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# GENDER VIOLENCE AND HUMAN RIGHTS IN AN ERA OF BACKLASH

JULIE GOLDSCHIED\*

## ABSTRACT

This Article brings the lens of civil cases seeking accountability for gender violence to the question of how international human rights decisions interpret gender and gender norms. It argues that a broad interpretation of gender is particularly critical as we face increasing backlash globally. It demonstrates how international human rights decisions assessing state responses to gender violence recognize the role of historic gender biases and stereotypes in holding states to account for redressing discriminatory responses to abuse, and considers structural limitations in those instruments that could impede those instruments' transformative reach.

## INTRODUCTION

### I. GLOBAL LANDSCAPE OF BACKLASH AND REFORM

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## INTRODUCTION

This Article contributes to a symposium that critically examines systematic persecutions attacking women and lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons globally for conduct deemed to transgress traditional gender roles. It responds to rising violent attacks and troubling evidence of backlash where progress

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had been noted.<sup>1</sup> Advocates have called for the International Criminal Court to undertake a preliminary examination into gender-based persecution committed by ISIS as a step toward ending impunity for sexual- and gender-based crimes.<sup>2</sup> At the same time that some advocates press for criminal prosecution of gender-based persecution, a developing body of case law addresses civil liability aimed at enhancing state accountability for gender-based crimes and official responses to them.<sup>3</sup>

This Article will review a sampling of international human rights decisions from the European Court of Human Rights and the CEDAW Committee interpreting gender equality and gender norms in cases seeking accountability for gender violence.<sup>4</sup> Those cases demonstrate

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1. See, e.g., HUMAN RIGHTS & GENDER JUSTICE CLINIC (HRGJ) OF CUNY SCHOOL OF LAW, MADRE & THE ORGANIZATION OF WOMEN'S FREEDOM IN IRAQ (OWFI), COMMUNICATION TO ICC PROSECUTOR PURSUANT TO ARTICLE 15 OF THE ROME STATUTE REQUESTING A PRELIMINARY EXAMINATION INTO THE SITUATION OF: GENDER-BASED PERSECUTION AND TORTURE AS CRIMES AGAINST HUMANITY AND WAR CRIMES COMMITTED BY THE ISLAMIC STATE OF IRAQ AND THE LEVANT (ISIL) IN IRAQ 1, 8 (2017), <https://www.madre.org/sites/default/files/PDFs/CUNY%20MADRE%20OWFI%20Article%2015%20Communication%20Submission%20Gender%20Crimes%20in%20Iraq%20PDF.pdf> [http://perma.cc/9S4X-4BR2] [hereinafter ICC COMMUNICATION]; INT'L CRIMINAL COURT, OFFICE OF THE PROSECUTOR, POLICY PAPER ON SEXUAL AND GENDER-BASED CRIMES ¶¶ 1, 3 (2014), <https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes-June-2014.pdf> [http://perma.cc/Q5BL-HE3B]; Lisa Davis, *Iraqi Women Confronting ISIL: Protecting Women's Rights in the Context of Conflict*, 22 SW. J. INT'L L. 27, 29 (2016).

2. See ICC COMMUNICATION, *supra* note 1, at 2–3.

3. For discussion of some of those cases, see, e.g., *infra* Part III. For a discussion of developments in the Inter-American system, see, e.g., Caroline Bettinger-López, *Violence against Women Normative Developments in the Inter-American Human Rights System*, in THE NORMATIVE GAPS IN THE LEGAL PROTECTION OF WOMEN AND GIRLS FROM VIOLENCE: PUSHING THE FRONTIERS OF INTERNATIONAL LAW 1 (Rashida Manjoo & Jackie Jones, eds.) (forthcoming April 2018). For additional sources, see, e.g., *infra* note 4.

4. This review does not purport to be comprehensive but rather analyzes decisions that illustrate prevailing approaches. It reviews decisions interpreting the European Convention on Human Rights, Convention for the Protection of Human Rights and Fundamental Freedoms art. 32, June 1, 2010, Rome, 4.XI.1950, [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf) [https://perma.cc/TTP5-V7WG] [hereinafter European Convention], and the Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, art. 2, Convention on the Elimination of All Forms of Discrimination against Women (Dec. 18, 1979), <http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf> [https://perma.cc/U9BF-7SXH] [hereinafter CEDAW], two treaties that, as discussed in *infra* Part III, provide redress for gender violence as a form of discrimination. With that limitation, it does not review the emerging case law under other international human rights instruments prohibiting gender violence, such as the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (the “Convention of Belém do Pará”), and other documents that govern the Inter-American system or other regional treaties, such as the Protocol to the African Charter on Human and Peoples’ Rights on the rights of Women in Africa, which also contain commitments to gender equality and the prohibition of gender violence. See generally Sally Goldfarb & Julie Goldscheid, *International Human Rights Law on Violence Against Women and Children and Its Impact on Domestic Law and Action*, in WOMEN AND CHILDREN AS VICTIMS AND OFFENDERS: BACKGROUND, PREVENTION, REINTEGRATION (Helmut Kury, Sławomir Redo & Evelyn Shea eds., 2016), <https://link.springer.com/con>

that human rights instruments' commitments to ending gender stereotypes are promising and hold potential to address underlying biases that perpetuate structural inequalities. At the same time, those instruments' gender-specific framings may prove limiting when considering a broader spectrum of gender-based violence.

## I. GLOBAL LANDSCAPE OF BACKLASH AND REFORM

As others have detailed, the rise of extremism globally has fueled violence against women and gender nonconforming people. Sexual violence and rape are increasingly recognized as weapons of war and conflict.<sup>5</sup> Advocates have documented rises, for example, in gender-based persecutions and impunity for honor crimes.<sup>6</sup> They have documented sexual enslavement, shootings, beheadings, stonings, and burning of men, women, and youth, including those perceived as lesbian, gay, bisexual, transgender, intersex, and queer for defying rigid gender norms.<sup>7</sup> Distressing reports of police rounding up, beating, and humiliating dozens of gay or bisexual men in Chechnya have been met with global outrage but continue nonetheless.<sup>8</sup>

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tent/pdf/bfm%3A978-3-319-08398-8%2F1.pdf [http://perma.cc/JG97-U8Q8]; U.N. DEP'T OF ECON. & SOC. AFFAIRS, DIV. FOR THE ADVANCEMENT OF WOMEN, HANDBOOK FOR LEGISLATION ON VIOLENCE AGAINST WOMEN 5–8 (2010), <http://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf> [http://perma.cc/L298-ML7Z] [hereinafter U.N. HANDBOOK FOR LEGISLATION]; *see, e.g.*, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, BASIC DOCUMENTS IN THE INTER-AMERICAN SYSTEM, [http://www.oas.org/en/iachr/mandate/basic\\_documents.asp](http://www.oas.org/en/iachr/mandate/basic_documents.asp) [https://perma.cc/ZNP2-DE7G]; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, July 11, 2013, OAU Doc. CAB/LEG/66.6, *available at* <http://www.achpr.org/instruments/women-protocol> [https://perma.cc/L9QW-FCZK].

5. *See, e.g.*, U.N. HUMAN RIGHTS, OFFICE OF THE HIGH COMM., RAPE: WEAPON OF WAR, <http://www.ohchr.org/EN/NewsEvents/Pages/RapeWeaponWar.aspx> [https://perma.cc/TM43-V7VE]; *Sexual violence as a weapon of war*, UNICEF, <https://www.unicef.org/sowc96pk/sexviol.htm> [https://perma.cc/23QA-82EF]; AMNESTY INT'L, LIVES BLOWN APART: CRIMES AGAINST WOMEN IN TIMES OF CONFLICT: STOP VIOLENCE AGAINST WOMEN (2004), <https://www.amnesty.org/en/documents/ACT77/075/2004/en> [https://perma.cc/H5CV-X8N5]; *Women's Rights*, HUMAN RIGHTS WATCH, <https://www.hrw.org/topic/womens-rights> [https://perma.cc/W6HK-AT3K] (reporting on global initiatives).

6. *See, e.g.*, ICC COMMUNICATION, *supra* note 1, at 75; Yifat Susskind, *What will it take to stop Isis using rape as a weapon of war?*, ORG. OF WOMEN'S FREEDOM IN IRAQ (OWFI) (Feb. 18, 2015), <http://www.owfi.info/EN/article/what-will-it-take-to-stop-isis-using-rape-as-a-weapon-of-war> [https://perma.cc/X7E5-5Z6B].

7. *See* ICC COMMUNICATION, *supra* note 1, at 18, 29; SORENSEN CTR. FOR INT'L PEACE & JUSTICE ET AL., REPORT ON GENDER AND THE INTERNATIONAL CRIMINAL COURT EXPERTS MEETING DECEMBER 15–16 (2016) (on file with author); *see also, e.g.*, INTER-AMERICAN COMM. ON HUMAN RIGHTS, AN OVERVIEW OF VIOLENCE AGAINST LGBTI PERSONS: A REGISTRY DOCUMENTING ACTS OF VIOLENCE BETWEEN JANUARY 1, 2013 AND MARCH 1, 2014 1 (2014), <http://www.oas.org/en/iachr/lgtbi/docs/Annex-Registry-Violence-LGBTI.pdf> [https://perma.cc/SMF5-RL2P].

8. HUMAN RIGHTS WATCH, "THEY HAVE LONG ARMS AND THEY CAN FIND ME": ANTI-GAY PURGE BY LOCAL AUTHORITIES IN RUSSIA'S CHECHEN REPUBLIC 1 (2017), <https://www>

Some argue that this rise in sexual violence and enforcement of traditional gender roles and norms is linked with the rise of extremist groups, isolationism, and nationalism. For example, commentators maintain that extremists manipulate gender norms and gender dynamics to advance their goals, including using sexual violence to promote bonding among their fighters.<sup>9</sup> They argue that extremist groups justify and promote rape and slavery as recruitment tools.<sup>10</sup> Some call for a broad, inclusive understanding of gender in conditions of conflict, where sexual violence is used, across gender lines, in service of extremist agendas.<sup>11</sup>

Reports detail legislative and policy initiatives countenancing and even encouraging rape. For example, a legislative proposal in Turkey would allow those who sexually abuse girls under the age of eighteen to go free if they marry their victims.<sup>12</sup> President Rodrigo Duterte of the Philippines reportedly told his soldiers that he would personally assume responsibility if they rape three women while enforcing martial law.<sup>13</sup> And in the backdrop of the recent wave of outcry in the United States and Britain over sexual assaults by powerful men such as Harvey Weinstein,<sup>14</sup> many are reminded of

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.hrw.org/sites/default/files/report\_pdf/chechnya0517\_web.pdf [https://perma.cc/B92Y-YNEB].

9. See, e.g., Heather Hurlburt & Jacqueline O'Neill, *We need to think harder about terrorism and gender. ISIS already is.*, VOX (June 1, 2017), <https://www.vox.com/the-big-idea/2017/6/1/15722746/terrorism-gender-women-manchester-isis-counterterrorism> [https://perma.cc/6ASF-3J2K] (detailing, *inter alia*, ways that ISIS profits from human trafficking and systemic rape, including gang rapes).

10. See, e.g., Sirin Kale, *How Terrorist Groups Like ISIS Use Sexual Violence to Lure Recruits*, VICE (Oct. 11, 2017), [https://www.vice.com/en\\_id/article/mb7yga/how-terrorist-groups-like-isis-use-sexual-violence-to-lure-recruits](https://www.vice.com/en_id/article/mb7yga/how-terrorist-groups-like-isis-use-sexual-violence-to-lure-recruits) [https://perma.cc/9KYP-ZXVJ] (citing NIKITA MALIK, HENRY JACKSON SOC'Y, *TRAFFICKING TERROR: HOW MODERN SLAVERY AND SEXUAL VIOLENCE FUND TERRORISM* (2017), <http://henryjacksonsociety.org/wp-content/uploads/2017/10/HJS-Trafficking-Terror-Report-web.pdf> [https://perma.cc/W83B-73G4]).

11. See, e.g., Rosanne Marrit Anholt, *Understanding sexual violence in armed conflict: cutting ourselves with Occam's razor*, 1 J. INT'L HUMANITARIAN ACTION 5 (2016) ("... it is exactly sexual violence against men that emphasizes the importance of holding on to the link between women's subordination and (sexual) violence."); R. Charli Carpenter, *Recognizing Gender-Based Violence Against Civilian Men and Boys in Conflict Situations*, 37 SECURITY DIALOGUE 83, 86 (2006).

12. Harriet Agerholm, *Turkey says child rape pardon law can be amended but refuses to withdraw proposal*, INDEP. (Nov. 21, 2016), <http://www.independent.co.uk/news/world/europe/turkey-akp-child-rape-law-pardon-amended-protest-chp-amended-withdraw-a7430251.html> [https://perma.cc/LVSS-E92J].

13. Mary Papenfuss, *Philippines President Duterte Says His Soldiers Can Rape During Martial Law*, HUFFINGTON POST (May 28, 2017), [http://www.huffingtonpost.com/entry/duterte-martial-law-rape\\_us\\_592a3abbe4b0065b20b6f179](http://www.huffingtonpost.com/entry/duterte-martial-law-rape_us_592a3abbe4b0065b20b6f179) [http://perma.cc/8A7Y-8KN2].

14. See, e.g., Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 23, 2017), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories> [http://perma.cc/KQ9G-UJ2T]; Daniel Victor, *How*

President Trump boasting about kissing, groping, and trying to have sex with women, saying, “when you’re a star, they let you do it.”<sup>15</sup>

At the same time, a seeming global consensus confirms that gender violence, including intimate partner violence and sexual assault, violates international human rights norms. Multiple international treaties and conventions treat gender violence as a crime, countering historical impunity.<sup>16</sup> International authorities ranging from the United Nations to the World Health Organization to the World Bank, have spearheaded campaigns to prevent gender violence and to support and assist its survivors.<sup>17</sup> Increasingly, the “due diligence” standard is invoked as a measure for holding states accountable for gender violence committed by both state and private actors.<sup>18</sup> That standard is generally understood to encompass the state’s duty to prevent, protect against, prosecute, punish, and provide redress for

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*the Harvey Weinstein Story Has Unfolded*, N.Y. TIMES (Oct. 18, 2017), [https://www.nytimes.com/2017/10/18/business/harvey-weinstein.html?mc=aud\\_dev&mcid=Google-nytimes&mccr=OctoberContent&mcid=2017-10&subid=OctoberContent&ad-keywords=AudDevGate&gclid=Cj0KCQjwybvPBRDBARIsAA7T2khaPeZnss5vfkBUBtGabNaoT12dijvw24SioDkaXJ9pH-x\\_4uNkOgsaAsjKEALw\\_wcB&r=0](https://www.nytimes.com/2017/10/18/business/harvey-weinstein.html?mc=aud_dev&mcid=Google-nytimes&mccr=OctoberContent&mcid=2017-10&subid=OctoberContent&ad-keywords=AudDevGate&gclid=Cj0KCQjwybvPBRDBARIsAA7T2khaPeZnss5vfkBUBtGabNaoT12dijvw24SioDkaXJ9pH-x_4uNkOgsaAsjKEALw_wcB&r=0) [https://perma.cc/9UVA-KBMY] (linking to related coverage).

15. David A. Fahrenthold, *Trump recorded having extremely lewd conversation about women in 2005*, WASH. POST (Oct. 8, 2016), [https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eed4\\_story.html?postshare=2491475870527101&tid=ss\\_tw&utm\\_term=.e59465966528](https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eed4_story.html?postshare=2491475870527101&tid=ss_tw&utm_term=.e59465966528) [https://perma.cc/9FA8-N6XP]. See also, e.g., Omar Burgess, *President Trump Was Quietly Subpoenaed for 2007 Sexual Assault Allegation* (Oct. 15, 2017), <http://www.complex.com/life/2017/10/trump-subpoenaed-for-2007-allegations> [https://perma.cc/Z3E5-YPQY]; Nicholas Hautman & Evan Real, *These Are the Women Who’ve Accused Donald Trump of Sexual Misconduct Over the Past 30 Years—and How He Responded*, US WEEKLY (Oct. 28, 2016), <https://www.usmagazine.com/celebrity-news/news/the-women-whove-accused-donald-trump-of-sexual-misconduct-w444770> [https://perma.cc/LV75-6DS9].

16. See generally *supra* note 4.

17. See, e.g., U.N. HANDBOOK FOR LEGISLATION, *supra* note 4, at 28–29; *Facts and figures: Ending violence against women*, U.N. WOMEN, <http://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures> [https://perma.cc/A3CS-8UWU]; *Violence against women*, WORLD HEALTH ORG. (Nov. 2017), <http://www.who.int/media/centre/factsheets/fs239/en> [https://perma.cc/F5HV-5R7E]; *Violence Against Women and Girls*, WORLD BANK (Nov. 8, 2017), <http://www.worldbank.org/en/topic/socialdevelopment/brief/violence-against-women-and-girls> [https://perma.cc/ZM5Q-94XS].

18. See, e.g., Comm. on the Elimination of Discrimination against Women, Gen. Recommendation No. 35, ¶ 24b, U.N. Doc. CEDAW/C/GC/35 (2017) [hereinafter CEDAW Gen. Rec. 35] (describing state responsibilities to respond to gender violence with “due diligence”); Yakın Ertürk (Special Rapporteur on violence against women, its causes and consequences), *Integration of the Human Rights of Women and a Gender Perspective: Violence Against Women*, U.N. Doc. E/CN.4/2006/61/Add.4 (Jan. 13, 2006); *Due Diligence Framework*, DUE DILIGENCE PROJECT, <http://www.duediligenceproject.org/about.html> [https://perma.cc/DN9N-CZ8G] (detailing contours of the due diligence obligation and providing resources for implementation); Julie Goldscheid & Debra J. Liebowitz, *Due Diligence and Gender Violence: Parsing its Power and its Perils*, 48 CORNELL INT’L L.J. 301, 301 (2015).

acts of gender violence.<sup>19</sup> Reports detail states' obligations to ensure formal sanctions against gender violence, to develop and implement programs and services advancing primary and secondary prevention, and to provide redress for survivors.<sup>20</sup> Yet, as the above examples suggest and as a body of advocacy and reporting detail, much work remains to advance universal compliance with seemingly basic goals, such as including gender violence among the crimes proscribed by criminal law, providing adequate services to survivors, and establishing meaningful and effective prevention programs.<sup>21</sup>

The trajectory of backlash and bias-motivated violence calls for critical inquiry into how existing laws can and should be interpreted to hold states accountable. Of course, law is only one tool in the range of strategies needed to end gender and other forms of bias-motivated violence.<sup>22</sup> Nevertheless, laws and commentary detailing the links between gender violence, historic gender discrimination, the pernicious nature of bias, and the insidious ways bias manifests should be invoked to shape interpretations that go as far as the law can to advance peace, safety, and equality.

## II. TENSIONS AND TRANSFORMATION

Not surprisingly, multiple questions animate debates about the promises and limits of strategies to advancing the laudable goal of state accountability for gender violence. International human rights instruments' focus on prevention and their framing of gender violence as an equality problem grounded in historic gender stereotypes and gender norms hold promise to meaningfully advance the goals of

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19. See *supra* note 18 (citing sources).

20. For one recent example, see, e.g., U.N. Secretariat (Special Rapporteur on violence against women, its causes and consequences), ¶ 19, U.N. Doc. A/HRC/35/30 (June 2, 2017) (documenting key elements of a human rights-based approach to integrated services and protection programs with a focus on shelters and protection orders). For additional reports, see, e.g., *Committee on the Elimination of Discrimination against Women*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM'R, <http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/CEDAWIndex.aspx> [<https://perma.cc/QH4L-3YYR>] (collecting, *inter alia*, Special Rapporteur and country reports).

21. I include criminal law in this list of needed reforms in acknowledgment of the calls for criminalization from advocates in jurisdictions in which gender violence is excluded from the universe of crimes subject to state sanction, notwithstanding the myriad of ways the criminal justice responses to gender violence in the United States and elsewhere have proved problematic and even harmful to the survivors they purport to vindicate. See, e.g., Goldscheid & Liebowitz, *supra* note 18, at 317.

22. See, e.g., Ratna Kapur, *Gender, Sovereignty and the Rise of A Sexual Security Regime in International Law and Postcolonial India*, 14 MELB. J. INT'L L. 317, 340–41 (2013) (critiquing centrality of the state in responses to gender violence and arguing that the stability of gender and binary gender categories is maintained in part through the focus on sexual violence against women).

preventing and even eliminating gender violence.<sup>23</sup> As Part III demonstrates, that framing of gender violence as a form of discrimination provides a powerful foundation for surfacing and challenging the nuanced ways gender biases and stereotypes infuse both the commission of gender violence and the response of authorities at all points of contact. Yet, implementation efforts risk prioritizing and privileging criminal justice reforms over the challenging work of rooting out historic biases and discrimination.<sup>24</sup> In addition, tensions inherent in those and related instruments reflect structural limitations that may constrain an instrument's transformative reach. In particular, the gender-specific framing of many interventions as targeting "violence against women," in tandem with the focus on "protection," could prove to limit those instruments' abilities to redress gender violence committed against LGBTI and gender nonconforming survivors.<sup>25</sup>

A number of human rights instruments name and treat gender violence as a form of discrimination against women, marking significant and hard-fought advocacy victories. The equation of gender violence with gender discrimination is laudable, while, as discussed below, the gender-specific focus on "women" may prove limiting. A close look at the instruments' language illustrates this tension. The Convention on the Elimination of All Forms of Discrimination against Women's (CEDAW) General Recommendation No. 19 explicitly defines "gender-based violence" as a form of discrimination.<sup>26</sup> It describes gender violence as a "form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men."<sup>27</sup> It critiques previous reports that failed adequately to reflect the "close connection between discrimination against women, gender-based violence, and violations of human rights and fundamental freedoms."<sup>28</sup> The General Recommendation stresses the importance of challenging outdated stereotypes and bias.<sup>29</sup> It critiques traditional attitudes regarding women as subordinate to

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23. See Julie Goldscheid, *Domestic and Sexual Violence as Sex Discrimination: Comparing American and International Approaches*, 28 T. JEFFERSON L. REV. 355, 378–84 (2005).

24. See *id.* at 388–92; see also, e.g., Goldscheid & Liebowitz, *supra* note 18, at 311–17.

25. See, e.g., Julie Goldscheid, *Gender Neutrality, The "Violence Against Women" Frame, and Transformative Reform*, 82 UMKC L. REV. 623, 636–46 (2014).

26. Comm. on the Elimination of Discrimination against Women, Gen. Recommendation No. 19, ¶ 1, U.N. Doc. A/41/45 (1992) [hereinafter CEDAW Gen. Rec. 19]. See also CEDAW Gen. Rec. 35, *supra* note 18 (reaffirming and elaborating on links between gender violence and gender discrimination).

27. *Id.*

28. *Id.* ¶ 4.

29. *Id.* ¶¶ 11–12.



men and stereotyped roles that are invoked to justify gender violence, sometimes in the form of “protection or control.”<sup>30</sup> It calls on states to identify and take “effective measures” to overcome these attitudes, customs, and practices and to eliminate prejudices that hinder women’s equality.<sup>31</sup>

Similarly, the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the “Istanbul Convention”) explicitly situates “violence against women” and “domestic violence” as problems of discrimination.<sup>32</sup> The Preamble recognizes “that violence against women is a manifestation of historically unequal power relations between women and men,” and that the “structural nature” of violence against women is “gender-based violence,” which is one of the crucial social mechanisms that enforce women’s subordination relative to men.<sup>33</sup> One of its stated purposes is to “contribute to the elimination of all forms of discrimination against women and promote substantive equality between women and men, including by empowering women.”<sup>34</sup> Notwithstanding the focus on “women,” it explicitly recognizes that men may also be victims, and it recognizes the harms of intersectional discrimination, requiring that the treaty’s implementation, particularly with respect to victims:

[S]hall be secured without discrimination on any ground such as sex, gender, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, gender identity, age, state of health, disability, marital status, migrant or refugee status, or other status.<sup>35</sup>

It makes explicit that “special measures” necessary to “prevent and protect” women from gender-based violence should not be considered discrimination under the Convention, opening the door to remedial measures that advance substantive equality.<sup>36</sup> As discussed below,

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30. *Id.* ¶ 11.

31. *Id.* ¶¶ 24(e–f).

32. Council of Europe Convention on preventing and combating violence against women and domestic violence art. 3, May 11, 2011, V.2011, <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008482e> [<https://perma.cc/QF23-JBZM>] [hereinafter Istanbul Convention]. For a description of the ways in which the Istanbul Convention was built on CEDAW’s anti-discrimination framework, see, e.g., Council of Europe Secretariat, *The Istanbul Convention and the CEDAW framework: A comparison of measures to prevent and combat violence against women (working paper prepared for reference purposes only)*, <https://rm.coe.int/168059aa28> [<https://perma.cc/H486-FSM5>].

33. Istanbul Convention, *supra* note 32, at preamble.

34. *Id.* at art. 1.1(b).

35. *Id.* at art. 4.3.

36. *Id.* at art. 4.4.

decisions interpreting the European Convention on Human Rights, which contains an enforcement mechanism and which prohibits discrimination based, among other things, on “sex, race, colour, language, [and] religion,” have begun to reference the Istanbul Convention in claims asserting that state responses to gender violence discriminated against victims and survivors.<sup>37</sup>

Yet at the same time that CEDAW and the Istanbul Convention explicitly acknowledge the harms of gender stereotypes and the ways they manifest in gender violence, those treaties are framed primarily in terms of discrimination against “women” and reflect and incorporate the gender-specific frame, “violence against women.”<sup>38</sup> No doubt the question whether anti-violence initiatives should be framed in gender-neutral or gender-specific terms is the subject of longstanding and hotly contested debate.<sup>39</sup> Yet recent examples of backlash against women, LGBTI individuals, and other gender nonconforming people suggest we should urge a gender-neutral frame that enables critique of a broad range of gender stereotypes to fall within its frame.

Although many support the gender-specific frame as a way of calling attention to the disproportionate impact of gender violence on women, and of its roots in patriarchal values and beliefs,<sup>40</sup> it can serve as a barrier to transformational reform. It can produce “awkward practical contradictions,” for example, touting programs addressing “violence against women” that nevertheless serve men as well.<sup>41</sup> The focus on “women” operates to exclude survivors from marginalized groups who may identify more with other aspects of their identities than with their identities as women.<sup>42</sup> It fuels legal challenges by men who claim to be excluded and therefore aggrieved by the gender-specific frame.<sup>43</sup> It produces practical challenges in that gay and transgender men may be excluded from needed services.<sup>44</sup> It may expose survivors to increased risk, for example, by assuming that a female visitor to a woman in a domestic violence shelter is a friend and not an abuser.<sup>45</sup> Moreover, by equating the identity of “woman” with “victim,” it may serve to enshrine rather than challenge traditional gender stereotypes.<sup>46</sup>

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37. See European Convention, *supra* note 4; see *infra* Part III (discussing cases).

38. See Goldscheid, *supra* note 25, at 628–29.

39. *Id.* at 628–46.

40. *Id.* at 628–30.

41. *Id.* at 626.

42. *Id.* at 637–40.

43. *Id.* at 641–44.

44. Goldscheid, *supra* note 25, at 645–46.

45. *Id.*

46. *Id.* at 640–41.

The gender-specific frame may fuel protective representations that, as Diane Otto persuasively has argued, inscribe women's vulnerabilities and deny women agency and autonomy.<sup>47</sup> This protective lens, reflected explicitly in the due diligence directive to "protect" and codified in other human rights instruments,<sup>48</sup> may reinforce a gender-specific trope casting "women" as passive victims and fueling traditional stereotypes that run counter to the anti-stereotyping goal of challenging traditional gender roles and celebrating women's autonomy.<sup>49</sup> As many of the CEDAW and European Court of Human Rights decisions, discussed in more detail below, illustrate, these instruments recognize multiple forms of societal subordination and hold states to account.<sup>50</sup> But those accounts, which often rest on narratives of a woman's vulnerability, stand in sharp contrast to the lives of survivors, who exercise courage, strength, and agency daily. That protectionist frame may, even inadvertently, fail to promote, and may even impede, intersectional, progressive strategies for reform.

Neither CEDAW's General Recommendation No. 19 nor the Istanbul Convention are entirely clear with respect to how they would be applied to violence committed against LGBTI people. Both define gender-based violence as "violence that is directed against a woman because she is a woman or that affects women disproportionately,"<sup>51</sup> while the Istanbul Convention recognizes in its Preamble that "domestic violence affects women disproportionately and that men may also be victims of domestic violence."<sup>52</sup> Both titles reflect the gender-specific "woman"-centered frame, although the Istanbul Convention's title, which includes "domestic violence" as well as "violence against women," seemingly encompasses gender violence (at least

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47. *Id.* (citing Diane Otto, *International Human Rights Law: Towards Rethinking Sex/Gender Dualism*, in THE ASHGATE RESEARCH COMPANION TO FEMINIST LEGAL THEORY (Margaret Davies & Vanessa E. Munro eds., 2013) (critiquing asymmetrical approaches to sex/gender distinctions). *See also, e.g.*, Jamie R. Abrams, *The Feminist Case for Acknowledging Women's Acts of Violence*, 27 YALE J. L. & FEMINISM 287, 316 (2016) (critiquing stereotypes of survivors as weak and dependent).

48. *See, e.g.*, Goldscheid & Liebowitz, *supra* note 18, at 320–22; *see also infra* Part III (discussing cases, including, for example, Bălșan v. Romania, App. No. 49645/09, Eur. Ct. H.R. 21 (2017), which draw on that protective frame).

49. *See, e.g.*, LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 141 (2011) (urging focus on survivors' autonomy); *see also* Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WISC. L. REV. 1003, 1015–16 (1995); Zanita Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 COLUM. J. GENDER & L. 1, 21 (1998).

50. *See infra* notes 58–61; *see also infra* Part III (discussing cases).

51. CEDAW Gen. Rec. 19, *supra* note 26, ¶ 6; Istanbul Convention, *supra* note 32, at art. 3(d).

52. Istanbul Convention, *supra* note 32, at preamble.

domestic violence) committed against those who do not identify as women.<sup>53</sup> Of course, courts could interpret both those instruments in a manner similar to that employed by the United States Department of Justice, which, under the United States' Violence Against Women Act, supported programs and services addressing "violence against women" while reassuring that those programs are available to men.<sup>54</sup> Notably, as cases discussed in Part III illustrate, the European Convention on Human Rights, which generally prohibits discrimination based, *inter alia*, on "sex," and which, *inter alia*, protects the right to life (Article 2), prohibits torture (Article 3), and the right to respect for private and family life (Article 8), but which does not invoke the gender specific "violence against women" frame, may prove to have a broader, and more inclusive, reach than the gender violence-specific instruments, at least with respect to LGBTI people.<sup>55</sup>

Absent clarity about their reach, these gender-specific approaches could be interpreted to exclude men, including transgender and gay men, who may well be harmed by the very gender stereotypes that inform gender violence committed against women.<sup>56</sup> Indeed, in the United States, courts have been split over whether anti-discrimination laws, which prohibit, among other things, discrimination based on "sex," would apply to discrimination against LGBTI people.<sup>57</sup>

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53. *Id.* In addition, the Istanbul Convention's anti-discrimination provision explicitly prohibits discrimination based, *inter alia*, on sex, sexual orientation, and gender identity. *See id.* at art. 4.3.

54. *See, e.g., What is Domestic Violence?*, U.S. DEPT OF JUSTICE, OFFICE ON VIOLENCE AGAINST WOMEN (last updated June 16, 2017), <http://www.ovw.usdoj.gov/domviolence.htm> [<https://perma.cc/CE94-ME3Q>] (acknowledging that domestic violence occurs in both opposite-sex and same-sex relationships); *Frequently Asked Questions, April 9, 2014, Nondiscrimination Grant Condition in the Violence Against Women Reauthorization Act of 2013*, U.S. DEPT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OFFICE FOR CIVIL RIGHTS, <https://www.justice.gov/sites/default/files/ovw/legacy/2014/06/20/faqs-ngc-vawa.pdf> [<https://perma.cc/DYQ7-XDFX>] (making clear that programs funded under VAWA may not discriminate based, *inter alia*, on sex, gender identity or sexual orientation, with limited exceptions allowing sex-specific programming where "necessary to the essential operation of a program," and then, when "comparable services" are provided to individuals who would not be served by the sex-segregated or sex-specific programming).

55. *See* European Convention, *supra* note 4.

56. *See, e.g.,* Goldscheid, *supra* note 25, at 634–35 nn.60–62 (reviewing studies of prevalence of intimate partner violence in LGBT relationships); *see also id.* at 636–38 (discussing queer and gender theorists' resistance to the gender-specific frame).

57. *See, e.g.,* WILLIAM N. ESKRIDGE, JR., YALE L. & ECONOMICS RESEARCH PAPER NO. 582, TITLE VII'S STATUTORY HISTORY AND THE SEX DISCRIMINATION ARGUMENT FOR LGBTI WORKPLACE PROTECTIONS (2017); KATIE R. EYER, AM. CONSTITUTION SOC'Y: FOR LAW & POLICY, SEX DISCRIMINATION LAW AND LGBT EQUALITY (2017); Brief of NAACP Legal Defense and Educational Fund, Inc. and the Asian American Legal Defense and Education Fund as *Amici Curiae* in support of Respondent, Gloucester Cty. Sch. Bd. v. G.G., 136 S. Ct. 2442 (2016) (No. 16-273) (detailing role of race and gender-based stereotypes in anti-LGBTI prohibitions).

At the same time, both CEDAW and the Istanbul Convention recognize the role of intersectional discrimination in informing how multiple forms of structural subordination impact violence and abuse. CEDAW's General Recommendations Nos. 28 and 35 explicitly incorporate socially constructed discrimination based on gender as part of the Convention's prohibition of discrimination against women.<sup>58</sup> Those Recommendations similarly acknowledge intersectional discrimination and that discrimination against "women based on sex and gender" is linked to other factors, including race, ethnicity, religion, and sexual orientation.<sup>59</sup> Likewise, CEDAW's General Recommendation No. 33 on women's access to justice opens the door to recognizing multiple social and cultural barriers.<sup>60</sup> It recognizes that "intersectional or compounded discrimination may include ethnicity/race, indigenous or minority status, colour, socio-economic status and/or caste, language, religion or belief, political opinion, national origin, marital and/or maternal status, age, urban/rural location, health status, disability, property ownership, and being lesbian, bisexual, transgender women or intersex persons."<sup>61</sup> While these definitions are laudable in explicitly recognizing intersectional discrimination, they seem categorically to exclude men, including gay men, who are omitted from the language of the recommendations. Taking a more inclusive approach, the Istanbul Convention provides that implementation "shall be secured without discrimination on any ground such as . . . sexual orientation, gender identity . . ." <sup>62</sup> Overall, these instruments offer a rich, if complex, foundation from which the CEDAW Committee and European Court of Human Rights, which adjudicate complaints brought under CEDAW's Optional Protocol, and the European Convention, respectively, can recognize and provide redress for the impact of gender norms and intersectional discrimination on gender violence.

### III. REDRESS AND ACCOUNTABILITY FOR GENDER VIOLENCE AS DISCRIMINATION

International human rights instruments' promises of redress and accountability for gender violence hold the potential to provide

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58. Comm. on the Elimination of Discrimination against Women, Gen. Recommendation No. 28, ¶ 5, U.N. Doc. CEDAW/C/GC/28 (2010) [hereinafter CEDAW Gen. Rec. 28]; CEDAW Gen. Rec. 35, *supra* note 18, ¶ 12.

59. CEDAW Gen. Rec. 28, *supra* note 58, ¶¶ 5, 18, 19; CEDAW Gen. Rec. 35, *supra* note 18, ¶ 12.

60. Comm. on the Elimination of Discrimination against Women, Gen. Recommendation No. 33, ¶¶ 3, 7, U.N. Doc. CEDAW/C/GC/3 (2015) (recognizing compounded discrimination and socially constructed gender identities, respectively).

61. *Id.* ¶ 8.

62. Istanbul Convention, *supra* note 32, at art. 4.3.

remedies for gender violence itself and for institutional responses that compound discriminatory harms. This section reviews decisions under the European Convention on Human Rights<sup>63</sup> and the Convention on the Elimination of All Forms of Discrimination against Women<sup>64</sup> in which survivors have sought state accountability for failed and discriminatory responses to gender violence. It reviews three categories of decisions: cases seeking state accountability for failed law enforcement responses to requests by gender violence survivors (typically, intimate partner violence in heterosexual relationships) for assistance; cases involving custody determinations where domestic violence is a factor; and cases seeking state accountability for violence based on gender identity. As this Part demonstrates, many of these decisions explicitly recognize and challenge the roles and impacts of gender discrimination and gender-based stereotypes both in perpetuating gender violence and in institutional responses to it. They offer valuable examples of how human rights instruments' expressed and intended purposes of condemning discrimination and holding states to account for meaningful responses can be applied to facts on the ground. But the gender-specific framing of "violence against women" that is reflected in CEDAW and in the Istanbul Convention may well limit the transformative reach of that otherwise progressive frame.

A number of cases, decided both under the European Convention on Human Rights and by the CEDAW Committee, recognize state accountability for gender violence, both as a form of discrimination and as a violation of other treaty provisions. A number of the decisions under both of these instruments carefully parse the role and manifestation of gender bias and stereotypes and can serve as a model for how human rights instruments' expressed purposes of condemning bias in all its forms may be interpreted.

#### *A. European Convention Domestic Violence Decisions*

Decisions by the European Court of Human Rights holding states accountable for meaningfully responding when gender violence survivors call for assistance draw on the European Convention's explicit anti-discrimination prohibition, as well as on the Convention's

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63. Article 34 of the European Convention provides for applications by individuals claiming violations of the Convention. European Convention, *supra* note 4, at art. 34.

64. CEDAW's Optional Protocol provides a Communications Procedure that allows either individuals or groups of individuals to submit individual complaints to the CEDAW Committee. G.A. Res. 54/4, Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, at art. 4 (Oct. 15, 1999).

other human rights provisions.<sup>65</sup> This section will first discuss cases seeking state accountability for gender violence that claim violations of the Convention's anti-discrimination provision, and then will review additional decisions that reflect the Court's analysis of the nuances of abuse even where charges of discrimination are not brought.<sup>66</sup>

### 1. *Discrimination Claims*

A series of cases brought by survivors of gender violence and their families assert that law enforcement's responses violate the European Convention's anti-discrimination prohibition.<sup>67</sup> In many of these cases, the European Court of Human Rights easily concluded that states' failed responses amounted to impermissible gender discrimination, with little searching analysis. For example, in *Bălșan v. Romania*, the European Court of Human Rights found that the violence suffered by the plaintiff at the hands of her husband throughout their marriage "[could] be regarded as gender-based violence, which is a form of discrimination against women."<sup>68</sup> The Court recognized the pernicious role of stereotypes when it reasoned that it was "concerning" that the national authorities, in responding to the plaintiff's requests for help after assaults intensified during divorce proceedings, had done little to stop or to prevent assaults from happening again; instead, the authorities considered the acts of abuse as "being provoked and . . . as not being serious enough to fall within the scope of the criminal law."<sup>69</sup> In unanimously finding a violation of the Convention's anti-discrimination prohibition (Article 14), the Court concluded that the State's failure to protect women violated their rights to equal protection.<sup>70</sup> The decision detailed Romania's official statistics showing that domestic violence was tolerated, and even "perceived as normal," and that the number of victims increased every year with the majority being women.<sup>71</sup> It took the national authorities to task for being aware of the history

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65. See European Convention, *supra* note 4, at arts. 2–3, 14.

66. For a summary of domestic violence cases, see, e.g., EUR. COURT OF HUMAN RIGHTS, DOMESTIC VIOLENCE (2017), [http://www.echr.coe.int/Documents/FS\\_Domestic\\_violence\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Domestic_violence_ENG.pdf) [<https://perma.cc/LQC7-PSCK>].

67. See European Convention, *supra* note 4, at art. 14 (providing that "[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.").

68. *Bălșan v. Romania*, App. No. 49645/09, Eur. Ct. H.R. 21 (2017).

69. *Id.* at 16.

70. *Id.* at 19, 22.

71. *Id.* at 7–8.

of abuse but failing to consider protective measures against the abuser, despite the plaintiff's repeated requests to the police, the prosecutor, and the courts.<sup>72</sup> The decision cited both the CEDAW Committee's concluding comments with respect to Romania, and the Istanbul Convention, in concluding that the authorities' responses were "inconsistent with international standards . . . ." <sup>73</sup>

The decision may well be applauded on a number of grounds. It explicitly recognized states' obligations to take abuse seriously and recognized gender violence in general, and domestic violence in particular, as a form of gender discrimination.<sup>74</sup> Moreover, its critique of the national authorities' treatment of the abuse suffered by the complainant as "being provoked" by her abuser acknowledges a classic stereotype that often thwarts claims by survivors of gender violence.<sup>75</sup>

But the decision's focus on the criminal justice system's responses as the lens through which to measure state responsiveness falls short of the full promise of equality reflected in the European Convention. For example, the *Bălșan v. Romania* decision rightly discusses the State's failure to respond to the plaintiff's calls for intervention and the failure of the criminal law to appropriately or adequately offer any measure of redress.<sup>76</sup> While the decision's focus on criminal justice responses is certainly responsive to the nature of the complaint and may well have been a laudable reaction to the plaintiff's apparent call for improved law enforcement responses, the decision might have advanced broader anti-discrimination goals by identifying or discussing other ways to challenge the insidious bias that perpetuates abuse and institutional failures to adequately assist survivors and redress harm. In addition, the decision frames the State's failure as a failure "to protect women" against domestic violence,<sup>77</sup> arguably enshrining the protectionist frame legal scholars have critiqued as in tension with the anti-stereotyping goals of many international human rights instruments.

Like *Bălșan v. Romania*, in *Talpis v. Italy*, the European Court of Human Rights found violations of the European Convention in light of law enforcement's failed responses to a history of domestic violence by the plaintiff's husband, which resulted in the murder of her son and her own attempted murder.<sup>78</sup> A majority of the Court

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72. *Id.* at 19.

73. *Id.* at 9–10, 17.

74. *Bălșan*, App. No. 49645/09 at 14, 21.

75. *Id.* at 19.

76. *Id.* at 17, 21.

77. *Id.* at 21.

78. Press Release, European Court of Human Rights, EHCR 075, Italian authorities failed to protect a mother and son because they did not take prompt action on a complaint



concluded that police failure to take prompt action in response to Ms. Talpis' complaints created "a situation of impunity" conducive to additional acts of violence, which led to the attempted murder of Ms. Talpis and the murder of her son.<sup>79</sup> Consequently, the Court found that the authorities "failed in their obligation to protect [Ms. Talpis and her children]", and that she had been "the victim of discrimination as a woman" on account of the authorities' inaction.<sup>80</sup> Further, the Court concluded that the authorities' inaction underestimated the violence and "essentially endorsed it."<sup>81</sup>

The decision detailed a history of abuse and of Ms. Talpis' repeated complaints to law enforcement with little or minimal response.<sup>82</sup> For example, after one incident, the officers fined her husband for carrying a prohibited weapon and then invited Ms. Talpis to go home.<sup>83</sup> After a call during which law enforcement found that her husband committed bodily harm, the police closed the complaint file.<sup>84</sup> The final incident followed a call by Ms. Talpis to the police after which her husband was taken to a hospital in a state of intoxication and then was discharged.<sup>85</sup> He subsequently entered the family apartment with a kitchen knife, stabbed Ms. Talpis in the chest as she was trying to escape, and stabbed their son, who subsequently died of his injuries.<sup>86</sup> The husband was sentenced to life imprisonment for murder and attempted murder and was ordered to pay Ms. Talpis damages.<sup>87</sup>

The Court found that the domestic authorities' failure to issue any kind of protection order, and their delay in questioning Ms. Talpis, deprived her of the immediate protection she needed.<sup>88</sup> It found a violation of the right to life (Article 2) and of the prohibition of inhuman or degrading treatment (Article 3).<sup>89</sup> It also concluded that the State's "failure to protect women against domestic violence" violated their right to equal protection and the Convention's prohibition of discrimination (Article 14), and that by failing to take action

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concerning conjugal violence (Feb. 3, 2017) [hereinafter Talpis Press Release], available at <http://www.giurisprudenzapenale.com/wp-content/uploads/2017/03/Scarica-il-comunicato-stampa-della-Corte-ENG.pdf> [<https://perma.cc/B42R-H7WX>].

79. *Id.* (stating that two judges dissented from this finding).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. Talpis Press Release, *supra* note 78.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

following repeated requests for intervention, the State “essentially endorsed” the violence.<sup>90</sup> The Court acknowledged the “undisputed statistical data” showing the disproportionate impact of domestic violence on women, and “that the socio-cultural attitudes of tolerance of domestic violence were alive and well.”<sup>91</sup> It easily concluded that the violence inflicted against Ms. Talpis “should be considered as being grounded on sex and that it consequently amounted to a form of discrimination against women” given the statistics demonstrating that domestic violence victims are primarily women, and that domestic violence persisted despite reforms.<sup>92</sup> Thus, like *Bălșan v. Romania*, the Court’s recognition of domestic violence as discrimination marks a notable step forward in formally acknowledging the discriminatory nature of intimate partner violence and the biased response survivors often receive from authorities. On the other hand, the decision does not offer much more than a somewhat conclusory statement about how courts should analyze discrimination in these contexts. Also like *Bălșan v. Romania*, it incorporates the protectionist frame that serves to promote state accountability but also stands in tension with the directive to combat gender stereotypes.

In *Kilic v. Turkey*, the European Court of Human Rights employed a similar analysis in finding that state responses violated the Convention’s prohibition of discrimination.<sup>93</sup> There, the applicant’s husband killed their daughter after the applicant complained to the authorities four times, stating that she feared for her and her children’s lives and asked for intervention.<sup>94</sup> She had obtained three protection orders and injunctions, but the authorities failed to punish the husband’s failure to comply with the orders issued against him and created a “context of impunity” enabling him to repeatedly assault his wife without being called to account.<sup>95</sup> By leaving her without resources or protection in light of her husband’s violent behavior, the authorities “created a climate that was conducive to domestic violence.”<sup>96</sup> The Court noted that it took nineteen days for one of the protection orders, and eight weeks for the second, to be served.<sup>97</sup> The police did not assess the risk to the applicant’s daughter when

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90. Talpis Press Release, *supra* note 78.

91. *Id.*

92. *Id.*

93. Press Release, European Court of Human Rights, ECHR 227, Turkish authorities did not effectively protect the life of a woman threatened with death by her husband (June 28, 2016) [hereinafter Kilic Press Release].

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

considering his punishment after he was arrested, and no penalties were assessed for his failure to comply with the injunctions that had been issued.<sup>98</sup> The Court noted the authorities' failure to help her find appropriate shelter, and that they had failed to take into account her vulnerable psychological, physical, and material situations, and offer her appropriate support.<sup>99</sup> Given these failures, the Court found a violation of the prohibition of discrimination, along with a violation of the right to life.<sup>100</sup> It highlighted the authorities' failure to provide her with protection, and by contrast, noted that her husband had been afforded impunity.<sup>101</sup> By regularly "turning a blind eye" to repeated violence and death threats, the authorities created a "climate that was conducive to domestic violence."<sup>102</sup> That said, here, as in *Bälşan and Talpis*, the Court relied on a protectionist frame in holding the state to account.

Similarly, in *M.G. v. Turkey*, the applicant filed a complaint after leaving her home on account of longstanding domestic violence.<sup>103</sup> M.G. had repeatedly sought protective measures from the family court in response to her former husband's continual threats of violence and death.<sup>104</sup> The Court found a violation of the Convention's prohibition of torture and inhuman or degrading treatment based, in part, on the fact that the complaint against him was still pending more than five and a half years after she had filed it.<sup>105</sup> The Court further found that the State's failure, "even where unintentional, to protect women against domestic violence breached [women's] right to equal protection under the law."<sup>106</sup> The Court noted that the country's "general and discriminatory judicial passivity . . . creat[ed] a climate that was conducive to domestic violence."<sup>107</sup> It also noted that the country had not yet guaranteed divorced women protective measures against their former spouses and found a violation of the prohibition on discrimination taken together with the violation of torture and inhuman or degrading treatment.<sup>108</sup> Notably, the Court

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98. *Id.*

99. Kilic Press Release, *supra* note 93.

100. *Id.*

101. *Id.*

102. *Id.*

103. Press Release, European Court of Human Rights, ECHR 101, The authorities' passivity with regard to a woman's experience of domestic violence was in breach of Convention (Mar. 22, 2016) [hereinafter M.G. Press Release], available at <https://rm.coe.int/168062cf75> [<https://perma.cc/4F6R-PL35>].

104. *Id.*

105. *Id.* at 2–3.

106. *Id.* at 3.

107. *Id.*

108. *Id.*

found it unacceptable that M.G. had been left without resources or protection, a welcome acknowledgment of the material resources that are essential to a survivor's safety, well-being, and autonomy, albeit with a nod toward the protectionist frame that conjures traditional notions of male protection of women.<sup>109</sup>

In a few cases, the European Court of Human Rights closely examined the role of gender-based stereotypes in informing state responses. For example, in *Opuz v. Turkey*, the applicant alleged that Turkey's domestic law was discriminatory and insufficiently protected women.<sup>110</sup> It cited international human rights principles, including those articulated in CEDAW, the United Nations Commission on Human Rights Resolution 2003/45, the Belém do Pará Convention, and decisions by the Inter-American Commission on Human Rights, to conclude that "the State's failure to protect women against domestic violence breaches their right to equal protection of the law and that this failure does not need to be intentional."<sup>111</sup> The Court concluded that although the State had adopted welcomed legislative reforms, the "general attitude of local authorities," such as the way domestic violence survivors were treated by police and the "judicial passivity" in providing "protection" reflected discrimination.<sup>112</sup> Similarly, research demonstrating that police officers do not investigate domestic violence complaints but instead seek to mediate them, as well as "unreasonable delays in issuing injunctions," revealed that the authorities tolerate domestic violence and that existing remedies are not effective, thus creating a climate that was discriminatory and conducive to domestic violence.<sup>113</sup> The Court concluded that the "general and discriminatory judicial passivity . . . albeit unintentional, mainly affected women" and concluded that the violence suffered by the applicant and her mother was gender based and a form of discrimination against women.<sup>114</sup> It reaffirmed that "the State's failure to protect women against domestic violence breaches their right to equal protection . . . and that this failure does not need to be intentional."<sup>115</sup>

That reasoning opened the door to subsequent claims that particular practices were discriminatory. So, for example, in *Eremia*

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109. M.G. Press Release, *supra* note 103.

110. *Opuz v. Turkey*, App. No. 33401/02, Eur. Ct. H.R. ¶ 178 (2009).

111. *Id.* ¶¶ 184–91. It further recognized that the Belem do Para Convention describes every woman's right to be free from violence as encompassing "the right to be free from all forms of discrimination."

112. *Id.* ¶ 192.

113. *Id.* ¶¶ 195–98.

114. *Id.* ¶¶ 200, 202.

115. *Id.* ¶ 191.

*v. Moldova*, the applicant claimed that the State's response was discriminatory because she had been subjected to violence on a number of occasions, the authorities were aware of that history, the judge refused to act quickly, and no action was taken in response to her formal complaint.<sup>116</sup> In addition, the applicant was allegedly pressured to withdraw her complaint against her husband, the police failed to enforce her protection order for over two months, and they suggested reconciliation because she was "not the first nor the last woman to be beaten up by her husband."<sup>117</sup> After a detailed analysis of the authorities' response, the Court concluded that the authorities' actions effectively condoned the violence and reflected a discriminatory attitude toward the applicant "as a woman."<sup>118</sup>

Similarly, in *Mudric v. Moldova*, the Court found that the State's response to a domestic violence survivor, who had been subjected to repeated violence, reflected a discriminatory attitude toward her "as a woman."<sup>119</sup> The Court acknowledged that three protection orders had been issued but were not enforced, that her husband openly opposed local police and social workers, and that despite legal provisions authorizing criminal proceedings and a psychiatric examination, the authorities did not take steps to exercise that authority for almost a year.<sup>120</sup> It took into account states' obligations under CEDAW to respond to domestic violence with due diligence and concluded that the authorities' responses were not "a simple failure or delay" but instead condoned the abuse and reflected a discriminatory attitude toward the complainant "as a woman."<sup>121</sup>

In a subsequent complaint against Moldova, *T.M. and C.M. v. Moldova*, the Court applied a nuanced understanding of the ways gender bias impacts law enforcement's responses to domestic violence.<sup>122</sup> As in *Mudric*, it concluded that the authorities' responses to requests for help by a survivor of domestic violence reflected a discriminatory attitude toward the complainant, who had made numerous complaints to law enforcement and received slow and, in her view, inadequate responses.<sup>123</sup> The Court noted, among other things, that the authorities' assessment that injuries were not sufficiently severe reflected a failure to understand that domestic violence does not always result in physical injury.<sup>124</sup> It took note of

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116. *Eremia v. Moldova*, App. No. 3564/11, Eur. Ct. H.R. ¶ 86 (2013).

117. *Id.* ¶ 87.

118. *Id.* ¶ 89.

119. *Mudric v. Moldova*, App. No. 74839/10, Eur. Ct. H.R. ¶¶ 62, 63 (2013).

120. *Id.* ¶ 62.

121. *Id.* ¶ 60, 62, 63.

122. *T.M. and C.M. v. Moldova*, App. No. 26608/11, Eur. Ct. H.R. ¶ 62 (2014).

123. *Id.*

124. *Id.* ¶ 59.

the length of time it took for authorities to consider one of the applications for a protection order, their failure to forward it for enforcement, as well as law enforcement's failure to remove the abuser from the home, as indicative of the authorities' "passivity" in their failure to consider protective measures.<sup>125</sup> It "question[ed] the attitude of the domestic court," which found no evidence of domestic violence despite a record before it of verbal and physical abuse and concluded that the responses "condoned" the violence and "reflected a discriminatory attitude" toward the complainant "as a woman."<sup>126</sup>

Other decisions reflect the Court's recognition that state responses could violate the Convention due to their discriminatory impact. For example, in *A. v. Croatia*, the complainant claimed, among other things, that the State's laws relating to domestic violence were insufficient and ineffective, and since acts of domestic violence were predominantly committed against women, those laws were also discriminatory.<sup>127</sup> She had survived repeated abuse by her husband, who had endured a concentration camp and had been found to suffer from mental disorders, including PTSD.<sup>128</sup> After several criminal proceedings and ongoing threats and abuse, the applicant and her husband's marriage was dissolved.<sup>129</sup> She claimed that Croatia's domestic violence legislation was discriminatory because it treated acts of domestic violence, including acts of serious physical abuse, as minor offenses whereas similar acts that occurred between strangers were treated as a matter for traditional criminal law remedies.<sup>130</sup> In addition, she argued that two national strategies for addressing domestic violence had been adopted but not implemented; in particular, provisions requiring experts to be trained were insufficient and had not been evaluated.<sup>131</sup> Finally, she argued that statistics capturing the results of cases requesting protective measures and statistics revealing the length of domestic violence proceedings revealed discriminatory treatment of those cases, since women were the predominant victims of domestic violence.<sup>132</sup>

In what could signal a framework for analyzing disparate impact claims, the Court acknowledged that it would accept arguments of discriminatory impact even if a discriminatory policy is not specifically aimed at the impacted group, unless the policy is justified by

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125. *Id.* ¶¶ 59–60.

126. *Id.* ¶¶ 61–62.

127. *A. v. Croatia*, App. No. 55164/08, Eur. Ct. H.R. ¶ 88 (2010).

128. *Id.* ¶¶ 9–17.

129. *Id.* ¶ 39.

130. *Id.* ¶ 89.

131. *Id.* ¶ 90.

132. *Id.* ¶¶ 89–92.

a “legitimate aim” and the means of achieving that aim are “appropriate, necessary and proportionate.”<sup>133</sup> The Court here rejected the applicant’s claim.<sup>134</sup> It noted that unlike *Opuz*, the complainant here did not provide statistical or other information reflecting discriminatory treatment of women domestic violence victims,<sup>135</sup> nor did the applicant allege that she had been dissuaded from pursuing prosecution or discouraged from seeking protection from her abuser.<sup>136</sup> The Court evaluated whether the arguments presented *prima facie* evidence of gender discrimination<sup>137</sup> and concluded that the fact that some allegations of domestic violence may be treated as “minor offenses” was not itself discriminatory, and that the legislative framework was not discriminatory.<sup>138</sup> The Court dismissed the complainant’s other allegations of discrimination based on its conclusion that even though failure to institute all recommended sanctions was “problematic,” it didn’t support a conclusion of discrimination since the complainant had failed to support her allegations about failed training of experts with examples, data or reports.<sup>139</sup>

Other decisions have rejected arguments that state responses were discriminatory after concluding that the state adequately responded to calls for law enforcement intervention. For example, in *Rumor v. Italy*, the Court rejected allegations that Italy had violated Articles 3 and 14 of the Convention.<sup>140</sup> There, the complainant’s former partner had been detained and arrested following acts of violence the Court concluded were “sufficiently serious” to violate the Convention’s prohibitions on “torture” or “inhuman or degrading treatment or punishment.”<sup>141</sup> Nevertheless, the Court concluded that the authorities’ responses, which included arrest, custody and criminal charges, and forfeiture of the former partner’s parental rights, reflected a legislative framework that “was effective in punishing the perpetrator” and preventing recurrent violence.<sup>142</sup> The Court dismissed the petitioner’s complaints, for example, about the location of the facility where he was detained (which was near where she

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133. *Croatia*, App. No. 55164/08 ¶ 94.

134. *Id.* ¶¶ 100–104.

135. *Id.* ¶ 97.

136. *Id.*

137. *Id.* ¶ 98.

138. *Id.* ¶ 100. The Court’s conclusion in this regard was buttressed by its observation that in this case, both “minor offences” and criminal proceedings were instituted against the complainant’s husband.

139. *Croatia*, App. No. 55164/08 ¶¶ 101–103.

140. *Rumor v. Italy*, App. No. 72964/10, Eur. Ct. H.R. ¶¶ 76–77 (2014).

141. *Id.* ¶ 61 (finding that underlying violence constituted a violation of Article 3 of the Convention).

142. *Id.* ¶¶ 64–65, 76.

lived), and her claims that the authorities' responses failed to give her adequate notice.<sup>143</sup> Once the Court concluded that the State's response was adequate, it summarily determined that there was no violation of Article 14's anti-discrimination mandate.<sup>144</sup>

## 2. Other Claims

A number of decisions by the European Court of Human Rights in cases alleging states' failed responses to gender violence reflect an understanding of the workings of gender bias, even when the complaints were not framed as anti-discrimination claims. For example, in *B.V. v. Belgium*, a woman alleged various violations of the European Convention on Human Rights based on the Belgian authorities' failed responses to her complaints of sexual assault.<sup>145</sup> She had been raped and sexually assaulted by a co-worker and had sought intervention from the Brussels police.<sup>146</sup> The police conducted various interviews but ultimately took no action and discontinued the investigation, although they did not inform her about that decision.<sup>147</sup> After learning that no action was to be taken on her complaint, she asked the prosecutor's office to reopen the case and then filed a formal complaint.<sup>148</sup> She lodged continued complaints over the next nine years during which various interviews were conducted, but no action was taken, and the case was dismissed based on insufficient evidence.<sup>149</sup>

The petitioner claimed violations of Article 3 (prohibition of inhuman and degrading treatment), Article 6, Section 1 (right to a fair hearing within a reasonable time), and Article 13 (right to an effective remedy).<sup>150</sup> The European Court of Human Rights concluded, without searching analysis, that her allegations of rape could be regarded as complaints of inhuman and degrading treatment and therefore required authorities to carry out an effective investigation.<sup>151</sup> The Court took a close look at the way her complaints were handled; for example, it observed that the only action taken after her

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143. *Id.* ¶¶ 67–75.

144. *Id.* ¶ 77.

145. Press Release, European Court of Human Rights, ECHR 145, The Belgian authorities did not take the necessary steps to establish the circumstances surrounding alleged acts of rape and indecent assault (Feb. 5, 2017) [hereinafter *B.V. Press Release*], available at <https://legalnews.be/wp-content/uploads/2017/05/Judgment-B.V.-v.-Belgium-investigation-into-allegation-of-rape-and-indecent-assault.pdf> [<https://perma.cc/6N3S-TP6Q>].

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *B.V. Press Release*, *supra* note 145.



initial complaint was filed in 1998 was a single interview, and that all the other interviews were carried out later after the petitioner's repeated complaints.<sup>152</sup> It concluded that the investigation was undertaken "without any indication of a coherent investigative plan," and therefore, could not be said to have been "serious and thorough."<sup>153</sup> Accordingly, the State violated the Convention's prohibition of inhuman and degrading treatment.<sup>154</sup> Even though the case was not framed as violating an anti-discrimination mandate, its close and critical evaluation of the State's responses implicitly reflected an understanding of the historic ways in which complaints of sexual assault have, historically, not been thoroughly and promptly investigated.

Similarly, in *Valiulienė v. Lithuania*, the European Court of Human Rights analyzed the applicant's claims of the State's failed responses after a history of repeated physical violence, requests for medical and legal interventions, and law enforcement authorities' repeated decisions to discontinue investigations and prosecutions.<sup>155</sup> As just one example, in 2005, a prosecutor discontinued the pretrial investigation notwithstanding the conclusion that Valiulienė had been strangled, hit, and kicked on five separate occasions in a period of approximately one month and that her partner was suspected of having perpetrated the criminal acts.<sup>156</sup> The prosecutor determined that under the prevailing law at the time of the assaults, the prosecution should have been brought by the victim in her private capacity and that the crimes were not justiciable because they were not of "public importance."<sup>157</sup> Her subsequent appeals, some of which were successful, were ultimately dismissed based on the conclusion that they were time-barred.<sup>158</sup>

Valiulienė claimed that the State had failed to investigate the repeated acts of domestic violence, had failed to hold the perpetrator accountable, and that the criminal proceedings against him had been excessively lengthy.<sup>159</sup> The Court reviewed the State's response closely and critically, and determined that once the case was transferred for public prosecution, the investigation was twice suspended for lack of evidence notwithstanding the petitioner's serious attempts to advance the prosecution.<sup>160</sup> It noted the prosecutors' judgment that the investigations were not sufficiently thorough and concluded that

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152. *Id.*

153. *Id.*

154. *Id.*

155. *Valiulienė v. Lithuania*, App. No. 33234/07, Eur. Ct. H.R. ¶¶ 44–53 (2013).

156. *Id.* ¶ 21.

157. *Id.*

158. *Id.* ¶ 32.

159. *Id.* ¶ 42.

160. *Id.* ¶ 82.

the failure to prosecute was “a serious flaw.”<sup>161</sup> Further, it observed that her subsequent attempts to have her abuser prosecuted all proved futile, notwithstanding her persistent efforts.<sup>162</sup> The Court concluded that the State’s responses did not provide “adequate protection” and therefore violated the Conventions prohibition under Article 3’s prohibition of “torture” or “inhuman or degrading treatment or punishment.”<sup>163</sup> Given that conclusion, it found it unnecessary to examine allegations that the State also violated Article 8’s promise of respect for private life.<sup>164</sup>

Another decision similarly reflects the European Court of Human Rights’ close scrutiny of how law enforcement handles cases involving allegations of gender violence and similar offenses, even when those claims are not framed as cases of discrimination. In *L.E. v. Greece*, the Court considered claims that forced trafficking violated the European Convention Article 4’s prohibition of slavery and forced labor.<sup>165</sup> The Court concluded that the nine-month delay between the time when the petitioner was formally classified as a victim of trafficking and when the statement went into her file was not reasonable; the lack of follow up with respect to witness statements, other procedural failings, and unexplained periods of inactivity led to the conclusion that Greece had violated the Convention’s prohibition of slavery and forced labour.<sup>166</sup>

## B. CEDAW Domestic Violence Decisions

### 1. Law Enforcement Responses and Discrimination

The CEDAW Committee also has considered claims of discrimination in similar cases alleging failed and discriminatory responses by the authorities to claims of gender violence. A number of these decisions reflect a nuanced understanding of the ways gender stereotypes manifest. For example, in *V.K. v. Bulgaria*, a woman sought a protection order after she sought shelter and left her abusive

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161. *Valiuliené*, App. No. 33234/07 ¶ 82.

162. *Id.* ¶ 84.

163. *Id.* ¶ 86.

164. *Id.* ¶ 87.

165. Press Release, European Court of Human Rights, ECHR 28, Criminal complaint by a victim of human trafficking was not dealt with by the Greek authorities in a way compatible with the Convention (Jan. 21, 2016), available at [https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/judgment\\_l.e.\\_v.\\_greece\\_-\\_criminal\\_complaint\\_by\\_a\\_victim\\_of\\_human\\_trafficking.pdf](https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/judgment_l.e._v._greece_-_criminal_complaint_by_a_victim_of_human_trafficking.pdf) [<https://perma.cc/NXH8-CENJ>].

166. *Id.* The Court also found violations of Article 6, § 1 and Article 13, guaranteeing, respectively, the right to a fair hearing within a reasonable time and the right to an effective remedy).

husband.<sup>167</sup> He had prohibited her from working, controlled the family income and spending, and allowed her money only for the family's basic needs.<sup>168</sup> His physical and economic abuse escalated when she defied his instructions, and she left her husband after he refused to provide financial support.<sup>169</sup> Moreover, she suffered beatings which required her to seek medical care.<sup>170</sup> Following that decision, she went to the family home to collect her and her children's belongings, but he had come home early from work and started a dispute and locked the children in the apartment.<sup>171</sup> The petitioner called the police, and she managed to take her daughter, but her son remained locked in the apartment, and the father refused to let the petitioner see him.<sup>172</sup> The petitioner eventually retrieved her son and fled from Poland to Bulgaria to seek protection, where she sought a protection order.<sup>173</sup> The court rejected her application based on its interpretation of Bulgaria's Law on Protection against Domestic Violence, requiring that the request must be submitted within one month from the last date of abuse; here, no act of abuse had been committed during that period.<sup>174</sup> It also found "no immediate danger" to the applicant or her children's lives and healths.<sup>175</sup> The applicant's appeal was subsequently denied.<sup>176</sup> The husband filed divorce proceedings and continued to see the children and filed a civil claim for property to be divided before the divorce proceedings had completed.<sup>177</sup>

The Committee read CEDAW's anti-discrimination mandate broadly and found that the lower court violated the petitioner's rights by applying an "overly restrictive" definition of domestic violence, which was not warranted by Bulgaria's law and which was inconsistent with the State's obligations under CEDAW.<sup>178</sup> The Committee took the lower court to task for focusing on whether the allegations constituted "direct and immediate" threats while ignoring her emotional and psychological suffering and for failing to take into account the past history of abuse.<sup>179</sup> The Committee concluded

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167. See Comm. on the Elimination of Discrimination against Women, *V.K. v. Bulgaria*, Comm. No. 20/2008, ¶¶ 2.11, 2.15, U.N. Doc. CEDAW/C/49/D/20/2008 (2011).

168. *Id.* ¶ 2.2.

169. *Id.* ¶¶ 2.5–2.11.

170. *Id.*

171. *Id.* ¶ 2.11.

172. *Id.*

173. *V.K.*, Comm. No. 20/2008 ¶¶ 2.13–2.15.

174. *Id.* ¶ 2.18.

175. *Id.*

176. *Id.* ¶ 2.20.

177. *Id.* ¶ 2.21.

178. *Id.* ¶ 9.9.

179. *V.K.*, Comm. No. 20/2008 ¶9.9.

that the court's requirement that abuse be proved "beyond reasonable doubt" was unduly high and inconsistent with CEDAW, as well as with modern anti-discrimination standards for civil domestic violence proceedings.<sup>180</sup>

The Committee specifically addressed the way traditional gender-based stereotypes and attitudes regarding women as subordinate to men contribute to domestic violence.<sup>181</sup> It reasoned that a state's obligation to "banish gender stereotypes" should be considered in evaluating judicial handling of the case.<sup>182</sup> Accordingly, it found the local court's decision to deny the protective order "lacks gender sensitivity" and "reflects the preconceived notion that domestic violence is to a large extent a private matter falling within the private sphere" which should not be subject to state control.<sup>183</sup> The court's focus on physical violence and on immediate threats, reflected a "stereotyped and overly narrow concept" of abuse.<sup>184</sup> Similarly, the Committee critiqued the lower court for finding petitioner's complaint deficient for failing to make clear exactly how she was struck.<sup>185</sup> It also found evidence of "[t]raditional stereotypes of women" in the divorce judgment, which referred to her use of "insolent language" with regard to her husband and ordered her to assume her maiden name after the marriage was dissolved.<sup>186</sup> The Committee concluded that the court's refusal to issue a permanent protection order was "based on stereotyped, preconceived and thus discriminatory notions of what constitutes domestic violence."<sup>187</sup> It found further violation of the State's obligation to provide for "immediate protection of women from violence" based on the unavailability of shelters.<sup>188</sup>

The CEDAW Committee similarly took historic stereotypes and biases into account in finding that Bulgaria violated its obligations to take appropriate measures and provide redress for all forms of discrimination, including gender violence, in *Jallow v. Bulgaria*.<sup>189</sup> There, Jallow had endured a long history of abuse by her husband; though her husband first filed a complaint against her with the help of local child protective services, sought and obtained an emergency

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180. *Id.*

181. *Id.* ¶ 9.11.

182. *Id.*

183. *Id.* ¶ 9.12.

184. *Id.*

185. *V.K.*, Comm. No. 20/2008 ¶ 9.12

186. *Id.*

187. *Id.*

188. *Id.* ¶ 9.13.

189. Comm. on the Elimination of Discrimination against Women, *Jallow v. Bulgaria*, Comm. No. 32/2011, ¶¶ 8.4, 8.6, U.N. Doc. CEDAW/C/52/D/32/2011 (2012).

protective order against her, and initiated a divorce proceedings against her.<sup>190</sup> She agreed to the divorce and accepted all of the conditions as the only way to regain custody of her daughter.<sup>191</sup>

The Committee's decision reflected its nuanced understanding of gender bias. For example, it noted that on one occasion, when police were called by the social workers who responded to the husband's request for intervention to persuade his wife to stop breastfeeding, they focused on the husband's pornography rather than responding to Jallow's concerns about his violence.<sup>192</sup> The Committee concluded that the authorities' failure to investigate the allegations of the husband's abuse of Jallow and her daughter violated the Convention.<sup>193</sup> Moreover, the Committee found further violation based on the fact that the Regional Court granted the husband's request for a protective order, did not consider Jallow's reports of his abuse, and failed to explain its refusal to remove the protection order against her even after the Regional Court had dismissed his application for a permanent protection order.<sup>194</sup> The Committee specifically concluded that the authorities based their responses on "a stereotyped notion that the husband was superior and that his opinions should be taken seriously, disregarding the fact that domestic violence proportionally affects women considerably more than men."<sup>195</sup> It concluded that Jallow and her daughter were "victims of gender-based discrimination" based on the State's failure to protect Jallow's "equal rights in marriage and as a parent," particularly given that she was separated from her daughter based on the emergency protection order granted against her without due consideration of her allegations of abuse.<sup>196</sup> Notably, the Committee explicitly recognized the role of intersecting forms of discrimination, acknowledging that the applicant's vulnerable position as an "illiterate migrant woman" who did not speak the local language in its reasoning.<sup>197</sup>

## *2. Custody, Domestic Violence, and Gender Discrimination*

In at least one case involving custody decisions where the relationship was marked by abuse, the CEDAW Committee closely analyzed the particular facts of the case and concluded that states

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190. *Id.* ¶¶ 2.2–2.16.

191. *Id.* ¶ 2.15.

192. *Id.* ¶ 8.4.

193. *Id.*

194. *Id.* ¶ 8.5.

195. *Jallow*, Comm. No. 32/2011 ¶ 8.6.

196. *Id.*

197. *Id.* ¶¶ 8.2, 8.5.

are obligated to advance substantive, not just formal equality. For example, in *Gonzales-Carreño v. Spain*, the Committee considered a custody case in which there was a history of domestic violence.<sup>198</sup> The parents had separated, and there was a long history of failed state response, including failure to enforce the husband's obligation to pay child support, a three-year wait for a court to hold a hearing about her request to use the marital dwelling, over thirty criminal complaints of threats, abuse and violence filed by the petitioner, only one of which led to a misdemeanor conviction with a nominal fine, and an order allowing unsupervised visitation between the child and her father.<sup>199</sup> After one such unsupervised visit, the father apparently shot their daughter and then committed suicide.<sup>200</sup>

The Committee recognized the insidious nature of gender stereotypes in ruling that the State had violated the Convention. It recognized that the judicial authorities, social services, and the psychological experts were focused on "normalizing relations" between father and daughter, despite the reservations both social services and psychological experts had expressed about the father.<sup>201</sup> It acknowledged that the authorities' focus on normalizing relations "reflect[s] . . . stereotyped conception[s] of visiting rights based on formal equality," which gave advantages to the father despite his abusive conduct and minimized the positions of the mother and daughter as victims of domestic violence.<sup>202</sup> The Committee recognized that by allowing unsupervised visits without the necessary safeguards, the State applied "stereotyped and therefore discriminatory notions in a context of domestic violence" and therefore violated CEDAW.<sup>203</sup> It noted the broad range of responses the State had adopted to address domestic violence, which included legislation, awareness-raising and capacity building.<sup>204</sup> However, it concluded that in order for domestic violence victims "to see the practical realization of the principle of non-discrimination and substantive equality and enjoy [their] human rights and fundamental freedoms," public officials must respect the state's due diligence obligations, which it determined was not done in this case.<sup>205</sup>

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198. Comm. on the Elimination of Discrimination against Women, *Gonzalez-Carreño v. Spain*, Comm. No. 47/2012, ¶ 2.1, U.N. Doc. CEDAW/C/58/D/47/2012 (2012).

199. *Id.* ¶¶ 2.5–2.7.

200. *Id.* ¶ 2.17.

201. *Id.* ¶ 9.4.

202. *Id.*

203. *Id.* ¶ 9.7 (noting violations of Articles 2(a), (d)–(f), 5(a), and 16, as well as paragraph 1(d) of the Convention).

204. *Gonzalez-Carreño*, Comm. No. 47/2012 ¶ 9.9.

205. *Id.*

*C. Gender Identity, Gender Violence, and Discrimination*

A few decisions from the European Court of Human Rights construe the European Convention's anti-discrimination mandate broadly to encompass claims of failed responses to homophobic violence. In *M.C. and A.C. v. Romania*, petitioners were attacked after participating in Bucharest's annual gay pride march.<sup>206</sup> They brought claims alleging that law enforcement's slow and ineffective response violated Article 3 (prohibiting torture), Article 8 (right to respect for private and family life), and Article 14 (prohibition of discrimination), as well as Article 1 of Protocol No. 12 (which generally prohibits discrimination).<sup>207</sup> The Court concluded that the authorities' "duty to prevent hatred-motivated violence" by private individuals and to investigate potential discriminatory motives can fall under the obligations of Article 3 or Article 8, but also form part of authorities' positive obligations under Article 14 to secure the "fundamental values protected by Articles 3 and 8 without discrimination."<sup>208</sup> The Court reasoned that Romania violated Article 3 and Article 14 because the police "intentionally protracted the investigations for homophobic motives."<sup>209</sup> Thus, the Court construed the European Convention's anti-discrimination mandate broadly; the absence of specific prohibitions based on sexual orientation or gender identity did not bar the claim.

The Court similarly held states to account in at least two other decisions (not available in English) in instances of gender violence committed against LGBTI individuals. In *Halat v. Turkey*, the Court found a violation of Article 3 (prohibition of torture) based on failed investigation and alleged mistreatment of a trans woman who suffered physical and psychological abuse by a police officer.<sup>210</sup> Similarly, in *Zontul v. Greece*, the Court found violations of Article 3 (prohibition of torture) in the case of a Turkish national who was seeking to travel to Italy with other migrants.<sup>211</sup> He was escorted to and detained in Crete where he was raped by one of the Greek coastguard officials allegedly because of his sexual orientation.<sup>212</sup> Thus, the Convention

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206. *M.C. & A.C. v. Romania*, App. No. 12060/12, Eur. Ct. H.R. ¶¶ 7–12 (2016).

207. *Id.* ¶ 47.

208. *Id.* ¶ 105.

209. *Id.* ¶ 126.

210. See *Turkey LGBTI Resources*, REFUGEE LEGAL AID INFO. FOR LAWYERS REPRESENTING REFUGEES GLOBALLY, RIGHTS IN EXILE PROGRAMME, <http://www.refugeelaidinformation.org/turkey-LGBTI-resources> [https://perma.cc/H86Z-3V8Y] (citing *Halat v. Turkey*, App. No. 23607/08, Eur. Ct. H.R. (2011)).

211. See *Necati Zontul v. Greece*, REDRESS, <http://www.redress.org/case-docket/necati-zontul-v-greece> [https://perma.cc/4SVX-FE75].

212. See *id.*; see also Press Release, European Court of Human Rights, ECHR 017,

held states to account for responding to gender violence against LGBTI people, even absent specific anti-discrimination provisions.

#### IV. APPLICATIONS AND LIMITATIONS IN A TIME OF BACKLASH

This growing body of case law illustrates the promise of international human rights instruments that explicitly condemn and call for remedies to account for individual and institutional gender biases. Decisions under both the European Convention and CEDAW offer valuable examples of how adjudicators can closely review the responses of institutional actors, such as law enforcement and criminal justice officials, to identify and critique manifestations of gender bias. No doubt, CEDAW's language requiring sanctioning of all forms of gender bias and explicitly naming the role of historic stereotypes and biases, supports those laudable results. It provides a foundation for future decisions to similarly take a close look at factual records to determine whether state responses reflect insidious, unintentional and systemic, bias. The Istanbul Convention, which has begun to be referenced by the European Court of Human Rights when interpreting the European Convention, holds similar potential to guide interpretation in cases involving intimate partner and sexual violence.

Ironically, the gender-specific language of CEDAW and the Istanbul Convention could prove to limit those instruments' reach. Even though both of those instruments explicitly acknowledge the role of intersectional discrimination, and even though the Istanbul Convention explicitly prohibits discrimination based, *inter alia*, on sex, sexual orientation and gender identity, both are framed primarily in terms of eliminating discrimination against "women,"<sup>213</sup> which could be interpreted to exclude claims of gender violence or of institutional responses to gender violence committed against men, particularly gay or trans men, in ways that perpetuate and compound gender bias. Notably, a number of domestic violence cases interpreting the European Convention have held states to account after finding that officials discriminated against a complainant "as a woman."<sup>214</sup> This framing raises questions regarding whether the Court might similarly find discrimination if a gay or trans man

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European Court finds an illegal migrant was tortured by one of the Greek coastguard officers supervising him (Jan. 17, 2012).

213. Istanbul Convention, *supra* note 32, at 1–2, 4.3; *see also* CEDAW Gen. Rec. 19, *supra* note 26.

214. *See, e.g.*, Talpis Press Release, *supra* note 78; Eremia v. Moldova, App. No. 3564/11, Eur. Ct. H.R. § 86 (2013) ¶ 89; Mudric v. Moldova, App. No. 74839/10, Eur. Ct. H.R. ¶¶ 60–64 (2013); T.M. and C.M. v. Moldova, App. No. 26608/11, Eur. Ct. H.R. ¶¶ 62–63 (2014).



claimed that law enforcement officials responded to their calls for assistance in cases of domestic or sexual violence against them in ways that reflected gender bias.

Although the number of cases is too small to draw a firm conclusion, the European Convention decisions holding states to account for responses to bias-motivated violence against LGBTI people are noteworthy.<sup>215</sup> Those decisions interpreted the Convention's gender-neutral anti-discrimination provision.<sup>216</sup> That permissive language, broadly prohibiting discrimination and identifying prohibited grounds as illustrative rather than exclusive (i.e., by denoting with the language "such as," that the enumerated categories were not an exclusive list), may more readily be construed as prohibiting discrimination based on sexual orientation and gender identity, than are instruments prohibiting discrimination against "women."

Moreover, the protectionist frame that threads throughout international human rights instruments, commentary and caselaw, may similarly prove limiting when applied to LGBTI survivors of abuse.<sup>217</sup> This frame has been critiqued by feminists as antithetical to longstanding anti-stereotyping goals.<sup>218</sup> That protectionist frame, which invokes traditional images of passive, cis-female victims, may not be applied as easily to gender-nonconforming and LGBTI survivors.

In addition, the decisions' focus on police and law enforcement accountability may ring hollow for LGBTI survivors globally given the ways law enforcement resources historically have and continue to be used against LGBTI and gender nonconforming communities.<sup>219</sup> While LGBTI and all survivors should be assured nondiscriminatory responses when they seek law enforcement assistance, to be truly responsive to the harms of gender violence, states should address underlying conditions that produce biased violence and inequality, including broadly focused prevention measures, material resources, and meaningful programs for redress. The firm commitment to equality reflected in CEDAW, the European Convention,

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215. See, e.g., *supra* Section III.C.

216. European Convention, *supra* note 4, at art. 14 ("The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.")

217. See *supra* notes 47–55; see also, e.g., *Bălșan v. Romania*, App. No. 49645/09, Eur. Ct. H.R. ¶ 22 (2017); Talpis Press Release, *supra* note 78; Kilic Press Release, *supra* note 93; *M.G. v. Turkey*, App. No. 646/10, Eur. Ct. H.R. ¶ 2 (2016); *Opuz v. Turkey*, App. No. 33401/02, Eur. Ct. H.R. ¶¶ 184–92 (2009); *Valiuliene v. Lithuania*, App. No. 3323/07, Eur. Ct. H.R. ¶¶ 73, 84–87 (2013).

218. See, e.g., *supra* notes 47–49.

219. See, e.g., Goldscheid & Liebowitz, *supra* note 18, at 311–17 (detailing the risks of calling for increased state intervention).

and the Istanbul Convention opens the door to remedial measures that address the underlying conditions of structural inequality that drive and fuel gender violence of all sorts.

This time of backlash calls on us to think broadly and boldly about how different forms of bias and discrimination interact to produce and reproduce subordination on multiple grounds. The cases imposing civil liability on states for failed responses to gender violence offer important examples of how courts can closely read factual records to identify and sanction the nuanced operation of abuse. The law can play a valuable role in condemning bias-motivated violence, but it will have greater power to advance anti-subordination goals if it is interpreted broadly and across identity categories. For cases involving violence based on gender, a nuanced understanding of the multiple and complex ways gender bias operates, including the ways in which it impacts gender-nonconforming women, men, and LGBTI people, will best advance those equality grounded goals.

