The increasing recognition of domestic violence as a social problem is due to two reasons. Firstly, the causes of violence have social roots and secondly the phenomenon erodes the social fabric regardless of its private origin behind closed doors. Violence in the family exists as an absolute inappropriateness vis-a-vis the peaceful image of the home. The fundamental problem that women face is not discriminatory treatment vis-à-vis men. Rather women are in inferior position because they have no power either in public or private worlds, or in international human rights law. Thus the problem of domestic abuse as a human rights issue will have to be seen as a part of larger...
reality of subordination of women--their powerlessness in terms of defining the human rights discourse

Women’s subordinate position in the home makes their experience different from men’s. The image of the family as a protective retreat has been created largely through male eyes, disregarding women’s oppression and the extensive discrimination against them which is inherent to the patriarchal structure and functioning of the family. The significance of family for women is also more vital than that of men, because while a man is allowed an independent existence, woman’s identity and survival is not socially conceivable without family. In behavioural terms, violence against women ranges from simple oppression to abuse, aggression, exploitation and severe oppression. Human Rights violations from female foeticide, infanticide, marital cruelty, dowry murders, child abuse, incest to women, battering and murder are committed within the safe confines of the home making the women highly vulnerable in families. They remain largely invisible, being considered as family matter.

Universal Declaration of Human Rights, the Magna Carta of the mankind exhorts that “All human beings are born free and equal in dignity and rights”. Human right to dignity, worth of human person and freedom from discrimination and recognition of violence as a form of discrimination are the pre requisites to protect and preserve the human rights of women placed under special circumstances.

The right to be free from domestic violence includes within its ambit the right to equality and right to live with human dignity. The Constitution of India running along in the same spirit upholds the ideal of equality under Article 14 and right to live with human dignity under Article 21. Equality is the foundation on which all other rights are built. Since domestic violence primarily targets women, it violates the concept of equality and non-

discrimination on the grounds of sex. The Supreme Court’s decision in Vishaka’s case emphasizes the fact that violence against women amounts to discrimination, which violates a woman’s basic human rights.\textsuperscript{2} The evolutionary motive force for human rights is the mankind’s demand for decent civilized life in which the inherent dignity of each human being is well respected and protected.

Domestic violence against women is a violation of the right to live with human dignity and identity, as it reinforces and reproduces the subordination of women and thus obstructs the developmental process. Amartya Sen defines “capabilities” as the freedom to choose what you have reason to value. “Development” as he opines is a process of expanding the real freedoms that people enjoy\textsuperscript{3}. Domestic violence against is women as an obstacle in the developmental process of the country. The expansion of human capabilities if it leads to development the freedom from domestic violence is to be viewed as integral to any exercise for evaluating developmental progress. The conventional standards for assessing well-being and development has been indicators such as income, education and health\textsuperscript{4}. The broader attempts of including the criteria of gender empowerment in a country necessarily includes the effective property rights and freedom from physical and mental abuse. Domestic violence manifests itself in the denial of the right to equal protection of the law to which every human being is entitled. Denial of the state to recognize such offence committed against women also denies her right to simple and prompt recourse to a competent court for protection against acts that violates her rights.\textsuperscript{4}

\textsuperscript{2} Vishaka and Others v. State of Rajasthan, A.I.R. 1997 S.C. 3011
\textsuperscript{4} Universal Declaration of Human Rights (UDHR), Art. 1 adopted by the United Nations General Assembly in December 1948 and which all UN members, including India, are expected to honor, specifically states: “All humans are born free and equal in dignity and rights.” Article 2 states that all are entitled to these rights and freedoms “without distinction of
Domestic violence can undermine woman’s capabilities and her functionings in a range of ways. Familial violence manifests in the form of deprival of economic freedoms, social opportunities and political freedoms. The economic freedom indicates her capability to earn a living or acquire property. The international mandates designate the inherent “right to life, liberty, and security of person.” The victims of domestic violence are in constant fear for their lives, and are perpetually under the control of their abusers. The right to personal liberty and security is endangered where victims are deprived of their liberty of free existence and their right to security. Her mobility is restricted, her self-expression is monitored and her thoughts influenced by others in her milieu. A women suffering actual physical and mental injury can affect her functioning in the job market by disrupting the regularity of her work, life, her productivity, efficiency and her chances of upward mobility or promotion. The country thereby loses a potential economic contribution of a substantial section of the population of the country.

Simultaneously, domestic violence can erode women’s social opportunities by undermining her ability to build social relationships and social capital. Withdrawal from the society due to the shame attached to the continuous violence going on in the family atmosphere is another outcome of it. It suppresses her right to associate freely and the most fundamental attribute of the human beings i.e., the right to freedom of expression. Thereby, the right to have a respected physical, mental and moral integrity is denied. Thereby the sense of self of women is disrupted that justifies the learned-helplessness theory related to the domestic violence concept. The notions of self-respect any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property or other status.” In addition, Art. 7 states that “all are equal before the law and are entitled without any discrimination to equal protection of the law.”

Footnotes:
5 UDHR, Art. 3 and ICCPR, Art. 6 and 9
6 This theory means insecurity and dependence on the males aggravates the situation of a woman within a household and she is confined to the feelings that she is helpless and that there is no recourse wherein she endures pain and suffering.
can be double edged in relation to domestic violence. Notions of self-respect can prevent women from revealing such violence in order to maintain their own and their family’s social status. The threat of dis-possession from family aggravates the situation making her vulnerable to incompatible adjustments within the household. Domestic violence is a denial of right to social and political participation, by subjecting the victim to home confinement.

Woman who is a victim of domestic violence within the family loses her ability to be an active citizen or seek her entitlements as a citizen the undermining of her sense of self gets reflected in the assumption that violence she face within the family is something personal and not political. And more over the issue of domestic violence has not been targeted a good political option. Thus the right to equal access to the public service of the country and to take part in the conduct of public affairs, including decision- making is restricted. The relative silence on domestic abuse in society and in the media underlines the failure of transparency guarantees on this front. The dynamics of domestic violence if ignored leads to non- effective functioning of a range of public policy interventions in the field.

An important corollary to what is above discussed as to the developmental obstacles there is the threat that it can be carried over to future generations. Violence during pregnancy can cause miscarriages, low-birth-weight infants and even foetal and maternal deaths. The studies reveal that children who witness domestic violence tend to suffer from higher emotional and behavioural problems than other children. The seeds of it are carried on to their adult lives. For example a high proportion of street children report marital violence in their family life. Such long term consequences on the children reduce the productivity of future generations as well. The adolescent in violent family situation undergo a period of identity crisis where he or she is unable to
arrive at a defined self understanding and left unable to choose and invest energy into the right careers.⁷ And often some of them might end up at suicide.

The prevalence of domestic violence violates any guarantee of protective security. It undermines the whole notion of the home as a protective space. It adversely affects individuals, their families and the wider society. The problem of domestic violence is symbolic to the law of jungle, where might is right. The reconciliation with the subjugation and hopelessness harms the woman more than the violence itself, as it erodes her personality and also that of the children. This brings us to the crux of the whole problem of familial violence. It is the sense of inadequacy, of vulnerability, of helplessness, of weakness and fear of violence that often destroys the women’s sense of self.

Marital violence accounts for serious health implications in the victim. According to the World Report on Violence and Health by the World Health Organisation, Geneva, 2002, domestic violence accounts for a substantial but largely unrecognized proportion of maternal mortality. Another disintegrative effect of the domestic violence need to be understood on the basis of greater demand on health care systems, temporary or chronic economic and psychological dependence of victims on the welfare system. It leads to adverse economic burden on the society’s welfare system.

International mandate requires the state ‘no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’⁸. The standard international definition of torture comes from the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT).⁹ The right not to be subjected to torture is also denied in cases

⁸ UDHR, Art. 5 ; ICCPR, Art. 7
⁹ It requires three main elements: (1) severe physical or mental pain or suffering; (2) intentional infliction for certain purposes including punishment, coercion, intimidation, and discrimination; and (3) involvement of a public official. even though India has yet to ratify the
involving domestic violence against women. Domestic violence manifests all the dynamics of terrorism i.e. seemingly random but actually well planned, psychological and physical warfare and creation of an atmosphere of intimidation. What the abuser wants is a sense of power and control over the victim who is seen as a threat to the abuser who is inwardly weak and insecure. All methods are used to keep the victim under Power and Control: using isolation, using coercion threat and intimidation, sexual abuse, using children, economic abuse, and minimizing, denying and blaming, emotional abuse, treating the wife or other female members like a servant or child using all the patriarchal privileges of a male.

There is the denial of the right to optimum standard of physical and mental health as the victim undergoes prolonged physical and mental trauma. The right to affection and enriching personal relations required for the basic human existence suffers a setback. The denial of personal development restricts a woman’s right to participate in various activities, curtails her prosperity in career or working field, academic field etc. Viewed from a human rights perspective it is the general denial of women’s human right to be human. The concept of human rights evolved largely from ideas of western political theory about rights of individuals to autonomy and freedom.

Swami Vivekananda has rightly remarked: “Just as a bird could not fly with one wing only, a nation would not march forward if the women are left behind.” The oppression of women in the family results in the maintenance of women as second-class citizens thus depriving the country of women’s full potential for taking part in the developmental process. This is a serious developmental problem for the country. It is in this wider framework, that the

Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), provisions regarding torture in the UDHR and ICCPR which generally adopt CAT’s definition of torture, and both under which India has obligations, can be used to support Indian domestic violence claims.
violation of human rights of women occurring at the basic cell of the society i.e. the family needs to be viewed from a larger sociological framework.

3.1 International Human Rights Responses to Domestic Violence in the Context of Sex Equality and Sex Discrimination

The phenomenon of domestic violence against women was identified primarily as a private concern. From this perspective, violence was seen to be a matter of individual responsibility, and the woman was perceived to be the one responsible for either adjusting more adequately to the situation as dictated by cultural norms or developing an acceptable method of suffering silently. This basic understanding of domestic violence as a personal issue has limited the extent to which legal resolution to the problem has been actively pursued.

In most societies, domestic violence against women has typically not been perceived as a crime. Through much of the international legal history, women have been invisible in the development and growth of international law. It took a long journey to adopt the policy that women’s rights are human rights. Recognising the importance of the social costs of gender directed violence, the international agencies working on women’s development have taken the lead in attempting to fill critical gaps in efforts to promote and protect women’s human rights. Historically, stark distinctions were apparent as between the ‘public sphere’-the political, legal and social institutions and the ‘private sphere’-the home and the family. Doctrine of privacy and protection of the family reinforced this artificial divide. As a result the international human rights treaties offered protection to women against violence that occurred only in the public realm.

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10 The domain of International law was held to be governing only the relationship between nation states or the treatment of individuals by the government or public officials. The traditional view was that international law is applicable only to governments and their representatives, but not to private actors as in the case of family violence. Domestic violence against women occurring within the four walls of the family was defined as a private issue and was thus kept outside the ambit of International law.
The gross human rights violations against women within the family remained invisible and ignored. To break the barriers between the violence against women in the public life and private life were one of the greatest challenges undertaken by the United Nations Organization and its affiliated agencies. The necessary theory of accountability of states\textsuperscript{11} for their inaction in cases of violence against women within the home led to the gradual acceptance of the notion that the state making little or no effort to stop violence is tacitly condoning it.\textsuperscript{12} This interrelationship between the accountability of international law and its inactiveness in private matters turned it into a constructive act of the state.\textsuperscript{13} A state also has an obligation under human rights law to apply its laws without discriminating against women and to provide an adequate remedy for acts done by private individuals. A state’s institutionalized inaction in the face of a pervasive domestic violence problem violates international obligations. This analytical shift in the international community, allowing domestic violence to be identified and addressed as a human rights violation led to the development of specific international legal obligations directly addressing domestic violence.

3.2 Exploring the Internationalizing Elements of Domestic Violence

There exists a dilemma in the notion that domestic violence, something so intimate in nature, could constitute a human rights violation that needs to be

\textsuperscript{11} The theory of due diligence, equal protection of laws, freedom from torture that upholds the right of the individual to live with human dignity and security emphasized the theory of accountability of states to ensure the human rights of its members.

\textsuperscript{12} The Inter American Court of Human Rights has issued a judgment in the case of Velásquez Rodriguez, which articulates one of the most significant assertions of State responsibility for acts by private individuals; this represents an authoritative interpretation of an international standard on State duty. The opinion of the Court could also be applied, by extension, to article 2 of the International Covenant on Civil and Political Rights (ICCPR), which requires States parties to ensure to all individuals the rights recognized in that Covenant. In the same case, the Inter American Court further reaffirmed that States are "obliged to investigate every situation involving a violation of the rights protected by [international law]". It discussed the scope of the duty of States, under article 1 of the American Convention on Human Rights, "to ensure" the rights within the treaty to all persons within their jurisdiction.

discussed about at the international level. This happens as we have not yet analyzed what types of violence constitute domestic violence for which a state is responsible for. In this context I would like to import the concept of “patriarchal terrorism” referred to by sociology theorist Michael Jhonson to refer to a violence which is the product of patriarchal traditions of men’s rights to control the women that results in the form of terroristic control of women by their male heads of family that involves the systematic use of not only violence, but economic subordination, threats, isolation and other control tactics. The term domestic violence is applicable to a miscellany of harms. Exempting a very few minor harms it is very necessary to understand and acknowledge the concept of ‘systemic intimate violence within the family’ qualitatively constitutes and has a significant and ever present negative effect on our society within the term domestic violence which caters to its internationalizing factor. Distinguishing between types of violence is objectionable but necessary in this context. Grievous bodily harm and attempted murder; rape and sexual assault; torture and ill-treatment; etc. requires a response at the international level and review of national legal systems through the lens of international law. It encompasses violence which is invasive of the victim’s mental and physical autonomy in away that is particularly destructive of the individual’s dignity.

Systemic intimate violence within the four corners of the family and between inmates consists of five elements which together constitute an extreme violation of an individual’s human rights that ought to trigger the provisions of international law. These elements are

1. *The severe emotional or physical harm or the threat which is experienced by the victim:* The underlying premise is that every person has an interest in the maintenance of her or his physical autonomy and an essential right to be free from fear. This is reflected in International treaties, declarations, other international instruments and many states’ constitutional and legal
Assessing severity of a violence that is perpetrated in a private space to fix international responsibility is a difficult task. The level of severity in cases of domestic violence albeit in a context of love, intimacy and domesticity, is such that it shocks human conscience. According to the European Court of Human Rights, the severity of the harm depends on all the circumstances of the case, like the nature and context of the treatment, its duration, and its physical and mental effects and in some cases, the sex, age and state of health of victim etc. To fix the culpability of the accused it must depend not on the gravity of the act but on the sensitivity of the victim. Here again the challenge of non identifiability of such harm creeps in making it insufficiently serious to warrant hospitalization or police intervention or to prove in judicial proceedings. The incorrect assumption that because the violence is committed in private, by anon-state official and often within the context of a relationship, the violence is neither severe nor extreme is to be done away with. Where a victim suffers lasting physical or emotional damage, and the state fails to provide effective police intervention and basic shelters to help mitigate the consequences thereof, the state reasonably can, and should, be held accountable for its failings.

2. A continuum of violence experienced by the victim rather than a single incident: Acts of violence that are not in and of themselves may become severe and debilitating if they induce an ongoing environment of fear and control from which the victim is unable to escape. Emotional and physical harm may operate separately, but generally are combined to spin a web of abuse in which the exigency of violence escalates. The continual nature of systemic intimate

14See e.g.,UDHR, ICCPR, ICESCR, CEDAW, DEVAW, the African Charter, the Rome Statute etc.
15A v. The United Kingdom,(App NO100/1997/884/1096):1998 27 E H R R 611,para 20. The severity of acts of domestic violence was recognized by the E C H R in the case of Opuz v. Turkey.(App No.33401/02)ECHR 9 June2009
16The intensity of harm is measured not from an inconvenience or discomfort level but rather consists of physical and psychological abuse and outrages that any human being would have experienced as such. (Discussion on mens rea component in respect of criminal liability in Prosecutor v. Kurarac, Judgment )ICTY -96-23-T(22February 2001) paras 508-514; See also Prosecutor v. Aleksovski, ( Judgment) ICTY-95-14/1-T (25 June1999),para54.
violence has been recognized to varying degrees in the domestic violence legislation of foreign jurisdictions\textsuperscript{17}.

3. Violence which is being committed predominantly by men against women within an intimate relationship: The intimate relationships between the woman and the man masks the harm, complicates and distorts the victim’s and society’s understandings of the violence, her ability to escape and the approach of society to her experience. It is this element that distinguishes domestic violence from other forms of violence in society. The issue of domestic violence is cloaked with societal shame. Hence encapsulated within the relationship, the recurrent violence becomes normalized, preventing the abused from reporting the violence and authorities from recognizing it.

4. Vulnerability of women: The victim i.e., the woman is a member of a vulnerable group susceptible to vulnerability backed by societal misunderstanding of the nature of the violence inflicted leading to victims isolation. The aggravating factors that contribute to the vulnerability of women are traditional roles of hegemony between men and women, private nature of systemic violence within the four corners of the family, the concomitant escalation of extreme violence upon separation, economic difficulties restraining women’s freedom and the acquiescence of women’s community to the violence. The right to be treated equally by the state also requires equality of protection against violence where it occurs most frequently i.e. the private space.

5. The failure of the State to help the victims: The violence inflicted is ‘systemic’ in the sense that it occurs in a society in which the state in question has omitted to satisfy the standards that will help to remedy such violence. This failure gets manifested in deficient police services, inaccessible or inefficient

\textsuperscript{17} E.g., Mexico and Nicaragua. In Mexico, the Law of Assistance and Prevention of Domestic Violence 1996 defines the violence as ‘an act of power or omission that is recurring, intentional and cyclical, and is aimed at dominating, subordinating, controlling or harming any member of the family through physical, verbal, psycho-emotional or sexual violence’.
court processes, poor health services and lack of economic assistance in the form of welfare systems or laws\textsuperscript{18}.

The nature of the harm inflicted being silent effectively removes the existence of the harm from the realm of reality. As far as the state is concerned, the abuse or violence disappears. The systemic failure of the state to protect victims of severe intimate violence and punish its perpetrators constitutes an endorsement of the harm, implicit or otherwise. The conduct of the state, therefore by virtue of its failure to act, perpetuates the violence, creating an atmosphere of impunity\textsuperscript{19}. It is in this manner that the State’s role is triggered in International Law.

3.3 International Concern and Standards on Family and Domestic Violence

The family is exalted as the very foundation of human existence, a haven for love, care and loyalty. It is asserted throughout the national and international Human Rights documents as the ‘basic and fundamental unit of the society’\textsuperscript{20}. The significance of ‘family’ in a society as a provider of natural environment for the growth and well being of all its members,\textsuperscript{21} the need for giving social, legal and economic protection to the basic unit of the society,\textsuperscript{22} the inter relationship

\textsuperscript{18} The seriousness of the element of state failure is clearly explained in the case of \textit{Opuz v Turkey} in which the ECHR held that Turkey had violated its obligations under Art.2 (right to life), Art.3 (right to be free from torture and cruel, inhuman or degrading treatment) and Art.14 (right to equal enjoyment of the Convention Rights) by failing to assist the applicant and her mother when they had sought the assistance of the State to prevent abuse by the applicant’s husband. This case exemplifies how the state can be responsible for continued acts of violence between intimate family members.


\textsuperscript{22} European Union Charter of Fundamental Rights, 2000, Art.33.
between the family, the child and the woman, have all been affirmed throughout the standards set by the United Nations Organisation. Family is upheld as the dominant ideology, through which a particular set of household and gender relationships are universalized and naturalized.

The International Bill of Human Rights and the other Core UN Human Rights Treaties forms the basic guideline to the fundamental rights and freedoms of human beings in the international arena. These documents do not explicitly address the issue of domestic violence. Yet its principles articulate the concepts of fundamental rights and freedoms that are commonly violated in domestic violence cases. Those rights include the right to equality, right to equal protection of the laws, right to life, liberty and security of the person, right to physical and mental integrity, and right to be free from discrimination, torture, degrading and inhuman treatment. The mandates set up under the International Bill of Rights and the efforts of the United Nations Organisation, through international conventions, declarations, and conferences has brought to light the issue of domestic violence and the need to evolve laws to combat it both in the international and regional forums.

The preamble of the United Nations Charter, 1945 begins by referring to faith in fundamental human rights, in the dignity and worth of the human persons, and in the equal rights of men and women. The Universal Declaration of Human

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24 It consists of The Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, and its implementing covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which entered into force in 1976.
25 It consists of the International Covenant on the Elimination of All Forms of Racial Discrimination, 1965; the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; and the Convention on the Rights of the Child, 1989.
The Nature of Domestic Violence - A Human Rights discourse

Rights - proclaimed in 1948 by the General Assembly is considered as the cornerstone of UN’s human rights system. It upholds and protects the dignity and integrity of human beings. The golden thread of fundamental human rights and freedom is embedded in its provisions when it exhorts that all human beings are born free and equal in dignity and rights. All the rights and freedoms set forth therein are held entitled to all human beings without distinctions of race, colour, sex, language, religion, national origin, property, political opinion etc.

Right to life, liberty and security of person and the right to be recognized as a person before the law are conferred by the Declaration. Freedom from torture is fundamental to allowing an individual to live a life of dignity and security. The Declaration provides freedom from torture or cruelty, in human or degrading treatment or punishment. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted in the year 1984 defines torture as “an act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person” for a purpose such as obtaining or a confession, punishment, intimidation, or coercion “or for any reason based on discrimination of any kind”. Domestic violence is a violation of a woman’s rights to bodily integrity, to liberty, and often right to life itself. This approach equates domestic violence to a form of torture. Article 5 of the UDHR and Article 7 of the ICCPR both state, “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or

26 The Declaration consisting of 30 articles was written by Eleanor Roosevelt, chair of the UN Commission on Human Rights, and 17 other international delegates. It is held to be the primary international articulation of the fundamental and inalienable rights of all human beings.

27 Id., Art. 1

28 Id., Art. 2

29 International Covenant on Civil and Political Rights, Art. 6(1)

30 Universal Declaration of Human Rights, Art. 3; International Covenant on Civil and Political Rights, Art. 9(1)

31 Universal Declaration of Human Rights, Art. 6

32 Id., Art. 5; International Covenant on Civil and Political Rights, Art. 7

33 The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 1

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punishment. The standard international definition of torture comes from the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), which requires three main elements: (1) severe physical or mental pain or suffering; (2) intentional infliction for certain purposes including punishment, coercion, intimidation, and discrimination; and (3) involvement of a public official. The first two elements should not be too difficult for domestic violence victims to show: evidence of egregious domestic abuse including severe and repeated beatings, sexual assaults, and repeated insults and mental abuse may satisfy the first element, and the intentional infliction of this abuse may be shown through examples of the abuser demonstrating or referencing his control over the victim.

In the U.S. in order to satisfy the third element, the victim must be in the control or physical custody of the offender, and a public official must have awareness of the torture prior to the fact and has breached his legal responsibility to intervene to prevent the torturous activity. Physical control can be contended to mean not just imprisonment or detention but also as overpowering or domination of the body. Moreover, a police officer who receives abuse complaints from domestic violence victims and does not intervene to prevent future abuse may meet the involvement of a public official criterion. Thus, even though India has yet to ratify the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, provisions regarding torture in the UDHR and ICCPR which generally adopt CAT’s definition of torture, and both under which India has obligations, can be used to support Indian claims on domestic violence34.

The Declaration further ensures the right to marry, to found a family and equal rights as to marriage and at its dissolution. It exhorts free and full consent in entering into marriage. Moreover the family is upheld as the natural and fundamental group unit of society and emphasizes on its protection by both society and the state. The family, as being acknowledged as the basic unit of the society, the violence perpetrated against women within the family and their right to personal dignity, life and security within the family receives recognition in the international and national platform.

Thus it can be inferred that any form of violence against women which is seen as a threat to their life, liberty or security of person or which is torture or cruel, inhuman or degrading treatment is a violation of the international human rights obligations of the member states, and thus contrary to the principles of the Universal Declaration. The International Bill of Rights resorts to a gender neutral terminology while pronouncing the rights of individuals. The provisions contained therein begins with terms like ‘no one’, ‘every one’, all etc., which means that they are equally applicable to women and implicitly refers to the protection to be accorded to them in cases of domestic violence.

3.4 Domestic Violence in International Law - Historical Overview and Status Quo

Efforts rendered by the United Nations from 1975 to 1995, through conventions and conferences, addressing violence against women, brought to light the specific issue of domestic violence against women as a topic for consideration in the international field. The International bodies such as the Human Rights Committee monitoring the International Covenant on Civil and Political Rights, 1976 and Committee on the International Covenant on Economic Social and Cultural Rights considered the issues of violence against

35 Universal Declaration of Human Rights, Art. 16(1).
36 Id., Art. 16(2).
37 Id., Art. 16(3).
women by the state, in the community or in the family, as an infringement of gender equality, civil liberties and socio economic rights. Domestic violence violates a number of other rights, including the right to life and liberty, the right to self-determination, the right not to be subjected to torture or other cruel and degrading treatment, etc. Many of these rights are enshrined in the International Covenant on Civil and Political Rights (ICCPR), which India has signed and ratified. In light of this legally binding international obligation, the failure of a government to prohibit acts of violence against women constitutes a failure of state protection. The main provisions of the ICCPR that can be applied to cases of domestic violence are as follows: Articles 1, 2, 3, 6, 7, 16, 23, 26. The first Optional Protocol to the ICCPR allows individuals, whose countries are party to the ICCPR and the protocol, who claim their rights under the ICCPR have been violated, and who have exhausted all domestic remedies, to submit written communications to the UN Human Rights Committee. In a number of cases women have used the communication procedure under the first Optional Protocol to the ICCPR to complain to the Human Rights Committee of the UN about sex discrimination which breaches the ICCPR.

The following analysis examines the international instruments and institutions that address domestic violence in one form or the other. The analysis is divided into two periods: 1946-200 and 2000-2009. The development of domestic violence as a subject in international law from 1946-2000 is stilted and haphazard. From 2000, onwards the lens of International Law begins to focus on domestic violence as a specific manifestation of violence against women.

3.4.1. 1946: Commission on the Status of Women

As the initial international body responsible for developing women’s rights the Commission on the Status of Women was established as a part of the

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38 *The Mauritian Women Case* (Communication No. 35/1978); *Broeks v. The Netherlands* (Communication No. 172/1984); *Avellanal v. Peru* (Communication No. 202/1986)
Economic and Social Council which falls under the purview of ICESCR, the object being ‘to promote implementation of the principle that men and women shall have equal rights’. The ICESCR was considered as the weakest Covenant due to a fear of judicial intervention in the policies of the executive branch of government and the fact that it requires state resources and governments to fulfill their socio economic obligations and that too it provided only for progressive realization depending on the resources of the concerned governments. The CSW had a communications mechanism which allowed it to hear communications that reveal ‘a consistent pattern of reliably attested injustice and discriminatory practices meted out against women’. The highlight activity of the CSW was to take into account forms of violence against women in developing its policy work rather than at engaging and remedying specific violations of women’s rights.

3.4.2. 1975: First World Conference on Women in Mexico City, Mexico

In 1975, United Nations sponsored the first world conference in Mexico City, and declared the period 1976 to 1985 to be the UN Decade on Women. Activities undertaken during the period provided a foundation for the creation of an international awakening on violence perpetrated against women both in the public and private life.

3.4.3. 1979: Convention on the Elimination of All Forms of Discrimination against Women

The most extensive instrument dealing exclusively with the rights of women is the Convention on Elimination of All Forms of Discrimination against Women, adopted by the UN General Assembly in 1979. Consisting of a preamble and 30 articles, it defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination. The Convention affirmed the principle of equality by requesting the state parties to take all “appropriate measures, including legislation to ensure the full development and advancement of women, for the purpose of guaranteeing
them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men”\textsuperscript{39}. It has been described as an International Bill of Rights for women as it sets out detailed information that aids in the recognition of discrimination against women and the measures that have to be taken in order to eliminate discrimination.\textsuperscript{40} General Recommendation No.19\textsuperscript{41} forwarded by the Committee on the Elimination of All forms of Discrimination against Women dealt exclusively with violence against women and made clear that states were obliged to eliminate violence perpetrated by public authorities and by private persons. It stated that certain traditions customs and practices had perpetuated the stereo typed subjugated role of women and often justified the gender based violence.

The Recommendation categorically stated that; CEDAW extrapolates a prohibition on violence by stating:

“Gender-based violence ,which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination….These rights and freedoms include: a)the right to life; b)the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment; c)the right to equal protection according to humanitarian norms in time of international or internal armed conflict; d)the right to liberty and security of person; e)the right to equal protection of the law; f)the right to equality in the family; g)the right to the highest standard attainable of physical and mental health; h)the right to just and favourable conditions of work.”\textsuperscript{42}

\textsuperscript{39} Convention on the Elimination of All Forms of Discrimination Against Women,Art. 3
CEDAW calls on states to change the way public and private entities and individuals treat women. This is important in relation to domestic violence because it brings the state into the private realm. It compels the State to equalize private relationships (i.e., the way individuals treat women and not only the way the State treats women) and to intervene when discrimination marks both public and private affairs.

Allowing the states to enter reservation to its own obligations can, and does impede the extent to which the treaty benefits the individuals in crisis. The injunction in the Vienna Convention on the Law of Treaties that reservations may not be ‘compatible with the object and purpose’ of a treaty has not stopped some states from entering reservations against CEDAW’s core provisions. There is a profound omission in the treaty that the goal of eradication of violence against women is not expressly stipulated in the treaty itself. The result is treaty though on its face prohibits the discrimination of women but member states actively and openly discriminate against their female citizens. CEDAW does important policy work leading to political and legal reforms. It sets a precedent for the development of women’s rights in International Law. As a signatory to CEDAW in 1980, India is legally bound to put its provisions into practice.

3.4.4. 1985: UN Resolution

In 1985 the UN General Assembly passed Resolution 40/36 on domestic violence, inviting states to ‘take specific action urgently in order to prevent domestic violence and to render the appropriate assistance to the victims thereof’. The resolution was the first of its kind to refer to the public effects of domestic violence. It focuses on the negative impacts of domestic violence on children, the family and the victim and invites governments to make broad changes to their justice systems to deal with the punishment of abusers and the

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43 E.g., sex discriminatory laws in countries such as Nigeria, Mali, Sudan etc.
44 1985 UN Resolution (n 76), Art.2.
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The member states were held responsible for preventing domestic violence and assisting victims. The Resolution invites the member states to be more sensitized towards the civil and criminal sanctions to be used against the domestic violence. To be clearer it was an important expression of minimal government action and invited the member states to introduce civil and criminal legislation addressing domestic violence, enforce the same, protect battered family members and punish the offenders.

The resolution identified the special and delicate position of the victim referred to as ‘specialized assistance’ and compels states to be respectful of victims, in particular the manner in which the victim is treated. The delicacy of the victim’s position includes the recognition that urgent and temporary solutions are required such as shelters and other facilities and services for the safety of the victims. The Resolution also identified the preventive steps that the states should take and exhorted to provide support and counseling to families in order to improve their ability to create a non-violent environment, emphasizing the principles of education, equality of rights and equality of responsibilities between men and women, their partnership and peaceful resolution of conflicts.

States should oppose the normalization of domestic violence through social endorsement, recognize the connection between inequality, ignorance and gender-based harm and address each link in the chain of violence. The resolution raised the tension between intervention on the one hand and the protection of privacy on the other. The legislations on domestic violence that

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45 Id., Art.7.
46 Id., Art.7(b).
47 Art. 7(f) and 7(g) refers to specialized training and units for those who deal in some capacity with victims of domestic violence.’
48 Id., Art.7(c).
49 Art. 7(d) (n 76).
50 Id., Art.7(i) (inviting states to make ‘legal remedies to domestic violence more accessible and, in view of the crinino-genic effects of the phenomenon, in particular on young victims, to give due consideration to the interests of society by maintaining a balance between intervention and the protection of privacy’)
are being enacted in different parts of the world are in consonance of the views prescribed by the Resolution of 1985.

3.4.5. 1990: UN Resolution

The 1990 Resolution took a tentative step in the direction of recognizing domestic violence as having an impact not only on the immediate lives of the victims but also on ‘broader society’. This public component is reflected in the Resolution’s proposal that domestic violence be combated through ‘multi-disciplinary policies, measures and strategies, within and outside the criminal justice system’\(^{51}\). The implementation of the Resolutions both of 1985 ansd 1990 was left to the autonomy of member states which made the injunctions vague and non-specific. The 1990 Resolution marked a remarkable progress in terms of understanding the psychological components of domestic violence, the negative impact it has on the other family members and the fact that intimate nature of violence should not preclude a public and if necessary criminal response.\(^{52}\). Neither resolution came up with domestic violence as a violation of woman’s human rights.

Despite the resolutions lacking an authoritative status under a traditional approach to customary International Law, they contribute to the body of evidence that proves that domestic violence is an international concern, requiring attention at the international level, and that the activities of private individuals in the context of domestic violence are in fact the responsibility of the states.

3.4.6. 1992: General Recommendation Number 19

General Recommendation No.12 referred to legislation to protect women from all kinds of violence including domestic violence and drew out a statistical data on the incidence of violence against women. In 1992, during the 11th session of the CEDAW committee, the United Nations issued General Recommendation

\(^{51}\) UN Resolution 1990, Art.1

\(^{52}\) Id., Art.4.
Number 19, which pertains specifically to the issue of violence against women. Gender-based violence is defined as ‘violence that is directed against a woman because she is a woman or that affects women disproportionately’. The General Recommendation No. 19 can be of particular importance in cases of domestic violence, as it creates an express link between discrimination and violence, makes a bold statement about cultural autonomy and prohibits a wide range of violence. It clarifies that traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths…(etc). Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms. The Recommendation also brings out how violence against women as a group inhibits that group’s ability to enjoy rights and freedoms. This is a logical extrapolation of CEDAW to violence against women.

‘Family violence’ forms a separate heading within the Recommendation. The General Recommendation 19 recognized the violence in the family as:

“one of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes. Lack of economic independence forces many women to stay in violent relationships. The abrogation of their family responsibilities by men can be a form of violence, and coercion. These forms of violence are not only physically and mentally destructive but also have long-term effects on the mental health of women.”

53General Recommendation 19(No. 20) Art.6. General Recommendations are not formal parts, but integral explanatory sources for the interpretation and full implementation of CEDAW.
violence put women’s health at risk and impair their ability to participate in family life and public life on a basis of equality.”

The Recommendation also covers violence perpetrated by public authorities but it is not restricted to action by or on behalf of Governments. States are also required to protect women from violence by ‘any person or organization or enterprise, including private persons’. To a certain extent, General recommendation 19 closes the textual gap in the CEDAW text and makes it clear that the obligation to end discrimination against women includes the duty to prevent violence against women. It also formed the basis for DEVAW, and can therefore be seen as one of the triggers which brought violence against women into the mainstream of International law.

Although the provisions of this recommendation are not automatically and legally binding on states, as a signatory to CEDAW, India has a general obligation to take cognizance of these recommendations.

3.4.7. 1980: Second World Conference on Women, Copenhagen

In 1980, the UN sponsored the Second World Conference on Women, held in Copenhagen. For the first time domestic violence was explicitly referred to in an official document of the UN. The conference also produced a resolution titled “Battered women and Violence in the Family,” which emphasized that domestic violence was a complex problem and constituted an intolerable offense to the dignity of human beings.

3.4.8. 1985: Third World Conference on Women, Nairobi

The Third World Conference on Women Held in 1985 in Nairobi adopted by consensus the ‘Nairobi Forward looking Strategies’. It mainly

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54 Id., para 23.
55 Id., Art.9.
57 Supra n.13, p.245.
focused on violence against women in the home and recognized it as a serious impediment to the objectives of the Decade of Women. It called for guidance to be given to the law enforcement authorities to deal with the victims sensitively. By the end of the Decade on Women in 1985, the United Nations, through its various conferences had identified domestic violence as a major obstacle to development and peace. United Nation’s General assembly adopted two resolutions directly addressing the issue of domestic violence.58

3.4.9. 1993: World Conference on Human Rights, Vienna

The Third World Conference on Human Rights held at Vienna provided a global platform in acknowledging and affirming that the human rights of women as ‘inalienable, integral and indivisible part of human rights’ and thereby expanded the international human rights agenda to understand gender specific violations. It exhorted that ‘women’s rights are human rights’ and led to the articulation of the concept of domestic violence as a human rights violation for the first time. It reiterates and expands upon principles outlined in the Universal Declaration on Human Rights and the United Nations Charter, and it represents a landmark in the recognition of women’s rights as being indivisible from human rights. Adopted by consensus at the World Conference on Human Rights in 1993, it marks a renewed commitment to “remove the current obstacles and meet challenges to the full realization of all human rights and to prevent the continuation of human rights violations resulting thereof throughout the world.” Moreover, this declaration is unique in the sense that it set a new international norm, namely that human rights ought to be considered indivisible, independent, and interrelated. Prior to it, issues affecting women disproportionately, such as domestic violence, sexual harassment, and female

58 The first resolution on domestic violence, i.e. Resolution 40/36 of November 29, 1985, called for criminological research on the problem of domestic violence and requested the member states to implement specific measures to address it; The second resolution i.e. Resolution 45/114 of 1990 urged member states to develop and implement policies, measures and strategies both within and outside the criminal justice system to respond to the problem of domestic violence.
genital mutilation, was rarely addressed by human rights treaties. By acknowledging women’s rights, the rights of the “girl-child,” and the prevalence of gender-based violence, the Vienna Declaration of Platform of Action (VDPA) successfully widened the scope of ‘human rights.’ States were urged to withdraw any reservations from the Convention on the Elimination of all Forms of Discrimination against Women and the VDPA strengthened mechanisms for monitoring the implementation of women’s rights worldwide. Furthermore, proceedings at the World Conference on Human Rights ended with a resolution to integrate women’s rights into more UN activities. This, in turn, has resulted in the subject of women’s rights becoming part of the mainstream discourse on human rights.

3.4.10. 1993: The Declaration on the Elimination of Violence against Women

In 1993, there were two major developments that furthered the application of the due diligence standard within the domestic violence context: the issuance of the Declaration on the Elimination of Violence Against Women (DEVAW) based largely on the provisions of General Recommendation 19 by the U.N. General Assembly and the appointment of a Special Rapporteur on Violence Against Women. In the wake of Vienna, the General Assembly adopted the UN Declaration on the Elimination of Violence Against Women (DEVAW) in 1995. The Declaration in its Preamble recognized violence against women as a manifestation of unequal power relations between men and women and defined violence against women as;

“Any act of gender based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to

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59 G.A Res.48/104 (1993). This landmark document was a result of efforts within the United Nations Commission on the Status of Women (CSW) and the Economic and Social Council (ECOSOC).
women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.”60

This definition refers to the gender-based roots of violence, recognizing that "violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men." It broadens the definition of violence by including both the physical and psychological harm done towards women, and it includes acts in both private and public life. It sets an International precedent that violence against women is objectionable. DEVAW provided that state should investigate and punish acts of domestic violence, develop comprehensive legal, political, administrative and cultural programs to prevent violence against women, provide training to law enforcement officials and promote research and collect statistics relating to the prevalence of domestic violence.

As a declaration, however its authority is limited. It acts as a guide to how states ought ideally to prevent and address violence against women. It is possible to conclude that DEVAW was never intended to be the end of this process, but rather a first solid foundation on the basis of which states were supposed to take actions at all levels designed to eliminate violence against women61. The Declaration is held as the first international instrument to express international political consensus that states have human rights obligations to prevent gender-based violence and to redress the harm caused.

3.4.11. 1995: Beijing Declaration and Platform for Action

The Beijing Platform for Action was a turning point in International Women’s Law. The Fourth World Conference on women1995, held in Beijing, China was a significant step in addressing the issue of domestic violence. It reaffirmed the conclusions of the Vienna Conference and put women’s human rights even more firmly on the world agenda. The Beijing Declaration followed

60 The Declaration on the Elimination of Violence Against Women, Art. 1.
61 Supra n.10, p. 38.
by the Platform for Action (1996-2001)\textsuperscript{62} identified Domestic violence as a human rights violation.\textsuperscript{63} Undoubtedly the key strength of Beijing was its representative value. It acknowledged the long standing failure of governments to promote and protect a woman’s human right to be free of violence in their homes. Recommended actions included the strengthening of legal system’s response to all forms of violence against women including, domestic violence. Areas of concern for another five years were laid down (2002-2006) fixing the responsibility upon the UN Commission on the Status of Women to annually report to the UN of the plan of action in each country.

In June 2000, the UN General Assembly reviewed the implementation of the Beijing Platform (Beijing +5) and reaffirmed government’s commitment to work for the realization of women’s rights. The new document (Women 2000/Beijing +5 Outcome Document) reaffirmed the 150-page Platform for Action at the landmark 1995 UN Women’s Conference and moved forward with tougher measures to combat domestic violence and trafficking of women. The Outcome Document calls for prosecution of all forms of domestic violence, now including marital rape.\textsuperscript{64} The traditional practices of forced marriage and honor killings were addressed for the first time in an international document. These documents and programs of action do not have the status of international law, yet they carry political and moral weight as policy guidelines for the UN governments and other international organizations. was adopted by consensus in 1995, at the Fourth World Conference on Women. The conference and the resulting documents were framed around an agenda for promoting women’s social, economic, and political empowerment. The Beijing Declaration embodies an

\textsuperscript{62} U.N. Doc. A/Conf.177/20 (1995). The document outlined many specific actions governments, NGO forum and others should take to confront and combat violence against women. It’s preamble expressed its determination to advance the goal of equality, development and peace for all women everywhere in the interest of humanity.

\textsuperscript{63} The Platform for Action affirmed that violence against women whether occurring in the private sphere or in the public sphere, is a violation of human rights.

\textsuperscript{64} Pradeep Kumar Panda- Rights –Based Strategies in The Prevention of Domestic Violence; Working Paper Series 344, ,Centre for Developmental Studies Tvm, Kerala (2003), p.16
international obligation to the advancement of women, with a particular emphasis on ensuring that a gender perspective is reflected in state policies and programmes. Adjunct to the Declaration is the Platform for Action, which outlines a series of measures for action in the hopes of improving the status of women at the state and international level. The Platform ended with a call for states to reconvene every five years, in order to assess the degree of progress made towards affirming and reinforcing women’s rights. This review process has been carried out faithfully, with states meeting in 2000 (Beijing+5) as well as in 2005 (Beijing+10). The Fourth World Conference on Women was noteworthy because it drew considerable attention to the severity of the issue of violence against women. The resulting documents stressed the seriousness of violence against women, while simultaneously acknowledging that the true scope of the problem was still unclear. The Platform for Action admitted that a lack of gender-disaggregated data made it difficult to ascertain the extent to which women are the victims of violence. By requesting states to develop improved data and statistics, the Platform for Action in effect gave a voice to the abused women whose suffering was going unnoticed. The collection of more comprehensive data on violence against women, including domestic violence, is central to revealing the actual situation of women in society. Thus, the Beijing Declaration and Platform for Action contributed extensively to the effort to unearth inequalities and improve the condition of women across the globe.

3.4.12. 2000: The CEDAW Optional Protocol

The Optional Protocol is an addendum to CEDAW and requires signature and ratification like any other treaty. It was adopted by the General Assembly on the 6th October 1999 and entered into force on 22nd December 2000. As of 8th March 2009, 79 states had ratified the Optional protocol. It enables the CEDAW Committee to receive communications by or on behalf of individuals who have grievances falling within the scope of CEDAW.
Another method of using human rights law in relation to the issue of domestic violence involves using the statements made by international human rights bodies to place pressure on governments to take further steps to combat domestic violence. Although the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) does not explicitly mention domestic violence, the CEDAW Committee has nevertheless interpreted the Convention’s provisions in such a manner as to bring this issue within its scope.

The CEDAW Committee has also produced important jurisprudence on the issue of domestic violence. The Optional Protocol to CEDAW allows individuals or groups of individuals who are victims of any breaches of CEDAW to submit complaints to the Committee. Under a communications procedure, the Committee will be able to focus on individual cases when considering CEDAW. It would be able to say what is required from States in individual circumstances. This would help States to understand better the meaning of the obligations they have undertaken by acceding to CEDAW. Crucially, communications may also be submitted on behalf of individuals with their consent, unless acting on their behalf without their consent may be justified. This is a much wider test of standing than that which is contained in the European Convention on Human Rights. As one of the categories of

65 The Optional Protocol to CEDAW is the first gender specific international complaints procedure. As well as putting CEDAW on a par with human rights treaties which have complaints procedures, it enhances existing mechanisms by specifically incorporating practices and procedures that have been developed under other complaints procedures. The Committee's views on communications would amount to what is called jurisprudence. Jurisprudence is the term used for a body of case law about any particular subject. It is used for guidance in interpreting laws. Jurisprudence from communications would provide clarification and guidance for States and for individuals about States' obligations under CEDAW. This has occurred with the ICCPR in regard to the publication of the Human Rights Committee's views on the cases that have been brought to it under the Optional Protocol to the ICCPR.

66 Id., Art. 2 provides a Communications Procedure which allows either individuals or groups of individuals to submit individual complaints to the Committee. Communications may also be submitted on behalf of individuals or groups of individuals, with their consent, unless it can be shown why that consent was not received.
sources of International law identified in the International Court of Justice Statute, the decisions of international and national judicial bodies and tribunals are an important source to consider in determining whether domestic violence is a violation of International Human Rights Law.

Three important communications on the issue of domestic violence have been considered by the Committee and they are discussed below:

In A.T v. Hungary\(^67\) the Committee on the Elimination of Discrimination Against Women along with the independent experts who monitor the implementation of the Convention on the Elimination of Discrimination Against Women noticed that the complainant, although she sought help from Hungarian civil\(^68\) and criminal courts\(^69\) and child protection authorities, did not receive any assistance or protection from the Hungarian government. The case involved allegations of severe domestic violence. The Committee found that Hungary had violated the rights of A.T. under the Convention, and made recommendations to Hungary that it must act to protect the safety of the author and act more generally to effect the rights granted under the Convention. Hungary did not dispute the allegations and indicated that it would take steps to improve its laws and policy regarding domestic violence. The CEDAW Committee concluded its opinion with the recommendations that Hungary was to take immediate and effective measures to guarantee the physical and mental integrity of the claimant and her family. It was directed that the claimant be given a safe home for her to live with her children. The Committee acknowledged the need of the victim to receive appropriate child support and legal assistance and that she be given reparation.


\(^68\) At that time, 2003 Hungary had no system of protection orders or restraining orders, with the result that there were no state institution or laws that prevented the domestic violence from continuing.

\(^69\) The criminal proceedings were lengthy and provided no immediate protection to the victim.
proportionate to physical and mental harm undergone and to the gravity of violations of her rights.

The case posited domestic violence as a serious consideration for the CEDAW Committee, which recognized, the systemic nature of the violence and the social and legal reluctance of this form of gender-specific and intimate violence. The Committee had made clear that the state had an obligation to protect the individuals from such violence invoking the due diligence principle and where it failed to do so, it was held to be in breach of International Law. Significantly, Hungary made specific reference to standards of protection that are internationally expected and as a result of its interaction with the CEDAW Committee, Hungary had made amendments to its domestic violence laws, significantly to incorporate protection orders, which prior to the submission of communication, did not existed.

The other notable communications were made against Austria in Goekce(deceased)v. Austria\textsuperscript{70} and Fatima Yildirim v. Austria\textsuperscript{71}.

\textit{Goekce v. Austria} was a case relating to domestic violence which ended in the death of the victim at the hands of her husband. The petitioners claimed that Sahide Goekce was a victim of a violation by the State Party under CEDAW, when the State Party failed to take appropriate measures to protect Sahida’s right to personal security and life and failed to prosecute her husband as an extremely violent and dangerous offender under criminal law. There was also lack of coordination between law enforcement and judicial personnel. The committee held the complaint admissible. The police were found to be

\textsuperscript{70} 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 Communication No5/2005 UN Doc CEDAW/C/39/D/5/2005; (Decision)CEDAW Committee (views adopted 6 August 2007)

\textsuperscript{71} The Vienna Intervention Centre against Domestic Violence and the Association for Women’s Access to Justice on behalf of Banu Akbak, Gulen Khan an Melissa Ozdemir (descendants of the deceased),alleged victim Fatima: \textit{Fatima Yildirim V Austria} Communication No.6/2005 UN Doc CEDAW/C/39/D/6/2005; (Decision) CEDAW Committee (views adopted 1 October 2007)
accountable for failing to exercise due diligence to protect Sahide Goekce. The committee also stated that the perpetrator’s rights cannot supersede women’s human rights to life and physical and mental integrity and that the public prosecutor should not have denied the request of the police to arrest the perpetrator.  

_Fatima Yildirim v. Austria_ was a case relating to domestic violence which ended in the death of the victim at the hands of her husband. The petitioners argued that the state party had failed to take appropriate measures to protect Fatma Yildrim’s right to life and personal security as a victim of domestic violence. Poor communication between the police and the Public prosecutor did not adequately allow the prosecutor to assess the danger posed by Fatima’s husband. There was a lack of due diligence since the criminal justice system, particularly prosecutors, considered domestic violence as a minor offence. Hence criminal law was not applied to such violent behavior because law enforcement authorities did not take the danger seriously. The committee found that Fatima had made positive and determined efforts to save her life and failure to detain her husband was considered to be a breach of the State Party’s due diligence obligation to protect Fatima. Once again, the committee held that a perpetrator’s basic rights, such as the presumption of innocence, private and family life, right to personal freedom cannot supersede women’s human rights to life and to physical and mental integrity.

Notably, both the _Goekce_ and the _Yildirim_ communications were brought by the Vienna Intervention Centre against Domestic Violence and the Association for Women’s Access to Justice, on behalf of the family members of victims of domestic violence who had been killed by their husbands. Şahide Goekce and Fatima Yildirim were both murdered by their husbands following years of brutal abuse. Despite reporting the violence to the police and obtaining...
protection orders, the Austrian authorities repeatedly failed to ensure the women’s safety. The 2007 decision of the CEDAW Committee under the Optional Protocol was of global significance because it was found that Austria had failed to implement the law and therefore failed in their duty to provide ‘due diligence.’

Violations of CEDAW were found by the Committee in all three instances and the Committee set out the duties which states should fulfill in relation to victims of domestic violence, such as the provision of a safe home, child support and legal assistance. All allegations of domestic violence should be investigated in a thorough manner and victims provided with sufficient access to justice. The Committee’s opinions provided the states guidance as to how to fulfill its obligations in respect of domestic violence. It also shows quite systematically the ways in which a legal framework can break down and fail to protect victims of domestic violence. Where communications and recommendations are made public, a powerful tool develops. It is through condemnation and public damnation that change potentially takes root. The policy of shaming and condemning a violation of human rights specifically of women victims is the predominant role played by the Committee recommendations.

3.4.13. 2000: UN General Comment No.28

General Comment No.28 was adopted by the UN’s human Rights Committee which is the committee responsible for the implementation of the ICCPR. The major thrust areas of the Comment was to ensure that the rights of women and men are equally protected both in the public and private sector. The comment protested against the governments who rely on to the cultural, historical and religious justifications in order to stay in power. The comment required the states to take account of the factors that impede equal enjoyment by women of the rights contained in the ICCPR. Specifically the states were to provide information on legal measures to protect women with regard to
domestic violence, rape, safe termination of pregnancies occurring as a result of rape, forced abortion sterilization etc and analyses laws that confine women to the home. This request was made in the context of Art.9 of the ICCPR which prohibits arbitrary arrest and detention, usually associated with state incarceration. The Comment refers to ‘any laws or practices which may deprive women of their liberty on an arbitrary or unequal basis, such as by confinement within the house’.

This is an example of the integration of domestic violence into the work of the other UN Committees. It helps to demonstrate that the confinement of domestic violence victims to their homes (either through physical force, coercion or threats, economic need or as a result of depression) is of the same manner as state detention. This form of detention though not perpetrated by state authorities now falls within the scope of ICCPR’s arrest and detention provisions. The connection made between formal arrest and the isolation engendered by domestic violence is a major step forward in recognizing the fact that intimate violence is no less cruel than violence committed by state authorities. General Comment in Referring to equal access to justice and legal aid insisted that women should be able to overcome the barriers in giving evidence as witnesses on the same terms as men and that their testimony should not be pitted against that of men. It emphasizes the importance of this in ‘family matters’, thereby acknowledging that this is the realm in which women need particular legal assistance.

The General Comment No.28 appears to be more assertive in its recommendations and explanations as to the need for taking positive steps to ensure that women are able to enjoy the rights provided under the ICCPR. This represents a significant step in the direction that reflect the emergence of a concrete, definitive and authoritative norm in the International law prohibiting domestic violence.

The General Assembly Resolution 58/147 invoked the connection between domestic violence and discrimination against women. The Preamble identified domestic violence against women and girls as a human rights issue and approaches the domestic violence as violence that occurs in the private sphere between ‘individuals who are related through blood or intimacy’. This widens the scope of the Resolution as the domestic violence is identified as a ‘public concern’ and attempts to embrace violence that occurs in all manner of intimate contexts, and not solely restricted within marital relationships. Within the concept of domestic violence, the Resolution includes physical, psychological, sexual and economic harm and importantly reference is made to the isolation of the victim, all of which results in imminent harm to the safety, health or well-being of women.

The Resolution makes recommendations regarding legislative steps to strengthen legislation or enact legislation, spanning criminal and civil measures, such as social assistance, restraining orders and the establishment of ‘one-stop center’s and safe havens for domestic violence victims. This recommendation is extremely important due to its pragmatic nature, confirming that all levels of state may have a role to lay in addressing one incident of domestic violence while also dismantling the systemic obstacles that prevent domestic violence victims from obtaining public assistance, such as re-victimisation and gender insensitive laws and practices. In September 1994, the International Conference on Population and Development was held at

74 UNGA Res 58/147 UN Doc A/RES/58/147 ,para7(m).
75 Id.,para1(c ) and (e).
76 Id.,para7(a)-(e).
77 Id.,para7(f)-(g).
78 Id., para7 (h)-(l).
Cairo. The major focus of the conference was the right to health including reproductive choices for women.

3.4.15. 1994-2009: Reports of the Special Rapporteur on Violence against Women, Its Causes and Consequences

Thematic Rapporteurs are held as one of the most effective tools within the United Nations to monitor human rights violations. In 1994, Radhika Coomaraswamy was appointed by the U.N. Commission on Human Rights as the first Special Rapporteur on Violence against Women, Its Causes And Consequences. In her preliminary report, she emphasized that states have a duty under international human rights law to protect women from violence in their homes. It held that all states were not only responsible for their own conduct or of its agents alone but also were responsible for their failure to take necessary steps to prosecute private citizens for their behaviour when found incompatible with the international mandates. The United Nations framework for a model law on domestic violence was forwarded on the basis of the report on the causes and consequences of violence against women. The definition on domestic violence was widened to encompass all forms of gender inequality and gender discrimination existing within the family. “All acts of gender based violence i.e. Physical psychological and sexual abuse by a family member against women in the family ranging from simple assaults to aggravated physical battery, kidnapping, threats, intimidation, coercion, stalking, humiliating, verbal abuse forcible or unlawful entry, arson, destruction of property, sexual violence, marital rape, dowry related violence, female genital mutilation, violence related to exploitation through prostitution,

violence against household workers and attempts to commit such acts shall be termed as domestic violence.

The UN Special Rapporteur on Violence against Women has recommended “A Framework for Model Legislation on Domestic Violence”, 1996 (UN Model Code), which provides valuable guidance on the provisions that should be included in domestic violence legislation. The purpose as envisaged by the United Nations is to

a. Comply with international standards sanctioning domestic violence,
b. Recognise that domestic violence is gender-specific violence directed against women,
c. Recognise that domestic violence constitutes a serious crime against the individual and society, which will not be excused or tolerated,
d. Establish specific legislation prohibiting violence against women within interpersonal and family relationships, protecting victims of such violence and preventing further violence,
e. Create a wide range of flexible and speedy remedies (including remedies under special domestic violence legislation, penal and civil remedies) to discourage domestic violence and harassment of women within interpersonal relationships and within the family and protect women where such violence has taken place,
f. Assure survivors of domestic violence the maximum protection in cases ranging from physical and sexual to psychological violence,
g. Establish departments, programmes, services, protocols and duties, including but not limited to shelters, counselling programmes and job training programmes to aid victims of domestic violence,
h. Facilitate enforcement of the criminal laws by deterring and punishing perpetrators of domestic violence,
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i. Enumerate and provide by law comprehensive support services, including but not limited to:

ii. Emergency services for victims of abuse and their families,

iii. Support programmes that meet the specific needs of victims of abuse and their families

iv. Education, counselling and therapeutic programmes for the abuser and the victim

v. Programmes to assist in the prevention and elimination of domestic violence which includes raising public awareness and public education on the subject.

i. Expand the ability of law enforcement officers to assist survivors, to enforce the law effectively in cases of domestic violence and to prevent further incidents of violence,

j. Train judges to be aware of the issues relating to child custody, economic support and security for survivors in cases of domestic violence by establishing guidelines for protection orders and sentencing guidelines which do not trivialize domestic violence

k. Provide for and train counsellors to support police, judges and the victims of domestic violence and to rehabilitate perpetrators of domestic violence,

l. Develop a greater understanding within the community of the incidence and causes of domestic violence and encourage community participation in eradicating domestic violence.81

3.5 Regional Legal and Policy Instruments and Jurisprudence Relating to Domestic Violence

Inter-American System

The international legal and policy framework outlined above has been accompanied by the adoption of various legal and policy frameworks at the regional level. The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, 1994 otherwise known as the Convention of Belém do Pará, is the first legally binding only international Convention directed solely at eliminating violence against women. It recognizes that every woman has the right to be free from violence in both public and private spheres. It refers to physical, sexual and psychological violence that ‘occurs within the family or the domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman, including, among others, rape, battery and sexual abuse\textsuperscript{82}.

It is the first regional human rights treaty to focus exclusively on gender based violence and to prohibit violence within the home. It requires that States parties apply due diligence to prevent, investigate and impose penalties for violence against women and contains detailed provisions regarding the obligations of States to enact legislation. States parties are obligated to adopt legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman; take all appropriate measures, including legislative measures, to amend existing laws or to modify legal or customary practices which sustain the persistence and tolerance of violence against women; establish fair and effective legal procedures for victims; and establish the necessary legal and administrative mechanisms to ensure that victims have effective access to just and effective remedies\textsuperscript{83}.

\textsuperscript{82} Convention of Belem Do Para Art.2(a).
\textsuperscript{83} Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, Art. 7.
European System

The European Parliament and Council in 2007 established the ‘Daphne III Programme’, as specific programme to prevent and combat violence against children, young people and women and to protect victims and groups at risk as part of the General programme ‘Fundamental Rights and Justice’. In 2007 the European Council issued a recommendation on the prevention of injury and the promotion of safety, calling on member states to take measures to prevent injuries, including those caused by international violence, particularly domestic violence against women and children. The European Court of Human Rights has made some of the more progressive decisions vis-à-vis state responsibility for harm committed by private actors which will be described later in the chapter.

One of the most recent developments in the area of human rights law and domestic violence is the adoption by the Committee of Ministers of the Council of Europe of the Convention on Preventing and Combating Violence against Women and Domestic Violence in April 2011. The Convention was opened for signature in Istanbul on 11 May 2011 and was signed by 13 states. The Convention defines “domestic violence” shall mean all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim. The convention is the first legally binding instrument in the region that creates a comprehensive legal framework to combat violence against women through prevention, protection, prosecution, and victim support. It defines and criminalizes multiple forms of violence against women: physical, sexual and psychological violence, as well as forced marriage and female genital mutilation. The treaty also establishes an international group of independent experts to monitor its implementation at the national level. The provisions of
the Convention are comprehensive in nature, encompassing not only criminal justice responses, but also areas such as awareness raising and the provision of social support measures to victims. The Convention relies primarily on a reporting mechanism to monitor implementation, a strategy similar to that which is used as regards the UN human rights treaties such as CEDAW.

**African System**

The right of women to enjoy a safe home environment earlier existed only as a sub right, forming part of the larger right to have a family unit based on ‘traditional values recognized by the community’. This had placed the women and children under the authority of male household member whose control was rarely subject to intervention. In July 2003, the African Union adopted its own regional treaty relating to the human rights of women-the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa, as a supplement to Banjul Charter which came into force in 2005. This is a powerful statement in International Law regarding the right of women to be free from domestic violence and a corresponding obligation on the states to protect that right. It requires states parties to take measures to suppress all forms of violence against women, identify the causes, punish the perpetrators, and ensure effective rehabilitation and reparation for victims.

By the year 2007, out of 185 signatories of United Nations CEDAW, about 87 countries have adopted specific legislations to criminalise domestic violence, of which 13 are in Latin America: Argentina, Bolivia, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Mexico, Nicaragua, Peru, Puerto Rico, Uruguay and Venezuela. The signing of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women in 1994 provided the momentum to enact such legislation. Thus aroused the need to undertake the international obligations by the state parties to comply with the international standard through legislative interventions or by policy change.
3.6 Analyses of Landmark Decisions on Domestic Violence in Courts Around the World

In addition to the development of legal and policy instruments at the regional level, there is also an increasing body of jurisprudence on violence against women under the regional human rights treaties. Cases heard by the European Court of Human Rights and the Inter-American Commission on Human Rights have directed States to, create appropriate criminal legislation; review and revise existing laws and policies; and monitor the manner in which legislation is enforced. A closer look at the international case law on domestic violence reveals a distinct trend towards its interpretation so as to provide more protection to victims of domestic violence, as well as to support the efforts of police officers and social workers. In selecting cases, preference was accorded to verdicts that were frequently cited or referred to by other judgments. In addition, ground-breaking cases taking place in international courts and tribunals, such as the European Court of Human Rights or the Inter-America Commission on Human Rights, have been included. Indeed, each of the decisions appears to have either set a legal precedent, or exemplifies the implementation of progressive domestic violence laws.

In *Valesquez-Rodriguez v. Honduras* 86 the Inter-American Court of Human Rights specifically commented on state tolerance of human rights violations and stressed:

“What is decisive is whether a violation of rights recognized by the American Convention on Human Rights has occurred with the support or the acquiescence of the government, or whether the state has allowed the act to take place without measures to prevent it or to punish those responsible.”

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Further the Court added that where human rights violations by private parties are not seriously investigated, the parties were to be taken as, aided by the government making the state responsible under international law. This situation can be made equally applicable in cases where domestic violence is perpetrated by a single individual and who is not represented by the governmental power.

The importance of appropriately enforcing legislation was emphasized by the Inter-American Commission on Human Rights in the case of Maria da Penha v. Brazil87 in which the Commission found the Brazilian Government in breach of its human rights obligations due to significant judicial delay and incompetence in the investigation of domestic violence. The Brazilian Maria da Penha Law (2006) states that “domestic and family violence against women is defined as any action or omission based on gender that causes the woman’s death, injury, physical, sexual or psychological suffering and moral or patrimonial damage.”88 More specifically, the Commission found that Brazilian law enforcement officials had violated the petitioner’s right to a fair trial and judicial protection because of the unwarranted delay and careless processing of this case of domestic violence. In its decision, the Commission recommended prompt compensation for the victim, and urged the adoption of measures at the national level to eliminate the tolerance of domestic violence in the Brazilian legal system.

The need to review and revise existing laws and policy to eliminate discrimination against women was addressed by the Inter-American Commission on Human Rights in the case of Maria Mamerita Mestanza Chávez v. Peru89 which dealt with forced sterilization.

The European Court of Human Rights (ECHR) has been responsible for passing a number of landmark statutes in cases of domestic violence. One of its

88 The Brazilian Maria da Penha Law 2006, Art. 5
earliest judgements, passed in 1979 in the case of *Airey v. Ireland*\(^{90}\), pertained to the responsibility of states to abide by the Convention for the Protection of Human Rights and Fundamental Freedoms. In this case, the petitioner sought to dissolve her marriage on the grounds of her husband’s alleged physical and mental cruelty to her and their children. However, due to the prohibitively high costs of seeking a judicial separation order, she was unable to find a lawyer willing to act on her behalf.

ECHR upheld the legal notion of positive obligations, and stated:

> “The substance of Airey’s complaint is not that the State has acted, but that it has failed to act… not having been put in a position in which she could apply to the high court…she was unable to seek recognition in law of her de facto separation from her husband.”

Therefore, the court found that Ireland had violated Airey’s rights by failing to provide her with a means of accessing the nation’s legal system and had thus breached the ‘right to access courts’ and ‘respect for family life’\(^{91}\).

Domestic violence constitutes a clear violation of several of the rights contained in the European Convention on Human Rights; it was not until 2007 that the European Court of Human Rights dealt substantively with a case involving this issue. In *Bevacqua and S. v. Bulgaria*\(^{92}\) the appellant filed for divorce and custody after enduring years of domestic violence, but Bulgarian authorities were exceptionally slow in processing the case. As a result of this bureaucratic incompetence, the appellant and her son lived in constant fear of harassment by the husband over the course of the proceedings. The decision, issued by the European Court of Human Rights in 2008, found that, in the specific circumstances of this case, Bulgaria had violated its obligations under Article 8 of the Convention for the Protection of Human Rights and

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\(^{90}\) *Airey v. Ireland* (European Court of Human Rights, Application no. 6289/73).

\(^{91}\) European Convention on Human Rights Convention Articles. 6 and 8.

\(^{92}\) European Court of Human Rights Application no.71127/01.
Fundamental Freedoms by requiring the domestic violence victim to prosecute the case. The Court awarded costs and damages to the applicants. The case is significant as the first domestic violence case to be decided in the European Court of Human Rights.

In *M C v. Bulgaria* the European Court of Human Rights highlighted the importance of monitoring the manner in which legislation is enforced. The case found that although the article prohibiting rape in Bulgaria’s penal code did not mention any requirement of physical resistance by the victim, physical resistance appeared to be required in practice to pursue a charge of rape.

By a series of cases, the European Court has clearly established that domestic violence can constitute a violation of the right to life (article 2); the right to be free from torture or inhuman or degrading treatment (article 3); the right to respect for private and family life (article 8); and the prohibition of discrimination (article 14). One example of this jurisprudence is the case of *Opuzv. Turkey*. It was a case in which the applicant alleged that the authorities had failed to protect herself and her mother from domestic violence on the part of her husband, which had resulted in the death of her mother and her own ill-treatment. The Court held that there had been a violation of Article 2, due to the failure of the authorities to safeguard the right to life of the applicant’s mother. The applicant had been subjected to violence, injury and death threats and she alleged that the authorities were negligent towards her situation, which caused her pain and fear in violation of article 3 of the Convention. She argued that the injuries she had suffered amounted to torture within the meaning of article 3. The Court held that the violence suffered was sufficiently serious to amount to ill-treatment within the meaning of article 3, although it did not specify whether it amounted to torture, as opposed to

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94 Application No.33401/02ECHR 9 June 2009; Facts of the case was brought by Nahide Opuz who with her mother suffered years of brutal domestic violence at the hands of her husband. Despite their complaints the police and prosecuting authorities did not adequately protect the women, and ultimately Ms. Opuz’s mother was killed by him.
inhuman or degrading treatment. The Court concluded that there had been a violation of article 3. It reads:

‘…as a result of the State authorities’ failure to take protective measures in the form of effective deterrence against serious breaches of the applicant’s personal integrity by her husband.\(^{95}\)

In addition, the applicant claimed that there had been a breach of article 14 of the Convention, an argument which was also upheld by the Court. The applicant demonstrated through statistical data that domestic violence affected mainly women, and established that judicial passivity in Turkey created a climate conducive to domestic violence.

The judgment is a call to European States to take domestic violence seriously. In the pioneering ruling *Opuz v Turkey*, the European Court of Human Rights recognized for the first time that domestic violence is a form of discrimination against women, and that states are required to eliminate and remedy it. The case also recognized that domestic violence is not a “private family matter” but that it is in the public interest to ensure state protection from it. The continual nature of domestic violence and the harm to women’s integrity caused was specifically recognised in this case.\(^{96}\) The effect of the judgment was to mitigate the effects of normalization process and the impact of repeated violations on women subjected to men. The connection between discrimination and violence was confirmed through this case where ECHR held that state’s failure to protect women against domestic violence constitutes a breach of their right to equal protection of the law.

The opinions in *Bevacqua* and *Opuz* represent a significant progression in the articulation of the due diligence standard. Specifically, as the Court held

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\(^{95}\) *Id.*, para 176.

\(^{96}\) It was opined in the case that “although there were intervals between the impugned events…the overall violence to which the applicant and her mother were subjected over a long period of time cannot be seen as individual and separate episodes and must therefore be considered together as a chain of connected events”.

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in these cases, states party to the European Convention must provide individuals with the means to obtain some form of enforceable protective measure, such as an order of protection, a restraining order, or an expulsion order. Member states must also establish the legal framework to enable criminal prosecutions of domestic violence when it is in the public interest, even if the victim withdraws her complaint. Through the holdings in Bevacqua and Opuz, these basic standards have gained binding legal authority within the jurisdiction of the ECHR97.

The European Court of Human Rights is certainly to be commended for its jurisprudence in this area, which is having an important impact on the international level, as evidenced by the recent Jessica Lenahan case. In July 2011 the Inter-American Commission on Human Rights referred extensively to the jurisprudence of the European Court in its decision in the case of Jessica Lenahan (Gonzales) v. United States98. This is the first case brought by a domestic violence survivor against the U.S. before an international human rights court. The facts of this case involved the abduction of Ms. Lenahan’s three daughters by her estranged husband. Ms. Lenahan had a domestic violence restraining order against her estranged husband and called the police on numerous occasions following her daughters’ disappearance. Despite the existence of the restraining order99, the police refused to act. Simon Gonzales then arrived at the police station and opened fire. The police returned fire, resulting in his death. They later found the bodies of the three children in the back of his truck. Gonzales sued the Castle Rock Police Department for failing to protect her daughters, particularly since Gonzales had a restraining order

99 A restraining order can include provisions restricting contact; prohibiting abusive behavior; determining child custody and visitation issues; mandating offender counseling; and even forbidding firearm possession.
against her ex-husband. The case went to the U.S. Supreme Court, where, in 2005, the Court ruled that Gonzales did not have a constitutional right to protection, and that the police’s failure to enforce her protection order was not unconstitutional. Gonzales then took her case to the IACHR, alleging the U.S. violated her human rights. The petitioners alleged that the American Declaration imposes a duty on State parties to adopt measures to respect and ensure the full and free exercise of the human rights enumerated therein; a duty which under certain circumstances requires State action to prevent and respond to the conduct of private persons. They furthermore invoked the ‘due diligence’ principle to interpret the scope of State obligations under the American Declaration in cases of violence against women; obligations they consider the State failed to discharge in this case.

The State rejected the arguments presented by the parties related to the American Declaration and the applicability of the due diligence principle to the facts of this case by claiming that: a) the American Declaration is a nonbinding instrument and its provisions are aspirational, b) that the American Declaration is devoid of any provision that imposes an affirmative duty on States to take action to prevent the commission of crimes by private actors, and that b) even though the due diligence principle has found expression in several international instruments related to the problem of violence against women, its content is still unclear. The Commission considered that the issuance of a restraining order signals a State’s recognition of risk that the beneficiaries would suffer harm from domestic violence on the part of the restrained party, and need State protection. This recognition is typically the product of a determination from a judicial authority that a beneficiary – a woman, her children and/or other family members – will suffer harm without police protection. It is a key component in determining whether the State authorities should have known that the victims were in a situation of imminent risk of domestic violence upon breach of the terms of the order.
The Inter-American Commission held that the failure of the police to protect Jessica Lenahan and her children constituted a violation of various provisions of the American Declaration of the Rights and Duties of Man, specifically the right to life\textsuperscript{100}, the right to equality\textsuperscript{101}, relating to the special protection of children\textsuperscript{102}, the right to judicial protection\textsuperscript{103}. \textit{Jessica Gonzales v. United States} marks the first time the Commission has been asked to consider the nature and extent of the U.S.’s affirmative obligations to protect individuals from private acts of violence under the American Declaration on the Rights and Duties of Man. The commission acknowledged and affirmed the failure of due diligence of state authorities to take necessary action to provide security and legal help to the victims in the case. In its decision the Commission recommended that a range of reforms be implemented on the federal and state levels in order to protect women and children from domestic violence.

Ms. Gonzales’ Inter-American petition and her related advocacy have triggered a reframing of domestic violence as a human rights problem in the U.S. This new configuration may have reverberating effects on how our legal

\textsuperscript{100}American Declaration of Rights and Duties of Man, Art. I. Every human being has the right to life, liberty and the security of his person. Petitioners contention was that the State’s duty to protect these victims from domestic violence was of broad reach, also implicating their right to life and their right to special protection under Articles I and VII of the American Declaration, given the factual circumstances of this case.

\textsuperscript{101}Id., Art. II. All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor. The petitioners contended that the State’s failure to adequately respond to Jessica Lenahan’s calls regarding the restraining order, to conduct an investigation into the death of Leslie, Katheryn and Rebecca Gonzales, and to offer her an appropriate remedy for the police failure to enforce this order, all constituted acts of discrimination and breaches to their right to equality before the law and non-discrimination under Article II of the American Declaration.

\textsuperscript{102}Id., Art. VII. All women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid.

\textsuperscript{103}Id., Art. XVIII. Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights. This right is similar in scope to the right to judicial protection and guarantees contained in Article 25 of the American Convention on Human Rights, which is understood to encompass: the right of every individual to go to a tribunal when any of his or her rights have been violated; to obtain a judicial investigation conducted by a competent, impartial and independent tribunal that establishes whether or not a violation has taken place; and the corresponding right to obtain reparations for the harm suffered.
and political framework addresses and how the public perceives violence against women\textsuperscript{104}.

Some national courts have endeavored and emphasized the idea of supporting the interference of law enforcement officials in cases of domestic violence. In \textit{R v. Godoy}\textsuperscript{105}, the Supreme Court of Canada ruled in favour of police officers who, after receiving a call from the respondent’s home, forced their way in and arrested the man for assaulting his wife. Initially, it was held that the arrest was illegal, since the officer’s presence on the private property was unauthorized. Although the police entered the respondent’s private residence without a warrant, the court found that the intrusion and subsequent arrest were justified based on the duty of law enforcement officials to respond to emergency calls. It was held: “The police duty to protect life is engaged whenever it can be inferred that the 911 caller is or may be in some distress, including cases where the call is disconnected before the nature of the emergency can be determined. The importance of the police duty to protect life warrants and justifies a forced entry into a dwelling in order to ascertain the health and safety of a 911 caller. This interference is authorized at common law as it falls within the scope of the police duty to protect life and safety.”

In \textit{Thurman v. City of Torrington},\textsuperscript{106} the plaintiff here sued the city, arguing that the police department had violated her constitutional right to equal protection under the law. She claimed that officers failed to enforce her estranged husband’s probation orders, and ignored his assaults against her. The decision ruled that the city and twenty-four of its officers violated Thurman’s


\textsuperscript{105} \textit{R v. Godoy} [1999] 1 S.C.R. 311

\textsuperscript{106}(595 F. Supp. 1521 D. Conn. 1984) United States, Connecticut District Court, 1984 held: “If officials have notice of the possibility of attacks on women in domestic relationships or other persons, they are under an affirmative duty to take reasonable measures to protect the personal safety of such persons in the community. [A] police officer may not knowingly refrain from interference in such violence…. Such inaction on the part of the officer is a denial of the equal protection of the laws.”
right to equal protection under the 14th Amendment. Thurman repeatedly notified the police of her husband’s threats. Police failed to arrest him despite assurances that they would. Eventually, her husband brutally stabbed her, leaving her disfigured and partially paralyzed. The court concluded that a police officer “may not automatically decline to make an arrest simply because the assailant and his victim are married to each other.”\(^{107}\) The first hallmark case in 1984 in Torrington, Connecticut awarded Tracy Thurman $2.3 million and following the case, many police departments strengthened their policies on responding to domestic violence.

In *Estate of Maria Teresa Macias v. Mark Ihde*\(^{108}\), after the death of Mrs. Macias at the hands of her abusive husband, her family filed a case alleging that her constitution rights had been violated. This initial claim was dismissed after the Court found that murder was not a “constitutional deprivation”. The Court of Appeals reversed this judgment, on the grounds that the violation of equal protection was the constitutional deprivation, not murder. The Court held:

“The alleged constitutional deprivation in this matter was the alleged denial of equal police protection to Mrs. Macias... The district court erred in concluding that the alleged constitutional deprivation was the murder of Mrs. Macias. The district court also erred in dismissing the action without determining whether the Appellees’ conduct deprived Mrs. Macias of her right to equal protection.”


In the South African case of *S. v. Bayoli and Ors*, the respondent argued that existing legislation on domestic violence was unconstitutional since it placed the burden of disproving guilt upon the shoulders of the accused. In this particular case, the respondent was punished for violating an order of protection based solely on his wife’s testimony; he appealed this decision on the grounds that the state had not proved his guilt beyond reasonable doubt. While the eventual judgement defended the value of presumption of innocence, the court also found that in cases of domestic violence fairness to the complainant required that the enquiry proceedings be speedy and dispense with the normal process of charge and plea.

Domestic violence has now been clearly recognised as a human rights issue, the European Court’s jurisprudence being extremely significant in this regard. The decision of the Inter-American Commission in the Jessica Lenahan case is certainly very much to be welcomed, as is the adoption of the new Council of Europe Convention. The challenge is in ensuring that human rights law is used to its full potential in contributing to the movement to combat domestic violence. International case law on domestic violence has aided in establishing the notion that domestic violence is a systemic violation of women’s rights and that the justice system has a responsibility to prevent and persecute incidents of domestic violence.

All these cases come to us a reminder that State is to be made accountable for the violations of human rights happening between the private parties. In the cases referred above they never set precedence of norms to be followed by the State for failure to protect liability suits in domestic violence cases. Instead courts have recognized a duty to protect the citizens from the harm done by against others. If law enforcement officers refuse to make an arrest, when a request for assistance is made, a protective order exists, or a history of violence is known, the officers, department and jurisdiction may be

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held liable. No where the role of State is envisaged or emphasized as a part to be played in the life of two private individuals. The life of two individuals together may arise out of blood relationship consanguinity, marriage ties or adoption. That which is happening among them is specifically understood as private .The state plays a very limited or rather no role in what is happening between them. There exists no foundational philosophy followed as to the familial relations mentioned in the above cases cited. State cannot moralise human beings within their relationships .Rather these aberrations happening within the human behaviours can be viewed as products of their nurturing, their beliefs, environment, attitudes and the interests that govern them. The Various pieces of legislations, policies and approaches that are developed explicitly acknowledge violence against women as a form of discrimination in general and domestic violence in particular as a violation of human rights. But no significant foundational philosophy is being brought out to work magic within two individuals ie. “respecting the rights of each other”; through these developments that assure a violence free atmosphere to the women at home.

3.7 India’s Obligations under International Human Rights Treaties

India acceded to the ICESCR and the ICCPR in 1979. India is a party to both ICCPR and ICESCR and is therefore bound to respect and implement the standards set by the same. The International Covenant on Civil and Political Rights (ICCPR) has the following provisions that are relevant in the context of domestic violence: equal rights of men and women to the enjoyment of all civil and political rights set forth in it; inherent right to life, and right against arbitrary deprivation of life; equality before the law and equal protection of the law; prohibition of discrimination on grounds including sex; the right not to be subjected to torture or cruel, inhuman and degrading treatment or punishment; the right to liberty and security of person; the right to hold opinions without interference; equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.
The relevant provisions in the International Covenant on Economic, Social and Cultural Rights (ICESCR) applicable to the context are: equal rights of men and women to the enjoyment of all economic, social and cultural rights set forth in the treaty, right to work, including the right to opportunity to gain one’s living by work that is freely chosen or accepted, widest possible protection and assistance to the family and special protection to mothers for a reasonable period before and after childbirth; right to adequate standard of living, right to be free of hunger, right of everyone to the highest attainable standard or physical and mental health; and right to take part in cultural life.

The Supreme Court had recognized its obligations regarding international law in its decisions in *Kesavananda Bharati v. State of Kerala*¹¹⁰ the Court held that international covenants and conventions could inform the scope of certain fundamental rights. The Court in *Sheela Barse v. The Secretary, Children’s Aid Society*¹¹¹ went further and observed that India’s international obligations be incorporated into its domestic legislation. In *Vishaka v. State of Rajasthan*¹¹² the Court explained that recognizing international conventions and norms and construing domestic law whenever they were not inconsistent with each other and domestic law did not address the issue, was an accepted rule of judicial construction.” In *Gita Hariharan and another v. Reserve Bank of India & Another*¹¹³ Supreme Court has upheld the need and significance to adhere to the international obligations:

“The message of international instruments:- Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (“CEDAW”) and the Beijing Declaration, which directs all State parties to take appropriate measures to prevent discrimination of all forms against women is quite clear. India is a signatory to CEDAW

¹¹⁰ (1973) 4 S.C.C. 225.
¹¹² A.I.R 1997 S.C. 3011,3015.
having accepted and ratified in June, 1993. The interpretation that we have placed … gives effect to the principles contained in these instruments. The domestic Courts are under an obligation to give due regard to International Conventions and Norms for construing domestic laws when there is no inconsistency between them.”

**Ratification of India to CEDAW- Special Ramifications**

India became a signatory to the UN Convention on Elimination of Discrimination Against Women (CEDAW), in 1980 and ratified it in 1993. India has ratified CEDAW with reservations as to Art 5(a), 16(1) and Article – 29(1). Articles 5 (a) and 16(1) of CEDAW is to be specifically highlighted in the Indian context.

Article 5 (a) of the Convention exhorts the state parties to take appropriate measures as to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

Article 16(1) exhorts the states parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

a. The same right to enter into marriage;

b. The same right freely to choose a spouse and to enter into marriage only with their free and full consent;

c. The same rights and responsibilities during marriage and at its dissolution

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114Reservation: With regard to Article 29 of the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declares that it does not consider itself bound by paragraph 1 relating to arbitration agreements with state parties in matters of interpretation of provisions of CEDAW.
d. The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

e. The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

f. The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

g. The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation; and

h. The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.115

By entering reservations in these two aspects, the Government of the Republic of India reserves with itself and acknowledges the peculiar socio cultural patterns existing in India and follows policy non-interference in the personal affairs of any Community without its initiative and consent. This reservation was entered into by Indian Government upon the sole satisfaction of the fact that any upheaval of existing socio cultural patterns in the societal fabric is likely to overthrow the whole cultural heritage upon which the Indian civilization thrives. This reservation made by the Government of India sends out the message that the existing socio cultural patterns are unique to India and are to be preserved. The difficulty of enactment of a Uniform Civil Procedure Code for all the communities in India is the best exemplification of the consequence faced in any attempt to uproot the existing cultural settings. The

country acknowledges the socio-cultural institutions of marriage and family and the sanctity of familial relations as inviolable and tries to preserve a sui generis model of its own.

CEDAW spells out the state obligation in three broad categories as outlined: firstly, to respect, this implies recognition of the issue of domestic violence by enacting laws and formulating policies; secondly, to fulfill i.e., to actually realize the standards set through laws and policies and ensuring that women are not subjected to domestic violence; and thirdly, to protect i.e., to set up institutional frameworks and mechanisms for implementing the standards set through law and policy, and to ensure that such mechanisms function in an efficient manner.

Conclusion

Human rights instruments had effectively acknowledged the issue of violence against women. Apart from violence the specific issue of domestic violence is recognized as a developmental issue through the General Recommendation No.19. Through the decided cases, states are being made accountable for not resorting to protective measures in combating the menace. The trilogy of human rights instruments, cases and commentaries in International law makes a compelling argument that the right to be free from domestic violence is a Human Right for which states can be held accountable.

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116 A law on domestic violence enacted by the Indian state sends out a clear message that domestic violence will not be tolerated and that it is both a crime and a civil wrong. However, enacting a law alone is not enough. It should be supported by condemnation of domestic violence from important people in power when a violation takes place.

117 This would mean that the government is obliged to create an environment where women can enjoy secure and peaceful existence within their homes. In its obligation to fulfill, the state has a duty to provide counseling centres, make shelter homes available, raise awareness among key players such as the police, medical professional and members of judicial services and take efforts to change the power relations and attitudes that are some of the root causes for domestic violence.

118 In the case of domestic violence, the obligation to protect requires the government to appoint, register and allocate funds for different agencies set up under the domestic violence law and to provide them with necessary facilities for their proper functioning.
There appears to have been no foundational philosophy laid down though neither the international human rights instruments nor by the decisions laid by Courts that can be made applicable to the familial relations existing within four walls of the home. An examination of national legal framework on domestic violence against women becomes imperative to determine the national responses to the International mandates on the issue. Those issues are addressed in Chapters five and six of the thesis respectively.