

SUMMARY PAPER

The Due Diligence Standard for Violence against Women¹

1. Introduction

This paper provides an overview of the concept of due diligence as developed in international law and as conceptualized in the framework of the mandate of the Special Rapporteur on violence against women, its causes and consequences.²

In the broadest sense, due diligence refers to the level of care or activity that a duty-bearer is expected to exercise in the fulfilment of their duties. For various areas of law, standards of due diligence have been developed in order to provide a sort of “measuring stick” with which to assess if a State or other actor is meeting the obligations that they have assumed. Using the language of a rights-based approach, a due diligence standard serves as a tool for rights-holders to hold duty-bearers accountable by providing an assessment framework for ascertaining what constitutes effective fulfilment of the obligation, and for analyzing the actions or omissions of the duty-bearer. This is especially important where the potential infringement comes through a duty-bearer’s failure to act, as it can be difficult for rights-bearers to assess if an omission constituted a violation of their right without some normative basis for the appraisal.

The due diligence standard for violence against women (VAW) is laid out in the Declaration on the Elimination of Violence against Women (1993) in Article 4(c), where States are urged to “exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.” The Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) noted in its General Comment No. 19 that “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.”³

Non-discrimination is a fundamental principle in applying the due diligence standard. It requires States to use the same level of commitment in relation to preventing, investigating, punishing and providing remedies for acts of VAW as they do with other forms of violence.⁴ Due diligence obligations must also be implemented in good faith, as duty-bearers must endeavour to effectively fulfil their obligations, not merely enact formal legal provisions.⁵ The focus of due diligence assessment, therefore, is analysis of results and effectiveness, as States that are found to be ‘going

¹ The Special Rapporteur would like to acknowledge the support of the International Human Rights Law Clinic at the University of Virginia School of Law, especially Calleigh McRaith, in the preparation of this summary paper.

² The mandate of the Special Rapporteur on violence against women, its causes and consequences was established by Commission on Human Rights 1994/45 and was most recently renewed by its successor the Human Rights Council in 2011 pursuant to resolution 16/7.

³ CEDAW General Recommendation 19, ¶19, U.N. Doc. A/47/38 (1992).

⁴ Special Rapporteur on Violence Against Women, The Due Diligence Standard as a Tool for the Elimination of Violence Against Women, ¶ 35, U.N. Doc. E/CN.4/2006/61 (2006) [hereinafter Due Diligence Standard].

⁵ *Id.*, ¶ 36.

through the motions’ of fulfilling their duties without making a legitimate, reasonable effort towards the intended effect are violating their obligation to exercise due diligence. Although many of these rights-fulfilling functions may be performed by NGOs or other non-state actors, it should be noted that due diligence obligations cannot be delegated. The State or other duty-bearer retains ultimate responsibility for the fulfilment of these obligations.⁶

Historically, VAW due diligence analysis has tended to focus on the State’s response to acts of violence that have already occurred, using tools such as legislation reform, access to justice, and the provision of care services.⁷ In 2006, however, the previous Special Rapporteur on Violence against Women (Yakin Ertürk) published a report on using the due diligence standard as a tool for the elimination of violence against women.⁸ Setting up a framework of analysis under the principles of (1) prevention, (2) protection, (3) punishment and (4) reparations, she also detailed ways she believed the due diligence standard could be expanded to solidify obligations to prevent and compensate victims of VAW, and include non-State actors as duty-bearers in the due diligence framework. The following is a summary of her analysis of current applications and possible expansions of the due diligence standard, with additional considerations submitted by the first Special Rapporteur on VAW (Radhika Coomaraswamy) and the current mandate holder (Rashida Manjoo).

2. Prevention

General methods of seeking to fulfill prevention obligations:⁹

- Adoption of specific legislation
 - Criminal sanctions
 - Civil remedies including protection/restraining and/or expulsion orders
- Development of awareness-raising campaigns, including large-scale media campaigns
 - National days of action on gender violence
 - “Zero tolerance” campaigns
 - Efforts to involve men and boys in prevention activities
- Provision of training for specified professional groups
 - Including police, prosecutors, and members of judiciary
- Development of national action plans to coordinate VAW activities

Suggested means of improvement/expansion:¹⁰

- Follow-up on prevention plans to evaluate effectiveness

⁶ Id. ¶34.

⁷ Id. ¶15.

⁸ Id.

⁹ Id. ¶¶ 38-46.

¹⁰ Id. ¶¶ 40, 46, 78-81.

- State engagement with overall societal transformation to address root causes of VAW including discrimination, gender inequality, and social and cultural attitudes on gender
- Engage in empowerment discourse, including education, skills training, legal literacy, and access to productive resources, to break cycles of accepting subordination and violence
- Promote and support women's empowerment as highlighted or codified in international laws such as the Convention on the Elimination of All Forms of Discrimination against Women, the International Covenant on Civil and Political Rights, and International Covenant on Economic, Social and Cultural Rights; and instruments such as the Beijing Platform for Action.

3. Protection

General methods of seeking to fulfil protection obligations:¹¹

- Provision of services¹²
 - Telephone hotlines
 - Health care
 - Counseling centers
 - Legal assistance
 - Shelters
 - Restraining/Protection orders
 - Financial aid to victims

Suggested means of improvement/expansion:¹³

- Address lack of enforcement of protective measures by the police or the judiciary
- Address absence or inadequate provision of services
 - Lack of shelters force women to continue living with abuser
 - Focus on short-term emergency assistance neglects to provide victims with means of avoiding re-victimization.
- Provide effective and appropriate mechanisms to prevent further harm in situations where women have already been victims or are at known risk of violence
- Provide a safe and conducive environment for reporting by establishing strong victim/witness protection measures, such as restraining or expulsion orders, which protect women from retaliation

¹¹ Id. ¶¶ 46-49.

¹² These services are often provided in conjunction with NGOs, and may be funded by the State or external donors. Id. ¶47.

¹³ Id. ¶¶ 49, 82-83.

- Provide quality physical and psychological health services, and material assistance such as shelter or child maintenance.

4. Punishment

General methods of seeking to fulfill the obligation to hold perpetrators of acts of violence against women to account:¹⁴

- Adopt or modify legislation
 - Amendments to criminal code to remove discriminatory provisions and increase punishment for crimes of VAW
 - Specific legislation aimed at establishing new criminal offences (frequently found with trafficking and harmful traditional practices)
 - Creation of specialized investigatory or prosecutorial units
- Reinforcing capacities and powers of police, prosecutors, and magistrates/judges
 - Including implementation of programs which require the gathering of data on VAW crimes, provide legal information to victims, and encourage victims to enforce their rights

Suggested means of improvement/expansion:¹⁵

- Address procedures or enforcement attitudes which intimidate victims or discourage them from pursuing justice. These can include:
 - Complicated or degrading reporting procedures
 - Referral of victims to social services rather than legal remedies
 - Dismissive attitudes by police or other enforcement agencies
- Address failure of law enforcement to seriously investigate crimes of VAW¹⁶
- Address issue of reduced or inappropriate sentences being handed down by judicial systems
- Create systems for counseling and rehabilitation of perpetrators of violence
- Provide gender-sensitivity training to police and judiciary

5. Reparations

The previous Special Rapporteur considered reparations to be one of the most grossly underdeveloped areas of the due diligence standard.¹⁷ In her 2010 report to the Human Rights

¹⁴ Id. ¶¶ 50-52.

¹⁵ Id. ¶¶ 53-54.

¹⁶ Under the non-discrimination principle of due diligence, state actors are required to treat crimes of VAW with the same level of seriousness as they would any other crime of violence. Id. ¶ 35.

¹⁷ *Due Diligence Standard*, *supra* note 4, ¶ 55.

Council, the current mandate-holder attempts to develop the conceptual understandings of gender-responsive reparations which have a transformative potential. The legal basis for a right to a remedy and, linked to it, a right to reparation, has become firmly enshrined in the corpus of international human rights and humanitarian instruments. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law define the contours of State responsibility for providing reparation to victims for acts or omissions which can be attributed to the State. States are responsible for their failures to meet their international obligations even when substantive breaches originate in the conduct of private persons, as States have to exercise due diligence to eliminate, reduce and mitigate the incidence and consequences of private discrimination.

Nevertheless, the conceptual framework and its practical implications of the due diligence obligation to provide reparation - as recognised by the Convention on the Elimination of all Forms of Discrimination against Women and the Declaration on the Elimination of Violence against Women - remains grossly underdeveloped. The report stresses that violence perpetrated against individual women generally feeds into patterns of pre-existing and often cross-cutting structural subordination and systemic marginalization. Hence measures of redress need to address both individual reparation and the wider structural factors that enable violations of rights.

In view of the structural and multiple forms of discrimination that women face during conflict and post-conflict as well as in times of peace, the report highlights that reparations cannot be just about returning women to the situation in which they were found before the individual instance of violence. Instead, reparations should strive to have a transformative potential. This implies that reparations should aspire, to the extent possible, to subvert instead of reinforce pre-existing patterns of cross-cutting structural subordination, gender hierarchies, systemic marginalization and structural inequalities that may be at the root cause of the violence that women experience.

General methods of seeking to fulfill the obligation to provide reparation:

- Compensation to victims through civil proceedings or funds for victims of crimes¹⁸
- Restitution to help restore victims to the position they were in before the violation¹⁹
- Rehabilitation, including medical, psychological, legal, and social services²⁰
- Measures of satisfaction, such as public apologies, verification of facts, disclosure of truth, and commemoration to victims²¹
- Guarantees of non-repetition²²

¹⁸ Id. ¶ 55.

¹⁹ Special Rapporteur on Violence Against Women, *Reparations to Women Who Have Been Subjected to Violence*, ¶ 17, U.N. Doc. A/HRC/14/22 (2010) (by Rashida Manjoo) [hereinafter *Reparations*].

²⁰ Id.

²¹ Id.

²² Id.

Suggested means of improvement/expansion:

- Establish financial damages for physical and psychological injuries, as well as loss of employment and educational opportunities, loss of social benefits, harm to reputation and dignity, and legal, medical, and rehabilitation/support service costs²³
- Have women themselves participate in the design and process of reparations²⁴
- Reparations should not be simply about restoring women to their original position but should instead have “transformative potential”²⁵
- Institute administrative reparations schemes rather than litigation on a case-by-case basis²⁶

6. Additional considerations for determining compliance with the due diligence standard²⁷

- Ratification of international human rights instruments
- Constitutional guarantees of equality for women
- Existence of national legislation and/or administrative sanctions providing adequate redress for women victims of violence
- Policies or plans of action that deal with the issue of VAW
- Gender-sensitivity of the criminal justice system and police
- Accessibility and availability of support services
- Existence of measures to raise awareness and modify discriminatory policies in the field of education and the media
- Collection of data and statistics concerning violence against women

²³ Id. ¶ 84.

²⁴ *Reparations*, *supra* note 19, ¶ 29.

²⁵ Id. ¶ 31, 85.

²⁶ Id. ¶¶ 37-39, 84.

²⁷ Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, *Violence Against Women in the Family*, ¶ 25, U.N. Doc. E/CN.4/1999/68 (1999).

7. Broadening the vision of due diligence

In addition to summarizing current due diligence applications, the previous Special Rapporteur also leveled several critiques at the existing due diligence standard and gave recommendations for increasing its effectiveness. One of the primary problems is that the due diligence standard as currently used focuses primarily on VAW as an isolated act and fails to take into consideration the connections between VAW and the violation of other rights, including general principles of gender equality and non-discrimination. As described by the previous Special Rapporteur, that current due diligence discussions “have remained blind to structural inequalities and the complex and intersecting relations of power in the public and private spheres of life that lie at the heart of sex discrimination.”²⁸ Thus, under her vision, a failure to effectively address social structures or violations of other rights that lead to increased vulnerability to GBV is itself a failure of due diligence as it pertains to VAW.

The previous Special Rapporteur also addressed the need to move away from a public/private dichotomy in viewing women’s rights. Categorizing VAW violations such as domestic violence as part of the “private sphere” tends to have a normalizing effect, and it makes State intervention seem to be less appropriate in these situations than it would be for “public” incidents of violence.²⁹ She reminded us that “the State, by failing to respond to intimate/domestic violence, can be held responsible for not fulfilling its obligation to protect and punish in a non-discriminatory way and can be charged as an accomplice to private violations.”³⁰ The same can presumably be said not only about intimate partner violence, but also about other acts of VAW/GBV, such as rape, which are typically perpetrated by non-State actors.

Finally, global restructuring in areas related to economic activity and governance was also discussed by the previous Special Rapporteur, highlighting the rise of transnational corporations, global financial institutions, inter-governmental organizations and international NGOs, which have reconfigured ideas of territoriality and sovereignty.³¹ She believed that these organizations have not yet been appropriately held accountable for their international obligations under the due diligence standard, saying, “Therefore, the State is no longer the only site of normativity – or the unique subject of international law. Other actors... are emerging as spheres of influence whose responsibilities vis-à-vis human rights standards have not been subject to scrutiny.”³² It was stressed that these non-State actors also have obligations, such as undertaking gender-assessments before distributing aid or pursuing a program of action, under the due diligence standard.³³ The standards for non-State actors have not been as thoroughly developed, but those conducting due diligence analysis were urged to begin taking these actors into consideration.³⁴

²⁸ *Due Diligence Standard*, *supra* note 4, ¶56.

²⁹ *Id.* ¶ 59.

³⁰ *Id.* ¶ 61.

³¹ *Id.* ¶ 69.

³² *Id.*

³³ *Id.* ¶¶ 94-99.

³⁴ *Id.*

In her 2011 thematic report, the current Special Rapporteur on Violence against Women described a holistic framework for addressing the issues associated with VAW.³⁵ This report analyzes the forms, causes and consequences of multiple forms of discrimination as regards violence against women; highlights the reality that multiple and intersecting forms of discrimination have contributed to and exacerbated violence against women; and argues, that the intersections between gender-based discrimination and other forms of discrimination, and the consequences thereof, are too often overlooked.

The report proposes a holistic approach which requires amongst others: (a) treating rights as universal, interdependent and indivisible; (b) situating violence on a continuum that spans interpersonal and structural violence; (c) accounting for both individual and structural discrimination, including structural and institutional inequalities; and (d) analyzing social and/or economic hierarchies among women, and, between women and men i.e. both intra-gender and inter-gender. She argues that a one-size-fits-all programmatic approach is insufficient for combating gender-based violence. Violence results from a complex interplay of individual, family, community and social factors – and, even though all women are at risk for violence in every society in the world, not all women are equally vulnerable to acts and structures of violence. A holistic approach for the elimination of all forms of violence against all women requires addressing systematic discrimination and marginalization, and, the adoption of measures that address both inter-gender and intra-gender inequality and discrimination. The lack of recognition of intra-gender inequality and discrimination, has led to the privileging of experiences of urban middle-class women, despite the importance of social location on women's vulnerability to and experiences with violence. The consequence is that program designs and goals advanced in the interest of women may only reach the rights violations experienced by some women.

However, the framework is not complete without a consideration of “the right to an adequate standard of living and also a focus on *inter alia*, bodily integrity rights, education, civil and political engagement, and individual self-determination. These fundamentals directly affect a woman's ability to equitably and holistically participate in public and private spaces.”³⁶

³⁵ Special Rapporteur on Violence Against Women, Rashida Manjoo, *Report of the SR on Violence Against Women, Its Causes and Consequences*, U.N. Doc. A/HRC/17/26 (2011).

³⁶ *Id.* ¶ 103.