CNDH [the National Human Rights Commission] warned of the pattern of violence against women in Ciudad Juárez – is a failure of the State to comply in general with its obligation of prevention.’<sup>832</sup> The ‘second moment’<sup>833</sup>, after the women were reported missing but before the discovery of their bodies, gave rise to what the Court called ‘an obligation of strict due diligence’<sup>834</sup> – an ‘obligation of means that is more rigorous’<sup>835</sup> – as the ‘State was aware that there was a real and imminent risk that the victims would be sexually abused, subjected to ill-treatment and killed.’<sup>836</sup> (In outlining ‘two moments’ of prevention, the Court upheld the standards of systemic and individual due diligence, that the Special Rapporteur would later go on to delineate in her 2013 report.) The Court also furthered earlier jurisprudence in the Inter-American system, and under the CEDAW-OP, that made clear that prevention strategies must be effective, practically realised and implemented – their mere existence does not represent a good faith application of due diligence:

Although the obligation of prevention is one of means and not of results (supra paragraph 251), the State has not demonstrated that the creation of the FEIHM and some additions to its legislative framework, although necessary and revealing a commitment by the State, were sufficient and effective to prevent the serious manifestations of violence against women that occurred in Ciudad Juárez at the time of this case.<sup>837</sup>

In making its decision on the due diligence obligation to prevent, the Court relied on:

- CEDAW Committee General Recommendation no. 19;
- Article 7(b) of the Convention of Belém do Pará;

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<sup>831</sup> *Claudia Ivette González et al. ("Cotton Field") v. Mexico*, Concurring Opinion Of Judge Cecilia Medina Quiroga, paragraph 18.

<sup>832</sup> *Claudia Ivette González et al. ("Cotton Field") v. Mexico*, paragraph 282.

<sup>833</sup> *Claudia Ivette González et al. ("Cotton Field") v. Mexico*, paragraph 283.

<sup>834</sup> *Claudia Ivette González et al. ("Cotton Field") v. Mexico*, paragraph 283.

<sup>835</sup> *Claudia Ivette González et al. ("Cotton Field") v. Mexico*, paragraph 283.

<sup>836</sup> *Claudia Ivette González et al. ("Cotton Field") v. Mexico*, paragraph 283.

<sup>837</sup> *Claudia Ivette González et al. ("Cotton Field") v. Mexico*, paragraph 283.

- *Maria da Penha Maia Fernandes v. Brazil* (with particular reference to the Commission's finding that the violation was 'general pattern of negligence and lack of effectiveness of the State'<sup>838</sup>);
- the 2006 Report of the Special Rapporteur (with reference to her conclusion that a norm exists in 'customary international law that obliges States to prevent and respond with due diligence to acts of violence against women'<sup>839</sup>);
- the 'Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention'<sup>840</sup>; and,
- *Opuz v. Turkey*.

The Court's concluding characterisation of violence against women – focusing on macrosystemic aetiology alongside the root causes specific to violence occurring in Ciudad Juárez – marked a new advancement in the Inter-American system's efforts 'to address women's rights in a holistic manner.'<sup>841</sup> The Court concluded that:

the obligation of prevention encompasses all those measures of a legal, political, administrative and cultural nature that ensure the safeguard of human rights, and that any possible violation of these rights is considered and treated as an unlawful act, which, as such, may result in the punishment of the person who commits it, as well as the obligation to compensate the victims for the harmful consequences.<sup>842</sup>

A further significant element of the *Cotton Field* case – with regard primary prevention, in particular – relates to the Court's move towards transformative remedies within its judgement on reparations. Ruth Rubio Marín and Clara Sandoval argue that the Court's application of a gender perspective to reparations, as well as to the merits of the case, 'marks a significant moment of change in the gender jurisprudence of the

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<sup>838</sup> *Maria da Penha Maia Fernandes v. Brazil*, paragraph 56.

<sup>839</sup> United Nations, *The due diligence standard as a tool for the elimination of violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Yakin Erturk*, E/CN.4/2006/61, (20 January 2006), paragraph 29.

<sup>840</sup> Committee on the Elimination of Discrimination against Women, *Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention, and reply from the Government of Mexico*, CEDAW/C/2005/OP.8/MEXICO, (January 7, 2005), available at <http://undocs.org/CEDAW/C/2005/OP.8/MEXICO>

<sup>841</sup> Stedman, "The Leap from Theory to Practice: Snapshot of Women's Rights Through a Legal Lens," 9.

<sup>842</sup> *Claudia Ivette González et al. ("Cotton Field") v. Mexico*, paragraph 252.

Inter-American Court of Human Rights.<sup>843</sup> As highlighted in the previous chapter, whilst transformative remedies are, by nature, ‘after the fact’ rather than preventative, the expansion of norms concerning guarantees of non-repetition ‘include preventive measures that are capable of serving as a transformative tool, particularly in challenging the underlying causes of violence and changing mindsets.’<sup>844</sup> Linking the individual with the systemic, transformative remedies impact on the recursive dialogue concerning primary prevention and state responsibility. In line with the UN Special Rapporteur’s report on transformative remedies, the Court held that:

the concept of “integral reparation” (*restitutio in integrum*) entails the re-establishment of the previous situation and the elimination of the effects produced by the violation, as well as the payment of compensation for the damage caused. However, *bearing in mind the context of structural discrimination* in which the facts of this case occurred, which was acknowledged by the State (supra paras. 129 and 152), the reparations *must be designed to change this situation*, so that their effect is not only of restitution, but also of rectification. In this regard, re-establishment of the same structural context of violence and discrimination is not acceptable.<sup>845</sup>

This was the first time the Court advised on transformative remedies. Its approach further bolstered the conceptualisation of violence against women as structural and systemic, as well as strengthening the jurisprudence that state responsibility to respond to violence against women includes duties of transformation as well as restitution. Whilst this marks a huge leap forward in concretising the feminist conceptualisation of state responsibility, the Court, disappointingly, rejected the argument by the petitioners and the Inter-American Commission that as a further matter of non-repetition, ‘the Court should order the state to adopt “an integral and coordinated policy, backed with sufficient resources, to guarantee that cases of violence against women are adequately prevented, investigated and punished, and that their victims receive

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<sup>843</sup> Ruth Rubio Marín and Clara Sandoval, “Engendering the Reparations of the Jurisprudence of the Inter-American Court of Human Rights: The Promise of the *Cotton Field* Judgement,” *Human Rights Quarterly*, 33 (2011): 1090. p. 1062 – 1091, p. 1090

<sup>844</sup> Abdul Aziz and Moussa, *Due Diligence Framework: State Accountability Framework for Eliminating Violence against Women*, 75.

<sup>845</sup> *Claudia Ivette González et al. (“Cotton Field”) v. Mexico*, paragraph 450.

reparations.”<sup>846</sup> Although the Court outlined extensive and holistic remedies aimed at non-repetition<sup>847</sup>, Rubio Marín and Sandoval suggest that by rejecting the Commission’s request it ‘lost a major opportunity to apply its own concept of transformative reparations to the awards it made.’<sup>848</sup> They go on to assert that ‘when the shortcomings are indeed structural, triggering systemic transformation is both a necessary and legitimate task for an international human rights tribunal.’<sup>849</sup> The ‘Court’s willingness to embrace a gender-sensitive approach’<sup>850</sup> continued in its proceeding cases on violence against women, including *Inés Fernández Ortega et al. v. Mexico* (2010), *Rosendo Cantú et al. v. Mexico* (2010), and *Jessica Lenahan (Gonzales) v. United States* (2011). In *Ortega* and *Cantú* the Court developed its jurisprudence around rape and sexual violence as a gendered abuse, and as form of torture, for which the state has a responsibility to prevent. The framing of sexual violence against women in the IACtHR cases bears likeness to Rhonda Copelon’s characterisation of rape as torture<sup>851</sup>, and Sally Goldfarb’s conceptualisation of ‘psychic injury’:

[Gender-based violence] is particularly harmful to its victims, who suffer not only the physical and emotional injury of the crime itself but also the added psychic injury of knowing they were victimized because of their group identity.<sup>852</sup>

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<sup>846</sup> *Claudia Ivette González et al. (“Cotton Field”) v. Mexico*, paragraph 474.

<sup>847</sup> Guarantees of non-repetition included: ‘renewed investigations, prosecutions and punishment for perpetrators; investigations of public servants who failed to exercise due diligence in responding to the disappearances and murders and, in some cases, threatened or persecuted the victim’s next of kin, and a public announcement of the results of such investigations; the standardization of investigative protocols concerning cases of sexual violence and parameters to be taken into account when implementing rapid investigation responses in the case of disappearances of women and girls; creation and updating of a national website and database with information on all missing women and girls; training of all personnel in Mexico involved, directly or indirectly, in the prevention, investigation, and prosecution of violence against women; and the development of an educational programme for the people of the State of Chihuahua, to ameliorate the situation of gender-based violence there.’ Bettinger-Lopez, “Violence Against Women: Normative Developments in the Inter-American Human Rights System,” 184.

<sup>848</sup> Rubio Marín and Sandoval, “Engendering the Reparations of the Jurisprudence of the Inter-American Court of Human Rights: The Promise of the *Cotton Field* Judgement,” 1090.

<sup>849</sup> Rubio Marín and Sandoval, “Engendering the Reparations of the Jurisprudence of the Inter-American Court of Human Rights: The Promise of the *Cotton Field* Judgement,” 1091..

<sup>850</sup> Bettinger-Lopez, “Violence Against Women: Normative Developments in the Inter-American Human Rights System,” 185.

<sup>851</sup> Rhonda Copelon, “Intimate Terror: Understanding Domestic Violence as Torture,” In *Human Rights of Women: National and International Perspectives*, edited by Rebecca Cook, ed., (Philadelphia: University of Pennsylvania Press, 1994), 121.

<sup>852</sup> Sally Goldfarb, “Violence Against Women and the Persistence of Privacy,” *Ohio State Law Journal*, 61, (2000): 161.

The Court, for the first time, acknowledged the impact of rape as gender-based violence, and called for a response that recognises that:

severe suffering of the victim is inherent in rape, even when there is no evidence of physical injuries or disease. ... Women victims of rape also experience complex consequences of a psychological and social nature.<sup>853</sup>

Notably, in *Ortega*, the court also 'highlighted the vulnerability of indigenous women and emphasised state obligations to implement protective measures which take into consideration the customs, values, as well as economic and social characteristics of indigenous communities.'<sup>854</sup> As Bettinger-Lopez describes 'the Court dove into an "intersectional" analysis' in *Cantú* and *Ortega*, 'highlighting the particular vulnerabilities of multiply-marginalized women.'<sup>855</sup> The Court's intersectional approach to primary prevention and state responsibility was further evidenced in its decision on reparations. Once again the Court considered transformative reparations to the individual alongside the broader reach of guarantees of non-repetition, and made comprehensive orders aimed at structural and sociocultural change and the empowerment of women, including:

The State must facilitative the necessary resources so that the indigenous Me'paa community may establish a community centre, to be considered a Women's Center, where educational activities regarding human rights and the rights of women can be carried out, pursuant to paragraph 267 of the present Judgment.

The State must adopt measures so that the girls of the community of Barranca Tecoani that carry out their middle school studies in the city of Ayutla de los Libres, may provide facilities that offer adequate food and shelter, so as to allow the girls to continue their education at the institutions which they attend [...]<sup>856</sup>

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<sup>853</sup> *Fernández Ortega et al. v. Mexico*, Series C no. 224 [2010] IACHR, paragraph 124

<sup>854</sup> Stedman, "The Leap from Theory to Practice: Snapshot of Women's Rights Through a Legal Lens," 11 – 12.

<sup>855</sup> Bettinger-Lopez, "Violence Against Women: Normative Developments in the Inter-American Human Rights System," 188.

<sup>856</sup> *Fernández Ortega et al. v. Mexico*, paragraph 308.22, 308.23.



The uptake of a feminist approach to state responsibility within the Inter-American system, was further evident in *Jessica Lenahan (Gonzales) and others v. United States* (2011).

*Jessica Lenahan (Gonzales) and others v. United States*

In June 1999, Jessica Lenahan's three daughters were abducted by her ex-husband, Simon Gonzales. Ms Lenahan had a restraining order against Simon Gonzales following prolonged domestic abuse. The 'police failed to adequately respond to Jessica Lenahan's repeated and urgent calls over several hours reporting that her estranged husband had taken their three minor daughters (ages 7, 8 and 10) in violation of the restraining order.'<sup>857</sup> During calls to the police she was told by dispatchers that: 'at least you know where the kids are right now'<sup>858</sup>, and 'I don't know what else to say, I mean.... I wish you guys uh, I wish you would have asked or had made some sort of arrangements. I mean that's a little ridiculous making us freak out and thinking the kids are gone...'<sup>859</sup> Nearly ten hours after their abduction Simon Gonzales drove to the police department and opened fire; he was shot and killed by the police. The police then found the bodies of Ms Lenahan's daughter in the back of Simon Gonzales' car; they had each been shot multiple times. Having heard about the shooting Ms Lenahan drove to the police station. Her requests to see her daughters were ignored for 12 hours, and she was not given any information as to whether they were alive or not. The following investigation into their deaths was insufficient. Ms Lenahan claimed in her petition that the United States violated her rights under the American Declaration by failing to exercise due diligence to protect her and her daughters from domestic violence perpetrated by her ex-husband, even though she had a restraining order in place against him.

Ms Lenahan also argued that the state had failed in what could be characterised as its systemic due diligence obligations. The petitioners argued that:

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<sup>857</sup> *Lenahan (Gonzales) v United States*, Case 12.626, [2011] (Merits) IACmHR Report no. 80/11, paragraph 2

<sup>858</sup> *Lenahan (Gonzales) v United States*, paragraph 74.

<sup>859</sup> *Lenahan (Gonzales) v United States*, paragraph 75.

domestic violence is a widespread and tolerated phenomenon in the United States that has a disproportionate impact on women [and that the failings in this case ... ] are representative of a larger failure by the United States to exercise due diligence in response to the country's domestic violence epidemic. The petitioners contend that Jessica Lenahan's claims are paradigmatic of those of numerous domestic violence victims in the United States [and whilst the ...] prevalence, persistence and gravity of the issue are recognized at the state and federal levels [the common response remains to...] treat it as a family and private matter of low priority, as compared to other crimes. According to the petitioners, the present case demonstrates that police departments and governments still regularly breach their duties to protect domestic violence victims by failing to enforce restraining orders.<sup>860</sup>

As the United States was not a signatory to the Convention of Belém do Pará, the CEDAW, or the American Convention on the Rights of Man, the Inter-American Commission could only admit the case based on the state's duties under the American Declaration, and could not issue a legally binding decision. The US argued that the case was inadmissible as the American Declaration doesn't impose on the state any 'affirmative duty, such as the exercise of due diligence, to prevent the commission of individual crimes by private actors, such as the tragic and criminal murders of Jessica Lenahan's daughters.'<sup>861</sup> However, this 'landmark admissibility case'<sup>862</sup> relied instead on the customary international law status of the due diligence obligation to prevent violence against women (as proposed by former Special Rapporteur Ertürk), and emphasised the 'strong link between discrimination, violence and due diligence'<sup>863</sup> held at the international and regional level. The Commission found that the US had failed in its duty to prevent violence against women (paragraph 160), noting in support of its findings that:

the principle of due diligence has a long history in the international legal system and its standards on state responsibility. It has been applied in a range of

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<sup>860</sup> *Lenahan (Gonzales) v United States*, paragraph 48.

<sup>861</sup> *Lenahan (Gonzales) v United States*, paragraph 3.

<sup>862</sup> García-Del Moral and Dersnah, "A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship," 661.

<sup>863</sup> *Lenahan (Gonzales) v United States*, paragraph 111.

circumstances to mandate States to prevent, punish, and provide remedies for acts of violence, when these are committed by either State or non-State actors [...] moreover [...] there is a broad international consensus over the use of the due diligence principle to interpret the content of State legal obligations towards the problem of violence against women; a consensus that extends to the problem of domestic violence. This consensus is a reflection of the international community's growing recognition of violence against women as a human rights problem requiring State action.<sup>864</sup>

The Commission affirmed the conceptualisation of domestic violence advanced in *A.T. v. Hungary* and *Opuz v. Turkey*, arguing that '[d]omestic violence [...] has been recognized at the international level as a human rights violation and one of the most pervasive forms of discrimination, affecting women of all ages, ethnicities, races and social classes,<sup>865</sup> and that the due diligence obligation of prevention applied to 'domestic violence acts perpetrated by private actors'<sup>866</sup>. The Commission also framed violence against women as discrimination and a violation in its own right: 'international human rights bodies have moreover considered State failures in the realm of domestic violence not only discriminatory, but also violations to the right to life of women.'<sup>867</sup>

In relation to the standard of reasonableness inherent within due diligence prevention, the Commission applied an intersectional lens to assessing 'risk of harm', recognising 'that certain groups of women face discrimination on the basis of more than one factor during their lifetime, based on their young age, race and ethnic origin, among others, which increases their exposure to acts of violence.'<sup>868</sup> As such the Commission argued that '[p]rotection measures are considered particularly critical in the case of girl-children, for example, since they may be at a greater risk of human rights violations based on two factors, their sex and age.'<sup>869</sup>

The Commission continued its interpretation of due diligence as being an obligation of means not result, and again emphasised that this includes effective implementation and

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<sup>864</sup> *Lenahan (Gonzales) v United States*, paragraph 122, 123.

<sup>865</sup> *Lenahan (Gonzales) v United States*, paragraph 111.

<sup>866</sup> *Lenahan (Gonzales) v United States*, paragraph 111.

<sup>867</sup> *Lenahan (Gonzales) v United States*, paragraph 112.

<sup>868</sup> *Lenahan (Gonzales) v United States*, paragraph 113.

<sup>869</sup> *Lenahan (Gonzales) v United States*, paragraph 113.

*de facto* protection, alongside legislative and public policy provisions: 'Even though the Commission recognizes the legislation and programmatic efforts of the United States to address the problem of domestic violence, these measures had not been sufficiently put into practice';<sup>870</sup> '[t]he States' duties to protect and guarantee the rights of domestic violence victims must also be implemented in practice.'<sup>871</sup> In relation to the specific issue of restraining orders, the Commission made clear that '[t]hey are only effective [...] if they are diligently enforced.'<sup>872</sup> The failure to implement was viewed by the Commission as discriminatory, as 'women constitute the majority of the victims.'<sup>873</sup>

Again, referencing its findings in *Maria da Penha*, the Commission reiterated that 'State inaction towards cases of violence against women fosters an environment of impunity and promotes the repetition of violence "since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts.'"<sup>874</sup> Impunity has become an issue of focus for the Inter-American system, with the Court and Commission highlighting the cultural significance of state endorsed impunity and the link between individual acts of violence against women and the wider culture of violence against women. Kenneth Roth, argues that '[w]hen the 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>875</sup> As an issue of primary prevention, the Court and Commission continue to emphasise the state's duty to tackle impunity, especially given its role as a powerful (and arguably, hegemonic) sociocultural actor.

The Commission furthered the jurisprudence of the *Cotton Field* case (where the Court assessed the individual violative acts of the case in light of the wider context of a pervasive and systemic culture of violence against women), and emphasised:

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<sup>870</sup> *Lenahan (Gonzales) v United States*, paragraph 161.

<sup>871</sup> *Lenahan (Gonzales) v United States*, paragraph 163.

<sup>872</sup> *Lenahan (Gonzales) v United States*, paragraph 163.

<sup>873</sup> *Lenahan (Gonzales) v United States*, paragraph 163.

<sup>874</sup> *Lenahan (Gonzales) v United States*, paragraph 163, citing *Maria da Penha Maia Fernandes v. Brazil*, paragraph 56.

<sup>875</sup> Kenneth Roth, "Domestic Violence as an International Human Rights Issue," *In Human Rights of Women: National and International Perspectives*, edited by Rebecca Cook, (Philadelphia: University of Pennsylvania Press, 1994), 330.

[The] States' duty to address violence against women also involves measures to prevent and respond to the discrimination that perpetuates this problem. States must adopt the required measures to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary practices and other practices based on the idea of the inferiority or superiority of either of the sexes, and on stereotyped roles for men and women.<sup>876</sup>

In outlining the primary preventative duties of the state under the due diligence standard, echoing the CEDAW Committee's General Recommendation no. 19, the Commission further concretised the link between discrimination, violence against women and due diligence. The Commission argued that there was 'international recognition that the due diligence duty of states to protect and prevent violence has special connotations in the case of women, due to the historical discrimination they have faced as a group.'<sup>877</sup> Quoting its decision in *Maria da Penha*, the Commission again argued that the due diligence principle in response to violence against women, entailed an obligation 'to prevent these degrading practices.'<sup>878</sup> In response to Lenahan's argument that the state had failed in its wider duties to respond to violence against women, the Commission 'found the existence of a general pattern of State tolerance and judicial inefficiency towards cases of domestic violence, which promoted their repetition, and reaffirmed the inextricable link between the problem of violence against women and discrimination in the domestic setting.'<sup>879</sup> In light of this, the Commission made extensive recommendations including at the primary level, calling for the adoption of:

public policies and institutional programs aimed at restructuring the stereotypes of domestic violence victims, and to promote the eradication of discriminatory socio-cultural patterns that impede women and children's full protection from domestic violence acts, including programs to train public officials in all branches of the administration of justice and police, and comprehensive prevention programs.<sup>880</sup>

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<sup>876</sup> *Lenahan (Gonzales) v United States*, paragraph 126.

<sup>877</sup> *Lenahan (Gonzales) v United States*, paragraph 129.

<sup>878</sup> *Lenahan (Gonzales) v United States*, paragraph 131, quoting from *Maria da Penha Maia Fernandes v. Brazil*, paragraph 56.

<sup>879</sup> *Lenahan (Gonzales) v United States*, paragraph 131.

<sup>880</sup> *Lenahan (Gonzales) v United States*, paragraph 201.6.

Whilst the United States was under no compulsion to follow the non-binding judgement of the Commission, the case has had an impact at the state and local levels. The 'DOJ hosted a Roundtable on Domestic Violence and Human Rights for government workers that considered the value added of a human rights approach to domestic violence programmes and advocacy [and ...] approximately 30 cities and counties across the U.S., inspired by Jessica's win, passed resolutions declaring freedom from domestic violence a human right.'<sup>881</sup>

*Jessica Lenahan (Gonzales) and others v. United States* represents the development of a distinctly feminist account of state responsibility within the Inter-American context. Having received 'eight very extensive *amicus* briefs' the case also 'represents activists' heavy investment'<sup>882</sup> in the framing of violence against women as discrimination *and* a violation of women's human rights in its own right. The cases of the CEDAW Committee, ECHR, ACHPR, and the IACtHR/IACHR provided opportunities to institutionalise significant feminists norms. The due diligence standard was the key to these opportunities. Whilst the evolving legal obligations have largely been outlined above, further focus is needed on the ways that due diligence has operated as a political and normative tool, to further the broader conceptualisation of violence against women as a human rights abuse.

#### *Due diligence as a sociopolitical and normative tool*

In the context of the elimination of violence against women, the due diligence standard has operated as far more than a measure of state responsibility, it has acted as a 'framework for action'<sup>883</sup>. The concept has allowed for substantive change in the scope and content of the international human rights law approach to violence against women, and has proven pivotal in the framing of violence against women as a human rights violation. It has served as a 'rallying point'<sup>884</sup> for activists and academics, and a

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<sup>881</sup> Bettinger-Lopez, "Violence Against Women: Normative Developments in the Inter-American Human Rights System," 190.

<sup>882</sup> García-Del Moral and Dersnah, "A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship," 670.

<sup>883</sup> Yakin Ertürk, "The Due Diligence Standard: What Does It Entail for Women's Rights?" In *Due Diligence and Its Application to Protect Women from Violence*, edited by Carin Benninger-Budel, (Leiden, The Netherlands: Martinus Nijhoff Publishers, 2008), 27.

<sup>884</sup> Sarkin, "A Methodology to Ensure that States Adequately Apply Due Diligence Standards and Processes to Significantly Impact Levels of Violence Against Women Around the World," 4; Bourke-

'useful instrument in the tool box of all who advocate for women's human rights.'<sup>885</sup> It has fundamentally changed the notion of citizenship within the transnational context, by broadening the rights-claims that women can make of the state.<sup>886</sup> Perhaps most significantly, it has served to erode the public/private dichotomy that, for many years, acted as a barrier to conceptualising violence against women as a human rights concern. As Yakin Ertürk, suggests:

[the] violence against women agenda has exposed [...] inconsistencies in the public/private divide and applying the due diligence standard to women's rights has helped to invalidate the liberal state theory thereby bringing violations of rights in the private sphere under scrutiny.<sup>887</sup>

Whilst the legal development of due diligence is obviously important to the substantive provisions of a feminist theory of state responsibility, the wider sociopolitical impact of the standard is often over-looked. As García-Del Moral and Dersnah contend: 'due diligence is not only a legal principle; it is a political and sociological concept, the implications of which require more careful consideration by citizenship and human rights scholars.'<sup>888</sup> Using frame analysis, the scholars argue that due diligence is a political and social construct that represents 'intense negotiations over the meaning of gender, violence, citizenship, and human rights.'<sup>889</sup> Arguably, the standard is one of the foremost ways that feminists have contested the discursive space within international human rights law. The gendered conceptualisation and application of the standard – or what García-Del Moral and Dersnah call the 'feminist appropriation'<sup>890</sup> of due diligence – has served as a 'discursive opportunity structure'<sup>891</sup>

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Martignoni, "The history and development of the due diligence standard in international law and its role in the protection of women against violence," 61.

<sup>885</sup> Bourke-Martignoni, J., 'The history and development of the due diligence standard in international law and its role in the protection of women against violence', In Benninger-Budel, C., (Ed.), *Due Diligence and Its Application to Protect Women from Violence*, (Leiden, The Netherlands: Martinus Nijhoff Publishers; 2008), p. 47 – 62, p. 61

<sup>886</sup> García-Del Moral and Dersnah, "A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship," 664.

<sup>887</sup> Ertürk, "The Due Diligence Standard: What Does It Entail for Women's Rights?" 33.

<sup>888</sup> García-Del Moral and Dersnah, "A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship," 662.

<sup>889</sup> García-Del Moral and Dersnah, "A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship," 664.

<sup>890</sup> García-Del Moral and Dersnah, "A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship," 661.

to challenge the public/private dichotomy and expand notions of state responsibility for violence against women. In the context of institutional and language orthodoxy within the discourse, the status of the due diligence standard as part of the wider 'lingua franca of the human rights movement'<sup>892</sup>, has also helped to centre violence against women as *human rights* concern, not just a 'women's issue'. As private violence disproportionately affects women, the expansion of state responsibility to include the violative actions of non-state actors was a pivotal moment in 'advancing the cause of dealing with preventing and eradicating the practice of VAW and gender-based violence.'<sup>893</sup> As such the appropriation of the due diligence standard 'became a central cog in many campaign strategies on women's human rights'<sup>894</sup>; challenging the gendered depoliticisation of the so-called private sphere and reimagining the international human rights law discourse to include violence against women.

As a rallying point for wider reconceptualisation of violence against women, the due diligence principle has served to strengthen the sociopolitical standing of women's human rights, as well as to expand the legal means to hold states responsible and accountable. However, questions remain as to the gaps and contradictions that exist in both the sociopolitical and legal development of the standard.

### **Assessment of the Legal and Sociopolitical Significance of the Due Diligence Standard with regard the Elimination of Violence Against Women.**

#### *Issues surrounding due diligence*

As evidenced in the case law of the CEDAW Committee and regional courts and bodies, the due diligence standard has 'institutionalise[d] broader notions of state

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<sup>891</sup> García-Del Moral and Dersnah, "A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship," 664.

<sup>892</sup> Sarkin, "A Methodology to Ensure that States Adequately Apply Due Diligence Standards and Processes to Significantly Impact Levels of Violence Against Women Around the World," 5.

<sup>893</sup> Sarkin, "A Methodology to Ensure that States Adequately Apply Due Diligence Standards and Processes to Significantly Impact Levels of Violence Against Women Around the World," 5.

<sup>894</sup> Bourke-Martignoni, "The history and development of the due diligence standard in international law and its role in the protection of women against violence," 47.



responsibility<sup>895</sup> for violence against women. It has worked as a 'juridical bridge' to bring violations of women's rights to account. However, there are numerous questions that remain as to the persisting 'normative gap'<sup>896</sup> in the protection of women from violence. Some of these questions pertain directly to the standard, such as: the connotation of lesser culpability; the degree of flexibility the concept allows states in fulfilling their duties; and, the use of individuals as a means to achieving broader structural change. Other questions speak to the wider context of the standard, such as: the lack of a legally binding international instrument on violence against women; the fragility of the feminist conceptualisation of violence against women as gendered and discriminatory; and, the assumption that greater state intervention is desirable. Beginning with the questions specific to the standard, I will consider to what degree the due diligence standard closes the 'normative gap'.

#### *Due diligence as a lesser shade of culpability*

Whilst the due diligence standard has served to expand notions of state responsibility, it remains distinct in its application as a measure of means, not of result: a violation of women's rights doesn't necessarily mean a breach of the state. Whilst the principle allows for some degree of responsibility it is less clear on culpability and accountability. In the context of preventing violence against women, due diligence offers a lesser standard of accountability, often described as 'indirect responsibility'. As Rebecca Cook argues, in this context 'responsibility can be understood as a limited sub-category of

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<sup>895</sup> García-Del Moral and Dersnah, "A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship," 661.

<sup>896</sup> 'The Special Rapporteur has highlighted that a normative gap exists at the international level. The lack of a legally binding instrument on violence against women precludes the articulation of the issue as a human rights violation in and of itself, comprehensively addressing all forms of violence against women and clearly stating the obligations of States to act with due diligence to eliminate violence against women.' United Nations, *Violence against women: Twenty years of developments to combat violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Rashida Manjoo, A/HRC/26/38 (May 28, 2014), paragraph 68, available at <http://undocs.org/A/HRC/26/38>; United Nations, *Existing legal standards and practices regarding violence against women in three regional human rights systems and activities being undertaken by civil society regarding the normative gap in international human rights law: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Rashida Manjoo, A/HRC/29/27 (June 10, 2015), paragraph 3 available at <http://undocs.org/A/HRC/29/27>; 'The idea of a normative gap is a simple one. It is a condition that exists when some widely - accepted moral principle has insufficiently binding rules to guide and / or impel actors' behaviour in line with that principle. Put most simply, it is a gap between aspiration and firm commitment.' David Richards and Jillienne Haglund, "Exploring the Consequences of the Normative Gap in Legal Protections Addressing Violence Against Women," *In The Legal Protection From Violence: Normative Gaps in International Human Rights Law*, edited by Rashida Manjoo and Jackie Jones, (Abingdon, Oxon: Routledge, 2018), 40.

accountability.<sup>897</sup> Applying ‘two separate regimes of responsibility for “private” as opposed to “public” acts has an effect on accountability for protection of human rights.’<sup>898</sup> Carin Benninger-Budel argues that ‘[t]he fact that it is women who are the primary victims of violence perpetrated by non-state actors has played a major role in the historical refusal to view such violence as a human rights violation.’<sup>899</sup> Whilst the due diligence standard has allowed for the institutionalisation of the conceptualisation of violence against women as a human rights violation, it has done so by defining a lesser degree of state responsibility. For those who argue that the standard has ‘helped dissolve the public/private divide’, there are also those who ‘question whether the distinct methods used in the examination and estimation of international responsibility with regard to conduct by state actors and non-state actors has on the other hand entrenched this division.’<sup>900</sup> Addressing violence against women with a lesser measure of accountability can act to reinforce the public/private dichotomy active in international human rights law and in standard-setting at the national level. As Amy Sennett argues, the flexibility inherent in the due diligence standard – and the lack of clarity that this breeds – may actually allow states to ‘escape responsibility’.<sup>901</sup> As the standard is one of means and not results it allows the state to use claims of due diligence as a defensive standard rather than as a standard of responsibility. Rikki Holtmaat suggests that even in the context of specific obligations, the concept of due diligence ‘seem to suggest that as long as the state argues it has done something this is enough, no matter whether the internationally agreed result has been achieved.’<sup>902</sup> Menno Kamminga gives a condemning assessment of the use of the due diligence standard in the context of violence against women:

Advocates of due diligence as a tool to promote women’s rights should perhaps be reminded that they have not invented the concept. The due diligence standard has an established meaning in both general international law

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<sup>897</sup> Rebecca J Cook, “Accountability in International Law for Violations of Women’s Rights by Non-State Actors,” *Studies in Transnational Legal Policy*, (25), (1993): 95.

<sup>898</sup> Carin Benninger-Budel, “Introduction,” *In Due Diligence and Its Application to Protect Women From Violence*, edited by Carin Benninger-Budel, (Leiden, The Netherlands: Martinus Nijhoff Publishers, 2008), 17.

<sup>899</sup> Benninger-Budel, “Introduction,” 5.

<sup>900</sup> Benninger-Budel, “Introduction,” 17.

<sup>901</sup> Amy J. Sennett, “*Lenahan (Gonzales) v. United States of America*: Defining Due Diligence?” *Harvard International Law Journal*, 53(2), (Summer 2012): 547. 537 – 547.

<sup>902</sup> Rikki Holtmaat, “Preventing Violence Against Women: The Due Dilligence Standard and Article 5(a) of the CEDAW Convention,” *In Due Dilligence and Its Application to Protect Women from Violence*, edited by Carin Benninger-Budel, (Leiden, The Netherlands: Martinus Nijhoff Publishers, 2008), 88.

and domestic law. It is widely perceived as a weak standard, an obligation of conduct rather than an obligation of result. Its exercise is subject to available resources and to a margin of appreciation. For precisely these reasons, the obligation to act with due diligence is a standard that is well liked by governments and by companies. When accused of abuses they have learned to defend themselves by arguing that they have acted with all due diligence and therefore are not accountable.<sup>903</sup>

In his scathing account of the utilisation of the standard in the human rights discourse, Kamminga goes on to argue that 'reliance on due diligence is both unnecessary and counterproductive' and that a focus on positive obligations with regard women's rights should replace 'due diligence mania'.<sup>904</sup> He is not alone in calling for an emphasis on positive obligations over due diligence obligations. What makes this particularly challenging is the discourse's generalised use of the term 'due diligence' and its conflation with positive obligations. As due diligence has often been used to bolster positive obligations there has been some conceptual erosion of the duties incumbent on the state with regard its positive obligations. In the context of primary prevention of violence against women, this is particularly evident in the conflation of systemic due diligence and the positive obligations of the state under Article 2(e)-(f) and 5(a) of the CEDAW to modify prejudicial social and cultural patterns and practices. Whilst Rikki Holtmaat rightly argues that '[b]anishing gender stereotypes [...] is one of the main, general mechanisms to prevent violence against women'<sup>905</sup>, this norm has developed through joint application of Article 5(a) of the CEDAW (a positive obligation) *and* the due diligence obligation to prevent violence against women, and so their co-constitutive relationship makes it difficult to distinguish between the two. This is problematic when it comes to defining standards inherent in the duty of primary prevention, and determining breaches of these standards.

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<sup>903</sup> Menno T. Kamminga, "Due Diligence Mania: The Misguided Introduction of an Extraneous Concept into Human Rights Discourse," *In The Women's Convention Turned 30*, edited by Ingrid Westendorp, (Cambridge: Intersentia Publishing, 2012), 413.

<sup>904</sup> Kamminga "Due Diligence Mania: The Misguided Introduction of an Extraneous Concept into Human Rights Discourse," 407.

<sup>905</sup> Holtmaat, "Preventing Violence against Women: The Due Diligence Standard with Respect to the Obligations to Banish Gender Stereotypes on the Grounds of Article 5(a) of the CEDAW Convention," 64.

*Primary prevention: a positive obligation or a duty of due diligence?*

The responsibility of states to prevent violence against women at a primary level, has entered the discourse most notably through the application of the due diligence standard to specific instances of violence against women. In cases and complaints brought before the international and regional human rights bodies, as outlined above, applicants have called for the state to be responsible for the wider culture or pattern of violence against women that existed beyond, and arguably contributed towards, the specific violative act at issue. The Courts and monitoring bodies have increasingly spoken to this more general responsibility; in keeping with former Special Rapporteur Manjoo's articulation of a duty of systemic due diligence. In the cases outlined above the responsibility of the state at the primary level has regularly been articulated as an obligation of due diligence. This has often been applied in conjunction with other obligations under CEDAW Article 5(a), or its regional or customary law equivalents. The combination of the two owes as much to the sociopolitical significance of the due diligence standard, as to its legal value. Due to the struggle in bringing violence against women into the international human rights discourse, and the success of the due diligence concept in correcting that erasure, advocates have clung to the standard as a framework for accountability. As touched on above, as a rallying point, and '*cause célèbre*'<sup>906</sup>, the due diligence standard holds significant sociopolitical and institutional value within the discourse. However, as the understanding of violence against women has grown, and the surrounding norms have evolved, it could be argued that the utility and efficacy of the standard as a *legal* tool has not been sufficiently (re)appraised. Whilst its sociopolitical value remains, marking a major victory within transnational feminist advocacy, its legal import has arguably dwindled. As positive obligations have been strengthened and developed by the evolution of customary law status and the codification of legal obligations in binding regional instruments, the broad and flexible standard of due diligence has not kept up. Rikki Holtmaat argues that the treaty and customary norms and obligations that have evolved over the past decades are often 'much more precise and far stretching than the general obligation "to act with due

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<sup>906</sup> Kamminga "Due Diligence Mania: The Misguided Introduction of an Extraneous Concept into Human Rights Discourse," 408.

diligence”.<sup>907</sup> Holtmaat goes on to ask: ‘does this concept offer us enough strongholds as to the accountability of states insofar as the prevention of violence against women is concerned?’<sup>908</sup> Faced with resistance to structural change; the scale of the work needed at the sociocultural level; and, the demands of implementation, is a standard of responsibility that is so vague and flexible actually effective?<sup>909</sup> Whilst the case law evidences a developing approach to systemic prevention, as outlined above, this seems case-specific and inconsistent; with hesitance still evident in both the regional Courts’ decisions, despite the gender jurisprudence of some of their cases. As evident in the dissenting opinions of the *Talpis* case, there remains ambivalence on the European Court as to the wider sociocultural duties of the state in its obligation to prevent. Similarly, in the *Cotton Fields* case, the Court declined to make recommendations on the duties of the state regarding primary prevention, despite concluding on systemic and structural failings at the sociocultural and political levels. The positive obligations of the state under CEDAW Article 2(e)-(f) and 5(a), and the arguably customary law standards of General Recommendation no. 19, should not be left subject to the degree of flexibility and context-specificity inherent in the due diligence standard. In its General Recommendation no. 35 the CEDAW Committee further clarified the positive obligations under the convention and General Recommendation no. 19:

Article 2 establishes that the overarching obligation of States parties is to pursue by all appropriate means and without delay a policy of eliminating discrimination against women, including gender-based violence against women. *This is an obligation of an immediate nature*; delays cannot be justified on any grounds, including on economic, cultural or religious grounds. General recommendation No. 19 indicates that in respect of gender-based violence against women this obligation comprises two aspects of State responsibility: for such violence resulting from the actions or omissions of (a) the State party or its actors, and (b) non-State actors.

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<sup>907</sup> Holtmaat, “Preventing Violence against Women: The Due Diligence Standard with Respect to the Obligations to Banish Gender Stereotypes on the Grounds of Article 5(a) of the CEDAW Convention,” 88.

<sup>908</sup> Holtmaat, “Preventing Violence against Women: The Due Diligence Standard with Respect to the Obligations to Banish Gender Stereotypes on the Grounds of Article 5(a) of the CEDAW Convention,” 65.

<sup>909</sup> Holtmaat, “Preventing Violence against Women: The Due Diligence Standard with Respect to the Obligations to Banish Gender Stereotypes on the Grounds of Article 5(a) of the CEDAW Convention,” 65.

These obligations are of an immediate nature and have defined content, and speak to the duties of primary prevention incumbent on the state. It is important that when applying systemic due diligence, the nature of these obligations – as immediate and results-based – aren't collapsed into a lesser standard of responsibility. Whilst there is general consensus that 'due diligence is not about undermining positive obligations but about reinforcing them'<sup>910</sup>; there are obvious problems with clearly outlining and conceptualising the differences and ensuring both are appropriately applied. Legal obligations of result must be enforced as such, and the primacy of the due diligence standard in holding states responsible for primary prevention runs the 'danger that concrete obligations are replaced with the due diligence obligation.'<sup>911</sup> Because the standard operated as such a powerful sociopolitical tool within the discourse, framing previously established substantive rights in new ways, delineation between the standard and primary obligations at hand has become difficult to maintain. There is particular risk of this kind of conflation in the application of PIPR obligations, which, while interrelated with the due diligence obligation, represent distinct obligations in their own right.

As the term 'due diligence' is rarely used it is common to look for language that implies the standard's existence, such as: 'vigilance', 'due care', 'all appropriate measures'; or, in the context of rights, the evolving standards of 'respect, protect, fulfil'.<sup>912</sup> Similarly, PIPR obligations are sometimes considered 'indicative of the existence'<sup>913</sup> of the due diligence standard. However, as outlined by Katja Samuel, it is widely considered that PIPR obligations, including prevention, 'do not of themselves constitute due diligence obligations; rather [...] they trigger parallel but separate due diligence obligations.'<sup>914</sup> Samuel goes on to consider James Crawford's assessment of prevention as a parallel but distinct obligation to due diligence. Crawford, former Special Rapporteur of the International Law Commission for State Responsibility (1998 – 2001), argues that the characterisation of the obligation to prevent, as outlined in Draft Article 23 of the ILC Draft Articles, is distinct from the obligation to act with due

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<sup>910</sup> Sarkin, "A Methodology to Ensure that States Adequately Apply Due Diligence Standards and Processes to Significantly Impact Levels of Violence Against Women Around the World," 16.

<sup>911</sup> Holtmaat, "Preventing Violence against Women: The Due Diligence Standard with Respect to the Obligations to Banish Gender Stereotypes on the Grounds of Article 5(a) of the CEDAW Convention," 88.

<sup>912</sup> Samuel, "The Legal Character of Due Diligence: Standards, Obligations or Both?" 24.

<sup>913</sup> Samuel, "The Legal Character of Due Diligence: Standards, Obligations or Both?" 24.

<sup>914</sup> Samuel, "The Legal Character of Due Diligence: Standards, Obligations or Both?" 24.

diligence, ‘in the ordinary sense’<sup>915</sup>. In the prior case, whilst ‘the mere failure to prevent is not a sufficient condition for responsibility [...] *it is a necessary one*.’<sup>916</sup> An obligation of prevention is not breached unless the ‘apprehended event occurs’<sup>917</sup>. However, the obligation of due diligence ‘would be breached by a failure to exercise due diligence, even if the apprehended result did not (or not yet) occur.’<sup>918</sup> Only the obligation to prevent was included in Draft Article 23, as a ‘particular obligation of result.’<sup>919</sup> As such there exists two distinct obligations: one substantive and one procedural; one of result and one of means. Whilst this distinction is significant, it doesn’t inherently devalue the concept of due diligence: it simply calls for greater clarity in applying due diligence alongside other obligations. As a measure of conduct rather than result, due diligence should be seen as strengthening the obligation of prevention, and furthering the principles of good faith, loyal action, and timely undertaking of positive obligations. Due diligence should be ‘about ensuring compliance with the positive obligations that a state already has’<sup>920</sup>; offering a useful *measure* of conduct. In fact, as it doesn’t rely on a breach to assess responsibility, it should be seen as heightening compliance. In this way due diligence is vital, offering a tool that should strengthen the compliance of the state with its duties, rather than ‘subtract from their positive obligations.’<sup>921</sup> However, this relies on correctly interpreting and implementing *both* obligations: due diligence as a standard of means, concerned with appropriate measures and procedural duties; and the obligation to prevent – as outlined in treaty and customary law – as a standard of result<sup>922</sup>, concerned with positive obligations and substantive rights and duties.<sup>923</sup> Whilst greater judicial clarity is arguably needed in applying due diligence alongside PPIPR obligations, the parallel duty of due diligence shouldn’t be considered as undermining the positive obligation to prevent.

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<sup>915</sup> James Crawford, *State Responsibility; The General Part*, (Cambridge: Cambridge University Press, 2013), 227.

<sup>916</sup> Crawford, *State Responsibility; The General Part*, 227.

<sup>917</sup> Crawford, *State Responsibility; The General Part*, 227.

<sup>918</sup> Crawford, *State Responsibility; The General Part*, 227.

<sup>919</sup> Crawford, *State Responsibility; The General Part*, 228.

<sup>920</sup> Sarkin, “A Methodology to Ensure that States Adequately Apply Due Diligence Standards and Processes to Significantly Impact Levels of Violence Against Women Around the World,” 17.

<sup>921</sup> Sarkin, “A Methodology to Ensure that States Adequately Apply Due Diligence Standards and Processes to Significantly Impact Levels of Violence Against Women Around the World,” 17.

<sup>922</sup> Kamminga “Due Diligence Mania: The Misguided Introduction of an Extraneous Concept into Human Rights Discourse,” 411.

<sup>923</sup> Samuel, “The Legal Character of Due Diligence: Standards, Obligations or Both?” 10.

In the case of Article 5(a) of the CEDAW, the positive obligation to challenge sociocultural discrimination and prejudicial practices has been strengthened by application alongside the systemic due diligence obligation to prevent violence against women. Together they reinforce the obligation on states to ‘remove the structural causes of violence against women.’<sup>924</sup> This can be seen in the case law of the CEDAW-OP and regional human rights bodies, as outlined above. However, Kamminga argues that the duty to prevent violence against women is best treated as a separate positive obligation, with due diligence cast aside completely. He highlights the approach of the European Court, which has ‘used the concept of due diligence only sparingly’; preferring to ‘rely on the notion of positive obligations.’<sup>925</sup> Kamminga argues for the ECtHR’s approach in *Rantsev v. Cyprus and Russia* (2010), where the Court made no reference to due diligence but instead relied on Article 4 to establish a positive obligation to prevent trafficking. He argues that ‘[b]y laying down the *result that must be achieved* (effective prevention and investigation) the Court did much more for the victims than if it would merely have held that States have to *make a due diligence effort* to achieve this result.’<sup>926</sup> However, in the *Opuz v. Turkey* decision, which concretised the state’s obligation to prevent violence against women, including domestic violence, the Court relied heavily on due diligence to frame the state’s (positive) obligation to prevent. Whilst positive obligations represent clearer substantive rights and incur stricter responsibility, the application of these rights and obligations to contexts of private violence still largely rely on the due diligence standard. This is no small caveat, given the majority experience of violence against women is at the hands of an intimate partner or family member, and that women disproportionately suffer private violence. Due diligence in the context of domestic violence, and in the context of primary prevention, works to instrumentalise substantive rights. Due diligence in this regard remains a vital ‘juridical bridge’. However, there does need to be greater clarity on the *normative destination arrived at*, with a focus on further clarification of positive obligations of prevention. As former Special Rapporteur Yakin Ertürk suggests, the ‘major potential for expanding the due

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<sup>924</sup> Holtmaat, “Preventing Violence against Women: The Due Diligence Standard with Respect to the Obligations to Banish Gender Stereotypes on the Grounds of Article 5(a) of the CEDAW Convention,” 88 – 89.

<sup>925</sup> Kamminga “Due Diligence Mania: The Misguided Introduction of an Extraneous Concept into Human Rights Discourse,” 410.

<sup>926</sup> Kamminga “Due Diligence Mania: The Misguided Introduction of an Extraneous Concept into Human Rights Discourse,” 410 – 411.



diligence standard lies in the full implementation of generalized obligations of prevention'.<sup>927</sup>

Without clearer delineation of obligations at the legal/judicial level and at the sociopolitical/discursive level, hard-fought for substantive rights risk being collapsed into readings of due diligence as a minimum standard of care and responsibility. In the particular context of women's international human rights law, an area of international law in its (relative) infancy, the overreliance on due diligence – as a standard of relative and undetermined content – risks setting a low bar or a cap on quickly evolving standards such as 'respect, protect, fulfil'.<sup>928</sup> Further work is needed to expand the notion of due diligence in the context of the norms and general principles *specific* to international human rights law. This would be furthered by setting the due diligence standard for preventing violence against women in a binding international instrument that directly addressed violence against women, and clearly outlined substantive rights and positive obligations.

#### *The individual and the transformative agenda*

Attention also needs to be given to developing the state's systemic due diligence obligations in a way that doesn't further 'a discourse of women as victims'<sup>929</sup>; and in a manner that doesn't seek to profit politically from the individual. The due diligence obligation to prevent, and the due diligence obligation to provide reparations, have both been used to expand the 'transformative agenda'<sup>930</sup> with regard primary prevention and eliminating violence against women. However, critics have argued that this approach burdens victims and inappropriately leverages their suffering to achieve wider change. As a 'powerful claims-making tool' transformative reparations have 'been criticised for sidelining victims [...] or for actors appropriating their voices for their

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<sup>927</sup> Ertürk, "The Due Diligence Standard: What Does It Entail for Women's Rights?" 38.

<sup>928</sup> Kamminga "Due Diligence Mania: The Misguided Introduction of an Extraneous Concept into Human Rights Discourse," 412; Holtmaat, "Preventing Violence against Women: The Due Diligence Standard with Respect to the Obligations to Banish Gender Stereotypes on the Grounds of Article 5(a) of the CEDAW Convention," 88.

<sup>929</sup> García-Del Moral and Dersnah, "A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship," 670.

<sup>930</sup> United Nations, *Violence against women: Twenty years of developments to combat violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Rashida Manjoo, A/HRC/26/38 (May 28, 2014).

own political ends.’<sup>931</sup> Seeking sociocultural change and gender transformation through individual cases risks the manipulation of the individual and the loss of a victim-oriented approach. Conversely, it could be seen that the recognition of the victim’s suffering as part of a wider context may further strengthen their individual rights-claim and political agency.

What is certain though, is that transformation through litigation shouldn’t be the principal approach to strengthening norms of state responsibility for primary prevention. Due diligence needs to be placed in the context of wider advocacy that pushes for greater instrumentalisation and implementation of existing standards.

Whilst further clarity is needed when addressing the state’s positive obligation to prevent violence against women, and restraint cautioned with regard kneejerk appeals to due diligence (where stricter standards may apply), some of the most significant challenges facing the use of the due diligence standard arguably lie outside of itself. The contested status of legal rules and norms, and conceptual fragility, at the broader level of institutionalising state responsibility for violence against women pose sizeable challenges to implementing (systemic) due diligence.

As a measure of reasonableness that is context specific and shaped by the primary rule, the due diligence standard is as effective as the wider legal and normative approach to state responsibility for violence against women. There exists two sizeable problems in articulating state responsibility for violence against women. The first relates to: the legal status and institutionalisation of the norms surrounding the elimination of violence against women; and, the lack of a legally binding international instrument focused on violence against women. The second relates to: the fragmentation of norms; the inconsistent framing of violence against women; and the fragility of the feminist conceptualisation of state responsibility for eliminating violence against women. Both problems will be explored in some depth below.

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<sup>931</sup> Luke Moffett, “Reparations in Transitional Justice: Justice or Political Compromise?” *Human Rights and International Legal Discourse*, 17(1), (2017): 70.

*Due diligence and the normative gap.*<sup>932</sup>

There still exists no internationally binding treaty that deals specifically with violence against women. Whilst the Belém do Pará, Maputo, and Istanbul Conventions are binding on state parties, no such global instrument exists – representing a universal commitment to eliminate violence against women. At the international level the main application of the due diligence obligation to prevent violence against women has come by way of the CEDAW Committee's General Recommendation no. 19; often read in conjunction with the DEVAW. The DEVAW is a soft-law declaration, and the legal standing of General Recommendations is contested.<sup>933</sup> In fact, Rhonda McQuigg's account of General Recommendation no. 19, is that it is 'in strict legal terms only a non-binding interpretation of CEDAW.'<sup>934</sup>

Although the international application of due diligence is rooted in non-binding recommendations and declarations, one of the strengths of the soft-law approach is that 'such declarations may provide a basis for the speedy consolidation of customary rules.'<sup>935</sup> As Brownlie suggests, non-binding norms can lead to customary law, as they have 'decisive catalytic effect'<sup>936</sup> on state practice. This has been argued to be the case by the CEDAW Committee and former Special Rapporteur Ertürk. In General Recommendation no. 35 (2017) the Committee argue that:

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<sup>932</sup> The following analysis has been shaped by conversations with former Special Rapporteur, Professor Rashida Manjoo, and Professor Jackie Jones. In her 2015 report, Special Rapporteur Manjoo discussed 'closing the normative gap in international human rights law'. Prior to this, a series of expert meetings and consultations with activists, practitioners and academics in the women's rights sector took place. My own participation in this, included a paper delivered at a 2013 panel discussion on 'International Legal Gaps in the Protection of Women from Violence', and participation in a meeting of European experts to 'discuss whether a new international legal instrument was required, useful, and mandated.' Details of these events and the wider process of consultation can be found in the addendum to the Special Rapporteurs 2015 report. United Nations, *Addendum to the Human Right Council Thematic report of the Special Rapporteur on Violence, its Causes and Consequences*, A/HRC/29/27/Add.5 (June 12, 2015), available at <http://undocs.org/A/HRC/29/27/Add.5>

<sup>933</sup> Rashida Manjoo, "Normative Developments on Violence Against Women in the United Nation System," In *The Legal Protection From Violence: Normative Gaps in International Human Rights Law*, edited by Rashida Manjoo and Jackie Jones, (Abingdon, Oxon: Routledge, 2018), 74. p 73 – 106, p. 74

<sup>934</sup> Ronagh J. A. McQuigg, "Is it time for a UN treaty on violence against women?" *The International Journal of Human Rights*, 22(3), (2018): 309.

<sup>935</sup> Heléne Combrinck, "Positive State Duties to Protect Women from Violence: Recent South African Developments," *Human Rights Quarterly*, 20, (1998): 674. 666 – 690, pp. 674

<sup>936</sup> Ian Brownlie, *Legal status of natural resources in international law (some aspects)* (Volume 1 62), (Boston: Nijhoff, 1979), 261.

For over 25 years the practice of States parties has endorsed the Committee's interpretation. The *opinio juris* and State practice suggest that the prohibition of gender-based violence against women has evolved into a principle of customary international law. General recommendation No. 19 has been a key catalyst for this process.<sup>937</sup>

The 2006 report of the Special Rapporteur found on the same basis 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>938</sup> This approach has been taken up by the European and Inter-American Courts, with the latter utilising it in the case of *Jessica Lenahan (Gonzales) and others v. United States*, to hold the United States accountable to its responsibility to prevent violence against women, despite it not being a party to any international or regional binding or non-binding instrument addressing violence against women.

Whilst there is some debate as to whether the due diligence standard to prevent violence against women does have customary international law status, with Christine Chinkin<sup>939</sup> and former Special Rapporteur Manjoo<sup>940</sup> both arguing that evidence of customary law status is inconclusive or incomplete; the more pressing question, with regard efficacy of the standard, is whether customary law status is helpful in clarifying responsibility and accountability. As Jackie Jones argues '[e]ven if one were to agree with General Recommendation 35 that violence against women had obtained the status of customary international law, there are still major drawbacks for relying solely on this status.'<sup>941</sup> Whereas treaty law is 'precise, concise and transferrable'<sup>942</sup>, making it

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<sup>937</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, CEDAW/C/GC/35, (2017), available from <http://undocs.org/CEDAW/C/GC/35>

<sup>938</sup> United Nations, *The due diligence standard as a tool for the elimination of violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Yakin Erturk, E/CN.4/2006/61, (20 January 2006), paragraph 29.

<sup>939</sup> Christine Chinkin, "Chapter 4: Sources," *In International Human Rights Law*, edited by Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran, (Oxford: Oxford University Press, 2014), 92 – 3; Jackie Jones, "The Importance of International Law and Institutions," *In The Legal Protection From Violence: Normative Gaps in International Human Rights Law*, edited by Rashida Manjoo and Jackie Jones, (Abingdon, Oxon: Routledge, 2018), 19.

<sup>940</sup> United Nations, *Violence against women: Twenty years of developments to combat violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Rashida Manjoo, A/HRC/26/38 (May 28, 2014), paragraph 68.

<sup>941</sup> Jones, "The Importance of International Law and Institutions," 19.

<sup>942</sup> Jones, "The Importance of International Law and Institutions," 19.

an appropriate mechanism to strengthen and consolidate the standard-setting of the past three decades, the existence of customary law still leaves open questions about the specific content of rules and standards. With regard due diligence this is even more pressing as effective interpretation and application of the standard relies on the clarity of the primary rule or obligation. As Beth Simmons argues, '[t]reaties are the clearest statements available about the content of globally sanctioned decent rights practices [...] Treaties serve notice that governments are *accountable* [...] and] signal a seriousness of intent that is difficult to replicate in other ways.'<sup>943</sup> Jones further argues that 'one very significant shortcoming is the fact that there is no monitoring body attached to a rule of customary international law that could or would monitor compliance.'<sup>944</sup> As implementation and compliance are widely considered to be pressing challenges in the international human rights law approach to violence against women, reliance on customary law as a foundation for due diligence obligations seems questionable. Interestingly, Jones characterises the normative gap left by the absence of a binding instrument as an indication of 'the failure of the State in its responsibility to act with due diligence in addressing widespread and systemic violations of women's and girls' human rights.'<sup>945</sup> The Special Rapporteur noted the same failing in her 2015 report:

The normative gap under international human rights law raises crucial questions about the State responsibility to act with due diligence and the responsibility of the State as the ultimate duty bearer to protect women and girls from violence, its causes and consequences.<sup>946</sup>

Without an internationally binding standard, the development of the due diligence standard has relied on regional standards that lack universality. Whilst there are numerous problems that come from the divergence and fragmentation of norms at the regional level, the issue of universality as a core concern of human rights is also at play. In light of this an international instrument could serve to concretise the notion of

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<sup>943</sup> Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*, (Cambridge University Press, 2009), 5.

<sup>944</sup> Jones, "The Importance of International Law and Institutions," 19.

<sup>945</sup> Jones, "The Importance of International Law and Institutions," 11.

<sup>946</sup> United Nations, *Existing legal standards and practices regarding violence against women in three regional human rights systems and activities being undertaken by civil society regarding the normative gap in international human rights law: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Rashida Manjoo, A/HRC/29/27* (June 10, 2015), paragraph 63.

women's rights as universal and inalienable. As the Special Rapporteur on the Rights of Women in Africa, Commissioner Lucy Asuagbor, also argues, a legally binding treaty at the individual level could 'achieve some useful harmony' otherwise lacking at the domestic and international level.<sup>947</sup> With specific reference to the development of state responsibility, Jeremy Sarkin argues that more needs to be done to make due diligence 'known and accepted' as a necessary standard, and 'methodology',<sup>948</sup> and this relies on linking this methodology to universal standards and processes of accountability:

For a due diligence methodology to take hold, *all states must be made to comply with a due diligence strategy*. That means that such a methodology must be obligatory when the states report on human rights matters, such as at Universal Periodic Review (UPR) or at the various treaty bodies [... therefore] there may be a need for a new binding international instrument that specifically prohibits violence against women and clearly articulates and delineates due diligence standards and processes with which states need to comply.<sup>949</sup>

To improve compliance 'a universal process to deal specifically with VAW is needed with an oversight mechanism.'<sup>950</sup> Stedman further impresses upon the issue of compliance with regard the efficacy of due diligence:

the extent to which State obligations are capable of positively impacting the status of women's rights is limited by the ineffective implementation of such obligations. Furthermore, the absence of a binding instrument with an

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<sup>947</sup> Special Rapporteur on the Rights of Women in Africa, Lucy Asuagbor, argues the case for universal standards over regional standards: '[I]nternational standards differ from regional standards that collectively suffer a lack of implementation at the domestic level. The resultant fragmentation works to the disadvantage of victims who may be faced with several but non-inclusive and non-complementary avenues of redress. In this instance, a global VAW treaty that prescribes clear and legally binding enforcement mechanisms at both the international and domestic levels could achieve some useful harmony.' Special Rapporteur on the Rights of Women in Africa, *Response by Commissioner Lucy Asuagbor to Dr. Dubravka Šimonović on questions on the adequacy of the legal framework on violence against women*, accessed May 10, 2019,

<https://www.ohchr.org/Documents/Issues/Women/SR/Framework/SRWInAfrica.docx>

<sup>948</sup> Sarkin, "A Methodology to Ensure that States Adequately Apply Due Diligence Standards and Processes to Significantly Impact Levels of Violence Against Women Around the World," 35.

<sup>949</sup> Sarkin, "A Methodology to Ensure that States Adequately Apply Due Diligence Standards and Processes to Significantly Impact Levels of Violence Against Women Around the World," 35.

<sup>950</sup> Sarkin, "A Methodology to Ensure that States Adequately Apply Due Diligence Standards and Processes to Significantly Impact Levels of Violence Against Women Around the World," 22.

international mandate to monitor State compliance with due diligence obligations related to violence against women hints at a slow progression moving forward.<sup>951</sup>

The call for a binding instrument was taken up by former Special Rapporteur Manjoo in 2013. The 'normative gap' was first highlighted in her 2014 report, with specific reference to the need for a legally binding instrument which clearly outlines the 'obligations of States to act with due diligence to eliminate violence against women.'<sup>952</sup> The issue became the focus of her 2015 thematic report, where she considered: 'Closing the gap in international human rights law: lessons from three regional human rights systems on legal standards and practices regarding violence against women'<sup>953</sup>. The Special Rapporteur concluded:

Transformative change requires that the words and actions of States reflect an acknowledgement that violence against women is a human rights violation, in and of itself and, more importantly, it requires a commitment by States to be bound by specific legal obligations in the quest to prevent and eliminate such violence.<sup>954</sup>

The current Special Rapporteur Dubravka Šimonović has looked to continue the conversation on the 'adequacy of the international legal framework on violence against women'<sup>955</sup> and has sought the input of women's civil society groups on the issue. Amongst other questions on the 'adequacy of the international legal framework', Special Rapporteur Šimonović asked: 'Do you consider that there is a need for a

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<sup>951</sup> Stedman, "The Leap from Theory to Practice: Snapshot of Women's Rights Through a Legal Lens," 28.

<sup>952</sup> United Nations, *Violence against women: Twenty years of developments to combat violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Rashida Manjoo*, A/HRC/26/38 (May 28, 2014), paragraph 68.

<sup>953</sup> United Nations, *Existing legal standards and practices regarding violence against women in three regional human rights systems and activities being undertaken by civil society regarding the normative gap in international human rights law: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Rashida Manjoo*, A/HRC/29/27 (June 10, 2015).

<sup>954</sup> United Nations, *Existing legal standards and practices regarding violence against women in three regional human rights systems and activities being undertaken by civil society regarding the normative gap in international human rights law: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Rashida Manjoo*, A/HRC/29/27 (June 10, 2015), paragraph 65.

<sup>955</sup> "Adequacy of the international legal framework on violence against women," United Nations, accessed May 9, 2019, <https://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/AdequacyInternationalLegalFramework.aspx>

separate legally binding treaty on violence against women with its separate monitoring body?<sup>956</sup> The Rapporteur acknowledged the overwhelming response in favour of a new instrument: 'Many civil society organizations [...] urged adoption of a new treaty, which would be "specifically on violence against women, comprehensive and legally binding" and reflect "uniformity, specificity and state accountability"'.<sup>957</sup> The report also noted that:

[a] significant number of submissions pointed out that the lack of a specific global treaty on gender-based violence against women had important symbolic value and further indicated that a new treaty could have an important role in galvanizing implementation at the State level.<sup>958</sup>

This picks up on the issue of implementation and accountability. Whilst there might be widespread consensus that the norms surrounding violence against women are well established, methods of implementation and accountability are weak. The argument of a normative gap is based on the 'gap between aspiration and firm commitment'.<sup>959</sup> In the context of violence against women the gap 'is a condition where states have widely agreed upon some standard of human dignity [...] but have failed to institute binding rules to hold states accountable to this standard'.<sup>960</sup> However, despite the acknowledgement of a normative gap and the majority support for a new binding international instrument, the Special Rapporteur 'did not support this view but articulated other solutions'.<sup>961</sup> In particular, the Special Rapporteur felt that:

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<sup>956</sup> "Adequacy of the international legal framework on violence against women," United Nations, accessed May 9, 2019, <https://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/AdequacyInternationalLegalFramework.aspx>

<sup>957</sup> United Nations, *Report of the Special Rapporteur on violence against women, its causes and consequences on the adequacy of the international legal framework on violence against women*, A/72/134 (July 19, 2017), paragraph 43 available from <http://undocs.org/A/72/134>

<sup>958</sup> United Nations, *Report of the Special Rapporteur on violence against women, its causes and consequences on the adequacy of the international legal framework on violence against women*, A/72/134 (July 19, 2017), paragraph 84.

<sup>959</sup> Richards and Haglund, "Exploring the Consequences of the Normative Gap in Legal Protections Addressing Violence Against Women," 40.

<sup>960</sup> Richards and Haglund, "Exploring the Consequences of the Normative Gap in Legal Protections Addressing Violence Against Women," 40.

<sup>961</sup> Rashida Manjoo, "Closing the Normative Gap in International Law on Violence Against Women: Developments, Initiatives and Possible Options," *In The Legal Protection From Violence: Normative Gaps in International Human Rights Law*, edited by Rashida Manjoo and Jackie Jones, (Abingdon, Oxon: Routledge, 2018), 209. 199 – 212.



the argument of a normative gap on violence against women at the international level does not take into account the coverage by the Convention [CEDAW] of gender-based violence as a form of discrimination against women and the recent adoption of general recommendation No. 35 (2017) on gender-based violence against women, updating general recommendation No. 19 (1992) on violence against women.<sup>962</sup>

The above position of the current Special Rapporteur that violence against women is a form of discrimination (and therefore covered by a binding international treaty), speaks to the wider issues of norm fragmentation and contestation over framing and conceptualisation. These issues will be picked up shortly, as this contestation is both a cause and consequence of the difficulty in applying due diligence to violence against women.

The call for a new legally binding instrument responds to the normative gap at the international level, which weakens the implementation of the due diligence standard. The gap also responds to the fragmentation of norms at the international and regional level (caused largely by the lack of a single international instrument), which makes conceptualising and interpreting the due diligence standard consistently problematic. In turn, this impacts on the effective application and development of the standard, and broader notions of state responsibility.

#### *Fragmentation and framing*

In international judicial application (as outlined above) the due diligence standard for eliminating violence against women is rooted in four main settings: the CEDAW Committee's General Recommendation no. 19, the DEVAW, the Convention of Belém do Pará, and the Istanbul Convention. It has been applied with reference to the prevention of violence against women, by the CEDAW Committee, the African Commission on Human and Peoples' Rights, the Inter-American Court and Commission of Human Rights, and the European Court of Human Rights. Across these bodies a number of jurisprudential approaches have emerged with regard the

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<sup>962</sup> United Nations, *Report of the Special Rapporteur on violence against women, its causes and consequences on the adequacy of the international legal framework on violence against women*, A/72/134 (July 19, 2017), paragraph 87.

application of due diligence, reflecting the differences in framing across the regional conventions and at the international level. Chief amongst these differences is the framing of violence against women as gender-discrimination (or not), and the bearing of this conceptualisation on the interpretation of the due diligence standard and the obligation of prevention, and the two interpreted in parallel.

It has long been recognised that there are two dominant feminist framings of violence against women within the international human rights discourse. As touched on in Chapter 2, these are: the framing of violence against women as a form of gender discrimination; and, the framing of violence against women as torture or a violation of the right to life/dignity/bodily integrity. Alice Edwards describes these as ‘pragmatic strategies’ borne out of the need to conceptualise violence against women in a way that included it ‘within the existing human rights framework’<sup>963</sup>. With very little political will to address violence against women as a criminal issue, let alone conceive of it as a human rights abuse, the transnational women’s movement had to ‘use what they had’ to bring violence against women under international human rights law. Whilst there was initially no understanding (or willingness) to conceive of violence against women under the Women’s Convention<sup>964</sup>, it was the CEDAW Committee who first articulated violence against women as a human rights violation. To do this, the Committee creatively interpreted the treaty in its General Recommendation no. 19 to include violence against women as a form of gender-discrimination. (Some argue this created a new norm, and provided the ‘missing link’<sup>965</sup> between the convention and violence against women, whereas others argue that the ‘link was not “missing,” but was simply not sufficiently visible’<sup>966</sup> prior to the interpretive recommendation.) The

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<sup>963</sup> Alice Edwards, *Violence Against Women Under International Human Rights Law*, (Cambridge: Cambridge University Press, 2011), xi.

<sup>964</sup> Belgium proposed violence against women be included under Article 6 with reference to ‘attacks on the physical integrity of women’, but this lacked support. Lars Adam Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women*, (Boston: Martinus Nijhoff Publishers, 1993), 91; The objection from Pakistan and the lack of broader support meant the proposal was withdrawn. United Nations Economic and Social Council, *Commission on the Status of Women, Twenty-sixth session, Summary record of the 638<sup>th</sup> meeting held at the Palais des Nations, Geneva, E/CN.6/SR.638* (September 17, 1976), paragraph 40, available at <http://undocs.org/E/CN.6/SR.638>

<sup>965</sup> Heisoo Shin, “CEDAW and Violence against Women: Providing the ‘Missing Link’,” *In The Circle of Empowerment: twenty-five years of the UN Committee on the Elimination of Discrimination Against Women*, edited by Hanna Beate Schoepp-Schilling and Cees Flinterman. (New York: Feminist Press at the City of University of New York, 2007), 229.

<sup>966</sup> Šimonović, “Global and Regional Standards on Violence against Women: The Evolution and Synergy of the CEDAW and Istanbul Conventions,” 601.

Committee has used the framing of violence against women as discrimination to vastly expand norms around state responsibility for preventing violence against women:

By clearly categorizing all forms of violence against women in terms of gender discrimination, the CEDAW Committee opened an avenue for mobilizing a feminist understanding of due diligence to subvert the public/private divide.<sup>967</sup>

The linking of 'a State's obligation to protect women from violence' and its 'obligations to eliminate discrimination against women generally' has been the basis of formulating state responsibility for violence against women at the international level.<sup>968</sup> In particular the obligations of the state under Article 2 'to pursue by all appropriate means and without delay a policy of eliminating discrimination against women' has been interpreted by the Committee in General Recommendation no. 19 and General Recommendation no. 28 as 'impos[ing] a due diligence obligation on States parties to prevent discrimination by private actors.'<sup>969</sup> This is specifically called for within the convention under Article 2(e), which obligates states '[t]o take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.' This is (argued to be) the binding international legal basis of the state's obligation to prevent violence against women. Likewise the framing of systemic due diligence and the duty of primary prevention is best framed (within binding obligations) under Article 2(e)-(f) and Article 5(a) of the Convention and paragraphs 11 and 12 of General Recommendation no. 19, which all emphasise the state's duty to address the root causes of violence against women. Whilst these might not be referenced within the legal sources of the regional courts' jurisprudence they have certainly had an impact on shaping it. This is most notable in the evolution and cross-fertilisation of case law addressing due diligence and primary prevention, as evidenced in *A.T. v. Hungary*, which went on to influence the landmark European (*Opuz v. Turkey*) and Inter-American (*Jessica Lenahan (Gonzales) v. United States*) cases. Perhaps most importantly, this framing has allowed for the expansion of state responsibility to

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<sup>967</sup> García-Del Moral and Dersnah, "A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship," 662.

<sup>968</sup> Manjoo, "Normative Developments on Violence Against Women in the United Nation System," 74.

<sup>969</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 28 on Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/28, (2010), paragraph 13. available from <http://undocs.org/CEDAW/C/GC/28>.

include systemic due diligence. The norms of primary prevention – as outlined in Chapter 3 – have been furthered by the CEDAW Committee and regional courts by applying due diligence within the frame of violence against women as discrimination. This includes:

- tackling root causes such as gender inequality, and the framing of individual violations within the wider structural pattern of violence against women: as in *Maria da Penha* where the Commission highlighted the 'social and historical roots and factors that sustain and encourage violence against women'<sup>970</sup>, and in *Lenahan* where the Commission emphasised that the 'States' duty to address violence against women also involves measures to prevent and respond to the discrimination that perpetuates this problem'<sup>971</sup>;
- the primacy of substantive equality, and the 'practical realization of the principle of equality'<sup>972</sup>: as in *A.T.* and *González et al.* where the courts highlighted the insufficiency of *de jure* protection in realising a state's responsibility to prevent;
- the call for gender-specificity and the roll of women's organisations: as in *Ortega* where the Court called on the state to fund a Women's Centre 'where educational activities regarding human rights and the rights of women can be carried out'<sup>973</sup>;
- the obligation of gender transformation: as in *González et al.* where the Court stated 're-establishment of the same structural context of violence and discrimination is not acceptable'<sup>974</sup>, and *X and Y* where the Committee linked the state's duties of sociocultural modification with preventing violence against women<sup>975</sup>; and,
- the role of the state as a sociocultural actor in tackling violence against women at the structural and systemic level: as in *Opuz*, *Maria de Penha* and *Lenahan*, where the Court and Commission criticised the 'passivity'<sup>976</sup> of the state, and

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<sup>970</sup> *Maria da Penha Maia Fernandes v. Brazil*, paragraph 55.

<sup>971</sup> *Lenahan (Gonzales) v United States*, paragraph 126.

<sup>972</sup> *Goekce (deceased) v Austria*, paragraph 12.1.2, this was common to *Yildirim (deceased) v Austria*, CEDAW paragraph 12.1.2.

<sup>973</sup> *Fernández Ortega et al. v. Mexico*, paras. 308.22, 308.23

<sup>974</sup> *Claudia Ivette González et al. ("Cotton Field") v. Mexico*, paragraph 450.

<sup>975</sup> *X and Y v Georgia*, paragraph 8.7.

<sup>976</sup> *Opuz v. Turkey*, paragraph 198.

framed the lack of 'willingness by the State, as the representative of the society' as acting to 'create a climate that is conducive to domestic violence'<sup>977</sup>.

The international and regional jurisprudence that has led to interpretative widening and thickening of the due diligence standard – giving a framework of accountability to the norm of state responsibility for primary prevention – is arguably rooted in the framing of violence against women as discrimination. However, whilst this framing has been dominant at the international level, due in large to the growth of the CEDAW Committee's influence through the individual complaints process under the Optional Protocol, it has not been without criticism or contention. There are concerns over the framing itself, and questions over consistency in applying the frame. Whilst the framing of violence against women as discrimination responds to the gender-based nature of the violence experienced by women, it could also be seen as limiting the conceptualisation and interpretation of violence against women within the discourse, such that violence against women is not seen 'first and foremost as a human rights violation *in and of itself*'.<sup>978</sup> Former Special Rapporteur Manjoo has pushed for a new binding instrument on violence against women on this basis, arguing that:

CEDAW, whilst having many positive qualities and being an essential piece of international legislation preventing discrimination against women, did not specifically provide the normative tools for effectively holding States to account for their lack of protection of women and girls from violence.<sup>979</sup>

In an interview with Daniela Nadj, the then Special Rapporteur critiqued the CEDAW framing, arguing that the Committee has to twist the Convention to make individual complaints of violence against women admissible:

The functioning of the (CEDAW) Committee regarding violence against women is to try and fit this pervasive human rights violation under the discrimination label, and to then find ways to justify the Committee's

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<sup>977</sup> *Maria da Penha Maia Fernandes v. Brazil*, paras. 55, 56; *Lenahan (Gonzales) v United States* (Merits) paragraph 163, citing *Maria Da Penha Maia Fernandes v Brazil*, paragraph 56

<sup>978</sup> Manjoo, "Normative Developments on Violence Against Women in the United Nation System," 87.

<sup>979</sup> Manjoo, "Closing the Normative Gap in International Law on Violence Against Women: Developments, Initiatives and Possible Options," 201.

jurisdiction by using other provisions in the CEDAW. When it receives a complaint, or when it interrogates the state parties reports, it does what I call jurisdictional gymnastics to address the issue of violence against women. It has to ask questions such as: Is violence against women discrimination? Is the violence due to stereotyping? Is it due to family relations?<sup>980</sup>

By doing this it restricts the accountability and responsibility of the state to instances where violence can be evidenced as discriminatory. At a conceptual and discursive level it frames acts of violence, torture, and deprivation of liberty, as only being violative if they are also discriminatory. In so doing, the framing arguably furthers the public/private divide; maintaining that violence that men experience is torture, but violence that women experience is discrimination. For this reason the dominance of this framing has led feminist lawyers to question the 'merits of these strategies in the long term' and 'what these strategic choices actually mean for women – conceptually, structurally, and procedurally.'<sup>981</sup> Even those in support of the framing of violence against women as a form of discrimination – which is the majority of commentators – still pause to give explanation of the less than obvious legal roots of the international human rights law approach to violence against women. As Rhonda McQuigg states: 'an anti-discrimination framework is perhaps not the first discourse which comes to mind when considering violence against women, and indeed to approach this issue purely as one of discrimination would not capture the essence of the problem.'<sup>982</sup>

Whilst the framing is limited, it is just that: limited; not wholly deficient. I would argue that the discrimination lens does 'capture the essence of the problem', but not the *fullness* of the problem. That violence against women is treated as a form of discrimination – not just a cause or consequence of discrimination – captures the inescapably gendered experience of violence against women. Whilst the discrimination frame was borne (at least in part) out of a 'pragmatic response[...] to gender gaps in the law'<sup>983</sup>, its conceptualisation accurately accounts for the way that violence against

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<sup>980</sup> Rashida Manjoo and Daniela Nadj, "'Bridging the Divide': An Interview with Professor Rashida Manjoo, UN Special Rapporteur on Violence Against Women," *Feminist Legal Studies*, 23, (2015): 343.

<sup>981</sup> Edwards, *Violence Against Women Under International Human Rights Law*, xii.

<sup>982</sup> McQuigg, "Is it time for a UN treaty on violence against women?" 306.

<sup>983</sup> Edwards, *Violence Against Women Under International Human Rights Law*, xii.

women is experienced<sup>984</sup> as specifically and fundamentally gendered by women, and the simultaneous psychosocial trauma this inflicts:

First, discriminatory violence is particularly harmful to its victims, who suffer not only the physical and emotional injury of the crime itself but also the added psychic injury of knowing they were victimized because of their group identity. Second, group-based violence serves a terroristic function, intimidating not only the individual who has been attacked but all other members of the same group who fear that they could be next. Thus, all women – including those who have not been direct victims – pay the price for violence against women in lost options, autonomy, and peace of mind. And finally, group-based violence serves the broader function of reinforcing the prevailing subordination of the targeted group. In this way, violence against women is an instrument of social control.<sup>985</sup>

This has been picked up and applied by the regional Courts in their consideration of harm and due diligence.<sup>986</sup> Applying a discrimination frame also allows for intersectional analysis of violative acts and the state's responsibility to prevent at a primary level, by considering how multiple and multiply-mediated forms of discrimination impact on women's experience of violence, and the role of the state in challenging and mitigating those factors:

By accounting for the roots of violence, the obligation easily accommodates an analysis of gender violence that is linked to other forms of discrimination. It requires attention to multiple and intersecting forms of discrimination because they are part and parcel of the cause and consequences of gender violence.<sup>987</sup>

This frame has meant that the application of due diligence has been expanded to account for a state's increased duties and responsibility to prevent violence against

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<sup>984</sup> This has been well theorised and articulated by feminist theorists for decades, and has been researched and evidenced by trauma specialists. See the work of Catherine MacKinnon, Robin West, Mary Becker, Susan Brownmiller.

<sup>985</sup> Goldfarb, "Violence Against Women and the Persistence of Privacy," 16.

<sup>986</sup> *Fernández Ortega et al. v. Mexico*, paragraph 124.

<sup>987</sup> Goldscheid and Liebowitz, "Due Diligence and Gender Violence: Parsing its Power and its Perils," 309.

vulnerable and marginalised women. This has been most clearly noted in the Inter-American cases, where the discrimination frame has led to interpretive thickening of the state's responsibility for the girl-child<sup>988</sup>, for the maquiladora workers<sup>989</sup>, for indigenous women<sup>990</sup>, and women who are at increased risk of, and exposure to violence, such as trans women and women who 'face discrimination on the basis of more than one factor during their lifetime'<sup>991</sup>, such as race, ethnicity, disability, indigeneity, or economic status.

Whilst the discrimination frame has led to the interpretive expansion of due diligence obligations, it is, as touched on above, limited. Its emphasis on discrimination has led to significant advances in how primary prevention is conceptualised, with an increased focus on the state's responsibility with regard the wider context and culture of discrimination and violence against women, but it has also, arguably, paid insufficient attention to the substantive rights and violations that are framed as discriminatory. This is not specific to the issue of violence against women, but reflective of the nature of the CEDAW as 'primarily focused on combating discrimination against women, as opposed to securing the rights of women in a more substantive manner.'<sup>992</sup> However, the lack of focus on substantive rights has meant that women's experience of violence has not been consistently interpreted through the engendered application of existing human rights provisions, such as the right to bodily integrity, or the prohibition of torture.<sup>993</sup>

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<sup>988</sup> *Lenahan (Gonzales) v United States*, paragraph 113.

<sup>989</sup> *Claudia Ivette González et al. ("Cotton Field") v. Mexico*, paragraph 2.

<sup>990</sup> *Fernández Ortega et al. v. Mexico*, paras. 308.22, 308.23.

<sup>991</sup> *Lenahan (Gonzales) v United States*, paragraph 113.

<sup>992</sup> McQuigg, "Is it time for a UN treaty on violence against women?" 306.

<sup>993</sup> Gendered violations of torture – particularly those committed by private actors – are still regularly conceptualised as outside the purview of existing 'gender-neutral' human rights provisions, such as the CAT. The lack of development in engendering existing substantive rights is reflected in academic commentary, where the second frame of engendering existing human rights provisions has received far less attention than the discrimination frame. The academic mainstay for the frame of violence against women as torture remains Rhonda Copelon's 1994 work: 'Intimate Terror: Understanding Domestic Violence as Torture'. Writing in 2018, Rhonda McQuigg ("Is it time for a UN treaty on violence against women?") highlights the two feminist frames of violence against women, and uses Copelon to evidence the frame of torture. Likewise, writing in 2018, Jeremy Sarkin ("A Methodology to Ensure that States Adequately Apply Due Diligence Standards and Processes to Significantly Impact Levels of Violence Against Women Around the World,") does the same. That Copelon's work has stayed the test of time is a testament to her scholarship, but it also reflects the dearth of further theorising and analysis of this frame. (Copelon, "Intimate Terror: Understanding Domestic Violence as Torture."): An example of how this manifests in the case law outlined above, is the framing offered by the third party petitioner, Interights, in the *Opuz* case, and the Court's response to it. Interights argued that State responsibility for preventing violence against women should be measured against 'exemplary diligence' given 'the *jus cogens* nature of the right to freedom from torture and the right to life' (*Opuz v. Turkey*, paragraph 125).



There also exists within the discrimination frame a lack of clarity as to the nature of the relationship between violence against women and gender discrimination, which has impacted upon the application of the due diligence principle and state responsibility for preventing violence against women. Is violence against women a *form* of discrimination, or a *cause* or *consequence* of discrimination; or all three? Part of this is rooted in textual differences across the CEDAW and regional treaties. The CEDAW Committee predominantly treats violence against women as a form or manifestation of discrimination. (Although it also recognises discrimination as both an underlying cause and consequence of violence against women in General Recommendation no. 19.) Alternatively, Article 6(a) of the Convention of Belém do Pará states: 'The right of every woman to be free from violence includes, among others: The right of women to be free from all forms of discrimination.' David Richards and Jillienne Haglund highlight this difference – describing it as an 'inconsistency due to overlap'<sup>994</sup>. When considering 'whether this is the same thing stated two ways'<sup>995</sup>, they conclude:

The answer to this appears to us to be “no”, as on one hand CEDAW states that some forms of discrimination constitute violence against women, and on the other hand, the Inter-American treaty states that all forms of discrimination constitute violence against women.<sup>996</sup>

The Istanbul Convention – similarly to the Belém do Pará – specifically states violence against women is a human rights violation in its own right, but also frames it as a form and consequence of gender discrimination. However, it diverges from this understanding by separating domestic violence out from the discrimination framing (as outlined in Chapter 3). This disrupts the jurisprudence of the European Court, and diverges from international and regional standards. This has major impacts for the

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This is in keeping with the ILC assessment of due diligence in the *Bosnia Genocide case*. Whilst the ECtHR did take a gendered approach to violence against women in the *Opuz* case, and spoke to the 'gravity of offences' (paragraph 170), it could have gone farther to outline how an engendered reading of torture impacted on the measure of diligence required to prevent violence against women. The gendered approach to Article 2 and 3 in *Opuz* relied on application in conjunction with Article 14. A broader reading of violence against women as gendered torture – beyond the framing of discrimination – was not evident in the Court's framing.

<sup>994</sup> Richards and Haglund, "Exploring the Consequences of the Normative Gap in Legal Protections Addressing Violence Against Women," 43.

<sup>995</sup> Richards and Haglund, "Exploring the Consequences of the Normative Gap in Legal Protections Addressing Violence Against Women," 43.

<sup>996</sup> Richards and Haglund, "Exploring the Consequences of the Normative Gap in Legal Protections Addressing Violence Against Women," 43.

framing of violence against women, and consequently efforts to apply due diligence – and importantly systemic due diligence – to instances of domestic violence. As outlined above the initial framing of state responsibility for private violence relied on Article 2 (e) of the CEDAW – without this gendered analysis the foundations of state responsibility for violence against women become less clear. This is particularly true of systemic due diligence and primary prevention which relies on a conceptualisation of violence as gendered and systemic. Whilst the Convention makes sure of the duty of prevention, it also provides a dangerous opening to gender-neutral readings of domestic violence. In other regions, and at the international level, this could have a significant impact on norm conceptualisation. By ‘invisibilising (once again) the structural discrimination which permits the violence to flourish in the first place’<sup>997</sup>, the Istanbul Treaty blurs the relationship between violence against women (more broadly) and discrimination, and weakens recourse to provisions of systemic due diligence which have expanded notions of state responsibility for this pervasive violation. Beneath the disjointed overlap of regional and international instruments lies a lack of conceptual clarity concerning the relationship between violence against women and discrimination. This appears across and within the case law of the regional bodies; with some cases displaying a lack of internal clarity of framing, as outlined below.

In the case of *Opuz v. Turkey* – widely considered a watershed moment in the ECtHR’s gender jurisprudence – the framing of the Court’s findings under Article 14 relied on a number of understandings of the relationship between violence and discrimination. Given the foundational relationship between the determination of reasonableness and the articulation of the primary rule, this lack of conceptual clarity raises questions about the Court’s assessment of due diligence. Whilst the Court found that the state had failed in its duty to prevent violence against women – applying Articles 2 and 3 in conjunction with Article 14 – when it came to describing how the violation was gender-based and discriminatory it appears unclear if the Court considered violence against women to be discriminatory (as understood under the CEDAW framing) or if it was the way the authorities *responded* to the violence that was discriminatory. The Court’s assessment of the state’s responsibility seemed to emphasise the second framing over the first, characterising ‘violence against women as a form of

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<sup>997</sup> Jones, “The European Convention on Human Rights (ECHR) and the Council of Europe Convention on Violence Against Women and Domestic Violence (Istanbul Convention),” 140.

discrimination owing to the State's failure to exercise due diligence'<sup>998</sup>, and pronouncing that 'the State's failure to protect women against domestic violence breaches their right to equal protection'<sup>999</sup>. In a list of its considerations on the relationship between violence against women and discrimination, the Court referred to: the CEDAW, Belém do Pará, the DEVAW, the cases before the CEDAW Committee and Inter-American bodies, and the framing of HRC resolution 2003/45 (which articulates violence against women as a *consequence* of discrimination). Whilst the Court noted the framing of violence against women as a form, cause, and consequence of discrimination, it seemed most hesitant on pronouncing on violence against women as a *form* of discrimination (the framing of the CEDAW): only suggesting that 'the violence suffered by the applicant and her mother *may* be regarded as gender-based violence which is a form of discrimination against women'<sup>1000</sup>. This is particularly puzzling given its judgement on the state's discriminatory response to the violence Nahide suffered seemed to rely heavily on evidence provided by the petitioners that the abuse she suffered *was* gender-based and discriminatory. Despite this, the Court much more readily emphasised the nature of the state's response and judicial passivity as discriminatory. The ECtHR's consideration of international and regional gender-jurisprudence in this case was welcomed, and showed the Court's willingness to apply a gendered framing of violence against women. However, the listing of overlapping frames – without grounding its own conceptualisation – seems to evidence a lack of clarity as to the Court's gender analysis and interpretation of violence against women as discrimination. As the framing of the international and regional cases overlap, and the Court ultimately found violations under Article 14, there appears to be a lack of critical concern for the specific frame the Court used to determine a breach of discrimination. This said, the Court's decision could have been based on cumulative framing: finding a breach of Article 14 based on a combination of the subtly different frames of the CEDAW and Inter-American case law and treaties.

Similar conceptual blurring and cumulative framing is evident in the Inter-American cases, where the frame of violence against women as discrimination seems more readily to hinge on the *state's response* as discriminatory, rather than characterisation of

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<sup>998</sup> *Opuz v. Turkey*, paragraph 190.

<sup>999</sup> *Opuz v. Turkey*, paragraph 191.

<sup>1000</sup> *Opuz v. Turkey*, paragraph 200.

the violence itself as gender-based: 'a state's failure to act with due diligence to protect women from violence constitutes a form of discrimination, and denies women their right to equality before the law.'<sup>1001</sup> Whilst the state's passivity is discriminatory, the framing of systemic due diligence relies on recognition that violence against women – as a structural phenomenon – *is itself gendered and discriminatory*. There seems to be a degree of conflation concerning discrimination as it relates to the primary rule (the framing of violence against women as gender-based) and discrimination as it relates to the application of the due diligence standard (the general principle that due diligence should be applied in good faith and in a non-discriminatory manner). In the *Lenahan* case the Court rightly considers the frame of discrimination, but does little to separate discrimination as framing the primary rule from discrimination in relation to due diligence. Instead the Court describes a 'strong link' between the three ideas:

In the same vein, the international and regional systems have pronounced on the *strong link between discrimination, violence and due diligence*, emphasizing that a State's failure to act with due diligence to protect women from violence constitutes a form of discrimination, and denies women their right to equality before the law. These principles have also been applied to hold States responsible for failures to protect women from domestic violence acts perpetrated by private actors. Domestic violence, for its part, has been recognized at the international level as a human rights violation and one of the most pervasive forms of discrimination, affecting women of all ages, ethnicities, races and social classes.<sup>1002</sup>

Repeatedly the regional Courts combine their judgments on the failure to act with due diligence in a non-discriminatory manner, and the failure to respond to violence against women (itself a form of discrimination). Both of these norms are at issue, and are to some degree related, but conceptual clarity is needed. The application of due diligence relies on clear appreciation and conceptualisation of the primary rule, and the application of systemic due diligence, specifically, relies on clearly conceiving of violence against women as gendered and discriminatory.

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<sup>1001</sup> *Lenahan (Gonzales) v United States*, paragraph 111.

<sup>1002</sup> *Lenahan (Gonzales) v United States*, paragraph 111.

Analysis of the international and regional bodies' gender jurisprudence seems similarly blurry with some commentators lumping together 'violence and discrimination against women' without making it clear if this frames two distinct violations; if the two relate; or, if they co-constitutively frame one violative act. For instance, in Brooke Stedman's analysis of the international and regional bodies' application of the due diligence standard, she repeatedly touches on a number of frames of violence against women as discriminatory (including Belém do Pará and General Recommendation no 19), before assimilating those ideas into broad analysis of 'violence *and* discrimination'. In describing the European Court's jurisprudence concerning due diligence and violence against women, she says 'the ECtHR formally recognised State responsibility to prevent violence and discrimination against women in two landmark cases, *Opuz v. Turkey* and *Bevacqua and S. v. Bulgaria*.'<sup>1003</sup> This is true if Stedman is presenting 'violence and discrimination' as separate violations, but does not accurately account for the gender-jurisprudence of the Court. Historically the Court was reluctant to apply a gendered lens to violence against women, refusing to make findings on the basis of Article 14 (prohibition of discrimination). The 'conspicuous' absence of a discrimination frame was out of keeping with international standards and heavily criticised, as outlined above. This changed with the *Opuz* verdict, where the Court for the first time held that domestic violence was gender-based and discriminatory. However, the Court's application of Article 14 has been inconsistent. In *Bevacqua and S v. Bulgaria* the Court refused to find on Article 14 but did pronounce on Article 8 (right to family life). In *Opuz* the court found on Article 14 but not on Article 8. In *Civek v. Turkey* the Court reverted to a gender-neutral reading and refused to find on Article 14. A month later in *M.G. v. Turkey* it found on Article 14 and reaffirmed its judgement in *Opuz*. Both *Opuz v. Turkey* and *Bevacqua and S. v. Bulgaria* are domestic violence cases where the Court expanded the responsibility of the state under the due diligence principle, but, significantly, the Court did not make findings under Article 14 in *Bevacqua*, and failed to apply gendered analysis to the case.

Whilst the discrimination frame is essential to readings of the state's systemic due diligence obligation to prevent violence against women, the blurring, or blurriness, of the framing, has led to increased calls for violence against women to be dually framed

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<sup>1003</sup> Stedman, "The Leap from Theory to Practice: Snapshot of Women's Rights Through a Legal Lens," 13.

as a human rights violation in and of itself *and* a form of discrimination. This approach has been taken up by the Istanbul Convention – despite its divergent (and internally inconsistent) approach to domestic violence – and has long been the approach of third party interveners and petitioners in the regional cases.<sup>1004</sup>

The fragmented and overlapping framing across the international and regional bodies – particularly with relation to violence against women as gender-based and discriminatory – furthers the call for a new legally binding document. As well as the lack of bite (with the absence of a hard law provision), the lack of conceptual clarity (with no single, unified and codified approach), means that the application of the due diligence standard is complicated and inconsistent. As such, one single binding instrument that cements the gendered and discriminatory nature of violence against women, *including* domestic violence, and establishes violence against women as a human rights violation, is essential to actualising the feminist conceptualisation of state responsibility for preventing violence against women. This framing is especially needed for the development of systemic due diligence, which relies on the clarification of primary rules; particularly those outlining primary prevention.

Clarification of norms and obligations is especially needed given the risk of calling for greater state action. Given the state remains a prolific perpetrator of human rights violations against women<sup>1005</sup>, Benninger-Budel asks: '[i]s a state that functions according

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<sup>1004</sup> In the *Lenahan case*, for instance, the CUNY International Women's Human Rights Law Clinic amicus brief focused on violence against women as a form of gender discrimination and a form of torture: Brief for the International Women's Human Rights Law Clinic City University of New York as Amici Curiae Supporting Respondents, Jessica Ruth Gonzales in her individual capacity and on behalf of her deceased daughters, Katheryn, Rebecca, And Leslie Gonzales v United States Of America, Case No. 12.626 Petition No. P-1490-05, retrieved from <https://ccrjustice.org/sites/default/files/assets/10.20.08%20IWHR%20Gonzales%20amicus%20brief%20FINAL%2010-20-2008.pdf>

<sup>1005</sup> 'Examples abound of sexual violence committed by State actors, both as individuals acting in official or semi-official capacities, and through group or collective actions. Sexual violence committed by the military, both against members of the military and against civilians, is all too common. Tragic accounts of the widespread and systematic use of rape in war starkly highlight this point. In other cases, the State turns a blind eye toward abuses carried out by paramilitary forces as a way to deflect culpability. Outside of military settings, women and girls, particularly racial, ethnic, religious, and sexual minorities, are subjected to sexual assault, rape, brutal strip-searches, beatings, and even shootings and killings by law enforcement and other state officials. As but one example, the United Nations Committee Against Torture has noted with alarm reports of women being subjected to sexual violence in police stations in Guatemala. State agents explicitly advocate or frequently condone violence against sex workers, migrant women, and trans people.' Goldscheid and Liebowitz, "Due Diligence and Gender Violence: Parsing its Power and its Perils," 312.

to patriarchal principles in any position to protect women from violence?’<sup>1006</sup> As Julie Goldscheid and Debra Liebowitz suggest, in invoking the due diligence standard we must be cautious to ‘parse its powers and its perils’<sup>1007</sup>. At a symbolic and material level, recourse to the state as a ‘protector of women’s rights’ is beset with challenges – as outlined in chapter I – and these require attention when calling for the state to take increased responsibility and accountability. As Brown cautions, the call for state protection creates and perpetuates the ‘legal and thereby ontologising ... construction of ... female powerlessness’<sup>1008</sup>. Much like the critique of the Men and Boys’ Network, the engagement of the state risks further diminishing the citizenship of women, by characterising them as weak, in need of protection, and consequently making their lives and bodies open to further regulation.<sup>1009</sup> Acting at a global level, reinforcing this standard of protection within customary or treaty law, risks the universalization of this ‘ontologising construction of female powerlessness’, and the concomitant endorsement of male power and force. At the state level, the implications of these international standards are the material expansion of criminalisation and regulation of women’s lives, bodies and homes. This is particularly true when seeking to expand the powers of the state in the context of criminal interventions, such as the push for mandatory arrests and no-drop prosecutions as an obligation of due diligence protection. Given that ‘[f]or many, the State, particularly as embodied by the criminal justice system, is a perpetrator of violence rather than a protector against violence’<sup>1010</sup>, calls for increased intervention must seek to redress (rather than further) the state’s troubling relationship with marginalised women, such as migrant workers, trans women, and racial and ethnic minority women. Advocating for due diligence must be part of a broader ‘normative challenge to [the] human rights discourse’<sup>1011</sup>, going beyond the ‘the familiar liberal, rights-based model’<sup>1012</sup>, and applying a holistic conceptualisation of women’s rights. A new treaty must mark an advance of radical, engendered notions of state responsibility. As such, the potential for the ‘de-politicisation, professionalisation,

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<sup>1006</sup> Benninger-Budel, “Introduction,” 16.

<sup>1007</sup> Goldscheid and Liebowitz, “Due Diligence and Gender Violence: Parsing its Power and its Perils,” 301.

<sup>1008</sup> Wendy Brown, “Finding the Man in the State,” *Feminist Studies*, 18(1), (Spring 1992): 9.

<sup>1009</sup> Jones, “The Importance of International Law and Institutions,” 9.

<sup>1010</sup> Goldscheid and Liebowitz, “Due Diligence and Gender Violence: Parsing its Power and its Perils,” 313.

<sup>1011</sup> Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism*, (Delhi: Permanent Black, 2005), 136.

<sup>1012</sup> Bourke-Martignoni, “The history and development of the due diligence standard in international law and its role in the protection of women against violence,” 59.

and standardisation of the anti-domestic violence movement<sup>1013</sup> through 'partnership' with the state should be a concern. Any effort to move towards a new instrument should therefore be led by the transnational women's movement and uphold a gendered and holistic conceptualisation of violence against women along with feminist principles of state responsibility for prevention. Again it is worth noting – as touched on in chapter 1 – that engagement with international human rights law is premised on the independence afforded women's groups from the state at this level<sup>1014</sup>; and the ability this gives for feminists to negotiate the gendered implications of state responsibility beyond the confines of their national context. This discursive opportunity remains a vital avenue for solidarity, community and empowerment across women's groups, and for overcoming systemic oppressions at the state level.

### *Conclusions*

As discussed, there remain questions as to the efficacy of the due diligence standard, with consistent application affected by internal and external challenges. The flexibility and lack of clarity about the standard's substantive content leaves it open to be used defensively by states. This requires clearer articulation and application of primary rules and substantive rights, and interpretation of the positive obligations that flow from them. The differing frames of violence against women, and the fragmentation of legal norms across the regional conventions, add further challenge to concretising due diligence obligations. These problems are largely resolved by the introduction of a new binding instrument. This binding instrument must uphold the norms of primary prevention and the feminist conceptualisation of state responsibility, as outlined in Chapter 3, and as evidenced in the evolving regional case law and visionary theorisation of the UN Special Rapporteur. This is particularly the case given the risks and complexities of calling for greater involvement of the state – a hegemonic, patriarchal actor – in women's lives.

As outlined above, the due diligence standard has acted as a powerful legal tool for strengthening accountability and expanding interpretation of substantive obligations of

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<sup>1013</sup> Goldscheid and Liebowitz, "Due Diligence and Gender Violence: Parsing its Power and its Perils," 313.

<sup>1014</sup> Jude Howell, "Gender, civil society and the state in China," In *Gender, Politics and the State*, Vicky Randall and Georgina Waylen, eds., (London and New York: Routledge, 1998), 178.



primary prevention. It has also acted as a central sociopolitical framework for establishing violence against women, and domestic violence in particular, as a human rights violation. These legal and jurisprudential developments form part of, and are rooted in, a feminist theory of state responsibility; and build on the conceptual developments at the paradigmatic level outlined in the previous chapter. Combined they form an approach to violence against women that is distinct from criminal, civil or public health understandings of violence against women, and raise up norms that are unique to the human rights approach to eliminating violence against women. Whilst the due diligence standard continues to act as an effective tool for accountability, its sociopolitical and legal significance are capped without development of a new binding instrument concretising norms and rules of primary prevention. Where once the due diligence standard was a rallying-point for activists, it is now left floundering in the normative gap, with a significant number of scholars<sup>1015</sup>, including former Special Rapporteur Manjoo, calling for the international human rights law approach to catch-up. Due diligence must be part of the next evolutionary leap of the human rights law approach to violence against women, serving not only to help close the 'normative gap' but also to bring further normative challenge, as part of the feminist reimagining of state responsibility within international human rights law.

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<sup>1015</sup> See: Manjoo and Jones, eds., *The Legal Protection From Violence: Normative Gaps in International Human Rights Law*; McQuigg, "Is it time for a UN treaty on violence against women?"; Sarkin, "A Methodology to Ensure that States Adequately Apply Due Diligence Standards and Processes to Significantly Impact Levels of Violence Against Women Around the World."; Edwards, *Violence Against Women Under International Human Rights Law*.

## **A Feminist Theory of State Responsibility for Violence Against Women: Conclusion.**

The transnational women's movement has led the international human rights law approach to violence against women since its origins. As such, this approach is rooted in (radical) feminist theory, methodology and epistemology. Whilst seemingly centred on the liberal machinery of the institutional international legal order, the approach is one that looks radically at the gendered and politicised nature of the state, society, and the problem of violence against women, and engages with the law on that basis; confronting patriarchy where it manifests in the law, and in practice and appropriation of the law. It operates through a liberationist lens, seeking not only to achieve 'equality with men', but rather to free women from oppression, violence and subjugation. Its understanding of gender is deeply political, intersectional, and radical, and forefronts positionality, community, and empowerment, as they relate to questions about paradigm, policy, and praxis. It blurs boundaries between theory and practice and constantly calls into focus the experience, wisdom, and expertise of women and women's organisations; and, likewise, calls into question, those approaches that lack this experiential grounding and wisdom.

The feminist approach to violence against women, as evidenced in the emerging international human rights response of the past decades, casts a large shadow on the state. Beyond its historical, legal significance as the primary subject of international law, the feminist approach to violence against women places a high degree of culpability, responsibility and accountability on the state due to its operation as a hegemonic cultural and sociopolitical actor. Engagement with the due diligence standard is premised on this understanding: that violence against women is a macrosystemic phenomenon that demands the state be responsible for its actions (and inactions) at this level. It frames violence against women in such a way that rejects the idiosyncratic, individualised, privatised, and overly pathologised accounts of violence against women. It calls into question the fraternal social contract and creates a deeply politicised discursive space within international law, and international society, in which, and from which, women can renegotiate their identities and claims as citizens. In this way it undermines past renderings of international law as 'public' and women (and violence against women) as constitutively 'private'. It recognises the role of the state in the most

intimate spaces of women's lives, and the existence of women at the most public and global setting.

From this discursive space the transnational women's movement has been able to institutionalise and operationalise particular substantive norms, developed from 'asking the woman question' both of international law and violence against women. The conceptualisation of violence against women as: rooted in patriarchy; gendered and discriminatory; and, operating at an individual and societal level in a systemic manner; has formed the bedrock of standard-setting, good policy, and praxis developments at the international and state levels. The increased acceptance of the feminist understanding and characterisation of violence against women has led to a focus on primary prevention which aims to tackle 'upstream' or 'root' causes. The norms inherent in this development – gender mainstreaming, gender specificity, transformative equality, intersectionality, and empowerment – frame the work of leading women's organisations, and mark a fuller approach to human rights more broadly: one that emphasises the holism, indivisibility, and inalienability of women's human rights. This approach to the primary prevention of violence against women, seeks to see women, and their experience of violence against women, fully, politically, and 'prophetically' – calling out and validating the reality of women's experience, throwing off the hegemonic consciousness of the day, and seeing instead 'what might be'.

As evidenced in the case study on the Men and Boys' Network, this approach to primary prevention is incompatible with welfarist, paternalistic/fraternalistic, gender-neutralised, and depoliticised engagement with violence against women. It is an approach that is epistemologically and methodologically dependent on the leadership and vision of women. As such, the rapid advance of the Men and Boys' Network shows the fragility of these seemingly broadly-held norms. This is most evident in the depoliticisation and gender-neutralisation of the framing of domestic violence at the regional, European level, and at the domestic level, as evidenced by the Welsh approach. This fragility is borne of the normative gap at the international level. Whilst there arguably exists a rule of customary law that requires of states to pursue the elimination of violence against women, there remains no binding international conventional law that concretises and outlines specifically the duties of the state; and

makes accountable the responsibility of the state. This creates both symbolic and normative problems, and operates as a bar to implementing the hard-fought normative gains of the transnational women's movement. The due diligence standard has served as a juridical bridge for bringing 'private' acts of violence against women into the purview of international law, and as a broader sociopolitical tool for actualising the feminist theory of state responsibility – particularly with regard primary prevention and systemic due diligence. However, as previously summarised, this standard is weak, and its reign as 'cause célèbre' is tired. The discourse has since advanced more robust norms and accounts of positive rights with relation to preventing violence against women; and the duty of states to *respect*, *protect* and *fulfil* human rights extends beyond the limited framing of due diligence offered by the DEVAW and General Recommendation no. 19. The norms of primary prevention outlined in Chapter 3, and the progressive jurisprudence of the regional courts outlined in Chapter 4, need to be further concretised both to maintain the institutional and discursive gains of the past three decades, and to provide a more robust platform for further advancement and development.

The absence of political will, however, and the advent of alternative actors contributing to the discourse, should raise concerns for those looking to utilise the international human rights law approach to violence against women, to further advance a case for state responsibility for violence against women. In response the transnational women's movement must continue to fight for leadership of the international human rights law approach to violence against women, and to defend the discursive space they have created from, and for, the lived experience of women, and the futures they collectively envision. I believe a new international treaty is instrumental to that future.

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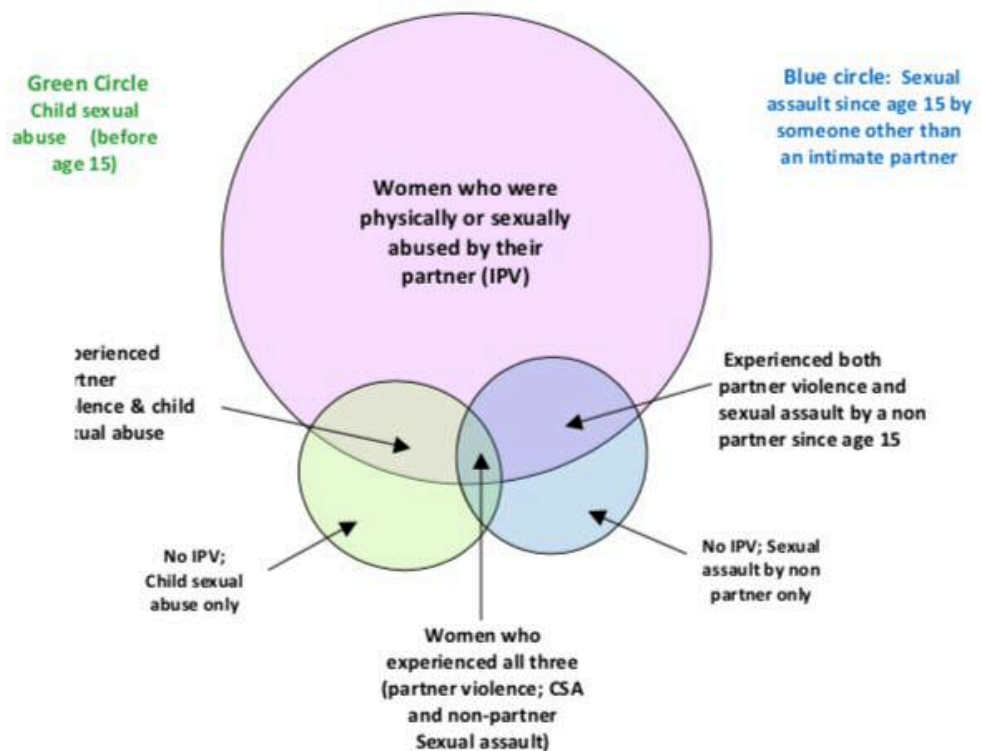
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## Appendices

### Appendix I:

Claudia García-Moreno, Henrica A.F.M. Jansen, Mary Ellsberg, Lori Heise, Charlotte Watts, *Multi-country Study of Domestic Violence and Women's Health*, (Geneva: World Health Organisation, 2005); Heise, *What works to prevent partner violence*, 2.

**Figure 1.1. Proportional Venn diagram of experiences of violence among 24,000+ women in 15 global sites**



**Number of women reporting one of the three forms of violence = 12,011**

Source: WHO Multi-country Study of Domestic Violence and Women's Health (2005)

## Appendix 2:

“Putting prevention into practice: How to change the story,” Our Watch, 47, accessed 4 September 2018, [www.ourwatch.org.au/getmedia/a8d9dc3d-2291-48a6-82f8-68f1a955ce24/Putting-prevention-into-practice-AA-web.pdf.aspx](http://www.ourwatch.org.au/getmedia/a8d9dc3d-2291-48a6-82f8-68f1a955ce24/Putting-prevention-into-practice-AA-web.pdf.aspx)

Initiatives in these categories should be avoided as they cause harm and may have a negative impact on efforts to prevent violence against women	Initiatives in this category may not cause harm, but they are unlikely to have any impact on violence against women		Initiatives in these categories should be the focus of prevention work, as they alone can create the changes necessary to reduce violence against women	
	Gender unequal or exploitative	Gender blind	Gender sensitive	Gender specific
Gender inequality resulting in a higher probability of violence against women	These approaches perpetuate gender inequalities and may inadvertently maintain or support gender inequality by reinforcing gender stereotypes.	These approaches ignore gender norms and inequalities, can minimise efforts to address gender inequality, and risk contributing to the gendered drivers of violence through implicit support of existing norms.	These approaches acknowledge but do not address gender inequalities. They are not harmful, but they don't make sustainable changes to society that lead to long-term and significant reductions in violence.	These approaches acknowledge gender inequalities and consider women's specific needs, but do not transform norms and practices.
				Gender transformative These approaches address the causes of gender-based inequalities and work to transform harmful gender roles, norms and relations. They challenge both normative and structural inequality.
				Gender equality resulting in a lower probability of violence against women.