

Human Rights: From Practice to Policy

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The Due Diligence Standard, Private Actors and Domestic Violence

Presentation by Stephanie Farrior

The provenance of the due diligence standard is quite interesting. It entered the general consciousness of human rights activists in 1988 with the Inter-American Court's decision in *Velasquez Rodríguez*. It had apparently been mentioned previously in a 1979 report of an independent expert from Senegal regarding human rights in Chile. The substance of the standard had been described in the report of the UN Expert on the Question of the Fate of Missing and Disappeared Persons in Chile (Judge Abdoulaye Dieye of Senegal) back in 1979, in a section setting out the areas of state responsibility (UN Doc. A/34/583/Add.1 (1979), paras. 172-175).

Nonetheless, the due diligence argument really came onto the radar screen of the human rights movement in 1988. The *Velásquez Rodríguez* case was about a case of disappearance. It was unclear exactly who had disappeared Manfredo Velásquez. There was a pattern of disappearances by groups that were quasi-governmental entities with some state connection that was not conclusively affirmatively established in this case. The Court decided that the state's failure to prevent the disappearance, to investigate it, and to punish the perpetrators was a violation of the obligation in the Inter-American Convention to "ensure" the full exercise of rights and freedoms in the Convention, including the right to life. So, what did this duty on the part of states entail? The Court said states have a duty to organize the governmental apparatus, and in general all the structures through which public power is exercised, so that they are capable of judicially ensuring the free and full enjoyment of human rights.

Due Diligence and Violence against Women

This idea of a "duty to exercise due diligence to the full enjoyment of rights" was then picked up in a series of documents addressing violence against women. The *Velásquez Rodríguez* decision was made in 1988. In 1992, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was adopted. CEDAW did not actually mention violence against women or domestic violence. Nonetheless, violence against women was clearly covered by a range of

provisions in the convention, as noted in CEDAW's General Recommendation 19. General Recommendation 19 explains that "States may also be held responsible for private acts"—and not just those perpetrated by state agents: "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." Four obligations in the General Recommendation were derived from the *Velasquez* judgment: prevent; investigate; punish; and provide compensation.

In 1993, the UN General Assembly adopted the Declaration on the Elimination of Violence against Women. The Declaration urges states 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." Two years later in Beijing—in 1995—the Declaration and Platform for Action that emerged also used the due diligence standard,—setting out what the obligations of states are with respect to preventing, investigating, punishing and providing compensation for acts of violence against women, even if they are carried out by private individuals.

In 1993, in the lead up to the Vienna Conference there was a great concern about the potential for backsliding with respect to the universality of human rights. The justifications of culture, religion or tradition to defend human rights violations loomed very large ahead of the conference. As a result, women around the world organized. This period of time was a remarkable collective organizing era for women. Before the Conference they engaged in extensive planning and preparation work with the state delegations that would be voting on an outcome document, and also planned their own side events. This advance preparation and organizing had a significant impact on the outcome of the Conference. There was strong language in the resulting Declaration—language explicitly stating that religion, culture and tradition could not be used to justify human rights violations, and certainly not violence against women. The due diligence standard was very much on their minds.

Yet women's rights activists and those who were actively looking to make the due diligence standard a practical reality faced opposition from within some human rights NGOs. Skeptics within the human rights movement argued that international law and human rights law in particular addressed state conduct—direct conduct and direct violations by state agents. Inaction by state agents, they argued, did not give rise to state responsibility. There was considerable inconsistency within the human rights movement with regard to policy on non-state actors. On the one hand, a developing avenue of work on economic non-state actors and human rights violations was gaining acceptance, but when it came to violence against women—it was not considered a human rights issue. The Beijing conference in 1995 helped move things forward.

Amnesty International and the Due Diligence Standard

In response to internal pressure from members of Amnesty International (AI), AI started examining more seriously the extent to which it should look at issues concerning women's human rights. In the lead-up to Amnesty's 1997 International Council Meeting we held an international conference looking at government inaction and what state responsibilities exist when it comes to human rights abuses by private actors. Among the people participating was a prominent member of one AI section who was dead-set against the very idea that an international legal obligation existed on the part of states to take action to address private violence, and that state responsibility could arise from absence of action. I was going to be presenting on due diligence at the conference and was alerted in advance to his views. At the conference I outlined over a century and a half of international arbitral decisions where the due diligence standard had been applied, holding states accountable for failing to prevent an act of violence against a private person by another private person. Arbitral awards had been given to the families of people whose murders had not been prevented, investigated or punished by the state. The existence of this longstanding jurisprudence helped move AI to adopt policies that moved it forward to the place where the UN human rights bodies had already arrived.

An important part of the due diligence history comes from an arbitral decision that arose out of the US Civil War, the *Alabama* Claims

Arbitration. The agreement between the US and the UK that established the arbitral tribunal was part of an effort to prevent more armed conflict between the two countries. Why? A ship that was built in the UK during the US Civil War called the *Alabama* was used to sink around 60 northern merchant ships as part of a plan to ruin the commerce of the North. It was very successful. The US argued that the UK either knew or should have known that the ship was being built in its territory. After the Civil War ended, the US complained to the UK that it should have done something about the *Alabama*, in essence, that the UK owed a duty to prevent activity by private actors in the UK that was aimed at conducting violent acts against other private actors so as to harm US interests. The Treaty of Washington was concluded in 1871 between the two states to settle a number of disputes including the *Alabama* Claims. Part of the Treaty of Washington established the rules for the arbitral tribunal to apply in determining whether the UK might bear responsibility as a state for failing to prevent private actors from carrying out violent acts that had a negative impact on the complaining state. The rules the parties agreed to included a due diligence standard. It said that a neutral state has an obligation to exercise due diligence to prevent, including other things, private actors from carrying out acts that were likely to bring about negative impact on one of the warring states. What the due diligence standard consisted of—the amount of diligence that was due—however, was a matter of some contestation. The decision ultimately reached was that the level of diligence due varied in relation to the risk—the likelihood of harm and the severity of the harm. This was the due diligence standard from the *Alabama* Claims. The US was awarded 15.5 million dollars, which the UK subsequently paid.

The longstanding arbitral jurisprudence was important because despite the language of due diligence in General Recommendation 19, the Declaration on Violence Against Women, and the Beijing Platform for Action, there was still disagreement within the human rights movement whether violence against women by non-state actors was a human rights issue. To legitimize our claim we needed to show that the due diligence standard was not anything new. In a way this was ironic, because Amnesty had established its worldwide reputation by being at the forefront of establishing human rights standards. Now, it was behind the times.

At that same conference on government inaction, the researcher on Kenya from Amnesty who had recently visited refugee camps in Kenya described as absurd that AI would not work on behalf of women who were raped by private persons in the camp, such as other refugees, but it would work on behalf of women raped by state agents, such as a camp guard. It seemed untenable to argue that there could be no state responsibility in such a situation. The researcher spoke of doing “mandate gymnastics” simply to find ways to fit rapes of these refugees by private actors into the mandate of the organization and hence be able to address it.

Implications of the Due Diligence Standard for Action against Domestic Violence

As the due diligence standard was incorporated into human rights instruments, advocacy groups and UN bodies started examining how they could apply the due diligence standard in their work. The UN Special Rapporteur on Violence against Women incorporated the due diligence standard into her reports. Yakin Ertürk held a consultation each year in Asia with the Asia Pacific Women for Law and Development (APWLD); women’s rights activists from around the Asia Pacific region participated. In 2005, she decided that the focus would be on due diligence in addressing violence against women. I was invited to conduct a training session and workshop; we followed it with break-out sessions where the women discussed the areas of most concern in their work and how due diligence might be applied in their own advocacy. Marital rape was an issue that came up often, as was the lack of training of law enforcement and the judiciary on laws regarding domestic violence. Of the four areas of state responsibility—prevent, investigate, punish and provide compensation—perhaps the greatest interest among participants was in what steps states should take to prevent violence by private actors in the first place.

What are states supposed to do to meet their responsibility to exercise due diligence? State responsibility could be—as in the long line of arbitral claims cases—failing to act with respect to violence against a specific individual. The idea of failure to protect comes from the international law on responsibility for injuries to aliens, but it evolved to include broader, general human rights protection, not just injury to

aliens. The standard could be used in the case of an individual murder or killing or attack, but the women at this workshop were particularly interested in prevention. It is fine to address beatings and killings after the fact, particularly in the domestic violence context, but the rate of domestic violence is so high in every culture, in every country, in every part of the world, and it has been for so long, that we need plans in place to prevent domestic violence in the first place.

The leading cause of death worldwide of women between the ages of 15 and 44 is domestic violence. Every day one hundred women are killed by domestic violence. So if we look at the larger picture of what states must do to address violence against women in addition to investigating, punishing and providing compensation it is also training and addressing the root causes of this violence.

It is significant that the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) adopted in 1965 includes an article requiring states to take action aimed at the root causes of discrimination, through measures including “teaching, education, culture and information,” which is understood to include using the media. Article 7 recognizes the power of the media and of education in shaping views. There is a corresponding article in CEDAW, Article 5, which is also aimed at addressing the root causes of discrimination. I think that the due diligence standard can be and is being used by activists to argue that states really need to look at root causes and get serious about addressing why it is that domestic violence is so pervasive, why it continues without great change.

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Glossary

AI (and Amnesty) – Amnesty International. Founded in 1961, AI is one of the oldest and most prominent transnational human rights organizations, with international headquarters in London. The organization relies on 3 million members and supporters in 150 countries to carry out its work, and policies are vetted through complex processes and structures that involve membership in the decisions. (See *ICM, IEC, IS, AI mandate, and Secretary General* below.)

ICM – International Council Meeting, AI’s highest organizational decision-making body.

Held every two years, the ICM today brings together approximately 500 members and staff for the purposes of planning and reviewing the direction of Amnesty International’s human rights work. The ICM also elects the International Executive Committee (IEC).

AI Mandate - For many years, an internal “mandate” limited Amnesty International’s work to a relatively small number of issues, including the release of prisoners of conscience, fair trials for political prisoners, opposition to torture, disappearances and the death penalty. The mandate was amended several times, and was ultimately replaced in 2002 with a broader mission statement linking AI’s work to the full spectrum of rights enshrined in the UDHR.

Special Rapporteur – An individual charged by the United Nations Human Rights Council to investigate a specific set of human rights concerns. (See *Thematic mechanisms*.)

UN Human Rights Division – The UN Secretariat’s initial office devoted to human rights, replaced in 1993 by the Office of the UN High Commissioner for Human Rights.