

# **Canada's Due Diligence Obligation to Prevent, Protect, Punish and Remedy Violence Against Aboriginal Women**

**Andrea Sobko\***  
*Osgoode Hall Law School*

---

\* Andrea Sobko is currently completing her Juris Doctor at Osgoode Hall Law School in Toronto, Canada. She is the Director of Educator Support for the Ontario Justice Education Network. Andrea completed an internship on CEDAW with IRAW-AP in Malaysia in 2009.

When Debbie Anne Sloss' body was found in her Toronto apartment in July 1997, no one knew how long she had been there or what had happened to her. Debbie was an Ojibway woman from Ontario with two children, and she had just turned 42 years old. The police stopped working on Debbie's case after two days, none of her relatives were contacted and she lay unidentified in the morgue for almost a month. It wasn't until a relative from Debbie's community overheard the news of her death that word spread back to her family. The police told Debbie's sister that she had died of a drug overdose because "she liked to party too much", and the police report described her as a "Native Indian" and known "alcoholic and crack addict". Debbie's death remains unsolved and her family is convinced that racism and stereotyping hindered the police investigation into her death. According to Debbie's daughter, the police "just passed her off as another dead Indian."<sup>1</sup>

Unfortunately, stories such as Debbie Sloss' are all too common. Violence against Aboriginal women and girls has become a national human rights crisis in Canada with more than 600 women having been murdered or missing since the 1960s.<sup>2</sup> Of the cases that have been documented, nearly half remain unsolved.<sup>3</sup> The legacy of colonialism in Canada and practices such as the residential school system have left many Aboriginal women facing drug addiction, alcoholism, unemployment and homelessness, thereby increasing their risk of violence. Indigenous women are five times more likely to die from violence than other Canadian women of the same age.<sup>4</sup> In spite of the extensive documentation of violence against Aboriginal women, the Canadian government has failed to acknowledge the seriousness of the human rights abuses, and has done little to address the root causes of the violence.

It is now well-established in international law that violence against women (VAW) is a violation of women's fundamental human rights, and that states have an obligation to act with due diligence in preventing,

---

<sup>1</sup> Native Women's Association of Canada, *Voices of Our Sisters in Spirit: A Report to Families and Communities*, 2<sup>nd</sup> Edition (March 2009) at 39 [NWAC, "Voices"].

<sup>2</sup> Native Women's Association of Canada & Canadian Feminist Alliance for International Action, *Murders and Disappearances of Aboriginal Women and Girls in Canada: Information Update for the United Nations Committee on the Elimination of Discrimination Against Women* (June 25, 2013) at 7 [NWAC & FAFIA, "Murders"].

<sup>3</sup> Native Women's Association of Canada, *Fact Sheet: Missing and Murdered Aboriginal Women and Girls* (2010) at 2 [NWAC, "Fact Sheet"].

<sup>4</sup> Amnesty International, *No More Stolen Sisters: The Need for a Comprehensive Response to Discrimination and Violence Against Aboriginal Women* (London, Amnesty International Publications, 2009) at 1 [Amnesty, "No More Stolen Sisters"].

investigating, punishing and remedying such violence.<sup>5</sup> However, state parties often act with impunity and non-compliance with respect to this obligation. This paper will examine the extent to which Canada has failed to meet its obligation under international human rights law to act with due diligence in addressing violence against Aboriginal women and girls. Part I will provide an overview of the extent of the human rights abuses that Canada's indigenous women have suffered and will link this violence to an historic pattern of systemic discrimination against Canada's Aboriginal population. Part II will outline the due diligence obligation, including its legislative framework and interpretation in international law. Finally, Part III will discuss the extent to which Canada has put in place the protocols and standards to meet its due diligence obligation to prevent, protect, punish and remedy violence against Aboriginal women and girls.

## **Part I: Violence Against Aboriginal Women and Girls in Canada**

### ***Background***

Violence against Aboriginal women and girls in Canada has reached unprecedented levels and is one of the most pressing human rights concerns currently facing the country. The Native Women's Association of Canada (NWAC) has, as part of their *Sisters In Spirit* initiative, collected national data on Canada's missing and murdered Aboriginal women in an effort to document the disappearances that occurred between the 1960s and 2010.<sup>6</sup> This is considered the best source of data on the disappearances of Aboriginal women because the official Homicide Survey does not provide accurate statistics by Aboriginal status.<sup>7</sup> As of 2010, NWAC had documented 582 cases of missing and murdered Aboriginal women throughout Canada in the previous 30 years.<sup>8</sup> Of those, 67% were murder cases, 20% were cases of missing women or girls, 4% were cases of suspicious death and 9% are still unknown.<sup>9</sup> Forty three percent of the documented murder cases remain unsolved.<sup>10</sup> NWAC recorded

---

<sup>5</sup> See CEDAW General Recommendation No. 19: *Violence Against Women*, UNCEDAWOR, 11<sup>th</sup> Sess, UN Doc A/47/38 (1992) at para. 9; *Declaration on the Elimination of Violence against Women*, GA Res 48/104, UNGAOR, UN Doc A/RES/48/104 (1993) at 4(c); *Velasquez Rodriguez Case (Honduras)* (1988), Inter-Am Ct HR (Ser C) No 4.

<sup>6</sup> NWAC, "Voices", *supra* note 1 at 3.

<sup>7</sup> Lawyers' Rights Watch Canada & BC CEDAW Group, *Missing and Murdered Aboriginal Women and Girls in British Columbia and Canada* (January 2012) at 5 [LWRC & BC CEDAW].

<sup>8</sup> NWAC & FAFIA, "Murders", *supra* note 2 at 7.

<sup>9</sup> NWAC, "Fact Sheet", *supra* note 3 at 1. Suspicious deaths are those that are regarded as natural or accidental by the police but considered suspicious by family or community members.

<sup>10</sup> *Ibid* at 2.

153 murders of Aboriginal women in the period from 2000 to 2008 alone, and reports that Aboriginal women and girls represented approximately 10% of all female homicides in Canada during this period, even though they make up only 3% of the total female population.<sup>11</sup> It is estimated that if women and girls in the general Canadian population had gone missing or been murdered at the same rate, it would amount to 18 000 Canadian women having disappeared in the last thirty years.<sup>12</sup> The majority of these women (55%) were under 31 years of age and 88% of them were mothers.<sup>13</sup>

The disappearance rates in the Western provinces have been particularly high, with more than half of all documented cases occurring in British Columbia, Alberta, Saskatchewan and Manitoba.<sup>14</sup> In northern British Columbia, Yellowhead Highway has become known as the 'Highway of Tears' after dozens of women have gone missing in its vicinity.<sup>15</sup> The official police count is 18 women, half of whom are Aboriginal, however this number is suspected as being too low.<sup>16</sup> In total, more than a quarter (28%) of documented cases have taken place in the province of British Columbia.<sup>17</sup> Since the mid-1990s, 69 women have gone missing from Vancouver's Downtown Eastside (DTES), a neighbourhood known for its high incidence of poverty, drug use and sex work.<sup>18</sup> Many of these women were victims of serial killer Robert Pickton, who was charged with the murder of 26 women in 2002. He was tried and convicted for six of them, and was sentenced to life in prison without parole in 2007.<sup>19</sup>

These statistics outline the extreme violence faced by Aboriginal women in Canada. Between April 2010 and March 2013, NWAC compiled 86 'new' cases, raising the total number of documented missing or murdered Aboriginal women to 668.<sup>20</sup> Most Aboriginal groups and human rights organizations agree that there are many more cases that have gone undocumented and that the actual number is likely much higher.<sup>21</sup>

---

<sup>11</sup> NWAC, "Fact Sheet", *supra* note 3 at 1.

<sup>12</sup> Human Rights Watch, *Those Who Take Us Away* (United States: Human Rights Watch, 2013) at 7 [HRW].

<sup>13</sup> NWAC, "Fact Sheet", *supra* note 3 at 2. There is very little information available about the impact on the estimated 440 children who have lost their mothers.

<sup>14</sup> NWAC, "Fact Sheet", *supra* note 3 at 2.

<sup>15</sup> HRW, *supra* note 12 at 7.

<sup>16</sup> BC CEDAW Group, *Nothing to Report* (January 2010) at 5 [BC CEDAW].

<sup>17</sup> NWAC, "Fact Sheet", *supra* note 3 at 2.

<sup>18</sup> BC CEDAW, *supra* note 16 at 5.

<sup>19</sup> LWRC & BC CEDAW, *supra* note 7 at 6. Charges against Pickton for the murder of the additional 20 women were stayed in 2010 on the basis that his sentence would not increase with additional convictions. Evidence was presented at trial that Pickton may have murdered as many as 49 women.

<sup>20</sup> NWAC & FAFIA, "Murders", *supra* note 2 at 7.

<sup>21</sup> BC CEDAW, *supra* note 16 at 4.

### ***Social and Economic Marginalization***

The history of colonization coupled with the impact of the Canadian government's assimilation policies have left many Aboriginal women facing institutionalized patterns of poverty, including poor health, inadequate housing, lack of access to clean water, low school-completion rates and high levels of violence.<sup>22</sup> According to NWAC, "these conditions reflect entrenched sex and race discrimination. Aboriginal women in Canada face discrimination on multiple fronts: as women within their communities due to the patriarchal effects of colonialism, and as women and Aboriginal persons in mainstream society."<sup>23</sup> Among Canada's poorest citizens, Aboriginal women face a variety of social and economic barriers that increase their vulnerability to violence. A 2011 Statistics Canada (StatsCan) report indicated that 18% of Aboriginal women aged 15 and over are single mothers compared with 8% of non-Aboriginal women.<sup>24</sup> Their families tend to be larger and parenthood in teen years is much more common among Aboriginal youth.<sup>25</sup> With respect to housing, 31% of Inuit women and girls were living in crowded homes (i.e. more than one person per room) compared to only 3% of non-Aboriginal women, and indigenous women are much more likely to live in homes in need of repair.<sup>26</sup> In the area of education, StatsCan reported that 35% of Aboriginal women aged 25 and over had not graduated from high school, in contrast with 20% for their non-Aboriginal counterparts. Almost a quarter (23%) of women cited pregnancy or child rearing as the main reason for not completing high school.<sup>27</sup> Aboriginal women are also less likely to have completed post secondary education, which in turn leads to decreased labour market participation compared to non-Aboriginal women.<sup>28</sup> Unemployment rates for Aboriginal women were 13.5% compared with 6.4% for non-Aboriginal women, making them twice as likely to be unemployed.<sup>29</sup> Furthermore, the incomes of Aboriginal women tend to be relatively low, with a median of \$15,654 compared to \$20,640 for their non-Aboriginal counterparts.<sup>30</sup>

---

<sup>22</sup> NWAC & FAFIA, "Murders", *supra* note 2 at 7.

<sup>23</sup> *Ibid* at 15.

<sup>24</sup> Statistics Canada, *First Nations, Métis and Inuit Women* (Ottawa: StatCan, July 2011) at 20; see also LWRC & BC CEDAW, *supra* note 7 at 8.

<sup>25</sup> *Ibid* at 20.

<sup>26</sup> *Ibid* at 22-23.

<sup>27</sup> *Ibid* at 35.

<sup>28</sup> *Ibid* at 37 and 26.

<sup>29</sup> *Ibid* at 30.

<sup>30</sup> *Ibid*.

The residential school system in Canada has contributed to many of these negative outcomes in Aboriginal communities. Existing from the 1880s to the 1990s in Canada, this system placed approximately 150,000 Aboriginal children in schools where they were forbidden from speaking their own languages or engaging in cultural practices. Children were removed from their families and were often subjected to physical and sexual abuse. When attendance at residential schools became mandatory in the 1920s, RCMP officers were charged with enforcing that regulation, laying the foundation for a relationship of fear and distrust between police and Aboriginal communities.<sup>31</sup> Attendance in residential schools has been linked to patterns of drug and alcohol abuse, homelessness, prostitution, violence and suicide later in life.<sup>32</sup>

Canadian laws that institutionalize racism have further exacerbated the circumstances of the indigenous population. In the last century, various discriminatory laws have been implemented that have prohibited Aboriginal cultural and religious practices; denied voting rights; denied 'Indians' the right to be considered 'a person'; denied the right to legal representation; allowed the forcible removal of Aboriginal children from their homes; and denied status under the *Indian Act* to Aboriginal women who married non-status men.<sup>33</sup>

The epidemic of violence against Aboriginal women in Canada is thus placed within an historic pattern of institutionalized gender and race discrimination that has disenfranchised Canada's Aboriginal communities and reproduced multiple forms of oppression. As Bazilli and Sharma note, "women's unequal status in societies and the lack of control women have over their lives, manifested in poverty, is at the root of VAW."<sup>34</sup> Given this direct connection between VAW and poverty, it is unsurprising that Aboriginal women in Canada report rates of violence, including both domestic violence and sexual assault, 3.5 times higher than non-Aboriginal women.<sup>35</sup> In 2009, statistics showed that 13% of all Aboriginal women in Canada over the age of 15 stated that they had been violently victimized.<sup>36</sup> Moreover, many of the perpetrators of violence as well as those who administer the

---

<sup>31</sup> HRW, *supra* note 12 at 29.

<sup>32</sup> *Ibid* at 30.

<sup>33</sup> LWRC & BC CEDAW, *supra* note 7 at 7.

<sup>34</sup> Susan Bazilli & Richa Sharma, "Violence Against Women: What's Law Got to do With it?" (2014) *International Journal for Crime, Justice and Social Democracy* (forthcoming).

<sup>35</sup> NWAC & FAFIA, "*Murders*", *supra* note 2 at 6.

<sup>36</sup> LWRC & BC CEDAW, *supra* note 7 at 5.

criminal justice system often hold the view that Aboriginal women are responsible for the violence committed against them because of the risky lifestyles they lead.<sup>37</sup> As NWAC president, Beverly Jacobs, said, “it’s as if society is prepared to disregard the missing women as ‘garbage’.”<sup>38</sup>

### ***Response from the Human Rights Community***

Canada’s failure to take action in addressing the crisis of missing and murdered Aboriginal women has not gone unnoticed. Human rights organizations in Canada and abroad, including NWAC, the Canadian Feminist Alliance for International Action (FAFIA), Human Rights Watch (HRW) and Amnesty International, have been at the forefront of drawing greater attention to this issue. They have been calling on the Canadian government to initiate a national inquiry into the missing and murdered women and to develop a coordinated national action plan to address the structural roots of violence against indigenous women. They have also been demanding a review of police enforcement practices and investigation into the reported incidents of serious police misconduct, including rape and sexual assault.<sup>39</sup>

Many international human rights bodies have also expressed concern over the grave and systematic violence experienced by Canada’s Aboriginal women. The Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Committee on the Elimination of Racial Discrimination (CERD), and the Human Rights Council in its Universal Periodic Review have all called upon Canada to address the root causes of violence against women, and remedy the violations against indigenous women’s rights.<sup>40</sup>

Notably, the CEDAW Committee announced in December 2011 that Canada would be the site of an inquiry into the murders and disappearances of Aboriginal women under Article 8 of the Optional Protocol to CEDAW (OP-CEDAW).<sup>41</sup> Under the OP-CEDAW, if the Committee receives reliable information indicating that there have been

---

<sup>37</sup> Amnesty International, *Stolen Sisters: A human rights response to discrimination and violence against indigenous women in Canada* (Ottawa: Amnesty International Canada, 2004) at 7 [Amnesty, “*Stolen Sisters*”].

<sup>38</sup> NWAC & FAFIA, “*Murders*”, *supra* note 2 at 13.

<sup>39</sup> See NWAC & FAFIA, “*Murders*”, *supra* note 2 at 8; HRW, *supra* note 12 at 15.

<sup>40</sup> LWRC & BC CEDAW, *supra* note 7 at 12.

<sup>41</sup> NWAC & FAFIA, “*Murders*”, *supra* note 2 at 4.

“grave and systematic” violations of the rights in the Convention, it may conduct an inquiry into this activity whereby Committee representatives visit the state party to carry out an investigation, and ultimately release a report of recommendations on how to address the human rights concerns.<sup>42</sup> Canada’s selection not only highlights the magnitude of the abuses, but is also significant because it is one of only two inquiries that have ever been conducted since the OP-CEDAW came into force in 2000. The first inquiry concerned the abduction, rape and murder of more than 230 women in the Ciudad Juárez region of Chihuahua, Mexico.<sup>43</sup> Although the recommendations from the Committee are not legally binding, the hope is that this process will draw greater public attention to the issue of violence against Aboriginal women in Canada, as it did in Mexico.

Representatives of the Inter-American Commission on Human Rights (IACHR) visited Canada during the week of August 5, 2013 to investigate the murders and disappearances of indigenous women following two hearings at the IACHR in 2012 and 2013 where NWAC and FAFIA presented information on the situation.<sup>44</sup> Furthermore, from October 7-15, 2013 Canada was visited by James Anaya, the United Nations Special Rapporteur on the rights of indigenous peoples, in order to evaluate the situation of Aboriginal people in Canada and make a series of recommendations.<sup>45</sup> In his concluding statement, Anaya indicated that amidst the wealth and prosperity of the nation as a whole, Canada’s indigenous people live in conditions akin to countries where poverty abounds.<sup>46</sup> He concluded with respect to Canada’s missing and murdered Aboriginal women that a national inquiry was needed to help ensure a coordinated response and an opportunity for victims’ families to be heard.<sup>47</sup>

Despite the efforts of advocacy groups and recommendations from a growing list of international human rights bodies, the Canadian government has failed to recognize and respond to the gravity of the situation. The role of

---

<sup>42</sup>United Nations Office of the High Commissioner for Human Rights, *30 Years Working for Women’s Rights: Committee on the Elimination of Discrimination Against Women 1982-2012* (Geneva: OHCHR 2012) at 30 [UNOHCHR, “30 Years of CEDAW/C”].

<sup>43</sup>Bal Sokhi-Bulley, “The Optional Protocol to CEDAW: First Steps” (2006) 6:1 Human Rights Law Review 143 at 152; Committee on the Elimination of Discrimination Against Women, *Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention, and reply from the Government of Mexico*, UNCEDAWOR, 32<sup>nd</sup> Sess, CEDAW/C/2005/OP.8/MEXICO (2005).

<sup>44</sup>“Violence Against Indigenous Women Demands Inquiry”, *Human Rights Watch* (9 August 2013), online: *Human Rights Watch* <<http://www.hrw.org/news/2013/08/09/canada-violence-against-indigenous-women-demands-inquiry>>.

<sup>45</sup>United Nations Special Rapporteur on the rights of indigenous peoples, James Anaya, Press Release, “Statement upon conclusion of the visit to Canada” (15 October 2013) online: <<http://unsr.jamesanaya.org/statements/statement-upon-conclusion-of-the-visit-to-canada>>.

<sup>46</sup>*Ibid.*

<sup>47</sup>*Ibid.*



state responsibility for preventing and responding to violence against women is now at the forefront of many discussions on VAW as a human rights violation, and will be explored further in Parts II and III.

## **Part II: The Due Diligence Obligation in International Law**

### ***Source, Scope and Content***

Now well-established as part of conventional and customary international law, the due diligence standard plays a critical role in establishing state responsibility for violence committed by private actors, whether in the public or private sphere.<sup>48</sup> The due diligence standard:

“imposes upon the State the responsibility for illegal acts that are not committed by the State or its agents, but by private actors on account of State failure to take sufficient steps to prevent the illegal acts from occurring. Likewise once an illegal act has occurred, the State’s inaction and failure to investigate, prosecute or punish the act perpetrated by a private actor amounts to neglect of the State obligation to be duly diligent.”<sup>49</sup>

The due diligence standard does not eliminate or reduce the criminal responsibility of the private actors who perpetrate the violence, but rather emphasizes the responsibility of the state to act to prevent and respond to it.<sup>50</sup>

The due diligence standard was first applied by the Inter-American Court of Human Rights in its 1988 landmark decision in *Velásquez Rodríguez v Honduras*.<sup>51</sup> The Court held that Honduras failed to fulfill its duties under the *American Convention on Human Rights (American Convention)* in preventing the disappearance of Manfredo Velásquez. It concluded that an illegal act that violates human rights which is not directly imputable to the State can still lead to international responsibility of the state because of a lack of due diligence to prevent or respond to the violation.<sup>52</sup> The obligation was developed further in the context of VAW when the CEDAW Committee adopted *General Recommendation 19 (GR 19)* in 1992, which was focused specifically on VAW.<sup>53</sup> GR 19 made

---

<sup>48</sup> United Nations Office of the High Commissioner for Human Rights, *15 Years of the United Nations Special Rapporteur on Violence Against Women, Its Causes and Consequences* (Geneva: OHCHR 2009) at 25 [UNOHCHR, “15 Years of SRVAW”].

<sup>49</sup> *Ibid.*

<sup>50</sup> Amnesty, “*Stolen Sisters*”, *supra* note 37 at 5.

<sup>51</sup> *Velasquez Rodriguez Case (Honduras)* (1988), Inter-Am Ct HR (Ser C) No 4.

<sup>52</sup> *Ibid* at para 172.

<sup>53</sup> *CEDAW General Recommendation No. 19: Violence Against Women*, UNCEDAWOR, 11<sup>th</sup> Sess, UN Doc A/47/38 (1992).

explicit that CEDAW covered VAW in all its forms, and also identified that state parties may be held responsible for private acts if they fail to prevent, investigate, punish or compensate human rights violations resulting from violence.<sup>54</sup> This obligation was confirmed by Article 4(c) of the *Declaration on the Elimination of Violence against Women* (DEVAW), which was adopted by the UN General Assembly on 20 December 1993.<sup>55</sup>

A 2006 report by the former Special Rapporteur on Violence against Women (SRVAW), Yakin Ertürk, clarified the scope and content of the due diligence obligation.<sup>56</sup> Ertürk identified four basic principles that underlie the concept of due diligence as follows:

- The state cannot delegate their obligation to exercise due diligence, even where certain functions are being performed by another state or non-state actor;
- The principle of non-discrimination underlies the concept of due diligence in that state parties must use the same level of commitment in relation to prevention, investigation, punishment and provision of remedies for VAW as they do for other forms of violence;
- Due diligence must be implemented in good faith with an aim to preventing VAW. This requires States to take positive measures to ensure women's human rights are protected, promoted, respected and fulfilled; and
- Interventions designed to prevent and respond to VAW must be based on accurate empirical data.<sup>57</sup>

These principles apply to actions taken in relation to four levels of accountability with respect to VAW: prevention, protection, punishment and reparation. The extent to which a state is duly diligent can then be assessed through the interventions it makes with respect each level of accountability.<sup>58</sup> Ertürk clarified the content of these as follows:

---

<sup>54</sup> *Ibid* at para. 9.

<sup>55</sup> *Declaration on the Elimination of Violence against Women*, GA Res 48/104, UNGAOR, UN Doc A/RES/48/104 (1993). Article 4(c) states that: "States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should: (c) Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons."

<sup>56</sup> Yakin Ertürk, Special Rapporteur on Violence Against Women, its Causes and Consequences, *The Due Diligence Standard as a Tool for the Elimination of Violence Against Women*, ESC Dec 2006/61, UNESCOR, 62<sup>nd</sup> Sess, UN Doc E/CN4/2006/61, (2006).

<sup>57</sup> *Ibid* at 9-10.

<sup>58</sup> UNOHCHR, "15 Years of SRVAW", *supra* note 48 at 26.

### ***Prevention***

With respect to prevention, states may discharge this obligation by adopting specific legislation on VAW; ratifying relevant treaties; taking positive action through the development of policies, programs and specialized mechanisms, such as commissions and ombudspersons; developing public education campaigns; training professionals; and collecting data to assess the levels of violence.<sup>59</sup> Ertürk emphasized that the responsibility to prevent encompasses the state's role in transforming social and material structures that are the root causes of VAW.<sup>60</sup>

### ***Protection***

A state may fulfill its due diligence obligation to protect by providing women with services such as telephone hotlines, healthcare, counselling, legal aid, women's shelters, restraining orders and financial aid to victims of violence.<sup>61</sup> Ertürk identified a lack of enforcement of civil remedies and criminal sanctions by both the police and the judiciary as ways that states often fail to meet their due diligence obligation to protect. She also noted that the focus is all too often on short-term emergency assistance rather than solutions that will allow women to avoid re-victimization in the long term.<sup>62</sup>

### ***Punishment***

The obligation to punish acts of VAW can be measured in terms of a state's actions with respect to investigating and prosecuting cases of violence, observing the rule of law, and convictions and sentencing of crimes related to VAW.<sup>63</sup>

### ***Reparation***

The due diligence obligation to provide adequate reparations involves ensuring access to criminal and civil remedies for VAW, support services for survivors, and compensation for legal and medical costs associated with violence. It may also involve awarding financial damages for physical or psychological injuries suffered as a result of violence, for loss of employment and educational opportunities, loss of social benefits, or harm to reputation and dignity.<sup>64</sup>

---

<sup>59</sup> UNOHCHR, "15 Years of SRVAW", *supra* note 48 at 26; Ertürk, *supra* note 56 at 10.

<sup>60</sup> UNOHCHR, "15 Years of SRVAW", *supra* note 48 at 27.

<sup>61</sup> UNOHCHR, "15 Years of SRVAW", *supra* note 48 at 26; Ertürk, *supra* note 56 at 11.

<sup>62</sup> Ertürk, *supra* note 56 at 12.

<sup>63</sup> *Ibid.*

<sup>64</sup> UNOHCHR, "15 Years of SRVAW", *supra* note 48 at 27-28; Ertürk, *supra* note 56 at 19.

The due diligence standard therefore obliges governments to ensure that state agents comply with human rights standards, and to implement measures to prevent private actors from engaging in human rights violations or be in violation of their due diligence obligation under international law.<sup>65</sup> Ertürk noted that the application of the due diligence standard in international tribunals would continue to shape the practical dimensions of the obligation.<sup>66</sup>

### ***Application of the Due Diligence Obligation to Cases Involving Violence Against Women***

In the last two decades, a number of international cases have entrenched the due diligence principle as part of human rights law and interpreted the scope and content of the obligation.

#### **i. Committee on the Elimination of Discrimination Against Women**

In addition to the inquiry procedure, the OP-CEDAW includes a communications procedure that allows individuals to bring forward complaints regarding alleged violations of their rights under the Convention by their state party. If the Committee deems the communication to be admissible, it will provide the state party with its views and recommendations on the situation, and give specific measures for redress in individual cases.<sup>67</sup> The complaint must involve a state party to both CEDAW and OP-CEDAW, and the individual must have exhausted all domestic remedies at the national level for the complaint to be admissible.<sup>68</sup> The Committee explicitly addressed the due diligence obligation of states with respect to VAW in the cases of *Goecke v Austria*<sup>69</sup> and *Yildirim v Austria*,<sup>70</sup> which involved similar facts. The women involved, Sahide Goecke and Fatma Yildirim, were both murdered by their husbands after suffering extensive and prolonged violence, despite having sought assistance from law enforcement on many occasions.<sup>71</sup> Both communications alleged violations of Articles 1, 2, 3

---

<sup>65</sup> Amnesty, “*Stolen Sisters*”, *supra* note 37 at 4.

<sup>66</sup> Ertürk, *supra* note 56 at 12.

<sup>67</sup> UNOHCHR, “*30 Years of CEDAW/C*”, *supra* note 42 at 27.

<sup>68</sup> *Ibid* at 28.

<sup>69</sup> *The Vienna Intervention Centre against Domestic Violence and the Association for Women’s Access to Justice on behalf of Hakan Goecke, Handan Goecke, and Guelue Goecke (descendants of the deceased) v Austria*, CEDAW Committee, Communication No 5/2005, UN Doc CEDAW/C/39/D/5/2005.

<sup>70</sup> *The Vienna Intervention Centre against Domestic Violence and the Association for Women’s Access to Justice on behalf of Banu Akbak, Gülen Khan, and Melissa Özdemir (descendants of the deceased) v Austria*, CEDAW Committee, Communication No 6/2005, UN Doc CEDAW/C/39/D/6/2005.

<sup>71</sup> Andrew Byrnes & Eleanor Bath, “Violence against Women, the Obligation of Due Diligence, and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women - Recent Developments” (2008) 8(3) Human Rights Law Review 517 at 520.

and 5 of CEDAW,<sup>72</sup> arguing that the state party failed to take all appropriate measures to protect the women's rights to life and personal security, and that the Austrian justice system failed to act with due diligence to investigate and prosecute the violence that had occurred.<sup>73</sup> In both cases, there were multiple exclusion orders issued and prohibitions barring contact with the victims, however the Public Prosecutor declined to detain and prosecute the perpetrators on several occasions.<sup>74</sup> The Committee held that in light of the long record of battery and the numerous attempts by the women to seek help, the Austrian authorities should have known of the gravity of the violence, and their repeated failure to detain the perpetrators amounted to a breach of their due diligence obligation to protect the women.<sup>75</sup> The Committee noted that while Austria had established a comprehensive legal framework to address VAW, including domestic violence policies, shelters and criminal and civil remedies, in order for Austrian women to enjoy the practical realization of their rights, this system must be supported by state actors who adhere to their due diligence obligations.<sup>76</sup> The Committee recommended a range of measures, including strengthening the implementation of existing legislation, prosecuting perpetrators of violence, and ensuring that the privacy rights of the perpetrator do not supersede the right to life and security of the women.<sup>77</sup>

The jurisprudence of the CEDAW Committee was developed further through the inquiry into the missing and murdered women in Ciudad Juárez, México. As noted, the inquiry involved investigations into the deaths or disappearances of nearly 300 women, mostly maquiladora workers, from the region.<sup>78</sup> The Mexican authorities suggested that the cases were isolated and did not reflect a larger pattern of systemic gender-based violations.<sup>79</sup> The Committee concluded that the murders and disappearances constituted grave and systemic violations of the provisions of CEDAW, as well as GR 19 and DEVAW.<sup>80</sup> It found that the murders were not isolated incidents, but involved systematic violations of women's rights that reflected a culture of violence and discrimination against

---

<sup>72</sup> *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981, ratified by Canada 10 December 1981) [CEDAW].

<sup>73</sup> *Byrnes & Bath*, *supra* note 71 at 522.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid* at 524.

<sup>76</sup> *Ibid* at 523.

<sup>77</sup> *Ibid* at 525.

<sup>78</sup> Sokhi-Bulley, *supra* note 43 at 152.

<sup>79</sup> Andrew Byrnes & Maria Graterol, "Violence against Women: Private Actors and the Obligation of Due Diligence" (2006) 15 *Interights Bulletin* 156 at 156.

<sup>80</sup> *Ibid.* The Committee held that Mexico was in violation of Articles 1, 2, 3, 5, 6 and 15 of CEDAW.

women, which led to impunity for perpetrators.<sup>81</sup> A number of recommendations were made, including the need to strengthen the coordination between multiple levels of government, incorporate a gender perspective into all investigations, and maintain close relationships with civil society groups working towards eradicating VAW.<sup>82</sup>

## ii. Inter American Human Rights System

The Organization of American States (OAS) is a regional body that brings together all 35 independent states in the Americas and constitutes the main political, juridical and social government forum in the hemisphere.<sup>83</sup> The inter-American human rights system is composed of the norms and institutions created by the OAS to promote and protect human rights in the region.<sup>84</sup> The main human rights instruments within the system are the *OAS Charter*; human rights treaties, including the *American Convention*; and other instruments such as the *American Declaration of the Rights and Duties of Man (American Declaration)*.<sup>85</sup> The principle body charged with ensuring the protection of human rights is the IACHR, which promotes human rights in the region, issues recommendations to state parties and investigates regional human rights concerns. It also deals with complaints against member states alleging violations of inter-American human rights norms.<sup>86</sup> The IACHR can refer cases to the Inter American Court of Human Rights (IACtHR), which rules on cases between the Commission and member states regarding rights violations.<sup>87</sup> The court can issue binding judgements, however a state is only subject to the court's jurisdiction if it has ratified the *American Convention* and expressly recognized the court's jurisdiction.<sup>88</sup> When Canada became a member of the OAS in 1990, it recognized its international obligation to respect human rights under the *OAS Charter* and the *American Declaration*.<sup>89</sup> It has not, however, ratified any of the OAS' human rights instruments, including the *American Convention* nor the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention Belém do Pará)*.<sup>90</sup> The IACHR has

---

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

<sup>83</sup> "Who we are", online: Organization of American States <[http://www.oas.org/en/about/who\\_we\\_are.asp](http://www.oas.org/en/about/who_we_are.asp)>.

<sup>84</sup> Bernard Duhaime, "Canada and the Inter-American Human Rights System" (2012) Int'l J 639 at 640.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid* at 641.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid* at 642.

<sup>90</sup> Koshan, Jennifer, "State Responsibility For Protection Against Domestic Violence: The Inter-American Commission On Human Rights Decision In *Lenahan (Gonzales)* And Its Application In Canada" (2012) 30 Windsor Yearbook of Access to Justice 1 at 6.

noted, however, that the *American Declaration* is a source of legal obligations for all OAS member states, including those such as Canada and the United States that have not ratified the *American Convention*.<sup>91</sup> As such, Canada is still subject to the IACHR's jurisdiction for petitions alleging human rights violations under provisions of the *American Declaration*. According to Duhaime, "while the *American Declaration* is not a treaty per se, it has been considered to be binding, at least in part, on all member states, including Canada. Canada thus has an obligation to implement in good faith the commission's recommendations."<sup>92</sup>

In recent years, the IACHR and the IACtHR have delivered key jurisprudence on the issue of states' due diligence obligation in responding to VAW. In the 2001 case of *Maria da Penha Maia Fernandes v Brazil*,<sup>93</sup> the Commission concluded that Brazil had failed in its due diligence obligation to prevent violence against Ms. Fernandes. Her husband subjected her to prolonged and extreme violence, including shooting her in her sleep and causing her to become paraplegic, and attempting to kill her again by electrocuting her in the bathtub. Ms. Fernandes brought a complaint to the IACHR, which concluded there was a pattern of negligence in prosecuting crimes as well as a failure on the part of the state to prevent such degrading practices, resulting in a breach of their due diligence obligations.<sup>94</sup>

In 2009, the IACtHR heard the case of *González et al ('Cotton Field') v México*, which concerned three of the murdered women from Ciudad Juárez.<sup>95</sup> The Court focussed on the notion of foreseeable and avoidable risk, whereby a state is responsible for acts committed by non-state actors "when it is aware of a situation of imminent danger and had reasonable possibilities of preventing or avoiding that danger."<sup>96</sup> The Court held that once the missing persons reports had been filed for the three women, the government became aware of the immediate risk of harm and had failed to meet its due diligence obligations to investigate the disappearances and potentially still find the women alive. Mexico was found in violation of the *Convention of Belém do Pará*, and

---

<sup>91</sup> *Ibid.*

<sup>92</sup> Duhaime, *supra* note 84 at 642.

<sup>93</sup> *Maria da Penha Maia Fernandes v Brazil* (2001), Inter-Am Comm HR, No 54/01, OEA/Ser.L/V/II.111 doc. 20 704.

<sup>94</sup> Bonita Meyersfeld, "Developments in International Law and Domestic Violence" (2001) 16 Interights Bulletin 107 at 108. After this decision, Brazil passed the Maria da Penha law in 2006, which classifies domestic violence as a human rights violation.

<sup>95</sup> *González et al ('Cotton Field') v México* (2009), Inter-Am Ct HR (Ser C) No 205.

<sup>96</sup> Alejandra Vicente, "The Approach of the Inter-American Court to State Responsibility and Due Diligence in Investigating Violence Against Women" (2011) 16 Interights Bulletin 116 at 116.

to have violated the victims' rights to life (Article 4), integrity (Article 5) and personal liberty (Article 7) under the *American Convention*.<sup>97</sup> The Court recommended a series of measures including conducting gender-sensitive investigations; punishing individuals who failed to respond to the crimes; and erecting a monument in memory of the victims as a public acknowledgment of the state's international responsibility.<sup>98</sup>

The most recent and powerful precedent dealing with state responsibility for domestic violence comes from the 2011 IACHR decision in *Lenahan (Gonzales) v United States*.<sup>99</sup> When Jessica Lenahan discovered on June 22, 1999 that her three daughters were missing, she contacted the Castle Rock, Colorado police department eight times, fearing for their safety and complaining of a violation of the restraining order that she held against her former husband, Simon Gonzales.<sup>100</sup> Lenahan was told that she should call Gonzales herself to inquire about her daughters' whereabouts, and it wasn't until hours later that officers sent out an 'attempt to locate' bulletin.<sup>101</sup> Early on June 23, 1999, Gonzales drove to the Castle Rock police department and opened fire in the parking lot. The police killed Gonzales and later found the dead bodies of the three girls inside the truck. The subsequent investigation and autopsy did not determine whether they were killed by Gonzales or police gunfire.<sup>102</sup> Lenahan filed a lawsuit alleging that the City of Castle Rock and several of its police officers violated her constitutional right to due process.<sup>103</sup> She argued that she and her daughters had a right to be protected from harm by the police and that the city failed to properly train its officers regarding the enforcement of restraining orders, thereby recklessly disregarding her right to police protection.<sup>104</sup> Lenahan's case went all the way to the United States Supreme Court where all of her claims were rejected, with the majority holding that Lenahan had no constitutional right to police enforcement of the restraining order under the due process clause.<sup>105</sup> Having then exhausted all available domestic remedies, Lenahan filed a petition against the United States with the IACHR arguing that it was in violation of several provisions on the *American Declaration*, including her rights to

---

<sup>97</sup> *Ibid.*

<sup>98</sup> Meyersfeld, *supra* note 94 at 108.

<sup>99</sup> *Jessica Lenahan (Gonzales), et al v United States* (2011), Inter-Am Comm HR, No 80/11.

<sup>100</sup> Amy J Sennett, "Lenahan (Gonzales) v United States of America: Defining Due Diligence" (2012) 53 Harv. Int'l L J 537 at 538.

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid* at 539.

<sup>104</sup> Koshan, *supra* note 90 at 3.

<sup>105</sup> *Ibid.*



equality and non-discrimination, to life, to special protection as women and children, and judicial protection.<sup>106</sup> After considering existing international jurisprudence, the Commission synthesized a two-part test for determining whether or not states meet their due diligence obligation to protect in cases of domestic violence: it must be considered “i) 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.”<sup>107</sup> On the facts, the IACHR ruled that the issuance of the restraining order indicated the state’s recognition that the parties were at risk of domestic violence and in need of state protection. The restraining order was also an indicator of what actions could be reasonably expected from the authorities in terms of enforcement.<sup>108</sup> The Commission concluded that the state was obligated to ensure that the mechanisms in place to respond to calls such as those placed by Jessica Lenahan functioned effectively and in a coordinated fashion to enforce the terms of the restraining order, thereby protecting the victims from harm. Moreover, state agents should have been trained on the dynamics of domestic violence, and the necessity to respond to reports of violations of restraining orders in that context.<sup>109</sup> These failures to act with due diligence in spite of the known risk to Lenahan and her children constituted discrimination in violation of Article II of the *American Declaration*.<sup>110</sup> This decision is significant not only because it is the first time that the United States has been found guilty by an international tribunal of a human rights violation in the context of a domestic violence case, but also because of the clarifications it provides on the duty to protect as part of a state’s due diligence obligation.<sup>111</sup>

It is evident that the application of the due diligence standard within international tribunals has further clarified the scope and content of the obligation, and identified a number of practical components of the obligation. To synthesize, the case law has reinforced the notion that state parties must take positive steps to eradicate violence, and that such steps are integral to fulfilling states’ due diligence obligation. Furthermore, both the CEDAW Committee and the IACHR stressed that the responsibility of state parties for acts of violence committed

---

<sup>106</sup> Sennett, *supra* note 100 at 540.

<sup>107</sup> Koshan, *supra* note 90 at 7.

<sup>108</sup> *Ibid* at 8.

<sup>109</sup> *Ibid*.

<sup>110</sup> *Ibid*.

<sup>111</sup> Sennett, *supra* note 100 at 547.

by private actors arises when the state authorities knew or should have reasonably known of a situation that posed real and imminent risk of violence, and failed to take reasonable measures to alter or mitigate the harm.<sup>112</sup> The decisions in *Goecke*, *Yildirim*, *González et al* and *Lenahen* all stressed the fact that prosecution of the crimes is not enough to discharge the due diligence obligation if the state knew about and failed to prevent the violence from occurring.<sup>113</sup> Analytically, this confirms that the duties to prevent, protect, punish, and compensate are distinct obligations within the due diligence standard, and each remains regardless of whether the others are fulfilled.<sup>114</sup>

### **Part III: Canada's Due Diligence Obligation to Protect Aboriginal Women**

Despite growing domestic and international attention, the Canadian government has failed to recognize and respond to the gravity of the situation involving missing and murdered Aboriginal women. According to NWAC and FAFIA, Canada has failed to acknowledge that “it has obligations to 1) exercise due diligence to prevent, investigate and remedy the violence and 2) ensure that the rights of Aboriginal women and girls to life, security of the person, and equal protection and benefit of the law, and to equality in social and economic conditions, are fully realized.”<sup>115</sup> In spite of rising rates of violence against Aboriginal women in Canada, many of the murders and disappearances have never been fully investigated and perpetrators remain unpunished. Victims have been systematically denied access to justice, including the denial of legal aid funding as well as effective remedies to the human rights violations perpetrated against them. These practices, which will be discussed further below, amount to serious violations of women's human rights and a clear failure of the state to meet its obligations under the due diligence standard established in international law.

---

<sup>112</sup> Koshan, *supra* note 90 at 13.

<sup>113</sup> Byrnes & Bath, *supra* note 71 at 525.

<sup>114</sup> *Ibid.*

<sup>115</sup> NWAC & FAFIA, “*Murders*”, *supra* note 2 at 23.

## ***Prevention***

Recall that state parties can discharge their prevention obligation by, among other initiatives, adopting specific legislation on VAW, training professionals, and taking positive action through the development of policies and programs aimed at addressing the root causes of VAW. Canada has failed to execute these obligations in a number of areas, including a failure to establish a coordinated, national strategy designed to address the structural causes of violence.

Canada remains one of the few countries in the Americas that has yet to enact domestic violence laws.<sup>116</sup> While there are no specific criminal offences related to domestic violence, judicial precedent provides that domestic violence-related offences be treated contextually in bail hearings, and cases of self-defence and provocation. The *Criminal Code of Canada* also requires consideration of abuse as an aggravating factor during sentencing.<sup>117</sup> These are indeed positive steps towards meeting the prevention obligation, however Canada could strengthen its legislative framework with respect to VAW by adopting laws specific to these offences. On an international level, Canada has failed to ratify the only human rights treaty that deals specifically with VAW, the *Convention of Belém do Pará*.<sup>118</sup> This treaty obliges states to undertake specific measures to address the root causes of violence against women, and if ratified, would offer Aboriginal women in Canada an additional form of institutional protection.

With regard to training professionals, Canada has been criticized by women's groups for its failure to establish standardized police training protocols and coordinate the efforts of police forces on either a pan-Canadian or intra-provincial basis.<sup>119</sup> There is currently no national, standardized practice for dealing with missing and murdered Aboriginal women and girls. Few police forces provide officers with concrete guidelines and training to assist in evaluating the risks to missing women and what type of investigation is needed.<sup>120</sup> Notably, many of

---

<sup>116</sup> Koshan, *supra* note 90 at 15.

<sup>117</sup> *Ibid*; *Criminal Code*, RS C 1985, c C-46 s 718.2(a)(ii).

<sup>118</sup> Amnesty, "Stolen Sisters", *supra* note 37 at 4.

<sup>119</sup> LWRC & BC CEDAW, *supra* note 7 at 22.

<sup>120</sup> *Ibid*.

these cases are still dealt with on an individual, case-by-case basis as opposed to establishing a systemic response that looks broadly at the racialized patterns of violence against Aboriginal women.<sup>121</sup>

Within the prevention obligation, the SRVAW emphasized the importance of transforming the structures that are at the core of VAW, including cultural and social practices that perpetuate violence. In doing so, she highlighted the need for data collection to assess the levels of violence and respond accordingly with effective and responsive interventions.<sup>122</sup> Despite the known epidemic of violence against Aboriginal women and girls in Canada, no national database exists to document the disappearances.<sup>123</sup> Furthermore, NWAC was forced to shut down its *Sisters In Spirit* database, the only existing source of data on the missing and murdered Aboriginal women, when the federal government ceased all of its funding in 2010.<sup>124</sup> Data collection is integral to developing a comprehensive understanding of the levels of violence experienced by women and there is currently no comprehensive sex and race disaggregated data being collected to track the missing and murdered Aboriginal women.<sup>125</sup> Not only has the government failed to meet its due diligence obligation towards preventing violence in this regard, it has created barriers for civil society organizations to step in and fill this role by denying the funding to do so. This is particularly alarming given the widespread awareness that the scope of the violence is likely far greater than the documented cases.

Finally, in order to discharge its prevention obligation fully, the government needs to establish a coordinated, national response that addresses the social and economic factors that marginalize many Aboriginal women and heighten their risk of violence. As noted in Part I, Aboriginal women are disproportionately affected by homelessness, violence, drug addiction, unemployment and poverty. Amnesty International noted that the measures taken by the government to address VAW thus far have been piecemeal and fallen short of a coordinated strategy to address such serious human rights concerns.<sup>126</sup> Greater efforts are needed to ensure that indigenous women have access to housing, post secondary education, full-time and stable employment, and

---

<sup>121</sup> *Ibid.*

<sup>122</sup> UNOHCHR, "15 Years of SRVAW", *supra* note 48 at 26.

<sup>123</sup> LWRC & BC CEDAW, *supra* note 7 at 22.

<sup>124</sup> NWAC & FAFIA, "Murders", *supra* note 2 at 26.

<sup>125</sup> *Ibid.*

<sup>126</sup> Amnesty International Canada, *Matching International Commitments with National Action: A Human Rights Agenda for Canada* (Ottawa: Amnesty International Canada, 2012) at 13.

healthcare, including counselling for survivors of violence. The existing jurisprudence is clear that the duty to prevent places positive obligations on states to respond to VAW and ensure that its citizens are protected from harm. As noted in *Lenahan*, “state inaction...fosters an environment of impunity and promotes the repetition of violence since society sees no willingness by the State, as the representative of society, to take effective action to sanction such acts.”<sup>127</sup> Canada is still failing to meet its obligations to prevent violence and also to spread a wider message to society that violence against Aboriginal women will not be tolerated.

### ***Protection and Punishment***

The hundreds of incidents of missing and murdered women is evidence enough of the unequivocal failure by the Canadian government to fully investigate cases, punish perpetrators and protect indigenous women from violence. Numerous studies of policing in Canada show that indigenous people as a whole are not receiving the same level of protection as non-Aboriginal Canadians.<sup>128</sup> A 2013 HRW report that addressed the relationship between indigenous women and the RCMP shows a pressing need for Canada to take action to meet its due diligence obligation to protect women from violence.<sup>129</sup> Many Aboriginal women and girls that were interviewed reported serious incidents of physical and sexual assault by police, including one woman who reported being taken out of town and raped by RCMP officers who threatened to kill her if she told anyone.<sup>130</sup> The report also showed that despite the RCMP’s progressive policies in addressing domestic violence, indigenous women who reported violence were often blamed for the abuse and shamed for drug or alcohol use.<sup>131</sup> These incidents fall outside the provincial complaints mechanism for police misconduct, which only addresses deaths and certain serious bodily injuries, leaving Aboriginal women with very little recourse and sending a clear message that assaults on women are not worthy of punishment.<sup>132</sup> HRW reported extremely high levels of fear of police among the women interviewed; levels usually found in post-conflict zones where state security forces inflicted

---

<sup>127</sup> *Lenahan (Gonzales)*, *supra* note 99 at para 168.

<sup>128</sup> Amnesty, “*Stolen Sisters*”, *supra* note 37 at 17.

<sup>129</sup> HRW, *supra* note 12.

<sup>130</sup> *Ibid* at 8.

<sup>131</sup> *Ibid* at 10.

<sup>132</sup> *Ibid* at 10.

widespread abuse on citizens.<sup>133</sup> Many indigenous people believe the police are as likely to harm them as protect them, making it unsurprising then that few Aboriginal women see the police as trusted authorities they can turn to for protection from violence.<sup>134</sup>

In addition, serious concerns have been raised about the failure of state authorities to properly investigate and prosecute cases of violence, both of which are components of the state obligation to punish acts of VAW.<sup>135</sup> In nearly every case documented by NWAC, the families expressed concern and anger about the police response to the disappearances of their loved ones, including in some instances having to convince the police that their family member was in fact missing.<sup>136</sup> In the case of Beatrice Sinclair, the Winnipeg Police Service told her family that Beatrice could not be considered a missing person until she had been gone for a week and they refused to accept the missing person report.<sup>137</sup> The Saskatoon Police Service refused to perform a forensic search of Daleen Kay Bosse's vehicle, believing that "she was just going to come home on her own."<sup>138</sup> When Georgina Papin went missing from Vancouver's DTES, it was not until three years later that the Vancouver Police Department (VPD) found her remains on the farm of Robert Pickton.<sup>139</sup> She was 34 years old and the mother of seven children. The VPD has been widely criticized for its failure to take notice of the wider pattern of disappearances of sex workers and respond sooner. Racist and sexist stereotypes led many police officers to ignore the severity of the situation, blaming the disappearances on the women's transient lifestyles, and in doing so, failing to take measures to protect them.<sup>140</sup>

In 1999, a provincial inquiry was initiated in Manitoba to look into the death of Helen Betty Osborne, a young, Cree woman who was sexually assaulted and murdered in The Pas in 1971. The inquiry concluded that the police had long been aware of white men preying on indigenous women in The Pas but they did not feel it warranted particular vigilance in addressing.<sup>141</sup> It linked the disproportionate representation of Aboriginal

---

<sup>133</sup> *Ibid* at 34.

<sup>134</sup> Amnesty, "Stolen Sisters", *supra* note 37 at 18.

<sup>135</sup> Koshan, *supra* note 90 at 9.

<sup>136</sup> NWAC, "Voices", *supra* note 1 at 9.

<sup>137</sup> *Ibid* at 22.

<sup>138</sup> *Ibid* at 27-28.

<sup>139</sup> *Ibid* at 46.

<sup>140</sup> NWAC & FAFIA, "Murders", *supra* note 2 at 27.

<sup>141</sup> Amnesty, "Stolen Sisters", *supra* note 37 at 2.

people in Canadian prisons to a predisposition by the police to detain Aboriginal people over others. The inquiry concluded that “many police have come to view Indigenous people not as a community deserving of protection, but a community from which the rest of society must be protected.”<sup>142</sup>

Despite the known severity of this crisis and numerous inquiries and reports that have called upon the government to taken action, little has been done to ensure the protection of women and the punishment of those who perpetrate violence against them. Canadian officials have long been aware of the systemic pattern of racist violence against indigenous women and yet there has been no national reform of the policing system and only sporadic incorporation of indigenous perspectives into police practices. The systematic, racialized pattern to these incidents coupled with the negligence in investigating and prosecuting the crimes closely parallels the situation involving the disappearances of women in Ciudad Juárez, for which Mexico was held in violation of its due diligence obligation by both the CEDAW Committee and the IACHR. Furthermore, the rulings in the individual cases of *Goecke*, *Yildirim*, *Fernandes* and *Lenahan* all found state parties in violation of their due diligence obligations for police practices that were similar or even less severe than those outlined above. The clear failure of Canadian authorities to adequately investigate and punish the incidents of the violence against Aboriginal women amounts to a denial of their basic human rights and a violation of the state’s due diligence obligation to protect and punish.

### ***Reparation***

The due diligence obligation to provide adequate reparations requires states to ensure access to remedies, support services, and compensation for legal and medical costs associated with violence.<sup>143</sup> There has been a massive failure on the part of the state to provide adequate criminal remedies for the disappearances and murders, evidenced by the fact that nearly 50% of the documented cases remain unsolved.<sup>144</sup> Furthermore,

---

<sup>142</sup> *Ibid* at 18; Aboriginal Justice Implementation Commission, *Report of the Aboriginal Justice Inquiry of Manitoba: The Deaths of Helen Betty Osborne and John Joseph Harger* (Winnipeg: 1991) [AJIC].

<sup>143</sup> UNOHCHR, “15 Years of SRVAW”, *supra* note 48 at 27-28; Ertürk, *supra* note 56 at 19.

<sup>144</sup> NWAC, “Fact Sheet”, *supra* note 3 at 2.

none of the families documented in the NWAC report had received any kind of civil damages as compensation for negligence in police investigations, or other harms.<sup>145</sup>

The IACHR in *González et al* included public acknowledgement by the state party of their responsibility for the harm as a form of reparation.<sup>146</sup> In Canada, some public acknowledgement of the crimes has taken place; in particular, the establishment of the Missing Women Commission of Inquiry by the BC in government in 2010.<sup>147</sup> However, both the mandate and the work of the inquiry have been heavily criticized for a variety of reasons, calling into question its value in providing any reparation to families and community members. The inquiry has been criticized on the grounds that it had no specific focus on Aboriginal women; its terms of reference limited the inquiry to women who went missing from the DTES and those murdered by Robert Pickton, leaving out a large number of other cases; it focussed on police and prosecutorial failures rather than broader governmental failures, including the importance of addressing the systemic causes of VAW; and alarmingly, no Aboriginal groups participated in the process.<sup>148</sup> A number of Aboriginal groups that had been granted standing to participate in the process were refused provincial funding for legal counsel in 2011, forcing them to withdraw from the process. Despite outcries from advocates, the legal community and the Commission itself, the provincial government refused to change its position on funding, all the while providing public funds for 19 lawyers to represent the police and justice officials in the process.<sup>149</sup> A number of other groups withdrew in protest of the egregious failure to provide access to participation for the very groups the inquiry was meant to address. Furthermore, the reluctance of the Commission to consider how the marginalization of women contributes to their vulnerability to violence reflects a continued failure to acknowledge the systematic nature of the murders and disappearances of these women, and provide adequate reparation for families. On the whole, very little progress has been made in remedying the violence and compensating victims and their families adequately. Furthermore, initiatives such the provincial inquiry have possibly caused more harm than good in providing any kind of reparation to Aboriginal communities and Canadian society more broadly.

---

<sup>145</sup> NWAC, "Voices", *supra* note 1.

<sup>146</sup> Meyersfeld, *supra* note 94 at 108.

<sup>147</sup> NWAC & FAFIA, "Murders", *supra* note 2 at 26.

<sup>148</sup> NWAC & FAFIA, "Murders", *supra* note 2 at 26.

<sup>149</sup> LWRC & BC CEDAW, *supra* note 7 at 16-17.



As this analysis clearly indicates, the actions taken by Canada thus far do not demonstrate a serious and coordinated commitment to exercise due diligence to prevent, protect, punish and remedy violence against Aboriginal women. In each area of accountability, the protocols and practices have been severely inadequate in meeting the level of intervention required to meet the due diligence obligation. Furthermore, an application of the test developed in *Lenahan* indicates that Canada would be in clear violation of its due diligence obligations: 1) there is a known prevalence of the level of violence against Aboriginal women by state authorities and yet it has continuously failed to take measures to mitigate the harm, and 2) the evidence above clearly indicates that authorities have not taken reasonable measures to protect women, and in some circumstances, their actions may be exacerbating the situation. Based on the clear parallels with the existing precedents, Canada is in violation of international human rights law in failing to exercise its due diligence obligation with respect to violence against Aboriginal women.

## **Conclusion**

It is abundantly clear that Canada has failed to implement the standards required to meet its due diligence obligation. In doing so, it has violated the rights of Canada's Aboriginal women which are protected under a number of the international human rights treaties to which Canada is a signatory, including CEDAW and the *American Declaration*. This analysis provides insights into how the cases involving Canada's missing and murdered Aboriginal women might be dealt with should individual complaints ever reach either the CEDAW Committee or the IACHR. However, there remain significant barriers to reaching international tribunals, including that all domestic remedies must have first been exhausted. This can take years, large sums of money and can re-traumatize parties that have already experienced great loss and hardship.

Furthermore, even if judgments and recommendations ultimately condemn the actions of the Canadian government and hold them in violation of their due diligence obligations, the problem of enforcement remains. Further research is needed to determine effective mechanisms for holding state parties accountable for human rights abuses once they have been found in violation of their due diligence obligations, and whether there is a

role for public shaming in this process. If so, with the existing attention from Amnesty International, HRW, the IACHR and the Special Rapporteur on the rights of indigenous peoples, as well as the inquiry being conducted by the CEDAW Committee into this issues, the timing has never been more critical. The call for a national public inquiry has become widespread and urgent and now is the time to draw global international attention to the failure of the Canadian government to exercise due diligence in protecting Aboriginal women from violence. There is a clear need to enhance data collection systems on the missing and murdered Aboriginal women and develop a national strategy for addressing the root causes of violence. Furthermore, expanded training and coordination of police forces is needed to address the racist and sexist practices that have resulted in a failure to protect indigenous women. Ultimately the hope is that meaningful action will be taken to address the systemic barriers that make many Aboriginal vulnerable to violence, and that stories such as Debbie Sloss' will no longer be so common.

## BIBLIOGRAPHY

### LEGISLATION

*Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981, ratified by Canada 10 December 1981) [CEDAW].  
*Criminal Code*, RS C 1985, c C-46 s 718.2(a)(ii).

### JURISPRUDENCE

*González et al (“Cotton Field”) v México* (2009), Inter-Am Ct HR (Ser C) No 205.  
*Jessica Lenahan (Gonzales), et al v United States* (2011), Inter-Am Comm HR, No 80/11.  
*Maria da Penha Maia Fernandes v Brazil* (2001), Inter-Am Comm HR, No 54/01, OEA/Ser.L/V/II.111 doc. 20 704.  
*The Vienna Intervention Centre against Domestic Violence and the Association for Women’s Access to Justice on behalf of Banu Akbak, Gülen Khan, and Melissa Özdemir (descendants of the deceased) v Austria*, CEDAW Committee, Communication No 6/2005, UN Doc CEDAW/C/39/D/6/2005.  
*The Vienna Intervention Centre against Domestic Violence and the Association for Women’s Access to Justice on behalf of Hakan Goekce, Handan Goekce, and Guelue Goekce (descendants of the deceased) v Austria*, CEDAW Committee, Communication No 5/2005, UN Doc CEDAW/C/39/D/5/2005.  
*Velasquez Rodriguez Case (Honduras) (1988)*, Inter-Am Ct HR (Ser C) No 4.

### SECONDARY MATERIALS: UN DOCUMENTS

*Committee on the Elimination of Discrimination Against Women General Recommendation No. 19: Violence Against Women*, UNCEDAWOR, 11<sup>th</sup> Sess, UN Doc A/47/38 (1992).  
*Committee on the Elimination of Discrimination Against Women, Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention, and reply from the Government of Mexico*, UNCEDAWOR, 32<sup>nd</sup> Sess, CEDAW/C/2005/OP.8/MEXICO (2005).  
*Declaration on the Elimination of Violence against Women*, GA Res 48/104, UNGAOR, UN Doc A/RES/48/104 (1993).  
Ertürk, Yakin, Special Rapporteur on Violence Against Women, its Causes and Consequences, *The Due Diligence Standard as a Tool for the Elimination of Violence Against Women*, ESC Dec 2006/61, UNESCOR, 62<sup>nd</sup> Sess, UN Doc E/CN4/2006/61, (2006).  
United Nations Office of the High Commissioner for Human Rights, *15 Years of the United Nations Special Rapporteur on Violence Against Women, Its Causes and Consequences* (Geneva: OHCHR 2009).  
———, *30 Years Working for Women’s Rights: Committee on the Elimination of Discrimination Against Women 1982-2012* (Geneva: OHCHR 2012).

## SECONDARY MATERIAL: MONOGRAPHS

- Aboriginal Justice Implementation Commission, *Report of the Aboriginal Justice Inquiry of Manitoba: The Deaths of Helen Betty Osborne and John Joseph Harger* (Winnipeg: 1991).
- Amnesty International Canada, *Matching International Commitments with National Action: A Human Rights Agenda for Canada* (Ottawa: Amnesty International Canada, 2012).
- Amnesty International, *No More Stolen Sisters: The Need for a Comprehensive Response to Discrimination and Violence Against Aboriginal Women* (London: Amnesty International Publications, 2009).
- Amnesty International, *Stolen Sisters: A human rights response to discrimination and violence against indigenous women in Canada* (Ottawa: Amnesty International Canada, 2004).
- BC CEDAW Group, *Nothing to Report* (January 2010).
- Human Rights Watch, *Those Who Take Us Away* (United States: Human Rights Watch, 2013).
- Lawyers' Rights Watch Canada & BC CEDAW Group, *Missing and Murdered Aboriginal Women and Girls in British Columbia and Canada* (January 2012).
- Native Women's Association of Canada, *Fact Sheet: Missing and Murdered Aboriginal Women and Girls* (2010).
- , *Voices of Our Sisters in Spirit: A Report to Families and Communities*, 2<sup>nd</sup> Edition (March 2009).
- Native Women's Association of Canada & Canadian Feminist Alliance for International Action, *Murders and Disappearances of Aboriginal Women and Girls in Canada: Information Update for the United Nations Committee on the Elimination of Discrimination Against Women* (June 25, 2013).
- Statistics Canada, *First Nations, Métis and Inuit Women* (Ottawa: StatCan, July 2011).

## SECONDARY MATERIAL: ARTICLES

- Bazilli, Susan & Richa Sharma. "Violence Against Women: What's Law Got to do With it?" (2014) *International Journal of Law, Crime and Social Democracy* (forthcoming).
- Byrnes, Andrew & Eleanor Bath. "Violence against Women, the Obligation of Due Diligence, and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women - Recent Developments" (2008) 8(3) *Human Rights Law Review* 517.
- Byrnes, Andrew & Maria Graterol. "Violence against Women: Private Actors and the Obligation of Due Diligence" (2006) 15 *Interights Bulletin* 156.
- Duhaime, Bernard. "Canada and the Inter-American Human Rights System" (2012) *Int'l J* 639.
- Koshan, Jennifer. "State Responsibility For Protection Against Domestic Violence: The Inter-American Commission On Human Rights Decision In *Lenahan (Gonzales)* And Its Application In Canada" (2012) 30 *Windsor Yearbook of Access to Justice* 1.
- Meyersfeld, Bonita. "Developments in International Law and Domestic Violence" (2001) 16 *Interights Bulletin* 107.
- Sennett, Amy J. "*Lenahan (Gonzales) v United States of America*: Defining Due Diligence" (2012) 53 *Harv. Int'l L J* 537.
- Sokhi-Bulley, Bal. "The Optional Protocol to CEDAW: First Steps" (2006) 6:1 *Human Rights Law Review* 143.
- Vicente, Alejandra. "The Approach of the Inter-American Court to State Responsibility and Due Diligence in Investigating Violence Against Women" (2011) 16 *Interights Bulletin* 116.

## SECONDARY MATERIAL: ONLINE SOURCES

- United Nations Special Rapporteur on the rights of indigenous peoples, James Anaya, Press Release, "Statement upon conclusion of the visit to Canada" (15 October 2013) online: <<http://unsr.jamesanaya.org/statements/statement-upon-conclusion-of-the-visit-to-canada>>.
- "Violence Against Indigenous Women Demands Inquiry", *Human Rights Watch* (9 August 2013), online: Human Rights Watch <<http://www.hrw.org/news/2013/08/09/canada-violence-against-indigenous-women-demands-inquiry>>.
- "Who we are", *Organization of American States*, online: Organization of American States <[http://www.oas.org/en/about/who\\_we\\_are.asp](http://www.oas.org/en/about/who_we_are.asp)>.