Finding a Mechanism to Enforce Women's Rights to Freedom From Domestic Violence in the Americas

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INTRODUCTION

This Article will examine the enforceability, under international human rights law, of American women's fundamental right to state protection from domestic violence. A serious and widespread problem of domestic violence directed against women exists in the United States, as well as in Latin America and the Caribbean. Domestic violence is the leading cause of injury to women in the United States. A similar problem exists in Latin America and in the Caribbean. Throughout the region, states have violated women's fundamental human rights by failing to prosecute domestic violence, to sanction batterers, or to protect women from further serious injuries. This Article argues that state tolerance of domestic violence constitutes a violation of the right to life, the right of freedom from torture, and the right to equality before the law. This Article also argues that state responsibility for violation of women's fundamental human rights exists whenever an irresponsible legal system tolerates or encourages violence against women. The problem of domestic violence is considered with respect to three states: Brazil, Chile, and the United States.

In 1990, the Inter-American Commission of Women (CIM) sponsored a Consultation on Women and Violence (Consultation) to study the issue, and found that a high level and intensity of violence against women, including physical assaults by husbands and boyfriends, exists in the region. The Consultation also found that violence against women often includes sexual violence in its various forms, including rape by husbands, boyfriends, fathers, stepfathers, or other men. The statistics show that the main reasons women do not report domestic violence to the authorities is fear of retaliatory beatings, fear of putting their children at risk, and/or ineffective legal remedies. Consequently, the available statistics presumably report only a fraction of the problem of violence against women in the Americas. Thus, it is particularly troubling that the majority of national reports received showed an increase in acts of violence against women.

Regarding the problematic and inadequate nature of national legal remedies in the Americas, the Consultation on Women and Violence concluded that

*509 Although the national statistics presented and discussed during the Inter-American Consultation, even though still imperfect, are so overwhelming that they appear to resolve the question of the need for additional specificity of laws dealing with the problems of women in any social context.

The Consultation also noted “the difficulty in proving crimes of violence against women,” and “the frequently deficient judicial and police systems which all too frequently discriminate against women.” Furthermore, the Consultation recommended that international human rights norms be utilized to establish effective measures as a means of international denunciation of states for their shortcomings in failing to investigate, prevent, and punish violence against women.
A recent political trend is finally compelling recognition of women's rights as human rights. Inter-governmental organizations such as the United Nations and the Organization of American States (O.A.S.) have been increasingly responsive. During the last year alone, the U.N. Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) issued a Declaration that gender based violence violates women's fundamental human rights, the Inter-American Center for Women (CIM) of the O.A.S. approved a draft of the Inter-American Convention to Prevent, Punish and Eradicate Violence Against Women, and the U.N. Special Rapporteur on Torture declared that the rape of women by prison officials constitutes torture.

*510 Other recent developments in international human rights law, such as Brazil's ratification of the American Convention on Human Rights last October, and Chile's accession to the Optional Protocol of the Covenant on Civil and Political Rights last August, improve the enforceability of women's fundamental human rights in these countries. To date, the United States has not formally acceded to any of the international enforcement mechanisms that allow for litigation of domestic violence complaints against the state. However, litigation of complaints against the United States for failure to protect women from domestic violence can proceed in the Inter-American system.

A large body of international human rights law on the issue of violence against women has developed over the last fifteen years, particularly in the United Nations system. The year 1985, five years after the end of the U.N. Decade for Women, marks the beginning of substantive international law specifically designed to protect women's right to be free from domestic violence. The hallmark of the United Nations' work on women's rights, the 1980 Convention for the Elimination of All Forms of Discrimination Against Women (Women's Convention), was recently interpreted by the CEDAW to stand for the norm that gender based violence is a violation of women's fundamental human rights. The United States is now considering adoption of the Women's Convention; thirty-one of the thirty-three other countries in the region have already adopted this Convention. The Women's Convention, numerous other international legal instruments, and customary international human rights law all mandate women's fundamental right to be free from domestic violence. However, a question remains as to whether and how this right will be guaranteed and enforced.

Women's entitlement to state protection from domestic violence has been considered problematic because domestic violence occurs at the hands of private actors. The public/private distinction in international human rights law is difficult to overcome; however, recent developments in international human rights law show that the sphere of state responsibility for human rights violations has expanded considerably. As Charlotte Bunch eloquently reminds us,

[c]ontrary to the argument that such violence is only personal or cultural, it is profoundly political . . . .

Failure to see the oppression of women as political [results in the institutionalized domination of women and] also results in exclusion of sex discrimination and violence against women from the human rights agenda. Female subordination runs so deep that it is still viewed as inevitable or natural, rather than seen as a politically constructed reality maintained by patriarchal interests, ideology, and institutions. But I do not believe that male violation of women is inevitable or natural. Such a belief requires a narrow and pessimistic view of men.

Recently, Latin American women have been very active in denouncing domestic violence as a human rights violation. This Article suggests that international human rights litigation be used to combat domestic violence and to bring the problem of domestic violence, previously consigned to the private sphere, into the public domain. Women's right to state protection from domestic violence is clearly within the realm of fundamental human rights, such as those espoused by the Universal Declaration. Because the implication of state responsibility for such human rights violations is best-developed in the Inter-American system, that system affords the most promising means for enforcing women's rights under international human rights law.
Part I of this Article explains how domestic violence constitutes an international human rights violation, identifies each state's responsibility, and defines battered women's complaints under international human rights law. Part II will examine recent developments in this field and weigh the pros and cons of various mechanisms for enforcing women's fundamental right to be free from domestic violence. The Women's Convention is given special attention as the major instrument setting forth women's rights under international law, but the analysis will show that this treaty has serious drawbacks as an enforcement mechanism. Instead, the Inter-American Human Rights Commission appears to be the best available enforcement mechanism available to women from states that are a party to the American Convention on Human Rights (American Convention) or to the American Declaration on the Rights and Duties of Man (American Declaration). Part III will then demonstrate the viability of individual battered women's petitions before the Commission, and the remedies of compensation and restitution will be discussed as aspects of a potentially successful case.

I. THE INTERNATIONAL HUMAN RIGHTS VIOLATION

A. International Human Rights Norms

Under international human rights law, the problem of domestic violence is the responsibility of the state for the following reasons: (1) domestic violence threatens women's rights to life and physical integrity; (2) the norms protecting people from violence prohibit a legal system's tolerance of and failure to prosecute domestic violence; (3) human rights norms guarantee equality before the law and prohibit the systematic gender bias that has worked against women victims of domestic violence. In short, discrimination in a legal system that perpetuates a de facto legal norm tolerating violence against women violates women's fundamental rights to life, physical integrity, and equality before the law. The right to state protection from violation of a person's fundamental human rights is inherent in every international human rights legal instrument. Under international human rights instruments, the legal obligation of states is not only to refrain from committing human rights violations, but also to affirmatively protect individuals from human rights violators. The CEDAW has declared that

*514 Under general international law and specific human rights covenants, states may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights, or to investigate and punish acts of violence, and to provide compensation. [FN31][FN31]

In addition, the Inter-American Court has held that states have an affirmative duty to investigate, prosecute and punish human rights violators, and that this duty must be implemented by domestic courts. [FN32][FN32] This affirmative duty requires, inter alia, that states ensure the right to a fair trial and the right to judicial redress.

Whether state responsibility for the domestic violence problem is analyzed under the Women's Convention, basic international instruments such as the U.N. Charter, customary international human rights law, the norms of the American Declaration, or those of the American Convention, the elements of the human rights violation remain the same. The two fundamental rights at issue are the right to physical integrity, which may implicate the right to life, and the right to equality before the law. Arguably, the state's failure to prosecute domestic violence is a violation of a person's fundamental human right to physical integrity even without the element of gender bias. However, the element of inequality before the law strengthens the argument that fundamental human rights have been violated not only because gender discrimination adds another human rights violation, but also because the victim's suffering becomes part of a systematic failure on the part of the state to protect women's rights with respect to a particular class of human rights violations.

B. A Strategy to Realize Women's Rights as Human Rights

The litigation of individual women's complaints is one of the best avenues for improvement of the domestic violence problem. Unlike other possible solutions to the problem, such as a fight for long-term substantive changes in the domestic and international legal systems, litigation of women's claims has the advantage of getting more immediate results, focusing public attention on domestic violence as a human rights issue, and recognizing the suffering of individual victims. Exposing the widespread, atrocious nature of domestic violence would dispel the formidable myths that have minimized domestic violence as "trivial" or as a "private" or "family" issue. The facts of individual cases show that irresponsible state legal systems foster an environment allowing the serious injury and torture of battered women. The facts also show that contrary to popular myth, many battered women both want and need some form of legal intervention to help prevent the abuse they suffer. Complaints in the international human rights arena could also help dispel the myth that the necessity of honoring cultural differences will always limit the legal enforcement of the rights of women living in developing states. The "cultural relativism" argument loses much of its force in the face of the continued struggle by U.S. and Latina women to have their rights recognized and enforced. Litigation will educate the public about the severity of domestic violence by bringing the history and suffering of battered women to the attention of those within the international human rights arena. Furthermore, litigation of these abuses will provide a means of compensation to domestic violence victims as well as a means of redress for violations of women's fundamental human rights.

By litigating individual cases under existing international human rights law, women can show that their right to state protection from domestic violence is a fundamental right, in the same class as the right to be free from torture, from disappearance, or from any other form of state-tolerated violence. Every right, including even the most fundamental human rights espoused by international human rights instruments, needs effective recourse measures in order to provide any actual protection.

*516 C. Legal Systems' Failure to Redress the Problem of Domestic Violence

State responsibility is generally found when state policy codifies, encourages, or condones human rights violations. In Brazil, Chile, and the United States, substantial proof of state responsibility for human rights violations of this kind exists. The Women's Rights Project of Americas Watch recently issued a report on Brazil's systematic tolerance of violence against women. According to this report, the great majority of domestic violence victims are women attacked by their male partners, and these partners are not prosecuted under the law. In Brazil, the "honor defense" permits men to murder their allegedly unfaithful wives or girlfriends with impunity, and the "privileged homicide" doctrine reduces charges for men who plead that "violent emotions" caused them to kill their partners. The case of one Brazilian woman makes clear the fact that domestic violence cases go unprosecuted. In one typical case, Marta, a Brazilian woman who was interviewed by America's Watch, was told by the police that "it would not do any good to register the crime because 70 percent of such cases are dropped." The report found that the most prevalent forms of violence against women are domestic battery, serious threat of death or physical harm, and rape.

In Chile, statistics show that the great majority of domestic violence victims are women, and that domestic violence affects many women in all classes of society. Domestic violence occurs in 2.5 million of the 12 million families in Chile. Of these, the great majority of domestic violence victims are women battered by their male partners. The available statistical evidence and conclusions by experts in the field of domestic violence shows that about fifty percent of Chilean women have been beaten by their male partners at some time in their lives, and that about twenty-five percent of Chilean women live in a permanently violent situation.

*517 The current Chilean legal system systematically fails to prosecute violence against women. Police officers and other legal agents who are required by Chilean law to report all known assault cases fail to prosecute cases brought to their attention by battered women seeking to make complaints. The failure of the legal system to prosecute domestic violence cases and the realistic fear of retaliatory beatings are the chief reasons that victims do not make legal complaints.
Moreover, when reports are made, the victim must have her injuries examined by the Instituto Médico-Legal. Without a report from this agency stating that the injuries meet the requirements of the criminal code, and the testimony of two government agents giving evidence of these injuries, \[\text{FN46}\] the prosecution cannot proceed. The Institute routinely fails to report battered women's injuries as serious enough for criminal prosecution, and many of those cases where reports are filed \*\text{518} go unprocessed. Furthermore, because the Institute is generally backlogged, appointments often cannot be made immediately after an attack and often are put off for a week or more. Wounds are thus less apparent, the victims' proof often lost, and cases dropped. \[\text{FN47}\] \[\text{FN47}\]

When injuries are determined serious enough for criminal prosecution, the victim must bring the confirming report of the Instituto Médico-Legal back to the police station or to the police agents staffed at the hospital where she originally sought help. At this stage as well, official obstruction is common due to police failure to forward the case to the tribunals and to judges' failure to bring the case to trial. Even in the most serious, “extremely grave” or “grave” injury cases, in which, by definition of the Chilean Penal Code, women have been permanently injured in a way that prevents normal functioning of an important part of the body, or killed by their male partners, three-quarters of batterers are found not guilty. \[\text{FN48}\] \[\text{FN48}\]

The failure of Chile's legal system to redress the problem of domestic violence is rooted in an institutionalized form of gender discrimination. Convincing work by Chilean legal scholars shows the clear relationship between failure to prosecute domestic violence and a sexist attitude that is entrenched in Chile's legal system. Nelly González, the founder and former Director of the Legal Office for Women, documents how sexism is institutionalized in the Chilean legal system, and argues that it is at the root of the legal system's failure to prosecute domestic violence. \[\text{FN49}\] \[\text{FN49}\] Sandra González and María Isabel Norero have written a book documenting the failure of various aspects of the legal system to comply with international human rights standards regarding women's rights. \[\text{FN50}\] \[\text{FN50}\] This last source demonstrates that gender discrimination\*\text{519} remains an identifiable and powerful element in the Chilean legal system, even after the reforms for women's rights undertaken in 1991. \[\text{FN51}\] \[\text{FN51}\] Chilean adultery law, for example, facially discriminates against women. \[\text{FN52}\] \[\text{FN52}\] Divorce is generally illegal in Chile, and is specifically nonexistent as a “remedy” for domestic violence unless the woman seeking divorce can show that the violence is grave and repeated. \[\text{FN53}\] \[\text{FN53}\] Furthermore, it is at the present time legally impossible to compel a batterer to leave his home, even if his presence is placing his wife and children in grave danger of further injury. \[\text{FN54}\] \[\text{FN54}\] The crime of domestic violence is not codified, and the responsible judicial agencies routinely fail to prosecute domestic violence under the general assault statutes. \[\text{FN55}\] \[\text{FN55}\]

In sum, studies show that battered women who use the Chilean legal system are subject to escalating violence because the legal system fails to protect them, and that the great majority of battered women want and need legal intervention but are afraid to seek legal help because of the often dangerous consequences. \[\text{FN56}\] \[\text{FN56}\] The documented experiences of battered women shows that the legal system is failing to redress their complaints and is exposing them to increasingly grave human rights violations.

Because the Chilean legal system is based on civil law rather than common law, legal actors will not prosecute domestic violence unless \*\text{520} it is specifically codified as a crime. Successful reform must include not only “typification,” the term for the codification or recounting of the elements that are essential for the prosecution of any act in the civil law system, \[\text{FN57}\] \[\text{FN57}\] but also a measure of criminality and sentencing that focuses on the batterer's behavior, and encourages judges to utilize their discretion to prevent further violence. \[\text{FN58}\] \[\text{FN58}\]

Chile is in the process of legislating the remedies mentioned above in the form of an Inter-Family Violence Act, which mandates that judges and other legal actors investigate, prosecute, and punish domestic violence, following a primary principle of protecting victims from further injury. \[\text{FN59}\] \[\text{FN59}\] The Act was proposed as part of Chile's efforts to comply with international human rights law, especially the Women's Convention. \[\text{FN60}\] \[\text{FN60}\] Although the Inter-Family Violence Act is expected to pass this year, it will take several years to fully implement its provisions, and as this Article goes to press no such implementing legislation has been enacted in Chile.
[FN61] Until this legislation is enacted and enforced, Chile will be in violation of international human rights law.

In the United States, the Senate Judiciary Committee has established beyond doubt that domestic violence is a crime of epidemic proportions, causing serious injury to millions of U.S. women. [FN62] Inaction on the part of the police in responding to domestic violence cases increases the likelihood of serious injury, and leads to death in many cases. [FN63] In addition, the Senate Judiciary Committee found that gender bias in the courts makes for a system that tolerates and perpetuates violence against women. [FN64] Every year, about four million women in the United States are victims of domestic violence. More than one-third are murdered by their current or former male partners. [FN65] Moreover, the domestic violence murder rate has increased in recent years in thirty-five states. [FN66] If the courts were to treat these cases in a manner comparable to other assault cases, over one-third of them would constitute severe crimes such as felony rape or battery. [FN67] The remaining two-thirds involve bodily injuries inflicted that are at least as severe as those that occur in ninety percent of robberies or aggravated assaults. [FN68] However, even in the most progressive states, the great majority of domestic violence cases that are prosecuted are adjudicated as misdemeanors, punishable by rarely effective warnings and/or temporary protective orders. [FN69]

*522 D. State Responsibility

In international human rights fora, individuals, or advocates acting on their behalf, may have standing to enforce their rights by bringing complaints to the available adjudicatory bodies. [FN70] The most effective individual complaints will be complaints by battered women who attempted to utilize the remedies of their domestic legal systems, but found that their reports to police or to other legal actors were not prosecuted or were underprosecuted. However, even women who have not attempted to use the domestic legal system can make a persuasive case that the state is at least partially responsible for their injuries because the state's tolerance of domestic violence creates and perpetuates an environment in which women feel they cannot turn to the legal system for aid. According to Americas Watch, “ to some extent a woman's decision to seek judicial assistance depends on her understanding of her basic legal rights and her confidence, or the confidence of her family and friends, that she will get justice.” [FN71]

In cases where a woman has reported an incident of domestic violence to the police or to other state agents, the failure of those agents to prosecute the victim's complaint can create state responsibility for the violation. Because the nature of domestic violence is such that, without adequate intervention by the legal system, the violence continues, escalates, and causes further injuries, [FN72] the failure to prosecute domestic violence may be said to constitute a violation of international human rights norms. Under international law, state responsibility is imputed to the state if the actions of police, municipal judges, or other low-level state agents constitute an official practice that is “carried out by the government, or at least tolerated by it.” [FN73] The standard of proof for showing a pattern of state tolerance of human rights violations in an international case is generally less formal than *523 in a typical domestic case. For example, circumstantial evidence is admissible in international cases before the Inter-American Court. [FN74]

In the Inter-American system, states have a duty to “prevent, investigate, and punish any violation of the rights recognized by the [American] Convention.” [FN75] In the U.N. system, the Women's Convention's Draft Declaration on domestic violence, which was adopted by the committee in January of 1992 and is currently pending before the U.N. General Assembly, states:

Under general international law and specific human rights covenants, states may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights, or to investigate and punish acts of violence, and to provide compensation. [FN76]

This duty, and the norm imputing state responsibility for the actions and omissions of low-level state agents, means that high government officials must ensure that local police and courts provide a means for legal redress of
domestic violence complaints. It could also impose “an obligation to undertake major education and training programs for women and men in relation to domestic violence or even to do something about the social structures which promote violence against women.”  

E. The Exhaustion of Domestic Remedies Requirement

In order for a complaint to be admissible before most international human rights commissions, international law requires that the petitioner exhaust all of the domestic remedies available to her. [FN78][FN78] When it can be shown, however, that the available domestic remedies are nonexistent, inadequate, or likely to be ineffective, international human rights bodies allow for exceptions to the exhaustion of domestic remedies requirement. [FN79][FN79] Because of the severe lack of remedies for female victims of domestic violence in national legal systems, battered *524 women's complaints should be admissible before international human rights commissions even if all domestic remedies have not yet been exhausted.

The Inter-American system is the most flexible and generous in its application of the exhaustion of domestic remedies requirement. In this system, the responding state bears the burden of showing that domestic remedies are available and effective. [FN80][FN80] The American Convention states that, under certain circumstances, domestic remedies do not have to be exhausted. These circumstances include instances when:

a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated
b. the party alleging violation of his [or her] rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies. [FN81][FN81]

The lack of due process of law referred to in exception (a), for example, can be established by a showing of gender bias in the legal system and inequality before the law. The due process exception to the requirement should apply in each state where gender bias or bias against prosecuting domestic violence claims is present in the legal system. In Chile, for example, the exception would apply because the general assault statutes do not cover domestic violence cases. [FN82][FN82]

In the Inter-American system, domestic remedies that are “mere formalities” do not have to be exhausted before a complaint is admissible. In the Honduran disappearance cases, for example, the Inter-American Court ruled that the “internal remedy” of habeas corpus did not have to be exhausted because it was shown to be a “mere formality,” and to require its exhaustion would have violated the object and purpose of the American Convention, which is the protection of human rights. [FN83][FN83] In Chile, the United States, and Brazil, women are, in *525 practice, denied access to remedies because the police and other legal actors routinely fail to prosecute domestic violence complaints. This inaction on the part of state agents fulfills the requirements of exception (b) for inaccessible remedies. In addition, exception (c), providing that domestic remedies are deemed to be exhausted when there is unwarranted delay in rendering a final judgment, applies to every woman who is forced to return home to repeated incidents of battering because of the legal system’s failure to promptly adjudicate her complaint. [FN84][FN84]

Even when domestic legal systems have taken steps to facilitate the prosecution of domestic violence cases, the result has not always been positive. In Brazil, although the Supreme Court has ruled that the “honor defense,” which allows men to murder their allegedly unfaithful wives and girlfriends without punishment, is illegal, the federal and local courts have refused to follow that Court's ruling. [FN85][FN85] In Chile, the Courts of Appeals and the Supreme Court have found batterers not guilty in about seventy-five percent of domestic violence cases. [FN86][FN86] In the United States, on the other hand, it is possible to sue the local police or municipality for monetary damages when their failure to prosecute domestic violence results in further injuries. [FN87][FN87] However, this damages remedy is only partially effective, because it fails to address the safety and protection concerns of the victim. Furthermore, the remedy is new and not available to every victim. Only a few battered
women have succeeded in recovering monetary damages under this theory. Cases can be brought to collect such damages under the equal protection or due process clauses of the U.S. Constitution, or under § 1983 of the federal Civil Rights Act of 1871; however, the plaintiff must show intentional sex discrimination or intentional discrimination against victims of domestic crimes on the part of the police in order to make out a successful complaint. The actual effectiveness of the remedy of civil protection orders is similarly questionable, and not available to, or only partially effective for, many classes of battered women in a number of U.S. jurisdictions.

II. RECENT DEVELOPMENTS AND POTENTIAL ENFORCEMENT MECHANISMS

Women's right to be free from domestic violence is implied in the rights to life, physical integrity, and equality before the law guaranteed by every human rights instrument. Although victims and their advocates have a strong case for establishing state responsibility for violations of international human rights law, their options for enforcing their claims are fairly limited under most of the applicable international legal instruments. However, recent efforts in international law to sanction domestic violence as a human rights violation have expanded the protection afforded women's rights. The following section will begin by analyzing recent developments in the United Nations and Inter-American Human Rights systems. The enforceability of women's right to state protection from domestic violence will be analyzed under international law applicable in national courts, under the U.N. Women's Convention, and under the Optional Protocol to the International Covenant on Civil and Political Rights. Although the Women's Convention, the Optional Protocol, and customary human rights law establish norms requiring each state to respect women's rights as human rights, only the Inter-American system provides a practical means for enforcement of such rights.

A. Recent Developments in the United Nations System

In February of 1992, the CEDAW, which is the agency charged with monitoring state compliance under the Women's Convention, issued General Recommendation No. 19 announcing that domestic violence is a violation of women's fundamental human rights. General Recommendation No. 19 makes clear that both public and private acts of domestic violence are covered by the relevant provisions of the Women's Convention, as interpreted by "general human rights norms and specific human rights covenants." The CEDAW also declared that gender based violence "impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under specific human rights conventions" including the right to life, the right not to be subject to torture, the right to liberty and security of the person, and the right to equality before the law.

The Women's Convention and the CEDAW's recent General Recommendation may be extremely useful as a means to overcome the argument that domestic violence is a "private" issue beyond the reach of international enforcement mechanisms. The CEDAW's General Recommendation No. 19 subverts this argument by stating that the norms of the Women's Convention regulate the "private" sphere. These instruments encourage states to undertake systematic and institutional changes to eliminate gender based violence. For example, the CEDAW's Recommendation urges

[t]hat states take all legal and other measures which are necessary to provide effective protection of women against gender based violence, including, inter alia:
(a) effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including inter alia violence and abuse in the family, sexual assault and sexual harassment in the workplace;
(b) preventive measures, including public information and education programs to change attitudes concerning the roles and status of men and women;
(c) protective measures, including refuges, counselling, rehabilitation and support services for women who are the victims of violence or who are at risk of violence.
However, the Women's Convention and its supervisory committee, the CEDAW, are not the best means of enforcing women's rights in international fora. While the CEDAW's General Recommendation No. 19 is a definitive jurisprudential interpretation of the provisions of the Women's Convention, the Recommendation itself is not binding on state parties. Like the Women's Convention itself, the Recommendation's enforcement provisions are limited to state compliance through reports made to the CEDAW. The CEDAW can only use reports and political persuasion to compel states to comply with General Recommendation No. 19's provisions and reporting requirements. In addition, once it has handed down a report, the CEDAW cannot compel a state to comply with its findings.

Last November, a group of twenty-nine states sponsored a General Assembly Resolution supporting the CEDAW's General Recommendation No. 19, calling on states to comply with the Recommendation's new reporting requirements and urging the United Nations to provide more financial support to the CEDAW so that it can properly conduct the work of reviewing and critiquing state submissions. International political pressure on states to comply with their obligations under General Recommendation No. 19 and the Women's Convention is necessary to ensure states' cooperation with the CEDAW's enforcement mechanism. Given the recent increase in such international political pressure, perhaps the CEDAW's ability to exact compliance and compel states to adopt “all measures necessary” to prosecute and prevent domestic violence and protect women victims from further attacks will improve considerably in the next several years.

In addition to the CEDAW's recent work, the United Nation's other women's agency, the Commission on the Status of Women (CSW) considered and approved a Draft Declaration on the Elimination of Violence Against Women during their August-September 1992 session. This Draft Declaration strongly supports the CEDAW's General Recommendation No. 19 and is likely to include a better enforcement mechanism since it will operate at the level of the United Nations General Assembly. The Draft Declaration on the Elimination of Violence Against Women may be adopted by the CSW during its 1993 session, approved by the Economic and Social Council during the following year, and soon thereafter, enacted by the General Assembly of the United Nations. Notably, even though the Draft Declaration must be adopted by the CSW before definitive action is taken in the General Assembly, the Declaration already enjoys broad political support within the Assembly. Pakistan introduced a Resolution on behalf of the group of seventy-seven developing nations welcoming the Draft Declaration, supporting the work of the CSW, and urging the CSW to submit its Draft at the 1993 U.N. World Conference on Human Rights. Additionally, in 1993, the CSW will review the possibilities for the adoption of an Optional Protocol to the Women's Convention, which would create a new means to enforce all of the provisions of the Women's Convention.

The 1991 Expert Group Meeting on Violence Against Women that preceded the Draft Declaration considered several new enforcement mechanisms. The most promising was the suggested appointment of a Special Rapporteur on violence against women, who would “determine the pervasive and egregious nature of violence against women,” receive information from governments and non-governmental organizations, “respond effectively,” and recommend measures to prevent continuing human rights violations. The reports of Special Rapporteurs on human rights violations have been the most powerful tool in the United Nation's monitoring and reporting system. A Special Rapporteur would be especially valuable to monitor and make recommendations on the problem in states that have not ratified the Women's Convention, or in countries that have made substantial reservations to the Convention. For example, a Special Rapporteur could take action against the United States, which has not ratified the Women's Convention but is obliged to comply with the norms of the customary international human rights law and the Convention on Civil and Political Rights.

The Expert Meeting set forth several other possible enforcement mechanisms to be decided upon in its August-September session, subject to approval by the General Assembly. These include: (1) expansion of the scope of reporting, investigative, and recommendation power of the CEDAW; (2) strengthening of the CSW's “communications” procedure, through which the CSW receives individual and group complaints; and (3) the enactment of the Draft Declaration, which would “crystallize the international norms of
the prohibition of violence against women, such as general principles, minimum standards and declarations.” [FN114][FN114] In the long run, the Declaration could eventually lead to a U.N. Convention with binding, rather than declarative, legal force. [FN115][FN115]

*531 The 1992 Expert Meeting considered several types of Optional Protocols, each with its own enforcement mechanism. [FN116][FN116] The 1993 CSW sessions could result in the adoption of any of these enforcement mechanisms, although the adoption of the Draft Declaration alone is the most probable outcome. [FN117][FN117] At this stage, the decision about which enforcement option states will undertake is a political decision that depends on the willingness of states and the United Nations system in general to create new binding international legal obligations. Since ratification of any of the proposed Optional Protocols would introduce new enforcement mechanisms that would apply to all of the provisions of the Women's Convention, those states that do not support all of the Convention's provisions will be unlikely to ratify any such Protocols. [FN118][FN118] Nonetheless, given that states may not be ready to submit themselves to the types of enforcement mechanisms contained in the Protocols, the push for ratification of the Draft Declaration, which enjoys a broad base of support, appears to be a viable first step.

B. Recent Developments in the Inter-American System

The Inter-American Commission for Women (CIM), a body of government delegates acting under a mandate of support from the O.A.S. General Assembly, [FN119][FN119] is currently formulating a Draft Inter-American Convention to Prevent, Punish and Eradicate Violence Against Women. This proposed Convention may be adopted by the O.A.S. General Assembly during its 1993 session. [FN120][FN120]

*532 This Convention would define the prohibited violence against women very broadly, and would specify that violence against women is a violation of women's fundamental human rights to life, physical integrity, judicial redress, and equality. [FN121][FN121] The Convention has been proposed specifically because traditional interpretations of international human rights law have failed to recognize the responsibility of states to prevent, punish, and eradicate violence against women. [FN122][FN122]

While the CIM is still considering various enforcement mechanisms, government replies to the draft indicate that the Convention would compel member states to take concrete measures to prevent, punish, and eradicate violence against women. [FN123][FN123] This is possible because the norms of the Inter-American system provide a separately enforceable right to judicial redress of human rights violations, which mandates a state's duty to investigate, prosecute, and punish human rights violators. [FN124][FN124] Thus, in the October 1992 CIM Assembly of Delegates, while the United States asserted its usual position against codifying its international legal obligations to protect women from domestic violence, it nonetheless agreed that "governments should take strong, effective action to prevent and punish violence against women.” [FN125][FN125]

The Draft Convention would require states to undertake a number of measures to combat violence against women. First, it would require states to include penal and civil sanctions in their domestic legislation “to punish and redress the wrongs caused to women.” [FN126][FN126] Second, it would require states to “modify or abolish existing laws, regulations, customs, and practices which constitute discrimination against women *533 with respect to the punishment of the aggressor and the protection of the victim.” [FN127][FN127] Third, states would provide, to the extent allowed by available resources. “legal, therapeutic and economic assistance to any woman in its jurisdiction who is, or is apt to become, subjected to violence.” [FN128][FN128] Fourth, states would attempt to use educational measures to counteract prejudices and customs and all other practices that are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles of men and women. [FN129][FN129] States would also encourage media campaigns to eradicate violence against women. [FN130][FN130] promote programs to raise public awareness of the issue, [FN131][FN131] foster international cooperation, [FN132][FN132] and adopt progressive measures to achieve economic and social equality for women. [FN133][FN133] These provisions received praise and support from the great majority of governments submitting comments and replies to
the CIM. [FN134] Only the government of the United States waved the banner of “cultural relativism” [FN135] and objected to these provisions on the grounds that local culture and custom would prevent the full enforcement of women's rights. [FN136] As in its other international activities on the issue of domestic violence, the United States' position focuses on other cultures as the cause of violence against women and fails to account for the way in which the legal system's tolerance of domestic violence helps to create and perpetuate it. [FN137]

*534 With respect to all of the state duties created by the proposed Convention, the CIM would draft model legislation and coordinate model programs in the areas of prevention, education, and support services. [FN138] As in the United Nations system, states would also undertake a duty to submit reports to the CIM on “effective measures to prevent and prohibit violence against women.” [FN139] and the CIM would include information about these reports and other developments in its Annual Report to the General Assembly. [FN140] Furthermore, state Parties and the CIM would be able to request Advisory Opinions from the Inter-American Court of Human Rights on the interpretation of the Convention or other relevant treaties. [FN141] Such opinions are an important and progressive means to develop and enforce human rights norms in the Inter-American system. Most importantly, the Draft Convention would provide an individual complaint procedure before the Inter-American Human Rights Commission and Court to consider violations of the Convention and to recommend measures to be taken to redress human rights violations. [FN142]

Even if these final provisions are not eventually approved by the O.A.S. General Assembly or ratified by member states, [FN143] the Convention's savings clause would give women the option to litigate complaints under the provisions of the American Convention and the American Declaration. [FN144] Many of the rights contained in the proposed Inter-American Convention to Prevent, Punish and Eliminate Violence Against Women are encompassed within the provisions of the American Declaration and of the American Convention. [FN145]

*535 In addition, the Preliminary Draft of the proposed convention would codify several other important enforcement options, including the review of states' internal legislation regarding domestic violence and the creation of an individual complaint procedure to enforce the provisions of the Draft Convention that are not included in the American Convention and Declaration. [FN146] Through the process of formulating and enacting a new convention on women's rights to state protection from domestic violence, the CIM has resoundingly endorsed the use of the individual complaint procedures of the Inter-American human rights system. In contrast to the reporting system utilized by the United Nations in the area of women's rights, these procedures allow for the litigation of individual battered women's claims to compel a state to, at a minimum, investigate, prosecute, and punish domestic violence. However, because the CIM's proposed Convention has not yet been enacted, immediate litigation should be channeled through currently available procedures under the American Convention and the American Declaration.

Advocates should undertake a dual strategy of lobbying for the adoption of the new CIM Convention and of litigating complaints under existing enforcement mechanisms. [FN147] The 1990 Consultation on Violence Against Women argued that despite criticisms to the contrary, this dual strategy would not make the CIM's Convention superfluous. In short, the Consultation argued that the codification of specific international human rights norms is necessary to increase awareness of the problem of domestic violence and to “establish minimum observance at the international level as a guarantee.” [FN148] Therefore, even though the CIM strongly supports the litigation of battered women's complaints before the Inter-American Human Rights Commission and asserts that already existing international norms provide for the right to state protection from domestic violence, the CIM's proposed Convention will play a new and important role in expanding the interpretation of those existing international norms and setting minimum standards for compliance.

*536 C. Enforcement Options

1. Litigation in National Courts
It is possible that cases seeking to enforce the provisions of the Women's Convention may be brought in national courts. The value of the rights established by the Women's Convention, however, will depend on the relative value of the norms of the Convention within the domestic system. While in some states international law is deemed superior to domestic law, in other states domestic laws may trump international law. The relationship between municipal and international law varies depending upon the domestic regime and the treaty in question. In Chile, for example, international human rights treaties like the Women's Convention (which it ratified in 1989) are generally valued at the level of federal Constitutional law, and are therefore superior to federal legislation.

The United States has not ratified the Women's Convention. However, its provisions may be binding on the United States to the extent they embody customary norms of international law. The domestic legal effect of customary international law is a matter of substantial controversy in the United States. Under article VI of the U.S. Constitution, treaties are the supreme law of the land, equivalent to acts of Congress and binding on the states. In the event of a conflict between a treaty and a federal statute, the last in time prevails. However, there is no comparable constitutional provision dealing with the domestic status of customary international law. In The Paquete Habana, the U.S. Supreme Court held that customary international law is part of domestic law “where there is no treaty, and no controlling *537 executive or legislative act or judicial decision.” But the domestic status of customary international law in relation to treaties or federal legislation remains unclear. Some commentators have argued that because the United States' international obligations under a treaty are the same as under a customary rule, U.S. courts should accord customary international law the same domestic status as treaties. In any event, the status of customary international human rights norms, such as the CEDAW's Declaration that domestic violence is a violation of women's fundamental human rights, is very much an open question in U.S. law.

U.S. courts are most likely to adjudicate cases based on customary international law involving human rights issues. A state violates international law if it practices, encourages, or condones violations of the rights that are fundamental under customary international human rights law. One violation of fundamental rights that the United States has consistently acknowledged as a violation of customary international law is torture, including state-tolerated violence, state-tolerated murder, and other inhuman or degrading treatment. The Women's Convention is one of several major human rights instruments that establish the type of international human rights norms that are recognized in the United States traditionally. In addition, the Universal Declaration of Human Rights, protecting women's fundamental rights to physical integrity and equality before the law, also constitutes customary law acknowledged by the United States.

Thirty-five states in the United States have not yet adopted statutes and procedures guaranteeing prosecution of domestic violence cases. If the United States were to ratify the Women's Convention and adopt the appropriate implementing legislation, all fifty states would be bound to enforce its provisions. However, ratification of this convention might conflict with proposed federal legislation, the Violence Against Women Act, whose provisions are not entirely consistent with those of the Women's Convention. The Act encourages states to adopt model legislation through funding incentives, but does not compel such adoption while the Women's Convention does.

Worldwide, litigation in national courts based on the international legal obligations of state parties to the Women's Convention has been successful in only four cases. In Tanzania, the highest court held that tribal law limiting women's property rights violated the state’s international legal obligations under the Women's Convention's anti-discrimination provisions. In Botswana, the highest court stated that the “comity of nations speaks clearly against discrimination against women” and that the general equal protection provision of Botswana's Constitution therefore prevents the awarding of citizenship in a patrilineal manner. In Australia, a federal court ruled that sexual harassment in the workplace violated the state's obligations under the Women's Convention's provision guaranteeing equality in the workplace. Also in Australia, a federal
arbitration commission ruled that the federal act that allowed a union's affirmative action plan for women was consistent with the Women's Convention's provision for temporary measures taken to ensure women equal opportunity with men. [FN162][FN162]

Despite these successes, not all states are willing to enforce international legal obligations through domestic courts. For example, a suit brought in Chile to enforce the state's international legal obligations under the Women's Convention might not succeed because the Chilean courts are complicit in the legal system's failure to adequately prosecute domestic violence. [FN163][FN163] In Brazil, which ratified the Women's Convention in 1988, a suit might succeed in the highest national courts, but probably would not be enforced by the lower courts. [FN164][FN164]

Successful lawsuits based on the Women's Convention's norms brought in national courts have focused on discriminatory provisions contained in domestic statutes. By contrast, the type of gender discrimination at issue in domestic violence cases typically involves the unwritten, de facto discriminatory policies and practices of the domestic legal system. Although de facto discrimination by a state's legal system is prohibited by international law, the process of remediying such discrimination in the very courts that have perpetuated it will be difficult.

If litigation against the state is unsuccessful, a final remedy would be to sue the batterers themselves for violating international human rights law. Although national courts have become increasingly involved in the enforcement of international human rights, suits against individuals have been infrequent. The leading international human rights case involving such a suit was the Filártiga litigation, brought in the United States in 1980, in which family members successfully sued a Paraguayan police officer who had tortured Joelito Filártiga to death in Paraguay. [FN165][FN165] The U.S. Court of Appeals for the Second Circuit held that the defendant had violated the customary international human rights norms guaranteeing the right to life and the right to be free from torture. [FN166][FN166] Typically, suits against individuals will only be successful where domestic legislation creates a cause of action and where domestic jurisdictional requirements are satisfied. [FN167][FN167]

As an overall strategy for developing international human rights law and for compelling states to comply with their international legal responsibilities to prosecute domestic violence, sanction batterers, and protect victims, suing batterers would be only partially effective. Furthermore, suing batterers fails to send the message that states themselves are responsible for complying with their international legal obligations. [FN168][FN168]

2. The U.N. Women's Convention

States that are parties to the Women's Convention have an international legal obligation to adequately prosecute domestic violence and to protect victims from continued violence. The central provision of the Women's Convention, article 1, prohibits intentional or de facto discrimination against women in the area of fundamental human rights, [FN169][FN169] and article 15(1) requires that state parties provide equality between men and women before the law, especially in the area of fundamental human rights. [FN170][FN170]

The provisions of the Women's Convention mandate reform of state legal and political systems. Article 2 requires state parties to enact legislative, judicial, administrative, and other measures to eliminate all forms of discrimination against women, including both intentional and de facto discriminatory treatment of women victims of domestic violence. [FN171][FN171] With greater enforcement power, and/or willingness on the part of states to comply with its provisions, the Women's Convention could be a powerful instrument because its mandate is broad and clear: states must take whatever measures are necessary in all public spheres to eliminate all forms of discrimination against women. [FN172][FN172]

Some states, such as Chile, that have adopted the Women's Convention, have used the Convention as a basis for substantive reforms that would improve their legal systems' treatment of violence against women. [FN173][FN173]
Other states, such as Brazil, have promised such reforms but failed to take concrete steps to enact them. [FN174] But even in the case of states like Brazil that have ratified but not complied with the provisions of the Women's Convention, adoption of the Women's Convention represents a major step towards recognizing the problem of violence against women and entering into an international legal obligation to end state tolerance of the crime. [FN175] If the United States adopts the Women's Convention, it will accrue to an international legal obligation to correct its system's mistreatment of violence against women.

*541 The major strengths of the Women's Convention are that it allows for a broader definition of gender discrimination, [FN176] that its provisions require progressive reforms in every sector of the legal and political system, [FN177] and that nearly every state in the world has ratified it. [FN178] In the western hemisphere, every state except the United States and the Bahamas has ratified the Women's Convention. [FN179]

3. The Optional Protocol to the Covenant on Civil and Political Rights

Upon ratification by a state, the Optional Protocol [FN180] allows individuals to submit complaints of states' violations of the provisions of the Covenant on Civil and Political Rights to the Human Rights Committee (the Committee), which is charged with reviewing individual petitions, determining violations, and issuing recommendations. [FN181] The Optional Protocol does not provide for a court with the power to issue advisory opinions or to review the Committee's decisions. [FN182] When an individual petition is reviewed, the Committee is authorized only to "forward its views" to the individual and government concerned, and is not permitted to issue judgments. [FN183]

The rights reviewed by the Committee are those found within the Covenant on Civil and Political Rights. Like the American Convention, the Covenant requires that states "ensure that any person whose rights or freedoms as herein recognized [by the Covenant] are violated shall have an effective remedy . . . ." [FN184] The rights recognized by the Covenant include a prohibition against torture and cruel, inhuman, or degrading treatment or punishment. The Covenant also guarantees equality before the law. [FN185] provides that state parties must ensure to all individuals the rights recognized by the Covenant "without distinction of any kind, such as race, colour, or sex," [FN186] and prohibits any derogation from the Covenant's provisions that would "involve discrimination solely on the grounds of . . . sex . . . ." [FN187]

Although the Human Rights Committee can receive individual complaints about violations of the Covenant, it does not have jurisdiction to adjudicate cases against state parties to the Covenant unless the state has also ratified the Optional Protocol. [FN188] Thus, although a state's failure to prosecute domestic violence violates the equal protection provisions of the Covenant on Civil and Political Rights, [FN189] battered women in many states would not have standing to bring their claims before the Committee. [FN190] Neither Brazil nor the United States is a party to the Covenant, and neither has ratified the Optional Protocol. [FN191] In September 1992, Chile ratified the Optional Protocol. [FN192]

The Committee's decisions under the Optional Protocol vary in the extent of their support for women's rights. For example, the Committee found that Peruvian legislation that facially discriminated on the basis of sex by prohibiting married women from filing civil suits violated the Convention's provisions concerning equality before the law. [FN193] However, at least in the area of public benefits, the Committee has adopted a low standard for determining whether less obvious forms of gender discrimination violate international law. The Committee has ruled that article 26 of the Covenant only prohibits "unacceptable discrimination," as measured by objective criteria. [FN194] However, because domestic violence implicates fundamental rights, a domestic violence case may be compelling enough to establish a higher standard of scrutiny for gender discrimination.

*543 By contrast, the Inter-American Court of Human Rights has stated that under the American Convention

the measure of the legitimacy of an act of discrimination is whether its aims are “unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind.”[FN195] Furthermore, the Court stated that article 1(1) of the American Convention, which requires that state parties ensure the free and full exercise of the rights provided in that Convention “without any discrimination” on the basis of sex, should be interpreted in the following manner:

[R]egardless of the form it may assume, any treatment that can be considered to be discriminatory with regard to the exercise of any of the rights guaranteed under the Convention is per se incompatible with that instrument. [FN196][FN196]

The following section of this Article discusses the enforcement mechanisms available in the Inter-American system, focusing specifically on the American Convention and the American Declaration. By comparison with the U.N. and domestic enforcement mechanisms discussed above, these two instruments are currently the most promising means for litigating claims of state responsibility for domestic violence.

III. AN INDIVIDUAL PETITION BEFORE THE INTER-AMERICAN HUMAN RIGHTS COMMISSION

A. The Inter-American Human Rights Commission and Court

The American Convention, which entered into force in 1978, established the institutional structure for the protection of human rights in the Americas. The Inter-American Human Rights Commission is a judicial body empowered to act on petitions from individuals alleging violations of the American Convention by a state party to the Convention. [FN197][FN197] The Commission may also receive individual petitions alleging violations of the American Declaration, whether or not the accused state is a party. [FN198][FN198] The Inter-American Human Rights Commission can receive petitions from victims living in any O.A.S. member*544 state, including those living in the United States. [FN199][FN199] Additionally, non-governmental organizations and advocates acting on behalf of the victim, including amici, may lodge petitions with the Commission containing denunciations or complaints of violations. [FN200][FN200]

A petition is admissible if domestic remedies have been exhausted, [FN201][FN201] if the petition is filed within six months of the alleged violation, if the matter is not pending before any other international body and is not a matter already studied by the Commission or by another international organization, [FN202][FN202] and if the petition states facts that tend to establish a violation of the Convention that is not manifestly groundless. [FN203][FN203] The Commission may consider facts that allege a human rights violation as well as any other available information that it considers pertinent to a determination of the matter. [FN204][FN204] Therefore, the petitions of battered women should include facts showing that the failure of state agents to prosecute domestic violence led to their injuries and should also include information on the domestic legal system’s general failure to prosecute domestic violence.

After the Commission receives a petition and finds it admissible, it must request information from the state accused of the violation and furnish a transcript of the relevant portions of the petition to that state. [FN205][FN205] The Commission then examines the matter in order to verify the facts alleged in the petition, and may also carry out an investigation, request the state to furnish necessary facilities and pertinent information, and, if requested, receive oral and written statements. [FN206][FN206]

The Commission then places itself at the disposal of the parties and attempts to reach a friendly settlement. [FN207][FN207] If a friendly settlement is reached, the Commission publishes a report for the Secretary General*545 of the O.A.S. and furnishes a copy to each of the parties. [FN208][FN208] If no friendly settlement is reached, the Commission must send a report to the state party that specifies the facts and conclusions regarding the case and includes the Commission’s proposals and recommendations. [FN209][FN209]
After the Commission issues a report, it may decide to forward the case to the Inter-American Court of Human Rights. [FN210][FN210] The Court only has jurisdiction, however, in cases in which state parties to the American Convention have accepted the Court's jurisdiction by either depositing an instrument stating this acceptance or by special agreement in the case at issue. [FN211][FN211] Brazil and Chile are parties to the American Convention, but the United States is not and could not agree to such jurisdiction as a non-party. [FN212][FN212]

In cases over which it has jurisdiction, the Court determines both whether a violation of the Convention's guarantees occurred and what measures are necessary to remedy the violation. If it finds a violation, the Court must ensure protection of the right violated and can order that the state pay fair compensation to the victim. [FN213][FN213] The Court may protect the victim and others by ordering the prosecution of the batterer under the state's criminal laws and should also order the state's criminal justice system to enforce imprisonment and long-term stay-away orders.

The Court also has broad jurisdiction to issue Advisory Opinions on the norms of the American Convention and “other treaties concerning the protection of human rights in the American states.” [FN214][FN214] Furthermore, the Court may issue Advisory Opinions when requested to do so by the Commission or by other organs of the O.A.S., regardless of whether the state involved has accepted the Court's jurisdiction. [FN215][FN215] Therefore, the Court could issue an Advisory Opinion regarding the United States' obligations under the American Declaration and could interpret any state's international legal obligations under the Women's Convention.

Although Advisory Opinions are limited to interpretations of the relevant international human rights instruments and cannot provide any other remedy, an Advisory Opinion could be useful in ensuring that the fundamental right to state prosecution of domestic violence is understood and enforced. The Court has been very progressive in its Advisory Opinions, using its authority to gradually develop international human rights law. [FN216][FN216] In addition, further action by the Commission is possible after the issuance of Advisory Opinions. For example, after the Court's 1983 Advisory Opinion ruling that Guatemala's reservations with respect to the Convention's death penalty provisions did not allow it to expand the death penalty to include political crimes, the Commission recommended that the killing of political prisoners in Guatemala be condemned as a violation of the Convention. [FN217][FN217] It is conceivable that in the future the Court might issue opinions recommending the characterization of domestic violence as a human rights violation requiring redress of an individual's injuries. [FN218][FN218]

Finally, the Court has the power, at the request of the Commission, to order preventive measures “in cases of extreme gravity or urgency, and when necessary to avoid irreparable damages to persons.” [FN219][FN219] Such preventive measures may be ordered whether or not the case is before the Court. [FN220][FN220] Thus far, the Court's use of its power to impose preventive measures has been limited to cases where it believes that a person's life is in danger. [FN221][FN221] These preventive measures should be available in domestic violence cases, so many of which end in murder.

The Commission may also publish a report, called a Resolution, as long as “the matter has not either been settled or submitted by the Commission or by the state concerned to the Court and its jurisdiction accepted.” [FN222][FN222] This report contains the Commission's findings as to whether the state has violated the American Declaration and/or the American Convention. [FN223][FN223]

The Report “prescribe[s] the period of time within which the state is to take measures that are incumbent upon it to remedy the situation examined.” [FN224][FN224] Unless it successfully appeals, [FN225][FN225] the state must take the measures recommended by the Commission within the allotted time period. If the state refuses to do so, the Commission may publish its decision in its annual report to the General Assembly. [FN226][FN226]

A finding by the Commission that a state is responsible for violations of battered women's rights because of its
failure to prosecute domestic violence would have significant implications for individual victims. The state would be subject to formidable pressure to redress the victim's injuries and to take reform measures to guarantee women's rights to protection from domestic violence. In cases where domestic violence caused the death of the victim, the victim's surviving family members would be entitled to retribution and compensation. Additionally, such a finding has significant political implications. No state, especially if it has ratified or signed the Women's Convention and entered into specific international legal obligations to protect women's rights, will want to be the subject of a published report that states that it has violated women's fundamental rights.

When the Commission finds a state responsible for human rights violations, it normally recommends that the state compensate*548* victims, [FN227][FN227] investigate the violations, and punish the violators. [FN228][FN228] These remedies should include the criminal prosecution of the violator. The Commission also uniformly recommends that a state redress violations by “adopting the necessary measures to avoid the commission of similar crimes . . . .” [FN229][FN229] In domestic violence cases, such measures should include the reform of a state's legal system, [FN230][FN230] preventive measures such as stay-away orders, the public recognition of the crime, and educational measures. [FN231][FN231] Remedies should also include the measures recommended by the Inter-American Commission of Women, including the passage of new legislation, the creation of support services for victims, educational projects, media campaigns, new research, or special protection for refugee, migrant, and elderly women. [FN232][FN232] Upon recommending measures the Commission usually requests that they be taken and completed within ninety days. [FN233][FN233] *549* Even though the Commission's recommendations are ultimately subject only to enforcement by means of moral and political pressure and not by legal order, the potential remedies are substantial. Although the Commission has a backlog of cases [FN234][FN234] and is limited by budgetary constraints placed on it by O.A.S. member states, it not only has the power to recommend a number of different remedies to redress violations, it has a history of exercising this power. Individual battered women and their advocates should push the Commission to use its full power to ensure that victims are compensated and protected, violators punished, and state systems reformed to prevent future incidences of domestic violence. Combined with continued political pressure from women's rights activists, the Commission's recommendations could be a powerful remedy.

B. State Responsibility in the Inter-American System

Under the Inter-American system, states are responsible for their failure to effectively prosecute domestic violence and to protect women from torture. States may be held responsible when judges, police, and other state officials fail to investigate, prosecute and punish domestic violence, thus failing to protect women's fundamental human rights. In the Velásquez Rodríguez case, the Inter-American Court held that state parties to the American Convention have an affirmative duty to investigate, prosecute, and punish human rights violators, and that this duty must be implemented through the state's judicial tribunals. [FN235][FN235] In Velásquez Rodríguez, the human rights violation at issue was forced disappearances that were tolerated by the Honduran government. The Court specifically stated that a forced disappearance counts among “crimes against humanity,” and that state tolerance of such a disappearance constituted a grave violation of the victim's fundamental human rights. [FN236][FN236] Arguably, the ruling could be limited to grave human rights violations. However, this limitation would not pose a problem in most domestic violence cases. Like forced disappearances, *550* domestic violence causes mental and physical injuries comparable to torture and other universally recognized human rights violations.

The Velásquez Rodríguez decision is significant because the Court implicated the state despite the fact that the forced disappearances were never shown to have been committed by state agents. [FN237][FN237] Honduras was held responsible because its legal system failed to protect the victims from human rights violations as required under article 1 of the American Convention, which provides that states must “ensure all persons subject to their jurisdiction the free and full exercise of those rights and freedoms [recognized herein].” Honduras was also held

responsible under article 25 of the Convention, which provides:

Everyone has the right to . . . effective recourse . . . to a competent court or tribunal for protection against acts that violate his [or her] fundamental rights recognized by the constitution or laws of the state concerned or by this Convention . . . . [FN238][FN238]

The Inter-American Human Rights Commission recently reaffirmed the Velásquez Rodríguez decision, holding that the amnesty laws of Uruguay and Argentina, which impede the complete investigation, prosecution, and punishment of those responsible for human rights violations under the former military dictatorships, violated article 1(1) and article 25 of the American Convention. [FN239][FN239]

In the Inter-American system, a woman may claim the right to judicial redress both as a member of a class of victims and as an individual. [FN240][FN240] First, if an individual battered woman can show that the state systematically failed to provide for judicial investigation, prosecution, and punishment of domestic violence cases, she can prove *551 that the state has violated her rights under the Velásquez Rodríguez standard. Second, if an individual battered woman can show that in her case the legal system failed to meet this standard, she can also show that the state has violated its international legal obligations under article 1(1) and article 25 of the American Convention. In both cases, state responsibility for the victim's injuries is based on the failure of judges, police, and other state agents involved in the case to ensure the individual's right to judicial redress.

The right to judicial redress for human rights violations is the hallmark of the Inter-American system. The Inter-American system is the only human rights regime that has enacted a non-derogation provision, explicitly prohibiting the suspension of “judicial guarantees essential for the protection of such [fundamental] rights.” [FN241][FN241] The Inter-American Court has stated that essential judicial guarantees are “those that ordinarily will guarantee the full exercise of these rights and freedoms protected by the non-derogation provision and whose denial or restriction would endanger their full enjoyment.” [FN242][FN242] The Court has also stated that, aside from the non-derogation provision,

the Convention provides other criteria for determining the basic characteristics of judicial guarantees. The starting point of the analysis must be the obligation of every state Party to ‘respect the rights and freedoms recognized and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms’ (Art. 1(1)). From that general obligation is derived the right of every person, set out in Article 25(1), ‘to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his [or her] fundamental rights recognized by the constitution or laws of the state concerned or by this Convention. [FN243][FN243]

The Court has further stated that article 25(1) incorporates the principle recognized in international human rights law that procedural instruments or the means designed to guarantee such rights must be effective. [FN244][FN244] In the words of the Court,

it is not sufficient that [a remedy] be provided for by the Constitution or by law or that it be formally recognized, but rather *552 it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective. [FN245][FN245]

Thus, the failure to provide effective judicial recourse is, in and of itself, a violation of the American Convention. Therefore, states could be held responsible where they systematically fail to prosecute domestic violence, or where, in individual cases, they fail to investigate and prosecute the claimed human rights violation or fail to protect the victim from further abuse.

The Inter-American Court has also stated that the concept of due process of law as expressed in article 8 of the Convention “should be understood as applicable, in the main, to all the judicial guarantees referred to in the American Convention,” even during states of emergency when derogation from some of the Convention's articles
would be permissible. [FN246][FN246]

A ruling that a state has failed in its responsibility to investigate, prosecute, and punish domestic violence identifies the state's responsibility to provide remedial and preventive measures. Public educational programs and protective measures such as shelters and support services for battered women are responsibilities that are clearly set out in the CEDAW's General Recommendation on Violence Against Women, and they are implicit in various other international legal instruments. [FN247][FN247] However, even if a ruling did not mandate the provision of preventive measures, a ruling that the state failed to take the required judicial actions would have significant political implications.

The Commission has condemned the fact that under state laws, women victims are not always guaranteed full participation in criminal proceedings. In the Uruguayan amnesty decision, [FN248][FN248] the Commission rejected Uruguay's contention that the guarantees of a fair trial (article 8) and judicial redress of human rights violations (article 15) applied only to criminal defendants. [FN249][FN249] The Commission found that, “in systems that allow it, the victim of the crime has access to the courts because of a citizen's fundamental right, which becomes particularly *553 important as a dynamic of the criminal process.” [FN250][FN250] Both Brazil and Chile's criminal justice systems allow for victim participation in the criminal proceedings; [FN251][FN251] however, these rights are not guaranteed in practice for women victims of domestic violence.

C. Litigation Under the American Convention and the American Declaration

1. Enforcement of the Right to Life

When domestic violence results in death, a woman has been deprived of her right to life. This deprivation may be in part attributable to state action or inaction. In such cases, a complaint alleging a violation of the right to life may be brought under either the American Convention or the American Declaration, both of which expressly guarantee the right to life. [FN252][FN252]

The right to life is the most fundamental of all international human rights, the deprivation of it being prohibited by every major international human rights instrument. [FN253][FN253] In Velásquez Rodríguez, the Inter-American Court found that article (1) of the American Convention, which requires states to “guarantee the full exercise and enjoyment of human rights,” such as the right to life, means that states must protect those persons within their jurisdiction from violations of the right to life. [FN254][FN254] As a result, the failure of the state legal system to protect persons from deprivations of the right to life must be interpreted as inconsistent with the state's international legal obligations. [FN255][FN255]

2. Enforcement of the Right to Freedom from Torture

The CEDAW has stated that violence against women in the family violates “the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment” and “the right to liberty and security of the person” guaranteed in all major human rights instruments.*554 [FN256][FN256] In the United States, the right to be free from torture is interpreted expansively as jus cogens. [FN257][FN257] Some international legal instruments, such as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, could be read to limit the concept of torture to intentional acts committed by government officials, especially in the context of a defendant in the criminal justice system. [FN258][FN258] However, other international instruments do not require that the acts be intentional to constitute torture. For example, the European Court and Human Rights Commission held that, under the European Convention of Human Rights, acts did not have to be undertaken with the purposes of extracting a confession to constitute torture. [FN259][FN259] The European Court did, however, rule that the definition of torture was limited to acts that constitute deliberate, cruel, or excessive abuse. [FN260][FN260] Given this interpretation, article 7 of the International Covenant on Civil and Political Rights, [FN261][FN261] and article
5(2) of the American Convention, [FN262][FN262] which mirror the European Convention's prohibition against torture, [FN263][FN263] should not be interpreted to require intentionality. Furthermore, unlike the Convention Against Torture, the relevant articles of the International Covenant on Civil and Political Rights and the American Convention do not limit torture to the context of the torture of a defendant. They simply state that “no one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.” [FN264][FN264]

Despite the fact that traditional interpretations limited the definition of torture, the CEDAW's General Recommendation No. 19 and two other recent interpretations of general principles of international law serve to expand the application of the prohibition against torture to include acts of domestic violence. [FN265][FN265] Both of these instruments strongly support CEDAW's General Recommendation No. 19 and mention that gender based violence constitutes torture. [FN266][FN266] It is quite *555 probable that most domestic violence cases will meet the standards of abuse required, for example, by the European Court. As the U.S. Senate Judiciary Committee has concluded, the criminal justice system has underestimated the intensity of the abuse in domestic violence cases, the majority of which involve injuries at least as serious as those in most aggravated assault cases. [FN267][FN267] Furthermore, even if a particular domestic violence case does not reach the level of “torture,” international legal instruments prohibit cruel, inhuman or degrading treatment or punishment. This prohibition is also part of fundamental human rights and customary international human rights law. [FN268][FN268]

Equating domestic violence with torture in this manner is controversial and poses problems of interpretation. Experts have noted the difficulty of defining torture in varying cultural contexts. In addition, the European Court and the Human Rights Commission have ruled in several cases that whether or not physical and mental mistreatment constitutes torture depends on a finding of deliberate, cruel, or excessive abuse, as measured in part by the views of society. [FN269][FN269] For example, in the Tyrer case, the European Commission found that corporal punishment of a schoolboy by police was “degrading treatment” rather than torture in part because the practice was generally accepted in the community. [FN270][FN270] On the other hand, the Human Rights Commission has ruled that the international human rights norm prohibiting torture is universal. For instance, the Commission found that Iran could not justify national religious practices that involved corporal punishment for criminal acts on the basis of cultural relativism. [FN271][FN271]

The Inter-American system has not fully resolved the issue of which acts constitute torture. To date, those violations of the Convention's right to physical integrity that have been denounced by the Commission have been limited to cases of physical punishment of those apprehended by state agents or by paramilitary forces. [FN272][FN272] However, the principle that physical beatings constitute torture, no matter what the *556 cultural context, is being developed in the Inter-American system to apply to domestic violence cases. [FN273][FN273]

A claim that domestic violence has violated a woman's right to be free from torture may be brought under either the American Convention or under the American Declaration. The American Convention expressly guarantees the right to humane treatment, [FN274][FN274] and the right to be free from torture, [FN275][FN275] The American Declaration does not articulate a specific right to freedom from torture, but such a right may be inferred from the text itself and from its relation to similar international instruments. The American Declaration's stated object and purpose includes a recognition on the part of the American states that “they should increasingly strengthen the system of protection of human rights in the international field as conditions become more favorable.” [FN276][FN276] The text of the Declaration itself shows that it was intended to protect people from torture, and from cruel or inhumane treatment. The first paragraph of the Declaration acknowledges the “dignity of the individual,” and the fourth paragraph affirms the American states' commitment to protecting essential human rights “together with the guarantees given by the internal regimes of the states.” [FN277][FN277] Additionally, article 1, which guarantees the right to the security of the person, is analogous to the American Convention's guarantees of freedom from torture. [FN278][FN278]

The majority of governments in the Inter-American system have made official statements that domestic violence constitutes a violation *557 of women's fundamental right to physical integrity. By contrast, in the process of
drafting the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, the United States argued against “stat [ing] that the right to be free from violence includes the protection of other rights,” which would include the right to be free from torture, and instead suggested limiting the language to “a general statement to the effect that the promotion and observance of human rights and fundamental freedoms is instrumental to freedom from violence against women.” [FN279] The United States admits that, “o n an international level, we believe that to a large extent, violence against women implicates already existing human rights, and is already covered by existing human rights instruments, particularly the Convention on the Elimination of All Forms of Discrimination Against Women.” [FN280] The U.S. position is simply that “drafting new agreements to elaborate on fundamental human rights already guaranteed in international agreements” is unnecessary. [FN281] [FN282]

The Preliminary Draft of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women states that domestic violence constitutes a violation of women’s fundamental right to physical integrity, and it cites the American Declaration as a principle source for this proposition. [FN283] The United States has not supported this interpretation. [FN284] Nevertheless, complaints may be brought against the United States under the American Declaration.

3. Equality Before the Law Under the American Convention

Article 24 of the American Convention states that all persons are equal before the law, and therefore are entitled, without discrimination, to equal protection of the law. Article 1 requires that state parties to the Convention “ensure all persons subject to their jurisdiction the free and full exercise of those rights [guaranteed by the Convention], without any discrimination on the basis of sex, or any other social classifications.” [FN285] In addition, the Convention provides that even during an emergency, state parties may not retreat from their obligations by taking measures that involve discrimination on the grounds of sex or social origin. [FN286] [FN287]

The breadth of these anti-discrimination provisions suggests that a battered woman can easily demonstrate that a state has violated her right to equality by failing to prosecute domestic violence cases. First, because the great majority of victims of domestic violence are women, a failure to prosecute acts of domestic violence constitutes de facto gender discrimination. Second, the Convention prohibits discrimination on the basis of “social origin,” or on the basis of “any other social condition.” Thus, if a state routinely gives greater protection to “public” acts of violence than to acts of domestic violence, the Convention’s provisions may be violated whether or not gender discrimination has been established. [FN288] [FN289]

In addition to the right of equality before the law, the American Convention guarantees the right to a fair trial. Article 8 defines “fair trial” as a hearing with due process guarantees conducted within a reasonable time by a competent, independent, and impartial tribunal. [FN290] The Convention also guarantees the right to judicial protection of one’s fundamental rights. Article 25 provides:

Everyone has the right to simple and prompt recourse, or any other effective recourse to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. [FN291] [FN292]

This right applies to criminal defendants as well as to anyone else seeking a determination of rights and obligations of any nature. [FN293] [FN294]

*559 4. Equality Before the Law Under the American Declaration

Like the American Convention, the American Declaration guarantees equal protection before the law.
While the United States is not a party to the Convention, gender bias in U.S. courts violates the Declaration’s equal protection provision. The United States, by permitting this bias, has violated its international legal obligations under the Declaration. Furthermore, article 2’s guarantee of equality before the law and its prohibition against discrimination are broadly worded. Thus, when “race, sex, . . . or any other factor,” leads to the failure to prosecute domestic violence, the United States has violated its international legal obligations under the Declaration.

The American Declaration also provides for a right to legal redress. In order to comply with the requirements of this right, the United States must guarantee that

[e]very person may resort to the courts to ensure respect for his [or her] legal rights. There should likewise be available a simple, brief procedure whereby the courts will protect him [or her] from acts of authority that, to his [or her] prejudice, violate any fundamental constitutional rights.

The Inter-American Commission on Human Rights has interpreted article 23 to provide the same right to judicial redress of fundamental human rights violations as is provided by the American Convention. In the Lopez Aurelli case, the Commission first interpreted the provisions of the American Convention to require Argentina to provide a fair trial and judicial redress for human rights violations for a man who was wrongfully imprisoned and tortured by the former military dictatorship. The Commission then used these norms to interpret Argentina’s duties under article 23 of the American Declaration, finding them to be practically the same as its duties to provide a fair trial and judicial redress of human rights violations under the American Convention. The Court’s holding suggests that the right to judicial redress under article 23 of the American Declaration would also apply to domestic violence cases, as it does under the American Convention.

RECOMMENDATIONS AND CONCLUSIONS

Women in the United States and Latin America are faced with an epidemic of domestic violence. National legal systems have not only failed to remedy this problem, they have contributed to it. Because domestic courts have proven largely unsympathetic to victims of such violence, international litigation is one of the most promising means for the realization of women's fundamental right to state protection from domestic violence. International litigation would increase public awareness of the severity of the domestic violence problem and of the corresponding gravity of a state's failure to meet its international legal obligations to protect women. International litigation would also increase pressure on many states to improve the national legal remedies available to victims. Finally, the redress of the international human rights violations endured by victims of domestic violence would pay homage to their suffering and human dignity. Women like Marta in Brazil, María Luisa in Chile, and the millions of U.S. women who have suffered death or physical and mental torture deserve the attention and respect of the international legal community.

Of the international fora available, the Inter-American system is the most promising for the litigation of domestic violence cases. Previous cases heard before the Inter-American Commission and Court have resulted in rulings that are favorable to victims and to other women attempting to enforce their rights. Battered women’s petitions before the Commission against state parties to the American Convention have a particularly strong chance of success. Other than the Inter-American system, only the Optional Protocol of the U.N. Covenant on Civil and Political Rights provides a viable litigation option. However, the Inter-American system provides a distinct advantage over the Optional Protocol in that the Inter-American Commission and Court tend to be more progressive in their decision making. Women in the Americas and their advocates should seek to develop international law in favor of women’s rights through litigation in the Inter-American system. One possible way to begin such litigation would be for an NGO to coordinate cases working in conjunction with local domestic advocacy groups.

In actions against states like Brazil and Chile, battered women can show that by failing to effectively investigate, prosecute, and punish domestic violence the state has violated its international legal obligations under the American Convention. Although the United States is not a party to the American Convention, battered women in
the United States have a right to litigate for redress of their injuries before the Commission under the American Declaration. The Declaration's norms relating to domestic violence are substantially similar to the Convention's norms. Therefore, domestic violence victims in the United States can establish state responsibility for violations of their fundamental human rights in the same manner as women living in states party to the American Convention.

The Inter-American Commission may recommend substantive remedies for the injuries of domestic violence victims, and possibly seek an Advisory Opinion from the Inter-American Court that would specify that the norms of the Convention and Declaration provide a right to state protection from domestic violence. The usual remedies recommended by the Commission are compensatory damages, punishment of the human rights violation, and reforms to ensure that the violation does not recur. The Commission's recommendations are enforceable through the threat of publication of a report showing a state's failure to remedy violations of women's fundamental human right to state protection from domestic violence.

The most important advantage of a finding of state responsibility for a victim's injury would be its value as precedent. Women's fundamental rights under international law have been viewed as lesser rights, and state tolerance of a world-wide epidemic of violence against women has been dismissed as a social and cultural problem. Once substantive legal remedies are realized, women's rights will be recognized as fundamental, non-derogable human rights. Although any attempt at litigation would do much to increase awareness of these issues, the Inter-American Human Rights Commission's recent history indicates that a petition for redress of women's fundamental right to state protection from domestic violence has a high probability of success.

[FNa1]. J.D., Washington College of Law, American University, 1993. This Article is based on a year's research generously supported by the Ford Foundation, including a summer's research in Chile, to study the strength of the Chilean women's movement. The author wishes to thank Professor Claudio Grossman, Director of the International Legal Studies Program of the Washington College of Law. Among the activists who supported this project, the author owes special thanks to the following people at the Washington College of Law: Professor Robert Vaughn, Dean of Students Ray Hazen, Professor Jamin Raskin, Professor Judith Winston, Professor Ann Shalleck, Professor Rick Wilson, and Professor Donna Sullivan. Thank you also to many friends and my editors and the staff of the Harvard International Law Journal. This project was inspired and made possible by Latin American women's rights activists. They are the power in the movement to realize women's rights to be free from violence.

[FN1]. In current terms of international law, “domestic violence” is defined to include acts of physical, mental, and sexual violence perpetrated against women that occur within the “family.” See General Recommendation No. 19, Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), 11th Sess., U.N. Doc. CEDAW/C/1992/L.1/Add. 15 (1992) [hereinafter General Recommendation No. 19]. For the purposes of this Article, the family includes marital, cohabiting, boyfriend-girlfriend, or blood relationships.

[FN2]. About 50% of women in the United States have been assaulted by their male partners at one point in their lives. A woman is more likely to be murdered by a male partner than a stranger. Four million women per year are severely assaulted by their male partners, and the problem has gotten worse in recent years. In addition, gender bias in the courts has led to a failure to prosecute domestic violence cases. The Violence Against Women Act of 1991: The Civil Rights Remedy: A National Call for Protection Against Violent Gender-Based Discrimination, S.Rep. No. 197, 102d Cong., 1st Sess. 37 (1991) [hereinafter Senate Report].

[FN3]. For a general discussion of this problem, see, e.g., Contraviolencia: Latino América, Fempress, Jan. 1990 (Chile); María Christina Vila, Violencia Familiar: Mujeres Golpeadas, 22 Opúsculos de Derecho Penal y Criminología 9 (1988) (Argentina); Gayne Villagómez, La Situación Jurídica de la Mujer, in Entre Los Limites y Las Rupturas 321, 324-29 (Centro de Planificación y Estudios Sociales ed., 1991) (Ecuador); Centro Dominicano de Asesoría e Investigaciones Legales, 2 Boletín CEDAIL 2-3 (1991) (Dominican Republic); M. Duarte Sánchez et al., Ayuda Breve y de Emergencia: Colectivo de Lucha Contra La Violencia Hacia Las Mujeres 27-29 (1992) (Mexico). In addition, the Women's Rights Project of the Human Rights Project has published three studies dealing with the...


[FN5]. See id. (discussing the nature of domestic violence in Costa Rica, the Dominican Republic, and Ecuador).

[FN6]. See id.

[FN7]. See id.


[FN9]. Id. at 18, § VI.A.2.

[FN10]. Id. at 18, § VI.A.4.


[FN12]. General Recommendation No. 19, supra note 1.


[FN17]. See Sonia Picado Sotela, La Mujer y Los Derechos Humanos 1-45 (1986) (Costa Rica) (a detailed history
of the development of women's rights under international law).

Prior to the 1970s, recognition of women's rights was scant. For instance, although early international accords dating from the 1920s spoke of women's rights, they did so only in general terms of political rights. Id. Likewise, the Universal Declaration of Human Rights, adopted in 1948, did not specifically include women's rights. Rather, women's rights were afforded protection generally by article 2, which entitled all people to the rights set forth in the Declaration without any distinction on the basis of sex (or other factors). This provision was included at the insistence of Eleanor Roosevelt and Latin American women, and was clearly intended to “address the problem of women's subordination.” Charlotte Bunch, Women's Rights as Human Rights, 12 Hum.Rts. Q. 486, 487 (1990) (citing B. Wiesen Cook, Eleanor Roosevelt and Human Rights, in Women and American Foreign Policy 98-118 (Edward Crapol ed., 1987)); G. Ashworth, Of Violence and Violation: Women and Human Rights, Change Thinkbook II (1986). Despite this effort, the struggle for the recognition of women's rights has been relegated to the area of “women's issues,” and viewed as less important than issues of violations of fundamental human rights that are seen as primarily effecting men. See Hillary Charlesworth et al., Feminist Approaches to International Law, 85 Am. J. Int'l L. 613 (1991); Andrew Byrnes, Women, Feminism and International Human Rights Law-Methodological Myopia, Fundamental Flaws or Meaningful Marginalization?, 12 Austl. Y.B. Int'l L. 205-40 (1992).

In addition, the anti-discrimination provisions of the U.N. Charter, the Declaration on the Elimination of all Forms of Discrimination Against Women, and similar provisions in universal human rights instruments are limited because they confine the area of women's rights to problems of discrimination between men and women only within the scope of the public realm, a traditionally “male” sphere of civil and political rights. International Law and World Order 698-99 (Burns Weston et al eds., 2d ed. 1986).

[FN18]. In 1985, the second U.N. conference held to review the progress of the Decade for Women, was convened in Nairobi, Kenya. This conference concluded that violence against women was a major barrier to achieving the Decade's goals of equality, peace, and development for women, and adopted concrete measures to combat domestic violence. The conference adopted a Forward-Looking Strategy calling for nations to take steps to end violence against women. These steps include providing judicial assistance to victims and adopting political and legislative measures to determine the cause of the violence, to impede it, and to eliminate it. This Strategy, along with several other such Strategies, was eventually adopted by the General Assembly. Although lacking an enforcement mechanism, it is the first international human rights instrument recognizing and attempting to remedy the serious and widespread problem of violence against women. SERNAM, Convención Sobre la Eliminación de Todas las Formas de Discriminación Contra la Mujer 23 (1991) (citing Nairobi Forward-Looking Strategies, paras. 3-5).


[FN20]. See General Recommendation No. 19, supra note 1. This Convention breaks the public/private distinction of human rights by refusing to restrict prohibited discrimination to those acts committed by or on behalf of governments.


[FN23]. Bunch, supra note 17, at 491.

[FN24]. See, e.g., Proyecto de Ley No. 10, at 4, República de Colombia, Gaceta del Congreso (Aug. 6, 1992) (amendments to the Colombian Constitution to prevent domestic violence justified in terms of international human rights law for women); Mujer, Violencia y Legislación, 2 Boletín CEDAIL 2-3 (1991) (violence against women violates various international human rights conventions, the Dominican government is obliged to comply with them,
and “women must demand from the legislative and judicial systems and from these systems’ servants, attention to our problems”); Villagómez, supra note 3, at 321 (arguing for changes in the penal system to prosecute domestic violence); Legislative Message Introducing the Chilean Inter-Family Violence Act, Mensaje, Boletín No. 157-07, 221-23 (1991) (on file with the Harvard International Law Journal [hereinafter Legislative Message] (naming seven international instruments that require the enactment of legislation to combat domestic violence). See also Critical Path, Preliminary Draft Inter-American Convention to Prevent, Punish and Eradicate Violence Against Women, 26th Assembly, Item 5, OEA/ser.L/II.26, CIM/doc.54/92 (1992); Soledad Larraín, Mujer y Derechos Humanos, 3 Temas Socialistas 119, 129 (1986); The Women's Movement in Latin America: Feminism and the Transition to Democracy (Jane S. Jaquette ed., 1989) [hereinafter The Women’s Movement in Latin America]; María Elena Valenzuela, The Evolving Roles of Women Under Military Rule, in The Struggle for Democracy in Chile 161-87 (Paul Drake & Ivan Jaksi eds., 1991).


[FN27]. See infra notes 252-283 and accompanying text.

[FN28]. See infra notes 37-77 and accompanying text.

[FN29]. The CEDAW Declaration interprets article 1 of the Women's Convention, the article defining discrimination, as including “gender based violence-that is violence which is directed against a woman because she is a woman or which affects women disproportionately.” General Recommendation No. 19, supra note 1.


[FN31]. General Recommendation No. 19, supra note 1, para. 10.


[FN33]. See International Covenant on Civil and Political Rights, supra note 30, art. 2 (right to effective redress for violations of the rights guaranteed by the Covenant); American Convention, supra note 25, art. 8 (right to a fair trial), art. 25 (right to effective judicial redress of human rights violations).


[FN35]. Cecilia Moltedo, Estudio Sobre Violencia Domestica en Mujeres Pobladoras Chilenas (1988) (majority of battered women interviewed said that they wanted better legal redress; they also made specific suggestions). Battered women's suggestions for reforms of the Chilean legal system are incorporated into the provisions of the pending Chilean Inter-Family Violence Act. Interview with Cecilia Moltedo (July 31, 1991); Interview with Adriana

[FN36]. See, e.g., The Women's Movement in Latin America, supra note 24 (discussing Latin American women's political strength and ability to win substantive changes for women's rights); See also Regional Network Against Domestic and Sexual Violence Expanded, 1 Women's Health J. 20 (1991) (ending violence against women as a primary focus of the women's rights movement); Nancy de la Fuente, La Evolución de los Derechos de la Mujer en los Sistemas Jurídicos (1991); Nancy de la Fuente, Law Faculty of the University of Zaragosa, Chile, 1990-1991, Mujer y Poder Judicial (unpublished manuscripts, on file with the Harvard International Law Journal) (reporting legal reforms for women's rights in seven Latin American nations, and advocating further change).


[FN38]. For example, not one of the 2000 domestic violence cases registered in Rio de Janeiro in 1990 ended in prosecution. In the northeastern state of Maranho, over 4000 cases of physical and sexual assaults were registered, but only 300 were forwarded for processing and only two resulted in the punishment of the accused. Criminal Injustice, supra note 3.

[FN39]. Id. at 48.

[FN40]. See id. at 14-15.


[FN43]. For information on this general conclusion, see Guillermo Adriásola, El Problema de Violencia Interfamiliar, Magnitud y Naturaleza, Address at the Colegio de Abogados de Chile y Consejo Nacional de Orientación Familiar (July 13, 1988) reprinted in Symposium on Interfamily Violence (1988); Soledad Larraín, Apuntas, in Police Training Materials 2-3 (1990-1991) (Chile) (annotations of facts and statistics); Interview with María Elena Valenzuela, Assistant Minister and co-founder of Chile's National Ministry for Women (SERNAM) (July 2, 1991). For statistical evidence, see Bustos, supra note 42 (one in three women attended to by the medical-legal community sought assistance because of domestic violence); Molledo, supra note 35 (80% of poor Chilean women in seven cities had experienced domestic violence); Ximena Ahumada & Ruth Álvarez, Estudio de Caso Sobre la Situación de la Violencia Conyugal en Chile 5, 7 (1987) (69%-80% of women receiving services at health care agencies in Santiago were victims of domestic violence). Although statistical research has focused on the poor, evidence suggests a widespread problem of domestic violence in the upper classes of Chile as well. Latin American and Caribbean Women's Health Network, Battered from the Beginning, 1 Women's Health J. 20 (1991) (citing a study by Ximena Ahumada, Ruth Álvarez, and Ana Maria Gutierrez of 110 battered women from the upper and middle classes of Chile) [hereinafter Battered from the Beginning]; Interview with Ximena Ahumada, a coordinator of workshops and various other programs for domestic violence victims (July 29, 1991); Interview with Rodrigo Silva, a family law attorney with an upper-class clientele (July 31, 1991). Based on domestic violence cases reported to local police tribunals in Santiago, “domestic violence exists in more or less equal proportions in the upper, middle, and lower classes.” Adriásola, supra note 43, at 2-8, 32.

[FN44]. Molledo, supra note 35, at 37; Ahumada & Alávrez, supra note 43, at 3-14, 25 (study surveying all legal
actors and institutions charged with reporting and prosecuting domestic violence complaints, and finding that, across the board, each agency routinely failed to even report the cases they encountered). See also Code of Crim. Proc. (Chile), art. 84, no. 2, 5 (requiring all professionals to report cases of physical assault that come to their attention in their professional capacity to the criminal tribunals, who would then proceed with prosecution).

[FN45]. Moltedo, supra note 35, at 37-38. For example, a woman named María Luisa filed half a dozen complaints with the police. Although she showed clear signs of physical injury, none of her original complaints resulted in the prosecution of a criminal charge against her husband. When her complaint was finally investigated and prosecuted, the court found her husband guilty of only a misdemeanor, merely requiring payment of a small fine. Subsequently, María Luisa's husband returned home and continued beating her, eventually leaving her paralyzed. Only then did the police pursue a criminal charge against María Luisa's husband. A. Sabater, Mi Marido Va a Golpearme, La Revista Femenina de El Mercurio, May 27, 1986, at 8.

[FN46]. These agents are (1) either the police or the medical-legal officer charged with reporting domestic violence cases in Chile's hospitals and (2) the officials of the Instituto Médico-Legal. Ahumada & Alvárez, supra note 43, at 10-14.


[FN48]. Also, imprisonment is rarely ordered as a sentence in grave cases. Nelly González, Criticas Paradigmaticas al Sistema Legal Chileno, Con Enphasis en la Problematica de la Mujer y el Derecho 23-24. (2d ed. 1990) [hereinafter González, Criticas Para-Digmaticas] (androcentric judicial norms related to a systematic failure to prosecute violence against women); Nelly González, Violencia Doméstica: Analisis Critico de Sentencias y Expedientes (1989) [hereinafter Gonzalez, Violencia Doméstica]; Penal Code (Chile), Book II, Title VIII, arts. 395-399, Book III, Title I, art. 49 (sentencing options limited by definitions of what constitutes a grave enough injury).

[FN49]. See González, Violencia Doméstica, supra note 48 (analysis specific to domestic violence, in the context of the paternalism of the Chilean legal system); González, Criticas Paradigmaticas, supra note 48.

[FN50]. Sandra González & Maria Isabel Norero, Los Derechos de la Mujer en las Leges Chilenas 26 (1990). According to González and Norero, the following changes in Chilean law would be necessary to achieve compliance with Chile's international legal obligations under the Women's Convention:
- a new definition of matrimonial and family law
- plenary judicial capacity for married women
- equality of rights and obligations with respect to children
- legislation on divorce and regulations on the act of separation
- the legal ability for women to exercise parental responsibility
- prevention and effective sanctions of domestic violence
- in general, the annulment of all discriminatory laws, and, at the very least, the annulment of all unconstitutional laws.

Id. (emphasis added).

[FN51]. Cf. Nueva Ley de la Mujer (Ley No. 18.802, Registro No. 70.353) (1991) (making several reforms in the
civil law system in favor of women's rights).

[FN52]. González & Norero, supra note 50, at 122 (men can divorce if their wives commit one act of adultery, whereas women can divorce only for repeated and “scandalous” acts on the part of their husbands).

[FN53]. Id. at 128-29.


[FN55]. Moltedo, supra note 35, at 37-38. Following the Chilean penal code, most domestic violence cases fall under the category of “light injury” cases. The relevant Chilean legislation follows a “14-day rule.”. Under this rule, if a domestic violence assault does not result in hospitalization or loss of work for more than 14 days, it is only a misdemeanor and does not result in any criminal sentence. See Penal Code (Chile), Book II, Title VIII, arts. 395-399, Book III, Title I, art. 49. This legislative limitation results in the great majority of domestic violence assaults being classified as minor crimes that are only punished with a small fine of about U.S. $18.00 or less. Id. art. 494; Interview with Julia Paulina Correa, (July 23, 1991); Interview with Adriana Muñoz (Aug. 6, 1991). The batterer in these cases remains free to return home.

[FN56]. Bustos, supra note 42, at 8-13 (violence escalated after complaints made). Moltedo, supra note 35, at 37-38 (the two most important reasons for not using the legal system are police tolerance of domestic violence and the legal system's inaction with respect to battered women's complaints).

[FN57]. Interviews with Claudio Díaz (July 8 and July 15, 1991).

[FN58]. Of 20 Chilean legal experts interviewed, 19 stated that the lack of “typification” of domestic violence as a crime is one of the main reasons that domestic violence is not prosecuted in the Chilean legal system. Interviews with Isabel Letalier, Women's Rights and Human Rights Activist, Mujeres Ahora (June 1 and July 30, 1991); Interview with Viviana Erazo, Assistant Director and co-founder, Fempress (June 14, 1991); Interview with Nelly González, Director, Oficina de la Mujer (June 28, 1991); Interviews with Judge Nancy de la Fuente, Professor of Law and founder, Asociación de Jueces Mujeres (June 24, June 25 and July 2, 1991).

Only one expert interviewed, Judge Alberto Chiagneau, felt that the failure to prosecute domestic violence could be solved by judicial activism without legislative reforms. Interview with Dr. Alberto Chiagneau, Appellate Court Judge and Professor of Procedural Law (July 8, 1991). In addition, the President of the Chilean Bar Association believes that current assault statutes provide an effective means of prosecution, and that “only societal organizations” can resolve the domestic violence problem. Heriberto Benquis, Remarks at the Colegio de Abogados de Chile y Consejo de Orientacion Familiar (July 13, 1988), reprinted in Symposium on Interfamily Violence 23-27 (1988).

[FN59]. Chilean Inter-Family Violence Act, arts. 1, 13-14 (domestic violence would be codified as a crime and prosecution mandated), arts. 6-12 (new sentencing plan and judicial monitoring of the case to prevent repeat violence), art. 6 (protection of the victim would become a paramount principle that must be followed by judges and other legal actors) (draft on file with the Harvard International Law Journal).

[FN60]. See Legislative Message, supra note 24, paras. 1.1-1.6.

[FN61]. Telephone Interview with María Elena Valenzuela, Assistant Director and co-founder of the Chilean National Ministry for Women, the executive agency that drafted the Inter-Family Violence Act (Feb. 8, 1993).
“Epidemic” is the term used by Senator Joseph Biden, Chair of the Senate Judiciary Committee and a sponsor of the Violence Against Women Act. Senate Report, supra note 2, at 34-37. Senator Biden also commented as follows:

Every 15 seconds, a woman is battered . . . . Last year, more women were beaten than were married . . . . [A]s figures have skyrocketed, our attention has waned . . . . Our society has, up until now, chosen not to appreciate the significance of these figures. We have systematically underestimated the problem, in seriousness, in scope, and intensity.

Between 1983 and 1987, domestic violence shelters reported a more than 100% increase in women taking refuge, and one million battered women were turned away because the shelters were full. Susan Faludi, Backlash xvi, 360 (1991). In the last decade, almost half of all homeless women were refugees of domestic violence. Id.

For example, a Kansas City, Missouri study of homicides between domestic partners showed that police had received domestic violence complaints and visited the homes of victims five or more times before the victim's death occurred. Similarly, in 50% of the murders of domestic partners in Newport News, Virginia, police had previously been alerted to the existence of domestic violence problems. Senate Report, supra note 2, at 34-37.

In one case in Georgia, a woman was killed by her estranged husband after filing numerous domestic violence complaints with the local police. The judge who had dismissed earlier cases against her husband reportedly “mocked,” “humiliated,” and “ridiculed” the victim and “led the courtroom in laughter as the woman left.” Supreme Court of Georgia, Report on Gender Bias in the Judicial System 235 (1991). See also Lauren McFarlane, Domestic Violence Victims v. Municipalities: Who Pays When the Police Will Not Respond? 41 Case W. Res.L.Rev. 929 (1991) (showing evidence of bias against domestic violence claims and a resultant high risk of serious assault, rape, or murder). Cases alleging discriminatory police practices with respect to domestic violence assaults have met with mixed results in the courts. Some victims have been awarded monetary damages for their injuries, while others have failed because courts have subjected the claims they presented to a less generous interpretation of the due process or equal protection clauses. Sex discrimination claims have resulted in similarly mixed results, but are generally hard to win because it is exceedingly difficult to make a showing of gender-based discriminatory intent. C. Hathaway, Gender Based Discrimination in Police Recluctance to Respond to Domestic Violence Assault Complaints, 75 Geo. L.J. 667, 685 (1986).

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See id.

[FN71] Criminal Injustice, supra note 3, at 50; see also McFarlane, supra note 64, at nn. 2-18.


[FN74] Id.

[FN75] Id. at 366 (citing the Velásquez Rodríguez case).

[FN76] General Recommendation No. 19, supra note 1, para. 10.

[FN77] Byrnes, supra note 17, at 205. Byrnes suggests that these types of obligations and the concurrent remedies have parallels in the obligations of the Convention to Eliminate all Forms of Racial Discrimination and the Women's Convention. See id.

[FN78] See, e.g., American Convention, supra note 25, art. 46(1)(a).

[FN79] See, e.g., Fin. v. Gr. Brit., 3 U.N.R.I.A.A. 1479 (1934). Guide to International Human Rights Practice, supra note 70, at 113 (collective cases based on violations of the same right(s), showing a large number of violations, may support an argument that domestic legislation or practice of the state does not afford due process or adequate remedies for the protection of the rights concerned).


[FN81] American Convention, supra note 25, art. 46(2).

[FN82] See also supra notes 37-40, 41-55, 62-69 for a description of gender bias in Brazil, Chile, and the United States.


[FN84] Id. (preliminary objections, judgment of June 26, 1987). The victim's family filed a petition with Commission shortly after his disappearance. They filed several criminal complaints and unsuccessful petitions for habeas corpus. Evidence showed that, in general, although domestic remedies were written into Honduran law, these domestic remedies were ineffective, irresponsible to human rights issues, and insufficiently protective in situations involving personal danger. The Court therefore held that the petition was admissible, and that the full exhaustion of “available” domestic remedies was not required. The Court also ruled that the burden of proving that domestic remedies were effective was on the responding state. Id. See Trooboff & Witten, at 362-64.


[FN87]. McFarlane, supra note 64. In one case, Tracey Thurman was awarded $2 million in a liability suit against the Torrington, Connecticut police who had refused to accept her complaints and later, after responding to a call for help and arriving at her house, saw her ex-husband throw a bloodied knife to the ground, and stood by watching as his continued beating caused paralysis. 20/20: Battered Women (ABC television broadcast, Sept. 17, 1991) (transcript available from Journal Graphics).

[FN88]. McFarlane, supra note 64.


[FN90]. Id. For example, until recently in Maryland, a couple must have been married or have had a child in common in order for the courts to have had authority to issue a civil protection order to protect a woman from a violent partner. In 1991, five battered women were killed after seeking assistance from the legal system. Two women who were eligible for civil protection orders received very little protection, and three other women were considered ineligible for protection under Maryland law. Retha Hill, Violence Against Women, Wash. Post, Feb. 10, 1992, at D1.

[FN91]. General Recommendation No. 19, supra note 1, para. 10.

[FN92]. Id. para. 8. According to the Recommendation, gender-based violence also violates the right to equal protection of humanitarian norms in time of international or internal armed conflict, the right to equality in the family, the right to the highest standard of physical and mental health, and the right to just and favorable conditions of work. Id.

[FN93]. The Convention was designed to expand women's rights under international law, with the ultimate goal of eliminating all forms of discrimination. Clearly, the Convention extends into the “private” sphere of “family life” and requires far-reaching institutional changes to end gender-based discrimination. “Since the preamble to the Convention points to the ineffectiveness of preexisting human rights conventions to relieve women's inequality, it is evident that the Women's Convention intends to step further than others, notably in penetrating the private spheres of personal and family life.” Rebecca J. Cook, Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women, 30 Va. J. Int'l L. 643, 706-07 (1990) [hereinafter Cook, Reservation] (footnote omitted).

[FN94]. See General Recommendation No. 19, supra note 1, paras. 9, 10. Paragraph 10 emphasizes that articles 2(e), 2(f), and 5 of the Convention are clearly “not restricted to actions by or on behalf of Governments.”

[FN95]. Because the Women's Convention requires governments to take all actions necessary to eliminate prohibited forms of discrimination, “the kind of measures to be taken [to eliminate gender based violence] are not restricted to the matters covered by specific articles of the Convention.” Id. para. 12 (citing Women's Convention, supra note 19, arts. 2, 3).

[FN96]. Id. para. 12.

[FN97]. Professor Donna Sullivan (drafting attorney for General Recommendation No. 19), Gender, Cultural

[FN98]. See Women's Convention, supra note 19. General Recommendation No. 19 urges:

2. That states report on all forms of gender based violence, and that such reports include all available data about the incidence of each form of violence, and about the effects of such violence on the women who are victims.

3. That states' reports include information about the legal, preventive and protective measures which have been taken to overcome violence against women, and on the effectiveness of such measures.

General Recommendation No. 19, supra note 1.

[FN99]. See, e.g., the CEDAW's report condemning the Australian Supreme Court's holding that rape of a prostitute is less reprehensible than other rapes. Australia: Supreme Court Versus CEDAW, Ms., May-June 1992, at 10. Because of the CEDAW's lack of institutional remedies and power in the past, the CEDAW has had difficulty collecting the reports that the Women's Convention requires states to submit. Bunch, supra note 17, at 496.

[FN100]. Advancement of Women: Convention on the Elimination of All Forms of Discrimination Against Women, Third Committee, 47th Sess., A/C.3/47/L.22 (1992) (resolution sponsored by Australia, Austria, Bangladesh, Barbados, Canada, Chile, China, Czechoslovakia, Denmark, Estonia, Ethiopia, Finland, France, Germany, Iceland, Indonesia, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Spain, Sweden and Ukraine). Eight states also sponsored a Resolution on Violence Against Women Migrant Workers, expressing concern over the particular vulnerability of this category of women to violence, urging all states to adopt appropriate measures to provide relevant support services and resources to these women, and calling upon the relevant agencies of the United Nations to recommend further measures to ensure the special protection of these women from violence. Advancement of Women: Violence Against Women Migrant Workers, Third Committee, 47th Sess., A/C.3/47/L.24 (1992) (resolution sponsored by Chile, China, France, Indonesia, Nicaragua, Philippines, Russian Federation, and Thailand).

[FN101]. Charlesworth, supra note 17, at 633-34 (because the Women's Convention and its enforcement body, the CEDAW, are "premised on the notion of progress through good will," the level of compliance with the Convention's norms will depend on the level of international community's tolerance for departures from those norms).

[FN102]. See General Recommendation No. 19, supra note 1.


[FN105]. Id.


[FN107]. Id.


[FN110], Id. See also Cook, Reservations, supra note 93.

[FN111], See infra notes 151-158, (U.S. legal obligations under customary international human rights law).

[FN112], Violence Against Women Report, supra note 103, § II.B.1, at 11.

[FN113], Id. § II.B.4, at 13.

[FN114], Id. § II.B.2, at 11-12.

[FN115], Id. § II.B.6, at 14.

[FN116], These protocols include: (1) a substantive Optional Protocol, which would fully define violence against women as a human rights violation but not create any new procedural enforcement mechanisms; (2) a procedural protocol that would provide for individual complaints about violations of the norms of the Women's Convention; and (3) a mixed substantive/procedural protocol that would crystallize existing norms and create a new individual complaints procedure. Violence Against Women Report, supra note 103, § II.B.5, at 13-14. Clearly the second or third options would provide superior types of enforcement mechanisms, because they provide for the capacity to enforce individuals' human rights and because the procedures they adopt are the most immune from political considerations. See, e.g., Richard B. Bilder, An Overview of International Human Rights Law, in Guide to International Human Rights Practice 3, 13-15 (Hurst Hannum ed., 1984). However, the Expert Group Meeting on Violence Against Women has already endorsed another option altogether. It concluded that a U.N. General Assembly Declaration on Violence Against Women is “an effective way to proceed in the short-term to crystallize an international norm on the prohibition of violence against women.” Violence Against Women Report, supra note 103, § II.B.7, at 14.

[FN117], Interview with Donna Sullivan, supra note 104.

[FN118], See Cook, Reservations, supra note 93, at 644.


[FN120], Id. para. 7.


[FN122], Id. para. 4(c)(6). The language of this proposed provision was supported by all of the governments who submitted comments and replies to the Preliminary Draft, except the United States and Brazil. See infra note 123.

[FN123], See Observations Received from Governments on the Preliminary Draft Suggested Text of an Inter-

[FN124]. See infra notes 235-249.


[FN126]. Preliminary Draft, supra note 121, art. 7(a).

[FN127]. Id. art. 7(b).

[FN128]. Id. art. 7(d).

[FN129]. Id. art. 7(e).

[FN130]. Id. art. 7(f).

[FN131]. Id. art. 7(g).

[FN132]. Id. art. 7(h).

[FN133]. Id. art. 7(i). The original Preliminary Draft provision to “ensure” women’s economic and social rights will probably be modified to a provision expressing the obligation to progressively achieve equality in this area. See Observations Received from Governments, supra note 123.

[FN134]. See Observations Received from Governments, supra note 123.

[FN135]. With respect to article 7(e), the provision requiring education programs to eliminate sexism, the United States noted “the limited role governments have, and should have, in modifying social and cultural patterns of conduct.” Reply of the Government of the United States, supra note 125, at 10. On the Draft Convention’s broad definition of prohibited violence against women, which includes the direct or indirect infliction of physical, sexual, or mental suffering, through deceit, seduction, threat, coercion, or any other means, the United States commented that it is “far too broad and vague to be either practical or enforceable. It would cover a myriad of daily human interactions, most of which would not normally be considered by either a woman or a government to be ‘violence’.” Id. at 5.

[FN136]. See Observations Received from Governments, supra note 123.

[FN137]. The State Department’s latest Country Reports on Human Rights Practices contains discussions of domestic violence in many states. One report on Cuba states that
anecdotal evidence from human rights groups and other sources indicates that domestic violence such as wife beating is a problem, but the lack of statistical data makes it impossible to gauge its extent. Due to cultural traditions, victims of mistreatment are reluctant to file a report or press charges, so instances are probably underreported.

U.S. Dep't of State, supra note 22, at 581. In discussing the Dominican Republic, the U.S. State Department reports say that “[d]iscrimination based on sex and race is prohibited by law. Nonetheless, women traditionally have not shared equal social and economic status or opportunity with men. Thus, this inequality is not rooted in the legal system; in fact, women are guaranteed equal protection under the law.” Id. at 593. But see also supra text accompanying note 3. Concerning Ecuador, the State Department reported the views of the Ecuadorian Women's Liberation Movement that “in practice, ‘culture, ideology, tradition and myth’ continue to inhibit achievement of full equality for women.” U.S. Dep't of State, supra note 22, at 605. Furthermore, the State Department blames domestic violence in Ecuador on “the latino culture,” which suppresses the existence and successes of a strong Ecuadorian women's movement, and discourages legal reforms to combat domestic violence. It reported that “[a]lthough violence against women, including within marriage, is prohibited by law, it is still a common practice.” Villagómez, supra note 3, at 324-25. Ecuadorian feminists report that current assault statutes completely fail to protect women from domestic violence assaults, but they also note a ten-year history of significant gains by the Ecuadorian women's movement. Id. at 321, 324-25.

[FN138]. Conclusions and Recommendations of the Inter-American Consultation on Women and Violence, supra note 8; Preliminary Draft, supra note 121, art. 11.

[FN139]. Preliminary Draft, supra note 121, art. 10.

[FN140]. Id. art. 11.

[FN141]. Id. art. 13.

[FN142]. Id. arts. 14-16. See also Observations Received from Governments, supra note 123 (while these provisions are heavily debated, most governments agree with their inclusion and support the need for a strong enforcement mechanism).

[FN143]. The Preliminary Draft would only require the ratification of the Convention by two states for the treaty to enter into force. Preliminary Draft, supra note 121, art. 26.

[FN144]. Id. art. 18.

[FN145]. See infra notes 214-218; see also notes 290-291.

[FN146]. For example, the proposed Convention on the Prevention, Punishment and Eradication of Violence Against Women imposes a state duty to take all appropriate measures to modify sexist social and cultural patterns, including the adoption of educational programs at every level, and it imposes a state duty to encourage media campaigns to eradicate violence against women. See Preliminary Draft, supra note 121, arts. 6-7.


[FN150]. The relationship of international law to “municipal law” can be very complex because “States differ as to whether their courts are required or permitted by domestic law, to give effect to the State's international legal obligations.” Henkin et al., supra note 70, at 140. For example, in 1966, the member states of the European Community (EC) treated the relationship between international legal obligations and municipal law differently. The Constitution of the Netherlands gives EC law (and other international law) precedence over all other domestic laws. West Germany and Italy, on the other hand, do not give EC law precedence over municipal law. Id. at 141-44; see also id. at 144-81 (on the relation of international law to municipal law in the United States). Self-executing treaties, either because they codify fundamental human rights norms, or because their specific ratification terms so provide, automatically trump most internal laws once they are signed. See id., at 408-13 (consent to be bound to a treaty) 966-1001, 1019-22 (obligations flowing from customary international human rights law).

[FN151]. Note, however, that under international law, a state's derogation from a treaty will not be excused based on conflicts with domestic law.

[FN152]. The Paquete Habana, 175 U.S. 677, 700 (1900). For example, in Garcia-Mir v. Meese, the U.S. Court of Appeals for the Eleventh Circuit held that customary international law did not supply the rule of decision because the Attorney General's order terminating a status review plan for aliens was a controlling executive act. Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir.1986).


[FN154]. See, e.g., Rebecca Cook, International Human Rights Law Concerning Women: Case Notes and Comments, 23 Vand. J. Transnat'l L. 779 (1990) [hereinafter Cook, International Human Rights] (surveying the field of litigation of women's rights under international law); Restatement, supra note 37, § 131 (U.S. courts bound to give effect to customary international law); id. § 701 reporters note (U.S. courts have increasingly enforced customary international law in the area of human rights).

[FN155]. See Restatement, supra note 37, § 702.

[FN156]. See id.; Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir.1980).

[FN157]. Id.; see also Judith E. Guertin, Customary International Law and Women's Rights: The Equal Rights Amendment As a Fait Accompli, 121 Det.C.L.Rev. 138 (1987)

[FN158]. The Violence Against Women Act, with the requirements of the Women's Convention as interpreted by CEDAW's General Recommendation No. 19, supra note 1, does not “take all legal measures which are necessary to provide effective protection of women against gender based violence,” as the CEDAW recommends. See Senate Report, supra note 2.

[FN159]. Cook, Reservations, supra note 93.


[FN162]. Id. at 816-17 (citing Australian Conciliation and Arbitration Commission, Austl. & N.Z. Eq.Opp.Rep. EOC (CCH) 77,124-27 (1988)).


[FN164]. See supra note 85 and accompanying text.

[FN165]. Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir.1980) (Filártiga was brought under the Alien Tort Claims Act, which provides that aliens can bring suit in U.S. courts for violations of international law.). See also Steven M. Schneebaum, The Enforceability of Customary Norms of Public International Law, 8 Brook. J. Int'l L. 289 (1982).

[FN166]. Filártiga, 630 F.2d at 876.

[FN167]. See Lillich, Domestic Courts, supra note 149, at 868.

[FN168]. Id. at 872 (noting concerns about the probable uneven development of international norms using this strategy).

[FN169]. Article 1 of the Women's Convention defines “discrimination against women” as any distinction, exclusion or restriction made on the basis of sex, which has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Women's Convention, supra note 19, art. 1 (emphasis added).

[FN170]. Id. art. 15(1).

[FN171]. Id. art. 2.

[FN172]. Id. art. 3.

[FN173]. See Legislative Message, supra note 24. In Chile, the ratification of the Women's Convention has led to the acknowledgement that international human rights norms require legislative reforms to protect women from domestic violence. See interviews with Chilean legal experts and women's rights activists, supra note 58.

[FN174]. Criminal Injustice, supra note 3, at 69.

[FN175]. Id.

[FN177] See supra text accompanying note 96.


[FN179] U.S. Dep't of State, supra note 22, at 1697-98 (1991). Chile ratified the Convention on December 9, 1989. SERNAM, supra note 18. The United States has signed, but not ratified, the Women's Convention. In 1991, the United States House of Representatives urged President Bush to complete the executive branch review of the Women's Convention so that the Senate could proceed with its consent and ratification of the Convention.


[FN182] Id.

[FN183] Shelton, supra note 181, at 71.

[FN184] International Covenant on Civil and Political Rights, supra note 30, art. 3.

[FN185] Id. art. 14.

[FN186] Id. art. 2(1).

[FN187] Id. art. 4(1).

[FN188] Optional Protocol, supra note 180, art. 1. See also Shelton, supra note 181, at 59, 68.

[FN189] See, e.g., Criminal Injustice, supra note 3, at 6 (stating that Brazil's failure to prosecute violence against women is a violation of article 3 of the Covenant, which provides for “the equal right of men and women to the enjoyment of all civil and political rights,” and article 26, which provides that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law”).


[FN196], Id. para. 53.

[FN197], American Convention, supra note 25.


[FN199], Newman & Weissbrodt, supra note 109. Thus, although women in the United States may not petition the Convention because the United States has not yet ratified it, they may do so under the American Declaration.

[FN200], American Convention, supra note 25, art. 44. See also Regulations of the Inter-American Commission on Human Rights, supra note 198, art. 19.

[FN201], The burden of proof on the exhaustion of domestic remedies rests with the state whenever the petitioner contends that she cannot conclusively establish that domestic remedies have been exhausted. This rule applies even when the facts in the petition clearly show that domestic legal remedies have not been exhausted. Regulations of the Inter-American Commission on Human Rights, supra note 198, art. 37.

[FN202], American Convention, supra note 25, arts. 46(c), 47(d).

[FN203], Id. art. 47.

[FN204], Regulations of the Inter-American Commission on Human Rights, supra note 198, art. 26.

[FN205], Id. art. 48(1)(a). If the government does not respond, the Commission may ascertain whether the grounds for the petition still exist, and, if they do, the Commission may proceed based on the facts established by the petition alone. Id. art. 48(1)(b), (1)(d).

[FN206], Id. art. 48(e), (f). In the case of petitions alleging violations of the American Declaration, the Commission adopts a final decision at the end of the investigatory phase. The decision includes the Commission's opinion on whether or not the state violated the norms of the Declaration, and whatever recommendations the Commission deems fit to remedy the violation.

[FN207], Id. art. 48(f).

[FN208], Id. art. 49.
[FN209]. Id. art. 50.

[FN210]. Id. art. 61(2).

[FN211]. Id. arts. 61(1), 62. Only Costa Rica, Peru, Venezuela, Honduras, Ecuador, and Argentina have recognized the jurisdiction of the Court on all matters relating to the interpretation of the Convention. Henkin et al., supra note 70. See also Hector Gros Espiel, El Procedimiento Contencioso ante la Corte Interamericana de Derechos Humanos, in Inter-American Institute for Human Rights, La Corte Inter-Americana de Derechos Humanos 67-101 (1986)(citing paragraph 86 of the Inter-American Court's third advisory opinion, which makes the formal acceptance of the Court's jurisdiction an obligatory prerequisite to the Court's contentious jurisdiction).


[FN213]. American Convention, supra note 25, art. 63(1).

[FN214]. Id. art. 64(1). The Court has interpreted these provisions as empowering it to issue advisory opinions with respect to any treaty dealing with human rights that has relevance in the Americas. Other Treaties, Subject to the Jurisdiction of the Court, Advisory Opinion, OC-1/82, Inter-Am. C.H.R. (1982) (Advisory Opinion requested by Peru on the scope of Court's jurisdiction with respect to such "other treaties"). See also Thomas Buergenthal, The Inter-American Court of Human Rights, 76 Am. J. Int'l L. 231, 234 (1982).


[FN218]. American Convention, supra note 25, arts. 51, 52.

[FN219]. Id. art. 63(2).

[FN220]. Id.; See also Buergenthal, Advisory Practice, supra note 216.

Rodríguez case). Similarly, the Inter-American Commission on Human Rights has issued cautionary measures under article 29 of its Regulations in cases where it believes the person's life to be in danger. See, e.g., Resolution No. 10/81, Case 3105 Inter-Am. C.H.R., OEA/ser.L/V/II.52, doc. 20, rev. 1 (1981) (requesting the suspension of pending death penalty sentences and consideration of the abolition of the death penalty).

[FN222]. American Convention, supra note 25, art. 51(1).

[FN223]. The conclusions and recommendations must be adopted by a majority of the Commission. American Convention, supra note 25, art. 51(1).

[FN224]. Id. art. 51(2).

[FN225]. After a Resolution is issued, the state involved may request the Commission to reconsider its decision, and the Commission may then request the state to present observations on this request. Newman & Weissbrodt, supra note 109, at 287-88.

[FN226]. Id.

[FN227]. If advocates could show that a class of women suffered the same human rights violation as a result of state policy, judicial redress and compensation could theoretically be recommended for the entire class of victims. Although compensation is recommended for every violation, the amount is not specified. American Convention, supra note 25, art. 50; Cases 10003, 10103, 10151, 10211, 10227, 10333, 10257, 10284, 10323, 10399, 10447, 10571, 10111, 10112, 10113, 10121, 10518. Annual Report of the Inter-American Commission on Human Rights 85, 91, 97, 109, 120, 120, 129, 135, 140, 148, 151, 160, 168, 168, 170, 172, 186, OEA/ser.L/V/II.81, doc. 6, rev. 1 (1992). Advocates could urge the state's authorities to follow the compensation norms established by the Inter-American Court. American Convention, supra note 25, art. 63(1). According to these norms, redress for human rights violations can include monetary compensation for injuries suffered, as well as retribution and moral compensation for pain and suffering, which could include measures such as a public memorial honoring the victim. Compensation for surviving family members is generally limited to the lost earnings of the victim. The Commission can also recommend economic damages to compensate pain and suffering and to cover therapy costs and lost time at work or school due to the abuser's infliction of emotional distress on the victim and her non-battering family members. Claudio Grossman, lawyer for the victims in the Velásquez Rodríguez case and the Suriname case, Remarks at the Washington College of Law (Dec. 5, 1991).


[FN230]. Id.

[FN231]. See, e.g., the legislative reforms proposed by victims and their advocates in Chile and the United States, detailed in the Chilean Inter-Family Violence Act, supra note 59, and other legal and preventive measures recommended by the CEDAW. General Recommendation No. 19, supra note 1.

[FN233]. Id. The Convention does not require this ninety day deadline. The Commission's practice is probably borrowed from article 51's requirement that the Commission may only take further steps three months after making an article 50 decision and recommendations:

If, within a period of three months from the date of transmittal of the report of the Commission to the states concerned, the matter has not either been settled or submitted by the Commission or by the state concerned to the Court and its jurisdiction accepted, the Commission may, by the vote of an absolute majority of its members, set forth its opinion and conclusions concerning the question submitted for its consideration.

American Convention, supra note 25, art. 50. Therefore, specific but more reasonable longer-term deadlines could be established for the enactment of systematic reforms and educational measures. On the other hand, there is no reason that judicial investigation, prosecution, and punishment should not be compelled within 90 days.


[FN236]. Id.

[FN237]. In fact, the perpetrators of the forced disappearances were never identified, and the proof that the violation occurred rested on circumstantial evidence that a pattern of forced disappearances was apparent in Honduras at the time the victims “disappeared.” Trooboff & Witten, supra note 73, at 366. The Court also ruled that such circumstantial evidentiary proof was admissible in international human rights tribunals specifically because the issue at hand was state responsibility and not the responsibility of individuals. Id. at 365.

[FN238]. American Convention, supra note 25, art. 25.


[FN240]. In Lopez Aurelli the Inter-American Commission issued a recommendation in a case brought by an individual holding that the individual's rights had been violated by Argentina's failure to comply with due process requirements. Lopez Aurelli Case, Inter-Am. C.H.R., OEA/ser.L/V/II.79, doc. 12, rev. 1 (1991). This recommendation was issued pursuant to both the American Convention and the American Declaration.

[FN241]. See American Convention, supra note 25, art. 27(2). The phrase “such rights” in article 27 refers to specific rights that are non-derogable during states of emergency. These include the right to life and the right to humane treatment.


[FN244]. Id. at 32, para. 24.
[FN245]. Id. at 33, para. 24.

[FN246]. Id. at 35, para 29. This due process guarantee includes the right to a hearing within a reasonable time, by a competent, independent and impartial tribunal. American Convention, supra note 25, art. 8.

[FN247]. General Recommendation No. 19, supra note 1, § II, para. 1(a), (b). See also Byrnes, supra note 17.

[FN248]. See supra note 239 and accompanying text.

[FN249]. Goldman, supra note 239, at 10.

[FN250]. Id. (citing paragraph 41 of the Commission's Official Report).

[FN251]. Interviews with Claudio Díaz, supra note 57 (victims can initiate criminal proceedings). See also Criminal Injustice, supra note 3.

[FN252]. American Convention, supra note 25, arts. 4(1), 27(2); American Declaration, supra note 26, art. 1(1).


[FN255]. See Restrictions to the Death Penalty, Advisory Opinion OC-3/83, supra note 215, at 47-59. For example, the right to life provisions of the American Convention could be used to counter the “honor defense” invoked by batterers to excuse murders committed in the context of domestic violence. See supra note 39 and accompanying text. In the United States, similar cases involving the inaction of the police and the courts could be litigated under the right to life provisions of the American Declaration. See supra notes 63-69.

[FN256]. General Recommendation No. 19, supra note 1, para. 8.

[FN257]. Restatement, supra note 37, § 702; Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir.1980).


[FN260]. Id.

[FN261]. International Covenant on Civil and Political Rights, supra note 30.

[FN262]. American Convention, supra note 25.

[FN264]. Id. Cf. Convention Against Torture, supra note 258, art. 1(1).


[FN266]. See also Report on the Results of the Meeting of Experts to Consider the Viability of an Inter-American Convention on Women and Violence, supra note 121.

[FN267]. See Senate Report, supra note 2.

[FN268]. Restatement, supra note 37, § 702.

[FN269]. Ireland v. United Kingdom, 23 Eur.Ct. H.R. (ser. B) at 3 (1976) (holding that several techniques of mental abuse, applied in combination during interrogations, did not amount to torture because “they did not occasion suffering of the particular intensity or cruelty implied by the word torture so understood”).


[FN271]. U.N. Commission on Human Rights; Preliminary Report by the Special Representative on the Human Rights Situation in the Islamic Republic of Iran, U.N. GAOR, U.N.Doc. E/CN.4/1985/20, at 13-19 (1985) (ruling that the prohibition against torture had reached the level of jus cogens, and that, as a fundamental freedom, it must be respected without distinction as to race, sex, language, or religion).


[FN273]. See supra notes 256-271.

[FN274]. American Convention, supra note 25, art. 5(1).

[FN275]. Id. art. 5(2).

[FN276]. American Declaration, supra note 26, preamble.

[FN277]. Id.

[FN278]. The relationship between the provisions in the American Convention and the American Declaration was addressed but not fully resolved by the Baby Boy case. Case 2141, Inter-Am. C.H.R. 25, OEA/ser.L/V/II.54, doc. 9, rev. 1 (1981). Even though the United States is not a party to the Convention, the petitioner's argument in that case was that the Convention's statement that life begins, “in general, from the moment of conception” should be used to interpret article 1’s right to life provision in the Declaration. The Commission did not reject this argument, but instead ruled that the Convention's provisions included the words “in general,” it was not intended to supersede the right to an abortion found in the constitutions of many O.A.S. states. The internal law of the United States also supports this interpretation of the American Declaration by guaranteeing freedom from torture and from other forms of cruel and inhumane treatment. See Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir.1980). The court stated:

In light of the universal condemnation of torture in numerous international agreements, and the
renunciation of torture as an instrument of official policy by virtually all nations of the world (in principle if not in practice), we find that an act of torture committed by a state official against one held in detention violates established norms of the international human rights law, and hence the law of nations.

Id. at 880. See also Restatement, supra note 37, § 702(d); Foreign Assistance Act of 1961, 22 U.S.C.A. §§ 2304, 502B(d)(1), 2151n, 116(a) (1990).

[FN279] Reply of the Government of the United States, supra note 125, at 8. The United States took this position despite the fact that it has not stated that domestic violence does not constitute torture and despite the fact that the United States government considers torture to be a violation of customary international human rights.

[FN280] Id. at 3.

[FN281] Id.

[FN282] Preliminary Draft, supra note 121, preamble (referencing the Universal Declaration, the Women's Convention, the American Convention, and the American Declaration).


[FN284] The Inter-American Court has interpreted article 1(1) of the American Convention to mean that "regardless of the form it may assume, any treatment that can be considered to be discriminatory with regard to the exercise of any of the rights guaranteed under the Convention is per se incompatible with that instrument." Advisory Opinion on the Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, supra note 195.

[FN285] American Convention, supra note 25, art. 27. The gender bias that exists in Brazil and Chile could be litigated as violations of equality before the law. See supra notes 38-40, 41-45, 49-55.

[FN286] The Inter-American system's anti-discrimination provisions are stronger than those of the U.N. Charter, which prohibits discrimination based on race, sex, language, or religion, but not any other status. U.N. Charter art. 1, para. 3.

[FN287] American Convention, supra note 25, art. 8.

[FN288] Id. art. 25.

[FN289] Id.


[FN291] Senate Report, supra note 2, at 43-44 (citing "overwhelming evidence" of gender bias in the courts, leaving victims without access to effective legal remedies).

[FN292] American Declaration, supra note 26, art. 23.

[FN293] Lopez Aurelli Case, Inter-Am. C.H.R., OEA/ser.L/VII.79, doc. 12, rev. 1 (1991). Argentina ratified the American Convention in 1984, but the victim's initial imprisonment and the government's failure to provide a fair trial had occurred prior to ratification when Argentina's international legal obligations were limited to those provided under the American Declaration. The Commission found that Argentina violated the right to a fair trial
under the American Declaration for those offenses. Id.

[FN294] Id.

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