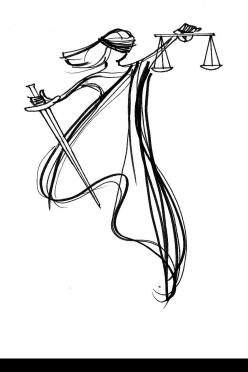
DUE DILIGENCE AND STATE RESPONSIBILITY

TO END VIOLENCE AGAINST WOMEN :

STANDARDS, INDICATORS AND GOOD PRACTICES

REPORT OF YEAR 1 (OCTOBER 2010 - SEPTEMBER 2011) AND

PROPOSAL FOR YEAR 2 (OCTOBER 2011 - OCTOBER 2012)



International Human Rights Initiative Website : <u>www.duediligenceproject.org</u>

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DUE DILIGENCE AND STATE RESPONSIBILITY TO END VIOLENCE AGAINST WOMEN:

STANDARDS, INDICATORS AND GOOD PRACTICES

I. Introduction:

The **Due Diligence and State Responsibility to Eliminate Violence against Women: Standards, Indicators and Good Practices** project is a research-advocacy project which aims to collect good practices and State actions in the formulation, implementation and enforcement of policies, laws, procedures and processes as well as develop due diligence standards and indicators on State compliance with obligation to prevent, protect, investigate, punish and provide redress in relation to violence against women.

II. Project Goals and Objectives:

The principle aim of the Project is to add content to the international legal principle of "due diligence" in the context of State responsibility to end violence against women. The objective is to create compliance indicators that are concrete and measurable across regions.

The Project sets out to do this by answering the following four questions:

(1) What is generally understood to be the content of the due diligence principle - by governments, civil society advocates, and international legal scholars and experts working on violence against women?

(2) How can compliance with this obligation be monitored, assessed and evaluated – by governments, civil society advocates and international legal scholars and experts working on violence against women?

(3) How are States complying with their due diligence obligation to prevent, protect against, prosecute, punish and provide redress for acts of violence against women?

(4) What are good practices to eliminate violence against women, globally and regionally?

III. Situational Analysis

(i) Introduction

Public international law mandates that States exercise due diligence to prevent, protect, fulfill and promote human rights. A State is obligated to take positive measures to prevent human rights abuses before they occur, such as adopting relevant laws and policies, and to effectively prosecute and punish them once they have occurred. The obligation not only extends to preventing human rights abuses by the State and its agents, but also those by non-state actors in the so-called 'private realm'. In order to determine whether a State has met this obligation, public international law has developed the principle of due diligence. That is, a State must act with due diligence to promote, protect and fulfill human rights. The State was traditionally held accountable for violations of human rights committed by its agents. The principle of due diligence has helped rupture the State/non-State actors dichotomy. The principle of due diligence is increasingly being applied to the issue of violence against women, where in the majority of the cases violence is perpetrated by non-state actors, for example by a close male relative or intimate partner. In fact, the most common form of violence experienced by women globally is intimate partner violence.¹ It is estimated that one in three women experiences violence in her lifetime. Situations of armed conflicts constitute another context where women are increasingly experiencing violence at the hands of non-state actors, such as paramilitary and militia groups. It is for instance estimated that between 250,000 and 500,000 women were raped in Rwanda during the 1994 genocide, that between 20,000 and 200,000 women and girls were raped during the armed conflict in Bangladesh in 1971.²

By extending liability for acts of violence perpetrated by non-state actors to the State, public international law recognizes that violence against women, whether committed by State or non-State actors constitutes human rights violations. This also means that the State has the obligation to enter the so-called "private sphere" where most instances of violence against women takes place. The State had traditionally been excluded from this sphere, which was viewed as the private family realm. Thus the due diligence principle has also helped rupture the artificial "public/private sphere" divide.³

The concept of due diligence shows tremendous potential for ensuring States take action to end violence against women perpetrated by non-state actors and in so-called "private sphere" or family realm, and for addressing more effectively the pandemic at its sources.

(ii) Evolution of the principle of due diligence

The principle of due diligence as applied to human rights generally and violence against women specifically has evolved over time to apply to acts of private persons which may not be directly imputable to the State but nevertheless can lead to international responsibility. The principle is not one of strict liability, but rather one of reasonableness based on principles of non-discrimination and good faith.⁴

The 1988 *Velázquez Rodríguez* case of the Inter-American Court of Human Rights clearly set out the due diligence principle by stating, "An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of an act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention".⁵

¹ UN Secretary-General's Study on Violence against Women, A/61/122/Add.1, para. 112.

² Ibid, para. 146.

^a **Bed**optarat **146**.UN Special Rapporteur on violence against women, its causes and consequences, 15 years of the ³ Report of the UN Special Rapporteur on violence against women, its causes and consequences, 15 years of the United Nations Special Rapporteur on Violence against Women, its Causes and Consequences (2009), paras. 59-63.

⁴ Velázquez Rodríguez v. Honduras, judgment of July 29, 1988, Inter-Am. Ct. H.R. (ser. C) No. 4, para. 172 - 174.

⁵ Velázquez Rodríguez v. Honduras, judgment of July 29, 1988, Inter-Am. Ct. H.R. (ser. C) No. 4, para. 172.

General Recommendation no. 19 (1992) of the Committee on the Elimination of All Forms of Discrimination Against Women ("CEDAW Committee") and the United Nations General Assembly 1993 Declaration on the Elimination of Violence against Women underline that States are responsible for private acts of violence against women if they fail to act with due diligence to prevent, protect against, investigate, punish and redress such acts of violence.⁶ This point was later reiterated in the Platform for Action of the Beijing World Conference on Women as well as in a number of regional and international documents and court decisions.⁷

Also, in 1994, the resolution establishing the mandate of the Special Rapporteur on violence against women its causes and consequences emphasized "the duty of Governments to refrain from engaging in violence against women and to exercise due diligence to prevent, investigate and, in accordance with national legislation, to punish acts of violence against women and to take appropriate and effective action concerning acts of violence against women, whether those acts are perpetrated by the State or by private persons, and to provide access to just and effective remedies and specialized assistance to victims".⁸ The Special Rapporteurs have also focused on this issue in a number of their thematic reports.⁹

This principle of due diligence, namely a State's obligation to prevent violations, protect victims/survivors, investigate, prosecute, and punish acts of violence against women and provide redress/reparation to victims/survivors has been further fleshed out in a series of recent international and regional opinions and cases.

The Inter-American Commission on Human Rights, in the case of Maria Da Penha v. Brazil concluded that the State's failure to prosecute or punish the repeated violence faced by Maria da Penha, perpetrated her then husband, after over 15 years of the case pending before criminal court, amounted to a violation of a State's obligation not only to prosecute and convict but also to prevent these acts of violence.¹⁰ And in its recent *Campo Algodonero* case, the Inter-American Commission found Mexico in violation of the American Convention on Human Rights and the Convention of Belem do Para for its failure to adequately prevent, prosecute and punish the murders of three young women.¹¹ While acknowledging that the duty to prevent is one of "means and not results",¹² the Court found that given that the State knew of the existence of a pattern of violence that has killed hundreds of women and girls, the State "did not act with the required due

⁶ CEDAW, General recommendation 19: Violence against women, 11° session, 1992, U.N. Doc.

HRI/GEN/1/Rev.1 at 84 (1994), para. 9. United Nations, Declaration on the Elimination of Violence against Women. General Assembly resolution 48/104 of 20 December 1993. A/RES/48/104, February 23, 1994, Article 4.c.

⁷ United Nations, Report of the Fourth World Conference on Women, Beijing, September 4 to 15, 1995, Beijing Declaration and Platform for Action approved at the 16° plenary session held on September 15, 1995. A/CONF.177/20/Rev.1, para. 1245b. See also 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, "Convention of Belém do Pará, para. 7(b), 1994.

⁸ Resolution E/CN.4/RES/1994/45, para 2.

⁹ See E/CN.4/1999/68, para. 25; E/CN.4/2006/61; and A/HRC/7/6 (2008), paras. 69-115.

¹⁰ Case 12.051, Report No. 54/01, Inter-Am. C.H.R., Annual Report 2000, OEA/Ser.L/V.II.111 Doc.20 rev. (2000).

paras. 55 and 56. ¹¹ Inter-Am.C.H.R., Annual Report 2009, OEA/Ser.L/V.II.111 Doc.20 rev. (2000) and González et al. ("Campo Algodonero") v. Mexico, Inter-Am. C.H.R. Judgment of Nov, 16 2009.

¹² Ibid, para. 279.

diligence to prevent the death and abuse suffered by the victims adequately",¹³ "nor did it effectively investigate the incidents of violence".¹⁴ In its latest decision, the Inter-American Commission on Human Rights in the case of *Jessica Lenahan (Gonzales) v. United States*, ¹⁵ referenced the due diligence standard as a way of understanding what State's human rights obligations mean in practice when it comes to violence against women and held the United States responsible for police failure to respond to situations of domestic violence with due diligence. The State, said the Commission, must duly investigate the complaints presented by Jessica Lenahan before the death of her daughters, and the circumstances of their deaths once their bodies were found.

The CEDAW Committee has also addressed a State's due diligence obligation in its communications on violence against women under the Optional Protocol to CEDAW. In *A.T. v Hungary*¹⁶ the CEDAW Committee found the State responsible for failing to take all appropriate measures to prevent and protect A.T. from repeated attacks by her common law husband, L.F., despite her several attempts to seek protection from the authorities. In *Fatma Yıldırım v Austria*,¹⁷ Fatma Yıldırım was fatally stabbed by her estranged husband, Irfan Yıldırım. Despite her repeated requests to the police that he be detained, he was not. The CEDAW Committee determined that the police knew or should have known of the extreme danger faced by Fatma Yıldırım, and its failure to arrest and detain Irfan Yıldırım constituted a failure of its due diligence obligation to protect her.

The European Court of Human Rights, in the case of *Osman v U.K.*¹⁸ held that the Convention implied, under certain circumstances, a positive obligation on the authorities to take preventive measures where there is a 'real and immediate' risk. Later, in the case of *Opuz v Turkey*¹⁹, the court also found that the authorities 'knew or ought to have known' the 'real and immediate risk to the life of an identified individual', and were therefore obligated to take preventive measures, that could have forestalled the eventual stabbing and death of the applicant's mother by the applicant's then husband.

Most recently, the due diligence principle has received much attention from the Council of Europe, particularly in light of the latest Convention on Preventing and Combatting Violence against Women and Domestic Violence 2011 (Article 5 which compels State parties to take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence.

The European Convention and the latest Inter-American Commission decision of *Jesicca Lenahan (Gonzalez)* delivered a few weeks ago, in particular have given impetus to the Due Diligence Project, underlining its importance and timeliness.

¹³ Ibid, para. 284.

¹⁴ Ibid, para 389.

¹⁵ Report No. 80/11, Case 12.626 Merits July 21, 2011

¹⁶ Communication No.: 2/2003, Ms. A.T. v. Hungary (Views adopted by the CEDAW Committee on 26 January 2005, thirty-second session under the Optional Protocol to CEDAW).

¹⁷ Communication No.: 6/2005, Fatma Yıldırım v. Austria (Views adopted by the CEDAW Committee on 6 August.

¹⁸ Osman v. the United Kingdom, § 115, Reports 1998-VIII, European Court of Human Rights Judgment dated 28 October 1998.

¹⁹ ECHR, Case of Opuz v. Turkey, Judgment of 9 June 2009/

IV. Project Strategy:

Global (October 2010 - September 2011 : completed)

The global component consists of literature review, which focus on studying the development and evolution of the due diligence principle in international law and how it is being commonly applied today. It also looks at the context of violence against women, its historical roots of exclusion and invisibility in the human rights discourse, as well as its later recognition as a violation of human rights.

The global component was further strengthened by an expert meeting held on 26-27 April 2011, in Boston USA. The 2 day expert meeting brought together a wide array of experts from around the world, and from various disciplines and fields (e.g. law, sociology, academia, civil society, and inter-governmental).

The final output of this Project is a report which will draw from the above, as well as from the research and data from the regional component described below.

Regional (October 2011 - October 2012)

This proposal is for the regional component of the Project. The regional component seeks to provide primary data and regional specificities that cannot be captured at the global level. This is accomplished through a questionnaire; meetings with regional experts; and continued research into publicly accessible research on State compliance in each region. The analysis of this regional process will be captured in regional reports, as well as feed into the larger, global report.

The Project will be working in all six regions as follows: Africa; Asia-Pacific; Europe; Latin America and the Caribbean; Middle East and North Africa; and Australia, North America and New Zealand. In each region, save for North America, approximately 6–10 countries will be selected. The selection of the countries will reflect the diversity of the region including political, legal, cultural and historical diversity as well as countries with different economic and financial capacity. Some countries may also be more exposed to or have had a history of exposure to specific types of violence against women such as violence committed during armed conflict, female genital mutilation, and early marriage.

V. Project Interventions:

Project interventions are aimed at:-

- Conducting a sampling of practices of countries in relation to their obligations to prevent, protect, investigate, punish and provide redress for victims of violence;
- Documenting and sharing good practices of countries in fulfilling the due diligence standard of State responsibility;

- Analyzing primary data and other research materials to develop due diligence indicators and standards;
- Advocating with civil society and States on measures to promote adoption by States of the due diligence standards and indicators.

(1) Literature review (completed)

The Project has and will continue to conduct literature review in the following areas, including but not limited to international, regional and national jurisprudence; laws; national action plans; State reports, submissions, pledges and statements at international fora and to international bodies; academic journals and writings; and civil society reports and statements in the area of violence against women.

(2) Expert strategising meeting (completed)

An expert meeting was held on 26-27 April 2011 in Boston, USA. The main goal of the meeting was to brainstorm and strategize on the meaning and content of the due diligence principle and in particular the duty to prevent, protect, prosecute and investigate, punish and provide reparations. A second goal of the meeting was to discuss and finalize the questionnaire, methodology and execution of the Due Diligence Project. The meeting was attended by 22 participants from 14 countries, who included human rights advocates, lawyers, political scientists, sociologists, anthropologists and other academics.

(3) Questionnaire

The principle tool for collection of data is a questionnaire to be distributed to civil society organisations working on violence against women. The questionnaire will probe existing State measures and challenges encountered by civil society in their work to end violence against women. The questionnaire will probe civil society on its perception of State action in discharging its obligation; the effectiveness of these actions; and how they can be improved.

The questionnaire will be distributed to 8-12 civil society organizations in approximately 6-10 countries per region. The criteria for selection of NGO respondents include those advocating against violence against women, those providing intervention services to survivors of violence against women such as safe housing (shelter), legal and emotional counselling or those whose mission or objective includes ending violence against women. The NGO respondents will also be asked to provide data about themselves and their work, such as how long they have worked in violence against women, the focus of their work in terms of geographical reach (global, regional, national, local), issues (including types of violence e.g. domestic violence, trafficking) and activities (advocacy, law reform, interventions services).

(4) Research of publicly accessible information

Descriptions of countries' compliance with their due diligence obligation can often be found in publicly accessible documents, such as Government reports to UN Treaty Bodies, and the Human Rights Council; country visits by mandate holders; and countries' own pledges and statements. Countries also sometimes release data, or make data accessible to the public. This data could be part of the census, prevalence studies, laws, policies, programs, and the country's own monitoring and evaluation of its policies. Research into this publicly accessible information for each country selected will serve to inform the status of State compliance with its due diligence obligation.

(5) Regional consultative meetings with experts

The objective of regional consultative meetings with experts is to obtain qualitative data of systemic regional patterns or issues, as well as to have a focused discussion on thematic issues of importance to that region. These consultative meetings may be organized as stand-alone events by the Project, or scheduled back to back with existing meetings. Project Directors and partners may also deliver presentations on the Project during other meetings on relevant themes.

(6) Toolkits, manuals training modules and workshops (Planned as Stage 2 - from 2012-2014)

In order to ensure that the findings are instrumentalised for practical application, executive summaries of the report, toolkits, manuals and training modules are planned as part of Phase B of the Project. Workshops and colloquia will also be conducted to encourage adoption and implementation of the Project findings and recommendation.

VI. Outputs :

1. The findings of the Project will be (a) compiled into a comprehensive report which will be shared with and disseminated to civil society; (b) submitted to various intergovernmental expert bodies and mandates for their consideration.

2. Executive summary, toolkits, manuals and training modules will be developed and distributed to civil society, inter-governmental organisations and governments. *(Planned as Stage 2)*

VII. Outcomes: The Project will yield the following outcomes:

1. A common understanding of the meaning of the due diligence principle which is global, yet which allows for particular (regional) realities;

2. Measurable indicators on the due diligence principle which will facilitate monitoring of the compliance of States' due diligence obligation;

3. Increased awareness of the due diligence principle;

4. Enhanced implementation of the due diligence principle;

5. Advocacy tools to increase awareness and promote adoption by States as well as instrumentalise the standards and indicators: (*Planned as Stage 2*)

- Technical support for civil society and governments to utilize the due diligence standards and indicators;
- Creating a pool of experts trained in the due diligence principle.

This will result in the due diligence principle becoming more accessible, tangible, practical, applicable, measurable and comparable globally.

VIII. Completed Project Interventions:

Below are the interventions already completed to date described in detail:

Literature Review and Delineating Project Parameters

1. Initial of the Project comprising a literature review on development of State responsibility and the due diligence principle as well as research on current data on violence against women is near completion.

- 2. The Project has and will continue to conduct literature review in the following areas: international, regional and national jurisprudence; laws; national action plans; State reports, submissions, pledges and statements at international fora and to international bodies; academic journals and writings; and civil society reports and statements in the area of violence against women.
- 3. The research gave us the opportunity to analyse existing data concerning relation to violence against women in relation to existing policies, laws and programmes which States indicate they have undertaken as well as to analyse the development of State responsibility in relation to violence against women.
- 4. Our review indicates that while much research and surveys have been undertaken on violence against women including prevalence and incidence, the same cannot be said for State responses to eliminate violence.
- 5. The findings of the literature review, research methodology as well as prototype questionnaire were tabled for discussion at the Expert Group Meeting which constitute Phase 2 of the Project. Both are presently being finalised pursuant to comments and inputs received from experts, consultants, academics and advocates to whom we reached out.

Expert Strategising Meeting

1. In this phase, the Project Directors identified and approached experts, consultants, and NGO focal points in preparation for the regional work. The global research shall be undertaken by regions. For each region, 2-3 consultants and experts will be engaged, with one consultant serving as lead consultant.

2. These distinguished experts are deliberately drawn from across different disciplines. They include women's human rights advocates, academics, lawyers, sociologists, anthropologists and political scientists from the six regions in which the research will be undertaken. Key intergovernmental representatives also attended the meeting. They also included representatives of inter-governmental organisations.

3. An expert strategising meeting was held on 26th - 27th April 2011. Twenty international experts from 14 countries and intergovernmental organisations and the Special Rapporteur on violence against women, its causes and consequences (who then served as consultant-advisor of the Project from September 2010 - June 2011)²⁰ participated. The objective of the meeting was to solicit expertise from civil society, academia, government, and international and regional inter-governmental organizations and to obtain input from the experts on the literature review, conceptual framework, research and questionnaire design of the Project.

4. The meeting intensively discussed -

(a) development of due diligence concept and principle as it is reflected in policy documents, conventions, cases and practices;

(b) gaps, challenges and opportunities in using the due diligence principle to eliminate violence against women; and

(c) criteria in measuring and developing each of the strands of State responsibility including the obligation to promote women's human rights and prevent violence against women, the obligation to protect victims/survivors of violence against women, the obligation to investigate and prosecute incidences of violence against women, the obligation to punish perpetrators of violence against women, the obligation to punish to victims/survivors of violence against women.

5. The meeting also commenced the process of identifying regional NGOs partners for the Project and to whom the questionnaires will be distributed.

6. The meeting generated deep incisive discussion on the due diligence principle and the implementation of the Project. Participants believed that the Project was timely and its findings would serve as benchmarks in this area. They expressed excitement about working on the Project.

7. The Directors have weaved in the input from the Expert Strategising Meeting to enhance and strengthen the conceptual clarity, methodology, framework and scope of the Project, and to ensure that the interventions, namely the questionnaire and regional consultations, are capable of delivering the data for analysis in developing the indicators and keeping in mind the purpose of the research to analyse the relationship between formal law, policies, programmes and other governmental measures on violence against women with the reality on the ground.

²⁰ A five member advisory committee comprising renown and respected women's human rights experts has been formed to advise, guide and provide macro-level direction. The advisors are listed below under 'Structure'.

IX. Moving Forward:

Questionnaire

The questionnaire is being circulated to experts for their input and comments. The questionnaire's efficacy will be tested in the next several weeks. Subsequently the questionnaire will be translated and distributed in collaboration with our regional partners who will assist in the identification of 6-10 countries in each region. The countries that have been tentatively identified in each region from which the selection will be made are as follows:-

Africa:

Pilot/test : Mali, Tanzania Survey : Mozambique, Uganda, Kenya, Botswana, South Africa, Nigeria, Senegal, Democratic Republic of Congo Language : English, French, Portuguese

Asia Pacific:

Pilot/test : Malaysia and Singapore. Survey : *South Asia* - India, Bangladesh, Sri Lanka; *South East Asia* - Indonesia, the Philippines; *Oceania* - Fiji, Solomon Islands; *East Asia/North Asia* - China/South Korea, Mongolia. Language : English, Chinese

Europe :

Pilot/test : Denmark, Macedonia, United Kingdom Survey : Bulgaria, Croatia, Georgia, Moldova, Ukraine and either Hungary/Poland/Romania; Finland, Germany, Spain and Ireland. Language : English, Spanish, Russian

Latin America and the Caribbean : Pilot/test : Costa Rica, Grenada Survey : *Andean* - Bolivia, Colombia, *Meso-America* - Nicaragua, Mexico, Southern Cone -Chile, Paraguay; *Amazonia* - Brazil; *Caribbean* - Jamaica and Guyana. Language : Spanish, Portuguese, English.

Middle East and North Africa : Pilot/test : Iraq Survey : *Mashreq* - Egypt, Jordan, Lebanon, Palestine, and Bahrain; *Maghreb* - Tunisia, Morocco, and Algeria. Language : Arabic, English and French.

North America and Australia and New Zealand : Pilot/test : USA Survey : Australia, Canada, New Zealand, USA. Language : English, French

Regional Consultative Meetings

The regional consultative meetings serve to complement the questionnaire and allows the Project to enquire deeper into particular issues and themes such as systemic regional patterns and issues as well as focus themes in relation to violence against women in each region. In Latin America and the Caribbean, for example, the issue will include impunity and violence against women, in Middle East the North Africa, culture and religion and in Africa, access to justice. The choice of themes will and have been selected in consultation with regional partners.

These consultative meetings will take the form of the project directors attending existing meetings to brief participants and obtain their input; held as stand-alone events; or scheduled back to back with existing meetings.

Input from States

The Project is conscious that civil society may not be aware of all governmental initiatives, programmes and implementation of governmental policies to eliminate violence against women. In this regard, the Project will liaise with governments for their input in order to ensure that the Project is able to take into account these inputs in the analysis and formulation of standards, indicators and good practices in this area.

X. Structure:

Advisory Committee

The Advisory Committee members provide macro-level strategic direction to the Project. The Advisory Committee allows the Project to benefit from the vast experience and expertise of the Advisory Committee members who will provide guidance and advice on the Project. The members of this committee who serve in their respective independent capacities are as follows:-



Directors

The Directors are responsible for conceptualizing, developing methodology and implementing the Project as well as maintaining communications with Project partners and relevant stakeholders.



Institutions

The Project is hosted at and supported by Northeastern University School of Law (NUSL) in Boston, USA. The Project also collaborates with the University of Columbia (Institute for the Study of Human Rights), New York, USA and is in the process of establishing formal collaboration with Universiti Sains Malaysia (Institute for Women's Studies), Malaysia.

Experts/Consultants

Experts and consultants are chosen for their regional and/or thematic expertise. Experts advise on the methodology and quality of the research; capacity to deliver results; effectiveness of the communication strategy; the choice of regional and national partners; the choice of countries in

which to conduct the survey and the analysis of the data gathered and generated. Consultants distribute the questionnaire; heighten civil society's awareness of the due diligence principle; collect and conduct analysis of the data; and prepare regional reports on the findings. For current project partners, please see :

http://www.duediligenceproject.org/The_Due_Diligence_Project/Partners.html

XI. Conclusion:

This Project is centered on the notion that real change will only result from partnerships at every level – Governments, inter-governmental organizations, civil society, academia, and grassroots advocates. We would like to invite you to support this unique and global initiative which seeks to add content to the fundamental international legal principle of due diligence in the hopes that further concretization of the principle will help guide Governments in their efforts to end violence against women, and civil society in working with Governments.