

MISSING WOMEN COMMISSION OF INQUIRY

VIOLENCE AGAINST WOMEN: EVOLVING CANADIAN AND INTERNATIONAL LEGAL STANDARDS ON POLICE DUTIES TO PROTECT AND INVESTIGATE

A RESEARCH REPORT PREPARED FOR THE
MISSING WOMEN COMMISSION OF INQUIRY
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Statement of Purpose

This paper is a research report prepared by the Missing Women Commission of Inquiry to provide background information.

The content of the report does not necessarily reflect the views of the Commissioner and Commission staff and, in particular, no conclusions have been reached on the issues raised in this report.

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1. INTRODUCTION

The police have a three-fold duty to enforce the law, maintain law and order and to prevent crime.¹ In carrying out these duties, the police must provide an impartial service to all people without regard to race, national or ethnic origin, colour, religion, gender, age, sexual orientation, belief, or social standing.² This prohibition against discrimination is one important aspect of the fundamental guarantee of equal protection of the law, which underpins all human rights.

In British Columbia, the Police Code of Ethics is framed on the basis of seven fundamental principles:

Police Officers in the Province of British Columbia, along with their respective organizations and agencies, embrace the following Fundamental Principles, which underpin the Guiding Values, Primary Responsibilities and Decision-Making framework

- *democracy & the rule of law*
- *justice & equality*
- *protection of life & property*
- *safeguarding the public trust*
- *that the police are the public and the public are the police*
- *the principles of the Constitution of Canada*
- *the rights enshrined in the Charter of Rights & Freedoms.*³

Through their activities, the police are part of society's common efforts to promote legal protection and a sense of security. As such, the police must "be responsive to the community as a whole and strive to deliver their services promptly, and in an equal and unbiased manner."⁴ More vulnerable groups or persons should enjoy particular protection.⁵ Discriminatory policing can be evidenced in both

¹ *Police Act*, R.S.B.C. 1996, c. 367, s. 2.

² Each office swears an oath to this effect. The specific wording of the oath varies from among police agencies.

³ *British Columbia Police Code of Ethics* (Justice Institute of BC), online: <http://www.jibc.ca/programs-courses/schools-departments/school-public-safety-security/police-academy/resources/code-ethics/british-columbia-police-code-ethics>.

⁴ *International Police Standards: Guidebook on Democratic Policing – Senior Police Advisor to the OSCE Secretary General* (Geneva Centre for the Democratic Control of Armed Forces, 2009) at p. 16.

⁵ *Ibid.*

inappropriately high levels of enforcement and inappropriately low levels of investigation and enforcement vis-à-vis particular communities, groups or persons. For example, ethnic profiling can result in over-enforcement and harassment of individuals and communities. At the same time, the failure to adapt to the needs of those individuals and communities who are particularly vulnerable to violence can result in under-investigation and a lack of protection.

Societies worldwide face serious barriers to providing adequate protection to women and girls who are at high risk to all forms of violence. Over the past few decades, many governments and organizations have recognized these barriers and taken steps to overcome them. While some progress has been made, girls and women continue to experience substantially higher levels of violence, particular sexual violence and violence within relationships, than do boys and men. Members of sexual minorities including gay men, lesbians and transgendered persons also face higher levels of violence.

Canadian and international law has evolved over the past two decades in response to this more profound understanding of the dynamics of violence against women as a human rights issue best understood in the context of social and economic inequality. Under the Constitution and as a general principle of international law, the state has a duty to protect women and children from sexual violence. This duty requires the government to demonstrate “due diligence” in taking sufficient measures to respond to this violence against women and girls.

This evolution of legal duties with respect to the police duty to protect girls and women from violence under Canadian and international law serves as an important backdrop to the work of the Missing Women Commission of Inquiry. While the Commission is not mandated to make any determination of civil or criminal liability, it can and should consider existing legal norms relevant to its fact-finding and advisory mandate. The legal framework for policing in Canada is complex and consists of written and unwritten constitutional principles, including the rule of law, federalism and the *Charter of Rights*, aboriginal rights, statutory standards, common law administrative and private law duties, internal codes, rules and guidelines,⁶ as well as Canada’s legal obligations under a variety of international human rights conventions.

⁶ Lorne Sossin, “The Oversight of Executive Police Relations in Canada: The Constitution, the Court, Administrative Processes and Democratic Governance”, (Research Paper Commissioned by the Ipperwash Inquiry: 2007) [hereinafter “Sossin”], at 6.

This research paper focuses on two elements within this complex legal framework: the common law and international law. It highlights some of the significant developments over the past 15 years that are highly relevant to the issue of missing and murdered women.

Rights that are declared in courtrooms – particularly in courtrooms that are far removed from the day-to-day existence in the Downtown Eastside or along the Highway of Tears – mean little if not respected in daily practice. Sophisticated legal analysis needs to be translated into language that everyone understands and rendered operational in real life. In order to be effective, these evolving legal standards must be incorporated into all aspects of the justice system, including police and prosecutorial practices, procedural law, and the law of evidence, and integrated into the professional development and institutional capacities of all individuals and organizations working within the justice system.

2. CANADIAN LEGAL STANDARDS

Legal norms that shape our understanding of police responsibility can be established through cases that consider the civil and constitutional liability of police actions and omissions. Civil and constitutional claims “are particularly compelling as forms of public accountability as they permit aggrieved individuals to call police officers, police authorities and boards and executive bodies directly to account for their police activities.”⁷

This overview of recent cases on police liability is divided into two sections. The first section discusses the evolution of case law on the duty of care owed by police to victims of crime or potential victims of crime. The second section discusses the constitutional dimensions of the case of *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*.⁸ In *Jane Doe’s* case, the court found that police were liable both in negligence and under the Constitution.

Given the fundamentally important role that police play in society, it is not surprising that there is a close connection between tortious police conduct, which attracts civil liability, and breaches of the Canadian Constitution. The Supreme Court of Canada has highlighted the connection between the tort of misfeasance in public office and the obligations of public officials to uphold the rule of law.⁹ In

⁷ Sossin, *supra*, at 34.

⁸ (1998), 39 O.R. (3d) 487 [hereinafter “*Jane Doe v. Toronto*”].

⁹ *Ibid.*

Odhavji Estate v. Woodhouse,¹⁰ the Supreme Court considered whether the family of a person who was shot dead during a police investigation could bring an action for negligence and the tort of misfeasance in public office against the police based on the failure of the officers involved to cooperate with the Special Investigations Unit. The Supreme Court held that the claim of misfeasance in public office could proceed. In doing so, Justice Iacobucci, writing for the Court, said:

*As is often the case, there are a number of phrases that might be used to describe the essence of the tort. In Garrett, supra, Blanchard J. stated, at p. 350, that "[t]he purpose behind the imposition of this form of tortious liability is to prevent the deliberate injuring of members of the public by deliberate disregard of official duty." In Three Rivers, supra, Lord Steyn stated, at p. 1230, that "[t]he rationale of the tort is that in a legal system based on the rule of law executive or administrative power 'may be exercised only for the public good' and not for ulterior and improper purposes." ... The tort is not directed at a public officer who is **unable** to discharge his or her obligations because of factors beyond his or her control but, rather, at a public officer who **could** have discharged his or her public obligations, yet willfully chose to do otherwise. (emphasis added)¹¹*

The close linkage between civil and constitutional liability flows from the fact that the rights of citizens “turn significantly on the discretion of police officers, Crown attorney’s [*sic*] or judges to intervene, arrest, charge, prosecute, convict – or not.”¹²

a. Civil Liability for Police Actions and Failures to Act

The Shifting Terrain of Private Law Duties

Our system of police accountability relies on established complaint and discipline processes to regulate and sanction police behaviour. Under traditional common law approaches, there was a very high threshold for suing the police or prosecution authorities for failure to investigate crimes or inadequately investigating crimes. A person bringing such a claim had to rely on the tort of misfeasance in public office, where the threshold to establish misconduct involved proof of an illegal act and

¹⁰ [2003] 3 S.C.R. 263.

¹¹ *Ibid*, at para. 26.

¹² Commentary by Wes Pue, in Sossin, *supra*, at 59.

malicious intent.¹³ More recently there have been a few cases where the law of negligence has been successfully used against the police. In deciding these cases, courts must walk a fine line between holding police to account for negligent acts without creating standards that do not adequately take into account the difficulties faced by police in carrying out their duties. The case law shows a noticeable shift away from deference to police to a carefully defined duty of care and standard of care in some situations.

Hill v. Chief Constable of West Yorkshire

The basic common law principles regarding the duty of care owed by police is illustrated in the 1989 decision of the British House of Lords in *Hill v. Chief Constable of West Yorkshire*,¹⁴ which has been cited in Canada for its interpretation of the notion of proximity. This case was brought by the mother of one of the victims of the notorious “Yorkshire Ripper” serial killer. The Court confirmed that a generally-owed duty of care was enforceable only through the complaint procedures established by statute and internal discipline processes. No duty was owed to a private individual. The House of Lords concluded in *Hill* that two elements or “ingredients” were necessary to create the degree of proximity that would give rise to a private duty of care beyond the generally-owed public duty: (1) the defendant’s duty to control the perpetrator; and (2) the plaintiff’s membership in a special class of foreseeable victims.

Neither element was found present in *Hill*. At the time of the plaintiff’s daughter’s death, the killer had remained at large (and so outside of the “control” of the police) and every woman in England was, in the words of Lord Keith, his potential victim: “All householders are potential victims of an habitual burglar, and all females those of an habitual rapist.”¹⁵ Even if the necessary proximity had been present in *Hill*, the House of Lords continued, a private duty of care would be inappropriate for the reasons set out in the “policy branch” of the test set out in *Anns v. Merton London Borough Council*.¹⁶ Investigations of major crimes required difficult decision-making, and potential liability would be a distracting and possibly malignant influence on the decision-making process. Police officers, as professionals, would always strive to carry out investigations to the best of their abilities and in pursuit of

¹³ For a discussion of historical and contemporary approaches to this tort see Erika Chamberlain, “What is the Role of Misfeasance in a Public Office in Modern Canadian Tort Law?” (2009) 88 Canadian Bar Review 579.

¹⁴ [1989] A.C. 53 [hereinafter “*Hill v. Yorkshire*”].

¹⁵ *Ibid*, at 62.

¹⁶ [1978] A.C. 728.

public safety objectives. A private duty of care under these circumstances was neither just nor reasonable.

Jane Doe v. Toronto (Metropolitan) Commissioners of Police

In a ground-breaking decision in 1997, an Ontario court found that the Toronto Police has been negligent in its investigation of a serial rapist by failing to warn and to protect potential victims. This case is known as *Jane Doe v. Toronto (Metropolitan) Commissioners of Police*.¹⁷

A woman, who is known as Jane Doe due to a court order protecting her identity, was sexually assaulted by a man referred to as “the balcony rapist” because he broke into apartments in a particular neighbourhood in Toronto through the balconies in order to sexually assault women. She was the fifth known victim of this rapist. At the time of the trial, Jane Doe continued to suffer from serious post-traumatic stress and depressive disorder as a result of the attack. She claimed that the police were negligent in their investigation of the balcony rapist and failed to warn potential victims. She also made a constitutional claim that her section 7 and 15 rights under the Canadian *Charter of Rights and Freedoms* were violated because the police acted in a way that was discriminatory on the basis of gender. She succeeded in her case and was awarded damages of over \$220,000 together with a declaration her constitutional rights had been violated. The constitutional aspect of the case is discussed in the next section headed “Canadian *Charter of Rights and Freedoms*.”

The Jane Doe case was highly contested, with the trial lasting over eight weeks, involving thirty experts and reams of exhibits. At the end of the day, Justice McFarland found that the police had been negligent in their investigation and, in particular, had failed to warn Jane Doe based on a stereotypical view that women living in the area would become hysterical and panic and the police investigation would thereby be jeopardized.¹⁸ She also found:

*I am satisfied on Ms. Doe's evidence that if she had been aware a serial rapist was in her neighbourhood raping women whose apartments he accessed via their balconies she would have taken steps to protect herself and that most probably those steps would have prevented her from being raped.*¹⁹

¹⁷ *Supra*, note 8.

¹⁸ *Ibid*, at para. 162.

¹⁹ *Ibid*, at para. 148.

The judge found that the police owed a duty of care based on statutes and “the common law, which recognizes the existence of a broad conventional or customary duty in the established constabulary as an arm of the state to protect the life, limb and property of the subject.” She concluded:

In my view, the police failed utterly in their duty to protect these women and the plaintiff in particular from the serial rapist the police knew to be in their midst by failing to warn so that they may have had the opportunity to take steps to protect themselves.²⁰

It is no answer for the police to say women are always at risk and as an urban adult living in downtown Toronto they have an obligation to lookout for themselves. Women generally do, every day of their lives, conduct themselves and their lives in such a way as to avoid the general pervasive threat of male violence which exists in our society. Here police were aware of a specific threat or risk to a specific group of women and they did nothing to warn those women of the danger they were in, nor did they take any measures to protect them.²¹

In her judgment, Justice McFarland focused on the constitutional claim, but the same factual basis led to a finding that the police force was negligent. By virtue of the *Police Act*,²² police are charged with the duty of protecting the public from those who would commit crimes or have committed crimes. The discussion of the issues related to the negligence claim is not as extensive because these issues had been canvassed in some detail at the pre-trial phase, in response to a motion to strike out the statement of claim for failing to disclose a reasonable cause of action. Justice McFarland relied on the conclusions of the motions judge who had held:

*To establish a private law duty of care, foreseeability of risk must coexist with a special relationship of proximity. In the leading case of *Anns v. Merton* (London Borough), [1978] A.C. 728, [1977] 2 All E.R. 492, 121 Sol. Jo. 377 (H.L.), Lord Wilberforce defined the requirements of this special relationship as follows at pp. 751-52 A.C.*

First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a prima facie duty of care arises.

²⁰ *Ibid*, at para. 150.

²¹ *Ibid*, at para. 151.

²² R.S.O. 1980, c. 381, s. 57.

This principle has been approved by the Supreme Court of Canada in Kamloops (City) v. Nielsen, [1984] 2 S.C.R. 2, 66 B.C.L.R. 273, 29 C.C.L.T. 97, 8 C.L.R. 1, 10 D.L.R. (4th) 641, 26 M.P.L.R. 81, 54 N.R. 1, [1984] 5 W.W.R. 1.

Do the pleadings support a private law duty of care by the defendants in this case?

The plaintiff alleges that the defendants knew of the existence of a serial rapist. It was eminently foreseeable that he would strike again and cause harm to yet another victim. The allegations therefore support foreseeability of risk.

The plaintiff further alleges that by the time she was raped, the defendants knew or ought to have known that she had become part of a narrow and distinct group of potential victims, sufficient to support a special relationship of proximity. According to the allegations, the defendants knew:

- (1) that the rapist confined his attacks to the Church-Wellesley area of Toronto;*
- (2) that the victims all resided in second or third floor apartments;*
- (3) that entry in each case was gained through a balcony door; and*
- (4) that the victims were all white, single and female.*

Accepting as I must the facts as pleaded, I agree with Henry J. that they do support the requisite knowledge on the part of the police sufficient to establish a private law duty of care. The harm was foreseeable and a special relationship of proximity existed.

Do the pleadings support a breach of the private law duty of care?

The law is clear that in certain circumstances, the police have a duty to warn citizens of foreseeable harm. See Schact v. R., [1973] 1 O.R. 221, 30 D.L.R. (3d) 641 (C.A.), aff'd sub nom. O'Rourke v. Schact, [1976] 1 S.C.R. 53, 55 D.L.R. (3d) 96, 3 N.R. 453, and Beutler v. Beutler; Adams v. Beutler (1983), 26 C.C.L.T. 229 (Ont. H.C.J.). The obvious purpose of the warning is to protect the citizens.

I would add to this by saying that in some circumstances where foreseeable harm and a special relationship of proximity exist, the police might reasonably conclude that a warning ought not to be given. For example, it might be decided that a warning would cause general and unnecessary panic on the part of the public which could lead to greater harm.

It would, however, be improper to suggest that a legitimate decision not to warn would excuse a failure to protect. The duty to protect would still remain. It would simply have to be accomplished by other means.²³

Justice McFarland concluded her negligence analysis this way:

Sgts. Cameron and Derry made a decision not to warn women in the neighbourhood and did not do so. They took no steps to protect the women they knew to be a risk from an almost certain attack in result, they failed to take the reasonable care the law requires and denied the plaintiff the opportunity to take steps to protect herself to eliminate the danger and ensure that she would not be attacked.²⁴

The City of Toronto chose not to appeal the decision in this case and so the decision of the trial judge stands.

The Bonnie Mooney Case

In a case brought in British Columbia shortly after the Jane Doe decision, Bonnie Mooney, a victim of repeated domestic violence, was unsuccessful in her claim of police negligence. This section is largely based on Margaret Hall's thorough analysis of this case.²⁵ This analysis is referred to at length because it provides an excellent exposition of the difficult balancing involved in applying civil liability standards to police conduct in the context of violence against women.

Late one night in April 1996, Ronald Kruska smashed his way into the isolated cabin of his ex-partner, Bonnie Mooney, using a shotgun butt to break down the cabin's door. Bonnie Mooney was inside the cabin with her two young daughters and a friend, who died in the violent episode. Mooney had complained of Kruska's violent assault in the past and the relationship had been marked by several unreported incidents of violence. Kruska was known to be a violent individual, and had in fact been "flagged" as such in police records.

Seven weeks before Kruska's final, murderous rampage, Mooney had become terrified at Kruska's behavior when the two met in public. She went to the police to report the frightening and intimidating behavior. The police officer, Constable

²³ *Jane Doe v. Toronto*, at para. 170.

²⁴ *Jane Doe v. Toronto*, at para. 178.

²⁵ Margaret Hall, "Duty, Causation and Third-Party Perpetrators: The Bonnie Mooney Case" (2005) 50 McGill L.J. 597 [hereinafter "Hall"].

Andrichuk, noted Kruska's flagging for violence but told her that no action could be taken in the absence of an explicit or overt threat. He recommended that she see a lawyer about obtaining a restraining order and "stay in public places in the future."

In fact, there was a course of action open to Constable Andrichuk in response to Mooney's report. Section 810 of the *Criminal Code* could have been invoked in this situation. This section allows the parties to appear before a judge to determine whether one had reasonable grounds to fear the other. If so, the judge may order the defendant to enter a recognizance. Importantly, provincial domestic abuse policy dictated that police should apply this kind of proactive approach, rather than sitting back and waiting for the escalation into violence or explicit threat. An internal investigation carried out by the RCMP concluded that Constable Andrichuk's failure to carry out further investigation was improper.

The question that was the subject of litigation was whether this failure was also negligent. Mooney and her daughters claimed it was, in an action against Constable Andrichuk, the provincial government, and the federal government.²⁶ They claimed that Constable Andrichuk's inaction materially contributed to Kruska's later attack, and sought damages to compensate for their post-traumatic stress disorder, physical injuries sustained in the incident, and Mooney's loss of income. Both the trial judge and a majority of the Court of Appeal found that even if Constable Andrichuk owed Mooney a private duty of care and his failure to act was a breach of that duty, no causal connection between the breach and Kruska's later violent actions was established.

At trial, Justice Collver found that a private duty of care had come into being because Constable Andrichuk knew of Mooney's fear and concern that Kruska posed a danger to her. Constable Andrichuk was aware that Kruska had been flagged as a violent person, and that he was on probation for an assault carried out against Mooney four months earlier. The RCMP operational manual set out the provincial policy on domestic violence and made it clear that a proactive arrest-and-charge policy was to be followed in situations involving violence against women and children. Constable Andrichuk's inaction contradicted that policy. Justice Collver therefore found that a reasonable RCMP officer in Constable Andrichuk's position, aware of current police policy and of Mooney's reasonable fear of a violent individual who had assaulted her in the recent past (and who was on probation for doing so), should have investigated the matter further.

²⁶ *B.M. v. British Columbia (Attorney General)*, 2004 BCCA 402, aff'g 2001 BCSC 419 [Mooney (S.C.)], leave to appeal to S.C.C. refused, *Mooney v. Canada (A.G.)* (3 March 2005), No. 30546 [hereinafter "*B.M. v. British Columbia*"].

According to Justice Collver, however, that breach was not the *cause* of Kruska's violent rampage the following month, nor was it possible to show how Constable Andrichuk's inaction had "materially increased" the risk to Mooney and the others in the cabin with her that night. The shootings had been more immediately preceded by an angry telephone conversation the morning of the attack between Kruska and Mooney. The call was regarding her plan to build a small cabin on the property, to be inhabited by her friend, White. Kruska had perpetrated no violence during the period between Mooney's report to Constable Andrichuk and that conversation. Describing the police as "guardians, not guarantors, of public wellbeing," Justice Collver concluded that the causal link necessary to sustain an action in negligence was not present in this case.

The three Court of Appeal judges each wrote separate reasons. Justice Hall and Smith found that the negligence claim could not succeed and Justice Donald dissented.

Justice Hall declined to consider the duty of care issue at any length, noting that the case could be decided "more appropriately" on the issue of causation. He did, however, note the policy reasons given in *Hill* for not recognizing a private duty of care. He also dismissed the applicability of *Doe* and other Canadian police liability cases on the grounds that they concerned a duty to warn the potential victims of foreseeable harm. Warning was not a relevant factor in the *Mooney* case, because Mooney had herself brought the information to the police.

Justices Hall and Smith, giving separate reasons on the causation issue, agreed that in certain circumstances the ordinary "but for" test was unworkable and that, in these cases, a "material contribution" test would be appropriate. The material contribution test would be justified, for example, where concurrent acts were involved and where the causal relationship of each to the harm could not be shown, as where two hunters fire in a forest and one bullet injures the plaintiff. In their view, *Mooney* was not this kind of case. Constable Andrichuk and Kruska were not concurrent actors, but were separated by time, place, the nature of the duty owed, and the nature of the alleged breach.

As per Justices Hall and Smith, *Mooney* was not this kind of case where multiple causes each materially increased the risk of harm. It was not possible to say that Constable Andrichuk's inaction had increased the risk that Kruska would act out violently. Kruska, whose earlier convictions had resulted in threatened deportation back to his native Germany, who had been jailed in the past for violence, and who was threatened with jail again if he violated his parole, appeared to be impervious to police intervention. It could not be said that intervention on the part of Constable Andrichuk in March would have prevented Kruska's final, fatal rampage. Moreover, the evidence indicated that the immediate trigger for Kruska's rage that night was

his conversation with Mooney about her plans to build the guest cottage. If a cause for Kruska's murderous acts lay anywhere outside of his own mind, it lay in that conversation:

Here, the harm was the result of a discrete traumatic event, not a course of exposure to a potentially pathogenic agent in relation to which science is unable to offer any causal opinion. We know what caused the harm: it was Mr. Kruska's violent actions. The question is whether Constable Andrichuk's inaction played any legally significant historical causal role in Mr. Kruska's acting as he did. Proof that it did is not an impossibility in the sense that scientific knowledge cannot provide a causal connection and an inference of causation cannot be drawn on circumstantial evidence. ... Here, there was evidence of Mr. Kruska's character and violent history and his previous responses to sanctions imposed by the police and the courts. There was evidence of police and ministerial policies respecting the effect of police action on domestic violence. As well, there were the circumstances of the event itself, including the temporal relationship between Constable Andrichuk's inaction and Mr. Kruska's criminal actions. This is the stuff of which factual inferences based on common sense and experience are made.²⁷

In his reasons, Justice Hall reproduced the police arguments in defence which provided a number of reasons for not imposing a private law duty of care on police officers to investigate an individual's complaint including:

- a. Courts would be invited to second guess policy decisions related to the investigation, administration, and the approach to enforcement of the law generally. Such issues are not justiciable.
- b. A police department's (officer's) discretion with respect to the setting of priorities in connection with the investigation and suppression of crime would be fettered.
- c. Victims would unduly control what complaints should be investigated and the extent of the investigation.
- d. The financial impact on the community of providing increased police and legal services at the expense of other valuable services such as health care and education would be substantial.
- e. The rights of the majority would not be served by the imposition of a duty of care to investigate, in that important initiatives related to the investigation and suppression of crime would be obstructed by the diversion of resources to defend discretionary decisions exercised by law enforcement professionals.

²⁷ *B.M. v. British Columbia*, at para. 168.

- f. The chilling effect of imposing a private law duty of care and the threat of litigation following therefrom would invariably result in police officers carrying out their duties in a defensive frame of mind to the detriment of law enforcement generally.
- g. There is statutory authority to discipline police officers who breach their duty. Imposing a duty of care to investigate would not improve the delivery of police services to the community.
- h. A private law duty to investigate could lead to an overzealous arrest policy that would infringe upon the rights of potential suspects.²⁸

In his dissenting reasons, Justice Donald, noted that the facts of the *Mooney* case were different from the facts in *Hill* in significant ways. Mooney was an identifiable individual at foreseeable risk, not a member of a vast class of individuals none of whom was individually discernable as being at a greater risk than the others. She was clearly in “pressing need” of protection as a potential victim and had had “direct engagement” with the police officer.²⁹ Furthermore, Justice Donald found that “Canadian courts are not so protective of the police” in comparison with English courts and noted in particular, the Jane Doe case.³⁰

Justice Donald, also dissenting on the issue of causation, concluded that the traditional “but for” test was not practical where *inaction* was the alleged cause of the harm. Instead, he applied the “material contribution” test set out by the Supreme Court of Canada in *Athey v. Leonati*: where the “but for” test is practically unworkable, causation will be established where the negligence of the defendant has “materially contributed” to the occurrence of the injury.³¹

Applying this risk-based analysis of material contribution and causation, Justice Donald framed the central issue in terms of the relationship between Constable Andrichuk’s inaction and the risk of violence to Mooney. The threatening behaviour reported by Mooney to Constable Andrichuk in March demonstrated that, despite his recent conviction and incarceration for assault and ongoing probation order, Kruska remained a high risk for violence. That he was flagged as such by the police reflected that fact. Under these circumstances, the likelihood of future violence directed against Mooney was reasonably foreseeable. The inquiry should therefore have focused on whether the inaction of Constable Andrichuk failed to *reduce* the risk of future violence in a material way (more than *de minimis*), and not whether

²⁸ *Ibid*, at para. 137.

²⁹ *Ibid*, at para. 43.

³⁰ *Ibid*, at para. 47-49.

³¹ *Ibid*, at para. 152.

the inaction itself inflamed or encouraged Kruska in a way that increased that risk. The provincial domestic abuse policy, which Constable Andrichuk failed to follow, was adopted because it is now known that a proactive response to male violence against women generally reduces the risk of future violence:

[T]he right to police protection in these circumstances is so strong and the need for teeth in the domestic violence policy so great that the causal linkage must be found sufficient to ground liability. Contemporary authority ... requires flexibility in the rules of causation so that compensation for a wrong will be provided where fairness and justice require.³²

Justice Donald applied the criteria set out in the British Columbia Court of Appeal decision in *Haag v. Marshall*.³³ When the circumstances make it impossible to establish a definitive causal link, principles of fairness justify an inference of causation where:

a breach of duty has occurred, and damage is shown to have arisen within the area of risk which brought the duty into being, and where the breach of duty materially increased the risk that damage of that type would occur, and where it is impossible, in a practical sense, for either party to ... establish either that the breach of duty caused the loss or that it did not ...

It was impossible to determine what the exact effect on Kruska would have been if Constable Andrichuk had been more proactive. But it would be unjust if this factual impossibility resulted in a finding of no liability—leaving the loss with the plaintiff—where the defendant had breached his duty of care in a way that materially increased the risk of foreseeable harm to the plaintiff, and where that harm subsequently materialized as damage to the plaintiff:

Human behaviour is notoriously unpredictable; the behaviour of an erratic, irrational man like Kruska even more so. All that can be determined from the evidence is that police intervention is, in many cases, an effective deterrent, and hence, the Attorney General's policy [on domestic violence intervention].

Justice Donald cited the policies laid down by the Ministry of the Attorney General and adopted by the RCMP in relation to domestic violence. He concluded that these policies relate not only to the special proximity between police and complainants but they also give content to the duty of care and set the standard of care. The

³² *Ibid*, at para. 12.

³³ (1989), 61 D.L.R. (4th) 371.

general duty of the police is to protect, but in the area of domestic violence the degree of protection is heightened by government policy. The discretion whether to act on a complaint is very limited.³⁴ The standard of care was clearly one of “immediate action.”³⁵

Justice Donald’s summarized his finding that “having made herself known to the police as a person in fear of a violent abuser, B.M. established a special relationship of proximity with the police thereby creating a private duty of care. The duty on the police was to act on the complaint promptly.”³⁶ With respect to the standard of care, the police officer’s actions in failing to respond amounted to more than an error of judgment, because the governing police policy left little discretion: “The clear directive is to take immediate action. Given R.K.’s horrific record and the recent conviction for assault on B.M. herself, the decision not to deal with the complaint goes well beyond an error of judgment.”³⁷

In her comment on the Bonnie Mooney case, Margaret Hall explores the problematic distinction in common law between *misfeasance* and *non-feasance*, between active misconduct and passive inaction.³⁸ Duties generally arise when active misconduct leads to injury but passive inaction can be just as harmful. The underlying concern with basing legal liability on a failure to prevent harms perpetrated by third persons is the difficulty of proving causation and foreseeability.³⁹ However, a duty of care that will include actions to prevent harms perpetrated by others may exist in the following circumstances: (1) where the requisite proximity is created by a high degree of foreseeability in the context of a special underlying relationship; and (2) where that duty cannot be displaced by the reasons of policy involved in a particular case.⁴⁰

Hall cites the similarities between Mooney’s case and the circumstances at issue in the English case of *Osman v. Ferguson*.⁴¹ That case concerned a school teacher who had become obsessed with one of his students, stalking the boy and ultimately

³⁴ *B.M. v. British Columbia*, at para. 50-51.

³⁵ *Ibid*, at para. 58.

³⁶ *Ibid*, at para. 57.

³⁷ *Ibid*, at para. 59.

³⁸ Hall, *supra*, at 606.

³⁹ Hall citing Francis H. Bohlen, “The Moral Duty to Aid Others as a Basis of Tort Liability” (1908) 56 U. Pa. L. Rev. 217 at 219, referring to *Stovin v. Wise*, [1996] A.C. 923 at 935, [1996] 3 All E.R. 801 per Nicholls L.J.; see also *Haynes v. Harwood*, [1934] All E.R. Rep. 103 (C.A.).

⁴⁰ Hall, *supra*, at 606.

⁴¹ [1993] 4 All E.R. 344 (C.A.).

killing the boy's father during an attack on both father and son. The police were aware of the teacher's bizarre and threatening behaviour and had interviewed each of the parties several times, but had not intervened to protect the boy and his family. Describing the police inaction as a "failure in investigation", Lord Justice McCowan (giving the judgment of a unanimous Court of Appeal) found that, by reason of this failure, "[the boy] and his family were exposed to a risk from [the teacher] over and above that of the public at large. In my judgment the plaintiffs have therefore an arguable case that ... there existed a very close degree of proximity amounting to a special relationship." In *Osman*, as in *Mooney*, there was no control in the sense of the perpetrator's being under arrest, and no promise of protection. Proximity came into being because the police had knowledge of a clearly foreseeable and high degree of risk to an identified individual, from an identified individual, and they had the professional means and mandate to act in a way that would reduce that risk. However, the claim against the police was struck because *Hill v. Yorkshire* "laid down, as a matter of public policy, a blanket immunity on the police for such actions."⁴²

In her article, Hall makes a strong policy argument in favour of finding liability in circumstances like those in Bonnie Mooney's case:

Policy guides; liability deters. The prevention of violence against women and children requires deterrence. Police officers are asked to do difficult, dangerous things, perhaps carrying out decisions of others which they personally consider ill-advised. Inaction in these situations will often be easier than action, and where an "easy" explanation exists to justify inaction, no one should be surprised when inaction prevails even in the face of guidance to the contrary. Traditional professional-cultural beliefs about domestic violence (that victims invite and then choose to remain within violent relationships, involving police as players in the ongoing domestic drama rather than "real" protectors and enforcers of the law) work by legitimizing inaction, especially in difficult and dangerous situations. In cases of violence against women, police inaction has proved deadly. A necessary function of the law here is to counteract the deeply rooted power of cultural framing devices through liability, the ultimate social determination of wrongness.⁴³

In her case comment on this case, Elizabeth Sheehy contrasts the outcome with that in *Jane Doe* and finds the main difference to be the lack of a human rights perspective. She has notes that, although equality based arguments were raised in Mooney's appeal by an intervener, a claim brought under s.15 of the *Charter* from

⁴² *Ibid.*

⁴³ Hall, *supra*, at 615.

the outset may have influenced the outcome by contextualizing the causation analysis and by presenting discrimination as a stand-alone wrong.⁴⁴

Hill v. Hamilton-Wentworth Regional Police Services

In 2007, the Supreme Court of Canada ruled that the tort of negligent investigation exists in Canada. In *Hill v. Hamilton Wentworth Regional Police Services Board*,⁴⁵ the Court held that the police in Canada are not immune from civil liability for negligence in their investigations, and that innocent people harmed by a shoddy investigation can sue for damages. The appellant, Jason George Hill, was an aboriginal man who was wrongfully convicted and spent more than 20 months in prison in relation to bank robbery charges. Mr. Hill successfully appealed from his conviction and was acquitted after a new trial. He then sued the police alleging, among other things, negligence on the basis of witness contamination, improper recording and interviewing techniques, structural bias in a photo line-up (in which Mr. Hill was the only non-Caucasian) and police failure to re-investigate after learning of potentially exculpatory evidence. The Court recognized the tort holding that a police officer can be held liable if his/her investigatory conduct falls below the standard a reasonable police officer such that harm is caused to the suspect. However, they dismissed Mr. Hill's claim on the facts.

Following the tort analysis in *Anns v. Merton London Borough Council*, Chief Justice McLachlin determined that a duty of care exists. First, it is reasonably foreseeable that negligent police investigation may cause harm to the suspect under investigation. Second, the relationship between the police and the suspect is sufficiently close and direct, since the suspect is singled out and investigated. Additional considerations supporting the finding of a proximate relationship giving rise to a duty of care included the risks to the suspect's freedom and reputation, the failure of other tort actions and government compensation schemes to provide an adequate remedy to victims of negligent police investigation, and the benefit to the public interest from potentially minimizing wrongful convictions and institutional racism.

The Chief Justice noted that police owing a duty of care to targeted suspects is in keeping with *Charter* values of liberty and fair process, and she found no compelling policy reasons to negate the duty of care. She dismissed arguments advanced by the

⁴⁴ Elizabeth Sheehy, "Causation, Common Sense and the Common Law: Replacing Unexamined Assumptions with What We Know About Male Violence Against Women or from Jane Doe to Bonnie Mooney" (2006) 17 CJWL 97.

⁴⁵ [2007] 3 S.C.R. 129 [hereinafter "*Hill v. Wentworth*"].

Police Services Board and by the Crown as intervener that exposing the police to liability for negligence would open the floodgates to nuisance lawsuits and create a chilling effect on police that would interfere with their ability to do their jobs effectively. The Chief Justice noted that targeted suspects form a limited class of potential plaintiffs, a class further limited by the requirement to establish compensable harm. Moreover, the evidence appeared to the contrary: there had not been a large number of police negligence suits to date in Ontario or Quebec (where the civil law equivalent of negligent investigation has existed for many years). On the chilling effect point, Chief Justice McLachlin acknowledged that, conceivably, police might become more careful in conducting investigations, but pointed out that this is “not necessarily a bad thing.” She also acknowledged the point made by the Canadian Civil Liberties Association in its submissions that police officers are almost always indemnified from personal civil liability in the course of performing their professional duties, which decreases the likelihood that they will recoil out of fear of lawsuits.

Also at issue in *Hill* was the standard of care to which police should be held. The majority of the Supreme Court, like the Ontario Court of Appeal below, concluded that the proper standard was that of “the reasonable police officer in like circumstances”, rather than a higher standard such as gross negligence. The Chief Justice was careful to note that the standard is not perfection. This standard takes into account factors like urgency, prevailing practices and the discretion inherent in police investigation. Indeed, this was borne out by the Court’s unanimous dismissal of the appeal in *Hill* on its facts. While the investigation of the case against Mr. Hill was undoubtedly flawed, it was found not to breach the standard of care as judged by the standards of the day and what the officers knew and believed at the time of that investigation.

Chief Justice McLachlin writing for the Court addressed the issue of duty of care to the person subject to an investigation. She first discussed proximity. She observed the question is whether “this relationship is marked by sufficient proximity to make the imposition of legal liability for negligence appropriate”, and then observed:

Before moving on to the analysis of proximity in depth, it is worth pausing to state explicitly that this judgment is concerned only with a very particular relationship -- the relationship between a police officer and a particularized suspect that he is investigating. There are particular considerations relevant to proximity and policy applicable to this relationship, including: the reasonable expectations of a party being investigated by the police, the seriousness of the interests at stake for the suspect, the legal duties owed by police to suspects under their governing statutes and the Charter and the importance of balancing the need for police to be able to investigate effectively with the protection of the fundamental rights of a suspect or accused person. It might well be that both the considerations informing the analysis of both proximity

*and policy would be different in the context of other relationships involving the police, for example, the relationship between the police and a victim, or the relationship between a police chief and the family of a victim. This decision deals only with the relationship between the police and a suspect being investigated. If a new relationship is alleged to attract liability of the police in negligence in a future case, it will be necessary to engage in a fresh Anns analysis, sensitive to the different considerations which might obtain when police interact with persons other than suspects that they are investigating. Such an approach will also ensure that the law of tort is developed in a manner that is sensitive to the benefits of recognizing liability in novel situations where appropriate, but at the same time, sufficiently incremental and gradual to maintain a reasonable degree of certainty in the law. Further, I cannot accept the suggestion that cases dealing with the relationship between the police and victims or between a police chief and the family of a victim are determinative here, although aspects of the analysis in those cases may be applicable and informative in the case at bar. (See *Odhavji and Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*, (1998), 160 D.L.R. (4th) 697 (Ont. Ct. (Gen. Div.)).) I note that *Jane Doe* is a lower court decision and that debate continues over the content and scope of the ratio in that case. I do not purport to resolve these disputes on this appeal. In fact, and with great respect to the Court of Appeal who relied to some extent on this case, I find the *Jane Doe* decision of little assistance in the case at bar.⁴⁶*

It is worth noting that in the Ontario Court of Appeal judgment in *Hill*,⁴⁷ Justice MacPherson said:

*[I]t is important to note that the duty of care exists in Ontario with respect to both suspects (*Beckstead*) and victims (*Jane Doe [v. Metropolitan Toronto (Municipality) Commissioners of Police*, [1998] O.J. No. 2681 (Gen. Div.))]. The respondents attack only *Beckstead* in this appeal; they do not challenge *Jane Doe*. However, I can see no principled basis for distinguishing the two categories. Both reflect aspects of the public duty police officers must discharge. (Underlining added)*

[T]here is another category of police misconduct that has the potential to cause serious harm to members of the public, including innocent people and victims of crime. This category has nothing to do with improper purpose or unlawful

⁴⁶ *Hill v. Wentworth*, at para. 27.

⁴⁷ (2005), 76 O.R. (3d) 481 (C.A.).

*conduct; rather, the misconduct is anchored in very poor performance of important police duties.*⁴⁸

*It is important to give some flesh and blood to this non-malicious category of police misconduct.*⁴⁹

Other Recent Cases

Since the decision in *Jane Doe*, there have been a number of cases considering the extent to which police officers can be civilly liable for negligent investigations. Cases have been brought by suspects, victims and third parties who have claimed harm as a result of police action or inaction.

In *Odhavji Estate v. Metropolitan Toronto Police*,⁵⁰ an action was brought against police officers, a Chief of Police, the Metropolitan Toronto Police Services Board and Ontario arising from the fatal shooting of Mr. Odhavji. A Special Investigation Unit had investigated the incident and cleared the officers of any wrongdoing. Mr. Odhavji's estate and family commenced an action saying that a lack of thorough investigation caused them to suffer mental distress, anger, depression and anxiety. They claimed the officers' failure to cooperate in the investigation gave rise to actions in misfeasance in a public office against the officers and Chief of Police, and in negligence against the Chief of Police, Police Services Board and Province. The defendants sought to strike portions of the pleadings and the matter reached the Supreme Court of Canada. The Supreme Court of Canada allowed the action to proceed in misfeasance of public office and in negligence. The decision to allow the action to proceed in negligence rested heavily on legislation that required police officers to cooperate with the Special Investigations Unit, and the Chief of Police to supervise. Justice Iacobucci speaking for the Court on the issue of proximity said, on the case against the Chief of Police, and referring to *Cooper v. Hobart*:

... in order to establish that the defendant owed the plaintiff a duty of care, the reasonable foreseeability of harm must be supplemented by proximity. It is only if harm is a reasonable foreseeable consequence of the conduct in question and there is a sufficient degree of proximity between the parties that a prima facie

⁴⁸ Ibid, at para. 77.

⁴⁹ Ibid, at para. 78.

⁵⁰ [2003] 3 S.C.R. 263.

*duty of care is established. The question that thus arises is what precisely is meant by the term proximity.*⁵¹

...

In the present case, one factor that supports a finding of proximity is the relatively direct causal link between the alleged misconduct and the complained of harm. As discussed above, the duties of a chief of police include ensuring that the members of the force carry out their duties in accordance with the provisions of the Police Services Act. In those instances in which a member of the public is injured as a consequence of police misconduct, there is an extremely close causal connection between the negligent supervision and the resultant injury: the failure of the chief of police to ensure that the members of the force carry out their duties in accordance with the provisions of the Police Services Act leads directly to the police misconduct, which, in turn, leads directly to the complained of harm. ...

A second factor that strengthens the nexus between the Chief and the Odhavjis is the fact that members of the public reasonably expect a chief of police to be mindful of the injuries that might arise as a consequence of police misconduct. Although the vast majority of police officers in our country exercise their powers responsibly, members of the force have a significant capacity to affect members of the public adversely through improper conduct in the exercise of police functions...⁵²

Other cases have considered the extent of the liability of police for investigative failures. In *Thompson v. Webber*,⁵³ the British Columbia Court of Appeal found that there is no duty of care owed to a complainant who is neither suspect, nor victim of a crime, in the circumstances of that case. The plaintiff's argument was: if A reports to a police officer that B has committed a criminal offence against C, then the police officer has a duty of care to A, in the conduct of the investigation, if any, which follows up from the complaint. More particularly in this case, the plaintiff, a non-custodial parent, was intimately involved with the victims of the alleged crime, and a police officer, receiving a report from a non-custodial parent that the custodial parent was committing a criminal offence against the children subject to that custodial regime, owed a duty of care to the non-custodial parent. (The plaintiff was unrepresented). The judge said:

⁵¹ *Ibid*, at para. 48.

⁵² *Ibid*, at para. 56-57.

⁵³ 2010 BCCA 308.

In my view, the relationship of Mr. Thompson to the police officers, even on his full pleadings, is not sufficiently proximate to find a duty of care. Mr. Thompson was not the subject of the information provided to the police, either as a person said to be wronged - who were his children, or the person thought to be the wrongdoer - Ms. Thompson. He was, although the father of the children, one party removed from the complaint. I consider it is plain and obvious, on the pleadings, that Mr. Thompson was not within the circle of people the police would reasonably have in mind as a person potentially harmed by their actions.

In the hearing before us Mr. Thompson relied heavily upon Odhavji, saying it supports his proposition that as he is a family member of the person wronged, he has a recognized relationship to the police sufficient to support a duty of care. I do not think this is so. Odhavji, on my view, is a very different case. The wrong said to support the claim in negligence was failure to meet the requirements of specific legislation, in the context of investigation of police conduct leading to the death of the family member; the duty of care discussed by the court arose related to the Chief of Police's supervisory responsibilities to ensure appropriate police behaviour in investigating police conduct. This is not that case.⁵⁴

A similar conclusion was reached by the Ontario Superior Court in *Project 360 Investments Limited (Sound Emporium Nightclub) v. Toronto Police Services Board*.⁵⁵ The plaintiffs claimed that due to negligent police investigation an individual was shot in their nightclub resulting in economic harm. The defendants moved to strike part of the action on the basis that, while particular circumstances may create a relationship that is sufficiently proximate to give rise to a private law duty of care, there is no general private law duty of care owed to individual members of the public. In particular, the defendants sought to strike the pleading alleging that if the police had not acted negligently by failing to investigate, the harm could have been avoided, because the suspect involved in a shooting at the nightclub would have been arrested. The Court concluded that it was clear from the wording of the *Police Services Act*⁵⁶ and the common law, that the police owe a duty to the public as a whole and not to specific individuals. Section 1 of the *Police Services Act*, provides:

Police services shall be provided throughout Ontario in accordance with the following principles:

1. *The need to ensure the safety and security of all persons and property in Ontario.*

⁵⁴ *Ibid*, at para. 27-28.

⁵⁵ 2009 CanLII 36380 (ON S.C.).

⁵⁶ R.S.O. 1990, c. P.15.

2. *The importance of safeguarding the fundamental rights guaranteed by the Canadian Charter of Rights and Freedoms and the Human Rights Code.*
3. *The need for co-operation between the providers of police services and the communities they serve.*
4. *The importance of respect for victims of crime and understanding of their needs.*
5. *The need for sensitivity to the pluralistic, multiracial and multicultural character of Ontario society.*
6. *The need to ensure that police forces are representative of the communities they serve.*

In *Cragg v. Tone*,⁵⁷ a British Columbia Court was asked to consider whether the District of West Vancouver was liable to the plaintiff by reason of negligence of the police department in failing to prevent an assault by the defendant. The defendant, Mr. Tone had broken into Mr. Cragg's apartment and assaulted him causing serious personal injury. The facts concerned the handling of a 911- phone call and the failure to meet statutory and common law duty of care by: (1) negligently failing to correctly classify the plaintiff's telephone complaint as a priority 2 dispatch; (2) failing to appropriately and expeditiously dispatch an officer who could have intervened to prevent the assault; and also, (3) having failed to do all of that, failing to warn the plaintiff of the defendant's presence outside the home so that he could have taken evasive action that would have prevented the Mr. Tone's assault upon him. This amounted to negligent failure to adhere to procedures and standards expected of police personnel in these circumstances. The judge agreed that at duty of care existed in these circumstances.

Summary

Under the common law and police statutes the police owe a duty to the public as a whole and not to specific individuals. However in a small number of cases, courts have held police officers and police forces liable under tort law for investigative failures in certain specified circumstances. A plaintiff must prove that:

- The police knew or ought to have known of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party giving rise to a duty of care to a specific individual;
- The police failed to take measures within the scope of their powers which, judged reasonably might have been expected to avoid that risk breaching the relevant standard of care; and

⁵⁷ 2006 BCSC 1020.

- The plaintiff suffered damage caused by the police negligent actions and/or failure to act.

These cases demonstrate that the legal doctrines and remedial instruments available to courts to remedy police failures are limited. Commentators have noted the circumscribed scope for imposition of civil liability providing effective remedies that would modify police conduct.⁵⁸

b. Canadian Charter of Rights and Freedoms

There has only been one case to date that has considered whether police investigative failures can infringe an individual's constitutional human rights under the *Canadian Charter of Rights and Freedoms*. This is the case of *Jane Doe v. Toronto (Metropolitan) Commissioners of Police*. The civil liability dimensions of the case were discussed above.

Jane Doe argued that the police had violated her rights under two *Charter* provisions: her right to equality as guaranteed under s. 15 and her right to security of the person as enshrined in s. 7.

In her reasons, Madam Justice MacFarland placed Jane Doe's claims within the larger social, political and legal context as required for all s. 15 *Charter* claims. In particular, she focused on male sexual violence as a method of social control over women and the known failures of the police department to handle sexual assaults in an effective manner. She discussed the way the police can and do act as a filtering system for sexual assault cases and the ways in which sexist myths and stereotypes play a role in police refusals to file occurrence reports, ignore forensic reports and mistreat complainants.

With respect to the s.15 claim, the Court held that Jane Doe was not simply discriminated against, because she is a woman, by individual officers, but that systemic discrimination existed within the police force, which impacted adversely on all women. In making this finding, she relied upon in part internal police studies that revealed these discriminatory patterns of behavior. Among those problems she noted were:

- failure to treat survivors of sexual assault sensitively;
- lack of effective training for officers engaged in the investigation of sexual assault, including a lack of understanding of rape trauma syndrome and

⁵⁸ Sossin, *supra*, at 36.

- the needs of survivors;
- lack of co-ordination of sexual assault investigations;
- unsuitability of some officers in terms of personality/attitude to investigation of sexual assault complaints;
- too many investigators coming into contact with victims;
- lack of experienced investigators investigating sexual assault;
- lack of supervision of those conducting sexual assault investigations; and
- prevalence of rape myths and stereotypical reasoning about rape.

It was clear that a warning should have been given alerting women at risk and advising them to take precautions to protect themselves. The warning was not given because of the stereotypical discriminatory belief that women in the area would become hysterical and jeopardize the investigation. A man in similar circumstances would have been warned. This resulted in discrimination against the plaintiff by reason of her gender and resulted in violation of her rights to equal protection and benefit of the law.

The Court held that the police's failure to warn women in the community about the serial rapist on the loose, as well as the general pattern of poor investigations of sexual assault cases constituted a violation of women's rights to equality and freedom from discrimination:

[...] because among adults, women are overwhelmingly the victims of sexual assault, they are and were disproportionately impacted by the resulting poor quality of investigation. The result is, that women are discriminated against and their right to equal protection and benefit of the law is thereby compromised as the result.⁵⁹

With respect to the s. 7 claim, MacFarland J. concluded that "the defendants deprived the plaintiff of her right to security of the person by subjecting her to the very real risk of attack by a serial rapist" by failing to warn and additionally failing to take any steps to protect her or other women like her.

In closing, she referred to Mr. Justice Cory's comments in *R. v. Osolin*:

It cannot be forgotten that a sexual assault is very different from other assaults. It is true that it, like all the other forms of assault, is an act of violence. Yet it is something more than a simple act of violence. Sexual assault is in the vast majority of cases gender based. It is an assault upon

⁵⁹ *Jane Doe v. Toronto*, at para. 161.

*human dignity and constitutes a denial of any concept of equality for women.*⁶⁰

In a remarkable departure from traditional government approaches to *Charter* litigation, the City of Toronto did not appeal this decision. Instead, Toronto City Council authorized the City Auditor to conduct an audit regarding the handling of sexual assault cases by the Toronto Police Service. This report, entitled *Review of the Investigation of Sexual Assaults Toronto Police Service* and completed in 1999, contained 57 recommendations, including one that the Auditor conduct a follow-up audit consistent with the time frame outlined in the report of the Chief of Police.⁶¹

The systemic response undertaken by the City of Toronto was a positive one and is consistent with the growing recognition of the link between women's right to equality and the obligations on governments to take positive measure to protect women from violence.

The Constitutional Court of South Africa has explicitly recognized the linkage between equality rights and government responsibility:

*The non-sexist society promised in the foundational clauses of the Constitution, and the right to equality and non-discrimination guaranteed by section 9 [of the Constitution], are undermined when spouse-batterers enjoy impunity.*⁶²

*Freedom from violence has therefore been recognized a fundamental aspect to the equal enjoyment of human rights and fundamental freedoms and emphasis has been put on the state's obligation to protect women from the "gender discrimination inherent in violence against women".*⁶³

Judicial application of constitutional and other legal remedies in police contexts underscores that civil liberties and fundamental human rights are always at stake in police decision-making.⁶⁴ The recognition of the state's obligation to protect women

⁶⁰ [1993] 4 S.C.R. 595 at 669.

⁶¹ Jeffrey Griffiths, C.A., City Auditor, *Review of the Investigation of Sexual Assaults Toronto Police Service* (Toronto Audit Services, October, 1999).

⁶² *S v Baloyi and Others* (CCT29/99) [1999] ZACC 19; 2000 (2) SA 425 (CC) (3 December 1999), at para. 12.

⁶³ *Van Eeden v Minister of Safety and Security* (176/01) [2002] ZASCA 132 (27 September 2002). See also *Carmichele v Minister of Safety and Security and Others* (2001) AHRLR 208 (SACC 2001); and *S v. Baloyi and Others*, *supra*.

⁶⁴ Sossin, *supra*, at 36. For discussion, see also Sujit Choudhry and Kent Roach, "Racial and Ethnic Profiling: Statutory Discretion, Democratic Accountability and

from all forms of gender discrimination including violence is even more pronounced in international legal standards, which are discussed in the next section.

3. INTERNATIONAL LEGAL STANDARDS

International legal standards with respect to the police obligation to prevent and investigate violence against women are evolving at a faster pace by comparison with the domestic Canadian counterparts. This rapid evolution is not surprising given the broad range of international bodies engaged in promoting effective legal protections for women consistent with their right to equality.

The first part of this section provides a brief overview of the role of international legal standards in the interpretation and administration of the law in Canada. As part of the general trend toward globalization, there is increased permeability between human rights norms developed at the domestic and international levels and courts are more likely to look to comparative jurisprudence and approaches taken by other national courts on these issues.

The second part reviews the scope and content of Canada's international obligations to protect women from violence and to investigate violence against women. It provides an overview of the foundational international conventions and other legal instruments, which clearly define violence against women as a human rights issue. The conceptual framework consists of the state obligations to respect, protect, and fulfill as well as the more refined due diligence standards.

This framework is further explored in the third part, through a discussion of the leading cases on the positive state duty to protect women from violence and the duty to effectively investigate these crimes.

a. The Role of International Legal Standards in the Interpretation and Administration of Law in Canada

The Poverty and Human Rights Centre has developed a law sheet that provides an excellent synopsis of the international human rights law in the interpretation of law

Constitutional Remedies," (2002) 40 Osgoode Hall L.J. 1; and Lorne Sossin, "Discretion Unbound: Reconciling Soft Law and the *Charter*" (2002) 45 Canadian Public Administration 465.

in Canada.⁶⁵ This law sheet concludes that relevant international human rights law, whether it has been incorporated into Canadian legislation or not, can be used in the interpretation of ambiguous or open-textured domestic legal provisions.⁶⁶ This interpretation reflects the explanation by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*:⁶⁷

[t]he values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. As stated in R. Sullivan, Driedger on the Construction of Statutes (3rd ed. 1994), at p. 330:

*[T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. **In so far as possible, therefore, interpretations that reflect these values and principles are preferred.** [Emphasis added by the Court.]*

The law sheet explains that Canada's international legal obligations play a dual role:

In the case of a treaty that Canada has ratified, there is a presumption of conformity, that is, a presumption that the governments, as law-makers, do not intend to violate their human rights obligations. However, the use of international law goes beyond the presumption of conformity. A range of international human rights law sources, beyond customary law and beyond the treaties that Canada has ratified, can serve as context to assist in interpreting domestic norms.⁶⁸

Canadian courts have applied international human rights norms to interpret the *Charter*, legislation, and the common law. Relevant international human rights have also been used to guide the exercise of administrative discretion. The Poverty and Human Rights Centre cites the following examples:⁶⁹

⁶⁵ The following numbered paragraphs summarize information in The Poverty and Human Rights Centre, *The Role of International Social and Economic Rights in the Interpretation of Domestic Law in Canada – Law Sheet*. (February 1, 2008). Online: <http://povertyandhumanrights.org/2008/02/the-role-of-international-social-and-economic-rights-in-the-interpretation-of-domestic-law-in-canada/> [hereinafter "Rights Law Sheet"].

⁶⁶ Stephen Toope, "Inside and Out: The Stories of International Law and Domestic Law" (2001) 50 U.N.B.L.J. 11 at 16.

⁶⁷ [1999] 2 S.C.R. 817 at para. 70, [hereinafter "*Baker v. Canada*"].

⁶⁸ *Ibid*, at p. 4.

⁶⁹ Rights Law Sheet, at 5-6.

1. *Charter Interpretation:*

- The *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents that Canada has ratified;⁷⁰
- International human rights law is a relevant and persuasive contextual source for the interpretation of the *Charter*, because ““they reflect the values and principles that underlie the *Charter* itself,”⁷¹ are “a critical influence on the interpretation of the scope of the rights included in the *Charter*;⁷² and “our *Charter* is the primary vehicle through which international human rights achieve a domestic effect;”⁷³
- In *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*,⁷⁴ the Supreme Court of Canada applied various sources of international human rights law as an interpretive tool, which supported recognizing a process of collective bargaining as part of the *Charter*’s guarantee of freedom of association.
- In *Mclvor v. The Registrar, Indian and Northern Affairs Canada*, the British Columbia Supreme Court found that sources of international human rights law provided support for the view that the s. 15 right to equality encompasses the right to be free from discrimination in respect of the law governing transmission of Indian status from a parent to a child.⁷⁵

2. *Statutory Interpretation:*

- The Supreme Court of Canada has held in several cases that international human rights law should inform the contextual interpretation of Canadian legislation⁷⁶ including aspects of the *Immigration Act* in *Baker* and in *Suresh v. Canada (Minister of Citizenship and Immigration)*⁷⁷ and whether the *Quebec Cities and Towns Act* extended to the regulation of

⁷⁰ *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at para. 56. See also: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1056.

⁷¹ *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 750.

⁷² *Baker v. Canada*, at para. 70-71.

⁷³ *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at para. 73 [hereinafter *Ewanchuk*].

⁷⁴ 2007 SCC 27.

⁷⁵ 2007 BCSC 827, at para. 183; aff’d in part 2009 BCCA 153; leave to appeal to SCC dismissed (SCCA No. 33201).

⁷⁶ See Stéphane Beaulac, “Recent Developments on the Role of International Law in Canadian Statutory Interpretation” (2004) *Statute Law Review* 25(1), 19–39.

⁷⁷ [2002]1 SCR 3.

pesticide use in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*.⁷⁸

3. **Common Law:**

- In *Ewanchuk*, Justice L'Heureux-Dubé referred to the *Convention on the Elimination of All Forms of Discrimination Against Women*, a General Recommendation of the CEDAW Committee on the interpretation of discrimination as it relates to violence against women, and the *Declaration on the Elimination of Violence against Women*. These international norms were invoked by Justice L'Heureux-Dubé, in support of the conclusion that common law defences to sexual assault should be circumscribed.

4. **Administrative Discretion:**

- In *Baker*, the majority of the Supreme Court of Canada held, having regard to international human rights law, that it is mandatory for an immigration officer, when exercising his or her discretion over whether to deport a mother to Jamaica, to take into account the "best interests of the child" as understood under the *Convention on the Rights of the Child*.

This brief overview of the role of international legal standards in the interpretation and administration of law in Canada sets the stage for exploring the ways in which Canada's international obligations to protect women from violence shapes the duty of police. These international norms are integrated into Canadian law in four ways:

- the obligation on police to uphold the *Charter* in carrying out their duties;
- the obligation on police to exercise their administrative discretion in conformity with international human rights law norms;
- in the interpretation and application of police statutes and regulations; and
- in the application of common law standards to police actions and failures to act.

Like all public officers and officials, police have the primary responsibility to uphold these norms in their day-to-day activities and by integrating them into policies and practices. Legislators can take steps to clarify these obligations by directly incorporating them into laws and regulations. Ultimately courts have the responsibility to review police actions, policies and related laws to ensure that they are consistent with these international norms.

⁷⁸ [2001] 2 SCR 241.

b. Canada's International Obligations to Protect Women from Violence and to Investigate Violence Against Women

Violence Against Women as a Human Rights Issue

Given the important role of international human rights law in Canada, it is crucial to understand the substantive content of Canada's obligations to protect women from violence and to investigate violence against women under international human rights law. These obligations arise initially from the general protections for equality and the right to life and security of the person under the basic framework for international protections: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Social, Economic and Cultural Rights.⁷⁹

Despite the existence of these general formal commitments toward equal enjoyment of human rights by women and men, it subsequently became apparent that this was insufficient to motivate substantive change in striving towards gender equality. Experience demonstrated that these generic human rights guarantees "failed to deal with discrimination against women in a comprehensive way".⁸⁰ Furthermore, the declarations and subsequent rights conventions did not adequately address the specific needs of women or identify the gender-specific mechanisms used to deny women their human rights, such as sexual violence and limits to reproductive rights.⁸¹ As a result of lobbying by the women's movement, as well as recognition from within the UN of the failure to achieve equal rights for both men and women, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was introduced on 18 December 1979.⁸² Canada became a signatory to CEDAW in 1980 and ratified it in 1981.

⁷⁹ *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171; *International Covenant on Social, Economic and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3

⁸⁰ UN Division for the Advancement of Women (2009). *Convention on the Elimination of All Forms of Discrimination Against Women: Short History of CEDAW* (New York: United Nations, 2009) at para. 5.

⁸¹ Bianca Fileborn, *Addressing sexual assault through human rights instruments* (Australian Institute of Family Studies – Australian Centre for the Study of Sexual Assault: ACSSA Aware No. 25, 2010).

⁸² *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249

The more specific and detailed protection offered under CEDAW has been interpreted and applied by numerous international bodies including the CEDAW Committee, the United Nations Rapporteur on Violence Against Women and through decisions by various UN bodies and regional human rights courts.⁸³

In General Recommendation No. 19 on violence against women, the CEDAW Committee defined violence against women (VAW) or gender-based violence (GBV) as “Violence that is directed at a woman because she is a woman or affects women disproportionately.”⁸⁴

*VAW is a form, a cause and a consequence of discrimination. It is not possible to understand fully the causes or consequences of VAW without looking at the discrimination and inequality that women face at home and in the community. VAW is the result of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of women’s full advancement.*⁸⁵

The relationship between VAW, inequality and discrimination is complex and mutually reinforcing. It can best be understood as a cycle of discrimination, inequality and violence. Because individual acts of VAW form part of a broader pattern of inequality and discrimination, they cannot be understood or effectively addressed in isolation: “The State must address the disadvantage and discrimination faced by women in all areas of life, including in education, health, employment and access to goods and services, in addition to addressing the needs of individual women to ensure that they obtain an appropriate remedy and support for the violence that they experience.”⁸⁶ Individual acts of VAW also occur within the context of other forms of discrimination and inequality. This means that VAW often cannot be understood in isolation from such additional factors as disability, race and ethnicity, language, age, sexual orientation and immigration status.⁸⁷

⁸³ For a thorough discussion of these principles see: Rights of Women (UK), *From Rights to Action: using International rights and mechanisms on violence against women in the UK*, (Rights of Women, 2011). [Hereinafter “Rights of Women”]

⁸⁴ UN Committee on the Elimination of Discrimination against Women (CEDAW Committee), General Recommendation No.19: Violence against women, at para 6.

⁸⁵ UN Declaration on the Elimination of Violence Against Women (DVAW), General Assembly resolution 48/104, UN Doc. A/RES/48/104, 20 December 1993, Preamble.

⁸⁶ Rights of Women, at p. 16.

⁸⁷ *Ibid.*

The content of international human rights policy on violence against women has been drawn together in three legal policy documents: the Vienna Declaration and Programme of Action,⁸⁸ the Declaration on the Elimination of Violence Against Women,⁸⁹ and the Beijing Platform for Action.⁹⁰ The obligations on states to take active measures to eliminate VAW was reiterated and reinforced in June 2010 in a resolution of the UN General Assembly.⁹¹

Regional human rights bodies have also adopted specific instruments setting out the obligations of their member states. For example, the Organization of American States has adopted the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (known as the Convention of Belém do Pará).⁹² Similarly the Organization of the African Union has adopted Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa⁹³ and more recently the European Council adopted the Convention on preventing and combatting violence against women and domestic violence.⁹⁴ These conventions complement the UN conventions and provide additional protection to women through regional human rights systems.

Special protections for Indigenous women are guaranteed under of the Declaration of Rights of Indigenous Peoples.⁹⁵ Article 22 (2) of the Declaration says that “States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.”

A United Nations International Expert Group is currently considering measures to combat violence against Indigenous women and girls.⁹⁶ As a paper prepared for this expert group notes, “Violence against indigenous women and girls is rarely

⁸⁸ A/CONF.157/23 (12 July 1993)

⁸⁹ A/RES/48/104 (20 December 1993)

⁹⁰ Beijing Declaration and Beijing Platform for Action (BPfA), adopted at the Fourth World Conference on Women, Beijing, China (15 September 1995).

⁹¹ *Accelerating efforts to elimination all forms of violence against women: ensuring due diligence in prevention*. UNGA A/HC/14/L.9/Rev.1 (16 June 2010).

⁹² (1995). Neither Canada nor the United States have signed or ratified this convention.

⁹³ Adopted by the African Union on 11 July 2003, entry into force 2005.

⁹⁴ CETS No. 210 (2011)

⁹⁵ *Declaration of the Rights of Indigenous Peoples*, 2 October 2007, A/RES/61/295.

⁹⁶ This expert group met in New York on January 18-20, 2012 and was to submit its report to the 11th meeting of the Permanent Forum on Indigenous Issues in May 2012.

understood as one of the most pervasive human rights abuses, rather it is seen as a 'social issue.'"⁹⁷ Two of the goals of the expert group's work are:

- Draw attention to the ongoing issues of jurisdiction and policing when dealing with violence and its impact on indigenous women and girls and other family and community members; and
- Identify options and further plans to build the necessary conditions for developing anti-violence strategies including empowering and strengthening indigenous peoples' organizations and governance systems and other capacity enhancement programs for indigenous women and girls.⁹⁸

The Native Women's Association of Canada [NWAC] also prepared a paper for consideration at this meeting. Among other things, NWAC identified a number of principles to guide governmental obligations with respect to violence against Aboriginal women and girls within a human rights framework.⁹⁹

Obligations to Respect, Protect, and Fulfill

Government duties under international human rights law are understood as a three-tiered obligation to respect, protect and fulfill human rights.¹⁰⁰

The obligation to **respect** requires States to refrain from interfering directly or indirectly with the enjoyment of human rights. This is often referred to as a negative obligation to not infringe on the rights of individuals. The duty to respect human rights in the context of VAW includes a duty on State actors such as the police or prison officials not to commit acts of VAW. It also includes an obligation to ensure that apparently gender-neutral laws and policies do not have an unintended and adverse impact on women. This might be, for example, a law or policy that only allows local authorities to spend money on projects that are for the benefit of both men and women. On the face of it, this might seem fair. However, such a law or

⁹⁷ Secretariat of the United Nations Permanent Forum on Indigenous Issues Division for Social Policy and Development, *Concept Note*, (2011) at para. 8.

⁹⁸ *Ibid*, at para. 30.

⁹⁹ Native Women's Association of Canada, *Small Steps on a Long Journey: Submission to the International Expert Group Meeting* (December 2011) at 7-8.

¹⁰⁰ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The right to the highest attainable standard of health, at para. 33.

policy would have an adverse impact on availability of funding for women-only services, such as women-only refuges for women fleeing domestic violence.¹⁰¹

The obligations to *protect* and *fulfill* are positive obligations because they require the State to be proactive and ensure that everyone enjoys their human rights. The obligation to *protect* means that the State does not only have to refrain from interfering with the enjoyment of human rights and protect individuals from human rights violations carried out by State actors, it must also take positive steps to protect individuals from interference of their human rights by non-State actors. Non-State actors might be individuals in society or the family, and they might also be private companies and organizations. This is very important when addressing VAW, because VAW is so often perpetrated by such individuals in the private sphere.

State obligations to protect women from VAW can be understood on two levels:

- Protecting individuals and groups of women from known threats or risk of violence; and
- Protecting women in society generally from violence.

Police have an important role to play in carrying out the government's duty to protect by, for example, taking reasonable steps to prevent a real and immediate threat of violence to an individual woman that the authorities are aware of, or ought to be aware of. This might require, for example the police to undertake special measures to protect an individual woman who is known to be at risk of violence and/or the civil courts to grant an injunction to protect her. The CEDAW Committee in its General Recommendation No. 19 on violence against women has outlined that protective measures also include the provision of refuges, counseling, rehabilitation and support services for women who are at risk or have experienced VAW.¹⁰²

Second, states have an obligation to prevent VAW in a more general way, in order to protect all potential victims of VAW. This requires states to adopt gender-sensitive law and policy to protect women from violence, including effective criminal law and civil law provisions and policies to deter potential perpetrators. State actors must also challenge social attitudes that condone or perpetuate VAW.

The obligation to protect human rights relates closely to the due diligence standard that is required of states when they protect women from violence committed by non-State actors and is discussed in the next section.

¹⁰¹ Rights of Women, at 18.

¹⁰² *Ibid.*

The obligation to fulfill means that states must take all steps available to them to promote, facilitate and, ensure to ensure that in practice, everyone enjoys their human rights including freedom from violence. This includes adopting appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realisation of human rights.¹⁰³ The obligation to fulfill means that states must make rights a reality, not just an aspiration or a legal commitment. For example, states must not only adopt gender-sensitive legislation and policy but also periodically review and monitor it to ensure that it is implemented in a non-discriminatory manner and does not place women at a disadvantage.

The obligation to fulfill also requires that every individual has access to effective remedies if their rights have been violated.¹⁰⁴ For example, a woman experiencing violence from an intimate partner or family member might need the state to provide alternative housing and shelter. The obligation to provide could also require the state to ensure access to legal aid where a woman experiencing violence is unable to pay for legal representation. The CEDAW Committee's first decision on a complaint against Canada under the Optional Protocol makes an important connection between male violence, loss of housing and inadequate legal aid.¹⁰⁵ The successful complaint was brought by Cecilia Kell, an Aboriginal woman of the Rae-Edzo community in the Northwest Territories.

The Due Diligence Standard

One of the central features of the evolution of international norms to address violence against women is the refinement of the due diligence standard. The term due diligence broadly means due 'care' or 'attention'. Under international law, the due diligence standard refers to the standard of care required of states to prevent, investigate, punish and provide remedies for acts of violence regardless of whether these are committed by state or non-state actors.¹⁰⁶ The due diligence standard in this context has been defined in this way:

¹⁰³ *Ibid*, at p. 42.

¹⁰⁴ *Ibid*, at p. 48.

¹⁰⁵ On this point see the recent decision of the CEDAW Committee on Canada in the case of Cecilia Kell, an Aboriginal woman: Communication No. 19/2008 (CEDAW/C/51/D/19/2008) (26 April 2012).

¹⁰⁶ Article 4 (c) and (d) of the UN Declaration on Elimination of Violence against Women require States to "exercise due diligence to prevent, investigate and in accordance with national legislation punish acts of violence against women whether those actions are perpetrated by the State or private persons."

The due diligence standard

The positive obligations of States under general international law described above mean that States can be held responsible for acts of violence perpetrated by private persons or entities (such as private companies) if they fail to act with due diligence to prevent, punish, investigate and redress harm caused by private persons or entities. This does not mean that every act of VAW committed by a non-State actor is a human rights violation that the State can be held responsible for. Rather it means that if the State does not act with due diligence to prevent and respond to all forms of VAW perpetrated by non-State actors, it can be held responsible for that violence under international law.

Whilst the due diligence standard applies to State obligations in relation to all human rights, it has been developed as a particularly useful tool to identify the specific obligations of States to prevent and respond to VAW.

When this standard is considered in light of the principles of equality and non-discrimination, it requires States to employ all means to ensure that efforts to prevent, investigate, punish and provide remedies for VAW are as effective as the efforts employed with regards to other forms of violence. This means that the law, policies and their implementation must be gender-sensitive and respond to VAW within a wider context of gender inequality.¹⁰⁷

The due diligence standard can be described as an obligation of *means* rather than *result*.¹⁰⁸ As long as the state has exercised the “due diligence” required to protect women from these acts of violence, it will have met its obligations, even if the act of violence occurred despite its efforts. In other words, state responsibility will not necessarily arise as a result of the commission of the acts of violence themselves, but from the lack of due diligence to prevent these acts or to respond to them adequately.¹⁰⁹

Our understanding of the due diligence standard in international law continues to evolve. Recent international developments such as the adoption of the *Updated Model Strategies and Practical Measures to Eliminate Violence Against Women in the Field of Crime Prevention and Criminal Justice*¹¹⁰ and the 2006 Report of the Special

¹⁰⁷ Rights of Women, at 20.

¹⁰⁸ See *Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).

¹⁰⁹ *Ibid.*, at para. 172.

¹¹⁰ Adopted by the UN General Assembly in March 2011 (A/Res/65/228).

Rapporteur on Violence Against Women¹¹¹ serve to give additional content to the due diligence standard. The current Special Rapporteur on Violence Against Women, Ms. Rashida Manjoo, is in the process of consulting for her 2013 report on “state responsibility for eliminating violence against women which focuses on the implementation of the due diligence standard.”¹¹²

c. International Jurisprudence

The standard of due diligence has been considered and applied by numerous courts as a practical tool allowing them to assess whether the state has met its human rights obligations to protect women from violence committed by both private and state actors. An overview of this international jurisprudence is set out in this section, which includes decisions of the CEDAW Committee, the Inter-American Court of Human Rights (and the Inter-American Commission of Human Rights); and the European Court of Human Rights. It also reviews recent decisions of the courts of England and Wales in applying this international jurisprudence. The cases selected focus on the obligation of state authorities and particularly the police in preventing violence against women and duty to investigate these crimes effectively.

The primary role of the police was recognized by the Constitutional Court of South Africa in *F v. Minister of Safety and Security and Another*.¹¹³ This case dealt with the issue of whether the state was vicariously liable for rape committed by police officers. The Court made these poignant remarks about the state’s constitutional obligations to protect women and girls from rape, and the police’s crucial role in this regard:

Many men of our society, not unlike the policeman who raped Ms F, continue to force themselves on women and on girl-children. Often, with impunity, men forcibly violate women’s bodies, privacy, dignity and self-worth, freedom, and the right to be treated with equal regard. In short, rape of women and children violates a cluster of interlinked fundamental rights treasured by our Constitution.

The threat of sexual violence to women is indeed as pernicious as sexual

¹¹¹Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women – The Due Diligence Standard as a Tool for the Elimination of Violence Against Women*. E/CN.4/2006/61 (20 January 2006).

¹¹² Online: <http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/VAW.aspx>.

¹¹³ *F v. Minister of Safety and Security and Another* (CCT 30/11) [2011] ZACC 37.

violence itself. It is said to go to the very core of the subordination of women in society. It entrenches patriarchy as it imperils the freedom and self-determination of women. It is deeply sad and unacceptable that few of our women or girls dare to venture into public spaces alone, especially when it is dark and deserted. If official crime statistics are anything to go by, incidents of sexual violence against women occur with alarming regularity. This is so despite the fact that our Constitution, national legislation, formations of civil society and communities across our country have all set their faces firmly against this horrendous invasion and indignity imposed on our women and girl-children.

It follows without more that the state, through its foremost agency against crime, the police service, bears the primary responsibility to protect women and children against this prevalent plague of violent crimes...

*These are rights the state is under a constitutional obligation to respect, protect, promote and fulfill. As stated, a vital mechanism through which this is to be done is the police service....*¹¹⁴ [emphasis added]

In its first substantive decision, the *Velásquez Rodríguez* case,¹¹⁵ the Inter-American Court of Human Rights [IACHR] broke new ground in international law by laying out the responsibility a state incurs when it has not adequately investigated the actions of non-state actors. This case dealt with the countless disappearances in the early 1980s in Honduras. The Court began by clarifying that Article 1 of the Convention requires that “the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.”¹¹⁶ Of particular note is the requirement to provide an adequate investigation. The Court argued, “[w]here the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.”¹¹⁷

The Court acknowledged that just because a case is not resolved does not mean that the investigation is inadequate. But, even though Honduras’ formal procedures for

¹¹⁴ *Ibid*, at para. 53-61.

¹¹⁵ See *Velasquez Rodriguez* Case, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).

¹¹⁶ *Ibid*, at para. 166.

¹¹⁷ *Ibid*, at para. 177.

investigating such cases were “theoretically adequate”¹¹⁸ in this case, serious questions existed about the effectiveness of the investigation. For instance, judges failed to issue writs to further the investigation. There was no investigation into the overall practice of disappearances and whether the specific case fit into that larger pattern. Also, the legal system often required the victims’ families to provide evidence that should have been gathered by the competent authorities.

The ten cases discussed in this section can all be seen contributing to the development of our understanding of the state’s obligations regarding the prevention of violence against women and refining the duty to investigate these crimes first recognized in *Velásquez Rodríguez*.

Goekce v. Austria

This case was brought to the CEDAW Committee via a communication from the Vienna Centre against Domestic Violence and the Association for Women’s Access to Justice, two organizations in Austria that support women victims of gender-based violence. They claimed that Şahide Goekce [deceased], an Austrian national of Turkish origin and former client of the Vienna Centre, was a victim of continued domestic violence and was eventually shot by her husband, Mustafa Goekce, in front of her children. Prior to her death, it was known to the police that her husband owned a gun and had threatened to kill her on several occasions. Two requests that he be detained were denied by the police. On 5 December 2002, the Vienna Public Prosecutor had stopped the prosecution of Mustafa Goekce for causing bodily harm and making a criminal dangerous threat on grounds that there were insufficient reasons to prosecute him.

In *Goekce v. Austria*,¹¹⁹ the CEDAW Committee found a lack of due diligence based on the police’s failure to take the applicant’s repeated calls for help seriously by responding promptly.

Austria had argued that Şahide Goekce could not be guaranteed effective protection because she had not been prepared to cooperate with the Austrian authorities. In light of the information available to the public authorities, any further interference by the State in the fundamental rights and freedoms of Mustafa Goekce would not have been permissible under the Constitution.¹²⁰ Austria further asserted that its

¹¹⁸ *Ibid*, at para. 178.

¹¹⁹ *Goekce v. Austria* CEDAW/C/39/D2005, 5 August 2007 [hereinafter “*Goekce*”].

¹²⁰ *Ibid*, at para. 8.19.

system of comprehensive measures¹²¹ aimed at combating domestic violence does not discriminate against women and the allegations to the contrary are unsubstantiated. Decisions, which appear to be inappropriate in retrospect (when more comprehensive information is available) are not discriminatory in and of themselves (*eo ipso*). Austria maintained that it complies with its obligations under the Convention concerning legislation and implementation and that there had been no discrimination against Şahide Goekce as a woman.¹²²

The CEDAW Committee rejected these arguments:

The Committee notes that the State party has established a comprehensive model to address domestic violence that includes legislation, criminal and civil-law remedies, awareness-raising, education and training, shelters, counselling for victims of violence and work with perpetrators. However, in order for the individual woman victim of domestic violence to 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.¹²³

No police officer went to her home following the last call she made hours before she was ultimately shot and killed by her batterer.¹²⁴ The Committee found that given the combination of factors, the police knew or ought to have known that Şahide Goekce was in serious danger, in particular because Mustafa Goekce has shown that he had the potential to be a very dangerous and violent criminal. The police were therefore accountable for failing to exercise due diligence to protect Şahide Goekce:

The Committee considers that given this combination of factors, the police knew or should have known that Şahide Goekce was in serious danger; they should have treated the last call from her as an emergency, in particular because Mustafa Goekce had shown that he had the potential to be a very dangerous and violent criminal. The Committee considers that in light of the long record of earlier disturbances and battering, by not responding to the call

¹²¹ To illustrate the effectiveness of the measures, which are applied, the State party submits the statistics on prohibition orders to enter the common home and other legal measures.

¹²² *Goekce*, at para. 8.20.

¹²³ *Ibid*, at para. 12.1.2

¹²⁴ *Ibid*, at para. 12.1.4.

*immediately, the police are accountable for failing to exercise due diligence to protect Şahide Goekce.*¹²⁵

The Committee made the following recommendations to Austria:

- (a) *Strengthen implementation and monitoring of the Federal Act for the Protection against Violence within the Family and related criminal law, by acting with due diligence to prevent and respond to such violence against women and adequately providing for sanctions for the failure to do so;*
- (b) *Vigilantly and in a speedy manner prosecute perpetrators of domestic violence in order to convey to offenders and the public that society condemns domestic violence as well as ensure that criminal and civil remedies are utilized in cases where the perpetrator in a domestic violence situation poses a dangerous threat to the victim; and also ensure that in all action taken to protect women from violence, due consideration is given to the safety of women, emphasizing that the perpetrator's rights cannot supersede women's human rights to life and to physical and mental integrity;*
- (c) *Ensure enhanced coordination among law enforcement and judicial officers and also ensure that all levels of the criminal justice system (police, public prosecutors, judges) routinely cooperate with non-governmental organizations that work to protect and support women victims of gender-based violence;*
- (d) *Strengthen training programmes and education on domestic violence for judges, lawyers and law enforcement officials, including on the Convention on the Elimination of All Forms of Discrimination against Women, general recommendation 19 of the Committee, and the Optional Protocol thereto.*¹²⁶

CEDAW Report on Mexico

Throughout the 1990s and early 2000s, the Mexican city of Ciudad Juárez bore witness to the widespread, systematic abduction and eventual murder of an estimated 400 women. Approximately one-third of these women were also believed to have been sexually assaulted or raped prior to death, although due to poor

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*, at para. 12.3.

criminal and forensic investigation, it is likely that these numbers are even higher.¹²⁷ Some 4,500 women “disappeared” during this time, with their whereabouts or fates unknown.¹²⁸

The murder rates in Juárez are anomalous in two important respects. While more men than women were killed throughout the 1990s, one study showed that the number of women killed was increasing at twice the rate as for men.¹²⁹ The difference is that young men are usually killed over drug deals or due to their gang affiliation, while women are the victims of hate crimes resulting from gender bias.¹³⁰

Further, the homicide rate for women in Juárez greatly exceeded the Mexican national average and the rates in other border cities. For example, one study showed that the homicide rate for women in Juárez was more than three times as great as that in Tijuana, a border city of comparable size.¹³¹

Ciudad Juarez is known for its organized crime and corruption within the law enforcement system. These heinous crimes against women took place in an environment of impunity, with the police and criminal justice system failing to investigate, charge or punish perpetrators. The investigations that did take place

¹²⁷ Convention 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*, 27 January 2005, CEDAW/C/2005/OP.8/MEXICO [hereinafter “UN CEDAW, 2005”].

¹²⁸ The number of missing women given in the November 2003 National Human Rights Commission report was 4,587. Comisión para prevenir y erradicar la violencia contra las mujeres en Ciudad Juárez, Secretaría de Gobernación, *Informe de gestión, noviembre 2003– abril de 2004*, México, SEGOB, 2004, 67 p., Anexos, at 28. The Mexican government claims that this number reflects the number of reports of missing women, rather than the actual number of women “disappeared” (UN CEDAW, 2005, at 52).

¹²⁹ Inter-American Commission on Human Rights, *The Situation of the Rights of Women in Ciudad Juárez Mexico: The Right to Be Free from Violence and Discrimination*, OEA/Ser.L/V/II.117, doc. 44 (March 7, 2003) at para. 42 [hereinafter Inter-American Commission Report].

¹³⁰ Mariclaire Acosta Urquidi, *The Women of Ciudad Juárez* (Berkeley: Centre for Latin American Studies, University of California, May 2005), at 6 [hereinafter “Urquidi”].

¹³¹ Inter-American Commission Report, at para. 42 n.9.

were frequently mismanaged, and there has been extreme skepticism about the integrity of the few convictions that have been achieved.¹³²

*When the first cases of slaughtered women appeared, they were dismissed by the local authorities and never investigated seriously. It took years of mobilization and denouncement on the part of women's groups and the relatives of the victims for the word to reach other parts of Mexico. Even when the facts became known, very little was done about them, even at the national level. It was considered a local problem in a far away place where horrible things happened all the time.*¹³³

The police investigation of the cases of missing and murdered women in Ciudad Juarez has been found to violate women's right to equality in several legal proceedings. The Inquiry established under the Optional Protocol to the *Convention on the Elimination of All Forms of Discrimination Against Women* to review these investigations concluded that there had been grave and systemic violation of women's rights.¹³⁴ The Inquiry Procedure is considered to be effective in that:

- It allows investigation of substantial women's human rights abuses by an international body of experts;
- It is effective where individual communications (complaints) fail to reflect the systemic nature of widespread violations of women's rights;
- It allows widespread violations to be investigated where individuals or groups may be unable to submit communications due to practical reasons or because of fear of reprisals;
- It provides the CEDAW Committee an opportunity to make recommendations regarding the structural causes of violations; and
- It allows the CEDAW Committee to address a broad range of issues in the country.¹³⁵

The CEDAW Committee determined the following issues were relevant to the case:

- Rapid social change (initiated by rapid population and economic growth) had not been "accompanied by a change in traditionally patriarchal attitudes."

¹³² William Paul Simmons, "Remedies for the Women of Ciudad Juárez through the Inter-American Court of Human Rights" 4 Nw. U. J. Int'l Hum. Rts. 492

¹³³ Urquidi, *supra*, at p.7.

¹³⁴ UN CEDAW, 2005.

¹³⁵ C. Padilla, *A Primer on the Inquiry Procedure under the OP CEDAW* (EnGendeRights Inc., 2010).

- This had led to a culture of impunity, creating an atmosphere in which violations of human rights may occur. As a result, violence against women became prevalent, and intensified between 1993 and 2003.
- There was a failure of government and criminal justice agencies to adequately investigate and punish offenders. Investigations were often severely inadequate—marked by failures to collect relevant (and crucial) evidence, accurately identify victims, and significant delays in initiating an investigation and processing cases.
- There was a failure to recognise the structurally and culturally embedded nature of the offences—that they were not isolated incidents, but were instead the result of an ingrained culture that was supportive of violence against women.

While the Mexican government did implement policy and legislation prior to the Inquiry Procedure in an attempt to address these crimes, the CEDAW Committee held these official measures to be ineffective and insufficient, as they did not result in any marked improvement in the levels of violence against women. As the Committee report on Mexico noted:

*The policies adopted and the measures taken since 1993 in the areas of prevention, investigation and punishment of crimes of violence against women have been ineffective and have fostered a climate of impunity and lack of confidence in the justice system which are incompatible with the duties of the State.*¹³⁶

Furthermore, these policy changes failed to recognize the gendered (and socially embedded) nature of these crimes, and resorted to victim blaming and stereotyping rather than attempting to institute real social change. This indicates that policy and legislative changes alone cannot be viewed as being sufficient for fulfilling a state's obligations under CEDAW.

The CEDAW Committee detailed the many problems with the investigation of the disappeared and murdered young women.¹³⁷ These facts are discussed below in the context of the decision of the Inter-American Court of Human Rights.

The CEDAW committee has since worked closely with the Mexican government to ensure that effective and appropriate changes are made to their policies and legislation. Some of the initiatives introduced or pending (at time of the 2005 report) include:

¹³⁶ UN CEDAW 2005, *supra*, at 14.

¹³⁷ *Ibid*, at 14-27.

- establishing programs to combat trafficking in women and prostitution;
- establishing domestic violence shelters;
- establishing support and legal assistance for relatives of victims; and
- introducing public awareness and information campaigns on violence.¹³⁸

Many of these initiatives appear to represent positive developments; however, as the CEDAW committee noted, it was too early to determine whether these efforts have been effective in promoting actual change to levels of gender-based violence.¹³⁹

The murder and abduction of women and girls in Ciudad Juárez continued after the CEDAW Inquiry reported. At least 35 women were reportedly abducted in 2009 and their whereabouts remained unknown at the end of that year. The state government published a report on advances in the prevention and punishment of the murder of women, but failed to provide a full account of all alleged cases.

The Cotton Field Case (Campo Algodonero)

The CEDAW Inquiry was followed by litigation under the American Convention on Human Rights and the Convention of Belém do Pará. In November 2009, the Inter-American Court of Human Rights [IACHR] ruled in *Gonzalez et al. v. Mexico*, better known as the “Cotton Field” (Campo Algodonero) case, that Mexico was guilty of discrimination and of failing to protect three young women murdered in 2001 in Ciudad Juárez or to ensure an effective investigation into their abduction and murder.¹⁴⁰ The bodies of eight women were found in a cotton field outside of Ciudad Juarez. This case was brought forward on behalf of three of the victims: Laura Berenice Romas Monarrez, Claudia Ivette Gonzalez and Esmeralda Herrera Monreal. They were 17, 20 and 15 respectively. The Inter-American Commission on Human Rights [the Commission] and the Representatives of the murdered women alleged that since 1993 the number of disappearances and murders of women and girls in Ciudad Juarez has increased significantly.

In its pleadings, Mexico made partial acknowledgment of responsibility – it recognized irregularities in the first stage of investigations and acknowledged that this affected the mental integrity and dignity of the next of kin of the murdered women. But it denied that the right to life, human treatment, to dignity and to

¹³⁸ *Ibid*, at 31.

¹³⁹ *Ibid*, at 33.

¹⁴⁰ Inter-American Court of Human Rights, *Gonzalez et al. (“Cotton Field”) v. Mexico*, Judgment of November 16, 2009 (*Preliminary Objection, Merits, Reparations, and Costs*) [hereinafter “Cotton Field Case”].

personal liberty of the victims was violated as the State did not take part in the murders.

The IACHR found that Mexico had failed to adequately guarantee the life and physical integrity of women in Ciudad Juarez in the context of systematic violence based on gender, social condition and age. The Court found that the absolute lack of justice was itself sex discrimination. The decision was founded on the following findings of facts:

- Irregularities in the investigations and proceedings including delays in starting investigations
 - It was not uncommon for police to tell a family member attempting to report a girl missing that they should return in 48 hours, when it was clear there might have been something to investigate
 - The authorities often dismissed initial complaints saying the victim was probably out with a boyfriend and would return home soon
- Slowness of the investigations or absence of activity in case files;
- Negligence and irregularities in gathering evidence, conducting examinations and identifying victims;¹⁴¹
- Failure to search for the victims before their bodies were found.
 - The Court found that the only measures taken before the remains were found were registering the disappearances and preparing the posters reporting them, taking statements and sending an official letter to the Judicial Police. There was no evidence that the authorities circulated posters or made extensive inquiries into reasonably relevant facts provided by the 20 or more statements taken.¹⁴²
- Great lack of sensitivity on the part of police and prosecutors especially at the beginning of the cases, including blaming the women-victims for “low moral standards.”¹⁴³

¹⁴¹ The Court relied on the United Nations Manual on Effective Prevention and Investigation of Extralegal, Arbitrary and summary executions to extract the international standards regarding crime scene investigation and identified the following irregularities: (i) the failure to identify with precision the circumstances of the discovery of the bodies; (ii) negligible rigor in the inspection and preservation of the crime scene by the authorities; (iii) the improper handling of some of the evidence collected, and (iv) the methods used were inadequate to preserve the chain of custody. (See Cotton Field Case, at para. 301, 305)

¹⁴² Cotton Field Case, at para 194.

¹⁴³ The Court noted that police officers made light of the problem and even blamed the victims for their fate based on the way they were dressed, the place they

- There was also a lack of technical and scientific capacity and training at the time for members of the judicial police. For instance, in 25 cases dating back to the first years of the killings, the “files” consisted of little more than bags containing sets of bones, which provided virtually no basis to pursue further investigation.
- There was also a pattern of discriminatory attitude of the authorities.
 - The authorities had stereotyped conceptions of the missing women; the search/protection of missing women was not deemed to be important.
 - The Court found that gender-based discrimination did have an impact on how the state officials responded to crimes. The officials blamed the victims suggesting the way they dressed or where they worked, or their behaviour was to blame.¹⁴⁴
 - The Court adopted the finding of the UN Rapporteur, “[T]he arrogant behavior and obvious indifference shown by some state officials [...] leave the impression that many of the crimes were deliberately never investigated for the sole reason that the victims were ‘only’ young girls with no particular social status and who therefore were regarded as expendable. It is to be feared that a lot of valuable time and information may have been lost because of the delays and irregularities.”¹⁴⁵

One factor that the Commission and Representatives said characterize these murders is the failure to investigate which gave rise to a climate of impunity.¹⁴⁶

The IACHR concluded that the young women’s murders were clearly examples of gender-based violence. The question to be answered was whether this violence could be attributed to the State.¹⁴⁷ Pursuant to CEDAW, “States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”¹⁴⁸ The Court acknowledged that not every human rights violation by a private individual comes under its jurisdiction: the State’s obligation under the Convention does not imply unlimited responsibility. In this case, the Court examined

worked, their behaviour, the fact that they were out alone or their lack of parental care.

¹⁴⁴ Cotton Field Case, at paras. 153-54; 206-09.

¹⁴⁵ *Ibid*, at para. 147.

¹⁴⁶ *Ibid*, at para. 146.

¹⁴⁷ *Ibid*, at para. 231.

¹⁴⁸ *Ibid*, at para. 268.

two crucial time frames in considering Mexico's liability: (1) prior to the disappearances, and (2) before the discovery of the bodies.

With respect to before the disappearances, the IACHR concluded that the failure to prevent the disappearance does not per se result in the State's international responsibility:

...it has not been established that it knew of a real and imminent danger for the victims in this case. Even though the context of this case and the State's international obligations impose on it a greater responsibility with regard to the protection of women in Ciudad Juárez, who are in a vulnerable situation, particularly young women from humble backgrounds, these factors do not impose unlimited responsibility for any unlawful act against such women. Moreover, the Court can only note that the absence of a general policy which could have been initiated at least in 1998 – when the CNDH [National Human Rights Commission of Mexico] 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.¹⁴⁹

The situation changed in the second time period before the discovery of the bodies. The Court found that, at this point, the State was aware of the real and imminent risk that the victims would be sexually abused, subject to ill-treatment and killed. The obligation of strict due diligence with respect to missing women arises with respect to the first hours and days. It requires exhaustive searches, and prompt and immediate action, and Mexico did not adopt reasonable measures.¹⁵⁰

The IACHR found that there had been a breach of the obligation to investigate fully and effectively pursuant to the following definition of the duty to investigate:

The duty to investigate is an obligation of means and not of results, which must be assumed by the State as an inherent legal obligation and not as a mere formality preordained to be ineffective. The State's obligation to investigate must be complied with diligently in order to avoid impunity and the repetition of this type of act. In this regard, the Tribunal recalls that impunity encourages the repetition of human rights violations. In light of this obligation, as soon as State authorities are aware of the fact, they should initiate, ex officio and without delay, a serious, impartial and effective investigation using all available legal means, aimed at determining the truth and the pursuit, capture,

¹⁴⁹ *Ibid*, at para. 284.

¹⁵⁰ *Ibid*, at paras. 283-86.

*prosecution and eventual punishment of all the perpetrators of the facts, especially when public officials are or may be involved.*¹⁵¹

The Court concluded:

*The irregularities in the handling of evidence, the alleged fabrication of guilty parties, the delay in the investigations, the absence of lines of inquiry that took into account the context of violence against women in which the three women were killed, and the inexistence of investigations against public officials for alleged serious negligence, violate the right of access to justice and to effective judicial protection, and the right of the next of kin and of society to know the truth about what happened. In addition, it reveals that the State has failed to comply with ensuring the rights to life, personal integrity and personal liberty of the three victims by conducting a conscientious and competent investigation. The foregoing allows the Court to conclude that impunity exists in the instant case and that the measures of domestic law adopted have been insufficient to deal with the serious human rights violations that occurred. The State did not prove that it had adopted the necessary norms or implemented the required measures, in accordance with Article 2 of the American Convention and Article 7(c) of the Convention of Belém do Pará, that would have permitted the authorities to conduct an investigation with due diligence. This judicial ineffectiveness when dealing with individual cases of violence against women encourages an environment of impunity that facilitates and promotes the repetition of acts of violence in general and sends a message that violence against women is tolerated and accepted as part of daily life.*¹⁵²

The Court further concluded that these failures could be attributed in part to sex discrimination and violated the right to equality:¹⁵³

- The fact that the murders of women in Ciudad Juárez were not perceived at the outset as a significant problem requiring immediate and forceful action on the part of the relevant authorities;¹⁵⁴
- A culture of discrimination against women was “based on the erroneous idea that women are inferior”;¹⁵⁵ and

¹⁵¹ *Ibid*, at paras. 289-90.

¹⁵² *Ibid*, at para. 388-389.

¹⁵³ *Ibid*, at para. 402.

¹⁵⁴ *Ibid*, at para. 398-90.

¹⁵⁵ *Ibid*.

- Stereotyping of the victims and inaction at the start of the investigation constitutes discrimination in its own right but also perpetuates violence through giving impunity to the perpetrators.¹⁵⁶

Another aspect of the equality issues in this case was the failure of the State to adopt “all the positive measures necessary to ensure the rights of the disappeared girls” because the State was aware of the existence of a specific context in which girls were being disappeared.”¹⁵⁷

The Court also found that the personal rights of the Representatives were violated including their rights to human treatment of the victims’ next of kin¹⁵⁸ and threats, intimidation and harassment suffered by the next of kin.¹⁵⁹

The Court made a wide-ranging remedial order pursuant to its broad powers for reparations. The Court ordered a new investigation, reparations for the relatives, investigations of officials and improved measures to prevent and investigate cases of abduction and murder of women and girls. The order contains several notable features:

- The order for an effective investigation included the requirement that, “The investigation shall include a gender perspective; undertake specific lines of inquiry concerning sexual assault, which must involve lines of inquiry into the corresponding patterns in the area; be conducted in accordance with protocols and manuals that comply with the directives set out in this judgment; provide the victims’ next of kin with information on progress in the investigation regularly, and give them full access to the case files, and the investigation shall be carried out by officials who are highly trained in similar cases and in dealing with victims of discrimination and gender-based violence”;
- Measures of satisfaction and guarantees of non-repetition include: publication of this judgment; public act to acknowledge international responsibility; commemoration of the victims of gender-based murder; national day in memory of the victims;
- Development of a comprehensive, coordinated and long-term policy to ensure that cases of violence against women are prevented and investigated, those responsible prosecuted and punished, and reparation made to the victims;

¹⁵⁶ *Ibid*, at para. 400-01.

¹⁵⁷ *Ibid*, at para. 409.

¹⁵⁸ *Ibid*, at para. 424.

¹⁵⁹ *Ibid*, at para. 440.

- Implementation of a program to look for and find disappeared women in the State of Chihuahua;
- The Court ordered the creation of a national database. It called for the creation of a database of disappeared women and girls at the national level, and updating and comparing the genetic information from the relatives of missing persons with that of unidentified bodies is the possibility that the bodies of some of the women or girls found in Chihuahua belong to individuals who disappeared in other states of the Federation, and even in other countries;
- Standardization of protocols, federal investigation criteria, expert services and provision of justice to combat the disappearances and murders of women and the different types of violence against women;
- Training with a gender perspective for public officials (geared toward police, prosecutors, judges, military officials, public servants) as well as programs for the general public on (i) human rights and gender; (ii) a gender perspective for due diligence in conducting preliminary investigations and judicial proceedings in relation to the discrimination, abuse and murder of women based on their gender, and (iii) elimination of stereotypes of women's role in society.”¹⁶⁰

Interestingly, the Court denied the request for a prohibition for any official to discriminate based on gender. The parties had requested the express prohibition, under pain of punishment, for any current or future official within the three levels of government to make a denigrating statement or to act disparagingly or to minimize violations of the rights of women, in particular to deny or to play down the existence of violence against women in the context of gender-based murders in Ciudad Juárez.¹⁶¹ The Court denied this reparation stating, “The representatives did not submit arguments about the possible lacunae and deficiencies in this type of laws, programs and actions; consequently, the Tribunal does possess any elements on which it can rule with regard to this request.”¹⁶²

María da Penha Maia Fernandes v. Brazil

In May 1983, biopharmaceutist Maria da Penha Fernandes was fast asleep when her husband shot her, leaving her a paraplegic for life. Two weeks after her return from the hospital, he tried to electrocute her. The investigation was not commenced until eight years after the shooting and the case languished in court for two decades,

¹⁶⁰ *Ibid*, at para. 541.

¹⁶¹ *Ibid*, at para. 521.

¹⁶² *Ibid*, at para. 525.

while Maria da Penha's husband remained free. Years later, in a landmark ruling, *María da Penha Maia Fernandes v. Brazil*,¹⁶³ the Inter-American Commission on Human Rights [IAComHR] criticized the Brazilian government for not taking effective measures to prosecute and convict perpetrators of domestic violence.

The IAComHR held that the State had demonstrated a pattern of condoning domestic violence through ineffective judicial action. In the context of the facts of the specific case, this lack of due diligence was evidenced by the police's failure to prosecute and convict until after her batterer had shot her, despite the availability of ample evidence to do so before it culminated to this point.¹⁶⁴

The court emphasized that the duty of due diligence does not only impose obligations on the State to respond adequately *after* the act of violence has taken place, but includes a duty to take measures to *prevent* these acts from taking place in the first place. Although the perpetrator was eventually prosecuted to the full extent of the law after the shootings, this had no bearing on the court's finding that they had nonetheless failed to meet their duty of due diligence by taking adequate measures before the fact.¹⁶⁵

The IAComHR concluded that the facts of Maria de Penha's case were not isolated, but rather were one example of a systemic pattern of failure to meet international legal obligations:

*The impunity that the ex-husband of Mrs. Fernandes has enjoyed and continues to enjoy is at odds with the international commitment voluntarily assumed by the State when it ratified the Convention of Belém do Pará. The failure to prosecute and convict the perpetrator under these circumstances is an indication that the State condones the violence suffered by Maria da Penha, and this failure by the Brazilian courts to take action is exacerbating the direct consequences of the aggression by her ex-husband. 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.*¹⁶⁶

¹⁶³ *Maria da Penha Maia Fernandes v. Brazil*, Case 12.051, Inter-Am. C.H.R., Report No. 54/01, OEA/Ser.L/V/II.111, doc. 20, rev. 16 (2000) [hereinafter "*Maria da Penha*".]

¹⁶⁴ *Ibid*, at para. 55.

¹⁶⁵ See also: *Goekce*, *supra*, para. 12.1.6.

¹⁶⁶ *María da Penha*, *supra*, at para. 55.

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.¹⁶⁷

In *María da Penha*, the IAComHR took the Brazilian State's failure to prosecute and convict the perpetrator in that case, together with findings of a general pattern in inadequate action in other cases, as an indication that the State in effect condoned violence against women. It held that this condoning only served to perpetuate this violence against women "since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts."¹⁶⁸ The Commission held that the pattern of ineffective judicial action in domestic violence cases constituted a form of discrimination against women.

In the result, the IAComHR delivered a broad set of recommendations to Brazil so that it could meet its obligations under international human rights law:

VIII. RECOMMENDATIONS

61. *Based on the foregoing analysis and conclusions, the Inter-American Commission on Human Rights recommends once more that the Brazilian State:*

1. *Complete, rapidly and effectively, criminal proceedings against the person responsible for the assault and attempted murder of Mrs. Maria da Penha Fernandes Maia.*

2. *In addition, conduct a serious, impartial, and exhaustive investigation to determine responsibility for the irregularities or unwarranted delays that prevented rapid and effective prosecution of the perpetrator, and implement the appropriate administrative, legislative, and judicial measures.*

¹⁶⁷ *Ibid*, at para. 56.

¹⁶⁸ *Ibid*.

3. *Adopt, without prejudice to possible civil proceedings against the perpetrator, the measures necessary for the State to grant the victim appropriate symbolic and actual compensation for the violence established herein, in particular for its failure to provide rapid and effective remedies, for the impunity that has surrounded the case for more than 15 years, and for making it impossible, as a result of that delay, to institute timely proceedings for redress and compensation in the civil sphere.*

4. *Continue and expand the reform process that will put an end to the condoning by the State of domestic violence against women in Brazil and discrimination in the handling thereof. In particular, the Commission recommends:*

a. *Measures to train and raise the awareness of officials of the judiciary and specialized police so that they may understand the importance of not condoning domestic violence.*

b. *The simplification of criminal judicial proceedings so that the time taken for proceedings can be reduced, without affecting the rights and guarantees related to due process.*

c. *The establishment of mechanisms that serve as alternatives to judicial mechanisms, which resolve domestic conflict in a prompt and effective manner and create awareness regarding its serious nature and associated criminal consequences.*

d. *An increase in the number of special police stations to address the rights of women and to provide them with the special resources needed for the effective processing and investigation of all complaints related to domestic violence, as well as resources and assistance from the Office of the Public Prosecutor in preparing their judicial reports.*

e. *The inclusion in teaching curriculums of units aimed at providing an understanding of the importance of respecting women and their rights recognized in the Convention of Belém do Pará, as well as the handling of domestic conflict.¹⁶⁹*

¹⁶⁹ *Ibid*, at para. 60.

In response to this decision, the Brazilian government in 2006 enacted a law under the symbolic name “Maria da Penha Law on Domestic and Family Violence.”¹⁷⁰ The Maria da Penha Act establishes special courts and stricter sentences for offenders, but also other instruments for the prevention and relief in cities of more than 60,000 inhabitants, such as police stations and shelters for women. Today Maria da Penha is a notable figure in the movement for women’s rights in Brazil.

Jessica Gonzalez v. USA

In June 1999, Jessica Gonzales' three young daughters, ages seven, nine and ten, were abducted by her estranged husband and killed after the Colorado police refused to enforce a restraining order against him. Although Gonzales repeatedly called the police, telling them of her fears for her daughters' safety, they failed to respond. Hours later, Gonzales' husband drove his pick-up truck to the police department and opened fire. He was shot dead by the police. The slain bodies of the three girls were subsequently discovered in the back of his pickup truck. The police never investigated whether the girls were killed by their father or died as a result of the police crossfire.

Gonzales filed a lawsuit against the police, but was unsuccessful. In June 2005 the U.S. Supreme Court ruled that she had no constitutional right to police enforcement of her restraining order.¹⁷¹ She then filed a petition with the IACHR, saying that the inaction of the police and the Supreme Court's decision violated her and her children’s human rights.

This was the first case brought by a survivor of domestic violence against the U.S. before an international human rights tribunal. The IACHR found that the United States violated the human rights of Jessica Lenahan (formerly Gonzales) and her children in breaching several articles of the *American Declaration of Rights and the Man*.¹⁷² According to the American Civil Liberties Union, the decision underscores that the U.S. is failing in its legal obligation to protect women and girls from

¹⁷⁰ Brazil's Federal Law 11340 (*Lei Maria da Penha*) (Portuguese).

¹⁷¹ *Castle Rock v Gonzales*, 545 US 748 (2005) [hereinafter “*Gonzales*”], Stevens and Ginsburg JJ dissenting.

¹⁷² Because the US is not a party to the American Convention on Human Rights, claims against it must be brought under this older international human rights law instrument.

domestic violence.¹⁷³ The IACHR ruling also sets forth comprehensive recommendations for changes to U.S. law and policy pertaining to domestic violence. The IACHR found that the US had breached three articles: the right to life, liberty and security of the person under (Art. I); the right to equality before the law (Art. II); and the right of all women, during pregnancy and the nursing period, and all children to special protection, care and aid (Art. VII). The IACHR also made general findings with respect to domestic violence in the United States.¹⁷⁴

Women were recognized to constitute the majority of domestic violence victims, and the IACHR indicated that some women are at particular risk, including Native-American and low-income women.¹⁷⁵ The IACHR noted that abuse often escalates following separation and that children are especially at risk and in need of protection. It also recognized the significance of restraining orders as an attempt by states to take domestic violence seriously; however, the IACHR noted that “one of the most serious historical limitations of civil restraining orders has been their widespread lack of enforcement by the police.”¹⁷⁶

The IACHR found that the failure of the police to adequately respond to the applicant’s repeated appeals for their intervention ultimately culminated in her three daughters being abducted by her ex-husband, shot and killed.¹⁷⁷ The IACHR set out the due diligence obligation in the context of violence against women in these terms:

The international community has consistently referenced the due diligence standard as a way of understanding what State’s human rights obligations mean in practice when it comes to violence perpetrated against women of varying ages and in different contexts, including domestic violence. This principle has also been crucial in defining the circumstances under which a State may be obligated to prevent and respond to the acts or omissions of private actors. This duty encompasses the organization of the entire state structure – including the State’s legislative framework, public policies, law

¹⁷³ “Jessica Gonzales v. USA,” American Civil Liberties Union, online: <http://www.aclu.org/human-rights-womens-rights/jessica-gonzales-v-usa>.

¹⁷⁴ *Gonzales, supra*, at paras. 93-97.

¹⁷⁵ Jessica Lenahan is of Native American and Latin American descent.

¹⁷⁶ *Gonzales, supra*, at para. 97.

¹⁷⁷ Note that there is some contention as to whether they were shot by the ex-husband or by a police officer’s bullet in the cross-fire.

*enforcement machinery and judicial system – to adequately and effectively prevent and respond to these problems.*¹⁷⁸

In *Gonzales*, the IACHR set out the scope and content of the US's obligation to protect women from violence by outlining four principles of the due diligence standard upon which there has been international consensus:¹⁷⁹

- 1) *“a State may incur international responsibility for failing to act with due diligence to prevent, investigate, sanction and offer reparations for acts of violence against women”;*
- 2) *“the link between discrimination, violence against women and due diligence... 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.”*
- 3) *“the link between the duty to act with due diligence and the obligation of States to guarantee access to adequate and effective judicial remedies for victims and their family members when they suffer acts of violence.”*
- 4) *“the international and regional systems have identified certain groups of women as being at particular risk for acts of violence due to having been subjected to discrimination based on more than one factor, among these girl-children, and women pertaining to ethnic, racial, and minority groups; a factor which must be considered by States in the adoption of measures to prevent all forms of violence.”*

The Commission emphasized that a State's failure to protect need not be intentional to constitute a breach of its obligations.¹⁸⁰

The IACHR also stressed the heightened duty of the State to exercise due diligence where children are involved:

The Commission has also recognized 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

¹⁷⁸ *Ibid*, at para. 125.

¹⁷⁹ *Ibid*, at para. 126-127.

¹⁸⁰ *Gonzales, supra*, at para. 134.

*increases their exposure to acts of violence. Protection 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.*¹⁸¹

The IACHR concluded that the State owed the applicant's daughters a "reinforced duty of due diligence to protect them from harm and from deprivations of their life due to their age and sex, with special measures of care, prevention and guarantee."¹⁸²

In applying this framework to the facts of this case, the IACHR set out a two-part test for State responsibility in cases of domestic violence such as Lenahan's: (1) whether the State authorities at issue should have known that the victims were in a situation of imminent risk of domestic violence; and ii) whether the authorities undertook reasonable measures to protect them from these acts. It noted that the activities of the police as well as other state actors were relevant, and proceeded to apply this test to the facts.

The existence of the restraining order was sufficient to ground State responsibility given that issuing the order recognized that the beneficiary of the order could suffer harm from violence on the part of the restrained party and was in need of State protection. The restraining order also was "an indicator of which actions could have reasonably been expected from the authorities."¹⁸³ The duties were not met in the circumstances because the investigations were not carried out with the required diligence, including without undue delay,¹⁸⁴ and the response was "fragmented, uncoordinated and unprepared."¹⁸⁵ There appeared to be no protocols, directives or training in place to guide the police response.¹⁸⁶

The IACHR also stated that "the failure of the United States to adequately organize its state structure" to protect Lenahan's daughters amounted to a violation of their rights under Articles I and VII of the American Declaration.¹⁸⁷ These articles created a positive obligation to prevent violations of the right to life and "a reinforced duty of due diligence" to protect the victims "from harm and from deprivations of their

¹⁸¹ *Ibid*, at para. 113.

¹⁸² *Ibid*, at para. 164.

¹⁸³ *Ibid*, at para. 143.

¹⁸⁴ *Ibid*, at para. 144-149.

¹⁸⁵ *Ibid*, at para. 150.

¹⁸⁶ *Ibid*, at para. 152-157.

¹⁸⁷ *Ibid*, at para. 164.

life due to their age and sex.”¹⁸⁸ The IACHR noted the police’s false assumption that the girls were safe because they were with the father, the lack of evidence of any protocols or training with respect to the risks to children in these circumstances, and the insensitive response of the police to Lenahan. On a systemic level, “this form of mistreatment results in a mistrust that the State structure can really protect women and girl-children from harm, which reproduces the social tolerance toward these acts.”¹⁸⁹ Put another way, “State inaction toward 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.”¹⁹⁰

As the IACHR noted in the *Gonzales* decision, under international law, a State’s failure to exercise due diligence in protecting women from violence constitutes a form of discrimination against women:

*[...] 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.*¹⁹¹

The IACHR concluded that the State’s inadequate response to the claimant’s domestic violence situation constituted discrimination:

*[...] the systemic failure of the United States to offer a coordinated and effective response to protect Jessica Lenahan and her daughters from domestic violence, constituted an act of discrimination, a breach of their obligation not to discriminate, and a violation of their right to equality before the law under Article II of the American Declaration.*¹⁹²

The IACHR made several recommendations to the United States addressing both the individual and systemic dimensions of this case. Some recommendations were directed specifically towards Jessica Lenahan, and included investigation into the cause, time and place of death of her daughters; investigation into the failures relating to the non-enforcement of her protection order; and reparations to Lenahan and her next-of-kin.¹⁹³ Other recommendations were more systemic in nature, and

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*, at para. 167

¹⁹⁰ *Ibid.*, at para. 168.

¹⁹¹ *Ibid.*, at para. 111.

¹⁹² *Ibid.*, at para. 170.

¹⁹³ *Ibid.*, at para. 201.

concerned, for example, the obligation to adopt or reform existing legislation to make the enforcement of restraining orders mandatory and to provide protection measures for children in the domestic violence context, and to properly implement such laws through adequate resources, training, model protocols and directives. Even more broadly, the IACHR recommended that the United States:

*...continue adopting 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.*¹⁹⁴

The IACHR concluded its decision by stating that it would monitor the steps taken by the United States to comply with its recommendations until there has been full compliance.¹⁹⁵

Osman v. United Kingdom

The case of *Osman v. Ferguson* was discussed above in the context of common law police duties. *Osman v. United Kingdom*¹⁹⁶ was another attempt to get a satisfactory remedy to the police failure to investigate effectively a teacher's threatening behaviour before it culminated in a deadly attack. Here, the Osman family brought a case under the European Convention on Human Rights because its negligence case was stuck from the English courts.

The European Court of Human Rights [ECHR] found that States do have a positive obligation to prevent violence, but that the scope of the preventive duty is restricted:

The Court notes that the first sentence of Article 2(1) enjoins the State not only to refrain from the intentional and unlawful taking of life but also to take appropriate steps to safeguard the lives of those within its jurisdiction. It is common ground that the State's obligation in this respect 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. It is thus accepted by those appearing before the

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*, at para. 216.

¹⁹⁶ [2000] 29 EHRR 245.

Court that Article 2 of the Convention 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. The scope of this obligation is a matter of dispute between the parties.¹⁹⁷

For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention.¹⁹⁸

In this landmark case, the ECHR reasoned that where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of the duty to prevent and suppress offences against the person, it must be established:

that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual 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.¹⁹⁹

The ECHR did not accept the Government's view that the failure to perceive the risk to life in the circumstances known at the time or take preventive measures to avoid that risk must be tantamount to gross negligence or willful disregard of the duty to protect life. This was too high a standard and was incompatible with the requirements of the Articles 1 and 2 of the Convention and the obligation to secure the practical and effective protection of these rights. It is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have

¹⁹⁷ *Ibid*, at para. 115.

¹⁹⁸ *Ibid*, at para. 116.

¹⁹⁹ *Ibid*, at para. 117.

knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case.

However, the applicants were unsuccessful here because they failed to point to any decisive stage in the sequence of the events leading up to the tragic shooting when it could be said that the police knew or ought to have known that the lives of the Osman family were at real and immediate risk from the teacher. There had been no violation of Article 2 of the Convention in this case.²⁰⁰

M.C. v. Bulgaria

A 14 year-old girl, known as M.C., was raped by two men after meeting them in a disco. The facts turned on the definition of rape under Bulgarian law and failure to prosecute unless there was evidence of force. She brought a claim in the European Court of Human Rights (ECHR) that her rights under the European Convention on Human Rights had been violated, particularly her Article 3 right to be free from torture, inhuman or degrading treatment and her right to respect for her private life under Article 8.

In *M.C. v. Bulgaria*,²⁰¹ the ECHR noted that previous jurisprudence had established that Article 3 requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals.²⁰² Positive obligations on the State are also inherent in the right to effective respect for private life under Article 8.²⁰³ Effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions. Children and other vulnerable individuals, in particular, are entitled to effective protection. Rape infringes not only the right to personal integrity (both physical and psychological) as guaranteed by Article 3, but also the right to autonomy as a component of the right to respect for private life as guaranteed by Article 8.²⁰⁴

In *M.C. v. Bulgaria*, the ECHR specifically affirmed that the duty of due diligence requires the state “to enact criminal-law provisions effectively punishing rape and

²⁰⁰ *Ibid*, at paras. 121 -122.

²⁰¹*M.C. v. Bulgaria*, Application no. 39272/98 (04/03/2004), European Court of Human Rights (3 December 2003).

²⁰² *Ibid*, at para 149.

²⁰³ *Ibid*, at para. 150.

²⁰⁴ See concurring opinion of Judge Tulkens, *ibid*, at para. 1.

to apply them in practice through effective investigation and prosecution.”²⁰⁵ It also held that the duty required a legal conceptualization of rape that does not require a victim to demonstrate physical resistance in order for an assault to be characterized as rape.²⁰⁶

The ECHR criticized the authorities for not only doing an overall poor job of investigating the crime, but also for “having attached little weight to the particular vulnerability of young persons and the special psychological factors involved in cases concerning the rape of minors.”²⁰⁷ Therefore, the duty of diligence may require law enforcement officials to make certain efforts *above and beyond* their regular procedures where cases involve children or other vulnerable groups. There is a positive obligation to conduct an effective investigation which was breached because of unacceptable delays²⁰⁸ and failure of the authorities to investigate fully because thought of as “date rape” and focused on a limited, stereotypical view of resistance.²⁰⁹

Opuz v. Turkey

In *Opuz v. Turkey*,²¹⁰ the ECHR considered a case where there was a long history of domestic violence. The husband eventually was convicted of the murder of applicant’s mother and sentenced to life, but released earlier. The applicant filed a complaint against her husband out of fear and requested protection, but he continued to assault her after his release from prison. The Court held that the Turkish government had evidently failed to take domestic violence against women seriously, as evidenced by undue delays in the court system and poor responses by police, and that this had created a “climate that was conducive to domestic violence” and which was discriminatory to women.²¹¹

The Court rejected Turkey’s assertion that the dispute was a “private matter” as this was incompatible with the authorities’ positive obligations. Interference with family

²⁰⁵ *Ibid*, at para 153.

²⁰⁶ *Ibid*, at para. 166.

²⁰⁷ *Ibid*, at para. 183.

²⁰⁸ *Ibid*, at para 184.

²⁰⁹ *Ibid*, at para. 179-82.

²¹⁰ *Opuz v. Turkey*, Application no. 33401/02 9/9/2009, European Court of Human Rights (9 June 2009); See also: *Branko Tomasic and Others v. Croatia*, Application 46598/06 14/4/2009, European Court of Human Rights (15 January 2009).

²¹¹ *Ibid*, at paras. 198-200.

life might be necessary in order to protect the health and rights of others to prevent commission of criminal acts.²¹²

The Court noted that Article 2 places a primary duty on states which includes “putting in place effective criminal law provisions to deter” future offenses.²¹³ The Court emphasized that this duty must be interpreted in a way which does not impose an impossible and disproportionate burden on the authorities:

*Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the scope of the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Not every claimed risk to life, therefore, can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention.*²¹⁴

In the opinion of the Court, where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person, “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.”²¹⁵

In the light of all the circumstances of any particular case, it was clear that the continued violence was foreseeable:

²¹² *Ibid*, at para. 144.

²¹³ *Ibid*, at para. 128.

²¹⁴ *Ibid*, at para. 129.

²¹⁵ *Ibid*, at para. 130.

While the Court cannot conclude with certainty that matters would have turned out differently and that the killing would not have occurred if the authorities had acted otherwise, it recalls that a failure to take reasonable measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State.²¹⁶

The Court highlighted its factual findings that the violence suffered by the applicant had not come to an end and that the authorities had continued to display inaction.²¹⁷

The Court found that there was general “judicial passivity” when it came to domestic violence, which was a crime that affected mainly women and thus could be regarded as gender-based and discrimination against women.²¹⁸ The ECHR explained that “a general policy or measure that has disproportionate prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group.”²¹⁹

Rantsev v. Cyprus and Russia

The case of *Rantsev v. Cyprus and Russia*²²⁰ concerned the investigation of trafficking after the death of young girl. The applicant who are the victim’s father complained under Articles 2, 3, 4, 5 and 8 of the Convention about the lack of sufficient investigation into the circumstances of the death of his daughter, the lack of adequate protection of his daughter by the Cypriot police while she was still alive, and the failure of the Cypriot authorities to take steps to punish those responsible for his daughter’s death and ill-treatment. He also complained under Articles 2 and 4 about the failure of the Russian authorities to investigate his daughter’s alleged trafficking and subsequent death and to take steps to protect her from the risk of trafficking.

In reaching its conclusions, the ECHR summarized the law on effective investigations:

²¹⁶ *Ibid*, at para. 136.

²¹⁷ *Ibid*, at para. 173.

²¹⁸ *Ibid*, at para 192.

²¹⁹ *Ibid*, at para. 183.

²²⁰ [2010] 51 EHRR 1, Application no. 25965/04, European Court of Human Rights (7 January 2010).

- the persons responsible for carrying it out must be independent from those implicated in the events. This requires not only hierarchical or institutional independence but also practical independence;
- The investigation must be capable of leading to the identification and punishment of those responsible;
- A requirement of promptness and reasonable expedition is implicit in the context of an effective investigation;
- In all cases, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his legitimate interests;²²¹ and
- States must take such steps as are necessary and available in order to secure relevant evidence (whether or not it is located in the territory of the investigating State).²²²

The Court confirmed that there was a procedural obligation to investigate and that this requirement to investigate does not depend on a complaint from the victim or next-of-kin: once the matter has come to the attention of the authorities they must act of their own volition. States also have a procedural obligation to investigate situations of potential trafficking.²²³

The Court found that Cyprus had not violated Ms. Rantseva's rights but failed to provide her with effective protection against trafficking and exploitation:

*In the Court's opinion, there were sufficient indicators available to the police authorities, against the general backdrop of trafficking issues in Cyprus, for them to have been aware of circumstances giving rise to a credible suspicion that Ms Rantseva was, or was at real and immediate risk of being, a victim of trafficking or exploitation. Accordingly, a positive obligation arose to investigate without delay and to take any necessary operational measures to protect Ms Rantseva.*²²⁴

The failures of the police were multiple:

However, in the present case, it appears that the police did not even question Ms Rantseva when she arrived at the police station. No statement was taken from her. The police made no further inquiries into the background facts. They simply checked whether Ms Rantseva's name was on a list of persons wanted by

²²¹ *Ibid*, at para. 233.

²²² *Ibid*, at para. 241.

²²³ *Ibid*, at para 288.

²²⁴ *Ibid*, at para. 296.

*the police and, on finding that it was not, called her employer and asked him to return and collect her.*²²⁵

Russian authorities were also found to have violated the European Convention by failing in their procedural obligation to investigate alleged trafficking.²²⁶

Application of European Convention on Human Rights by English Courts

Pursuant to s. 6(1) of the British *Human Rights Act 1998*, it is unlawful for British public authorities, including police, to act in a way which is incompatible with rights which arise under the European Convention of Human Rights. This provision incorporates international obligations and the jurisprudence of the ECHR into British law.

The English courts have discussed the implications of this jurisprudence under the European Convention on Human Rights in a number of recent cases. In *Van Colle and another v. Chief Constable of Hertfordshire Police and Smith v. Chief Constable of Sussex Police*,²²⁷ the Court ruled that under Article 2 of the ECHR, in certain “well-defined” circumstances, there is a positive obligation on authorities to take preventative measures to protect an individual whose life was at risk from criminal acts of another. In this case, Court was satisfied that the authorities had known or should have known at the time of the existence of a real or immediate risk and had failed to take measures within the scope of their powers, which, judged reasonably, might have been expected to avoid risk.

Similarly, in *Mitchell and another v. Glasgow City Council*,²²⁸ a case concerning the duty owed to a tenant by a social housing landlord and whether landlord knew or ought to have known of a real or immediate risk to the tenant, the House of Lords Court extended this obligation to other state authorities. The court focused on what the authority knew or should have known, while specifically noting that, “one must beware the dangers of hindsight.”²²⁹ The House of Lords found that the European jurisprudence does not leave room for a test that varies on a case-by-case basis but is “constant and not variable.”²³⁰

²²⁵ *Ibid*, at para 251.

²²⁶ *Ibid*, at para. 298.

²²⁷ [2008] UKHL 50.

²²⁸ [2009] UKHL 11.

²²⁹ *Ibid*, at para. 33.

²³⁰ *Ibid*, at para 34.

More recently, in *OOO v. Commissioner of the Police of the Metropolis*,²³¹ the Court considered the scope of the positive duty on police to investigate crimes. Four young Nigerian women were brought to the UK illegally and made to work as slave labourers and subjected to violence in the homes where they worked. They asserted violations of their rights under Article 3 (cruel and inhuman treatment) and 4 (slavery) of the European Convention seeking a declaration to that effect and damages pursuant to the UK *Human Rights Act*, 1998. The Court rejected an argument that it should only find liability where the “officer’s failings were egregious” or “grossly negligent.”²³² The Court noted that this argument had been rejected in *Osman v. UK* and should not be resurrected.

The Court found that the officers “did nothing to commence an effective investigation”²³³ and that “it took an unequivocal threat of legal proceedings to galvanise an investigation.”²³⁴ While the investigation eventually proceeded, the applicants were nevertheless “victims of the failure to investigate” and had suffered frustration and anxiety as a result. They were therefore entitled to damages.

d. Summary: The Due Diligence Standard

While the existence of the duty to protect/exercise due diligence is undisputed, its content may be somewhat less clear. States are said to have a wide margin of discretion in deciding what measures to implement in addressing violence against women.²³⁵ As a general principle, however, this wide discretion must be circumscribed by human rights obligations.²³⁶ In determining what “due diligence” requires in a given case, the courts generally engage in a factual and contextual inquiry, whereby the measures taken by the state are scrutinized and assessed in light of all of the facts of the specific case.

While the requirements of due diligence depends on a case-by-case analysis, the courts have nonetheless provided some general guidelines. The obligation on state authorities clearly includes:

- The duty to investigate promptly and effectively;
- The duty to take effective judicial action;

²³¹ [2011] EWHC 1246 (High Court of England and Wales (Queen’s Bench Division)).

²³² *Ibid*, at para. 166.

²³³ *Ibid*, at para. 171.

²³⁴ *Ibid*, at para. 183.

²³⁵ *M.C. v. Bulgaria*, *supra*, at para 154.

²³⁶ *Ibid*.

- The duty to take adequate prevention measures; and
- Heightened duty owed to particularly vulnerable groups.

Breaches can occur in an individual case but is usually tied to a review of systemic patterns of conduct, or more accurately inaction. The case law indicates that a breach of due diligence will be found where there is sufficient evidence for the court to make an inference that the state has generally failed to take violence against women seriously. While the specific case at hand can serve as an example, the courts usually look to whether the failure falls within a *wider pattern* of state negligence.

In summary, under international law, states have a duty to exercise due diligence in preventing and responding to acts of violence against women committed by both state and private actors. This duty includes an obligation to conduct an effective criminal investigation, to prosecute and convict perpetrators, to provide effective judicial remedies to victims, as well as to take measures to tackle social and cultural attitudes that may lie at the root of violence against women.²³⁷ Furthermore, the state must be cognizant that certain groups of females, such as girl children, may be even more vulnerable to these acts of violence and that they are, therefore, under a heightened duty of due diligence vis-à-vis these groups.

4. CONCLUSION

This review of Canadian and international legal standards regarding the obligation to prevent violence against women and to effectively protect them shows that these duties have evolved considerably over the past two decades. This process is an ongoing one. Applying a human rights framework and linking sex discrimination to the issue of violence against women has resulted in higher levels of obligations on state authorities to take positive measures to protect women, thereby ensuring their equality. One need only compare the outcomes in the Bonnie Mooney and Jane Doe cases and the treatment of Jessica Lenahan's case in the U.S. Courts with the analysis and outcome of Lenahan's case before the Inter-American Commission on Human rights to see the vivid impact of equality-based legal analysis. In fact, Jennifer Koshan has argued that if the Lenahan/Gonzales principles had been applied in the Bonnie Mooney case, the outcome may well have been different.²³⁸

²³⁷ *Gonzales, supra*, at para. 126-127.

²³⁸ Jennifer Koshan, "State Responsibility for Protection Against Domestic Violence: The Inter-American Commission on Human Rights Decision in *Lenahan (Gonzales)* and Its Application in Canada" (2012) *Windsor Yearbook of Access to Justice* (forthcoming) draft available at <http://ssrn.com/abstract=2042200> at 13.

The due diligence standard under international law continues to be refined through judicial interpretation and application and through legal policy developments, particular through the work of United Nations bodies. These pronouncements provide practical guidance to individual police officers, police agencies and to other state authorities. The standard speaks to both the duties owed in specific cases where there is a known risk of violence and to the state's broader responsibility to eradicate violence against women. One of the expected next steps is the establishment of due diligence standards that take into account the vulnerability of Aboriginal women to gender-based violence and the complex socio-economic, racial cultural and geographic facets of their experience.