

**A Theory of Domestic Violence in International Law**

**JSD Thesis**

**by**

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### Introduction

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## Introduction

And so it seemed  
As he came closer  
My final moment  
Wife's love over<sup>1</sup>

### 1. My Claim

This thesis is born of the question: why do women suffer domestic violence disproportionately to any other group? Why does it continue, in the same form, with the same degree of pain, without rebate? And, if the same harm occurs over and over again, consistent through generations and uniform across borders, why then has the international community not yet developed effective means to address it?

This thesis attempts to find a legal answer. This is prefaced, however, by the acknowledgement that the law is only one tool in an array of mechanisms, such as health, economics, and politics, which, if properly combined, could alleviate the pain and difficulties experienced by many victims of domestic violence.

The area of law to which I look is international human rights law. My initial motivation for considering public international law arose from the repetition of similar forms of domestic violence around the globe. All over the world women suffer the same type of violence at the hands of their intimate partners and they endure the same feelings of helplessness and isolation when looking to the state for protection. If such violence is universal, it seems then, so too should be the solution.

I propose in this thesis that international law, if properly fashioned, can be used effectively as part of this solution. In particular, I maintain that the authoritative enunciation of a norm against domestic violence in international law can improve the way states address domestic violence. I do not propose that individual abusers should be tried by international law. My focus instead is on the extent to which states fail consistently to alleviate domestic violence. This is important because many legal systems appreciate neither the exigency of extreme forms of domestic violence, nor the extent to which women as a group are disproportionately victims of this violence.<sup>2</sup>

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<sup>1</sup> Anon

<sup>2</sup> Acts of violence against women by male intimates has been documented literally throughout the world. Although reported statistics differ, some maintain that within a twelve month period as many as 50% of women around the world report being hit by their intimate partners. For a list of authorities indicating that domestic violence is perpetrated predominantly by men against women throughout the world see Annexure One hereto.

The result of this lack of appreciation is an almost universal failure to police, prevent and punish domestic violence effectively.<sup>3</sup> Due to the socialized normalcy of domestic violence, very few cases are reported or actually prosecuted. Where prosecutions do proceed, victims will often drop their complaints either because they have reconciled with, or because they fear recrimination from, their abuser.<sup>4</sup> Given the disjuncture between the reality of domestic violence and the inefficacy of many legal systems to address it, a revision of the law vis-à-vis domestic violence is needed. Both national and international legal systems are in need of change.

This thesis proposes that the international community should adopt a clear and authoritative articulation of a legal right against extreme and systemic forms of domestic violence and a corresponding duty of states to help remedy such violence. This proposition is made on the basis that international law currently does not contain an effective articulation of this right, and that adopting effective global standards in international law for addressing such violence would help improve state enforcement of this right.

Under the current state of international law, it is difficult to convince states to prioritize its resources and infrastructures to protect abused women. Articulating clear and effective global standards in international law for addressing extreme forms of domestic violence would provide an important and practical benchmark against which domestic state legislation could be evaluated and re-shaped. Formulating such global standards could place pressure on states to take basic remedial steps against such violence, such as enacting legislation that allows for restraining orders to be made at the same time as a maintenance order, or creating accessible shelters, which will accommodate the divergent needs of women, including their children.<sup>5</sup>

## 2. The Appropriateness of International Law to Address Domestic Violence

The movement to recognize domestic violence as a human rights violation is a recent development in international law. Five decades ago, after World War II, the persecution of women did not receive specific attention in the Nuremberg or Tokyo tribunals but, rather, was subsumed into the general horror of the crimes committed against Jews, ‘Gypsies,’ homosexuals, the disabled and other targeted groups. For the most part, violence against women was considered a private matter, perpetrated by individuals over whom the state had no authority.

However, over the last 50 years, evolutions in international law, combined with a truly remarkable struggle by the feminist movement, have changed the way human rights lawyers see violence against women. The principle of state sovereignty – the notion that what happens within the borders of a state remains its exclusive concern – also started to wane, and the community of

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<sup>3</sup> Carin Benninger-Budel, *Violence against Women: for the Protection and Promotion of the Human Rights of Women*, 10 Reports / Year 2000, 25 (2000) at 341-409 [hereinafter CARIN BENNINGER-BUDEL] (describing violence by men against female intimates whom states failed to assist). See also the information in Annexure One hereto.

<sup>4</sup> See for example, CARIN BENNINGER-BUDEL, *supra* note x, at 25 (“Traditional notions of womanhood and family [in Armenia] as well as fear of the perpetrator, often prevent women from reporting these crimes. The family is seen as a private area of life and therefore any violence that occurs in the family is kept private as well.”).

<sup>5</sup> The details of these steps are described in chapter two. See, for example, World Health Organization, *World Report on Violence and Health* 99 (2002) [hereinafter World Report on Violence and Health] (“...societies with the lowest levels of partner violence were those that had community sanctions against partner violence and those where abused women had access to sanctuary, either in the form of shelters or family support.”).

nations began holding states accountable for the way they treat their citizens. The core values of dignity, equality, physical integrity, and freedom from fear, were refined. International law began to recognize the peculiar way in which violence and sexism intersect, and how violence against women is used as a technique of subordination, a method of inculcating a culture of fear, and an instrument that impedes women's ability to flourish. As a result, previously lawful actions are now categorized as human rights violations, and, patterns of behavior, once condoned, are now condemned.

Three specific manifestations of violence against women provide good examples of actions which, today, receive specific condemnation in international law. These manifestations are the mass rape of women during war time ("mass rape"); the cutting of women's and girls' genitalia ("FGC"); and, the trafficking of women and children ("trafficking"). Based on the development of international law and the efforts of academics and activists, mass rape is now admonished as a particular crime against humanity and an unlawful instrument of war.<sup>6</sup> FGC and trafficking, while enjoying less mainstream and high profile admonishment, have also achieved international recognition, condemnation and regulation.<sup>7</sup>

Domestic violence is the fourth manifestation of violence against women developing in international law. This is not my view alone. There are many who maintain that domestic violence is prohibited by the same overarching principles of international law that apply to mass rape, FGC and trafficking. Innumerable reports are emerging, indicating that domestic violence is the most common form of violence perpetrated against women; that it is one of the major

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<sup>6</sup> See the Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. ROME STATUTE OF THE INT'L CRIM. COURT, art. 7, § 1, U.N. Doc. A/CONF.183/9, reprinted in 37 I.L.M. 999, 1004 (1998) [hereinafter Rome Statute]. The Rome Statute places an obligation on states and combating parties to refrain from and prevent "[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity." See also Prosecutor v. Akayesu, Case No. ICTR-96-4-T, 37 I.L.M. 1399 (1998) [hereinafter Prosecutor v. Akayesu] and Prosecutor v. Kunarac, Case Nos. IT-96-23-T & IT-96-23/1-T (ICTY, Feb. 22, 2001), paragraph 437 [hereinafter Prosecutor v. Kunarac]. See also article 8(2)(b)(xxii) of the Rome Statute (defining war crimes as, *inter alia*, "[c]ommitting rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions."); and, article 7(1)(g) of the Rome Statute (defining a crime against humanity as "acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack" including "[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity."

<sup>7</sup> Trafficking is prohibited in several instruments, including the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 96 U.N.T.S. 271, *entered into force* July 25, 1951 [hereinafter Trafficking Convention]; the U.N. Convention Against Transnational Organized Crime and two optional protocols on trafficking in persons and smuggling of migrants, GA Res. 55/25 (Nov. 15 2000) [hereinafter U.N. Convention Against Transnational Organized Crime]. For a brief discussion of this instrument see Sean D. Murphy, *International Trafficking in Persons, Especially Women and Children*, 95 AM. J. INT'L L. 407 (2001) [hereinafter Murphy, *International Trafficking in Persons*]. FEMALE GENITAL MUTILATION: A GUIDE TO LAWS & POLICIES WORLDWIDE, (Anika Rahman & Nahid Tubia eds., 2000) [hereinafter FEMALE GENITAL MUTILATION: A GUIDE TO LAWS & POLICIES]. FGC was prohibited specifically in article 2(a) of the Declaration on the Elimination of Violence against Women, G.A. res. 48/104, 48 U.N. GAOR Supp. (No. 49) at 217, U.N. Doc. A/48/49 (1993) [hereinafter DEVAW] (referencing female genital cutting in the definition of violence against women). *Id.* Report of the Special Rapporteur on violence against women, its causes and consequences, U.N. ESCOR, 52d Sess., U.N. Doc. E/CN.4/1996/53 (1996) [hereinafter Report of the Special Rapporteur on Violence against Women] (submitted by Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1995/85).

international health risks for women; and, that women suffer domestic violence more than any other group.<sup>8</sup>

However, there are also theorists, lawyers and activists who are not convinced. They agree that domestic violence is horrible, but propose that it is not of the same substance and gravitas as other human rights violations. The skeptic may balk at the comparison between the mass rape of thousands of women and the perception of one-off incidents of spousal abuse. The skeptic may ask also how domestic violence is different from other crimes in society which are not regulated by international law, such as common assault and battery. And, understandably, this skepticism is accompanied by an intuitive resistance that so private a phenomenon should be treated by so public a remedy.

In some respects the skeptic is correct. For example, there are differences between domestic violence and the war-time context of mass rape, which is accompanied by a breakdown in order; the power of organized crime which traffics women around the world; and, the longevity of the mental and physical disorders that result from FGC. However, as this thesis demonstrates, when one looks in detail at the harm suffered by women at the hands of extreme forms of domestic violence, the parallels between such violence and the associated lack of state protection, and with that associated with mass rape, FGC and trafficking, are disquieting. Each of these forms of harm is epidemic and, sadly, there has been a grand failure on the part of governments to meet the needs of these victims. International law is responding appropriately in respect of mass rape, FGC, and trafficking. I propose that it do the same in respect of domestic violence.

I argue that extreme forms of domestic violence qualify as human rights violations enforceable in international law because: the rights violated are fundamental and universal; the societal system of explicit and implicit gender discrimination in many states makes women particularly vulnerable to violence; and, while this vulnerability ought to trigger greater state assistance, instead of proactive protection, there is a flailing legal system, placid apologies, and, all too often, abandonment.

Moreover, in terms of sheer international scale, domestic violence is the most common form of violence perpetrated against women internationally; it is one of the greatest international health risks for women; and, it is inflicted on women more than any other group in society. This thesis proposes that these factors are sufficient to distinguish extreme cases of domestic violence from other social crimes, which are dealt with solely through national criminal laws. This reality necessitates the selection of extreme cases of domestic violence for identification, clarification and codification by international law.<sup>9</sup>

Finally, as regards the intimacy of the relationship between the victim and the violator, such intimacy is no reason for not using international law to address domestic violence. International law is not confined to addressing actions committed by state actors. International human rights law already requires governments to intervene in many private settings, including the private

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<sup>8</sup> See Report of the Special Rapporteur on violence against women, *supra* note, at \*. Radhika Coomaraswamy, the first Special Rapporteur for violence against women, maintains that all states have an international obligation to prevent domestic violence. See Annexure 1 hereto.

<sup>9</sup> This is the phraseology of Professor Harold Hongju Koh.



activities of its citizens in cases of labor practices, child abuse, religious intolerance and racial discrimination, and to protect its workers, children and religious and racial minorities from violence committed by other individuals and non-state actors.

The same imperatives should be placed on governments in respect of domestic violence. This thesis will show that, contrary to our expectations, local and state agencies are not taking appropriate measures to help protect against domestic violence or effectively to assist the victims of such violence. Therefore, as with other cases of epidemic violence, which consist in the violation of people's fundamental and universal rights, international law can, and should, be used to compel states to take basic legislative steps to help remedy such violence, to adopt applicable policies to enforce such legislation, and to assess continuously the efficacy of their domestic violence programs.

### 3. The Efficacy of International Human Rights Law

Even if one accepts that domestic violence is a violation of international proportions, justifying the intervention of international law, a number of new questions may arise for the skeptic.

First, the skeptic may be concerned that international law is a weak body of law, proving ineffective especially in the realm of human rights. One of the primary criticisms of international law, apart from those based on sovereign immunity, relates to its lack of enforcement capability. This thesis acknowledges that international human rights law lacks traditional enforcement mechanisms and has failed in many ways. However, even if the criticisms of international law are correct (which I do not reject *in toto*), setting legal standards at a global rather than a purely national level remains a prevalent practice. This is because enforcement by an international body is not the only way in which international law operates in national systems. The successful implementation of international human rights law can occur also through an informal, *ad hoc*, incorporation of international legal principles in judicial, legislative and non-governmental activities.

On this basis, this thesis proposes that articulating a clear and authoritative international legal right against extreme and systemic forms of domestic violence and creating a set of core minimum obligations required of states to uphold that right, would help bring real change to bear in favor of domestic violence victims. Such measures, for example, could enable non-governmental organization to challenge their governments in national courts. An individual or an organization or both (depending on the rules of the jurisdiction) could appeal to their courts to compel governments to meet their international legal obligations by adopting minimum legislative standards and/or improving the implementation of anti-domestic violence legislation through increased allocation of resources. Adoption of such standards could also facilitate applications for asylum for the more desperate of domestic violence victims.

Second, the skeptic may question how international law, so clearly driven by political agendas, could ever benefit abused women. While acutely aware of the political vicissitudes that drive international law, my objective is to delineate canonic standards that could be employed when the political climate is agreeable. Therefore, this thesis approaches international law on the

basis that international human rights law does not operate solely through international courts and enforcement agencies. International law works also through the conversion of norms and *mores* into legal statements, and the enunciation of such legal statements on a supra level, which filter down into government practices, non-governmental efforts and individual activity. In this way, international norms, once articulated, have the potential to infiltrate and improve the individual lives of women irrespective of the then current international political climate.<sup>10</sup>

Third, the skeptic may wonder, if there is evidence of domestic violence in international law already, what more needs to be done. This thesis proposes that current international legal standards are inadequate. While there are international treaties, which, through interpretation and extrapolation, can be said to prohibit domestic violence implicitly, such legal standards are at an inadequately general level of abstraction, as recognized by the subsequent condemnation of trafficking, mass rape, FGC, enforced disappearances and other forms of harm through more specific international standards.

In addition, while international instruments, such as U.N. declarations and statements by U.N. agencies, contain more direct prohibitions against domestic violence, such prohibitions do not articulate adequately a corresponding responsibility of states to take steps to remedy such violence, and are not as absolute and categorical as other condemnations of human rights violations in international law. The international community currently is in the process of articulating a new norm regarding domestic violence. However, this norm has not yet developed; it is in an embryonic state and requires maturation, both in substance and in authoritative endorsement.

Moreover, there is a tendency in international law to place women's rights within a category which exists apart from mainstream human rights.<sup>11</sup> This separation between women's and human rights would not be problematic if women's rights received the same attention as mainstream human rights. However, as Radhika Coomaraswamy, the former U.N. special rapporteur for violence against women, points out, there is a "refusal to accept the values in and of themselves: an ideological resistance to human rights for women."<sup>12</sup>

It has been argued that human rights are perceived as male rights and in order for women's rights to achieve a more general status, this perception must be debunked.<sup>13</sup> To this end, the terminology of international instruments and the priorities of the international community needs to change to be more inclusive of women. For these reasons, this thesis critiques the current

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<sup>10</sup> See Harold Hongju Koh, The 1998 Frankel Lecture: Bringing International Law Home, 35 HOUS. L. REV. 623, 626 (1998) [hereinafter Koh, *Bringing International Law Home*].

<sup>11</sup> See Hilary Charlesworth, Christine Chinkin and Shelly Wright, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991) [hereinafter *Feminist Approaches to International Law*] (arguing that women's rights in international law have been marginalized).

<sup>12</sup> Radhika Coomaraswamy, *Women, Ethnicity and the Discourse of Rights*, in HUMAN RIGHTS OF WOMEN NATIONAL AND INTERNATIONAL PERSPECTIVES 39, 40 (Rebecca J. Cook ed., 1994).

<sup>13</sup> See Elizabeth M. Schneider, *The Violence of Privacy*, in THE PUBLIC NATURE OF PRIVATE VIOLENCE THE DISCOVERY OF DOMESTIC ABUSE, 36 (Martha A. Fineman & Roxanne Mykitiuk eds., 1994) [hereinafter Schneider, *The Violence of Privacy*] and Celina Romany, *Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, 6 HARV. HUM. RTS. J. 87 (1993) [hereinafter Romany, *Women as Aliens*] (confirming the male-centric structure and application of international law).

international law on domestic violence and proposes ways in which the most private of violence requires a clearer and more effective public response.

Finally, the skeptic may ask whether all forms of domestic violence are appropriate for regulation at international law. My answer is no. The thesis does not propose that all forms of domestic violence should be addressed in international law. The term domestic violence encompasses a wide range of conduct, from a one-off slap to long-term systematic physical and psychological abuse. Rather, this thesis proposes that international law can, and should, be used only to address and mitigate forms of domestic violence that fall at the more serious and systemic end of the spectrum of violence, which I refer to as “systemic intimate violence.”

#### 4. The Meaning of Systemic Intimate Violence

This thesis revises the legal definition of domestic violence to reveal its true nature. It does not use the traditional terms ‘family violence,’ ‘domestic violence’ or ‘violence at home’ because a significant component of the harm emanates directly from the failure of states to provide appropriate resources and infrastructure to help remedy such violence, which is not evident in these labels. In addition, words such as ‘family’ or ‘domestic’ limit the violence spatially or fail to translate the real danger inherent in the harm.<sup>14</sup>

As will become clear, most government agencies misunderstand the nature of domestic violence, with the result that domestic violence becomes repetitive, cyclical and, due to the lack of appropriate punitive measures, endorsed. This approach of inertia and ignorance on the part of states becomes systemic and the intimate violence, which we perceive as private, develops a very public dimension. For this reason, I adopt the expression ‘systemic intimate violence’ to refer to the violence between intimates which I maintain should be addressed in international law. I use this phrase because, while the violence occurs between intimates, it continues unchecked by the state and the state becomes a silent agent, a participant in the pain and an entity partly responsible for its perpetuation.

Systemic intimate violence also is a narrower subset of violence than ‘domestic violence’ generally. I define “systemic intimate violence” as meaning repetitive emotional or physical harm, or the threat thereof, committed between intimates, which forms a continuum of violence from which the victim, due to his or her isolation and/or incapacitation, is unable to procure traditional legal assistance.<sup>15</sup> It therefore has the following characteristics: the existence of an

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<sup>14</sup> See Isabel Marcus, *Reframing “Domestic Violence”: Terrorism in the Home*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE THE DISCOVERY OF DOMESTIC ABUSE*, 11, 26-7 (Martha A. Fineman & Roxanne Mykitiuk eds., 1994) [hereinafter Marcus, *Reframing “Domestic Violence”*] (explaining that the word “domestic” in domestic violence causes state officials to trivialize the violence. For example, the United States’ emergency number officials, 911, have a tendency to give a lower priority to calls labeled ‘domestic violence.’). Others have preferred a wider definition to include a broad range of violence against women. See, for example, MARIJKE VELZEBOER; MARY ELLSBERG; CARMEN CLAVEL ARCAS; CLAUDIA GARCÍA-MORENO, *VIOLENCE AGAINST WOMEN: THE HEALTH SECTOR RESPONDS 4* (Pan American Health Organization & Path (Program for Appropriate Technology in Health) 2003) [hereinafter *VIOLENCE AGAINST WOMEN: THE HEALTH SECTOR RESPONDS*] (using the term ‘gender-based violence’ “to refer to the broader range of acts that women and girls commonly suffer from intimate partners and family members, as well as individuals outside the family.”).

<sup>15</sup> This definition is based on a review of academic and legislative definitions from a variety of national jurisdictions. This methodology was adopted by the International Criminal Tribunal for the Former Yugoslavia in the case of

intimate relationship between adults; severe harm, physical or emotional or the threat thereof; a continuum of violence; and, the absence of effective state assistance. The combination of these factors creates a severe form of harm, which, in the face of endorsed impunity by the state, results in its systemic nature.

For the remainder of this thesis I use the term ‘domestic violence’ to refer to current laws and theories and the term ‘systemic intimate violence’ to refer to the type of violence that I propose should be regulated in international law.

## 5. Structure

### 5.1 Chapter One

The first chapter of this thesis consists of three parts. The first provides a brief description of systemic intimate violence and summarizes the deficiencies in international law as regards such violence. Part two examines the history and development of violence against women and domestic violence in international law. Finally, having mapped the background to current international law on domestic violence, the third part provides a detailed overview of the instruments in international law which regulate domestic violence and, by highlighting their deficiencies, proposes certain remedies.

### 5.2 Chapter Two

Chapter two, also consisting of three parts, describes the internationalizing elements of systemic intimate violence and the content of the state’s duty to address it.

Part one goes into more detail about the meaning of systemic intimate violence and the reason why this label is necessary and appropriate. The second part, examining the right to be free from systemic intimate violence, is a detailed break down and analysis of each element of systemic intimate violence. The third part is a description of the proposed international and national obligations to protect women from systemic intimate violence and the positive steps, which, I propose, are requisite for states to satisfy their international legal obligation to protect women from systemic intimate violence.

### 5.3 Chapter Three

Chapter three confronts the skeptic’s query that systemic intimate violence cannot constitute an international human rights violation. Drawing on international jurisprudence and the philosophy of law, this chapter articulates three factors which, combined, transform the interests of individuals into internationally protected human rights.

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Prosecutor v. Furundzija, Case No. IT-95-17/1-T, 38 I.L.M. 317, 352-53 (ICTY 1999) [hereinafter *Prosecutor v. Furundzija*], cited by the ICTY in *Prosecutor v. Kunarac*, *supra* note x, at paragraph 437. See MARYLAND INST. FOR CONTINUING PROF’L EDUC. OF LAWYERS, INC., *DOMESTIC VIOLENCE CASES: HANDLING THEM EFFECTIVELY IN CIRCUIT AND DISTRICT COURT*, 5 (2001) [hereinafter *DOMESTIC VIOLENCE CASES: HANDLING THEM EFFECTIVELY*] (recognizing that domestic violence encompasses both physical and psychological behavior that occurs in various types of adult intimate relationships).

Chapter three begins with a collation of theories as to what constitutes an international human right. Based on these views, I identify four elements which must pertain in order for an ‘interest’ to qualify as an international human ‘right.’ These elements are: (1) fundamentality; (2) universality; (3) vulnerability; and, (4) state accountability. I then apply these elements to the definition of systemic intimate violence, and conclude that systemic intimate violence qualifies as an international human rights violation.

#### 5.4 Chapter Four

Based on the analysis in chapter three that there is an international human right to be free from systemic intimate violence and a concomitant international obligation on states to uphold that right, chapter four provides the theoretical substantiation for imposing responsibility on states for the conduct of private citizens.

Chapter four begins with a brief historical overview of the law of state responsibility, showing how it has developed to include international obligations of states vis-à-vis their own citizens. The chapter then analyses the elements of generic international obligations and shows how each component of the principles of state responsibility can be applied to impose an international obligation on states to take the positive steps outlined in chapter two to help prevent and remedy systemic intimate violence.

#### 5.5 Chapter Five

In the final chapter of this thesis, I argue that international law is an effective source of law, and makes a real and practical difference to individuals. Through a process of norm infiltration, international human rights law translates values and aspirations into legal rights, enforceable before national courts and respected in national institutions.

The first part of the chapter describes the debate regarding the efficacy and validity of international law. It describes the theories which support and reject international law and concludes that there is sufficient evidence that international law operates through non-coercive compliance, a theory which I proceed to apply to systemic intimate violence.

The second part of the chapter demonstrates that the non-coercive compliance theory operates in three ways. First, international law has an expressive function in that it articulates the content of rights and duties, with which states consistently comply. Second, it has an implementing function, in that international law rules are implemented through the combined activities of international bodies, non-governmental organizations and government agencies. Finally, international law has an expansive function whereby it tracks the development of social norms and translates these into legal imperatives. Through these three mechanisms, I propose that international rules regarding systemic intimate violence can be applied nationally for the benefit of communities and families.

### 6. Methodology

## 6.1 Theories of Domestic Violence

There are many definitions of domestic violence. The legal definition one adopts depends largely on the underlying explanation for the occurrence of domestic violence.<sup>16</sup> There are two broad categories of thought on the causes of such violence. Some theorists view domestic violence as a purely individual, pathological phenomenon, which should be addressed on a case by case basis (what I call the ‘individual theory’). The second body of thought views domestic violence as a communal problem, which exists by virtue of social and political structures, which must be amended to end the abuse (what I call the ‘social theory’). I choose a combination of these theories to examine systemic intimate violence for the reasons discussed below.

The individual theories, in their most narrow form, explain domestic violence with an individually oriented approach, focusing on the “individual psychological character of the abuser,” her/his childhood experiences, socio-economic circumstances and other factors specific to her/his life.<sup>17</sup> A less narrow version of these theories, the socially-oriented perspective, examines abuse with reference to the effect of social externalities on the individual, such as social status, racism, alcohol abuse or unemployment.<sup>18</sup>

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<sup>16</sup> Amnesty International points out that the definition of domestic violence one adopts “influences the choice of measures that are considered relevant and effective to prevent and combat men’s violence against women.” AMNESTY INTERNATIONAL, MEN’S VIOLENCE AGAINST WOMEN IN INTIMATE RELATIONSHIPS AN ACCOUNT OF THE SITUATION IN SWEDEN, 6 (19 April 2004), available at [http://www2.amnesty.se/svaw.nsf/mvaw/\\$File/mvaw.pdf](http://www2.amnesty.se/svaw.nsf/mvaw/$File/mvaw.pdf) [hereinafter Amnesty International, *Intimate Violence in Sweden*]. For a description of the different approaches towards studying domestic violence, see Michael P. Johnson, Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence against Women, *JOURNAL OF MARRIAGE AND THE FAMILY*, VOL. 57, NO. 2, 283, 283-4 (1995) [hereinafter Johnson, *Patriarchal Terrorism*] (distinguishing between the family violence perspective and the feminist perspective of domestic violence). See also Heimer, Gun; Lundgren, Eva; Westerstrand, Jenny; Kalliokoski, Anne-Marie, *Captured Queen Men’s Violence against Women in “Equal” Sweden – a Prevalence Study*, 16-17 (Åströms tryckeri AB, Umeå, 2002), translated by Julia Mikaelsson and Geoffrey French available at <http://www.brottsoffermyndigheten.se/informationsmaterial/Captured%20queen.pdf/Captured%20Queen%20.pdf> [hereinafter the *Captured Queen Report*]. Both the *Captured Queen Report* and the Amnesty International Report on Intimate Violence in Sweden refer to these theories. Amnesty International refers to the structural perspective, the individually oriented approach, the system theory and the ecological model. *Id.*, at 6.

<sup>17</sup> See the *Captured Queen Report*, *supra* notex, at 14 (describing the individualistic theory as linking “the violence to the individual violent man, who is regarded as ‘mad’, ‘sick’ or ‘deviant’ in some other way, and the explanation of his violent actions is sought in his personality. Inherent in this approach is the concept of violence as consisting of isolated, deviant deeds committed by special, abnormal men. Possibly too, the women subjected to violence may be regarded as deviant in some way, for example, as ‘inadequate’ or ‘provocative.’”). The *Captured Queen Report* also describes the explanation of family violence that focuses on the individual psychological character of the abuser “who is regarded as ‘mad’, ‘sick’ or deviant’... and the explanation of his violent actions is sought in his personality. Inherent in this approach is the concept of violence as consisting of isolated, deviant deeds committed by special, abnormal men... Alongside this perspective, a socially-oriented perspective has had a strong influence on the understanding of men’s violence to women... From this angle of approach the spotlight falls on the social conditions applicable to the perpetrator of the violence, such as social exclusion, alcohol abuse or unemployment. The two perspectives may also be combined, such as when the ‘social heritage’ is linked to so-called re-victimization.” *Id.* See also Amnesty International Report on Intimate Violence in Sweden, *supra* notex, at 6.

<sup>18</sup> See *Captured Queen Report*, *supra* notex, at 15 (describing how these “circumstances, whether they exist now or were present during the man’s childhood, are presumed to cause his violent behaviour.”). There are a range of theories within the individual approach. For example, the so-called “systems theory” links the violence to the structure of the family and the relationships between the family members, without regard to externalities such as gender disparity. In terms of this theory, “the ‘special violent family’ is placed at the centre and related to the family and its structure, its discords and imbalance. The systems theory models of explanation concentrate on the balance

The second group of theories, the social theories, rejects the specification of “a set of definite characteristics and criteria for abused women and abusing men.”<sup>19</sup> Rather, the violence is seen in the context of social structures and organization, both explicit, such as the way laws operate, and implicit, such as the different gender roles and concomitant power dynamics in society.<sup>20</sup>

I adopt a combination of these theories in understanding domestic violence. The combined view is often referred to as the ecological model, which examines the integration between social structures, individual characteristics and the dynamics of the relationship in question.<sup>21</sup> The ecological model imports elements of all the theories, viewing domestic violence as “a multifaceted phenomenon grounded in the interplay between personal, situational and socio-cultural factors.”<sup>22</sup>

I choose to integrate the theories of domestic violence because neither the individual nor the social bodies of thought is satisfactory alone. Viewing domestic violence from a purely individualistic approach excludes characteristics about the nature of the violence and leads to the

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between individual members of the family, the parties being regarded as fairly equal whereas systematic power imbalance between men and women is ignored.” Captured Queen Report, *supra* notex, at 15. Some theorists adopt a combination of these perspectives, linking the ‘social heritage’ of the abuser to his current behavior.

<sup>19</sup> For example, the structural theory. See Amnesty International Report on Intimate Violence in Sweden, *supra* notex, at 6.

<sup>20</sup> This is similar to the feminist perspective, which examines the violence purely from a gender point of view. See Captured Queen Report, *supra* notex, at 15, (explaining that the “fact that men subject women to violence may be regarded from a structural perspective as an expression of male superiority which may manifest itself in actual physical attacks on women, but also in less drastic phenomena such as sexual harassment or verbal abuse.”).

<sup>21</sup> See Amnesty International Report on Intimate Violence in Sweden, *supra* notex, at 6. See also *Good Practice in Designing a Community-Based Approach to Prevent Domestic Violence*, Expert Paper Prepared by Lori Michau, Raising Voices, Kampala Uganda, for Violence against Women: Good Practices in Combating and Eliminating Violence against Women, Expert Group Meeting, Organized by the U.N. Division for the Advancement of Women in collaboration with U.N. Office on Drugs and Crime, 17 to 20 May 2005, Vienna Austria, at 2 (stating that the “Ecological Model demonstrates that violent behavior grows out of a complex interplay of individual, relational, communal and societal dynamics. It asserts that violence does not occur as a result of one factor in one of the four spheres of influence, but is rather more complex with multiple factors within different spheres influencing a person’s attitudes, behavior and choices...”). See also VIOLENCE AGAINST WOMEN: THE HEALTH SECTOR RESPONDS, *supra* notex, at 5 (taking into account the characteristics of the individual perpetrator, the relationship, the community and society. Social factors include “[n]orms granting men control over female behavior; acceptance of violence as a way to resolve conflict; notion of masculinity linked to dominance, honor or aggression; rigid gender roles.”).

<sup>22</sup> See Ellsberg, Mary, Peña, Rodolfo, Herrera, Andrés, Liljestrand, Jerker, Winkvist, Anna, *Candies in Hell: Women’s Experience of Violence in Nicaragua*, *Social Science & Medicine* 51 (2000), 1596-1597, available at [www.elsevier.com/locate/socscimed](http://www.elsevier.com/locate/socscimed) [hereinafter *Candies in Hell*]. This model contains four concentric spheres: (1) in the inner circle are the individual characteristics of the victim and abuser. These characteristics include witnessing violence as a child, alcohol abuse, poor or no education and a deficient level of income; (2) the second circle refers to the immediate circumstances in which the abuse takes place. Typical factors include male economic- and decision-making authority in the family; (3) the third circle considers the social and institutional environment in which the family power structure is determined. This contains family, work, neighborhood and social connections, confirming a strong connection between “isolation and lack of social support at both the individual and society level,” and, (4) the outer circle “includes the dominant cultural views and attitudes that permeate the society at large. It includes laws, social and economic policies and cultural norms... Numerous studies from around the world have suggested that violence against women is most common in societies where gender roles are rigidly defined and enforced, and where the concept of masculinity is linked to toughness, male honour, or dominance.” *Id.*

creation of erroneous stereotypes.<sup>23</sup> This has the tendency to exculpate the social infrastructures that allow the harm to continue unchecked.<sup>24</sup> At the same time, however, the characteristics of abusers should not be abandoned *in toto*. Understanding personality types facilitates the improvement in the design and application of legal mechanisms. For example, if an abuser has a respected public profile, is well known or holds a religious office, he may be more concerned about his image and therefore more open to reform.<sup>25</sup> On the other hand, someone who has been in jail before or has contacts in the police or judicial system may have less respect for court orders and injunctions.<sup>26</sup>

We cannot change abusive behavior of human beings but we can redesign the legal and social structures that exist to mitigate it. To this end, I adopt an analysis of domestic violence that takes into account the social, legal and political contexts.<sup>27</sup>

## 6.2 Country Analyses and the Selection of Jurisdictions

This thesis makes three claims which rely on empirical proof. First, I claim that systemic intimate violence exists worldwide. Second, I claim that almost all states fail to address systemic intimate violence adequately. Finally, I claim that notwithstanding the failure of states to

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<sup>23</sup> Two of the common misconceptions of abusers are that abusive men emanate from a particularly low income or minority class or suffer from some dysfunctional/medical condition such as deviant behavior, mental illness or alcoholism. See Amnesty International Report on Intimate Violence in Sweden, *supra* notex, at 28 (proposing that stereotypes are not useful and noting that "...eight out of ten women who stated that they had been subjected to violence in their current relationships were married to/living with a man born in Sweden. Two thirds of the women ... indicated that their husband/partner was gainfully employed and 23 per cent reported that their husband/partner held a university degree. A majority (83 per cent) of the men who had abused their current wife/partner were reported to consume alcohol once or twice week (*sic*) or less frequently"). Amnesty International explains that in Sweden, men "of foreign origin are often identified as being especially prone to subject women to violence; it is 'in their culture.' When Swedish men abuse their girlfriends, partners, wives or daughters, the violence is often explained in terms of adjustment problems, mental illness, deviant behaviour or alcoholism." *Id.*, at 29. The Captured Queen Report dismisses the stereotype that violence is perpetrated by immigrants with a patriarchal heritage. It appears that eight out of ten women who have been "subjected to violence in their present relationship are married to or cohabiting with a man who was born in Sweden." Captured Queen Report, *supra* notex, at 72-3. The Captured Queen Report also indicates that violence takes place irrespective of class or immigrant status, indicating that the "notion that men commit violence against a particular type of woman, and that most of these men are immigrants, alcohol abusers or Ill-educated is a myth." *Id.*, at 76.

<sup>24</sup> Amnesty International Report on Intimate Violence in Sweden, *supra* notex, at 29 (noting that stereotyping is problematic because the "myths serve to relieve the perpetrator of his responsibility for the acts of aggression, while the abused woman is turned into an accomplice."

<sup>25</sup> Joanne Fedler, *Lawyering Domestic Violence Through the Prevention of Family Violence Act 1993 —An Evaluation After a Year in Operation*, S. AFR. L.J. 231, 250 (1995) [hereinafter Fedler]. Fedler categorizes abusers into three personality types. This type of abuser would fall into category A or B, a category that is 'controllable' by the state.

<sup>26</sup> *Id.* This is a type C abuser. In such cases many victims see suicide or murder as their only alternatives. *Id.* at 251. The system theory too is deficient since it "concentrates on the balance between individual members of the family, the parties being regarded as fairly equal whereas systematic power imbalance between men and women is ignored." Captured Queen Report, *supra* notex, at 15.

<sup>27</sup> Amnesty International has adopted the view that the "causes of gender-based violence have certain common roots" and that men's violence against women does not occur "in a vacuum but feeds on societal perceptions, values and attitudes, as well as on explicitly or implicitly discriminatory forms of behaviour that lead to the subordination of women and the superiority of men in society." Amnesty International Report on Intimate Violence in Sweden, *supra* notex, at 6-7.



alleviate the difficulties surrounding systemic intimate violence, the practice of states demonstrates that the evolution of international human rights law has in fact led to improved state responses to systemic intimate violence. To substantiate these claims, I rely on the definitions, reports and statistics of systemic intimate violence in Mexico, Sweden, and Nicaragua, and, to a lesser extent, the United States and South Africa.<sup>28</sup>

I have not undertaken independent on-site studies. Rather, I have relied on the work of a significant number of reputable agencies, which have better resources, and the integrity and standards of investigatory methodology. The empirical evidence, in other words, already exists. I have drawn on this in substantiation of my claims. I selected these jurisdictions in the following manner.

As a point of departure, I examined countries which have signed and ratified the Convention on the Elimination of Violence against Women (hereinafter referred to as “CEDAW”), with the exception of the United States, which has not signed CEDAW.<sup>29</sup> Because this thesis examines domestic violence in international law, it is necessary to examine countries which have engaged, to varying degrees, in international law. I therefore narrowed the selection of countries to those which have submitted more than one report to the CEDAW committee, which CEDAW member states are required to do every four years. By comparing earlier and later CEDAW reports, I was able to determine the extent to which a state’s laws vis-à-vis systemic intimate violence had improved, deteriorated or stagnated.

In particular, I focused on countries that have submitted more than one report before and after the Declaration on the Elimination of Violence against Women (hereinafter referred to “DEVAW”) was adopted in 1993, this being the first time violence against women was recognized officially as an international human rights violation.<sup>30</sup> The analysis of a state’s

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<sup>28</sup> I use this methodology based on the approach of the ICTY. The ICTY, in determining the definition of rape, turned to national jurisdictions for such definitions, since there was no definition in international law. *See* Prosecutor v. Kunarac, *supra* notex, at paragraph 439 (“As observed in the *Furundžija* case, the identification of the relevant international law on the nature of the circumstances in which the defined acts of sexual penetration will constitute rape is assisted, in the absence of customary or conventional international law on the subject, by reference to the general principles of law common to the major national legal systems of the world. The value of these sources is that they may disclose ‘general concepts and legal institutions’ which, if common to a broad spectrum of national legal systems, disclose an international approach to a legal question which may be considered as an appropriate indicator of the international law on the subject. In considering these national legal systems the Trial Chamber does not conduct a survey of the major legal systems of the world in order to identify a specific legal provision which is adopted by a majority of legal systems but to consider, from an examination of national systems generally, whether it is possible to identify certain basic principles, or in the words of the *Furundžija* judgement, ‘common denominators’, in those legal systems which embody the *principles* which must be adopted in the international context.”)

<sup>29</sup> Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/830 (1979), reprinted in 19 I.L.M. 33 (1980) [hereinafter CEDAW] (establishing the Committee, “[f]or the purpose of considering the progress made in the implementation of the present Convention”). I refer to the Convention as ‘CEDAW’ and its committee as the ‘CEDAW committee.’ For a list of States which have signed and ratified CEDAW, *see* <http://www.un.org/womenwatch/daw/cedaw/states.htm>. *See also* Parties who have entered reservations to CEDAW, available at, <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>.

<sup>30</sup> DEVAW, *supra* notex. *See* Report of the Committee on the Elimination of Discrimination against Women Fiftieth Session A/50/38 31 May 1995, available at <http://www.un.org/esa/gopher-data/ga/cedaw/14/a50--38.en> [hereinafter

CEDAW report before and after DEVAW allowed me to assess whether the internationalization of domestic violence had made a useful contribution to that country's efforts to remedy domestic violence, and therefore whether such internationalization could provide a useful means in the future.

In addition to the information I obtained from comparing a state's past CEDAW reports, I used information from so-called "shadow" reports, which are submitted to the CEDAW committee by non-governmental bodies. These reports provide objective insight into a country's practices, bringing the CEDAW committee's attention to facts which are usually absent from the state's official CEDAW report. The existence of shadow reports, therefore, narrowed my selection of countries to those about which I could gain objective and factual insight. To ensure the accuracy and reliability of these reports I used the work of reputable non-governmental organizations, whose investigations detail and justify their own methodology, accountability and accuracy according to accepted standards for gathering data.<sup>31</sup>

From the countries which fulfilled these criteria, I selected countries which represent diverse socio-economic and political circumstances. I chose Nicaragua as a developing country, experiencing acute poverty and having emerged from a relatively recent conflict. I analyzed Sweden as a highly developed state, with an advanced economy and a society reputed for its egalitarianism. Finally, I examined Mexico as a hybrid between these two extremes, with an emphasis on constitutional and democratic governance but with a reputation of "machismo" and violence. I supplemented these country analyses with less formal evidence from South Africa and the United States and piecemeal evidence from other countries throughout the world.

In considering the development of Nicaragua's approach to systemic intimate violence I examined Nicaragua's first, fourth and fifth reports to the CEDAW committee which were reviewed in 1987 and 2001 (when reports four and five were considered by the CEDAW committee).<sup>32</sup> I obtained additional information from four independent studies on domestic

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CEDAW Fiftieth Session]. Specifically, Article 5 of DEVAW, *supra* notex, enjoins the UN bodies and other international organizations to include the protection of women from violence in their respective fields of competence.

<sup>31</sup> I refer to the work of organizations which have worked together with the United Nations and analogous institutional and regional bodies. Within specific countries, I have used reports of organizations whose work has been used and/or acknowledged by the aforementioned international organizations and bodies. These guidelines narrowed the pool of countries for selection. For example, a report on domestic violence in Sweden describes the method of obtaining information for the survey and statistics on which it is based. Captured Queen Report, *supra* notex, at 16-17. In the description of the methodological foundations used, it discusses the various forms of harm that constitute domestic violence, including physical violence, threats of violence and sexual violence and the way that such information can get lost in translation if not properly understood and phrased.

<sup>32</sup> Report of the Committee on the Elimination of Discrimination against Women, Sixth Session, General Assembly Official Records (A/42/38) 15 May 1987, paragraphs 169-213, pages 34-39 [hereinafter CEDAW committee Forty-Second Session]. Report of the Committee on the Elimination of Discrimination against Women, Twenty-fourth Session (15 January – 2 February) and Twenty-fifth Session (2-20 July 2001), General Assembly Official Records: Fifty-Sixth Session Supplement No. 38 (A/56/38) 2001, paragraphs 277-318, pages 72-74 [hereinafter 2001 Nicaragua CEDAW Report]. The CEDAW committee considered the fourth and fifth periodic reports of Nicaragua, which covered the period from 1991 to 1998. This report covers both the fourth and the fifth periodic reports of Nicaragua, submitted to CEDAW in terms of article 18 on 28 August 1998 and 9 September 1999 respectively. See the Fourth Periodic Report of Nicaragua: Committee on the Elimination of Discrimination against Women, Distr.: General 28 August 1998 English Original: Spanish, Consideration of Reports Submitted by State Parties under

violence in Nicaragua. In 1998, in celebration of the UN Declaration of Human Rights, several United Nations agencies launched a campaign to stop violence against women in the Caribbean and Latin America.<sup>33</sup> This resulted in the 1998 UNDP Report on Violence against Women.<sup>34</sup> An analysis of gender-based violence in Nicaragua formed part of this report, providing a series of relevant statistics.<sup>35</sup> Based upon these findings, three subsequent high-profile reports were undertaken, which form part of this analysis, namely, the 2000 Candies in Hell Report,<sup>36</sup> the 2001 OMCT CEDAW Shadow Report,<sup>37</sup> and, the 2002 RHR Nicaragua Report.<sup>38</sup>

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Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Fourth Periodic Report of State Parties, Nicaragua [hereinafter Fourth Nicaraguan CEDAW Report] and Fifth Periodic Report of Nicaragua: Committee on the Elimination of Discrimination against Women, Distr.: General CEDAW/C/Nic/5 9 September 1999 English Original: Spanish, Consideration of Reports Submitted by State Parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Fifth Periodic Report of State Parties, Nicaragua [hereinafter Fifth Nicaraguan CEDAW Report].

<sup>33</sup> See UNIFEM-UNDP-UNFPA-UNICEF-UNAIDS-UNHCR-UNHCHR-ECLAC, *A Life Free of Violence: It's Our Right*, United Nations Inter-Agency Campaign on Women's Human Rights in Latin America and the Caribbean, 1998, available at <http://www.undp.org/rblac/gender/index.html> [hereinafter UN 1998 Nicaragua Report].

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Candies in Hell*, *supra* note x, at 1595-1610. The *Candies in Hell* report provides sophisticated insight into domestic violence in Nicaragua. In collaboration with Sweden, the study combined the narrative of two survivors of domestic violence and used them to interpret the statistical data gathered in a manner similar to that of the Swedish report on domestic violence. The study was conducted in the municipality of León because, as it “shares general characteristics with the rest of the Pacific Coast of Nicaragua, in which the majority of the Nicaraguan population is located, it is likely that data are representative of at least the Pacific Coast region.” *Id.* at 1595 and 1607. The location of the research, the substance of the questions and the formation of the sample population are indicators of a high standard of research ethic. The survey comprised 488 women between the ages of 15 and 49. In addition, “[i]n-depth interviews with formerly battered women were performed and narratives from these interviews were analyzed and compared with the survey data.” *Id.* at 1595. This type of collaborative effort, together with the detailed methodological approach, confirms the reliability of the information and demonstrates an attempt to meet respectable standards of accountability and accuracy. In compiling the report, 488 women were interviewed and 360 of the interviewees had been married or had cohabited with a man at some point (either before or during the currency of the interview). Among women who had been married, 188 or “52% reported having experienced physical partner abuse at some point in their lives. Median duration of abuse was five years. A considerable overlap was found between physical, emotional and sexual violence, with 21% of ever-married women reporting all three kinds of abuse. Thirty-one percent of abused women suffered severe physical violence during pregnancy. The latency period between the initiation or marriage or cohabitation and violence was short, with over 50% of the battered women reporting that the first act of violence took place within the first 2 years of marriage.” Twenty per cent of the ever-married women reported “experiencing severe violence during the previous 12 months.”

<sup>37</sup> OMCT World Organization against Torture, *Implementation of the Convention on the Elimination of All Forms of Discrimination against Women by Nicaragua*, 2001, researched and written by Luisa Pérez-Landa, supervised and edited by Carin Benninger, submitted to the Committee on the Elimination of Discrimination against Women, twenty-fifth session, 2-20 July 2001, available at <http://www.omct.org/pdf/vaw/NicaraguaEng2001.pdf> [hereinafter OMCT CEDAW Report on Nicaragua].

<sup>38</sup> Reproductive Health Response in Conflict Consortium, *Post-Conflict Situation in Nicaragua, A Desk Study Overview*, Melinda Leonard, available at <http://www.rhrc.org/pdf/nicaragua.pdf>, in *If Not Now, When? Addressing Gender-based Violence in Refugee, Internally Displaced, and Post-Conflict Settings A Global Overview*, 117 120-121 (Jeanne Ward, ed.) 2002 [hereinafter RHR Nicaragua Report].

The following reports are discussed in the analysis of Sweden's laws vis-à-vis domestic violence: the 1984 CEDAW Report;<sup>39</sup> the 1993 CEDAW Report,<sup>40</sup> the 2000 CEDAW Report;<sup>41</sup> the 2002 Captured Queen Report,<sup>42</sup> and the 2004 Amnesty International Report on Intimate Violence in Sweden.<sup>43</sup>

In analyzing the development of Mexico's approach regarding violence against women, I considered three reports made by the government of Mexico to the CEDAW committee in 1984, 1998 and 2002.<sup>44</sup> I augmented this information with reference to two shadow reports in 1997 and 2002, and a report to the Organization of American States regarding the violence against women in Ciudad Juárez, Chihuahua in 2002.<sup>45</sup> These documents reveal that prior to 1994 there is no evidence of a specific policy or legislation to protect women from gender-based violence. After 1994, however, violence against women begins to appear on the agenda of Mexico as a component of achieving gender equality. Towards the end of the 1990s, it appears that Mexico improved its domestic violence laws but at the same time there is an increase, either in the reporting or in the actual rate of violence against women.

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<sup>39</sup> Report of the Committee on the Elimination of Discrimination against Women Volume I (second session) Official Records: Thirty-Ninth Session Supplement No. 45 (A/39/45) June 27 1984 at page 31-36, paragraphs 200-245 [hereinafter 1984 CEDAW report].

<sup>40</sup> Report of the Committee on the Elimination of Discrimination against Women, Concluding Observations: Sweden (1993), paragraphs 474 – 522, available at <http://www1.umn.edu/humanrts/cedaw/sweden1993.html>, provided by the University of Minnesota Human Rights Library [hereinafter CEDAW Concluding Observations: Sweden].

<sup>41</sup> Committee on the Elimination of Discrimination against Women, Distr.: General, 18 December 2000, Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women, Fifth Periodic Report of States Parties, Sweden, at 32, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N00/802/05/IMG/N0080205.pdf?OpenElement> [hereinafter Fifth Periodic Report by Sweden to CEDAW].

<sup>42</sup> Captured Queen Report, *supra* notex (describing the results of a study involving 7,000 respondents who answered an extensive questionnaire sent to a random sample of 10,000 women from the general population in Sweden, between the ages of 18 and 64. The study, conducted between October 1999 and January 2000, examined women's experiences of physical violence, sexual violence, threats of violence, controlling behavior and sexual harassment). See also Amnesty International, *Intimate Violence in Sweden*, *supra* notex.

<sup>43</sup> Amnesty International, *Intimate Violence in Sweden*, *supra* notex, at 25.

<sup>44</sup> 1984 CEDAW report, *supra* notex, at page 12-15, paragraphs 67-89; Report of the Committee on the Elimination of Discrimination against Women, Eighteenth and Nineteenth Sessions, General Assembly Official Records: Fifty-Third Session Supplement No. 38 (A/53/38/Rev.1) 14 May 1998, paragraphs 354-427, pages 32-36 [hereinafter the 1998 CEDAW report]; Report of the Committee on the Elimination of Discrimination against Women, Twenty-Sixth Session (14 January – 1 February 2002) Twenty-Seventh Session (3 – 21 June 2002) Exceptional Session (5 – 23 August 2002), General Assembly Official Records: Fifty-Seventh Session Supplement No. 38 (A/57/38/Rev.1) 6 August 2002, pages 205-212, paragraphs 410-435 [hereinafter the 2002 CEDAW report].

<sup>45</sup> Center for Reproductive Rights (formerly the Center for Reproductive Law and Policy), *Women's Reproductive Rights in Mexico: A Shadow Report*, 1997, available at [http://www.crlp.org/pdf/sr\\_mex\\_1297\\_eng.pdf](http://www.crlp.org/pdf/sr_mex_1297_eng.pdf) [hereinafter, *Women's Reproductive Rights in Mexico: A Shadow Report*]; Letter from the Center for Reproductive Rights (formerly the Center for Reproductive Law and Policy) to the Committee on the Elimination of Discrimination against Women (CEDAW), June 19, 2002, entitled, Supplemental Information on Mexico Scheduled for Review by CEDAW in August, 2002, available at [http://www.crlp.org/pdf/sl\\_mexico\\_eng\\_2002.pdf](http://www.crlp.org/pdf/sl_mexico_eng_2002.pdf); and, Report to the Inter-American Commission on Human Rights OAS, *The Situation Of The Rights Of Women In Ciudad Juárez, Mexico: The Right To Be Free From Violence And Discrimination*, Organization of American States EA/Ser.L/V/II.117 Doc. 44 7 March 2003 Original: Spanish, available at <http://www.cidh.oas.org/annualrep/2002eng/chap.vi.juarez.htm> [hereinafter OAS Report on the Situation of Women in Ciudad Juárez].

On this basis, I concluded that the internationalization of violence against women was followed by an improvement in each of the Mexican, Nicaraguan and Sweden government's approach towards systemic intimate violence and by an increase in the exposure of violence against women in those countries.

### 6.3 Feminist Theory and Domestic Violence

In the analysis of domestic violence, I take into account the concerns expressed by feminist theorists that the study of violence against women can perpetuate the perception of women as victims, weak and dependent.<sup>46</sup> I engage certain issues in the feminist theory debate regarding violence, victimization and the broad objective of improving lives of women. My objective is to contribute to the process in international law, whereby "women are brought within the purview of humanity" for purposes of creating a legal order.<sup>47</sup>

I do not insist that domestic violence is more or less serious than reproductive rights, employment equity or other manifestations of gender inequality. I propose only that, as one of the many issues facing women, systemic intimate violence persists and requires attention, as one of the primary causes of injury to women.<sup>48</sup>

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<sup>46</sup> See Karina Michael Waller, *Intrastate Ethnic Conflicts and International Law: How the Rise of Intrastate Ethnic Conflicts has Rendered International Human Rights Laws Ineffective, Especially Regarding Sex-Based Crimes*, 9 AM. U. J. GENDER SOC. POL'Y & L. 621 (2001). This debate also arose in the context of the ICTY's criminalization of mass rape under international criminal law. See James R. Mchenry III, *The Prosecution of Rape under International Law: Justice That Is Long Overdue*, 35 VAND. J. TRANSNAT'L. 1269 (2002) [hereinafter Mchenry, *The Prosecution of Rape under International Law*] (describing the work of the ICTY "fully codified women as legally equal to men in the human community, but it did not unfairly single women out as a weaker gender in need of special protections, nor did it establish a victimology for women in rape cases.").

<sup>47</sup> See Mchenry, *The Prosecution of Rape under International Law*, *supra* notex, at 1269 and 1274 (acknowledging the argument that describing women as victims may "inappropriately portray women simply as weak and defenceless individuals."). Mchenry argues that the decisions of the tribunals "simply bring women into an equal position as men under international law, vis-à-vis their status as innocent civilians... rather than reinforcing tired stereotypes about women and their weakness and vulnerability during war, the decisions by the tribunals, especially the Kunarac decision by the ICTY, actually make women more fully members of the international community and subject to the same prosecutions as men." *Id* at 1302. See in general Pamela Posch, *The Negative Effects of Expert Testimony on the Battered Women's Syndrome*, 6 AM. U. J. GENDER SOC. POL'Y & L. 485 (1998); A Renee Callahan, *Will the 'Real' Battered Woman Please Stand Up? In Search of a Realistic Legal Definition of Battered Woman Syndrome*, 3 AM. U. J. GENDER & L. 117 (1994).

<sup>48</sup> See Human Rights Watch, *Global Report on Women's Human Rights*, § 6, at <http://www.hrw.org/about/projects/womrep/> [hereinafter GLOBAL REPORT ON WOMEN'S HUMAN RIGHTS, *supra* notex] ("Domestic or family violence is one of the leading causes of female injuries in almost every country in the world and it accounts in some countries for the largest percentage of hospital visits by women.") See for example the Captured Queen Report, *supra* notex, at 15 (describing the structural perspective of violence against women as "an expression of male superiority which may manifest itself in actual physical attacks on women, but also in less drastic phenomena such as sexual harassment or verbal abuse. On this view, the violence to which men subject women not only expresses superiority but also helps to re-create it and to shape men's and women's conceptions of what being a man or a woman means.") I extrapolate this conclusion to show how integrated discrimination is. Harm to women exists not only in violence but also in the labor force, education and health care. It pervades racial discrimination, poverty and politics. Therefore, choosing the one component of violence, specifically domestic violence, is not an attempt to delineate domestic violence as a more serious threat to women than any other, but rather it is an attempt to tackle one specific manifestation of the broader reality of gender discrimination.

I focus on women who suffer domestic violence, and are unable to escape it, as a result of gender-based differentiation.<sup>49</sup> I refer to the abuser as male and the victim female.<sup>50</sup> While children, the elderly and men suffer from such harm, I have not included them within this analysis of systemic intimate violence because it is the coalescence of violence and discrimination that occupies this thesis.<sup>51</sup> I seek to explain the absence of effective legislation against domestic violence with reference to sex and gender discrimination, highlighting “the role gender plays in the etiology of domestic violence.”<sup>52</sup> As such, I acknowledge, but do not focus on, the numerous other groups that suffer similar forms of abuse, such as the disabled, the elderly

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<sup>49</sup> ELIZABETH M. SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* 25 (2000) [hereinafter SCHNEIDER] (“That women are sometimes violent in intimate relationships does not diminish the importance of discerning the role gender plays . . . [when considering the make-up of domestic violence].”).

<sup>50</sup> See Jennifer M. Mason, Note, *Buying Time for Survivors of Domestic Violence: A Proposal for Implementing an Exception to Welfare Time Limits*, 73 N.Y.U. L. REV. 621, 621 (1998) [hereinafter Mason, *Buying Time for Survivors of Domestic Violence*] (using feminine pronouns to refer to survivors of domestic violence in recognition of the high incidents of violence against women). See also Kristin A. Kelly, *Domestic Violence and the Politics of Privacy*, CORNELL UNIVERSITY PRESS, 2003, footnote 1 at 165 (describing her decision to use the feminine pronoun to refer to victims and the masculine to designate perpetrators as “based on two factors. First, although it is true that women are sometimes the perpetrators of violence in the home, in both heterosexual and homosexual relationships, it remains the case that the vast majority of individuals who are seriously injured or killed by domestic violence are female. Second, the perpetration of domestic violence by men against women involves patterns of domination that are directly tied to the victim’s gendered status”). Consider HARVEY WALLACE, *FAMILY VIOLENCE LEGAL, MEDICAL, AND SOCIAL PERSPECTIVES* 180 (Pearson Education, Inc., 2005) [hereinafter WALLACE, *FAMILY VIOLENCE*] (indicating that women have fewer capabilities to escape than men. Wallace acknowledges that family violence against men exists, probably more than is imagined, however, he explains that he uses the female to denote the victim because “the abuse visited on women is more severe and long-lasting than the type of abuse men suffer. Additionally, research has shown that men have far greater opportunities to leave the abusive situation than women.”). See Harvard Law Review, *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1501 (1993) [hereinafter Harvard Law Review, *Legal Responses to Domestic Violence*] (noting that the gendered dyad does not “reflect a particular bias; rather, it simply reflects the statistical reality of domestic violence.”). *Id.* This assumption is based on studies which “indicate that women are more than ten times as likely as men to be the victims of domestic violence.” *Id.* In reality, the discrepancy may be narrower as the reporting of domestic violence by men is undermined by the overwhelming humiliation associated with the social stigma of male weakness.

<sup>51</sup> See DOMESTIC VIOLENCE CASES: HANDLING THEM EFFECTIVELY, *supra* note x, at 5–6. While the plight of children who suffer indescribable harm remains a reality, its recognition in international law has been achieved and as such the discussion falls outside the purview of this article. There is no doubt that domestic violence includes violence by women against men. The statistics most likely are underreported, perhaps even more so than those of violence against women, since the stigma of assault by women on men is certainly charged and will dissuade reporting to the police. For a discussion of the way in which male-on-female violence differs from female-on-male violence, see Johnson, *Patriarchal Terrorism*, *supra* note x, at 285 (explaining that statistics obtained in general national surveys differ dramatically from those obtained from shelter populations. Johnson maintains that the distinction lies in the fact that “the two information sources deal with nearly nonoverlapping phenomena. The common couple violence that is assessed by the large-scale random survey methodology is in fact gender balanced, and is a product of a violence-prone culture and the privatized setting of most U.S. households. The patriarchal terrorism that is tapped in research with the families encountered by public agencies is a pattern perpetrated almost exclusively by men, and rooted deeply in the patriarchal tradition of the Western family.”). This leads to the inescapable and alarming conclusion that “[d]omestic violence is not gender-neutral.” Rhonda Copelon, *Intimate Terror: Understanding Domestic Violence as Torture*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 116, 120 (Rebecca J. Cook ed., 1994) [hereinafter Copelon, *Intimate Terror*].

<sup>52</sup> *Id.*



and non-human animals.<sup>53</sup> While I emphasize the mooring of domestic violence in “its historical roots of gender subordination and feminist activism,” I do not dismiss or trivialize other forms of violence.<sup>54</sup> They simply fall outside the narrow purview of this thesis.

A common question is whether the term ‘victim’ or ‘survivor’ should be used when referring to a woman who suffers abuse.<sup>55</sup> The concern is that the word ‘victim’ connotes a pernicious perception of weakness and vulnerability, which perpetuates the subjugated status of women.<sup>56</sup> On the other hand, the word ‘survivor’ is problematic in its implied commentary on those women who either kill or are killed as a result of their abuse, who leave their abusive partners, or who otherwise escape their abuse.<sup>57</sup> Using this term risks implying that women who do not escape their abuse are failures, weak or in some way they consented to the abuse.

In reality a woman who does not flee and ‘survive’ is no weaker than the one who does.<sup>58</sup> Therefore, while neither term is ideal, I choose to refer to women in domestic violence situations as victims and to the process of harm as victimization on the basis that this terminology is less judgmental. In no way is the term ‘victim’ used to suggest inferiority or weakness.<sup>59</sup> Where necessary, I refer to ‘survivors’ of domestic violence to denote that the cycle of violence is over.

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<sup>53</sup> *Id.* at 70–71 (noting that elder abuse is “vastly underreported”). For a discussion of elderly abuse worldwide *see* World Report on Violence and Health, *supra* notex, at 125-145.

<sup>54</sup> *Id.* at 28. Some academics have denounced this connection, arguing that “[o]ne should not assume that a special explanation is required when men hit women. The study of violence against women belongs under the study of violence, not gender.” RICHARD B. FELSON, VIOLENCE & GENDER REEXAMINED 4 (2002) [hereinafter FELSON, VIOLENCE & GENDER REEXAMINED]. I hope to demonstrate that indeed there is a special component to violence against women that distinguishes it from non-gender-based violence. In making this distinction, however, I do not attempt to minimize the cruelty of other forms of social violence. My purpose simply is to focus on the violence that affects women because of their gender and why the laws of their countries fail adequately to protect them.

<sup>55</sup> Compare Mason, *Buying Time for Survivors of Domestic Violence*, *supra* notex, at 622 (using the term ‘survivor’ instead of ‘victim’ in reference to “both . . . women who are currently being abused and who have been abused in the past”), with U.N. CENTRE FOR SOCIAL DEVELOPMENT AND HUMANITARIAN AFFAIRS, VIOLENCE AGAINST WOMEN IN THE FAMILY at 14, U.N. Doc. ST/CSDHA/2, U.N. Sales No. E.89.IV.5 (1989) [hereinafter U.N., VIOLENCE AGAINST WOMEN IN THE FAMILY] (using the term “victim” as a contrast to the concept of an “assailant”). The label designated to people who experience intimate violence can have a number of repercussions. *See*, for example, Captured Queen Report, *supra* notex, at 18 (providing reasons why some women may not report their abuse due to “a strong inner resistance against identifying themselves as ‘battered women’ and regarding their husbands/partners as ‘abusers’”).

<sup>56</sup> Cf. SCHNEIDER, *supra* notex, at 60–62 (grappling with the use of the phrase “battered woman” to describe a survivor of domestic violence); *see* FELSON, VIOLENCE & GENDER REEXAMINED, *supra* notex, at 136, 190 (allowing that in the case of rape, a trend has developed which labels women “‘rape survivor[s],” thus obviating a sense of passivity which necessarily accompanies the term “‘victim’”).

<sup>57</sup> Lenora Ledwon, *Diaries and Hearsay: Gender, Selfhood, and the Trustworthiness of Narrative Structure*, 73 TEMP. L. REV. 1185, 1188–89 & n.23 (2000) (opting for use of the term “‘victim’” rather than “‘survivor’” in a study dealing, in part, with the use of battered women’s diaries in court and explaining that this is because “many of the women involved in these cases do not, in fact, survive”).

<sup>58</sup> If any significant inroad is to be made into the occurrence of systemic intimate violence, it is necessary to avoid superimposing guilt onto or deflecting responsibility towards the innocent.

<sup>59</sup> A victim is defined as, “a person subjected to oppression, deprivation, or suffering.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2550 (1993). The term victim also describes, “[a] person or thing destroyed or sacrificed in the pursuit of an object, or in gratification of a passion.” Dictionary.com, at <http://dictionary.reference.com/search?q=victim> (last visited Nov. 2, 2003). To victimize is “to treat someone in an intentionally unfair way.” Cambridge Advanced Learner’s Dictionary, Definition, Victim, at <http://dictionary.cambridge.org/define.asp?key=88208&dict=CALD&desc=victim> (last visited Nov. 2, 2003).

There also is an important debate regarding the use of the label ‘battered woman.’ The so-called battered women’s movement brought domestic violence into the legal spotlight, focusing on the extremity of the harm that occurs within a private (and ostensibly safe) context. However, the term ‘battered woman’ has been criticized since many women who endure violence at the hands of their intimate partners, do not perceive themselves as ‘battered.’<sup>60</sup> The connotation of ‘battery’ implies a repeated physical act of extreme aggression, and does not lend itself to experiences of non-physical terror, abuse and rape. As a result, many abused women who need protection may not consider themselves ‘battered’ and therefore do not pursue legal assistance. I avoid using the term ‘battered women’ for these reasons.<sup>61</sup>

## 7. Final Introductory Comments

Worldwide, one in three women has been beaten, coerced into unwanted sexual relations, or abused—often by a family member or acquaintance.

At the start of the 21st century, violence kills and harms as many women and girls between the ages of 15 and 44 as cancer.

The costs to countries—in increased health care expenditures, demands on courts, police and schools and losses in educational achievement and productivity—are enormous.

In the United States, the figure adds up to some \$12.6 billion each year.<sup>62</sup>

United Nations Population Fund

This thesis is not an attempt to change human nature. I do not maintain that an amendment of laws, policies or government will change the fact of domestic violence. Rather, it is an attempt to change the way our communities and states respond to the predicament in which so many women find themselves. State institutions cannot stay the blow of a violent fist. However, once charged with the knowledge of such violence, they can provide an effective response, a place for recuperation, the facilities for rehabilitation and an expression of remorse and condemnation of such violence. Such measures would radically change the experience of the victim, limiting her pain to the period of the violence and not a moment beyond. To that end, this thesis attempts to lay the foundation and analysis for how international law can, and should, be used to place greater pressure on states to help remedy systemic intimate violence.

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<sup>60</sup> [Note: Martha Minow]

<sup>61</sup> See Johnson, *Patriarchal Terrorism*, *supra* notex, at 284 (indicating that the “terminology of *the battered wife* is also objectionable on the grounds that it shifts the focus to the victim, seeming to imply that the pattern in question adheres to the woman rather than the man who is in fact behaviorally and morally responsible for the syndrome.” The importance of terminology is evident also from the debate about the label ‘female genital mutilation.’ See Kirsten Bowman, *Comment: Bridging the Gap in the Hopes of Ending Female Genital Cutting*, 3 SANTA CLARA J. INT’L. 132 [page 5] (2005) (“The term was coined by a community that wanted to ensure their ability to convey both the true physical consequences of the procedure and that it not be associated with male circumcision... However, in perpetuating the use of this term western feminists have failed to recognize the shame and hurt they place on the communities that practice the procedure.”).

<sup>62</sup> United Nations Population Fund, *State of World Population 2005*.



## Chapter One

### The International Human Rights Violation of Systemic Intimate Violence

“The twentieth century will be remembered as a century marked by violence. It burdens us with its legacy of mass destruction, of violence inflicted on a scale never seen and never possible before in human history...

Less visible, but even more widespread, is the legacy of day-to-day, individual suffering. It is the pain of children who are abused by people who should protect them, women injured or humiliated by violent partners... This suffering... is a legacy that reproduces itself, as new generations learn from the violence of generations past, as victims learn from victimizers, and as the social conditions that nurture violence are allowed to continue. No country, no city, no community is immune.

But neither are we powerless against it.”

Nelson Mandela<sup>63</sup>

#### Part A: Introductory Comments

##### 1. Description of this Chapter

The purpose of this chapter is to describe the current international law on domestic violence. This chapter begins with a summary of the claim I make in this thesis as a whole that the current state of international law vis-à-vis domestic violence is adequate and requires reform. I describe the history of women’s rights in international law, chronicling the development of violence against women. I then narrow the focus of the discussion to the current law on domestic violence.<sup>64</sup> I describe the primary sources (i.e. regional and international treaties), secondary

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<sup>63</sup> Nelson Mandela, Foreword to World Report on Violence and Health, Summary, World Health Organization Geneva.

<sup>64</sup> For the purposes of determining the history and status of domestic violence in international law, I consider various United Nations documents, including: treaties; resolutions; decisions; and, other U.N. official records. In international law, U.N. documents may constitute the equivalent of legislation in national legal systems. For a general discussion of such documents, their authoritative weight and importance see <http://www.lib.msu.edu/foxre/unres.html>. Treaties are the most authoritative instruments in international law, as they document the express consent of nations. See section 38 of the Statute of the International Court of Justice [hereinafter ICJ Statute] and the discussion in chapter four in this regard. Resolutions and decisions are part of the official records of the U.N. which “constitute the primary documents submitted to or issued by the main U.N. bodies

sources (i.e. declarations, U.N. reports and resolutions), and academic authority, which take the view that domestic violence is an international human rights violation. I then discuss the legal status of these institutions, summarize the content that is applicable to systemic intimate violence, and provide an appraisal of their efficacy and/or shortcomings.

## 2. The Claim

There is evidence in international law of a prohibition against domestic violence. However, the existing international law addressing domestic violence is vague and amorphous, subject to dispute, and requires development. This is so primarily for three reasons.

First, there is no *specific and independent* international prohibition against systemic intimate violence. Most of the support for a prohibition on violence against women exists in so-called customary international law (“CIL”). The debate regarding the content, rules and very legitimacy of CIL is extensive.<sup>65</sup> Therefore, CIL, as the sole authority for a norm against systemic intimate violence, is neither authoritative nor without contention.

Where “strong” CIL exists, violence against women is merged with general principles relating to equality. In the last two decades, the high rates of violence against women globally have appeared on international human rights agendas. Based on three decades of testimony, fact finding, lobbying and law making, the former Special Rapporteur on Violence against Women, the United Nations Secretary-General and several others have referred to domestic violence as a human rights violation.<sup>66</sup> However, these statements are made in relation to other international law themes, usually discrimination against women as a whole. Whereas mass rape and trafficking, for example, have been recognized as independent categories of human rights violations, systemic intimate violence usually is raised as an *example* of the broader category of

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at a given session or year. They usually consist of 3 parts: meeting or plenary records; supplements which contain resolutions and decisions, and reports of major U.N. bodies, committees and commissions as well as the budget and financial reports; and annexes, reprints of related or other important documents. (Official Records may also be issued by other U.N. agencies or conferences.)” Resolutions are “are formal expressions of the opinion or will of U.N. bodies. They consist of two clearly defined parts, a preamble and an operative part. The preamble generally recites the considerations on the basis of which action is taken, an opinion expressed or a directive given. The operative part states the opinion of the organ or the action to be taken. These opinions can often be useful when doing the equivalent of a legislative history.” See <http://www.lib.msu.edu/foxre/unres.html>. Decisions “are formal actions, other than resolutions, dealing with non-substantive or routine matters such as elections, appointments, the time and place of meetings and the taking note of reports. They are sometimes also used to record the adoption of a text representing the consensus of members of a given organ on a question.” See <http://www.lib.msu.edu/foxre/unres.html>. “The General Assembly, the Security Council, the Economic and Social Council, and the Secretariat are usually considered the major bodies of the UN... The International Court of Justice is also considered a main body...” See <http://www.lib.msu.edu/foxre/unres.html>. Subsidiary U.N. bodies include the International Law Commission, the Human Rights Committee and the Committee on the Elimination of Discrimination Against Women, which are subsidiary bodies of the General Assembly, “and their reports, including decisions or resolutions adopted, are issued as Supplements to the Official Records of the General Assembly. See <http://www.lib.msu.edu/foxre/unres.html>.”

<sup>65</sup> For a discussion of the deficiencies in CIL see Patrick Kelly, *The Twilight of CIL*, 40 VA. J. INT’L L. 449 (2000). I develop this discussion in chapter four below.

<sup>66</sup> Special Rapporteur on Violence against Women, Its Causes and Consequences, United Nations Commission on Human Rights, Declaration 1994/45, adopted on 4 March 1994 [ hereinafter the Special Rapporteur on Violence against Women].

gender discrimination. While systemic intimate violence certainly is a form of inequality and gender-based violence, this thesis proposes that treating such violence solely as part of this general catch-all category is insufficient, and that systemic intimate violence requires independent and specific approbation to avoid the creation of laws that “suffer from ‘radical indeterminacy, ethnocentrism or patriarchy.’”<sup>67</sup>

Second, domestic violence, as it is currently understood, occupies a very narrow place in international law. Although violence against women is on the international agenda, only recently has the topic started to permeate political, health and economic discussions.<sup>68</sup> Articulating a right against domestic violence will not end such violence, without a corresponding redistribution of power and a review of power structures, both within and outside familial institutions.<sup>69</sup> This approach, therefore, in order to be meaningful, requires the attention of mainstream international and national bodies.

Finally, the precise nature of systemic intimate violence, the international obligation of states to prevent it, and the jurisprudential principles underlying it are under-theorized. The current legal rationale substantiating these issues is piecemeal, and existing recommendations to states to ameliorate domestic violence are uniformly repetitive and usually too broad to be of much use. This thesis therefore proposes that international legal jurisprudence requires a comprehensive discussion of the elements of systemic intimate violence which internationalize such violence; the steps states must take to stop it; whether it is theoretically possible to use international law to remedy such an intrinsically personal harm; and, finally, whether it is at all beneficial to turn to international law as a solution.

These practical, policy and academic deficiencies need to be remedied. This thesis provides a few tentative suggestions with the hope that this discussion will broaden and manifest into effective changes. First, an independent and specific prohibition against systemic intimate violence must be adopted and developed in international law. Second, the ramifications of systemic intimate violence must be incorporated into the political, economic and health-related components of international dialogues.<sup>70</sup> Finally, the right to be free from such violence requires greater theoretical substantiation, and the corresponding duty of states to help remedy such violence requires more meaningful and practical direction. These thoughts are discussed further in chapter two.

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<sup>67</sup> Hilary Charlesworth, *The Unbearable Lightness of CIL*, 92 AM. SOC’Y INT’L L. PROC. 46 (1998) (citing John Tasioulas, *In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case*, 16 OXFORD J. LEGAL STUD. 85 (1996)).

<sup>68</sup> For a discussion of the criticisms of the rights discourse see *Feminist Approaches to International Law*, *supra* notex, at 635 (describing the various criticisms of emphasizing rights of individuals in a system of competing rights and the potential to marginalize women’s rights). See also VIOLENCE AGAINST WOMEN: THE HEALTH SECTOR RESPONDS, *supra* notex, at 2-3 (describing the importance of integrating health with other sectors to end gender-based violence, including domestic violence).

<sup>69</sup> For example, the right to development only recently focuses on the needs of women. When the right was originally formulated the “subordination of women did not enter the traditional calculus” of determining the causes of underdevelopment and the contribution of women to the informal economy has been analyzed only in the last decade. See *Feminist Approaches to International Law*, *supra* notex, at 639-641.

<sup>70</sup> See *Violence against Women: The Health Sector Responds*, *supra* notex, at 7 (“...intervention by health providers can potentially mitigate both the short –and long-term health effects of gender-based violence on women and their families.”).

In order to analyze the development of international law and women's rights, however, it is necessary to understand the different authoritative weight given to the various sources of international law.

### 3. Sources of International Law

This section discusses the following questions regarding the sources of international law. In light of the fact that the world community has no parliament or legislature, how do rules of international law come about?<sup>71</sup> And specifically, how do we determine if a rule prohibiting systemic intimate violence exists in international law?

There are four generally accepted sources of international law: treaties; CIL; the general principles of law as recognized by civilized nations; and, legal jurisprudence, which encompasses judgments of international tribunals, jurisprudence of nations, and the teachings of respected academics. These are codified as sources of international law in the statute of the International Court of Justice.<sup>72</sup>

The first, and most authoritative, is the law that is made by international conventions. International conventions, otherwise known as treaties, are the culmination of an agreement between two or more nations.<sup>73</sup> The agreement to behave in a specific manner becomes a law that is binding on the consenting parties. There are several types of treaties: bi-partite treaties between two nations; regional treaties between several nations in a geographic area; pacts between nations with similar interests or requirements; and, international treaties between a multitude of states.

International treaties are the most authoritative sources of international law because they establish rules by the express agreement of the contracting parties. States expressly accede to the principles contained in the treaty, thereby making a commitment to fulfill specific legal obligations. These treaties are not automatically binding on states which do not sign them unless

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<sup>71</sup> See Oscar Schachter, *United Nations Law*, 88 AM. J. INT'L L. 1 (1994) (indicating that neither "the United Nations nor any of its specialized agencies was conceived as a legislative body." He points out, however, that U.N. bodies "act like legislatures by adopting lawmaking treaties and declarations of law.").

<sup>72</sup> Article 38 of the ICJ Statute, *supra* note 10, provides that the court shall use the following sources of international law: "a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law." See also the description of law to be applied by the International Criminal Court in terms of article 21(1) of the Rome Statute, which includes first the Rome Statute itself, second, where applicable "treaties and the principles and rules of international law, including the established principles of the international law of armed conflict and third, as a last resort, general principles of law derived from national legal systems." Rome Statute, *supra* note 9.

<sup>73</sup> See Oscar Schachter, *United Nations Law*, 88 AM. J. INT'L L. 2 (1994) (describing the origin and development of "norm-creating" treaties in the U.N. system).

the provisions of the treaty already are, or become, rules of CIL (a phenomenon which I discuss further below).<sup>74</sup>

The second source of international law is CIL, which involves the process by which certain norms become international law by virtue of states acting customarily in accordance with those norms. There is much debate surrounding this source of law. In light of the fact that most of the analysis of systemic intimate violence falls within the scope of CIL, the nature of CIL and its complexities, are discussed under a separate heading below.

The third source of international law is the general principles of law recognized by so-called ‘civilized’ nations. Apart from the unhappy connotations of “civilized nations” with colonialism and racism, this source of law is generally not contentious. Essentially, it is a reference to a collection of norms that underpin many legal systems.

Finally, judgments of international tribunals, scholarly works and the jurisprudence of other nations have been used as interpretive or guiding sources of international law.

Throughout this thesis I refer to all four sources of international law to substantiate my claim that there is evidence of a norm against systemic intimate violence in international law, which requires development. However, in light of the fact that there is no treaty governing systemic intimate violence *per se*, it is necessary to consider other sources of international law to determine its status in international law. For this reason, I turn to CIL.<sup>75</sup>

In the following section I provide an examination of the theory of CIL and conclude that, slowly developing in CIL is a principle against systemic intimate violence, but that it has not yet concretized. A final effort is needed to solidify the CIL status of systemic intimate violence as an international human rights violation.

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<sup>74</sup> Some maintain that rules of CIL can emerge by virtue of the treaty negotiation process, even before the treaty is signed. See Hilary Charlesworth, *The Unbearable Lightness of CIL*, 92 AM. SOC’Y INT’L L. PROC. 44 (1998) citing Louis Sohn, “*Generally Accepted*” *International Rules*, 61 WASH. L. REV. 1073, 1074 (1986).

<sup>75</sup> It is important to note that there is also a range of rights that exists irrespective of explicit state consent, known as *jus cogens* norms. These norms qualify as international rules by virtue of their content, which is deemed to be so fundamental that consent is not a pre-requisite to their binding nature. These rules are known as ‘peremptory norms’ or ‘*jus cogens*’ rules. An exception to the requirement of consent is made in the case *jus cogens* rules on the basis that the value in question is so fundamental that it is a precondition to our humanity and, therefore, no derogation therefrom is lawful. While there is no authoritative list of peremptory norms, the following are examples of generally accepted *jus cogens* norms, namely, the prohibition against torture, crimes against humanity, slavery, genocide and piracy. See also the description of law to be applied by the International Criminal Court in terms of article 21(1) of the Rome Statute, which includes first the Rome Statute itself, second, where applicable “treaties and the principles and rules of international law, including the established principles of the international law of armed conflict and third, as a last resort, general principles of law derived from national legal systems.” Rome Statute, *supra* note 9. I do not claim that systemic intimate violence is a violation of a *jus cogens* norm and, therefore, I focus exclusively on CIL.

## 4. The Complexities of CIL

### 4.1 Background

CIL has been described as “international custom” which is “evidence of a general practice accepted as law.”<sup>76</sup> In order for a practice to amount to a rule of customary international law there must be uniform and constant usage of the practice, which is recognized by countries as a rule of international law (*opinio juris sive necessitates*, hereinafter referred to as “*opinio juris*”).<sup>77</sup> An example of CIL is the principle that warring states will not capture the trading ships of the enemy state.<sup>78</sup>

For the most part, CIL is ambiguous since it lacks the clarity and express consensus of binding treaties and relies instead on “widespread state practice and *opinio juris* – a sense of legal obligation.”<sup>79</sup> Moreover, CIL is voluntary and it is generally accepted that it can develop absent “express, universal consent.”<sup>80</sup> At the same time, states are endowed with the ability to dissent from a rule of CIL. This is known as the principle of the “persistent objector” and provides that if a state has objected persistently to a rule of CIL during the course of the rule’s emergence such state is not bound by this rule. The dissent does not negate the legality of the rule vis-à-vis other states. It simply does not bind the objecting state.<sup>81</sup> Therefore, a balance must be struck because, while individual consent is not required, states are allowed to express their rejection of a principle of CIL through the process of a ‘consistent objection.’ This has been described as “a delicate, indeed precarious, equilibrium between opposite concerns: on the one hand, to permit customary rules to emerge without demanding the individual consent of every state; on the other hand, to permit individual states to escape being bound by any rule they do not recognize as such.”<sup>82</sup>

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<sup>76</sup> Article 38(b) of the ICJ Statute, *supra* note 10.

<sup>77</sup> Article 38(b) of the ICJ Statute, *supra* note 10, provides that the court shall use “international custom, as evidence of a general practice accepted as law.” See also *Paquete Habana*, 175 U.S. 677 (1900) [hereinafter *Paquete Habana*] emphasizes that the conclusion of treaties and the adoption of certain practices by states are evidence of the existence of a customary international law.

<sup>78</sup> See *Paquete Habana*, *supra* note 488.

<sup>79</sup> Andrew Guzman, *A Compliance Based Theory of International Law*, in FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS, 58, 70 (Oona A. Hathaway & Harold Hongju Koh eds., 2005) (Foundation Press, New York) [hereinafter Guzman]. Guzman suggests a new interpretation of customary international law as consisting of “legal norms whose violation will harm a country’s reputation as a law-abiding state.” *Id.*, 70-71. The obligatory nature of a rule of customary international law is a subject element. See Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 287, 319 (1995/1996) [hereinafter Hannum]. See also W. Michael Reisman, *Jonathan I. Charney: An Appreciation*, 36 VAND. J. TRANSNAT’L L. 23, 23 (2003) (referring to the mental element of *opinio juris sive necessitates*, Reisman warns against the confusion of Latin phrases as the attempt by lawyers “to conceal their confusion behind a solemn and pretentious Latin phrase.”).

<sup>80</sup> Slama, *supra* notex, at 626, citing Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT’L L.J. 457, 469 (1985).

<sup>81</sup> There is also a wealth of debate regarding acquiescence to rules of CIL and whether that constitutes consent or non-dissent, as the case may be. See Slama, *supra* notex, at 627-8.

<sup>82</sup> Slama, *supra* notex, at 626, citing Weil, *Towards Relative Normativity In International Law?*, 77 AM.J. INT’L L. 413, 433-34 (1981).

Given the high degree of violence against women condoned by states, and the persistent reluctance of states to intervene to mitigate such violence, it is difficult to assert either that states act consistently to prevent systemic intimate violence, or that they believe they have a customary legal obligation to do so. Therefore, the existence, or not, of a rule against systemic intimate violence in CIL, depends on one's interpretation of CIL.<sup>83</sup>

#### 4.2 Two Elements of CIL

CIL is said to consist of two elements: (1) the conduct element which is the consistent practice of states; and, (2) the mental element, known as *opinio juris*, which is the state's belief that what it is doing is obligatory.<sup>84</sup> Therefore, certain norms become international law if states consistently behave *with the understanding* that they are under a legal obligation to act accordingly.<sup>85</sup>

The elements of CIL raises a number of questions: how many states must practice a rule in order for it to become law; the inverse of this is applicable too; that is, it is unclear how many states are required to show that there is *not* a principle of CIL; how does one determine the presence or absence of *opinio juris*; what if states agree that a rule is law but fail to comply with its requirements; is there a difference between what states say and what they do as far as evidencing CIL and which is weightier, custom or *opinio juris*; is it appropriate to use CIL to determine human rights law, especially given the circularity of the elements of CIL when determining whether new law has been created; and, how in fact do we recognize the principles of CIL?

#### 4.3 Identifying the Rules of CIL

There is no accepted process of identifying CIL. However, there are many theories as to what constitutes CIL.<sup>86</sup> These can be divided into traditional theories and principles of 'new CIL.'

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<sup>83</sup> This is so because CIL consists of two elements, namely (1) the practice of states and (2) the subjective opinion or belief of states that they are obliged to comply with the norm in question. Usually, this is determined by looking at the general and consistent practice of states. Patrick Kelly, *The Twilight of CIL*, 40 VA. J. INT'L L. 449, 452 (2000).

<sup>84</sup> See Louis B. Sohn, 'Generally Accepted' International Rules, 61 WASH. L. REV. 1073 (1986) ("It is universally agreed that 'usages generally accepted as expressing principles of law' constitute one of the main sources of international law.'... Ordinarily, a rule is considered generally accepted when it is supported by constant practice of states acting on the conviction that the practice is obligatory.").

<sup>85</sup> Within these norms, there are certain legal rules or peremptory norms, which have been identified as binding on all nations, irrespective of whether or not a state has consented thereto. I do not discuss this as it is unlikely *at this stage* that one can argue that non-violence against women is such a peremptory norm or '*jus cogens*' rule. An exception to the requirement of consent is made in the case *jus cogens* rules on the basis that the value in question is so fundamental that it is a precondition to our humanity and, therefore, no derogation is lawful. While there is no authoritative list of peremptory norms, examples of generally accepted *jus cogens* norms are the prohibition against torture, crimes against humanity, slavery, genocide and piracy.

<sup>86</sup> See Reisman, D'Amato's articulation theory: A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 74-87 (1971) (arguing that articulation of compliance with international law is the surest way of determining the existence of *opinio juris*); Weisburd's theory of *opinio juris* as evidenced by sanctions, Weisburd, *CIL: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1, 10 (1988) (arguing that *opinio juris* exists when a state acknowledges that an opposing state has a right to question its conduct and a duty to repair its breach. The focus, therefore, is on the state's belief regarding the consequences which ought to follow a breach of an international rule); Cheng's theory of "instant custom," Chen, *United Nations Resolutions on Outer Space: "instant" International Customary*

### 4.3.1 Traditional Theories

#### a. Description

Traditional theories examine the balance between custom and *opinio juris*. There are three dominant views on this issue.

The first view is that *opinio juris* is the primary or only relevant element. Some view custom as “merely the immediate and spontaneous revelation of the common popular sentiment.”<sup>87</sup> According to this view, custom can exist by virtue of the psychological element alone. In 1965, Bin Cheng argued that if *opinio juris* can be established conclusively, there is no need for “usage at all in the sense of repeated practice.”<sup>88</sup> This became known as “instant custom,” a term which contradicts the intuitive temporal component of CIL and the sense that it develops over a long period of time.

The second view articulates the opposite, prioritizing custom over *opinio juris*. On the other extreme, some maintain that the belief that a custom is legal in nature is not necessary and that usage is the sole element of CIL.<sup>89</sup> In opposition to instant custom, therefore, these theorists argue that usage is the most important, or indeed the *only*, element in the formation of custom.<sup>90</sup>

The third view is a medium of the two, requiring a combination of both the mental and physical elements. This view is attributed to Gény’s theory that *opinio juris*, the psychological element, is necessary to determine whether a usage is motivated by a legal or social reason.<sup>91</sup> The combination of the two elements is evident in an investigation by the International Law Commission, which revealed that there are five elements to CIL:

- (a) concordant practice by a number of States with reference to a type of situation falling within the domain of international relations;
- (b) continuation or repetition of the practice over a considerable period of time;
- (c) a conception that the practice is required by, or consistent with, prevailing international law;
- (d) general acquiescence in the practice by other States ...

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*Law?*, 5 INDIAN J. INT’L L. 23, 46-47 (1965) (arguing that a rule of CIL may be developed instantly by the articulation of the belief that a particular norm constitutes CIL); and, Goldsmith’s and Posner’s positive theoretical account of CIL, Jack L. Goldsmith & Eric A. Posner, *A Theory of CIL*, 66 U. CHI. L. REV. 1113 (1999) and Jack L. Goldsmith & Eric A. Posner, *Further Thoughts on CIL*, 23 MICH. J. INT’L L. 191 (2001) (arguing that “CIL emerges from nations’ pursuit of self-interested policies on the international stage.”) Id at 191. This is countered by the traditionalist defense of Detlev F. Vagts, *International Relations Looks at CIL: A Traditionalist’s Defence*, 15 EUR. J. INT’L L. 1031(2004). For a description of the status quo of the theory on CIL see Jo Lynn Slama [note], *Opinio Juris in Customary International Law*, 15 OKLA. CITY U. L. REV. 603 (1990) [hereinafter Slama]. See also Louis B. Sohn, ‘Generally Accepted’ International Rules, 61 WASH. L. REV. 1073 (1986) (noting that “the methods of developing new rules of CIL have greatly changed since the Second World War. These changes have not been imposed on states by any external authority; they are the result of a voluntary acceptance by states of the need to adapt the methods of law creation to the needs of the rapidly growing and changing world community.”).

<sup>87</sup> Slama, *supra* notex, at 613 (citing Puchta and Savigny in describing the historical evolution of the principle of *opinio juris* in CIL). She also cites A. D’AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 47 (1971).

<sup>88</sup> Slama, *supra* notex, at 615.

<sup>89</sup> Slama, *supra* notex, at 614.

<sup>90</sup> Slama, *supra* notex, at 615-616. She cites Kelsen, Principles of International Law 450-51 (R. Tucker ed. 1966).

<sup>91</sup> Slama, *supra* notex, at 614 (1990) (describing the development of *opinio juris* in CIL).



[and the establishment of] the presence of each of these elements ... by a competent international authority.<sup>92</sup>

A further description proposes a four part test for CIL: “(1) state practice – the ‘quantitative’ element; (2) *opinio juris* – the ‘psychological’ element; (3) the norm must be adhered to by a majority of ‘specially affected’ states – the ‘qualitative’ element; and (4) the practice must be continued over some period of time – the ‘temporal’ element.”<sup>93</sup>

Despite the various formulations, it is possible to conclude that the two components of CIL are linked inextricably and this combination remains applicable.<sup>94</sup> However, there are several flaws with this formulation, which need to be taken into account.

## b. Flaws in the Traditional Theories

### *Circular Reasoning*

First, the psychological element of CIL creates circular reasoning when trying to determine the existence of new CIL. Requiring a psychological component begs the question, “[h]ow can custom create law if its psychological component requires action in conscious accordance with law pre-existing the action.”<sup>95</sup> In other words, how do we determine if a rule is new by looking retrospectively at states’ practices and asking if they thought they were bound by the rule at the time, if the rule in fact did not exist at the time? Such circularity appears to constitute a fatal flaw in this approach. Some commentators argue that, for new law to be created, it is not necessary to believe one is complying with a *legal* norm but rather than states perform in a manner because they regard their conduct as “obligatory” or “right.”<sup>96</sup> Nonetheless, the circularity involved renders this examination, at best, vague.<sup>97</sup>

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<sup>92</sup> Slama, *supra* notex, at 616, citing Hudson, Article 24 of the Statute of the International Law Commission, 2 Y.B. INT’L L. COMM’N 24, 26 (1950).

<sup>93</sup> Slama, *supra* notex, at 617-618. Slama cites the formula for custom creation summarized by Professor Dennis Arrow and based on the jurisprudence of the International Court of Justice and prevailing international law scholars. Arrow proposes a four part test.

<sup>94</sup> The third theory has been expressed in various ways. For example, the legality of a custom, according to Blackstone, is determined with reference to seven requisite elements namely, [t]he custom must: (1) have been ‘used so long, that the memory of man runneth not to the contrary’; (2) be continued without interruption; (3) be peaceably acquiesced in; (4) be reasonable; (5) be certain in its terms; (6) be accepted as compulsory; and (7) be consistent with other customs.” 1 W. Blackstone, Commentaries 75-76, cited by Slama, *supra* notex, at 610-611.

<sup>95</sup> A. D’AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 73 (1971) cited by Slama, *supra* notex, at 621. See also Hilary Charlesworth, *The Unbearable Lightness of CIL*, 92 AM. SOC’Y INT’L L. PROC. 44 (1998) (“A positivist account of customary law locates its normative force in the voluntarism that gave it birth. Thus custom, that curious (and circular) amalgam of “state practice” and *opinio juris*, binds because states have agreed to be bound by it”).

<sup>96</sup> Slama, *supra* notex, at 621 (citing Kelsen, Principles of International Law, 307 (1952)).

<sup>97</sup> The same criticism applies to the formulation of CIL by the International Law Commission. This formulation, while combining the mental and physical requirements, does not clarify the circularity confusion, that “if a practice must be consistent with prevailing international law in order to be deemed customary law, how does a new rule of custom ever emerge? Furthermore, what is acquiescence? How much acquiescence is necessary for it to be deemed ‘general?’ What ‘other states’ must acquiesce?” Slama, *supra* notex, at 617.

### *How Many States?*

How many states are needed to raise a norm to a principle of CIL? Sohn maintains that “[o]ne of the major elements determining the obligatory character of a particular rule of customary international law is its generality... ‘what is sought for is a general recognition among states of a certain practice as obligatory.’”<sup>98</sup> Sohn proposes that two main factors have to be taken into account: “first, express acceptance of the rule by a reasonable number of states belonging to various regional groups and representing different political, economic and ideological approaches; second, acquiescence by other states.”<sup>99</sup>

A sensible response is that there must be a modicum of generality about the norm evidenced by a reasonable number of states from a variety of regions. Complete universality, however, is not required and the fact that a few states object to the establishment of a new rule or to a revision of an old one does not prevent the birth of the rule.”<sup>100</sup>

### *When Does the Persistent Objector Become the Norm?*

According to some academics, there is more evidence of “deviations from purported CIL norms, and very little ‘general and consistent state practice.’”<sup>101</sup> If this is the case, at what point do the deviations become the norm, requiring a change in the content of the law? For example, if all states practice racism and we disregard the mental element, would racism become a principle of CIL? This is an obvious nonsense and is addressed by Blackstone’s original requirement that there are certain practices that are right (i.e. lawful) and others that are wrong (i.e. unlawful). However, while it is clear that the consistent practice of racism (or corruption or arms dealing) is not lawful, can we say the same about a norm against systemic intimate violence? This is unclear and can be clarified only with reference to a combination of both custom and *opinio juris*, which is the prevailing theory today.<sup>102</sup>

#### 4.3.2 New Theories

Recently, new theories regarding CIL have developed. This so-called “new” CIL recognizes as constituting CIL the rules “from rights and principles proclaimed in international human rights instruments that have their basis in the Charter of the UN and other treaties of a universal character.”<sup>103</sup> These rules may be evident from:

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<sup>98</sup> Louis B. Sohn, ‘*Generally Accepted*’ *International Rules*, 61 WASH. L. REV. 1073, 1074 (1986).

<sup>99</sup> Louis B. Sohn, ‘*Generally Accepted*’ *International Rules*, 61 WASH. L. REV. 1073, 1074 (1986).

<sup>100</sup> Louis B. Sohn, ‘*Generally Accepted*’ *International Rules*, 61 WASH. L. REV. 1073, 1074 (1986) (noting that “[o]ne of the major elements determining the obligatory character of a particular rule of CIL is its generality... It is not clear how generally accepted the practice of the states must be, but universality is not required.”).

<sup>101</sup> Jack L. Goldsmith & Eric A. Posner, *Further Thoughts on CIL*, 23 MICH. J. INT’L L. 191-2 (2001).

<sup>102</sup> Slama, *supra* note, at 616.

<sup>103</sup> THOMAS BUERGENTHAL, DINAH SHELTON AND DAVID STEWART, *INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL*, 395 (West Group, 2002) [hereinafter *INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL*]. See also Oscar Schachter, *United Nations Law*, 88 AM. J. INT’L L. 3 (1994) (noting that “some treaties such as codification conventions express preexisting customary law.”).

diplomatic correspondence, policy statement, press releases, the opinions of official legal advisers, official manuals on legal questions, ... executive decisions and practices, ... comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly.<sup>104</sup>

Members of the U.N. have indicated that U.N. declarations (which I describe in greater detail below) “may by custom become recognized as laying down rules binding upon States,” although the components of custom and *opinio juris* are still required to endorse the declaration, either at the time of its creation or later.<sup>105</sup>

In 1969, The International Court of Justice in the North Sea Continental Shelf Cases held that treaty provisions could qualify as customary international law provided the provision is of a “fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law.”<sup>106</sup> As Slama points out, however, the International Court of Justice gave little guidance regarding when a principle might be deemed to be of a “fundamentally norm-creating character.”<sup>107</sup>

Professor Schachter notes that “a large area of international regulation has been developed by the specialized [U.N.] agencies.”<sup>108</sup> Schachter’s theory of the creation of authoritative international obligations, based in part on the New Haven school, is summarized by Professor Koh as:

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<sup>104</sup> BROWNIE, *supra* note 329, at 5. See also Louis B. Sohn, ‘Generally Accepted’ International Rules, 61 WASH. L. REV. 1073, 1074 (1986) (noting that “a resolution of an international organization, adopted by consensus, or a nearly unanimous decision, may declare that a rule has become generally accepted.”). There is evidence of *at least* a discussion in international law that gender based violence within intimate relationships is a human rights violation. See Amnesty International, Intimate Violence in Sweden, *supra* note 98, at 4 (indicating that violence in intimate relationships is a human rights violation and that it is the “responsibility of states to take all the necessary steps to combat violence against women, regardless of whether the violence takes place in the public or the private sphere and irrespective of who the perpetrator is. It is incumbent upon all states to respect, protect and enable women to assert their human rights, to prevent violence and to investigate and punish the perpetrators. Furthermore, it is the responsibility of the state to support abused women and provide them with adequate protection”).

<sup>105</sup> Louis B. Sohn, ‘Generally Accepted’ International Rules, 61 WASH. L. REV. 1073, 1079 (1986) (citing a Memorandum of the Office of Legal Affairs of the Secretariat, U.N. Doc. E/CN.4/L.610, para. 4, quoted in 34 U.N. ESCOR Supp. (No. 8) at 15, U.N. Doc. E/3614/Rev. 1 (1962)).

<sup>106</sup> North Sea Continental Shelf Case (W.Ger. v. Den.) (W.Ger. v. Neth.), 1969 I.C.J. 4, 41-42. The court in the continental shelf case was discussing whether the equidistant principle might be said to be a rule of customary international law. To determine whether or not this was fundamental it considered: (1) the fact that the treaty provision regarding equidistance was secondary to the “primary obligation to effect delimitation by agreement;” [42-3] (2) the fact that the equidistant principle was subject to a “special circumstances” exception, which raised “further doubts as to the potentially norm-creating character of the rule;” [42-3] and, the fact that the treaty in question permitted reservations eroded the fundamental nature of the equidistant principle. North Sea Continental Shelf Case (W.Ger. v. Den.) (W.Ger. v. Neth.), 1969 I.C.J. 4, 42-43. Slama extracts three factors from this case which can be used to determine whether a particular principle is of a “fundamentally norm-creating character” necessary to have a binding obligation: “(1) Whether the principle involved imposes a primary obligation; (2) Whether the principle is subject to any exceptions; or (3) Whether a state may exclude itself from the obligation of the principle by an expression of its intent not to be bound by such.” Slama, *supra* note, at 651.

<sup>107</sup> Jo Lynn Slama [note], *Opinio Juris in Customary International Law*, 15 OKLA. CITY U. L. REV. 603, 650 (1990).

<sup>108</sup> Oscar Schachter, *United Nations Law*, 88 AM. J. INT’L L. 5 (1994).

(1) the designation of a behavioral requirement; (2) the indication that persons with competence and authority have made the designation; (3) an indication of the capacity and willingness of those concerned to make the designated requirement effective; (4) transmittal of the requirement to the target audience; and (5) creation in the target audience of psychological and operational responses that indicate that the designated requirement is regarded as authoritative and hence, as likely to be complied with in the future.<sup>109</sup>

Some have proposed that the activities of NGOs should be regarded as contributing to the expansion of CIL.<sup>110</sup> Others maintain that declarations are not CIL but comprise “a new body of international law, ‘declarative’ international law,” which are rules that, lacking one of the two elements of CIL, are “declared as law by a majority of states but not actually enforced by them, or rules that are both practiced and accepted as law, but only by a minority of states.”<sup>111</sup>

In general, new CIL potentially emerges from the U.N. system and its interaction with the international community.

#### 4.4 Applying the Theories to Systemic Intimate Violence

##### 4.4.1 Traditional Theories

If one takes the view that CIL exists, *and is evidenced*, only by consistent usage and the concomitant belief that the usage is required by law, how does one know which states at what time complied with which principle? There are mechanisms that could provide an answer, for example, by looking at the laws, customs and behavior of every state within a delineated time frame and drawing a conclusion about the customary nature of the practice.

However, if we were to adopt this *modus operandi* to determine whether systemic intimate violence is a violation of a principle in CIL, the answer is likely to be – it depends. Traditionally, there have been very few states which have created law around domestic violence. However, increasingly, and only recently, more and more states are adopting legislation prohibiting domestic violence and acknowledging the responsibility of the state to quell such violence. If one focuses on the latter development, then one could conclude that states in fact are consistently acting against systemic intimate violence, as required for a determination under CIL.

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<sup>109</sup> Oscar Schachter, *Towards a Theory of International Obligation*, 8 VA. J. INT’L L. 300, 307 (1968), in Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2603 footnote 113 (1997) [hereinafter Koh, *Why Do Nations Obey International Law*].

<sup>110</sup> Hilary Charlesworth, *The Unbearable Lightness of CIL*, 92 AM. SOC’Y INT’L L. PROC. 44 (1998) citing Isabelle Gunning, *Modernizing CIL: The Challenge of Human Rights*, 31 VA. J. INT’L L. 211 (1991). However, Charlesworth poses the important question whether “the increased participation of non-state actors in the generation of customary norms [will] affect compliance with those norms.” *Id.* Moreover, to the extent that non-state actors are contributors to the creation of CIL, their role “has the effect of generating weak norms on a wide variety of topics, so that compliance is neither particularly demanding nor particularly responsive to the problems the norms were designed to address.” Hilary Charlesworth, *The Unbearable Lightness of CIL*, 92 AM. SOC’Y INT’L L. PROC. 45 (1998).

<sup>111</sup> See Hiram E. Chodesh, *Neither Treaty Nor Custom: The Emergence of Declarative International Law*, 26 TEX. INT’L L.J. 87, 89 (1991) (arguing that “declarative law is not accepted as law by a generality of states.”).

One then would have to ask whether these states are addressing systemic intimate violence with the belief that such action is required by law. Once again it is possible to argue both ways. Many states which adopt anti-systemic intimate violence legislation actually incorporate reference to CEDAW, DEVAW or other international instruments into the legislation. This certainly links the conduct of the state to an international law imperative and evinces some mental belief that the legislation is *at least* conduct in compliance with international law. However, the absence of a reference to international law in such national legislation does not necessarily mean that the state does not deem itself bound by a principle of international law. Moreover, it might be possible to argue that the original states which implemented anti-systemic intimate violence legislation did so out of an internal motivation and, as the norm or ‘custom’ developed, subsequent states reformed their laws *with* the belief that there is a legal requirement.

Add to this broil the fact that, even where states have systemic intimate violence legislation, the violence continues. If a state allows high levels of systemic intimate violence, irrespective of the existence of anti-violence legislation, is this evidence of a persistent objector or does it mean that there really is no custom against systemic intimate violence?

Finally, to whom do we look to represent the mind of the state? Do we look to the motivation of the government and, if so, which administration? If the government is not democratically elected, do we accept its actions as custom even though it may be acting without the endorsement of its people?<sup>112</sup> As will be discussed below, this is an important question as regards countries which practice overt gender discrimination. Do women endorse these governments and, if not, is that relevant to the formulation of CIL?

While it is largely accepted that there is a norm prohibiting sex discrimination, the obligation this imposes on states in respect of systemic intimate violence is less clear.<sup>113</sup> Not all states would agree that they have an international obligation to protect women from systemic intimate violence:<sup>114</sup> some states may present economic justifications for their omission to prevent

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<sup>112</sup> Goldsmith and Posner argue that in many instances the perception that nations followed CIL from a sense of legal obligation, was incorrect and that there was a coincidence of interest or coercion which motivated the state’s behavior and not compliance with international law. Jack L. Goldsmith & Eric A. Posner, *Further Thoughts on CIL*, 23 MICH. J. INT’L L. 192 (2001).

<sup>113</sup> One indication of this is the fact that CEDAW is the most widely ratified international treaty. However, at the same time, it also has the highest number of reservations, indicating a divergent approach to what gender discrimination and equality entail.

<sup>114</sup> See the Castle Rock case, *supra* note 678. See also Paul, *Cultural Resistance to Global Governance*, *supra* note 597, at 9 (“Most states agree that men and women should enjoy formal equality under the law. Yes states often regard substantive equality ... as less universal.”).

disproportionate levels of violence against women;<sup>115</sup> other states acquiesce to violence against women based on the politicization of religious beliefs.<sup>116</sup>

This raises an important policy question. Can we really look for human rights norms in CIL? If CIL depends on the practice and *opinio juris* of states, and states are run by governments which may (and often do) act at odds with the human rights or needs of their citizens, can we really determine the rules of CIL with reference to state behavior?<sup>117</sup> For example, in 1998 the CEDAW Committee noted that despite the efforts of many countries, “overall global discrimination is worsening.”<sup>118</sup> On a strict interpretation of CIL, there is little evidence of state practice to support the claim that systemic intimate violence is prohibited in CIL. On the other hand, if we apply “new CIL” then we can conclude that, based on the international statements regarding domestic violence, there is a rule against systemic intimate violence, notwithstanding the dearth of state practice.

#### 4.4.2 New Theories

The quandary is mitigated slightly if one accepts that CIL may be evidenced by U.N. resolutions, declarations and treaty provisions i.e. new CIL.<sup>119</sup> This is because of the range of international declarations and statements which prohibit intimate violence, and which I describe below.

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<sup>115</sup> It has been argued that “the family is ‘naturally’ a realm of hierarchy and even injustice.” Susan Moller Okin, *Inequalities between the Sexes in Different Cultural Contexts*, in *WOMEN, CULTURE AND DEVELOPMENT A STUDY OF HUMAN CAPABILITIES* 274, 279 (Martha C. Nussbaum and Jonathan Glover eds., 1995) [hereinafter Okin]. However, one argument is that States and the international community have a dearth of female representatives, this being the reason for the existence of any lack of consensus as regards women’s rights. See Margareth Etienne, *Addressing Gender-Based Violence in an International Context*, 18 *HARV. WOMEN’S L.J.* 139 [page 7] (1995) (“The underrepresentation of women as heads of state, lawmakers, armed military personnel, and international decision-makers reveals their lack of control over power and resources globally. The absence of women in these positions shapes the definition of human rights, to the detriment of women.”)

<sup>116</sup> It is doubtful, however, that religious justifications for violence against women would withstand international admonishment, not least of all because the so-called religious justification is not accepted by many practitioners of such religions. For a detailed discussion of the way in which religious extremism targeted women in countries such as Afghanistan and Pakistan, see JAN GOODWIN, *THE PRICE OF HONOR MUSLIM WOMEN LIFT THE VEIL OF SILENCE ON THE ISLAMIC WORLD* (Revised Edition, Plume Printing, 2003) [hereinafter GOODWIN]. Goodwin argues that these approaches to women are not all consistent with the teachings of the religions in question. See GOODWIN, *supra* note 594, at 74 and 79.

<sup>117</sup> This is underscored by the theory of Goldstone and Posner who argue, based on case studies, that there is little, if any, evidence of multilateral cooperation and most cooperative conduct “was best modeled as a series of embedded bilateral prisoners’ dilemmas rather than as genuine multilateral cooperation” and was not based on a sense of legal obligation. Jack L. Goldsmith & Eric A. Posner, *Further Thoughts on CIL*, 23 *MICH. J. INT’L L.* 191-2 (2001).

<sup>118</sup> [Note: Citation to follow] get original quote. This is from Valerie A. Dormady, *Status of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1998*, 33 *INT’L LAW.* 637, 642 (1999).

<sup>119</sup> This has been described as “new” CIL. See Patrick Kelly, *The Twilight of CIL*, 40 *VA. J. INT’L L.* 449, 454-5 (2000) (describing advocates of new CIL as wanting to “expand CIL to include norms articulated in non-binding resolutions by the majority of states at international fora and to norms in multilateral treaties even though not agreed to by all.”). There are three legal arguments which hold that “resolutions may be authoritative evidence of binding international law”: (1) they are “authentic” interpretations of the U.N. Charter; (2) they are affirmations of recognized customary law; or, (3) they are expressions of general principles of law accepted by states. Oscar Schachter, *United Nations Law*, 88 *AM. J. INT’L L.* 3 (1994).

In general, these documents give us an objective benchmark and provide probative evidence of the mental element of states and U.N. resolutions and declarations may well evidence the existence of a CIL norm against systemic intimate violence. In fact, this is where we find the bulk of ‘authority’ for most of the international law against violence against women. This view of CIL is particularly compelling where resolutions or declarations are made unanimously. However, it has been cautioned that “[e]ven a UN declaration adopted unanimously will have diminished authority as law if it is not observed by states particularly affected.”<sup>120</sup>

It is also possible that what we may perceive as non-endorsement of a norm is in fact non-compliance with a norm due to the failure to “operationalize it – to develop concrete guidelines and procedures for determining when the norm is being complied with and when it is not.”<sup>121</sup> Therefore, the degree to which states *do not* protect women against systemic intimate violence is not a sign that an international norm does not exist, but rather that the norm is poorly implemented.

The views of new CIL proponents are well supported but they remain contentious. While “new CIL” has found support in recent decisions of the International Court of Justice, it is criticized for evidencing neither custom nor *opinio juris*.<sup>122</sup> This, of course, is correct – hence the term “new CIL.” However, whether or not this is accepted as CIL, remains a debate and not a conclusion.

If new CIL does not apply, then there is no international norm against systemic intimate violence.<sup>123</sup> However, as John Locke states, “[w]hat form of viciousness would be not only permitted, but necessary, if the example of the majority were to give us law.”<sup>124</sup>

#### 4.5 Is Systemic Intimate Violence an International Human Rights Violation By Virtue of CIL?

I propose that the international community is in the process of creating a customary international norm against systemic intimate violence. This is an immature norm, only recently emerging and requiring nurturing, formulation and application.

This is based on the following proposal regarding CIL. This thesis looks to both the conduct of states, and the psychological motivation behind such conduct, when determining that there is a right under CIL to be free from systemic intimate violence.

However, how we interpret each element is changing and we can use many of the sources proposed by new CIL to interpret the direction of state behavior and their concomitant intention. For example, it may be possible to argue that many states are practicing a usage against gender discrimination, with the necessary cognitive element that such usage is required by law (we can

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<sup>120</sup> Oscar Schachter, *United Nations Law*, 88 AM. J. INT’L L. 3 (1994).

<sup>121</sup> BUCHANAN, *supra* notex, at 75.

<sup>122</sup> Patrick Kelly, *The Twilight of CIL*, 40 VA. J. INT’L L. 449, 484-5 (2000).

<sup>123</sup> For a discussion of the legal status of resolutions and declarations, see Oscar Schachter, *United Nations Law*, 88 AM. J. INT’L L. 3 (1994) (maintaining that resolutions “embody declarations of principles and rules of international law” and “as a result regarded as especially significant when adopted without dissent.”).

<sup>124</sup> LOCKE, *supra* notex, at 179.

call them ‘states A’). However, there may be an equal number of states operating according to very explicit principles of gender discrimination (we can all these states ‘states B’). If we use international instruments to interpret the traditional elements of CIL, it is possible to conclude that a treaty such as CEDAW represents a common belief against gender discrimination and, therefore, the behavior of states B is non-compliance with the norm and not evidence of the non-existence of the norm in CIL.

The change in approach is necessary and inevitable for the following reasons. First, the institutions of international law only came into existence effectively after 1945 and, therefore, their norm-creating potential could not have been a factor in traditional determinations of CIL. Second, globalization and information technology have publicized the needs of the individual, which may be entirely inconsistent with their state’s conduct. For the purposes of international human rights law, which is dedicated to the individual, the voice of such individual may trump the conduct of her/his state.

The potential for a high degree of international consensus can be found also in the wide range of literature, reports, investigations and theories regarding domestic violence, evincing a move towards the popular recognition of the right to be free from systemic intimate violence. Whether the norm is articulated by states’ governments, non-governmental organizations or international representatives and entities, states and international organizations around the world are turning their attention to the economic cost, social disruption and personal violation caused by systemic intimate violence. This at least indicates a degree of international consensus.

Within the strict framework of international law, it is unclear how one would categorize the international instruments against systemic intimate violence. Perhaps they are a sign of the expanding sources of international law or perhaps they are not laws but evidence of norms, which are developing into rules, notwithstanding the contrary behavior of states. This is a discussion that will occupy theorists for many years. As Charlesworth states, CIL is “a dangerously manipulable, unbearably light source of international norms. But custom also has utopian potential.”<sup>125</sup>

The development of CIL is fluid and temporal. The resolutions, declarations and other international institutions against systemic intimate violence are really only two decades old. Therefore, I propose that there is evidence of an emerging, embryonic rule against systemic intimate violence in international law. The evidence is piecemeal and unsophisticated but it exists and, in order to achieve indisputable clarity, the rule against systemic intimate violence needs to be (1) specifically defined; (2) incorporated into mainstream international law; and (3) properly theorized according to the strict principles of international law.

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<sup>125</sup> Hilary Charlesworth, *The Unbearable Lightness of CIL*, 92 AM. SOC’Y INT’L L. PROC. 44 (1998) (demonstrating the ways in which CIL is simultaneously insubstantial and substantial).



## Part B: Women's Rights in International Law: The History and Current Status Quo

### 5. History of Women's Rights in International Law

#### 5.1 General

International human rights law prohibits the violation of certain rights. A list of inviolable rights appeared for the first time in 1948, in the United Nations' Universal Declaration of Human Rights (hereinafter "the UDHR").<sup>126</sup> The UDHR, a declaration and not a treaty, became a reflection of CIL, encompassing a list of mandatory norms that apply to all nations. The UDHR was followed by the two rights covenants, namely the International Covenant on Civil and Political Rights (hereinafter "the ICCPR") and the International Covenant on Social, Cultural and Economic Rights (hereinafter "the ICESCR"), dealing with civil and political rights, and socio-economic and cultural rights respectively.<sup>127</sup>

Based largely on the events of World War Two and the Holocaust, the rights articulated in these instruments reflect "the inherent dignity and the equal and inalienable rights" of all people.<sup>128</sup> In the course of the last thirty years, however, many have claimed that this list of norms fails to target the specific types of harm experienced by women.

Theorists have argued that women are abused as a group, and endure a particular version of harm relating to their gender, which intersects with their ethnicity, race or religion. While the provisions of the UDHR arguably could be extrapolated to apply to situations of gender-based violence and discrimination, some maintain this is insufficient and does not "provide the type of special protection women need by virtue of the different nature of their body and reproductive functions."<sup>129</sup> In light of the fact that extrapolation of UDHR norms does not provide adequate

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<sup>126</sup> UDHR, *supra* note 4.

<sup>127</sup> ICCPR, *supra* note 4. International Covenant on Social, Cultural and Economic Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976 [hereinafter the ICESCR]. See Oscar Schachter, *United Nations Law*, 88 AM. J. INT'L L. 2-3 (1994) (confirming that U.N. human rights treaties are regarded as "new customary law or recognized general principles of law with respect to some of the rights expressed.").

<sup>128</sup> Preamble to the UDHR, *supra* note 4. For a brief discussion of the development of human rights in international law see MYRES S. MCDUGAL, HAROLD D. LASSWELL, AND LUNG-CHU CHEN, HUMAN RIGHTS AND THE WORLD PUBLIC ORDER THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 4-5 (New Haven and London, Yale University Press, 1980) [hereinafter WORLD PUBLIC ORDER] ("From demands for physical security and inviolability of the person, with freedom from cruel and inhuman treatment and freedom from arbitrary arrest and confinement, a progression may be noted to demands for freedom of conscience and religion, of opinion and expression, and of association and assembly.")

<sup>129</sup> See Surya P. Subedi, *Protection of Women against Domestic Violence: The Response of International Law*, E.H.R.L.R. 6 587-606, 592-3 (1997) (arguing that the accumulation of international human rights law does not "contain specific measures for the protection of women against violence within the house and the community and violence during times of peace."). See also Dorothy Q. Thomas & Michele E. Beasley, Esq, *Domestic Violence as a Human Rights Issue*, HUMAN RIGHTS QUARTERLY 15 (1993) 36-62, 39 (describing the inadequacy of international law to prevent violence against women).

protection for women, many called for more precise and express rights for women.<sup>130</sup> The last thirty years, therefore, have seen the development of international instruments, bodies and organizations, which address specifically the rights of women in international law.<sup>131</sup>

From an institutional point of view, the demarcation of women's rights began as early as 1946, when the U.N. established the Commission on the Status of Women (hereinafter "CSW").<sup>132</sup> The CSW is a division of the U.N. Economic and Social Council, the entity responsible for the implementation of the provisions of the ICESCR. The administrative division of the CSW, the Division for the Advancement of Women, is responsible for some of the major developments in women's rights in international law and exists today as an effective body.<sup>133</sup>

The most important development for women in international law, however, was the adoption of the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter "CEDAW") and the creation of the CEDAW Committee to oversee its enforcement.<sup>134</sup> CEDAW, adopted unanimously by the United Nations General Assembly in

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<sup>130</sup> For a comprehensive discussion of the history of women's rights in international law, see Arvonne S. Fraser, *Becoming Human: The Origins and Development of Women's Human Rights*, The Johns Hopkins University Press 1999, originally published in 21 Human Rights Quarterly 853 (1999), available at <http://www1.umn.edu/humanrts/edumat/becominghuman/#ArvonneFraser>.

<sup>131</sup> See WORLD PUBLIC ORDER, *supra* note 7, at 612-652.

<sup>132</sup> For a discussion of the history of this organization see Peace Women, Women's International League for Peace and Freedom, U.N. Commission on the Status of Women, available at <http://www.peacewomen.org/un/ecosoc/CSW/CSWindex.html> [hereinafter Peace Women]. See also Division for the Advancement of Women, Commission on the Status of Women: Overview, available at <http://www.un.org/womenwatch/daw/csw/> [hereinafter CSW Overview]: "The Commission on the Status of Women (CSW) was established as a functional commission of the Economic and Social Council by Council resolution 11(II) of 21 June 1946 to prepare recommendations and reports to the Council on promoting women's rights in political, economic, civil, social and educational fields. The Commission also makes recommendations to the Council on urgent problems requiring immediate attention in the field of women's rights. The object of the Commission is to promote implementation of the principle that men and women shall have equal rights. The Commission's mandate was expanded in 1987 by the Council in its resolution 1987/22. Following the 1995 Fourth World Conference on Women, the General Assembly mandated the Commission to integrate into its programme a follow-up process to the Conference, regularly reviewing the critical areas of concern in the Platform for Action and to develop its catalytic role in mainstreaming a gender perspective in United Nations activities."

<sup>133</sup> See Peace Women, *supra* note 18. In 1972, the division was upgraded to the Branch for the Promotion of Equality for Men and Women under the then newly created Centre for Social Development and Humanitarian Affairs of the United Nations Office in Vienna. See Division for the Advancement of Women: Brief History, available at <http://www.un.org/womenwatch/daw/daw/>. The Division for the Advancement of Women acted as the substantive secretariat for the Beijing Conference in 1995, the largest conference in the history of the United Nations, and was responsible for the preparations for the three previous World Conferences on Women (Mexico 1975, Copenhagen 1980, Nairobi 1985). See The United Nations Fourth World Conference on Women, Beijing, China, September 1995, Action for Equality, Development and Peace [hereinafter Beijing Conference]. For information about the Beijing Conference see <http://www.un.org/womenwatch/daw/beijing/>.

<sup>134</sup> CEDAW. This was not the first treaty addressing one specific right or group of people: the same had been done in the prohibition of racial discrimination and would continue in respect of refugees, torture, children's rights and the rights of indigenous and tribal peoples. See Convention against Racial Discrimination, *supra* note 3; Convention relating to the Status of Refugees, adopted by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons on 28 July 1951, convened under United Nations General Assembly Resolution 429(V) of 14 December 1950, entered into force on 22 April 1954, in accordance with Article 43; Torture Convention, *supra* note 5; Children's Convention, *supra* note 7; Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), 72 ILO Official Bull. 59, entered into force Sept. 5, 1991.

1979, envisions the eradication of discrimination against women. CEDAW was followed by a range of global and regional declarations, recommendations and comments addressing various rights of women, resulting in a body of international law that deals exclusively with the needs and well-being of women.<sup>135</sup>

These instruments and bodies developed several major themes concerning women's rights. This jurisprudence includes health, reproductive and family rights, political and legal representation, economic and employment equality, the eradication of prostitution and cultural stereotypes, education, and safety. These themes have been addressed in international law with varying degrees of success. For the purposes of this thesis, however, I focus solely on the right to personal safety from systematic intimate violence, with a view to showing the deficiencies in the international laws used to enforce that right. The following section, therefore, discusses the history of the measures taken in international law to address domestic violence specifically.

## 5.2 Violence against Women in International Law

Domestic violence was one of the earliest forms of gender-based violence to generate international action.<sup>136</sup> In the early 1970s, the U.N. General Assembly proclaimed 1975 as International Women's Year, which was expanded to the United Nations Decade for Women from 1975 to 1985.<sup>137</sup> During this period, three of the four world conferences on women were

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<sup>135</sup> Convention on the Nationality of Women, O.A.S. Treaty Series No. 4, 38, entered into force Aug. 29, 1934; Convention on the Political Rights of Women, 193 U.N.T.S. 135, entered into force July 7, 1954; CEDAW, *supra* note 21; Optional Protocol to the Convention on the Elimination of Discrimination against Women, G.A. res. 54/4, annex, 54 U.N. GAOR Supp. (No. 49) at 5, U.N. Doc. A/54/49 (Vol. I) (2000), entered into force Dec. 22, 2000 [hereinafter CEDAW Optional Protocol]; Declaration on the Protection of Women and Children in Emergency and Armed Conflict, G.A. res. 3318 (XXIX), 29 U.N. GAOR Supp. (No. 31) at 146, U.N. Doc. A/9631 (1974); DEVAW, *supra* note x; *Beijing Declaration and Platform for Action*, U.N. Fourth World Conference on Women, U.N. Doc. A/CONF.177/20 (1995) & A/CONF.177/20/Add.1 (1995) [hereinafter *Beijing Declaration*]; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (2001), entered into force Sept. 9, 2003 [hereinafter the Trafficking Protocol]; United Nations High Commissioner For Human Rights Principles and Guidelines on Human Rights and Trafficking, E/2002/68/Add.1 (2002); Office of United Nations High Commissioner for Refugees, Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1a(2) of the 1951 Convention and Its 1967 Protocol Relating to the Status of Refugees, U.N. Doc. HCR/GIP/02/01 (2002); the creation of the Special Rapporteur on Violence against Women, *supra* note 1; Inter-American Convention on the Granting of Civil Rights to Women, 1438 U.N.T.S. 51, entered into force March 17, 1949; Inter-American Convention on the Granting of Political Rights to Women, 1438 U.N.T.S. 63, entered into force March 17, 1949; Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, 33 I.L.M. 1534 (1994), entered into force March 5, 1995 [hereinafter the Convention of Belem Do Para]; and, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa [hereinafter the Banjul Charter].

<sup>136</sup> See Information Note, the Division for the Advancement of Women, United Nations Work on Violence against Women, available at <http://www.un.org/womenwatch/daw/news/unwvaw.html> [hereinafter Division for the Advancement of Women Information Note]: "Initially the development of policy within the United Nations with regard to violence against women was concentrated on violence against women in the family."

<sup>137</sup> Division for the Advancement of Women Information Note, *supra* note 23: "In 1972, the General Assembly, in its resolution 3010 (XXVII), proclaimed 1975 International Women's Year, to be devoted to intensified action to promote equality between men and women, to ensure the full integration of women in the total development effort and to increase women's contribution to the strengthening of world peace."

held, namely in Mexico, Copenhagen and Nairobi (Beijing being the most recent, was held in 1995).<sup>138</sup>

The first World Conference on Women was held in Mexico in 1975. The World Plan of Action adopted at this conference “did not refer explicitly to violence, but drew attention to the need for the family to ensure dignity, equality and security of each of its members.”<sup>139</sup> It is clear that violence against women was not on the radar of international law at this stage and, when CEDAW was adopted four years later in 1979, violence against women was not incorporated into the original text.<sup>140</sup>

At the second World Conference on Women in Copenhagen in 1980, however, reference was made to family violence, and the conference participants adopted a resolution on “battered women and violence in the family.”<sup>141</sup>

At the third World Conference, which took place in Nairobi in 1985, violence against women was a far more prominent theme, emerging as “a serious international concern.”<sup>142</sup> The

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<sup>138</sup> See the Third World Conference on Women, Nairobi 1985, Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace Nairobi, 15-26 July 1985, available at <http://www.earthsummit2002.org/toolkits/women/un-doku/un-conf/nairobi.htm>, paragraph two [hereinafter the Nairobi Principles]: “The World Plan of Action for the Implementation of the Objectives of the International Women's Year, 1/ adopted by the World Conference of the International Women's Year at Mexico City in 1975, was endorsed by the General Assembly in its resolution 3520 (XXX). The General Assembly, in that resolution, proclaimed 1976-1985 the United Nations Decade for Women: Equality, Development and Peace.”

<sup>139</sup> Division for the Advancement of Women Information Note, *supra* note 23.

<sup>140</sup> The document was aimed at preventing *discrimination* against women and not violence against women.

<sup>141</sup> Division for the Advancement of Women Information Note, *supra* note 23.

<sup>142</sup> Division for the Advancement of Women Information Note, *supra* note 23. See the Nairobi Principles, *supra* note 25. Some of the specific references to violence against women include: the requirement that governments “undertake effective measures, including mobilizing community resources to identify, prevent and eliminate all violence, including family violence, against women and children and to provide shelter, support and reorientation services for abused women and children” (Paragraph 231); the demand for “[i]mmediate and special priority ... to the promotion and the effective enjoyment of human rights and fundamental freedoms for all without distinction as to sex, the full application of the rights of peoples to self-determination and the elimination of colonialism, neo-colonialism, apartheid, of all forms of racism and racial discrimination, oppression and aggression, foreign occupation, as well as domestic violence and violence against women” (Paragraph 245); the acknowledgement that violence against women “exists in various forms in everyday life in all societies. Women are beaten, mutilated, burned, sexually abused and raped. Such violence is a major obstacle to the achievement of peace and the other objectives of the Decade and should be given special attention. Women victims of violence should be given particular attention and comprehensive assistance. To this end, legal measures should be formulated to prevent violence and to assist women victims. National machinery should be established in order to deal with the question of violence against women within the family and society. Preventive policies should be elaborated, and institutionalized forms of assistance to women victims provided.” (Paragraph 258); and, that because of the increase of gender-based violence, governments “must affirm the dignity of women, as a priority action. Governments should therefore intensify efforts to establish or strengthen forms of assistance to victims of such violence through the provision of shelter, support, legal and other services. In addition to immediate assistance to victims of violence against women in the family and in society, Governments should undertake to increase public awareness of violence against women as a societal problem, establish policies and legislative measures to ascertain its causes and prevent and eliminate such violence in particular by suppressing degrading images and representations of women in society, and finally encourage the development of educational and re-educational measures for offenders.” (Paragraph 288).

Forward-looking Strategies adopted by the conference linked peace and equality to the eradication of violence against women in both the public and private spheres.<sup>143</sup>

Meanwhile, one year prior to Nairobi, in 1984, the U.N. Economic and Social Council passed resolution 1984/14 on violence in the family.<sup>144</sup> Based on this resolution, a year later the U.N. General Assembly passed Resolution 40/36 on domestic violence, inviting states to “take specific action urgently in order to prevent domestic violence and to render the appropriate assistance to the victims thereof.”<sup>145</sup> The resolution also called for U.N. research on domestic violence “from a criminological perspective to formulate distinct action-oriented strategies...”<sup>146</sup> The resolution laid the foundation for compelling legislative reform. At this stage, however, the resolution “invites” member states, *inter alia*, to enact and implement criminal and civil legislation, to provide temporary shelter relief for victims, to curb domestic violence through a process of education and research, and to improve the accessibility of social, legal and health services.<sup>147</sup> The resolution was not authoritative and mandatory, using the language of invitation and suggestion; however, it did lead to an Expert Group Meeting on Violence in the Family in 1986, focusing on the manner in which women are affected by domestic violence.<sup>148</sup>

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<sup>143</sup> “The conference included violence as a major obstacle to the achievement of development, equality and peace, the three objectives of the Decade.” Division for the Advancement of Women Information Note, *supra* note 23. See the Nairobi Principles, *supra* note 25. Some of the specific references to violence against women include: the requirement that governments “undertake effective measures, including mobilizing community resources to identify, prevent and eliminate all violence, including family violence, against women and children and to provide shelter, support and reorientation services for abused women and children” (Paragraph 231); the demand for “[i]mmediate and special priority ... to the promotion and the effective enjoyment of human rights and fundamental freedoms for all without distinction as to sex, the full application of the rights of peoples to self-determination and the elimination of colonialism, neo-colonialism, apartheid, of all forms of racism and racial discrimination, oppression and aggression, foreign occupation, as well as domestic violence and violence against women” (Paragraph 245); the acknowledgement that violence against women “exists in various forms in everyday life in all societies. Women are beaten, mutilated, burned, sexually abused and raped. Such violence is a major obstacle to the achievement of peace and the other objectives of the Decade and should be given special attention. Women victims of violence should be given particular attention and comprehensive assistance. To this end, legal measures should be formulated to prevent violence and to assist women victims. National machinery should be established in order to deal with the question of violence against women within the family and society. Preventive policies should be elaborated, and institutionalized forms of assistance to women victims provided.” (Paragraph 258); and, that because of the increase of gender-based violence, governments “must affirm the dignity of women, as a priority action. Governments should therefore intensify efforts to establish or strengthen forms of assistance to victims of such violence through the provision of shelter, support, legal and other services. In addition to immediate assistance to victims of violence against women in the family and in society, Governments should undertake to increase public awareness of violence against women as a societal problem, establish policies and legislative measures to ascertain its causes and prevent and eliminate such violence in particular by suppressing degrading images and representations of women in society, and finally encourage the development of educational and re-educational measures for offenders.” (Paragraph 288).

<sup>144</sup> May 24 1984.

<sup>145</sup> Article 2 of U.N. General Recommendation A/RES/40/36 29 November 1985 96<sup>th</sup> Plenary Session [hereinafter U.N. General Recommendation 40/36].

<sup>146</sup> Article 3 of U.N. General Recommendation 40/36, *supra* note 31. Article 5 also calls for inter-agency support for domestic violence within the U.N.

<sup>147</sup> Article 7(a) of U.N. General Recommendation 40/36, *supra* note 31.

<sup>148</sup> See Division for the Advancement of Women Information Note, *supra* note 23.

In 1989 the U.N. released a report on Violence against Women in the Family, which is one of the significant marks of change in the international legal landscape.<sup>149</sup> The report established four important factors. First, it described domestic violence as a problem in almost every country, giving it an international profile.<sup>150</sup> Second, domestic violence was cited as one of the more serious causes of ill-health amongst women, thereby linking it to the existing international right to health. Third, the report established that domestic violence is not random but is “associated with inequality between women and men, and strategies to perpetuate or entrench that inequality.”<sup>151</sup>

Finally, the report initiated a change in the emphasis in international law from protection of the family to protection of individuals *within* the family. Many human rights instruments promote the protection of the family unit as the “natural and fundamental group unit of society and is entitled to protection by society and the State.”<sup>152</sup> As far as systemic intimate violence is concerned, the family is the location of the harm. The emphasis on the protection and sanctity of the family unit in basic international human rights instruments sheds some light on the tendency of so many people to see all family activity, including intimate violence, as a private issue, falling outside the purview of the law. Therefore, the report, by acknowledging that domestic violence is both a manifestation of discrimination against women and a perpetuating force of gender inequality, helped to mitigate some of the exaggerated respect for the family unit.<sup>153</sup>

In 1990, the U.N. General Assembly adopted General Resolution 45/114 on domestic violence, which noted the “serious lack of information and research on domestic violence globally and the need for exchange of information on ways of dealing with this problem.”<sup>154</sup> This resolution was nuanced, identifying the need for “common policies;” “specialized approaches;” the particular needs of women, children and the elderly; the diverse approaches of different cultures to domestic violence; and, the impact of domestic violence on “attitudes and behaviour,

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<sup>149</sup> U.N., VIOLENCE AGAINST WOMEN IN THE FAMILY, *supra* notex. It was also at this time that the CEDAW committee recommended that states include a discussion of violence against women in their reports to the CEDAW committee. See article 2 of General Recommendation 19: Violence against Women, Committee on the Elimination of Discrimination Against Women, 11th Sess., U.N. Doc. A/47/38 (1992) [hereinafter General Recommendation 19].

<sup>150</sup> U.N., VIOLENCE AGAINST WOMEN IN THE FAMILY (“Violence against women is a problem worldwide, occurring, to a greater or lesser degree, in all regions, countries, societies and cultures, and affecting women irrespective of income, class, race or ethnicity.”).

<sup>151</sup> U.N., VIOLENCE AGAINST WOMEN IN THE FAMILY, *supra* note 25. HELEN O’CONNELL, EQUALITY POSTPONED: GENDER, RIGHTS AND DEVELOPMENT 11 (1996) [hereinafter O’CONNELL].

<sup>152</sup> Article 16(3) of the UDHR. See also article 18(1) of the Banjul Charter, describing the family as “the natural unit and basis of society.” Article 29(1) states that the “individual shall also have the duty... to preserve the harmonious development of the family and to work for the cohesion and respect of the family.” Article 17(1) of the ICCPR provides that “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.” Article 23(1) of the ICCPR echoes the UDHR, stating that the “family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”

<sup>153</sup> For a discussion of this see *Feminist Approaches to International Law*, *supra* notex, at 636 (describing how “protection of the family also preserves the power structure within the family, which can lead to subjugation and dominance by men over women and children.”).

<sup>154</sup> Preamble to General Resolution A/RES/45/114, adopted at the 68th plenary meeting of the General Assembly on 14 December 1990 [hereinafter General Resolution 45/114].

such as increased tolerance to violence in society as a whole.”<sup>155</sup> Once again, using suggestive language, the resolution “urged” states to adopt and implement multidisciplinary policies to prevent domestic violence, protect the victims and provide appropriate treatment for offenders.<sup>156</sup>

Possibly the most important aspect of the 1990 resolution was its globalizing effect. By urging member states to “exchange information, experience and research findings,” the resolution shifted domestic violence into the mainstream realm of international justice and public affairs.<sup>157</sup>

In 1992 the CEDAW committee incorporated violence against women into its jurisprudence with the adoption of General Recommendation 19. General Recommendation 19 confirmed expressly that domestic violence impedes gender equality and that the “full implementation of the Convention required states to take positive measures to eliminate all forms of violence against women.”<sup>158</sup>

General Recommendation 19 laid a framework, the value of which cannot be discounted. It broadened the definition of violence against women to include physical, sexual and psychological harm, including “threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.”<sup>159</sup> Moreover, it demonstrated that violence between intimates affects women disproportionately, demarcating women as a group in need of proactive state protection. To this end, it recommended that states take specific steps to reduce domestic violence, namely by improving the legal protection of women, through legislative amendments and gender-sensitive training for the judiciary;<sup>160</sup> gathering statistics in order to identify the nature and extent of the problem,<sup>161</sup> and, creating complaint mechanisms and places of refuge for women escaping violent circumstances.<sup>162</sup> Finally, it incorporated reference to the so-called ‘due diligence’ standard to determine what diligent states should do to fulfill the objectives contained in General Recommendation 19.<sup>163</sup>

Then, in 1993, the World Conference on Human Rights in Vienna witnessed one of the strongest global calls for the recognition of violence against women as an international human rights violation.<sup>164</sup> The incorporation of the human rights of women in the Vienna Declaration

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<sup>155</sup> General Resolution 45/114, *supra* note 39. However, article 2 emphasizes criminal sanctions for domestic violence, which, as discussed in chapter two, is not necessarily the ideal approach towards systemic intimate violence.

<sup>156</sup> General Resolution 45/114, *supra* note 39, at article 1(a)-(d).

<sup>157</sup> General Resolution 45/114, *supra* note 39, at articles 3 and 4.

<sup>158</sup> See General Recommendation 19, *supra* note 35.

<sup>159</sup> General Recommendation 19, *supra* note 35, at paragraph 6.

<sup>160</sup> General Recommendation 19, *supra* note 35 at paragraph 24(b).

<sup>161</sup> General Recommendation 19, *supra* note 35, at paragraph 24(c).

<sup>162</sup> General Recommendation 19, *supra* note 35, at paragraphs 24(i), (k) and r.

<sup>163</sup> General Recommendation 19, *supra* note 35, at paragraph 9: “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 for providing compensation.”

<sup>164</sup> See Office of the High Commissioner for Human Rights, World Conference on Human Rights, 14 – 25 June 1993, Vienna, Austria, available at <http://www.unhchr.ch/html/menu5/wchr.htm>. See also *Vienna Declaration and Programme of Action*, U.N. World Conference on Human Rights, U.N. Doc. A/CONF.157/24, at 20 (1993)



and Programme of Action led, *inter alia*, to the appointment of the Special Rapporteur on Violence against Women, its causes and consequences, and the emergence of FGC as an international human rights violation.<sup>165</sup>

The internationalization of violence against women gained significant momentum in the 1994 U.N. Declaration on the Elimination of Violence against Women (hereinafter referred to as “DEVAW”).<sup>166</sup> DEVAW adopted the same principles as the CEDAW committee’s General Recommendation 19, identifying the need for:

a clear and comprehensive definition of violence against women, a clear statement of the rights to be applied to ensure the elimination of violence against women in all its forms, a commitment by States in respect of their responsibilities, and a commitment by the international community at large to the elimination of violence against women.<sup>167</sup>

In the same year, the General Assembly of the Organization of American States (hereinafter referred to as “OAS”) adopted the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, which became known as the Convention of Belem Do Para.<sup>168</sup>

In 1995 at the IV World Conference of Women in Beijing, violence against women was identified as one of the twelve areas of women’s lives requiring urgent action.<sup>169</sup> The consequent

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[hereinafter the Vienna Declaration]. See <http://www.unhchr.ch/html/menu5/wchr.htm>: “...the Conference took historic new steps to promote and protect the rights of women...”

<sup>165</sup> [Note: citation to follow] The Mandate of the special rapporteur for violence against women included “seek and receive information on violence against women and to recommend measures to eliminate violence. In her reports she has covered, *inter alia*, military sexual slavery in wartime, rape in the community, domestic violence, trafficking and forced prostitution of women, women’s reproductive rights. She has also embarked on missions to Member States of the United Nations to investigate and propose strategies to address gender-based violence against women.” See the United Nations Work on Violence against Women, available at [http://www.eurowrc.org/06.contributions/1.contrib\\_en/30.contrib.en.htm#EuroWRC](http://www.eurowrc.org/06.contributions/1.contrib_en/30.contrib.en.htm#EuroWRC).

<sup>166</sup> DEVAW, *supra* note 22. Article 1 defines violence against women as including public and private violence: “For the purposes of this Declaration, the term “violence against women” means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life;” Article 4(k) requires states to “[p]romote research, collect data and compile statistics, especially concerning domestic violence, relating to the prevalence of different forms of violence against women and encourage research on the causes, nature, seriousness and consequences of violence against women and on the effectiveness of measures implemented to prevent and redress violence against women; those statistics and findings of the research will be made public;” Article 4(c) requires states to “[e]xercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.” See CEDAW Fiftieth Session, *supra* notex. Specifically, Article 5 of DEVAW, *supra* note 22, enjoins the U.N. bodies and other international organizations to include the protection of women from violence in their respective fields of competence.

<sup>167</sup> Preamble to DEVAW, *supra* note 22.

<sup>168</sup> Convention of Belem Do Para, *supra* note 22.

<sup>169</sup> See Chapter Three of the Beijing Declaration, *supra* note 22.



Beijing Declaration and Platform for Action adopted the definition of violence against women in DEVAW and expanded it to include violence perpetrated against women in war.<sup>170</sup>

At this point, the focus of violence against women shifted from non-state violence to crimes of conflict and the development of the norm against mass rape as a weapon of war, which characterized the genocides in Rwanda and the Former Yugoslavia during the 1990s. If the practice of FGC was one of the first specific acts of violence against women to receive international admonishment, mass rape was the second.<sup>171</sup> The jurisprudence of women's international rights was further augmented by the decisions of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, which established the precedent and legal rationale that led to the criminalization of mass rape as a weapon of war, a crime against humanity, and an instrument of genocide under the Rome Statute in 1998.<sup>172</sup>

In 2000, the U.N. General Assembly adopted the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. This enabled the CEDAW committee to receive communications by or on behalf of individuals who have grievances falling within the scope of CEDAW.<sup>173</sup> It also gives the CEDAW committee investigative powers, significantly augmenting the status of CEDAW.<sup>174</sup>

In the same year, in March 2000, the U.N. Human Rights Committee adopted General Comment No. 28, entrenching equality of rights between men and women.<sup>175</sup> This was an

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<sup>170</sup> Beijing Declaration, *supra* note 22. Paragraph 101 identifies domestic violence as one of the causes of ill health of women; paragraph 110(d) urges governments to increase financial support to prevent and deal with domestic violence.

<sup>171</sup> See FEMALE GENITAL MUTILATION: A GUIDE TO LAWS & POLICIES, *supra* *notex*. See also generally Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT'L L. 288, 347 (2003) [hereinafter Askin, *Prosecuting Wartime Rape*, *supra* note 57] (discussing the jurisprudence on rape as a weapon of war/genocide or as a crime against humanity). The culmination of these developments was thoroughly addressed by Elizabeth Schneider in her examination of the law regarding battered women from the feminist perspective, where the various motivations for and implications of domestic violence as an international human rights violation are garnered. See SCHNEIDER, *supra* *notex*, at 95. See Vienna Declaration, *supra* note 49. FGC was prohibited specifically in DEVAW, *supra* note 22, article 2(a), which includes female genital cutting in the definition of violence against women. *Id.* Report of the Special Rapporteur on Violence against Women, *supra* *notex*.

<sup>172</sup> See *Prosecutor v. Furundzija*, *supra* note 2, at 352-53. Although “[n]o international human rights instrument specifically prohibits rape[.] . . . [i]n certain circumstances . . . rape can amount to torture . . . .” *Id.* at 353. See *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, 39 I.L.M. 557, 570 (ICTR 1999) (identifying, *inter alia*, rape and torture as crimes against humanity). Article 7 of the Rome Statute, *supra* note 9, defines crimes against humanity as conduct that is widespread, systematic and focused on a segment of a population, including, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; . . . [p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . . or other grounds that are universally recognized as impermissible under international law . . . [o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. *Id.* art. 7 § 1(k).

<sup>173</sup> Article 2 of the CEDAW Optional Protocol, *supra* note 22.

<sup>174</sup> For a description of the history of the CEDAW Optional Protocol see the U.N. Division for the Advancement of Women, Department of Economic and Social Affairs, available at <http://www.un.org/womenwatch/daw/>.

<sup>175</sup> Equality of Rights Between Men and Women, Human Rights Committee, General Comment 28, U.N. Doc.CCPR/C/21/Rev.1/Add.10 (2000), [http://www.bayefsky.com/general/ccpr\\_gencomm\\_28.php](http://www.bayefsky.com/general/ccpr_gencomm_28.php) (last visited

important moment in women's rights jurisprudence. The U.N. Human Rights Committee authorized the interpretation of article 3 of the ICCPR as requiring proactive conduct by states to "ensure to men and women equally the enjoyment of all rights provided for in the Covenant."<sup>176</sup> General Comment No. 28 acknowledged what feminists had claimed for over three decades, namely, that the harm and inequality, which are unique to women, had not been addressed by mainstream international law.<sup>177</sup>

Today, almost every U.N. body has a policy on violence against women, including "a resource manual on strategies for confronting domestic violence," prepared under the supervision of the United Nations Centre for Crime Prevention and Criminal Justice.<sup>178</sup> In addition, the United Nations Children Fund has produced a report on "Domestic Violence against Women and Girls," describing the types, causes and consequences of domestic violence.<sup>179</sup>

The following analysis takes a closer look at the substance of these developments, noting their legal status, describing their content and providing an appraisal thereof.

### **Part C: Evaluation of the International Law on Domestic Violence**

#### **6. The Current Status of Domestic Violence in International Law: Progress and Deficiencies**

##### **6.1 Commission on the Status of Women (1946)**

###### **6.1.1 Status of CSW**

The CSW was the first international body to deal with women's rights. Is a functional commission of the Economic and Social Council of the U.N. It is a political body made up of 45 members (who are representatives of member states) elected by the Economic and Social Council.<sup>180</sup> The object of the CSW is "to promote implementation of the principle that men and women shall have equal rights."<sup>181</sup>

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October 22, 2005) [hereinafter Equality of Rights Between Men and Women]. See also CARIN BENNINGER-BUDEL, *supra* note 10, at 10.

<sup>176</sup> Equality of Rights Between Men and Women, *supra* note 61, at paragraph 3.

<sup>177</sup> Equality of Rights Between Men and Women, *supra* note 61.

<sup>178</sup> "Other parts of the United Nations system and its related entities, such as the International Labour Organization and the World Health Organization, addressed specific forms of violence against women within their specific mandates." Division for the Advancement of Women Information Note, *supra* note 23.

<sup>179</sup> United Nations Children's Fund Innocenti Research Ctr., Innocenti Digest No. 6, 2000, <http://www.unicef-icdc.org/publications/pdf/digest6e.pdf>, [hereinafter UNICEF, DOMESTIC VIOLENCE AGAINST WOMEN AND GIRLS]. UNIFEM also administers the Trust Fund in Support of Action to Eliminate Violence against Women providing financial support for projects to eradicate gender-based violence, as well as mounting innovative regional and international advocacy campaigns involving grass-roots activists on the issue.

<sup>180</sup> CSW Overview, *supra* n.. <http://www.un.org/womenwatch/daw/caw/>.

<sup>181</sup> CSW Overview, *supra* n.. <http://www.un.org/womenwatch/daw/caw/>.

### 6.1.2 Work of CSW

Originally, the CSW's mandate was to prepare recommendations and reports to the Economic and Social Council on promoting women's rights in political, economic, social and educational fields.<sup>182</sup> Later, this was expanded to promote equality, development and peace. The CSW was required to monitor the implementation of measures for the advancement of women and the progress thereof at sub-regional, regional, and international levels.<sup>183</sup>

The work of the CSW is closely linked with the four world conferences on women's rights discussed above. The CSW was part of the organization of these conferences and is responsible specifically for the implementation of the Beijing Platform for Action. It is also responsible for mainstreaming a gender perspective in U.N. activities.<sup>184</sup>

### 6.1.3 Appraisal of CSW

The CSW has not been used to its full potential, notwithstanding an impressive legacy of work and achievement. For example, the CSW has a communications mechanism which allows it to hear communications that reveal "a consistent pattern of reliably attested injustice and discriminatory practices against women."<sup>185</sup> It has also been suggested that "it is less powerful and effective than other UN commissions."<sup>186</sup> In general, the CSW has been more effective in promoting women's rights than on engaging in specific violations of women's rights.<sup>187</sup>

In addition, as the initial U.N. body responsible for the development of women's rights, the CSW was established as part of ECOSOC, which falls under the purview of the ICESCR. Unfortunately, however, the ICESCR has been the weaker of the two rights covenants because the enforcement of its rights requires state resources and governments are only required to fulfill the socio-economic rights if they have the resources to do so. As a result, many governments fail to comply with the covenant, citing a lack of resources and priorities as justification. Also, the designation of women's rights under the ICESCR as cultural, social and economic, rather than civil or political, confirms the view that the political and civil interests of women are generic, the same as men's, and therefore that no specific steps are necessary to enforce their rights. For the

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<sup>182</sup> CSW Overview, *supra* n..

For a discussion of the CSW *see* SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 65 (2006).

<sup>183</sup> SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 66 (2006).

<sup>184</sup> CSW Overview, *supra* n.. <http://www.un.org/womenwatch/daw/caw/>. For a detailed discussion of the type of work and process of CSW meetings *see* SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 65-68 (2006).

<sup>185</sup> The CSW "used these communications principally as a source of information for its studies rather than as an instrument designed to prod governments to address the specific complaints." INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 106. *See* Jessica Neuwirth, *Inequality before the Law: Holding States Accountable for Sex Discriminatory Laws under the Convention on the Elimination of All Forms of Discrimination against Women and Through the Beijing Platform for Action*, 18 HARV. HUM. RT.S J. 19, 49 (2005) (discussing "a little known and hardly used communications procedure for consideration of communications...").

<sup>186</sup> SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 66 (2006).

<sup>187</sup> *See* INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL, 105-106 (describing the limited powers of the CSW).

reasons discussed above, this view is incorrect, and prevents the CSW from reaching its full potential as a mechanism through which to combat systemic intimate violence.

## 6.2 CEDAW (1979)

### 6.2.1 Status of CEDAW

CEDAW is a binding treaty in international law.<sup>188</sup> As of March 2, 2006, 182 countries, “over ninety percent of the members of the United Nations”, are party to CEDAW.<sup>189</sup> For the reasons discussed, given the unanimous General Assembly resolution which created CEDAW, and the high rate of ratification, it is likely that the provisions of CEDAW constitute CIL.<sup>190</sup>

### 6.2.2 Content of CEDAW

The content of CEDAW can be broken down into three parts: (1) substantive provisions; (2) recommendations to states; and, (3) provisions relating to the CEDAW Committee.

#### a. Substantive Provisions

The only provisions in CEDAW which relate to violence against women are the prohibition against trafficking and prostitution.<sup>191</sup> Apart from these provisions, which relate to public forms of violence, there is no broad prohibition against violence against women.<sup>192</sup>

It is certainly possible to extrapolate violence against women from certain provisions of CEDAW. For example, the definition of discrimination against women in CEDAW refers to “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.”<sup>193</sup> Clearly, violence against women constitutes a restriction made on the basis of sex, which has the effect of impairing or nullifying the enjoyment or exercise of women’s human rights. However, it is a

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<sup>188</sup> The operation of treaties is governed by the Vienna Convention on the Law of Treaties, which is founded, in part, on the notion of *pacta sunt servanda*, that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.” Article 26 of the Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force Jan. 27, 1980. THOMAS BUERGENTHAL, DINAH SHELTON AND DAVID STEWART, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL, 82. See Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination against Women*, 30 VA. J. INT’L L. 634, 663 (1990).

<sup>189</sup> [www.un.org/womenwatch/daw/cedaw/states.htm](http://www.un.org/womenwatch/daw/cedaw/states.htm). There are 98 signatures and 182 ratifications, accessions and successions.

<sup>190</sup> North Sea Continental Shelf Case (W.Ger. v. Den.) (W.Ger. v. Neth.), 1969 I.C.J. 4. Jo Lynn Southard, *Protection of Women’s Human Rights Under the Convention on the Elimination of All Forms of Discrimination against Women*, 8 PACE INT’L L. REV. 1, 21-22 (1996) (describing the difficult views regarding the binding nature of CEDAW and the norm of non-discrimination in international law). See also Jo Lynn Slama [note], *Opinio Juris in CIL*, 15 OKLA. CITY U. L. REV. 603, 610-611 (1990) (noting the theories which suggest that “a rule of custom may evolve by the repetitious inclusion of the rule in treaties. It is generally accepted that treaties, both multilateral and bilateral, may contribute to a finding of *opinio juris* and have a role in the formation of CIL).

<sup>191</sup> Article 6.

<sup>192</sup> See Sally Engle Merry, *Constructing a Global Law – Violence against Women and the Human Rights System*, 28 LAW & SOC. INQUIRY 941, 952 (2003) (confirming that violence against women was not included in the original CEDAW text but that it has been developed with the denunciation of violence against women in DEVAW).

<sup>193</sup> Article 1.

profound omission that the eradication of violence against women is not a goal expressly stipulated in CEDAW.

## b. State Obligations

Article 2 is the central provision that places an international obligation on states to end discrimination against women, in all its forms. It requires states to pursue “by all appropriate means and without delay a policy of eliminating discrimination against women.”<sup>194</sup>

This includes amending national constitutions and legislation to “embody the principle of equality of men and women.”<sup>195</sup> States are also required to prohibit by law discrimination against women and to impose sanctions where this prohibition is breached.<sup>196</sup> Apart from legislative reforms, states are required to amend civil, political, social, educational and cultural institutions to implement all the provisions of CEDAW.<sup>197</sup>

CEDAW calls on states to change the way public and private entities and individuals treat women. This is important vis-à-vis domestic violence because it brings the state into the private realm. It compels the state to equalize private relationships (i.e. the way individuals treat women and not only the way the state treats women) and to intervene when discrimination marks both public and private affairs.<sup>198</sup>

## c. Provisions relating to the CEDAW Committee

The CEDAW Committee is one of six U.N. treaty bodies responsible for the implementation of its constituting treaty.<sup>199</sup> The CEDAW Committee was established to monitor the

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<sup>194</sup> Article 2.

<sup>195</sup> Article 2(a).

<sup>196</sup> Article 2(b).

<sup>197</sup> Articles 3, 4 and 5. Reforms include: judicial reform to ensure equality before the law, especially as regards marriage (Articles 15 and 16); education reform (Article 10); labor reform (Article 11 and 6, which prohibits the exploitation of women by trafficking or prostitution); the meaningful political enfranchisement of women (Articles 7, 8 and 9. Article 15 requires equality before the law and focuses on equality within the state); improved healthcare for women (Article 12); economic reform (Articles 13 and 14); and, the adoption of “all necessary measures at the national level aimed at achieving the full realization of the rights” in CEDAW (Article 24).

<sup>198</sup> Article 5(a) reads as follows: “To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.” See Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination against Women*, 30 VA. J. INT’L L. 634, 649-650 (1990) (confirming that CEDAW calls for state intervention in private matters marked by discriminatory conduct).

<sup>199</sup> The treaty bodies are: The Human Rights Committee established in terms of article 28 of the ICCPR; the Committee against Torture, established in terms of article 17 of the Torture Convention; the Committee on the Elimination of Discrimination against Women, created in terms of article 17 of CEDAW; the Committee on the Rights of the Child, established in terms of article 43 of the Children’s Convention; committees for the ICCPR and ICESCR respectively; the torture committee, established in terms of article \_\_\_ of the Torture Convention; the CEDAW Committee, established in terms of article \_\_\_ of CEDAW; the Refugee Committee established in terms of article \_\_\_ of the \_\_\_; and, the Human Rights Committee established in terms of \_\_\_. [Note: Citation to follow and content to be confirmed]

implementation of CEDAW by member states.<sup>200</sup> Member states are required to submit regular reports to the CEDAW Committee on the “legislative, judicial, administrative or other measures” adopted to give effect to the provisions of CEDAW.<sup>201</sup> The majority of the CEDAW Committee’s work is examining these reports, interviewing state representatives, and proposing ways in which states can enhance gender equality.<sup>202</sup>

### 6.2.3 Appraisal of CEDAW

#### a. Textual Deficiency

While the omission of any reference to violence in the text of CEDAW has been remedied to some extent by General Recommendation 19, the original text of CEDAW remains an unrefined tool that is disproportionate to address the extent and severity of violence against women.<sup>203</sup> This thesis proposes that, if one considers that subsequent to the adoption of CEDAW new independent instruments regarding mass rape and trafficking were formulated due, in part, to a deficiency in CEDAW, *a fortiori* additional specification is also required for systemic intimate violence, which was not addressed in the original CEDAW text.

To the extent that an international treaty exists for the protection of the rights of women, there is no escaping the fact that its text omits entirely any specific reference to preventing violence against women. The efficacy of DEVAW in enhancing the text of CEDAW to include violence against women is discussed below.

#### b. Reservations

One of the key deficiencies of CEDAW is the number of reservations entered by states against its seminal provisions.

A reservation is “a unilateral statement, however phrased or named, made by a State ... whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.”<sup>204</sup> Most reservations are lawful unless they are specifically prohibited by the treaty in question or if the reservation is “incompatible with the object and purpose of the treaty.”<sup>205</sup>

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<sup>200</sup> Article 17. The CEDAW Committee is responsible for monitoring “the progress made in the implementation” of CEDAW, which it does predominantly by receiving state reports on the status of women and holding dialogues with state representatives on the content of such reports. Article 17(1) read together with article 18 of CEDAW.

<sup>201</sup> A member state is required to submit a report within one year after entry into force for the state concerned and thereafter, at least every four years or whenever the CEDAW Committee requests. Article 18.

<sup>202</sup> Submissions are made to the Secretary-General of the U.N., for consideration by the CEDAW Committee.

Article 17.

<sup>203</sup> See Sally Engle Merry, *Constructing a Global Law – Violence against Women and the Human Rights System*, 28 LAW & SOC. INQUIRY 941, 952 (2003) (indicating that violence was not included in the original CEDAW text but that it has been developed through other instruments such as DEVAW).

<sup>204</sup> Article 2 of the Vienna Convention.

<sup>205</sup> The international law of treaties provides that, when signing a treaty, a state may enter a so-called reservation to such treaty. Article 19(c) of the Vienna Convention.

There are various legal permutations when a party enters a reservation to a treaty provision.<sup>206</sup> Generally speaking, a reservation modifies the treaty as between the reserving state and the other signatories but does not modify the treaty as between the other non-reserving signatories *inter se*. Under certain circumstances, parties to the treaty may object to reservations entered by other state parties, although this does not change the nature of the reservation.<sup>207</sup>

There are several advantages and disadvantages to reservations.<sup>208</sup> On the one hand, because of the flexibility to modify the treaty as desired, reservations induce more countries to sign treaties. On the other hand, they may dilute the efficacy of the treaty as a whole. This is problematic for the purposes of developing CIL since reservations to a particular part of a treaty will limit the extent to which a norm of international law can be said to have developed from the treaty and become applicable to non-signatories.<sup>209</sup> After all, the interpretation of a treaty and the existence of its provisions in CIL are determined with reference to the text of the treaty and the language of the reservations thereto.<sup>210</sup>

However, human rights treaties are outliers, different from all other treaties in international law because they operate against the state and for the benefit of the individual.<sup>211</sup> Therefore, allowing the state to enter reservations against its own obligations could, and has, impeded the extent to which the treaty benefits the human beings in question.<sup>212</sup> CEDAW is an example of this.

While CEDAW boasts one of the highest numbers of member states to have signed and ratified a treaty, most state signatories have entered significant reservations to some of the more seminal provisions of CEDAW.<sup>213</sup> In keeping with the Vienna Convention on the Law of Treaties, reservations may not be “incompatible with the object and purpose” of CEDAW.<sup>214</sup>

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<sup>206</sup> Article 21 of the Vienna Convention.

<sup>207</sup> Article 20 of the Vienna Convention.

<sup>208</sup> See Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination against Women*, 30 VA. J. INT'L L. 634, 649-650 (1990) (describing the advantages and disadvantages to allowing reservations in international human rights law).

<sup>209</sup> North Sea Continental Shelf Case (W.Ger. v. Den.) (W.Ger. v. Neth.), 1969 I.C.J. 4, 42-43. See Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination against Women*, 30 VA. J. INT'L L. 634, 651 footnote 35 (1990) (discussing the value of multi-party treaties as expanding CIL and citing Barcelona Traction case).

<sup>210</sup> See Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination against Women*, 30 VA. J. INT'L L. 634, 653 (1990) (citing the IAC death penalty case).

<sup>211</sup> See Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination against Women*, 30 VA. J. INT'L L. 634, 645-6 (1990).

<sup>212</sup> CEDAW allows for signatory states to enter reservations upon ratification or accession. Article 28(1). See William A. Schabas, *Reservations to the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child*, 3 WM. & MARY J. WOMEN & L. 79, 82 & 84-86 (1997) (describing the nature of reservations entered against CEDAW). See also Valerie A. Dormady, *Status of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, 33 INT'L LAW. 637, 637 (1999) (describing the problematic nature of reservations to CEDAW because “ratification of the treaty had not translated into compliance through legislative and policy changes by many state parties.”). This was endorsed by the opinion of the International Court of Justice in its discussion of reservations to the Genocide Convention.

<sup>213</sup> See Jo Lynn Southard, *Protection of Women's Human Rights Under the Convention on the Elimination of All Forms of Discrimination against Women*, 8 PACE INT'L L. REV. 1, 20-21 (1996) (describing the number of states and the nature of the reservations they have entered against seminal provisions of CEDAW).

<sup>214</sup> Article 28(2).



This, however, has not stopped states from entering reservations against core provisions, such as article 2, with the result that many state parties have explicit discriminatory laws on their books and in practice.<sup>215</sup>

The result is a treaty which facially prohibits the discrimination of women but whose member states actively and openly discriminate against their female citizens.<sup>216</sup> In Nigeria, for example, “assault is not an offense if inflicted ‘by a husband for the purpose of correcting his wife,’ so long as it ‘does not amount to an infliction of grievous hurt.’”<sup>217</sup> Algeria, Yemen and Mali are others examples of the concern that “that broad reservations to rights that would require any change in domestic law effectively mean ‘[n]o real international rights or obligations have thus been accepted.’”<sup>218</sup>

This is not to say that reservations have rendered CEDAW nugatory; however, its primary usefulness has been for non-governmental organizations and not governmental conduct.<sup>219</sup> In addition, it appears that CEDAW has been more successful in triggering new equality legislation rather than in rescinding old discriminatory legislation.<sup>220</sup>

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<sup>215</sup> See Jessica Neuwirth, *Inequality before the Law: Holding States Accountable for Sex Discriminatory Laws under the Convention on the Elimination of All Forms of Discrimination against Women and Through the Beijing Platform for Action*, 18 HARV. HUM. RT.S J. 19, 19-20 (2005) (describing the sex discriminatory laws in several countries which have ratified CEDAW). See also Sally Engle Merry, *Constructing a Global Law – Violence against Women and the Human Rights System*, 28 LAW & SOC. INQUIRY 941, 953 (2003) (discussing the problem of reservations to CEDAW). See Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination against Women*, 30 VA. J. INT’L L. 634, 687 (1990) (describing the reservation by Bangladesh with article 2 on the basis that it conflicts with Shari’a law. [Note: include ref to CEDAW Committee’s comment on the 25<sup>th</sup> anniversary of the adoption of CEDAW that “in no country in the world has women’s full de jure and de facto equality been achieved]

<sup>216</sup> See Jessica Neuwirth, *Inequality before the Law: Holding States Accountable for Sex Discriminatory Laws under the Convention on the Elimination of All Forms of Discrimination against Women and Through the Beijing Platform for Action*, 18 HARV. HUM. RT.S J. 19, 23-25 (2005) (describing the extent of sex discriminatory laws in countries such as Yemen, Sudan, Algeria, Mali and Nigeria).

<sup>217</sup> See Jessica Neuwirth, *Inequality before the Law: Holding States Accountable for Sex Discriminatory Laws under the Convention on the Elimination of All Forms of Discrimination against Women and Through the Beijing Platform for Action*, 18 HARV. HUM. RT.S J. 19, 23-25 (2005) (citing the U.N. Comm. On the Elimin. Of Discrim. Against Women, Statement to Commemorate the Twenty-Fifth Anniversary of the Adoption of the Convention on the Elimination of All Forms of Discrimination against Women, @ <http://www.un.org/womenwatch/daw/cedaw/cedaw25anniversary/cedaw25-cedaw.pdf> (oct. 13, 2004)).

<sup>218</sup> This concern was raised by the Human Rights Committee, in its general comment on reservations. See Jessica Neuwirth, *Inequality before the Law: Holding States Accountable for Sex Discriminatory Laws under the Convention on the Elimination of All Forms of Discrimination against Women and Through the Beijing Platform for Action*, 18 HARV. HUM. RT.S J. 19, 30 (2005).

<sup>219</sup> See Jessica Neuwirth, *Inequality before the Law: Holding States Accountable for Sex Discriminatory Laws under the Convention on the Elimination of All Forms of Discrimination against Women and Through the Beijing Platform for Action*, 18 HARV. HUM. RT.S J. 19, 37-38 (2005) (discussing the First CEDAW Impact Study, which concluded that “ratification of CEDAW had provided non-governmental organizations with an additional resource helpful to their advocacy efforts, but that in many states awareness of the Convention and its use in domestic activism remained very limited, even within the women’s rights movement... The study found that while the women’s rights framework and the use of CEDAW and CEDAW Committee reports had been ‘extremely useful’ in this respect, it could be argued that ‘it is at the grassroots level of organizing that these tools have been more effective.’”).

<sup>220</sup> See Jessica Neuwirth, *Inequality before the Law: Holding States Accountable for Sex Discriminatory Laws under the Convention on the Elimination of All Forms of Discrimination against Women and Through the Beijing Platform for Action*, 18 HARV. HUM. RT.S J. 19, 39 (2005).



### c. Difficulties Faced by the CEDAW Committee

The CEDAW Committee was designed to meet for a period of two weeks annually, during which time it is to review all country reports, hold dialogues with states, prepare comments and recommendations on the reports and provide feedback to the Secretary-General. No reference is made to remuneration.<sup>221</sup>

CEDAW traditionally is one of the least empowered U.N. bodies, lacking office space, resources, and time.<sup>222</sup> Its original meeting time was limited to no more than two weeks annually, a limitation which did not exist in respect of any other treaty body.<sup>223</sup> In addition, it shares the same deficiency as many human rights bodies, namely, a lack of enforcement power.<sup>224</sup>

### d. Positive Impact

While CEDAW is deficient in content and enforcement, the treaty is not a sinking ship. As anthropologist Merry states, “CEDAW is law without sanctions. But a close examination of the way in which the CEDAW process operates suggests that although it does not have the power to punish, it does important cultural work.”<sup>225</sup> Firstly, it set a precedent for the development of women’s rights law in international law. Secondly, one of CEDAW’s more effective tools lies in the reporting procedures whereby states are required to report on the status of women’s rights in their country. This has a surprising impact by naming and shaming, a process which should not be undervalued if one views international human rights as a “cultural system whose coin is admission into the international community of human-rights-compliant states.”<sup>226</sup>

Upon this basis, both legal and practical changes have taken hold, with varying degrees of success, throughout the world. There is no doubt that the international community and individual women are both better off for its existence. Yet CEDAW is only the beginning, and not the end, of the protection of women against violence.

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<sup>221</sup> It has been reported that CEDAW Committee members are paid \$3,000.00 a year as remuneration for their work. This includes eight weeks’ of meeting time and considerable preparation between meetings. SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 238, footnote 6 (2006).

<sup>222</sup> The CEDAW Committee was established with fewer resources, less financial support and less power than other treaty bodies. For a discussion of the difficulties faced by the CEDAW Committee see Margareth Etienne, *Addressing Gender-Based Violence in an International Context*, 18 HARV. WOMEN’S L.J. 139 [page 5] (1995).

<sup>223</sup> Jo Lynn Southard, *Protection of Women’s Human Rights Under the Convention on the Elimination of All Forms of Discrimination against Women*, 8 PACE INT’L L. REV. 1, 23 (1996) (describing the limitations of the CEDAW Committee due to weak U.N. support).

<sup>224</sup> See Andreea Vesa, *International and Regional Standards for Protecting Victims of Domestic Violence*, 12 AM. U.J. GENDER, SOC. POL’Y & L. 309, 312 (2004) (arguing that the major deficiency in international law generally and in respect of domestic violence specifically is the lack of enforcement mechanisms). See also Sally Engle Merry, *Constructing a Global Law – Violence against Women and the Human Rights System*, 28 LAW & SOC. INQUIRY 941, 942 (2003) (identifying the lack of enforcement mechanisms as CEDAW’s largest weakness).

<sup>225</sup> SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 72 (2006).

<sup>226</sup> Sally Engle Merry, *Constructing a Global Law – Violence against Women and the Human Rights System*, 28 LAW & SOC. INQUIRY 941, 942-943 (2003).

## 6.3 U.N. Resolutions (1990)

### 6.3.1 Status of the U.N. Resolutions

U.N. resolutions are passed by the General Assembly of the U.N. Such resolutions technically are not binding on states, although there are arguments that U.N. resolutions constitute CIL and, therefore, are binding and authoritative.<sup>227</sup> At the very least, resolutions set a standard, albeit advisory, of how states ought to behave. Moreover, because the members of the U.N. vote on them in the General Assembly, it is arguable that resolutions constitute proof of CIL, articulating the *opinio juris* of nations. Within the context of CIL, therefore, a U.N. resolution is tentative evidence of the existence of an international norm.<sup>228</sup>

### 6.3.2 Content of the U.N. Resolutions

#### a. The 1985 U.N. Resolution

The 1985 U.N. resolution is one of the first references to the public permutations of domestic violence.<sup>229</sup> It focuses, *inter alia*, on the negative impact of domestic violence on children, the family and the victim.<sup>230</sup>

The resolution suggests that states are responsible for the prevention of domestic violence and the assistance of victims. However, this suggestion is directed only to “Member States concerned.” The adjective “concerned” suggests that those states which are not concerned need not comply with the recommendations of the U.N. While this is probably a linguistic nuance that is unlikely to form the basis of a state’s claim to be exempt from its international obligations to protect women, it does contribute to a general atmosphere that the resolution is advisory and tentative, rather than authoritative and binding.

The 1985 resolution does not claim to be anything more than a point of departure from which the international law of domestic violence should be developed by international

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<sup>227</sup> See Jo Lynn Slama [note], *Opinio Juris in CIL*, 15 OKLA. CITY U. L. REV. 603, 647 (1990) (describing the opinions of the International Court of Justice in Western Sahara and the Nicaragua cases, which “make clear that *opinio juris* may be manifested in the Resolutions of the United Nations. “[T]he cumulative impact of many resolutions when similar in content voted for by overwhelming majorities and frequently repeated over a period of time may give rise to a general *opinio juris* and thus constitute a norm of CIL.”).

<sup>228</sup> See BROWNLIE, *supra* note 329, at 5 (describing the types of instruments and events which qualify as evidence of the rules of CIL, including “resolutions relating to legal questions in the United Nations General Assembly.”). The debate as to what constitutes CIL is extensive. Indeed, as discussed below, the entire notion of CIL is challenged on the basis, *inter alia*, that it is undemocratic and imprecise, subject to inconsistent interpretation. For a discussion in this regard, see Patrick Kelly, *The Twilight of CIL*, 40 VA. J. INT’L L. 449 (2000) (rejecting CIL as a viable source of international law).

<sup>229</sup> Article 3, for example, requests “the Secretary General to intensify research on domestic violence from a criminological perspective...”

<sup>230</sup> See Preamble, paragraphs 4-8 and 10. Specifically, the resolution notes the “situation of women as victims of crime” (Id., article 1) and invites “Member States concerned to take specific action urgently in order to prevent domestic violence and to render the appropriate assistance to the victims thereof.” (Id., article 2).

organizations and by states.<sup>231</sup> It “invites” member states to adopt certain measures, with a view to “making the criminal and civil justice system more sensitive in its response to domestic violence.”<sup>232</sup> Once again, the language is permissive and not mandatory, in keeping with the legal nature of the resolution. However, notwithstanding that the resolution merely ‘invites’ states to amend their justice systems, it does constitute an expression of the way law ought to be, thereby creating a preliminary standard of state behavior as regards domestic violence. As an initial statement on the matter, therefore, the 1985 resolution is an important expression of basic government action.

Governments are invited under the resolution to make several broad changes to their justice systems to deal with the punishment of abusers and the protection of victims.<sup>233</sup> First, the resolution states that states ought to introduce civil and criminal legislation addressing domestic violence, enforce such legislation, protect battered family members and punish the offenders.<sup>234</sup> It is interesting that already in 1985 the U.N. recognized the necessity of “alternative ways of treatment for offenders, according to the type of violence.”<sup>235</sup> The resolution identifies the “special and sometimes delicate position of the victim” and compels states to be respectful of victims “in particular in the manner in which the victim is treated.”<sup>236</sup> The delicacy of the victim’s position includes the recognition that urgent and temporary solutions are required, such as “shelters and other facilities and services for the safety of victims.”<sup>237</sup>

The resolution also identifies the need to prevent domestic violence, and not only punish its perpetrators.<sup>238</sup> This reveals an awareness of three factors: (1) the normalization of domestic violence through social endorsement; (2) the connection between inequality, ignorance and gender-based harm; and, (3) the obligation of the state to prevent the violence by addressing each link in the chain of violence.<sup>239</sup>

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<sup>231</sup> Article 3, for example, is a request to the Secretary-General “to intensify research on domestic violence from a criminological perspective to formulate distinct action-oriented strategies that could serve as a basis for policy formulation...” The resolution also invites other bodies within the U.N. to address domestic violence as a component of their mandates. *Id.* articles 4-6.

<sup>232</sup> *Id.*, article 7.

<sup>233</sup> *Id.*, article 7.

<sup>234</sup> *Id.*, article 7(a).

<sup>235</sup> *Id.*, article 7(a).

<sup>236</sup> *Id.*, article 7(b). In addition, article 7(e) calls on states to provide “specialized assistance to victims of domestic violence...”

<sup>237</sup> *Id.*, article 7(f). Article 7(g) refers to “specialized training and units for those who deal in some capacity with victims of domestic violence.”

<sup>238</sup> It calls on states to “initiate preventive measures, such as providing support and counselling to families, in order to improve their ability to create a non-violent environment, emphasizing principles of education, equality of rights and equality of responsibilities between men and women, their partnership and the peaceful resolution of conflicts.” *Id.*, article 7(c).

<sup>239</sup> This is confirmed in article 7(d), which calls on states to create public awareness of the problem of domestic violence, specifically as regards “serious acts of violence perpetrated against children.” Article 7(h) also requires states to “research and collect data on the background, extent and types of domestic violence.” The resolution also refers to the importance of integrating social welfare and health administration with the work of the criminal justice system in addressing domestic violence.

Finally, the resolution pre-empts the difficulty of reconciling overt state intervention to prevent domestic violence with the right to privacy.<sup>240</sup> While it does not provide a specific solution to the way in which this balance can be achieved, it does compel states to take balanced measures and, implicitly at least, the resolution acknowledges that it is possible to have more proactive domestic violence laws without compromising the right to privacy.

#### b. The 1990 U.N. Resolution

The preamble to the 1990 U.N. resolution refers to the “concern of Member States about domestic violence as an urgent problem deserving focused attention and concerted action.”<sup>241</sup> This statement indicates that states view domestic violence as an international concern and records a type of international consensus against domestic violence that was absent in the 1985 resolution.

The 1990 U.N. resolution also takes a tentative step in the direction of recognizing domestic violence as having an impact on the broader society and not only on the immediate lives of the victims.<sup>242</sup> This public component is also reflected in the resolution’s proposed solutions to combat domestic violence through “multidisciplinary policies, measures and strategies, within and outside of the criminal justice system.”<sup>243</sup> However, the detail of these steps is left to the investigation and imagination of the states.<sup>244</sup> While states are urged to cooperate with each other and with non-governmental organizations, as regards research findings, there is no stipulation as to what states should do with such information.<sup>245</sup>

### 6.3.3 Appraisal of the U.N. Resolutions

The 1985 and 1990 resolutions are ambiguous, both in language and content. Certainly the 1990 resolution is vague and general and provides no specificity as to what steps states should be taking to achieve the objective. There is little direct discussion regarding the nature of the right in question, the enforceability of the concomitant international obligation and the international relevance of the violence.

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<sup>240</sup> Article 7(i) invites states to make “legal remedies to domestic violence more accessible and, in view of the criminogenic effects of the phenomenon, in particular on young victims, to give due consideration to the interests of society by maintaining a balance between intervention and the protection of privacy.”

<sup>241</sup> Paragraph 9 of the Preamble. The Preamble to the 1990 resolution makes several references to the family and the destructive force of domestic violence to the family unit. Paragraphs 2, 4, 5, 7, and 10 of the Preamble.

<sup>242</sup> See paragraphs 10, 14, 15, and 17 of the Preamble.

<sup>243</sup> Article 1. The resolution also makes reference to “legal, law enforcement, judicial, societal, educational, psychological, economic, health-related and correctional aspects...” Id.

<sup>244</sup> The same is true as regards the resolution’s recommendation that states ensure that their criminal justice systems are effective and equitable as regards domestic violence. Article 2. Although, it should be noted that article 5 of the resolution requests the Secretary-General “to convene a working group of experts, within existing or with extrabudgetary resources, to formulate guidelines or a manual for practitioners concerning the problem of domestic violence for consideration at the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders and its regional preparatory meetings, taking into account the conclusions of the report of the Secretary-General on domestic violence.”

<sup>245</sup> Article 3.

In all fairness, however, these are factors that are evident with the hindsight of research (the very thing required by these resolutions) and the absence of political exigencies, which may or may not have influenced the permissive atmosphere of the documents.

The resolutions prioritize domestic violence in the general areas of crime prevention and criminal justice, thus changing the character of domestic violence from a family law infraction to a violation of justice.<sup>246</sup> Ultimately, the U.N. resolutions contribute to the body of evidence proving that domestic violence is an international concern, requiring attention at an international level and demonstrating (in theory) a consensus of states that the activities of private individuals, in the context of domestic violence, is in fact the responsibility of states.

#### 6.4 General Recommendation 19 (1992)

As will be discussed in chapter five, violence against women became increasingly important in the CEDAW Committee meetings around the time of General Recommendation 19.

General Recommendations 12 and 19, passed in 1989 and 1994 respectively, were official statements of the CEDAW committee, incorporating violence against women, including domestic violence, into the treaty's framework.<sup>247</sup>

##### 6.4.1 Status of General Recommendation 19

The CEDAW Committee is empowered to “make suggestions and general recommendations based on the examination of reports and information received from the State Parties.”<sup>248</sup> General Recommendations 12 and 19 are examples of this power. General Recommendation 12 urged states to consider the seriousness of violence against women and required statistics on gender-based violence.<sup>249</sup> As the later and more comprehensive recommendation, the discussion hereafter focuses on General Recommendation 19.

General recommendations by U.N. treaty bodies are not automatically binding on state parties to the treaty in question and are used to explain or interpret provisions within the governing treaty.<sup>250</sup> However, as with U.N. resolutions passed by the General Assembly, general

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<sup>246</sup> Article 4.

<sup>247</sup> *Report on the Committee on the Elimination of Discrimination Against Women: General Recommendation No. 12, Violence Against Women (8<sup>th</sup> Sess. 1989), adopted 3 Mar. 1989, U.N. GAOR, 44th Sess., Supp. No. 38, ¶¶ 7-9, 24, U.N. Doc. A/44/38 (1990), reprinted in *Compilation of General Comments and General Recommendations Adopted by the Human Rights Treaty-bodies*, at 78, U.N. Doc. HRI/GEN/1/Rev.1 (1994), establishing that violence against women was prohibited by CEDAW, *supra* note 21, and General Recommendation 19, *supra* note 35, at 5.*

<sup>248</sup> Article 21(1) of CEDAW.

<sup>249</sup> *Report on the Committee on the Elimination of Discrimination Against Women: General Recommendation No. 12, Violence Against Women (8<sup>th</sup> Sess. 1989), adopted 3 Mar. 1989, U.N. GAOR, 44th Sess., Supp. No. 38, ¶¶ 7-9, 24, U.N. Doc. A/44/38 (1990), reprinted in *Compilation of General Comments and General Recommendations Adopted by the Human Rights Treaty-bodies*, at 78, U.N. Doc. HRI/GEN/1/Rev.1 (1994).*

<sup>250</sup> SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 75 (2006) (“CEDAW General Recommendations are not legally binding in the same way as the terms of CEDAW, but they are designed to show states their obligations when they are not mentioned or not sufficiently explained in the convention itself.”).

recommendations made by treaty bodies may constitute evidence of the existence of a rule of CIL. The rule of CIL, in turn, theoretically binds all states.<sup>251</sup>

As will be argued in chapter four, General Recommendation 19 contributes to the plethora of evidence indicating the existence of an international norm against domestic violence in CIL. Therefore, in a cumulative sense, General Recommendation is an important instrument for domestic violence.

#### 6.4.2 Content of General Recommendation 19

##### a. Violence Equals Discrimination

General Recommendation 19 amends the textual gap in CEDAW and states expressly that the “definition of discrimination includes gender-based violence... [which] may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence”<sup>252</sup> Gender-based violence is “violence that is directed against a woman because she is a woman or that affects women disproportionately.”<sup>253</sup>

Domestic violence, referred to as violence in the family, is described as:

one of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes. Lack of economic independence forces many women to stay in violent relationships. The abrogation of their family responsibilities by men can be a form of violence, and coercion. These forms of violence put women's health at risk and impair their ability to participate in family life and public life on a basis of equality.<sup>254</sup>

The recommendation links violence against women to other international human rights violations, such as torture and discrimination.<sup>255</sup> It creates an express link between discrimination and violence. It reiterates states’ obligations to end to all forms of discrimination against women and explains that “[t]raditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion...”<sup>256</sup>

Because states have an obligation to prevent discrimination, and because violence against women is a manifestation of discrimination, QED states have an obligation to prevent violence against women. Therefore, states are required to take positive steps to prevent violence against women, whether perpetrated by public or private actors.<sup>257</sup>

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<sup>251</sup> See BROWNLIE, *supra* note 329, at 5.

<sup>252</sup> Article 6.

<sup>253</sup> Article 6.

<sup>254</sup> Paragraph 23.

<sup>255</sup> Article 7(b). It cites violence as “a form of discrimination that seriously inhibits womens’ [sic] ability to enjoy rights and freedoms on a basis of equality with men.”

<sup>256</sup> Article 11.

<sup>257</sup> General Recommendation 19, *supra* note 35, at paragraph 4: “The full implementation of the Convention required States to take positive measures to eliminate all forms of violence against women.”

## b. Culture Cannot Justify Violence

General Recommendation 19 makes a bold statement as regards cultural and traditional “prejudices and practices [which] may justify gender-based violence as a form of protection or control of women.”<sup>258</sup> It rejects this, explaining that the “underlying consequences of these forms of gender-based violence help to maintain women in subordinate roles and contribute to the low level of political participation and to their lower level of education, skills and work opportunities.”<sup>259</sup>

## c. Types of Prohibited Violence

General Recommendation 19 prohibits a wide range of violence. In general, violence against women is said to include “acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.”<sup>260</sup> The following forms of violence against women are listed specifically: family violence and abuse; forced marriage; dowry deaths; acid attacks; female circumcision;<sup>261</sup> prostitution;<sup>262</sup> trafficking;<sup>263</sup> rape in general;<sup>264</sup> sexual assault in armed conflict;<sup>265</sup> sexual harassment;<sup>266</sup> dietary restrictions for pregnant women;<sup>267</sup> sexual exploitation of rural women;<sup>268</sup> and, compulsory sterilization and abortion.<sup>269</sup> The effect of the violence is “to deprive them [*women*] the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms [*sic*].”<sup>270</sup>

“Family violence” is discussed separately and extensively. It is described as “one of the most insidious forms of violence against women,” which affects women of all ages.<sup>271</sup> The Recommendation explains that family violence is universal and “prevalent in all societies.”<sup>272</sup> It describes the variety of types of harm, such as “battering, rape, other forms of sexual assault, mental and other forms of violence...” and the “abrogation of their family responsibilities by men” as a form of violence and coercion.<sup>273</sup> It reveals that women are unable to leave the abusive situations because a “[l]ack of economic independence forces many women to stay in violent relationships.”<sup>274</sup> It raises the context of discrimination such as traditional attitudes which perpetuate the violence.<sup>275</sup> It concludes by stating that “[t]hese forms of violence put women’s

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<sup>258</sup> Article 11.

<sup>259</sup> Article 11.

<sup>260</sup> Article 1.

<sup>261</sup> Article 11.

<sup>262</sup> Articles 13 and 15.

<sup>263</sup> Articles 14 and 16.

<sup>264</sup> Article 15.

<sup>265</sup> Article 16.

<sup>266</sup> Article 17.

<sup>267</sup> Articles 19 and 20.

<sup>268</sup> Article 21.

<sup>269</sup> Article 22.

<sup>270</sup> Article 11.

<sup>271</sup> Article 23.

<sup>272</sup> Article 23.

<sup>273</sup> Article 23.

<sup>274</sup> Article 23.

<sup>275</sup> Article 23.

health at risk and impair their ability to participate in family life and public life on a basis of equality.”<sup>276</sup>

#### d. State Obligations

As regards the responsibility for violence, General Recommendation 19 states that CEDAW applies to violence “perpetrated by public authorities.”<sup>277</sup> However, in the following, separate article it is “emphasized... that discrimination under the Convention is not restricted to action by or on behalf of Governments.”<sup>278</sup> This article refers to the fact that CEDAW requires state parties to “take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.”<sup>279</sup> It then cites “general international law and specific human rights covenants” as authority for the fact that 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 for providing compensation.”<sup>280</sup>

After listing the forms of gender-based violence, General Recommendation 19 makes several recommendations to state parties.<sup>281</sup> These recommendations can be grouped into three categories: (1) legal; (2) educational and (3) research. State parties are encouraged to comment on the implementation of these steps in their reports to the CEDAW Committee.<sup>282</sup>

There are several aspects of the recommendations which focus on “family violence.” The first broad recommendation is of specific importance to systemic intimate violence. It requires state parties to “take appropriate and effective measures to overcome all forms of gender-based violence, *whether by public or private act.*”<sup>283</sup> Irrespective of whether the violence is conducted by private citizens or government entities, the state, it is suggested, remains responsible for the violence.

The recommendation is far more specific as regards systemic intimate violence (known as family violence):<sup>284</sup> it calls for criminal penalties “where necessary and civil remedies in cases of domestic violence;”<sup>285</sup> it denounces the defense of honor for crimes of assault against or murder of female family members and requires its removal by legislation;<sup>286</sup> it recognizes the victims’ immediate need for safety, “including refuges, counselling and rehabilitation programmes;”<sup>287</sup> it

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<sup>276</sup> Article 23.

<sup>277</sup> Article 8 (“Such acts of violence may breach that State's obligations under general international human rights law and under other conventions, in addition to breaching this Convention.”).

<sup>278</sup> Article 9.

<sup>279</sup> Article 9.

<sup>280</sup> Article 9.

<sup>281</sup> Article 24.

<sup>282</sup> Article 24(v) provides that the reports of state parties “should include information on the legal, preventive and protective measures that have been taken to overcome violence against women, and on the effectiveness of such measures.” In addition, reference is made to the reporting requirement in articles 24(b), (e), (h), (j), (l), (n), (q), (s), and (u).

<sup>283</sup> Article 24(a).

<sup>284</sup> Article 24(r)(i).

<sup>285</sup> Article 24(r)(ii).

<sup>286</sup> Article 24(r)(iii).

<sup>287</sup> Article 24(r)(iv).



requires “[r]ehabilitation programs for the perpetrators of domestic violence;”<sup>288</sup> and support service for families “where incest or sexual abuse has occurred.”<sup>289</sup>

### 6.4.3 Appraisal of General Recommendation 19

General Recommendation 19 incorporates a broad definition of violence against women into CEDAW. To some degree, this closes the textual loophole of the original CEDAW text. It also formed the basis for the U.N. declaration, DEVAW and, therefore, is one of a series of triggers which, so to speak, raised violence against women out of the margins of international discourse and into the mainframe of international law.<sup>290</sup>

However, there are three core ways in which General Recommendation 19 is deficient.

First, as its name suggests, General Recommendation 19 is of interpretive value only. It does not constitute an amendment to the treaty and, again depending on one’s interpretation of CIL, it is not clear whether it is binding on member states.<sup>291</sup> After all, this is not a resolution or declaration by the community of states represented in the General Assembly. It is an interpretation by the committee endowed with the power to administer the treaty. To the extent to which this could be viewed as binding CIL is contentious.

The recommendation points out that discrimination “is not restricted” to acts of government but it does not authoritatively extend responsibility to private conduct; rather it reminds state parties that they “*may* also be responsible for private acts *if* they fail to act with due diligence to prevent violations of rights.” No right against systemic intimate violence is established by this paragraph and certainly no clear state obligation manifests. While the first recommendation calls on state parties to overcome gender-based violence, “whether by public or private act,” it remains a recommendation, which can be applied to systemic intimate violence only by extrapolation.<sup>292</sup>

Second, even though there is sufficient content in General Recommendation 19 to argue that states should investigate, prosecute and punish systemic intimate violence, *and* pay compensation if they fail to do so, there is no express statement to this effect. As far as the text of General Recommendation 19 is concerned, there is only tentative authority that systemic intimate violence is a violation of a woman’s rights for which her state can be held responsible.

Third, the underlying theory of General Recommendation 19 “is that improving women’s status with relation to men will reduce their vulnerability to violence.”<sup>293</sup> In other words, General Recommendation 19 links violence against women to discrimination. At a purely intellectual level, this is correct: violence against women is a direct consequence of discrimination.

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<sup>288</sup> Article 24(r)(iv).

<sup>289</sup> Article 24(r)(v).

<sup>290</sup> See SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 76 (2006).

<sup>291</sup> Patrick Kelly, *The Twilight of CIL*, 40 VA. J. INT’L L. 449 (2000) (rejecting CIL as a source of international law).

<sup>292</sup> Article 24(a).

<sup>293</sup> SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 77 (2006).

However, it is not necessarily the best approach in international law. This is because many states actively practice gender discrimination or gender *differentiation* but nonetheless strive to eradicate violence against women. In linking violence to discrimination in such absolute terms, it becomes even more difficult to obtain the cooperation of stratified states. For example, Palestinian women have argued for a reinterpretation of Islam that would grant them greater safety, without requiring the equivalent treatment of men and women that would contradict the tenets of Islam.<sup>294</sup>

This is a difficult line to walk. It is counter-intuitive to discuss the reduction of violence against women without a commitment to gender equality. However, the heterogeneity of nations seems to require us to slice the cord linking violence against women to discrimination. While it is far from ideal, it should still be possible to lobby in certain states for the safety of women, albeit at the most basic level, within the confines of gender stratification. I emphasize that this is not ideal. However, encouraging states to comply with the narrow norm of reducing systemic intimate violence may introduce more state parties to the women's rights discourse.

### 6.5 Beijing Platform for Action and the Special Rapporteur (1995)

The Beijing Platform for Action was a turning point. Due to an admirable strength of will and organization, women's rights groups succeeded in changing the general view of violence against women in two ways. They demonstrated its global pervasiveness and highlighted its public nature, thereby ending the demarcation of violence against women as a private and quasi-legal phenomenon.

In addition, Beijing had a positive effect on the adoption and implementation of CEDAW, leading to greater compliance with CEDAW and more national reform.<sup>295</sup> States entered objections to reservations which had been made and reserving states began to rescind their original reservations.<sup>296</sup>

One of the reasons for the success of Beijing was its pure size. The extent of the conference and its global and eclectic attendance made it one of the more visible international events.<sup>297</sup> However, it has been criticized for its lack of enforcement mechanisms and for the fact that its follow-up procedure does not allow for state-specific assessment.<sup>298</sup>

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<sup>294</sup> See SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 77 (2006).

<sup>295</sup> Jessica Neuwirth, *Inequality before the Law: Holding States Accountable for Sex Discriminatory Laws under the Convention on the Elimination of All Forms of Discrimination against Women and Through the Beijing Platform for Action*, 18 HARV. HUM. RT.S J. 19, 46 (2005).

<sup>296</sup> Jessica Neuwirth, *Inequality before the Law: Holding States Accountable for Sex Discriminatory Laws under the Convention on the Elimination of All Forms of Discrimination against Women and Through the Beijing Platform for Action*, 18 HARV. HUM. RT.S J. 19, 43 (2005) (describing the impact of Beijing on the reservations made to key CEDAW provisions).

<sup>297</sup> Jessica Neuwirth, *Inequality before the Law: Holding States Accountable for Sex Discriminatory Laws under the Convention on the Elimination of All Forms of Discrimination against Women and Through the Beijing Platform for Action*, 18 HARV. HUM. RT.S J. 19, 47 (2005).

<sup>298</sup> Jessica Neuwirth, *Inequality before the Law: Holding States Accountable for Sex Discriminatory Laws under the Convention on the Elimination of All Forms of Discrimination against Women and Through the Beijing Platform for Action*, 18 HARV. HUM. RT.S J. 19, 51 (2005). See also Hilary Charlesworth, *The Unbearable Lightness of CIL*, 92

## 6.6 DEVAW (1994)

### 6.6.1 Status of DEVAW

DEVAW is the most explicit international instrument regarding domestic violence. It has been argued that DEVAW is a representation of CIL, even though it is not a treaty.<sup>299</sup> The new wave of CIL theory would recognize DEVAW as evidence of a norm against violence against women. According to this body of theory, “declaratory resolutions which, if accepted by an overwhelming majority of the General Assembly, usually by consensus or by an almost unanimous vote, can also constitute ‘generally accepted’ principles of international law.”<sup>300</sup> Theorist Louis Sohn maintains that “[a]ll these documents have by now been generally accepted even if at their birth there have been some doubts about their normative character.”<sup>301</sup>

### 6.6.2 Content of DEVAW

DEVAW is based largely on the provisions of General Recommendation 19. DEVAW summarizes three forms of violence as violations of international law, namely, violence in the family, public violence, and violence that is condoned by the state, irrespective of where it occurs.<sup>302</sup> It also stipulates that states should exercise “due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.”<sup>303</sup> Finally, DEVAW instructs states to

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AM. SOC’Y INT’L L. PROC. 46 (1998) (arguing that the Vienna Conference on Human Rights and the Beijing Declaration “contain relatively modest initiatives to improve the situation of women and reinforce a stereotype of women as wives and mothers. In any event, the compliance requirements in the official documents are very weak.”).<sup>299</sup> Surya P. Subedi, *Protection of Women against Domestic Violence: The Response of International Law*, 6 E.H.R.L.R. 587, 598-599 (1997) (arguing that if declarations and resolutions are coupled with state practice and *opinion jurisdiction*, this may “give rise to the emergence of new rules of CIL). See also Patrick Kelly, *The Twilight of CIL*, 40 VA. J. INT’L L., 452, 484-5 (2000) (describing the so-called new CIL which maintains that “unanimous and near-unanimous resolutions and declarations of the U.N. General Assembly and other international fora constitute a consensus in legal norms providing clear evidence of the *opinio juris* of nations.”). See also Louis Sohn, “*Generally Accepted*” *International Rules*, 61 WASH. L. REV. 1073, 1074 (1986). Sohn states quite explicitly that, based on statements by the International Court of Justice, “once a principle is generally accepted at an international conference, usually through consensus, a rule of CIL can emerge without having to wait for the signature of the convention.” *Id.* at 1077.

Others view this as “declarative” law which is distinct from CIL. For a discussion of this view, see Hiram Chodosh, *Neither Treaty Nor Custom: The Emergence of Declarative International Law*, 26 TEX. INT’L L.J. 87 (1991).

<sup>300</sup> Louis B. Sohn, “*Generally Accepted*” *International Rules*, 61 WASH. L. REV. 1073, 1078 (1986).

<sup>301</sup> Louis B. Sohn, “*Generally Accepted*” *International Rules*, 61 WASH. L. REV. 1073, 1079 (1986).

<sup>302</sup> Article 2 of DEVAW, *supra* note 22, includes the following forms of violence in its definition: “(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation; (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution; (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.”

<sup>303</sup> Article 4(c) of DEVAW, *supra* note 22.

develop sanctions to punish perpetrators of violence against women and to make the system of justice accessible for injured women.<sup>304</sup>

### 6.6.3 Appraisal of DEVAW

DEVAW effectively does what women have been demanding for decades: it requires the state to get involved.<sup>305</sup> The least contentious position is that it is a guide as to how states, should they wish to achieve an end to violence against women, ought to go about it.<sup>306</sup>

As a statement by an authoritative institution it sets an international precedent that violence against women is objectionable. As a declaration, however, its authority is questionable. Whether or not it can be demarcated as a principle of international law remains the subject of much debate.<sup>307</sup> It is possible to conclude that DEVAW “was never intended to be the end of this process, but rather a first solid foundation on the basis of which States were supposed to take actions at all levels designed to eliminate violence against women.”<sup>308</sup>

## 6.7 The Optional Protocol (2000)

### 6.7.1 Legal Status of the Optional Protocol

The Optional Protocol is an addendum to CEDAW and requires signature and ratification like any other treaty.<sup>309</sup> It was adopted by the General Assembly on 6 October 1999 and entered into force on 22 December 2000.<sup>310</sup> As of 1 March 2006, 77 states had ratified the Optional Protocol.<sup>311</sup> Reservations are not permitted by the Optional Protocol.<sup>312</sup>

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<sup>304</sup> Article 4(d) of DEVAW, *supra* note 22: “Develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence; women who are subjected to violence should be provided with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm that they have suffered; States should also inform women of their rights in seeking redress through such mechanisms.”

<sup>305</sup> Article 4(h) of DEVAW, *supra* note 22, also encourages States to include in their budgets “adequate resources for their activities related to the elimination of violence against women.” Article 4(k), which deals with the compilation of statistics and the collection of data, makes specific reference to domestic violence and “the causes, nature, seriousness and consequences of violence against women.”

<sup>306</sup> Preamble to DEVAW, *supra* note 22, (the U.N. General Assembly “urges that every effort be made so that it becomes generally known and respected”). There are arguments that U.N. resolutions and declarations are not CIL and therefore cannot be applied to a generality of states. Hiram Chodosh, *Neither Treaty Nor Custom: The Emergence of Declarative International Law*, 26 TEX. INT’L L.J. 87, 89 (1991).

<sup>307</sup> See Louis B. Sohn, ‘Generally Accepted’ International Rules, 61 WASH. L. REV. 1073 (1986); Michael Reisman, *The Cult of Custom in the Late 20<sup>th</sup> Century*, 17 CALIF. W. INT’L L.J. 133 (1987); Hiram Chodosh, *Neither Treaty Nor Custom: The Emergence of Declarative International Law*, 26 TEX. INT’L L.J. 87 (1991); and, Patrick Kelly, *The Twilight of CIL*, 40 VA. J. INT’L L. 449 (2000).

<sup>308</sup> Surya P. Subedi, *Protection of Women against Domestic Violence: The Response of International Law*, 6 E.H.R.L.R. 587, 602 (1997).

<sup>309</sup> See CSW Overview *supra* n.

<sup>310</sup> See CSW Overview *supra* n. The General Assembly adopted the Optional Protocol to the Convention on 6 October 1999 in its [resolution 54/4](#) (A/RES/54/4), without reference to a Main Committee. The Optional Protocol was open for signature on 10 December, 1999, Human Rights Day. On 22 December 2000, following receipt of the tenth instrument of ratification, the Optional Protocol entered into force.

<sup>311</sup> See CSW Overview *supra* n.

<sup>312</sup> Article 17.

The Optional Protocol enables the CEDAW committee to receive communications by or on behalf of individuals who have grievances falling within the scope of CEDAW.<sup>313</sup> It also gives the CEDAW committee investigative powers, significantly augmenting the status of CEDAW. However, the Optional Protocol has been used only once and only countries which ratify the protocol may be brought into the CEDAW committee's jurisdiction.<sup>314</sup>

## 6.7.2 Content of the Optional Protocol

State parties to the Optional Protocol recognize the authority of the CEDAW Committee to receive and consider communications by or on behalf of individuals or groups of individuals.<sup>315</sup> There are substantive and procedural requirements in order for a communication to be admissible.<sup>316</sup>

However, the Optional Protocol operates only on the basis of exhaustion of local remedies. Therefore, a complaint will only be considered by the CEDAW Committee if it is clear that "all available domestic remedies have been exhausted unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief."<sup>317</sup> In addition, if a communication is manifestly ill-founded or not sufficiently substantiated, it will be inadmissible.<sup>318</sup>

Provision is made for interim urgent relief.<sup>319</sup> The CEDAW Committee may request a state party urgently "to take such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violation."<sup>320</sup> Under ordinary circumstances, however, state parties have six months in which to respond to the allegations contained in the communication.<sup>321</sup> Once the CEDAW Committee has evaluated the communication and made its recommendations available to the state and the parties in question, the state party is required to consider the recommendations and respond in writing within six months.<sup>322</sup>

The Optional Protocol also allows for the CEDAW Committee to initiate investigations *meru moto*, if it receives "reliable information indicating grave or systematic violations by a State Party of rights set forth in the Convention."<sup>323</sup> Under such circumstances, the state party is invited "to cooperate in the examination of the information" and to submit observations.<sup>324</sup> The

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<sup>313</sup> Article 2 of the CEDAW Optional Protocol, *supra* note 22.

<sup>314</sup> The CEDAW Committee can only entertain communications concerning a state which is a party of both CEDAW and the Optional Protocol. Article 3.

<sup>315</sup> Articles 1 and 2. Such individuals must be members of state parties and can claim to be victims of a violation of a right protected by CEDAW.

<sup>316</sup> Article 4.

<sup>317</sup> Article 4(1).

<sup>318</sup> Article 4(2)(c).

<sup>319</sup> Article 5.

<sup>320</sup> Article 5(1).

<sup>321</sup> Article 6.

<sup>322</sup> The state party "shall give due consideration to the views of the Committee, together with its recommendations, if any, and shall submit to the Committee, within six months, a written response, including information on any action taken in the light of the views and recommendations of the Committee." Article 7(4).

<sup>323</sup> Article 8(1).

<sup>324</sup> Article 8(1).

CEDAW Committee is empowered to conduct inquiries and, if warranted, visit the territory of the state in question, with the state's consent.<sup>325</sup> Most of the inquiries are conducted confidentially.<sup>326</sup> Thereafter the procedure mirrors the communications process: the CEDAW Committee examines the findings of the inquiry; submits its findings to the state party; and, the state party has six months in which to respond.<sup>327</sup> While reservations to the Optional Protocol are not permitted, a state party is entitled to "declare that it does not recognize the competence of the Committee" as described above.<sup>328</sup>

### 6.7.3 Analysis of Cases under the Optional Protocol

There have been two applications under the Optional Protocol, which have both been declared inadmissible, and one investigation. While it is probably too early to assess the efficacy of the complaints procedure in the Optional Protocol, it is necessary and useful to analyze the three cases that have been considered by the CEDAW Committee to date.

#### a. Ms B.-J. v. Germany

The first application, made by a German citizen against Germany, involved a divorced woman who had been unable to secure a final maintenance hearing in Germany and was living in a state of dire financial uncertainty. The CEDAW Committee declared the application inadmissible on the basis that the applicant had not exhausted local remedies and that the CEDAW Committee was precluded *ratione temporis* from considering certain aspects of the complaint.<sup>329</sup>

In a separate opinion, two CEDAW Committee members dissented from the majority opinion, maintaining that the domestic proceedings regarding the allocation of maintenance were unreasonably prolonged.<sup>330</sup> Since the complainant was an older woman who had dedicated three decades of her life to supporting her family and husband, the lack of certainty of her financial income five years after the divorce "is rightly considered to be unacceptable and a serious violation of her human rights in and of itself."<sup>331</sup>

There are compelling reasons to support both the majority and the minority positions. The majority applied a narrow, black letter analysis to the facts, which demonstrates a positive restraint on "judicial activism" and compliance with the letter of the Optional Protocol. This will be a comfort to states which are concerned that the CEDAW Committee might become a loose

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<sup>325</sup> Article 8(2).

<sup>326</sup> Articles 6(1) and 8(5).

<sup>327</sup> Article 8(3)-(4).

<sup>328</sup> Article 10(1).

<sup>329</sup> See Excerpt from A/59/38 Annex VIII Decision of the Committee on the Elimination of Discrimination against Women, declaring a communication inadmissible under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women Communication No.: 1/2003, Ms. B.-J. v. Germany (Decision adopted on 14 July 2004, thirty-first session) Submitted by: Ms. B.-J. Alleged victim: The author State party: Germany Date of communication: 20 August 2002 (initial submission), paragraphs 8.4, 8.5, and 8.8(a).

<sup>330</sup> See Individual opinion of Committee members Krisztina Morvai and Meriem Belmihoub-Zerdani (dissenting). *Id* page 13.

<sup>331</sup> *Id.*

canon if too much power is vested in it. The minority, on the other hand, focused on the complainant's enduring status quo, which breaches both the letter and the spirit of CEDAW.

Notwithstanding the inadmissibility of the communication, the complaint against Germany proves that the mechanism is functional and respectable.

b. Ms A.T. v. Hungary

The second communication made to the CEDAW Committee under the Optional Protocol deals directly with domestic violence.<sup>332</sup> The communication, submitted by a Hungarian citizen against Hungary, claimed, *inter alia*, that Hungary had failed to protect her from extreme and repetitive forms of domestic violence, thereby violating its obligations in terms of CEDAW.

There are four important aspects to this opinion. The first is that Hungary does not actually dispute many of the allegations made against it. Rather, it demonstrates steps it has taken and will take to improve its laws and policy regarding domestic violence. Second, the CEDAW Committee does not hesitate to include domestic violence within its ambit of consideration. Third, the manner in which the claimant describes the pattern of domestic violence, and the acknowledgement by both the CEDAW Committee and Hungary of the fact that this violates the claimant's human rights, is weighty evidence of the right in international law to be free from systemic intimate violence. Finally, the claimant asks for urgent interim relief, the success of which remains unclear.

Hungary raises very few exceptions to the communication.<sup>333</sup> It refers to the fact that domestic violence is a problem in Hungary and that the laws must be adjusted to address this.<sup>334</sup> In addition, it makes reference to the CEDAW Committee's instructions in this regard on the combined fourth and fifth periodic report of Hungary in 2002.<sup>335</sup> On the one hand, this acknowledgment of responsibility is frustrating, not least of all because the improved mechanisms did not in fact assist the claimant (although this too is acknowledged by the state).<sup>336</sup> On the other hand, as a result of its interaction with the CEDAW Committee, Hungary has made

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<sup>332</sup> See Views of the Committee on the Elimination of Discrimination against Women under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women Communication No.: 2/2003, Ms. A.T. v. Hungary (Views adopted on 26 January 2005, thirty-second session) Submitted by: Ms. A.T. Alleged victim: The author State party: Hungary Date of communication: 10 October 2003 (initial submission) The Committee on the Elimination of Discrimination against Women, established under article 17 of the Convention on the Elimination of All Forms of Discrimination against Women, Meeting on 26 January 2005.

<sup>333</sup> In fact, it abrogates its right to make procedural exceptions, notwithstanding the possible viability of such exceptions. See paragraph 5.6 of the opinion, indicating that the state party "maintains that "although the author did not make effective use of the domestic remedies available to her and although some domestic proceedings are still pending, the State party does not wish to raise any preliminary objections as to the Advance Unedited Version admissibility of the communication. At the same time, the State party admits that these remedies were not capable of providing immediate protection to the author from illtreatment by her former partner."

<sup>334</sup> Paragraph 5.7.

<sup>335</sup> Paragraph 5.7.

<sup>336</sup> Paragraph 7.4 ("Based on the experience of the Office in the present case as well as in general, it is conceded that the legal and institutional system in Hungary is not ready yet to ensure the internationally expected, coordinated, comprehensive and effective protection and support for the victims of domestic violence.")

meaningful amendments to its domestic violence laws, most notably the incorporation of protection orders, which, prior to the submission of the communication, did not exist.<sup>337</sup>

The claimant's articulation of her claim and the CEDAW Committee's acceptance thereof, demonstrates the revised approach in international law to domestic violence, which incorporates the role of the state in allowing the violence to perpetuate. The communication maintains that "the irrationally lengthy criminal procedures against L.F. [the abuser], the lack of protection orders or restraining orders under current Hungarian law, and the fact that L.F. has not spent any time in custody, constitute violations of her rights under the Convention as well as violations of General Recommendation 19 of the Committee. She maintains that these criminal procedures can hardly be considered effective and/or immediate protection."<sup>338</sup> This is acknowledged by Hungary and confirmed by the CEDAW Committee. When Hungary conceded that its legal and institutional system was "not ready yet to ensure the internationally expected, coordinated, comprehensive and effective protection and support for the victims of domestic violence,"<sup>339</sup> it accepted that such a standard exists and that it is bound to comply with it. The CEDAW Committee confirms that a state can be held responsible for the conduct of non-state actors and imposes liability on Hungary for the following:

For four years and continuing to the present day, the author has felt threatened by her former common law husband – the father of her two children. The author has been battered by the same man, i.e. her former common law husband. She has been unsuccessful, either through civil or criminal proceedings, to temporarily or permanently bar L.F. from the apartment where she and her children have continued to reside. The author could not have asked for a restraining or protection order since neither option currently exists in the State party. She has been unable to flee to a shelter because none are equipped to take her in together with her children, one of whom is fully disabled. None of these facts have been disputed by the State party and, considered together, they indicate that the rights of the author under articles 5 (a) and 16 of the Convention have been violated.<sup>340</sup>

The general discussion of the *type* of violence perpetrated against the claimant echoes the definition of systemic intimate violence described above. The violence is described as "severe,"<sup>341</sup> a "persistent situation of insecurity,"<sup>342</sup> comprising physical, mental and financial abuse, and threats of harm.<sup>343</sup> Most importantly, the CEDAW Committee details the many ways in which the state systemically and systematically failed to assist the complainant: there were no protection or restraining orders; there were no shelters which would admit the complainant because she has a fully disabled child; the criminal proceedings were too lengthy and the tendency was to delay domestic violence cases; and, Hungary had failed to dislodge the attitudes of Hungarian citizens and politicians that domestic violence is not sufficiently serious to warrant

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<sup>337</sup> Paragraphs 2.1, 3.2, 5.7, 9.3 and 9.4.

<sup>338</sup> Paragraph 3.2. See also paragraphs 9.3 and 9.4 for the CEDAW Committee's acceptance of the role of state in allowing the violence to be prolonged.

<sup>339</sup> Paragraph 7.4.

<sup>340</sup> Paragraph 9.4.

<sup>341</sup> Paragraph 2.1.

<sup>342</sup> Paragraph 9.3.

<sup>343</sup> Paragraph 2.1.



immediate and effective state intervention.<sup>344</sup> Therefore, the core elements of systemic intimate violence appear in this opinion.

However, to what extent is the process effective for the claimant? The CEDAW Committee concludes its opinion with recommendations that Hungary “take immediate and effective measures to guarantee the physical and mental integrity” of the claimant and her family, and to ensure that the claimant “is given a safe home in which to live with her children, receives appropriate child support and legal assistance and that she receives reparation proportionate to the physical and mental harm undergone and to the gravity of violations of her rights.”<sup>345</sup> It is entirely unclear whether the request for urgent interim measures or the final recommendations were implemented by Hungary.

### c. Investigation of Ciudad Juárez, Mexico

The first and, as of the date of writing, the only investigation launched by the CEDAW Committee under the Optional Protocol relates to violence against women in Mexico. Towards the end of 2002, the CEDAW Committee received information about the murder, rape and disappearance of hundreds of women in the Mexican city of Ciudad Juárez, in the state of Chihuahua.<sup>346</sup> The CEDAW Committee launched an investigation into the situation in terms of article 8 of the Optional Protocol.<sup>347</sup>

There are a number of factors which make the violence against women in Ciudad Juárez remarkable. I discuss these factors in some detail since the substantive nature of the crimes, many of which are described as domestic violence, and the structural and systemic nature of the state’s response, demonstrate the advances made in international law as regards systemic intimate violence.

The first aspect relates to the increasing number of women who have disappeared over the last decade. Due to the inconsistency between the various reports it is impossible to determine the exact number of missing women, with estimates ranging from 350 to a few thousand.<sup>348</sup> However, it is not only the large number of the disappearances which is shocking, but also the

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<sup>344</sup> Paragraphs 9.3 and 9.4.

<sup>345</sup> Paragraph 9.6. The CEDAW Committee also makes several general recommendations regarding domestic violence and women in general in Hungary.

<sup>346</sup> See paragraph 3, page 4, Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention, and reply from the Government of Mexico, CEDAW/C/2005/OP.8/MEXICO, 27 January 2005 [hereinafter CEDAW Committee Ciudad Juárez Report] (“At its thirty-first session in July 2004, the Committee on the Elimination of Discrimination against Women concluded an inquiry under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women in regard to Mexico that also included a visit to the State party’s territory. The Committee included a procedural summary of the inquiry in its annual report (A/59/38, Part II, Chapt. V.B). It decided to make public at a later date its findings and recommendations regarding the abduction, rape and murder of women in the Ciudad Juárez area of Chihuahua, Mexico, as well as the observations received from the Government of Mexico thereon.”).

<sup>347</sup> CEDAW Committee Ciudad Juárez Report, paragraph 1, page 1.

<sup>348</sup> CEDAW Committee Ciudad Juárez Report, paragraph 36, page 11, paragraph 73, page 16 and paragraph 135, page 24.

consistent pattern with which the disappearances take place and fact that the violence has persisted and *escalated* for over a decade.

The second factor is the evidence of torture. Where bodies have been found, there is evidence of rape and torture.<sup>349</sup> Not only is the violence particularly cruel, but the murders are preceded by periods of captivity and mutilated corpses are “then abandoned on waste ground and eventually discovered by passers-by, not by the police.”<sup>350</sup>

Third, the victims apparently fit a profile. They are usually young, attractive women, who are very poor, working in the maquiladoras (export processing plant industry) or studying.<sup>351</sup> In general the victims are vulnerable and, due to their poverty, the victims and their families receive very little respect from the community and the authorities.

The fourth factor is the pattern by which the victims are abducted and murdered. At first, the victims would disappear “while on their way to or from their homes since they had to cross deserted, unlit areas at night or in the early morning.”<sup>352</sup> Today, however, the disappearances occur in broad daylight, in the city center.<sup>353</sup>

The fifth alarming aspect of the crimes in Ciudad Juárez, is the role of the state. In addition, it appears that “the local authorities, both state and municipal, are assumed to have a years-long history of complicity and fabrication of cases against the alleged perpetrators.”<sup>354</sup> police officials refuse to investigate disappearances when they are reported while simultaneously abandoning cases which are too old; families are instructed by the police to look for disappeared women themselves; cases are delayed indefinitely with no information regarding their progress; families are denied access to court files; evidence is removed from court files; victims’ bodies are found accidentally and not by the police; evidence is destroyed or marred; there is evidence that internal organs of corpses are missing; families are told to identify bodies as their relatives when the remains of the bodies look nothing like the relatives; officials present skeletons which have been picked clean; officials cover certain parts of the bodies and refuse to reveal them to families; outspoken families and members of society are intimidated, threatened and followed; complaints made against police officials are lost or delayed; evidence indicates that individual members of the police have participated in the disappearance and murder of victims; detainees are moved from the prison in Ciudad Juárez to Chihuahua where the press is not allowed access; and, detainees are reportedly tortured and coerced into making confessions. The hostile behavior

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<sup>349</sup> CEDAW Committee Ciudad Juárez Report, paragraph 61, page 15 (indicating that one third of the murdered women “have been brutally raped.”).

<sup>350</sup> CEDAW Committee Ciudad Juárez Report, paragraph 37, page 11.

<sup>351</sup> CEDAW Committee Ciudad Juárez Report, paragraph 63, page 15.

<sup>352</sup> CEDAW Committee Ciudad Juárez Report, paragraph 64, page 15.

<sup>353</sup> *Id.* According to the CEDAW Committee, “the method of these sexual crimes begins with the victims’ abduction through deception or by force. They are held captive and subjected to sexual abuse, including rape and, in some cases, torture until they are murdered; their bodies are then abandoned in some deserted spot.” CEDAW Committee Ciudad Juárez Report, paragraph 65, page 15.

<sup>354</sup> CEDAW Committee Ciudad Juárez Report, paragraph 87, page 17.

of state officials towards the victims' families, together with a rate of almost complete impunity, has exacerbated the intensity of the crimes and the acceleration of their occurrence.<sup>355</sup>

The sixth factor is the general status of the women within the local community, combined with extreme poverty in Ciudad Juárez, Chihuahua. The violence committed against women is “marked by hatred and misogyny.”<sup>356</sup> A rigid framework of classism and sexism supports the violence, leading to the CEDAW Committee’s conclusion that “the root causes of gender violence in its structural dimension and in all its forms — whether domestic and intra-family violence or sexual violence and abuse, murders, kidnappings, and disappearances must be combated.”<sup>357</sup> Due to the peculiarly rapid growth of Ciudad Juárez and the employment of women rather than men in the maquilas, “traditional dynamic of relations between the sexes, which was characterized by gender inequality” have worsened.<sup>358</sup> The increasing employability of women set against traditional patriarchal attitudes creates a tension which has perpetuated and exacerbated “the stereotyped view of men’s and women’s social roles.”<sup>359</sup> While it is the author’s opinion that an entire community cannot be labeled as hating women, there appears to be a great number of individuals in Ciudad Juárez who are hostile towards women and that such hostility is not challenged.

Many of the crimes are committed within the context of personal or intimate relationships. According to the Mexican government, the state of Chihuahua “acknowledges that 334 women were murdered between 1993 and May 2004. Of those, 66 per cent were the result of intra-family, domestic or ordinary violence involving husbands, boyfriends or other close family members.”<sup>360</sup>

The final factor is the role of international actors. The CEDAW Committee describes the role of NGOs as follows:

The NGOs which have provided information to the Committee are the forces which, for the longest time and with the greatest persistence, have taken the lead in reporting this clear violation of human rights and demanding justice. They are also a source of truthful, heartrending testimony, criteria and

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<sup>355</sup> CEDAW Committee Ciudad Juárez Report, paragraph 87, page 17 (“Thus far in the cases involving sex crimes, the murderers have acted with full impunity.”).

<sup>356</sup> CEDAW Committee Ciudad Juárez Report, paragraph 26, page 9. *See also* CEDAW Committee Ciudad Juárez Report, paragraph 24, page 9 (describing how violence against women is regarded as “a ‘normal’ phenomenon within the context of systematic and generalized gender-based discrimination.”).

<sup>357</sup> CEDAW Committee Ciudad Juárez Report, paragraph 34, page 10. *See also* CEDAW Committee Ciudad Juárez Report, paragraph 23, page 8 (“Furthermore, the delegation was informed by various sources that in Ciudad Juárez there is a marked difference between social classes, with the existence of a minority of wealthy, powerful families, who own the land on which the marginal maquilas and urban districts are located, making structural change difficult. The overall situation has led to a range of criminal behaviours, including organized crime, drug trafficking, trafficking in women, undocumented migration, money-laundering, pornography, procuring, and the exploitation of prostitution.”).

<sup>358</sup> CEDAW Committee Ciudad Juárez Report, paragraph 25, page 9.

<sup>359</sup> *Id.*

<sup>360</sup> CEDAW Committee Ciudad Juárez Report, paragraph 3.1, page 55. *See also* CEDAW Committee Ciudad Juárez Report, paragraph 245, page 39 (describing high rates of incest and violence against women in the family).

evidence which are essential to the effort to shed light on many of the circumstances under which the crimes have taken place.<sup>361</sup>

Several non-governmental and international organizations have visited the area and raised public awareness about the problem.<sup>362</sup> International officials have visited Ciudad Juárez, including: the Special Rapporteur for women's rights of the Inter-American Commission on Human Rights; the Special Rapporteur of the Commission on Human Rights on extrajudicial, summary or arbitrary executions; the United Nations Special Rapporteur on violence against women; and, in 2001 the United Nations Special Rapporteur on the independence of judges and lawyers visited Mexico.<sup>363</sup> There are over 300 civil society organizations publicizing and campaigning against the denial of justice in Ciudad Juárez and, as a result of national and international pressure, the city is now under public purview.<sup>364</sup>

Therefore, over a period of nine years, approximately 269 disappearances and murders of women and girls, usually between the ages of 15 and 25, were reported in Ciudad Juárez.<sup>365</sup> A substantial number of the killings were linked to domestic and intra-familial violence.<sup>366</sup> For the most part, the police and judiciary remained inert.<sup>367</sup>

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<sup>361</sup> CEDAW Committee Ciudad Juárez Report, paragraph 255, page 40.

<sup>362</sup> The recommendation that the CEDAW Committee launch an investigation into the disappearances in Ciudad Juárez came from local and international NGOs. See CEDAW Committee Ciudad Juárez Report, paragraph 3, page 4.

<sup>363</sup> CEDAW Committee Ciudad Juárez Report, paragraph 30-31, page 10.

<sup>364</sup> CEDAW Committee Ciudad Juárez Report, paragraph 244, page 39. It is recognized that, "as a result of national and international pressure during the first half of 2003, various measures ... have been taken at all three levels of government and that these may help to shed light on the murders and to prevent violence against women." CEDAW Committee Ciudad Juárez Report, paragraph 247, page 39.

<sup>365</sup> See Center for Reproductive Rights (formerly the Center for Reproductive Law and Policy), *Letter to the Committee on the Elimination of Discrimination against Women (CEDAW) entitled, Supplementary Information on Mexico Scheduled for Review by CEDAW in August, 2002*, June 19, 2002, available at [http://www.crlp.org/pdf/sl\\_mexico\\_eng\\_2002.pdf](http://www.crlp.org/pdf/sl_mexico_eng_2002.pdf) [hereinafter CRR, *Status of Women in Ciudad Juárez*]. See also OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369.

<sup>366</sup> See also part three of the OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraph 57 ("The killing of women in Ciudad Juárez is strongly linked to and influenced by the prevalence of domestic and intrafamilial violence.") See also paragraphs 43 and 57. Ciudad Juárez is an example of systemic intimate violence against women, and the impunity that may accompany it. Both the Mexican Government and non-governmental organizations agreed that most of the murders related to manifestations of violence with gender-specific causes and consequences. OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraph 28 (indicating that "the gender dimensions of this violence have yet to be effectively addressed."). The homicide rate for women between 1993 and 2001 rose at double the rate as that for men. See OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraph 42.

<sup>367</sup> The publicity aroused government and international concern that insufficient attention was devoted to the underlying causes of the sexual crimes and domestic violence. OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraph 11. Many citizens of Ciudad Juárez complained about the "insufficient response of the police and judiciary to these killings." OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraph 69.

When the brutality of and fear associated with the so-called “serial” killings gained public attention, the inaction of the authorities of the State of Chihuahua triggered international concern.<sup>368</sup> Only a decade after the killings commenced, did investigations begin in earnest.

In response to international pressure, the Mexican government at first justified its ineffective response by arguing that the victims were immoral women who lived double lives, and were responsible for their own victimization.<sup>369</sup> This approach fuelled the discussion of impunity, revealing disquieting details about Chihuahua’s failure to protect women from public violence and systemic intimate violence. The authorities who were responsible for investigating the crimes and prosecuting the perpetrators were reportedly negligent, for example, causing delays in the initiation of investigations into reports of disappearances; minimizing efforts in the initial investigation; failing to collect or record evidence; losing evidence; mistreating the family of the victim, and failing to provide information as to the status of the investigation or the workings of the legal mechanisms.<sup>370</sup> There was a lack of support services for the survivors of those who had been killed and a dearth of convictions or prosecutions of perpetrators.<sup>371</sup> In this way, the overall administration of justice was ineffective and political will to improve the status quo was seemingly absent.<sup>372</sup>

The impunity not only sanctioned past offences, but also led to a rise in criminal conduct.<sup>373</sup> In 1998, due to international pressure, the officials of Chihuahua created a Special Prosecutor’s Office to address the killings.<sup>374</sup> However, the practice of denigrating the victims and holding them responsible for their own victimization continued.<sup>375</sup>

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<sup>368</sup> Many of the killings were “manifestations of violence based on gender.” OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraph 11.

<sup>369</sup> CRR, *Status of Women in Ciudad Juárez*, *supra* note 648, at 5: “The negligence shown by the authorities, the ineffective administration of justice, and the government’s weak resolve to investigate these cases thoroughly highlight the Mexican Government’s failure to fulfill its obligation to stop gender-based violence.”

<sup>370</sup> OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraphs 34 and 70. OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraph 48 (“Because of the lack of basic information, family members ... have expressed a profound lack of confidence in the willingness or the ability of the authorities to clarify what happened or pursue accountability.”) *See also* OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraphs 54 and 70.

<sup>371</sup> OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraph 70.

<sup>372</sup> OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraph 34. Many families had requested DNA tests to determine and/or confirm the identity of a deceased and either waited without response or their requests were denied immediately. *See* OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraph 47 (“...even with a missing person’s report, the response was neither rapid nor comprehensive.”). It should be noted, however, that the Chihuahua officials have taken steps to improve the facilities and capabilities of the Unit for Attention to Victims of the Special Prosecutor’s Office. OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraph 55.

<sup>373</sup> As long as the officials remained incapable or unwilling to address the source, actors and motives behind the murders, the killings continued, apparently without abatement. OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraph 34 (“The organizations indicated that, because the Mexican State was allowing these crimes to remain in impunity, it was encouraging their persistence.”).

<sup>374</sup> OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraph 33.

<sup>375</sup> The officials reportedly blamed the victims for their disappearance, referring to their way of dress or lifestyles with the type of derogatory manner that revealed a lack of understanding regarding the exigency of economic conditions for many women, and betraying a sexist view regarding the choices women make and the extent to which they may or may not conform to the traditional roles expected of them. One of the problems highlight by the OAS Report on the Situation of Women in Ciudad Juárez is the fact that the increased jobs for women was a change in

Prejudice against the victims explains the disjuncture between the officials' claim of action and the reality of inaction, a reality which is resonant of historical gender discrimination. Simply, the officials' conduct displayed a perception "that violence against women – most illustratively domestic violence – is not a serious crime."<sup>376</sup>

The vulnerability of women as a group is stark. The story of Ciudad Juárez is not an isolated peculiarity but a theme that is more common of more countries than should be acceptable./

It is possible to conclude that the intervention of the CEDAW Committee has been effective.<sup>377</sup> Yet its efficacy lies in the CEDAW Committee's most uncertain power, that of publication. The media attention has brought the world into Ciudad Juárez and Ciudad Juárez to the world. As a result of the many publications of the events in Ciudad Juárez of the last decade, Mexico is implementing practical and policy changes, albeit slowly.

#### 6.7.4 Appraisal of the Optional Protocol

The confidentiality requirement of the Optional Protocol is worrying. While the Optional Protocol does call on states to "take all appropriate steps to ensure that individuals under its jurisdiction and not subjected to ill treatment or intimidation as a consequence of communicating with the Committee,"<sup>378</sup> it is possible that fear of state recrimination may chill or dissuade individuals from communicating with the CEDAW Committee. Without the interface of the media and the publication of international events, the intimidation of individuals who have communicated with the CEDAW Committee may go undetected. In addition, one of the main methods of enforcing international human rights law is through the naming and shaming process, which is absent in the case of confidential hearings.<sup>379</sup>

The entire operation of the Optional Protocol applies to rights contained in CEDAW. If a state has entered reservations to CEDAW it is unlikely that the Optional Protocol can be used in respect of the provisions to which the state party has reserved its commitment. In addition, while the preponderance of probabilities and wealth of CIL indicia establish violence against women as a violation of CEDAW, this is not definitive and its absence from the text of CEDAW remains a potential loophole.

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cultural patterns that led to further tensions "in a society marked by historical inequalities between men and women and few resources to assist in changing those attitudes." OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraph 40.

<sup>376</sup> OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraph 36.

<sup>377</sup> CEDAW Committee Ciudad Juárez Report, paragraph 256, page 40 (Describing the opinion of NGOs that "the intervention of international human rights bodies is essential and that the latter's efforts and, in particular, those of the Committee, are responsible for the Mexican authorities' recognition of the gravity of the situation; they believe that, in addition to advocating for an end to these crimes, the Committee has an essential role to play with respect to the implementation of measures aimed at preventing and eliminating gender-based violence).

<sup>378</sup> Article 11.

<sup>379</sup> This is not the case with all Optional Protocol proceedings. See article 13 which calls on state parties to facilitate access to information about the views and recommendations of the CEDAW.

The Optional Protocol has led to greater U.N. support for the CEDAW Committee.<sup>380</sup> However, while it expands CEDAW's powers of investigation, it does not expand its powers of enforcement.<sup>381</sup> Its inability to compel state conduct, coupled with the confidentiality requirements and the ability of state parties to reject the competence of the CEDAW Committee under certain circumstances, means the Optional Protocol actually imports little additional power.

The Optional Protocol, however, does bring the CEDAW Committee and the local individual into contact. Where the communications and recommendations are made public, a powerful tool develops. It is in global announcements that we see the efficacy of international human rights bodies and organizations. It is through universal condemnation and public damnation that a trickle of change appears in the lives of poor women in Ciudad Juárez. For whatever reason, the state officials who were inert in the face of the victims' families are now alert in the face of the camera. If cameras were to be placed in police stations, jails and police vehicles, the freedom with which the officials could pursue their own agenda would decrease. The watchdog of the world – the fallibility of the human ego and its need to be seen in the best light possible – gives the Optional Protocol and the CEDAW Committee a modicum of law enforcement capability.

## 6.8 U.N. General Comment No. 28 (2000)

### 6.8.1 Status of General Comment No. 28

General Comment No. 28 was adopted by the Human Rights Committee of the U.N., which is the committee responsible for the implementation of the ICCPR.<sup>382</sup> General Comment No. 28 is a revision the Human Rights Committee's comment on article 3 of the ICCPR, which requires state parties "to ensure the equal rights of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."<sup>383</sup> As described above, whether or not General Comment No. 28 constitutes CIL depends on the method used to determine the rules of CIL.

### 6.8.2 Content of General Comment No. 28

The comment's interpretation is that article 3 "implies that all human beings should enjoy the rights provided for in the Covenant, on an equal basis and in their totality."<sup>384</sup> States are obliged

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<sup>380</sup> This is evidenced by the General Assembly's request that the Secretary-General of the U.N. "provide the staff and facilities necessary for the effective performance of the functions of the Committee under the Protocol..." Paragraph 6 of the General Assembly resolution, to which the Optional Protocol is attached.

<sup>381</sup> See Jessica Neuwirth, *Inequality before the Law: Holding States Accountable for Sex Discriminatory Laws under the Convention on the Elimination of All Forms of Discrimination against Women and Through the Beijing Platform for Action*, 18 HARV. HUM. RT.S J. 19, 49 (2005) (criticizing the lack of enforcement mechanisms in the Optional Protocol).

<sup>382</sup> Adopted by the Human Rights Committee under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights Addendum General Comment No. 28 (68) Equality of rights between men and women (article 3), CCPR/C/21/Rev.1/Add.10, CCPR General Comment 28, 29 March 2000.

<sup>383</sup> Article 3 of the ICCPR, *supra* n.\*.

<sup>384</sup> Paragraph 2.

to ensure that men and women enjoy the rights equally.<sup>385</sup> Having identified the obligation of states, the comment describes the steps states must take to fulfill this obligation.<sup>386</sup>

In an important statement, the Human Rights Committee confirmed that the fulfillment of civil and political rights requires both negative measures (i.e. the abstention from harmful state conduct) and positive measures (i.e. the creation of facilities to implement civil and political rights).<sup>387</sup> State parties, therefore, are required to end discrimination on the ground of sex specifically and “to put an end to discriminatory actions, both in the public and the private sector...”<sup>388</sup> It is important to note that this section posits sex discrimination *in the private sector* as a civil and political issue.

In keeping with the approach of General Recommendation 19 and DEVAW, General Comment No. 28 raises the thorny issue of culture.<sup>389</sup> It requires state parties to ensure that “traditional, historical, religious or cultural attitudes are not used to justify violations of women’s rights to equality before the law and to equal enjoyment of all Covenant rights.”<sup>390</sup> However, it provides no information or guidelines as to how states should achieve this. This is particularly important since many governments rely on the support of such traditional or cultural communities in order to stay in power. It would be preferable if governments are not forced to choose between adherence to international law or allegiance to their constituents.

There is an overall obligation on states to provide information regarding the “actual role” of women in society.<sup>391</sup> The comment’s requests are an improvement on General Recommendation 19 and DEVAW as it requires states to “take account of the factors which impede the equal enjoyment by women” of the rights in the ICCPR and “spells out the type of information that is required.”<sup>392</sup>

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<sup>385</sup> It states that because “whenever any person is denied the full and equal enjoyment of any right” the full effect of article 3 is impaired. Paragraph 2.

<sup>386</sup> Paragraph 3. The steps include “the removal of obstacles to the equal enjoyment of such rights, the education of the population and of State officials in human rights, and the adjustment of domestic legislation so as to give effect to the undertakings set forth in the Covenant.”

<sup>387</sup> Paragraph 3 (“The State party must not only adopt measures of protection, but also positive measures in all areas so as to achieve the effective and equal empowerment of women.”).

<sup>388</sup> Paragraph 4.

<sup>389</sup> Paragraph 5.

<sup>390</sup> Paragraph 5.

<sup>391</sup> Paragraph 3. This relates to the affects on women of a state of emergency (paragraph 7); conflict (paragraph 8); reproductive rights (paragraphs 10 and 11); violence against women (paragraphs 11 & 12); clothing regulation (paragraph 13) (it is interesting to note that this paragraph states that it is a violation of the ICCPR “when women are subjected to clothing requirements that are not in keeping with their religion or their right of self-expression” or “when the clothing requirements conflict with the culture to which the woman can law a claim”); confinement (paragraphs 14, 15, & 16); alien status (paragraph 17); access to justice (paragraph 18 & 19); privacy (paragraph 20); freedom of thought and expression (paragraphs 21 & 22) (There is also a requirement to restrict dissemination of pornographic material which is likely to cause violence against women. This is important because it is mentioned in relation to the free speech clause of the ICCPR, with the result that the committee is taking a position contrary to the US: namely that free speech does not include the right to distribute harmful pornographic materials.); freedom in relation to marriage and children (paragraphs 23-28); equality before the law (paragraph 31)

<sup>392</sup> Paragraph 6.



Specifically, the comment requests states to provide information on nationals, legal measures and protection for women with regard to domestic violence, rape, safe abortion for pregnancy as a result of rape, forced abortion/sterilization and FGC.<sup>393</sup> The comment also requires information on laws which confine women to the house.<sup>394</sup> This request is made in the context of article 9 of the ICCPR, which prohibits arbitrary arrest and detention, usually associated with state incarceration. The comment refers to “any laws or practices which may deprive women of their liberty on an arbitrary or unequal basis, such as by confinement within the house,” In light of the fact that confinement to the home often is enforced by family members or intimate partners in connection with the infliction of systemic intimate violence, General Comment No. 28 brings systemic intimate violence within the scope of the ICCPR’s arrest and detention provisions. The connection between formal arrest and the isolation of systemic intimate violence is a major step forward in recognizing the fact that violence in the home is public.

In referring to access to justice, the comment insists that women should be able to “give evidence as witnesses on the same terms as men.”<sup>395</sup> This affects the so-called cautionary rule of evidence in terms of which women’s testimony traditionally is viewed with caution, as is a child’s, due to their ‘tendency’ to provide unreliable information. This is particularly important in cases of rape and domestic violence where, with only two witnesses, the woman’s testimony is usually balanced against that of a man. General Comment no. 28 requires women to have direct and autonomous access to the courts, which includes equal access to legal aid. It emphasizes the importance of this in “family matters” thereby acknowledging that this is the realm in which women need particular legal assistance.

### 6.8.3 Appraisal of General Comment No. 28

General Comment No. 28 is a departure from some of the ambiguous egalitarian language of other relevant international instruments. Its recommendations are accompanied by examples or explanations of why certain positive steps need to be taken to ensure women are able to enjoy the ICCPR rights. It also makes an authoritative statement about the long debate regarding positive and negative rights, namely, that proactive steps are necessary to entrench civil and political rights.

General Comment No. 28 therefore is a significant step in the direction of mainstreaming gender discrimination issues and taking women’s specific circumstances into account in all rights and not only those which apply exclusively to women. It is one of the many factors that, while running the risk independently of not constituting evidence of CIL, reflect the emerging norm, the beginning of the process towards the realization of a concrete, definitive and authoritative norm in international law against systemic intimate violence.

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<sup>393</sup> Paragraph 11.

<sup>394</sup> Paragraph 14.

<sup>395</sup> Paragraph 18.

## 6.9 Violence against Women in Regional Instruments, Bodies and Laws

### 6.9.1 The Inter-American System

In 1994, the General Assembly of the Organization of American States (OAS) adopted the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, which became known as the Convention of Belem Do Para.<sup>396</sup> An even more expansive definition of violence against women was incorporated into this regional instrument.<sup>397</sup> The Convention of Belem Do Para identified violence as one of the historic impediments to women achieving equality and a violation of their right to dignity.<sup>398</sup>

In many respects, the Convention of Belem Do Para is a stronger legal instrument than its most recent international equivalent, DEVAW. First, the Convention of Belem Do Para is a binding treaty, whereas DEVAW is a declaration, constituting an interpretation of a treaty (CEDAW) and at best, reflecting a principle of CIL. Second, while both the Convention of Belem Do Para and DEVAW prohibit public and private violence that is condoned or administered by the state, the regional instrument contains a more express and detailed prohibition of domestic violence *per se*.<sup>399</sup> It refers to physical, sexual and psychological violence that “occurs within the family or domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman, including, among others, rape, battery and sexual abuse.”<sup>400</sup>

Third, the Convention of Belem Do Para establishes an independent right “to be free from violence in both the public and private spheres.”<sup>401</sup> This is an important distinction since it establishes a responsibility on the part of state parties to fulfill that right, an express obligation that DEVAW does not emulate.<sup>402</sup> Finally, the Convention of Belem Do Para allows individuals to lodge petitions with the Inter-American Commission on Human Rights. By contrast, only recently have individual petitions been catered for in the Optional Protocol to CEDAW and, so far, the Protocol has been used on only one occasion.<sup>403</sup>

However, the Convention of Belem Do Para is a regional instrument. It does not constitute a principle of international law as a whole, although it certainly adds to the argument that there is a growing norm against systemic intimate violence.

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<sup>396</sup> Convention of Belem Do Para, *supra* note 22. For a discussion of the development of a norm against sex-discrimination in the inter-American system, see WORLD PUBLIC ORDER, *supra* notex, at 644-645.

<sup>397</sup> See Convention of Belem Do Para, *supra* note 22.

<sup>398</sup> See the Preamble to the Convention of Belem Do Para, *supra* note 22.

<sup>399</sup> Articles 1 and 2 of the Convention of Belem Do Para, *supra* note 22.

<sup>400</sup> Article 2(a) of the Convention of Belem Do Para, *supra* note 22.

<sup>401</sup> Article 3 of the Convention of Belem Do Para, *supra* note 22.

<sup>402</sup> The nature of this responsibility is described in chapter III of the Convention. See articles 7 and 8.

<sup>403</sup> [Note: citation to follow – Mexico City submission]

## 6.9.2 The European System

The Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “the European Convention”) prohibits sex discrimination as an impermissible basis for differentiation.<sup>404</sup> It requires states to respect the individual’s “private and family life, his home and his correspondence.”<sup>405</sup> However, this may be limited when it is:

in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>406</sup>

Therefore, while the right to privacy and family life is entrenched, it is not absolute and there is room for state intervention into the family affairs of individuals to protect the rights and freedoms of others. Within the articulation of the right to privacy, the protection of individuals is recognized.

Protocol No. 7 to the European Convention states that:

Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children.<sup>407</sup>

The European Court of Human Rights has released some of the more progressive decisions vis-à-vis state responsibility for harm committed in private. In the case of *A. v the United Kingdom*, the European Court of Human Rights considered whether caning a child constituted torture or inhuman or degrading treatment, as prohibited by Article 3 of the European Convention.<sup>408</sup> The Court concluded that Article 3 of the European Convention, read together with Article 1, places an obligation on state parties to take measures to ensure that their citizens are not subject to torture or inhuman or degrading treatment or punishment, “including such ill-treatment administered by private individuals.”<sup>409</sup> The Court emphasized the state’s responsibility to protect children and “other vulnerable individuals ... against such serious breaches of personal integrity.”<sup>410</sup> This laid the foundation for other cases regarding specific protection for vulnerable groups, which are discussed in chapter three below.

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<sup>404</sup> Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 with Protocol Nos. 1, 4, 6, 7, 12 and 13, *available at*, <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf> [hereinafter the European Convention].

<sup>405</sup> Article 8.

<sup>406</sup> Article 8 of European Convention, *supra* note 74.

<sup>407</sup> [Note: citation to follow]

<sup>408</sup> *Affaire A. c. Royaume-Uni, Case of A. v. The United Kingdom* (100/1997/884/1096) Strasbourg, 23 September 1998 [hereinafter *A. v. The United Kingdom*].

<sup>409</sup> *A. v. The United Kingdom*, *supra* note 78, at 10, paragraph 22.

<sup>410</sup> *A. v. The United Kingdom*, *supra* note 78, paragraph 22 page 10.

### 6.9.3 The African System

By contrast, Africa has experienced little of the successful application and enforcement of human rights. The original African Charter on Human and Peoples' Rights took positive strides in imposing on member states the obligation of actively ensuring that women enjoy a safe home environment.<sup>411</sup> However, both the formulation of the right (coupled with the rights of the child) and the implementation of the right are deficient. The right is a sub-right, forming part of the total right to have a family unit based on "traditional values recognized by the community."<sup>412</sup> The practical outcome of this right does not afford women any real benefit or elevation in status especially where such "traditional values" have placed women and children under the authority of the male household member, whose control and authority is rarely subject to restraint or intervention.<sup>413</sup>

The new African Union, established on 9 July 2002 seeks, *inter alia*, "to build a partnership between governments and all segments of civil society, in particular women, youth and the private sector, in order to strengthen solidarity and cohesion among our peoples."<sup>414</sup> While the founding document of the African Union, the Constitutive Act (which incorporates and augments the Banjul Charter), undertakes to promote gender equality, the document itself is wanting in respect of defining, defending and promoting women's rights.<sup>415</sup> The Constitutive Act also is potentially disappointing for human rights lobbyists in its continued commitment to sovereign immunity and its dedication to "non-interference by any Member State in the internal affairs of another."<sup>416</sup> However, it should be borne in mind that the nature of the instrument is to detail the objectives of the new AU, which include unifying the various African nations and not necessarily pursuing a new human rights regime.

In July 2003 the African Union adopted the Protocol on the Rights of Women in Africa as a supplement to the Banjul Charter.<sup>417</sup> An unprecedented public commitment to women's rights took place in July 2004, when the AU Heads of State adopted the Solemn Declaration on Gender

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<sup>411</sup> Banjul Charter, *supra* note 22, (requiring States to "ensure the elimination of every discrimination against women and also censure the protection of the rights of the woman and the child").

<sup>412</sup> *Id.* at 61.

<sup>413</sup> See Jennifer Nedelsky, *Violence Against Women: Challenges to the Liberal State and Relational Feminism*, in *POLITICAL ORDER* 454, 457–58, 472–73, 479–80 (Ian Shapiro & Russell Hardin eds., 1996). Nedelsky, in writing about the patriarchal structure of a liberal State, raises the question as to how fundamental change can be effected within a system, the foundation of which is based on tradition, especially when the precepts of that tradition are at odds with basic egalitarian values. *Id.* at 484–85. A statement made at the Beijing Conference, *supra* note 20, recognizes that the empowerment of women may well conflict with "regional particularities" and cultural norms but insists that these norms must be disregarded if they resist promotion and protection of fundamental rights and freedoms. Beijing Declaration, *supra* note 22, at 11. See also O'CONNELL, *supra* note 38, at 9.

<sup>414</sup> Preamble to the Constitutive Act of the African Union, Adopted by the 36<sup>th</sup> Ordinary Session of the Assembly of Heads of State and Government, 11 July, 2000, Lomé, Togo, available at <http://www.africa-union.org/home/Welcome.htm> [hereinafter AU Constitutive Act].

<sup>415</sup> AU Constitutive Act, *supra* note 84, at article 4(l).

<sup>416</sup> AU Constitutive Act, *supra* note 84, at article 4 (g).

<sup>417</sup> Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted July 11, 2003, at the African Union Summit in Maputo Mozambique. The protocol will enter into force one it has been ratified by 15 states [hereinafter Draft African Charter Protocol on the Rights of Women]. The Protocol came into force on November 25, 2005.

Equality at the AU Summit meeting.<sup>418</sup> This undertaking calls for the implementation of gender-specific economic, social, and legal measures and the protection of women against violence and discrimination.<sup>419</sup> As regards violence against women, the state parties agree to:

Initiate, launch and engage within two years sustained public campaigns against gender based violence as well as the problem of trafficking in women and girls; Reinforce legal mechanisms that will protect women at the national level and end impunity of crimes committed against women in a manner that will change and positively alter the attitude and behaviour of the African society.<sup>420</sup>

In October 2005 the First African Union Conference of Ministers Responsible for Women and Gender was held in Dakar, Senegal by the AU Women, Gender and Development Directorate. On a regional and political level, therefore, commitment to ending violence against women is evident.

## 7 Specifications of Women's Rights in Mainstream International Law

In addition to the international instruments described above which deal with generic prohibitions on female targeted violence, there are three specific strands of violence against women that have received specific admonishment in international law. These are mass rape as a weapon of war, FGC and trafficking of women and girls. I discuss these manifestations of violence against women below in order to demonstrate the analogous process of internationalization that is underway with respect to systemic intimate violence.

### 7.1 Background

Prior to the 1990s, mainstream human rights bodies, “which oversee instruments that have stronger protective mechanisms, have used the existence of this separate women's human rights regime as an excuse to marginalize sex discrimination and most other women's human rights violations, which nonetheless fall clearly within their own mandates.”<sup>421</sup> In the last twenty years, however, specific manifestations of violence against women have been prohibited expressly in international law, namely, mass rape, FGC, and trafficking. Based on these developments, this thesis proposes that an international prohibition against systemic intimate violence should be the next specification of women's rights in international law.

While there are clear differences between mass rape, FGC, trafficking and systemic intimate violence, I discuss these specific instances of violence against women in order to demonstrate a trend in international law towards the articulation of various forms of violence against women. In

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<sup>418</sup> [Note: citation to follow]

<sup>419</sup> For a discussion of this meeting see *Aide-Memoire* for AU Directorate of Women, Gender and Development, 5th Consultative Meeting on Gender Mainstreaming in the African Union, 25-26 January 2005, Abuja, Nigeria, Organized by: The Women, Gender and development Directorate of the African Union, Femmes Africa Solidarité (FAS) and Africa leadership Forum (ALF), available at <http://www.africa-union.org/summit/jan2005/Gender/Aide%20memoire.doc>.

<sup>420</sup> Article 4. [Note: citation to follow]

<sup>421</sup> Dorothy Q. Thomas & Michele E. Beasley, Esq, *Domestic Violence as a Human Rights Issue*, HUMAN RIGHTS QUARTERLY 15 (1993) 36-62, 47.

other words, broad principles in international law have been used to create ‘new’ and specific rules with a view to better protecting women against the harm in question. Therefore, I do not suggest that the nature and severity of, and the harm resulting from, systemic intimate violence is the same as that of mass rape, FGC and trafficking. Rather, I discuss these other forms of violence only to establish precedent for the specification in international law of certain forms of gender-based violence.

## 7.2 The Specification of Mass Rape

Prior to 1994, war-time rape was not prosecuted as a breach of humanitarian law or the laws of war.<sup>422</sup> In an effort to punish mass rape as a war crime, jurists extrapolated established international legal principles to this particular form of sexual violence.<sup>423</sup> In 1998, in the case of *Prosecutor v. Akayesu*, the International Criminal Tribunal for Rwanda, for the first time in legal history, tried and convicted an individual for genocide and crimes against humanity due to his orchestration and encouragement of mass rape of women.<sup>424</sup> This decision was followed by the judgment of the ICTY in the case of *Prosecutor v. Kunarac*, which cemented the *Akayesu* precedent, confirming widespread rape as a war crime and crime against humanity.<sup>425</sup>

The analysis in these cases of mass rape as a weapon of war is very different from the one regarding systemic intimate violence: the violence in question was public; it was part of warfare; and, those perpetrating the rapes were clearly demarcated as the enemy of the victims. These are all factors that assisted the reconceptualization of wartime rape as a human rights violation rather than an unfortunate side-effect of conflicts. Systemic intimate violence, on the other hand, lacks the public nature of mass rape; it does not take place within the context of a war and the perpetrators of the violence are not only known to the victims, but are ‘their own people,’ often belonging to the same ethnic or religious group. In other words, they are spouses, partners and relatives. Moreover, there is a quantitative distinction between the conduct of mass rape and systemic intimate violence, making the injury of the former more visible than that of the latter.

However, just as it was necessary to establish the public character of mass rape as an international human rights violation in an authoritative text, this thesis proposes that systemic intimate violence is set on a similar developmental course. As with instances of mass rape before the *Akayesu* and *Kunarac* decisions, the generic prohibitions under current international law against systemic intimate violence are inadequate to constitute an authoritative and mandatory obligation on states to help remedy such harm. A specific, express and authoritative prohibition against such violence is required. Even though international law has developed a great deal of

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<sup>422</sup> See Jennifer Green, Rhonda Copelon, Patrick Cotter and Beth Stephens, *Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique*, 5 HASTINGS WOMEN’S L.J. 171, 176 (1994) [hereinafter *Green et al*].

<sup>423</sup> *Green et al*, *supra* note 107, at 183-4.

<sup>424</sup> *Prosecutor v. Akayesu*, *supra* notex. See Mchenry, *The Prosecution of Rape under International Law*, *supra* notex, at 1272. See also Sherrie L. Russell-Brown, *Rape as an Act of Genocide*, 21 BERKELEY J. INT’L. 350 (2003) [hereinafter *Russell-Brown*].

<sup>425</sup> *Prosecutor v. Kunarac*, *supra* note 2. Due to the lack of precedent and patchwork authority regarding mass rape in war, the ICTY was able to develop the principles according of this crime. In contrast to the *Akayesu* decision, the *Kunarac* judgment is considered to be a more reasoned description of mass rape as both a war crime and a crime against humanity. See Mchenry, *The Prosecution of Rape under International Law*, *supra* notex, at 1284.

jurisprudence on systemic intimate violence, it has not yet attained the precision or authority that marks mass rape in international law.

### 7.3 The Specification of FGC

The specific international prohibition against FGC is due in part to the (ongoing) discord between cultural autonomy and universalism, which impeded the application of international human rights law in countries where FGC is practiced.<sup>426</sup> For example, when international activists sought to apply the Children's Convention to oppose FGC, they designated the procedure as child abuse. By extension, the mothers of children who underwent the surgery became child abusers in terms of the technicalities of the treaty. Given the strong cultural commitment to the communal importance of genital cutting, this designation reinforced the gap between the community's perceptions of the cutting as a form of purification, as opposed to the westerners' interpretation of cutting as a form of abuse.<sup>427</sup> Real change only began when international bodies identified the context of the practice, understanding its causes, rationales and sustaining elements.<sup>428</sup>

A similar shift is required in the development of international law on systemic intimate violence. The role of the state as endorsing and, thereby, entrenching intimate violence against women, needs to be a focus of international law. The ferocity of the violence between intimates does not take place in a vacuum but rather within a context of social, cultural and behavioral rules, which, as with FGC, which is a mandatory prerequisite for women prior to marriage, impede the ability of the state to prevent the pain in question. As international law develops to take these externalities into account, the regulation of the harm improves. The larger the picture of the violence is drawn, the better states and the international community will be equipped to react to it.

### 7.4 The Specification of Trafficking

On November 15, 2000, the General Assembly adopted the U.N. Convention Against Transnational Organized Crime and two optional protocols on trafficking in persons and smuggling of migrants.<sup>429</sup> Born from the international prohibition against slavery, the internationalization of trafficking is pivotal to the effort to end it.<sup>430</sup>

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<sup>426</sup> See John Tochukwu Okwubanego, *Female Circumcision and the Girl Child in Africa and the Middle East: The Eyes of the World are Blind to the Conquered*, 33 INT'L LAW. 159, 174 (1999) [hereinafter Okwubanego]: "One major reason why international organizations in general and the U.N. in particular have appeared to be insensitive to female circumcision is culture."

<sup>427</sup> Kirsten Bowman, *Comment: Bridging the Gap in the Hopes of Ending Female Genital Cutting*, 3 SANTA CLARA J. INT'L. 132 [page 6] (2005) [hereinafter Bowman] ("Nonwestern women and communities are not very willing to embrace the idea that they and their ancestors have been committing child abuse throughout history, and reject the notion that they are not free to raise their children as they see fit.").

<sup>428</sup> Bowman, *supra* note 112, at [page 8-9] (describing the alienating effect of western endeavors, which rendered many nations' anti-FGC laws nugatory. Greater success was achieved when UN representatives worked slowly, and with sensitivity, with the religious and cultural leaders of the communities in which FGC was practiced.)

<sup>429</sup> GA Res. 55/25 (Nov. 15 2000). For a brief discussion of this instrument see Murphy, *International Trafficking in Persons*, *supra* notex.

<sup>430</sup> See Susan Feanne Toepfer & Bryan Stuart Wells, *The Worldwide Market for Sex: A Review of International and Regional Legal Prohibitions Regarding Trafficking in Women*, 2 MICH. J. GENDER & L. 83, 94-104 (1994)

As with FGC and mass rape, the conceptualization of this form of violence against women was molded by the “principle that trafficking in women is sex discrimination and a violation of human rights.”<sup>431</sup> While both genders are victims of trafficking, the fact remains that “the large majority of people trafficked throughout the world are women and girl children.”<sup>432</sup> However, again, the generic prohibitions at international law against female discriminatory violence were deemed inadequate. Academic analysis of trafficking has led to the reformulation of the problem with a “particular genesis in gender oppression” and the need to formulate laws accordingly and specifically. For example, the creation in the United States of a nonimmigrant “T” visa for aliens who are victims of severe forms of trafficking.<sup>433</sup> By recasting the violence in the light of the reality of the coercion, financial exigency and extreme nature of the enslavement, lawyers were able to fashion specific and more appropriate legislation to address female trafficking, at both national and international levels.<sup>434</sup>

## 8 Academic Theories Regarding Violence against Women in International Law

### 8.1 General

International law is drawn from many sources, including the academic writing of respected authors and scholars.<sup>435</sup> For this reason, I describe below the academic analysis of violence against women in international law.

Since the beginning of the 1990s, the international community has started to listen to the call of theorists to “recharacterize internationally protected human rights to accommodate

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(describing the early history of the international law of trafficking in women including: the Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others in 1949; CEDAW in 1979; and, the Convention against Sexual exploitation). Fitzpatrick dates this back as early as 1904. See Joan Fitzpatrick, *Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking*, 24 MICH. J. INT’L L. 1143, 1144 (2003). See also Murphy, *International Trafficking in Persons*, *supra* notex; and, Shelley Case Inglis, *Expanding International and National Protections against Trafficking for Forced Labor Using a Human Rights Framework*, 7 BUFF. HUM. RTS. L. REV. 55 (2001) (“In response to increased recognition of the issue, governments, such as the United States, and international organizations, like the United Nations, have begun to focus financially and strategically on combating this immense human rights problem.”). See also Joan Fitzpatrick, *Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking*, 24 MICH. J. INT’L L. 1143, 1157-58 (2003) (describing the amendment of asylum laws to acknowledge the “harm threatened directly by non-state actors, against a backdrop of state indifference or ineffectuality in controlling the violence or protecting similarly situated victims.”).

<sup>431</sup> Susan Feanne Toepfer & Bryan Stuart Wells, *The Worldwide Market for Sex: A Review of International and Regional Legal Prohibitions Regarding Trafficking in Women*, 2 MICH. J. GENDER & L. 83, 84 (1994).

<sup>432</sup> Shelley Case Inglis, *Expanding International and National Protections against Trafficking for Forced Labor Using a Human Rights Framework*, 7 BUFF. HUM. RTS. L. REV. 55, 61 (2001).

<sup>433</sup> Murphy, *International Trafficking in Persons*, *supra* notex, at 410 (citing the Trafficking Victims Protection Act of 2000 § 107(e)).

<sup>434</sup> For example, the elements of coercion, deception and abuse of power in relationships between the perpetrator and the enslaved led to the realization that if the victim ultimately consents to the exploitation, such consent shall be irrelevant. See Joan Fitzpatrick, *Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking*, 24 MICH. J. INT’L L. 1143, 1149-50 (2003).

<sup>435</sup> This is discussed in greater detail in fn \_\_\_ below.



women's experience of injustice.<sup>436</sup> In 1991, Hilary Charlesworth, Christine Chinkin and Shelly Wright observed that "[i]nternational law is a thoroughly gendered system."<sup>437</sup> This was a bold statement in a time marked by "the immunity of international law to feminist analysis"<sup>438</sup> and with it came a range feminist commentary on the substance, procedures and politics of international law and women.

In 1993, scholars analyzed the reasons for the marginalization of violence against women in international law.<sup>439</sup> Authors such as Celina Romany identified the negative affect on women resulting from the distinction drawn at international law between public and private conduct, with the former being addressed by the law and the latter left largely unregulated.<sup>440</sup> The battered women's movement highlighted the severity of domestic violence, revealing domestic violence as a serious legal issue.<sup>441</sup>

More than a decade ago, activists in the field began to draw on an analogy to torture to describe the experience of domestic violence victims.<sup>442</sup> In 1994, Rhonda Copelon framed the

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<sup>436</sup> Rebecca J. Cook, *Women's International Human Rights Law: The Way Forward*, HUMAN RIGHTS QUARTERLY 15 (1993) 230-261, 231 (stating that until 1993 international law did not effectively address the rights of women). This is especially true of domestic violence, which occurs universally and universally is condoned. *See in general* Dorothy Q. Thomas & Michele E. Beasley, Esq., *Domestic Violence as a Human Rights Issue*, HUMAN RIGHTS QUARTERLY 15 (1993) 36-62, 52 (describing how states universally fail to protect women from domestic violence. She cites Brazil as an example, demonstrating how the police and the judicial system fail to assist victims of domestic violence). *See also* Surya P. Subedi, *Protection of Women against Domestic Violence: The Response of International Law*, E.H.R.L.R. 1997, 6, 587-606 @ (describing the universal nature of domestic violence and maintaining that it affects women predominantly).

<sup>437</sup> *Feminist Approaches to International Law*, *supra* note, at 614.

<sup>438</sup> *Id.*

<sup>439</sup> *See e.g.*, Copelon, *Intimate Terror*, *supra* note, at 117. *See, e.g.*, UNICEF, DOMESTIC VIOLENCE AGAINST WOMEN AND GIRLS, *supra* note 65, at 10.

<sup>440</sup> *See* Romany, *Women as Aliens*, *supra* note, at 98-99 (1993) (identifying "the diverse layers of coercion embedded in legal discourse"). *See also* John M. Eekelaar & Sanford N. Katz, *Preface*, to FAMILY VIOLENCE: AN INTERNATIONAL AND INTERDISCIPLINARY STUDY iii (John M. Eekelaar & Sanford N. Katz eds., 1978) [hereinafter Eekelaar & Katz] (observing that unlike racial conflict, family violence does not take place in public, and the silent suffering of its victims has only recently been recognized). *See* Copelon, *Intimate Terror*, *supra* note, at 117. Other authors have engaged the torture terminology in their discussion of violence against women, comparing battery to physical torture and prison life. *See* ANDREA DWORKIN, LIFE AND DEATH 153-55 (1997) [hereinafter DWORKIN, LIFE AND DEATH]: "When you look at what happens to women in battery, the only other place where you can see the same kind of systematic physical and psychological injuries is in prisons in which people are tortured. . . . When you are battered, over time, you are physically tortured. . . . Sometimes they use degrees of force so unconscionable as to be impossible to believe: for instance, hitting a woman with a big wooden beam; using knives on a woman; using a baseball bat on a woman. Sometimes the woman is tied up and tortured and it is called sex when she is hurt. She is often sleep deprived, purposefully, the way she would be if she were in a prison. He takes her life and he messes with it in order to fracture it, to break it into little pieces so that she has no life left." *Id.* *See also* Copelon, *Intimate Terror*, *supra* note, at 122-139.

<sup>441</sup> *See* Schneider, *The Violence of Privacy*, *supra* note, at 41 (describing the process of the battered women's movement and demonstrating how it has been retarded by the powerful denial by jurors, politicians and courts in general). Some have criticized this movement's labeling as being counter-productive. *See* Martha R. Mahoney, *Victimization or Oppression? Women's Lives, Violence, and Agency*, in THE PUBLIC NATURE OF PRIVATE VIOLENCE THE DISCOVERY OF DOMESTIC ABUSE, 59, 65 (Martha A. Fineman & Roxanne Mykitiuk eds., 1994) (arguing that, ironically, the battered woman syndrome, a psychological condition, is used to explain why women do not leave abusive relationships rather than the social exigencies such as a lack of shelters, protection and money.)

<sup>442</sup> *See, e.g.*, Copelon, *Intimate Terror*, *supra* note, at 117. *See, e.g.*, UNICEF, DOMESTIC VIOLENCE AGAINST WOMEN AND GIRLS, *supra* note 65, at 10.

comparison between intimate violence and torture as defined by the Convention against Torture.<sup>443</sup> Other authors have engaged the torture terminology in their discussion of violence against women, comparing battery to physical torture and prison life.<sup>444</sup> The culmination of these developments was thoroughly addressed by Elizabeth Schneider in her examination of the law regarding battered women from the feminist perspective, where the various motivations for and implications of systemic intimate violence as an international human rights violation are garnered.<sup>445</sup>

The parallel between domestic violence and official torture was part of the initiation of the discussion that violence at home could be as egregious as violence in public.<sup>446</sup> Amnesty International, a leading authority on torture in international law, applied the language and lore of the Torture Convention to sexual violence and other types of intimate harm, confirming the view that violence against women may constitute torture for which the state is accountable when it is of a nature and severity envisaged by the concept of torture in international standards and where the state has failed to fulfill its obligation to provide effective protection.<sup>447</sup> The struggle for international recognition of violence against women also developed through a range of literature focusing on FGC, harmful practices against women, and rape as a weapon of war and genocide.<sup>448</sup>

However, criticism continues to be leveled against the inclusion of systemic intimate violence in international human rights law.<sup>449</sup> Therefore, while authors have highlighted the similarities between frequent forms of intimate violence and the acts contemplated by the drafters of the Torture Convention and other international instruments, the explicit legal consequences of this analogy still need to be explored.<sup>450</sup>

There are several themes which have developed in the realm of women's rights jurisprudence, which help to advance the argument that systemic intimate violence is an international human rights violation.

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<sup>443</sup> See Copelon, *Intimate Terror*, *supra* notex, at 117.

<sup>444</sup> See DWORKIN, *LIFE AND DEATH*, *supra* note 92, at 153–55.

<sup>445</sup> See generally SCHNEIDER, *supra* note 57.

<sup>446</sup> See generally Copelon, *Intimate Terror*, *supra* notex.

<sup>447</sup> See AMNESTY INTERNATIONAL, *BROKEN BODIES, SHATTERED MINDS: TORTURE AND ILL-TREATMENT OF WOMEN* (2001), available at <http://web.amnesty.org/library/Index/engact400012001> (last visited Nov. 11, 2003) [hereinafter *BROKEN BODIES, SHATTERED MINDS*, *supra* note 98]. See also Amnesty International, *Intimate Violence in Sweden*, *supra* notex, at 4, 10 (describing how torture is a “predetermined attack on a person’s psyche, body and dignity”).

<sup>448</sup> See FEMALE GENITAL MUTILATION: A GUIDE TO LAWS & POLICIES, *supra* note 57. See generally Askin, *Prosecuting Wartime Rape*, *supra* note 57 (discussing the jurisprudence on rape as a weapon of war/genocide or as a crime against humanity).

<sup>449</sup> See FELSON, *VIOLENCE & GENDER REEXAMINED*, *supra* notex, at 3–5.

<sup>450</sup> See, e.g., SCHNEIDER, *supra* note 57, at 48; DWORKIN, *LIFE AND DEATH*, *supra* note 92, at 115 (referring to Amnesty International in the context of domestic violence). See Copelon, *Intimate Terror*, *supra* notex, at 120–39.

## 8.2 The Distinction between Public and Private

For many years, feminists have noted the failure of legal systems to access and remedy harm committed in private.<sup>451</sup> This inflexibility of legal systems is compounded by a communal tendency to shun victims of intimate violence.<sup>452</sup> Cultural conditioning can both trivialize and justify violence against women, with the result that victims of violence become “the targets of unpunishable and therefore, implicitly endorsed violence.”<sup>453</sup>

As a result, feminist theorists have extracted the theory of violence against women from the realm of family law and placed it within the ambit of public law, discussing the private violence against women with reference to the nation-state. A plethora of new and intellectually astute formulations of violence against women arose.<sup>454</sup> The recasting of violence against women from personal to political, with a concomitant change in the language used, clarified the way in which legal systems by-pass the specific needs of women. Labels such as “terrorism,” “patriarchal terrorism,” “torture,” and “private torture” were employed to describe the public dimension of domestic violence and to import the state as a figure responsible for the perpetuation of the violence.<sup>455</sup>

The suggestion that the state play a greater role in the affairs of the family triggered concern that the constitutionally protected right to privacy would be compromised.<sup>456</sup> It became

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<sup>451</sup> See MARTHA A. FINEMAN & ROXANNE MYKITIUK, *THE PUBLIC NATURE OF PRIVATE VIOLENCE THE DISCOVERY OF DOMESTIC ABUSE*, xi-xviii, 1994 (describing the development of feminist theory, which identified the need to bring the state into the private realm to curb the level of violence, thereby changing the boundaries of the public/private distinction. See also Martha R. Mahoney, *Victimization or Oppression? Women’s Lives, Violence, and Agency*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE THE DISCOVERY OF DOMESTIC ABUSE*, 59, 78-81 (Martha A. Fineman & Roxanne Mykitiuk eds., 1994) (showing how much violence against abused women takes place at work, underscoring the public nature of the violence and the almost complete absence of free will to exit the relationship). The ritual of classifying facts in order to place them into legal categories with standard modes of redress has resulted in the “generation of broad generalizations about groups or classes of things and people...” MARTHA A. FINEMAN & ROXANNE MYKITIUK, *THE PUBLIC NATURE OF PRIVATE VIOLENCE THE DISCOVERY OF DOMESTIC ABUSE*, xviii, 1994.

<sup>452</sup> See Marcus, *Reframing “Domestic Violence”*, *supra* notex, at 12-16 (describing the consistent patterns of domestic violence in a range of countries from India, to Pakistan, China to Poland. She demonstrates that notwithstanding the extensive and fraught nature of the violence, there is general silence and abstention when action is required).

<sup>453</sup> See *Id.* at 17.

<sup>454</sup> See *Id.* at 17 and 19-21 (arguing that a new analysis is needed to examine domestic violence and proposing that domestic violence is a form of coveture since the woman’s identity is subsumed into that of her husband).

<sup>455</sup> *Id.* at 25 (adopting the terminology of ‘terrorism’ to replace ‘domestic violence,’ arguing that ultimately, they both create psychological and physical harm through a series of “seemingly random but actually calculated attacks of violence,” creating “an atmosphere of intimidation in which there is no safe place of escape.”) *Id.* 31. See also Johnson, *Patriarchal Terrorism*, *supra* notex, at 286 (describing extreme forms of domestic violence as patriarchal terrorism); Copelon, *Intimate Terror*, *supra* notex, at 117 (describing domestic violence as torture); and Bonita C. Meyersfeld, *Reconceptualizing Domestic Violence in International Law* (distinguishing between domestic violence and private torture).

<sup>456</sup> For a discussion of this issue see Schneider, *The Violence of Privacy*, *supra* notex, at 36. Schneider discusses the United States Supreme Court case of *Griswold v. Connecticut*. The case, which legalized contraception, was both a coup and a blow for women’s rights. The case was decided on the basis that the right to privacy prevented the state from interfering in the affairs and choices of women but it also entrenched the view that the state was prevented from entering the home and family realm, even where the home was the location of the violence. *Id.* 50.

necessary to “develop both a more nuanced theory of where to draw the boundaries between public and private, and a theory of privacy that is empowering.”<sup>457</sup> To this end, it was argued that ‘privacy’ is a right that includes “autonomy, equality, liberty, and freedom of bodily integrity, that are central to women’s independence and well-being.”<sup>458</sup> For victims of domestic violence, so the argument develops, these aspects of privacy are absent.

One interpretation of the right to privacy, useful for understanding its nuanced dangers for women, is the notion that privacy comprises three dimensions. The first is the “dimension of autonomy over the development and expression of one’s intellect, interests, tastes, and personality.”<sup>459</sup> The second is the “decisional dimension – ‘freedom of choice in the basic decisions of one’s life respecting marriage, divorce, procreation [and] contraception.’”<sup>460</sup> Finally, there is “freedom from intrusion, restraint, and compulsion, and freedom to care for oneself and express oneself.”<sup>461</sup> This description recognizes that the true value of privacy is the freedom to flourish as an individual and not the creation of an impermeable barrier to the intervention – and assistance – by the state.

Privacy cannot be understood merely as the right to be left alone; rather, it is linked affirmatively to liberty, the right to autonomy and self-determination.<sup>462</sup> In this manner, theorists developed a notion of privacy which is not in opposition to, but is an affirmation of, women’s safety in the home.

### 8.3 The State-Centric v. Individual Approach

The politicization of violence against women resulted in many states creating criminal penalties for domestic violence.<sup>463</sup> However, for several reasons, which are discussed in greater detail in chapter four below, the incorporation of domestic violence into the criminal justice system did not always yield the expected benefits.<sup>464</sup> One of the reasons for this was the continued perception that domestic violence was a behavioral deviation between private individuals who were really pathological exceptions to the norm.<sup>465</sup>

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<sup>457</sup> Schneider, *The Violence of Privacy*, *supra* notex.

<sup>458</sup> *Id.*

<sup>459</sup> Schneider, *The Violence of Privacy*, *supra* notex, at 51 (citing Justice Douglas’ jurisprudence on privacy as gleaned from the United States Supreme Court cases of *Griswold* and *Roe v. Wade*, [Note: Citation to follow], where Justice Douglas distilled three components to privacy, namely, autonomy, decision-making capacity and freedom from intrusion).

<sup>460</sup> *Id.*

<sup>461</sup> *Id.*

<sup>462</sup> *Id.* At 52.

<sup>463</sup> See Celina Romany, *Killing “The Angel in the House”*: Digging for the Political Vortex of Male Violence against Women in THE PUBLIC NATURE OF PRIVATE VIOLENCE THE DISCOVERY OF DOMESTIC ABUSE, 285, 287 (Martha A. Fineman & Roxanne Mykitiuk eds., 1994) (arguing that the criminalization of domestic violence is a “significant step in the politicization of violence against women.”).

<sup>464</sup> See page \_\_\_ below [Note: Citation to follow].

<sup>465</sup> Celina Romany, *Killing “The Angel in the House”*: Digging for the Political Vortex of Male Violence against Women in THE PUBLIC NATURE OF PRIVATE VIOLENCE THE DISCOVERY OF DOMESTIC ABUSE, 285, 287-8 (Martha A. Fineman & Roxanne Mykitiuk eds., 1994) (maintaining that this perception eroded the politicization of domestic violence).

Most academics dismiss this. The more typical view today is that many severe forms of violence against women occur in private and, because the state has overlooked them, such violence has become cemented, entrenched and remains unpunished.<sup>466</sup> This state-centric approach is analogous to a wide-angle lens, moving away from the narrow focus on the individuals to the larger landscape, taking into account the many structural factors that comprise state-sanctioned violence.

#### 8.4 Cultural Autonomy v. Human Rights

A major obstacle to the development of an international norm against violence against women is the claim of cultural autonomy.<sup>467</sup> Emanating in part from colonial oppression, cultures and groups are insisting that the ‘West’ refrain from amending their cultures any further. International human rights law is so closely connoted with the ‘West’ that a confrontation between women’s rights activists and traditionalists has occurred.

The stand-off is fuelled in part by the adoption of a narrow and stagnant definition of culture, one which has been abandoned in anthropology.<sup>468</sup> Traditionally, academics have perceived culture as petrified in a snapshot moment in time. While this may be the view of westerners encountering cultures for the first time, it is shortsighted to conclude that the culture itself has not evolved in the past, influenced to greater or lesser degrees by externalities. This is not to say that because a culture has transmogrified before it is legitimate to subject it to changes in the future. Indeed, the type of changes imposed by colonial powers, for example, did not ‘influence’ or ‘modify’ cultures, but abolished them altogether. What is becoming clear, however, is that integrating human rights norms into certain cultures is not necessarily antithetical to the perpetuation of, or respect for, the integrity of those cultures.<sup>469</sup>

The issue of cultural relativity and systemic intimate violence is addressed in greater detail in chapter four below.

#### 8.5 The Universal v. The Local

Closely aligned to the debate of cultural relativity is the fact that notwithstanding the universality of domestic violence, there are distinct differences between the communities in which the violence occurs. In pursuing a universal agenda to address violence against women,

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<sup>466</sup> See Surya P. Subedi, *Protection of Women against Domestic Violence: The Response of International Law*, E.H.R.L.R. 1997, 6, 587-606 @ 591.

<sup>467</sup> See Sally Engle Merry, *Constructing a Global Law – Violence against Women and the Human Rights System*, 28 LAW & SOC. INQUIRY 941, 946 (2003) (discussing the obstacle of culture in implementing human rights). See also *Feminist Approaches to International Law*, supra note, at 636 (describing the CEDAW Committee’s decision requesting the U.N. and specialized agencies to review the status of women under Islamic law. The representatives of the Islamic nations objected to the decision as a threat to their freedom of religion and the CEDAW Committee’s recommendation was rejected).

<sup>468</sup> See SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 6-10 (2006).

<sup>469</sup> See SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 6-10 (2006).

some academics have started to reign in the call for universal solutions.<sup>470</sup> The sameness of the problem, such as the “difficulty of naming domestic violence, and the mismatch between the severity of the experience of abuse and the weakness of the legal and social tools that exist to address that abuse,” does not mean uniform solutions are viable.<sup>471</sup>

Theorists, therefore, are refining the use of international human rights law as regards violence against women. One view is that international human rights law provides a ‘minimum standard’ which is independent of a particular culture, tradition, religion or political perspective.<sup>472</sup> Once this standard is accepted, so the theory goes, universal norms can be molded to fit within the contours of different cultures.<sup>473</sup>

## 8.6 Discrimination v. Harm

Theorists also examine the intersection between violence against women and discrimination against women. Violence was identified as a manifestation of a male-centric view that posits women on a lower social echelon with less social value. The cultural and economic abjection of women was revealed as the foundation on which violence rests. The academic goal, therefore, was to link violence against women “to the broader problems of women ... and the need for social and economic resources, education, jobs, child care, and housing.”<sup>474</sup>

This solution has its drawbacks. Historically, the enforcement of the so-called civil and political rights (for example, freedom to vote, freedom of speech and the right to privacy) has fared better than that of social, cultural and economic rights (such as the right to education, housing and health). It seems that forcing the state to abstain from invasive behavior is more successful than insisting on proactive social and economic policies. Placing violence against

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<sup>470</sup> See Michele E. Beasley, *Introduction to Section III International & Comparative Perspectives on Domestic Violence*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE THE DISCOVERY OF DOMESTIC ABUSE*, 255, 255 (Martha A. Fineman & Roxanne Mykitiuk eds., 1994) (pointing out that there is both a universality and a dissimilarity in domestic violence around the world).

<sup>471</sup> Michele E. Beasley, *Introduction to Section III International & Comparative Perspectives on Domestic Violence*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE THE DISCOVERY OF DOMESTIC ABUSE*, 255, 255 (Martha A. Fineman & Roxanne Mykitiuk eds., 1994). See also Rosemary Ofeibe Ofei-Aboagye, *Domestic Violence in Ghana: Some International Questions*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE THE DISCOVERY OF DOMESTIC ABUSE*, 260, 273 (Martha A. Fineman & Roxanne Mykitiuk eds., 1994) (noting that Ghanaians “have a sense of communal well-being of their society” that requires mutual assistance and support, yet Ghanaians do not intervene in cases of domestic violence. She suggests that this communal structure could be harnessed through education to reduce the level of domestic violence). The claim that there are global basic solutions is strong. See *ENDING DOMESTIC VIOLENCE REPORT FROM THE GLOBAL FRONT LINES, PRODUCED BY THE FAMILY VIOLENCE PREVENTION FUND 5* (eds., Leni Marin, Helen Zia and Esta Soler, 1998) (“long range challenge for advocates and activists is to forge an international consensus on how to prevent domestic violence.”).

<sup>472</sup> Human rights are inalienable, existing by virtue of an individual’s membership to the human species. In theory at least, there is no process by which one becomes entitled to these rights and there are no constitutional tests which must be passed in order to have them. Marcus, *Reframing “Domestic Violence”*, *supra* notex, at 28.

<sup>473</sup> See SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* 20 (2006) (describing the way in which individual and international interaction “provide transnational knowledge to local and national activists and contribute local knowledge to transnational settings. They provide a critical link in localizing human rights.”).

<sup>474</sup> Schneider, *The Violence of Privacy*, *supra* notex, at 49 (arguing that “[w]ithout access to these resources, violence against women will endure.”).

women under the rubric of socio-economic issues, therefore, effectively allows states to claim a lack of resources or political instability as a reason for continuing violence against women.<sup>475</sup> While it is true that the economic and social abjection of women perpetuates gender-based violence, it is necessary to maintain an equal emphasis on the civil and political components of domestic violence.

In emphasizing discrimination, CEDAW and the subsequent international instruments aim to place women on an equal footing with men.<sup>476</sup> This approach is in line with liberal feminism or liberal political theory, which is based on the principle that people in similar situations should be treated similarly.<sup>477</sup> However, critics maintain that the liberal feminism underlying CEDAW is “unable to deal with situations where men and women are truly not similarly situated.”<sup>478</sup> Therefore, CEDAW inherently is limited because “it continues the androcentric approach to women’s human rights by using a male standard for determining those rights.”<sup>479</sup> This approach has been used to explain the absence of reference in CEDAW to domestic violence, rape, abortion, forced sterilization and FGC.<sup>480</sup> Therefore, the problem with CEDAW’s view of equality “is the standard used to measure such equality.”<sup>481</sup>

It is argued that, without taking into account the structural causes of discrimination generally, and violence specifically, seeking formal equality will not end violence against women. A gender-neutral approach (also known as formal equality, which is similar to the notion of color blindness) takes the position that there are no differences between men and women. However, this results in gender-neutral state policies ignoring the special needs of women which

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<sup>475</sup> See Celina Romany, *Killing “The Angel in the House”: Digging for the Political Vortex of Male Violence against Women*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE THE DISCOVERY OF DOMESTIC ABUSE*, 285, 293 (Martha A. Fineman & Roxanne Mykitiuk eds., 1994) (“The inadequacy of resources becomes the smokescreen for maintaining the preeminence of the social over the criminal nature of violence.”).

<sup>476</sup> CEDAW, article 1, describes discrimination against women as the impairment or nullification of the recognition, enjoyment or exercise by women on the “basis of equality of men and women, of human rights.” For example, article 16 of CEDAW requires states to “ensure, on a basis of equality of men and women, ... [t]he same rights to decide freely and responsibly on the number and spacing of their children.”

<sup>477</sup> Jo Lynn Southard, *Protection of Women’s Human Rights Under the Convention on the Elimination of All Forms of Discrimination against Women*, 8 *PACE INT’L L. REV.* 1, 5-6 (1996) (describing the criticism of liberal feminism).

<sup>478</sup> Jo Lynn Southard, *Protection of Women’s Human Rights Under the Convention on the Elimination of All Forms of Discrimination against Women*, 8 *PACE INT’L L. REV.* 1, 8 (1996).

<sup>479</sup> Jo Lynn Southard, *Protection of Women’s Human Rights Under the Convention on the Elimination of All Forms of Discrimination against Women*, 8 *PACE INT’L L. REV.* 1, 7 (1996).

<sup>480</sup> Jo Lynn Southard, *Protection of Women’s Human Rights Under the Convention on the Elimination of All Forms of Discrimination against Women*, 8 *PACE INT’L L. REV.* 1, 7 (1996).

<sup>481</sup> Jo Lynn Southard, *Protection of Women’s Human Rights Under the Convention on the Elimination of All Forms of Discrimination against Women*, 8 *PACE INT’L L. REV.* 1, 10 (1996). See also Martha R. Mahoney, *Victimization or Oppression? Women’s Lives, Violence, and Agency*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE THE DISCOVERY OF DOMESTIC ABUSE*, 59, 72 (Martha A. Fineman & Roxanne Mykitiuk eds., 1994) (criticizing the concept of formal equality, which seeks to place on people like expectations notwithstanding their dissimilar circumstances. Therefore, while abused women may be seen as weak, this is not because feminism has gone too far in describing the violence, but rather because the legal response to such description omits the objective structural difficulties, the persistent externalities, that differentiate the violence experienced by an abused women different from other forms of violence. Therefore, the assessment of systemic intimate violence needs to be contextual and informed, taking into account the range of mitigating and exacerbating factors.)

arise as a result of past discrimination.<sup>482</sup> Feminist theorists such as MacKinnon, Charlesworth and Fineman have argued that the law cannot simply be expanded to apply ‘equally’ to women but that it should be recreated to address specifically the needs women have as a result of past discrimination.<sup>483</sup>

Increasingly, academics are seeking to “reconceptualize violence against women in intimate relationships as a problem rooted in structural conditions such as political economy, globalization, the expansion of capitalism and the growing inequality between rich and poor nations as well as the dynamics of interpersonal interactions”.<sup>484</sup> To end this structural cycle, positive steps are required by the state to ensure the protection of the so-called ‘negative’ rights.<sup>485</sup>

## 8.7 Language

The language relating to violence against women has also been criticized extensively by theorists. The language of “battered women” was first used to emphasize the severity of systemic intimate violence. Over time, however, there was concern that overemphasizing the victimization of abused women reduces the autonomy, agency and independence of women. Focusing on victimization could be misleading because it excludes from the analysis of domestic violence other important pieces of the puzzle, such as the “extreme dangers of separation” and the “interaction of social structures that oppress women.”<sup>486</sup> In addition, this may create the

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<sup>482</sup> See Sally Engle Merry, *Constructing a Global Law – Violence against Women and the Human Rights System*, 28 LAW & SOC. INQUIRY 941, 950-1 (2003) (citing Rebecca Cook’s criticism that a gender neutral approach to equality is deficient: “As Cook points out violence against women is an issue that reveals acutely the limitations of the gender-neutral approach to equality and raises the need for special treatment – such as the creation of shelters – rather than formal equality.”) *Id.* at 951. See also Jo Lynn Southard, *Protection of Women’s Human Rights Under the Convention on the Elimination of All Forms of Discrimination against Women*, 8 PACE INT’L L. REV. 1, (1996) (describing the many deficiencies of CEDAW due to its failure to take the structural exigencies into account).

<sup>483</sup> [Note: add in the citation of Catherine MacKinnon, *Toward a Feminist Theory of the State*, 1989 Cambridge Harvard University Press; Hilary Charlesworth, *What are ‘Women’s International Human Rights?’* in *Human Rights of Women: National and International Perspectives* 58-84 (Rebecca J. Cook, ed. (1994)); and Martha Fineman, *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies*, 1995 New York: Routledge. ]

<sup>484</sup> See Sally Engle Merry, *Constructing a Global Law – Violence against Women and the Human Rights System*, 28 LAW & SOC. INQUIRY 941, 943-4 (2003).

<sup>485</sup> See Martha R. Mahoney, *Victimization or Oppression? Women’s Lives, Violence, and Agency*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE THE DISCOVERY OF DOMESTIC ABUSE*, 59, 67 (Martha A. Fineman & Roxanne Mykitiuk eds., 1994) (explaining the focus on positive rights with reference to the abortion struggle. The right to determine one’s own reproductive rights required the abstention of state intervention. However, notably absent is the concomitant claim for the right to have sufficient resources to support and raise and care for one’s child. The absence of the struggle for positive rights, according to Mahoney, is part of the reason why abused women remain demarcated as individual victims rather than members of a group or class of people who suffer due to unequal social structures, prejudice and deficient resources).

<sup>486</sup> See Martha R. Mahoney, *Victimization or Oppression? Women’s Lives, Violence, and Agency*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE THE DISCOVERY OF DOMESTIC ABUSE*, 59, 59-61 (Martha A. Fineman & Roxanne Mykitiuk eds., 1994) (providing a detailed analysis of the effects of labels on the way women and society view domestic violence. She also explains the perceived view of agency as requiring very specific conduct (74). When this conduct is not met the state may punish the abused, as is evident from Mahoney’s account of two abused women who lost custody of their children after leaving their abusive relationship (69-72)).



perception that women are weak, whereas in fact enormous strength and courage is required in the face of the violence.<sup>487</sup>

## 9 An Overall Assessment of the International Law on Systemic Intimate Violence

The Particular norm against sex-discrimination finds expression in many authoritative communications, at both international and national levels, and is rapidly being defined in a way to condemn all the great historic deprivations imposed upon women as a group.

McDougal, Lasswell and Chen<sup>488</sup>

The combination of instruments, cases and commentaries in international law make a compelling argument that the right to be free from systemic intimate violence is an international human right for which states can be held liable.<sup>489</sup> This argument is further substantiated in chapter four below.

A delicate balance is created by the aforementioned instruments. On the one hand, the array of instruments contributes to CIL and the interpretation of international instruments which confirm that states have an obligation to prevent and punish systemic intimate violence. On the other hand, states may dissent by consistent practice to be bound by the provisions of CIL. Moreover, CIL is subject to interpretation and the lack of precision in this area of law feeds the lack of precision in the determination of CIL norms.

As stated above, there is evidence of a norm *developing* in international law. We are in the midst of the amorphous process of norm-crystallization through custom. The more precise, certain and authoritative international instruments are, the easier it will be to rely on CIL when pursuing improved state responses to systemic intimate violence.

There are three steps missing in international law as regards systemic intimate violence. The first is specification. The precise right to be free from systemic intimate violence, with all its nuances, and the precise concomitant state obligation to help remedy such violence, with all its nuances, either is hidden within the network of instruments and their interpretation or is absent entirely. A clear, express and binding articulation of this right and duty is required. The accurate specification of systemic intimate violence in international law may or may not inhere in a treaty. While I do not maintain that the creation of a systemic intimate violence treaty is an ideal panacea, its absence is relevant. This is especially important to provide clear enforcement mechanisms.

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<sup>487</sup> Martha R. Mahoney, *Victimization or Oppression? Women's Lives, Violence, and Agency*, in THE PUBLIC NATURE OF PRIVATE VIOLENCE THE DISCOVERY OF DOMESTIC ABUSE, 59, 61-62 (Martha A. Fineman & Roxanne Mykitiuk eds., 1994) (describing the tensions in using battered women terminology: on the one hand, true pain of abuse needs to be told to create awareness. On the other hand, emphasizing the violent experience creates an impression of weakness and vulnerability).

<sup>488</sup> WORLD PUBLIC ORDER, *supra* notex, at 612.

<sup>489</sup> See for example Andreea Vesa, *International and Regional Standards for Protecting Victims of Domestic Violence*, 12 AM. U.J. GENDER. SOC. POL'Y & L. 309, 312 (2004) (confirming that there is evidence of a prohibition against "domestic violence" in CIL).

The second is the general politicization of systemic intimate violence, with concomitant economic empowerment. This requires a movement away from a male-centric approach to international law, which currently obscures the political nature of systemic intimate violence.<sup>490</sup> Systemic intimate violence is not a socio-economic issue alone. It is a political one, relating directly to civil rights, political rights and individual well-being. Although this is changing, the energy demanding this change should not subside.<sup>491</sup>

The third missing element is a precise theory and instructions as to what states should be doing to achieve compliance with their international obligation, within the unique contours of each state, to address effectively systemic intimate violence.

## 10 Summation

For women, international human rights presents the biggest gap between principle and practice in the known legal world.<sup>492</sup>

Since 1945, the regional and international commitment to violence against women has been staunch and many of the deficiencies highlighted by theorists in the 1980s and 1990s have been addressed.<sup>493</sup>

There is evidence of the development of a norm against systemic intimate violence in international law. The process is underway, emanating in part from the rubric of violence against women in international law, which has prohibited mass rape, FGC and trafficking. I propose that systemic intimate violence is the next category of violence against women, which ought, and is destined, to receive independent expostulation by authoritative international institutions.

However, while this internationalizing process has translated into changes for many women, systemic intimate violence exists and persists. Notwithstanding the development described above, international law remains deficient. It has not yet targeted systemic intimate violence with the precision and authority needed to remedy this violence. The institutions and bodies

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<sup>490</sup> See Celina Romany, *Killing "The Angel in the House": Digging for the Political Vortex of Male Violence against Women*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE THE DISCOVERY OF DOMESTIC ABUSE*, 285, 295-7 (Martha A. Fineman & Roxanne Mykitiuk eds., 1994) (arguing that the jurisprudence of the social contract is male-centric. The family is posited as a necessary foundation of social order, but one from which the state is removed. The violence women experience takes place in this realm and is compounded by the state's non-political perception thereof. Compounded by the social and psychological processes which normalize the violence, the political nature of violence and the way it impedes women's full citizenship is obscured and rendered invisible).

<sup>491</sup> See for example, Schneider, *The Violence of Privacy*, *supra* notex, at 47 (arguing that developing a legal process for women is vacuous without also providing them with the resources to use it, such as trained free legal counsel. She concludes that "although in theory we might prefer a more formal legal process for battered women, in practice, under present conditions of scarce legal resources, it may not be realistic."). [Note: augment this point. It is changing if one considers that Turkey and Romania are having to amend their treatment of women in order to join the EU].

<sup>492</sup> Catherine A. MacKinnon, *Crimes of War, Crimes of Peace*, in *ON HUMAN RIGHTS THE OXFORD AMNESTY LECTURES*, 83, 97 (Stephen Shute and Susan Hurley eds., 1993) [hereinafter MacKinnon, *Crimes of War, Crimes of Peace*].

<sup>493</sup> For a precise review of the deficiencies of international law vis-à-vis women see *Feminist Approaches to International Law*, *supra* notex.

responsible for addressing systemic intimate violence need to improve their understanding of such violence, and take more direct action towards remedying such violence.

This thesis proposes that continued activity is necessary at both international and national levels. I argue that one of the tools necessary for improving national laws and systems is a specific, express and binding prohibition against systemic intimate violence in international law. I now turn to discuss the content of this right to be safe from systemic intimate violence and the corresponding state obligations.

## Chapter Two

### Freedom from Systemic Intimate Violence: The Right and Corresponding Obligation

[I]mplicit prejudices call for explicit scrutiny.

We have to be clear on the nature of the ‘theory’ underlying the practice of extreme inequality, and be prepared to outline what justice may minimally demand.

Amartya Sen<sup>494</sup>

#### Part A: Introductory Comments

##### 1. Description of this Chapter

In this chapter I describe the proposed right to be free from systemic intimate violence and the elements that constitute that right. I then discuss the steps that the international community and states should adopt to mitigate systemic intimate violence.

This chapter: (1) begins with a discussion of why a new label is necessary to describe the phenomenon of domestic violence in international law; (2) analyzes each element of systemic intimate violence; and, (3) identifies the substance of the obligation on the international community and states to mitigate systemic intimate violence.

##### 2. The Label: Systemic Intimate Violence

###### 2.1 The Many Labels of Domestic Violence

There are many meanings and almost as many labels for domestic violence. The labels used to describe domestic violence demonstrate a pattern by which academics and practitioners have attempted to reveal the extreme nature of the violence and its political causes.

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<sup>494</sup> Amartya Sen, *Gender Inequality and Theories of Justice*, in *WOMEN, CULTURE AND DEVELOPMENT A STUDY OF HUMAN CAPABILITIES* 259, 270 (Martha C. Nussbaum and Jonathan Glover eds., 1995) [hereinafter Sen, *Gender Inequality and Theories of Justice*].

One of the first changes to the domestic violence lingo was launched by the battered women's movement. The terminology employed by this movement was intended to shake the consciousness of courts and demonstrate the exigency of the harm. The theory of battered woman syndrome referenced the psychological conditioning of victims to explain their behavior in the face of extreme domestic violence. For some women, however, the label was alienating. Many victims did not see themselves as battered women, notwithstanding the physical and psychological violence they endured.<sup>495</sup> The difficulty of self-identifying as a battered woman, coupled with the social stigma of battered women being weak and helpless, led to the articulation of different labels, such as 'domestic abuse', 'intimate abuse', 'domestic violence', 'spousal abuse', 'family abuse', 'gender-based violence', and 'violence in the family'. Other labels use phrases such as 'torture' and 'terror' to import the extremity of violence and the role of the state in allowing its perpetuation.

I veer away from the existing labels and choose one which I believe captures both the nature of the violence in question and its structural component. I do this because, while some labels, such as "intimate terror" or "private torture" may achieve this broader meaning, there is a sense of borrowing words from established areas of law, which potentially offends the "true" victims of such harm. While survivors of domestic violence indicate that the terms "torture" and "terror" are in fact apt, using these phrases may cause friction with the proprietary hold some maintain over these labels.

Therefore, for the purposes of creating a legal category in international law for such violence, I use the term 'systemic intimate violence'. However, this is not to suggest that the myriad of labels used in the literature is defunct. A strict use of labels and words is the burden of lawmakers, but for the victims, the more words, phrases and notions available to describe their experiences, the better.

## 2.2 The Type of Violence Covered by the Label: Systemic Intimate Violence

This entire thesis is limited to a specific type of harm, namely, systemic intimate violence. It is this particular manifestation of domestic violence which I propose constitutes an international human rights violation.

The term 'domestic violence' is one that applies to a miscellany of harm. Currently, falling within the one composite term of 'domestic violence' are acts as diverse as a single event of shoving or pushing on the one hand, and ongoing incidents of battering, breaking bones, burning, raping, and torturing on the other. While all of these forms of harm constitute domestic violence, this thesis does not propose that all such forms of violence can be addressed at international law. Rather, only a subset of domestic violence – 'systemic intimate violence' – has the elements

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<sup>495</sup> See Nancy Fraser, Martha Minow and Schneider as auth for the development of labels such as "battered women" and their drawbacks. (see 48 of Schneider). See also Rosemary Ofeibe Ofei-Aboagye, *Domestic Violence in Ghana: Some International Questions*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE THE DISCOVERY OF DOMESTIC ABUSE*, 260, 266-7 (Martha A. Fineman & Roxanne Mykitiuk eds., 1994) (describing the importance of terminology. She notes that questions incorporating words such as "beating" and "battery" will not extract information from abused women whereas asking women whether they are subjected to methods of "discipline" to keep the order, will yield more information about domestic violence.)

necessary to elevate such conduct from the exclusive purview of domestic laws to justifying intervention at international law.<sup>496</sup>

Why is it necessary to segregate harm into these categories? By using a single, undifferentiated notion of domestic violence, current legislation fails to grasp the mélange and nature of harm produced by intimate aggression. This results in laws that are improperly fashioned and therefore ineffective. Because of the different types of harm involved, international and domestic laws should distinguish between systemic intimate violence on the one hand, and other forms of domestic violence on the other. This may make it easier to identify effective, appropriate and direct tools to reduce the frequency and harmful effects of both categories of violence.<sup>497</sup>

Distinguishing between types of violence may seem objectionable; yet, this is the task of lawyers in respect of all human behavior, including violence. For example, lawyers must distinguish between: grievous bodily harm and attempted murder; rape and sexual assault; human rights violations and crimes against humanity; torture and legitimate interrogation; mass killing and genocide. In the same manner, not all conflict or violence that takes place within a family or intimate context is necessarily a human rights violation. It would be unreasonable, and I believe inaccurate, to suggest that intimate discord of all types warrants the same legal approach.

In addition, the purpose of this distinction is not to reduce the status or seriousness of a category of harm or to rank harm according to some qualitative hierarchy. Rather, the objective is to create laws that best address specific types of conduct, to demarcate human conduct which should receive international attention from human conduct that is not suited for global redress.

I therefore distinguish between, on the one hand, forms of violence that can be (and are) addressed by domestic legal systems in their current form and, on the other hand, systemic intimate violence, which I propose requires a review of national legal systems through the lens of

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<sup>496</sup> The forms of violence which would fall into the category of systemic intimate violence are not limited to the location of the home but are defined with reference to the perpetrator and victim of the harm. The words domestic or home are used to import the characteristic of intimacy or privacy.

<sup>497</sup> An example of successful conceptual reformulation is the conceptualization of sexual harassment as an actionable offense. See Ann Scales, *Law and Feminism: Together in Struggle*, 51 U. KAN. L. REV. 291, 294 (2003). Prior to this relatively new concept, women in the workplace were forced to endure sexually-invasive conduct without redress. See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 1* (1979) [hereinafter MACKINNON, *SEXUAL HARASSMENT*]. Their options were to tolerate the abuse or leave the workplace. See *id.* The reformulation of this conduct as the actionable offense of sexual harassment gave women the recourse needed to address this form of gender discrimination. See, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986) (recognizing that conduct may be prohibited as “sexual harassment” even when it is not “directly linked to the grant or denial of an economic quid pro quo”). However, it is noted that the reformulation of domestic violence is but one part of a much larger multi-disciplinary approach to this phenomenon. See also Diana E.H. Russell, *Introduction: The Politics of Femicide*, in *Femicide in Global Perspective*, 3, 7 (Diana E.H. Russell and Roberta A. Harmes eds., 2001) (describing the definition of ‘femicide’ and indicating how the definition of “newly defined forms of women’s oppression can play a critical role in mobilizing feminists to try to combat and prevent the problem... Until feminists realize that there is a term that applies to the killing of females because they are females, they will likely not recognize the link between different kinds of femicide nor engage in a concerted campaign to protest and try to prevent femicides”)

international law. On the basis that categorizing forms of violence is uncomfortable but necessary, I now turn to the other elements of systemic intimate violence.

## **Part B: The Right**

### **3 Definition of the Right to be Free from Systemic Intimate Violence**

Systemic intimate violence has a significant and ever-present negative effect on our society which distinguishes it from other forms of violence.<sup>498</sup>

For the purposes of this thesis, I define “systemic intimate violence” as meaning any form of violence which contains the following elements: (i) severe emotional or physical harm, or the threat thereof; (ii) a continuum of violence rather than a one-off incident; (iii) it is committed predominantly by men against women within an intimate relationship; (iv) the victim is unable to procure traditional legal assistance due to her isolation, incapacitation or general vulnerability; and (v) the violence is ‘systemic’ in the sense that it occurs in a society in which the state in question has failed to supply the minimum facilities necessary to help remedy such violence.

The combination of these factors eludes the legislative and enforcement efforts of many states, which, in turn, re-enforces the systemic nature of such violence. I deal with each of these elements in more detail below.

### **4 Elements of Systemic Intimate Violence**

#### **4.1 Severe and Frequent Acts of Emotional or Physical Harm**

##### **4.1.1 Physical and Emotional Violence**

Typically, acts of systemic intimate violence include various forms of physical violence, including punching; slapping; shouting; battery; biting; burning; hacking; electrocuting; starvation; mutilation; sleep deprivation; forced sexual encounters; non-consensual sexual touching; rape; forced sexual activities with third parties; poisoning; exposure; property destruction; murder; the withholding of medical care; threats of harm; threats of harm to third parties; threats of removing children; threatening to use a lethal weapon; persistent shouting; accusations of infidelity; controlling day to day activities; isolation; and threats of suicide.<sup>499</sup>

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<sup>498</sup> See Justice Sachs’s statement in the South African constitutional case of the State v. Godfrey Baloyi, Case CCT 29/99, paragraph 11 (1999) [hereinafter State v. Baloyi] (“All crime has harsh effect on society. What distinguishes domestic violence is its hidden, repetitive character and its immeasurable ripple effect on our society and, in particular, on family life.”) Id. The Swedish government has stated that domestic violence is “an extremely difficult area with particular characteristics that could not be compared with those of other acts of violence.” See Cedaw Concluding Observations: Sweden, *supra* note, at paragraph 503.

<sup>499</sup> Physical violence comprises “assault and battery in the form of blows, kicks, boxes on the ears, shoving, strangleholds and the use of various objects and weapons. Sexual violence includes sexual touching and degrading sexual acts and games that a man inflicts upon a woman or forces her to take part in, rape and violence to the breasts and genitals. Psychological violence consists, i.a., of threats of physical and/or sexual violence, death threats, constant insults and abusive language, controlling behaviour, threats against other persons who are important to the woman (for example, her children or parents), imposed and degrading acts and behaviour, restraining the woman from comforting her crying children or preventing her from seeking help and treatment. Injuries caused by physical

However, systemic intimate violence is not only physical and also includes emotional violence and threats of violence. Emotional violence comprises a combination of intense and persistent verbal abuse, insults, derision, threats of harm, intimidation, stalking, financial deprivation and isolation.<sup>500</sup>

#### 4.1.2 Threats

The threat of violence can be as destructive as the execution thereof. Often, one serious physical or sexual attack has the effect of so hurting or degrading the victim, that the mere threat of its recurrence is an act of violence whereby the abuser controls the victim.<sup>501</sup> The threat of violence is particularly powerful if there has been past or intermittent physical injury.<sup>502</sup>

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assault are most often localised to the head, followed by the arms, the neck and the abdomen.” Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 6. See SCHNEIDER, *supra* note 57, at 66 (“[I]t is now widely recognized that within intimate relationships there is a significant overlap between physical abuse and sexual abuse.”). See also *Captured Queen Report*, *supra* note 123, at 24 (identifying the types of violence to which women are exposed for the purposes of eliciting statistics on domestic violence. The questionnaire asked “whether the man has ever thrown anything at the woman which could have injured her, whether he has pushed her, held her or dragged her, struck her with a hard object or kicked her, throttled her or tried to suffocate her, banged her head against something or threatened to use, or used, a firearm or other weapon”). See *Candies in Hell*, *supra* note 122, at 1595 (identifying “extreme jealousy and control as constant features of the abusive relationship.”).

<sup>500</sup> The recognition of emotional abuse is a significant achievement in remedying violence against women and most progressive laws refer to the act of violence as both physical and non-physical. The South African Domestic Violence Act defines domestic violence as physical, sexual, emotional, verbal and psychological abuse, which “harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant.” See Domestic Violence Act no. 116 of 1998, 1998 SA CRIMINAL LAW 116 (BSRSA, LEXIS through June 2003 update) [hereinafter the South African Domestic Violence Act]. § 1. Section 1 of the Act defines physical abuse as “any act or threatened act of physical violence towards a complainant;” sexual abuse as “any conduct that abuses, humiliates, degrades or otherwise violates the sexual integrity of the complainant;” and economic abuse as including “the unreasonable deprivation of economic or financial resources to which a complainant is entitled under law or which the complainant requires out of necessity . . . .” *Id.* See *WORLDLawDirect.com*, What is the legal definition of domestic violence?, at

[http://www.worldlawdirect.com/article/446/What\\_is\\_the\\_legal\\_definition\\_of\\_domestic\\_violence.html](http://www.worldlawdirect.com/article/446/What_is_the_legal_definition_of_domestic_violence.html) (last modified Feb. 14, 2003). In many States this is not an offence. See for example *Captured Queen Report*, *supra* note 123, at 30 (describing controlling behavior, which does not fall within the purview of a criminal code. Examples of such behavior included “jealousy, the man preventing the woman from seeing relatives and friends, calling her disparaging names or forbidding her to make her own decisions about money.”). See also *Candies in Hell*, *supra* note 122, at 1602 (indicating “extreme jealousy and control as constant features of the abusive relationship. Nearly one-third of women referred to their husband’s jealousy as the main cause of violence.”) See SCHNEIDER, *supra* note 57, at 65.

<sup>501</sup> The *Captured Queen Report* includes the notion of threats. The concept of sexual violence includes “any physical, visual, verbal or sexual act that is experienced by the woman or girl, at time or later, as a threat, invasion or assault, that has the effect of hurting her or degrading her and/or takes away her ability to control intimate contact... For a woman who has been beaten, the threat of further assault is a reality which may be as frightening as the violence itself. Threats to kill the woman may likewise be uttered at the same time as threats of abuse made earlier are being put into effect, so that threats of violence and actual violence become very hard to separate.” *Captured Queen Report*, *supra* note 123, at 17. Section 1 of the South African Domestic Violence Act recognizes the threat of violence and prohibits “any act or threatened act of physical violence towards a complainant.” South African Domestic Violence Act, *supra* note 141.

<sup>502</sup> Because controlling behavior and threats form a continuum of violence, there is no such thing as “mere threats.” *Captured Queen Report*, *supra* note 123, at 79: “...there is a link between controlling behavior by the male and his subjecting the female to violence, including threats. There is also a clear link between threats on the one hand and



Therefore, for the purposes of the definition, threats of violence which are debilitating also constitute acts of violence.

#### 4.1.3 Severity

The definition of systemic intimate violence envisages severe forms of violence only.<sup>503</sup> It encompasses violence which is invasive of the victim's mental and physical autonomy in a way that is particularly destructive of the individual's dignity.<sup>504</sup> The standard of severity is such that it shocks human conscience.

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the exercise of physical and sexual violence on the other.” The incremental dynamic of domestic violence in Sweden was confirmed in the Captured Queen Report, which references five forms of harm, namely, physical violence, sexual violence, threats of violence, sexual harassment and controlling behavior. Captured Queen Report, *supra* note 123, at 20. The notion of a continuum of violence, which includes the threat of violence, is discussed in analyses of domestic violence in Nicaragua. See *Candies in Hell*, *supra* note 122, at 1596. Captured Queen Report, *supra* note 123, at 17. SCHNEIDER, *supra* note 57, at 65 (“What he did wasn’t exactly battering but it was the threat. I remember one night I spent the whole night in a state of terror, nothing less than terror all night. . . . And that was worse to me than getting whacked.”). See also Captured Queen Report, *supra* note 123, at 16 (describing the importance of threats within the definition of domestic violence: “And where is the line to be drawn between threats and actual violence? For a woman who has been beaten, the threat of further assault is a reality which may be as frightening as the violence itself. Threats to kill the woman may likewise be uttered at the same time as threats of abuse made earlier are being put into effect, so that threats of violence and actual violence become very hard to separate.” Moreover, the Captured Queen Report also reveals that women “who have been subjected to threats report suffering both more intensely and from more physical and psychological disorders than do women subjected to other types of violence.” *Id* at 58.

<sup>503</sup> Typically, acts of systemic intimate violence include: punching; slapping; shouting; battery; biting; burning; hacking; electrocuting; starvation; mutilation; sleep deprivation; forced sexual encounters; non-consensual sexual touching; rape; forced sexual activities with third parties; poisoning; exposure; property destruction; murder; the withholding of medical care; threats of harm; threats of harm to third parties; threats of removing children; threatening to use a lethal weapon; persistent shouting; accusations of infidelity; controlling day to day activities; isolation; and threats of suicide.

<sup>504</sup> Many academic and research sources describe various acts of reported abuse. The author gathered the instances of abuse cited above from legal consultations with domestic violence clients at the South African NGO, People Opposing Woman Abuse (POWA) over a period of one year. Many women experience some form of sexual aggression. See SCHNEIDER, *supra* note 57, at 66 (“[I]t is now widely recognized that within intimate relationships there is a significant overlap between physical abuse and sexual abuse.”). See Captured Queen Report, *supra* note 123, at 24 (identifying the types of violence to which women are exposed for the purposes of eliciting statistics on domestic violence. The questionnaire asked “whether the man has ever thrown anything at the woman which could have injured her, whether he has pushed her, held her or dragged her, struck her with a hard object or kicked her, throttled her or tried to suffocate her, banged her head against something or threatened to use, or used, a firearm or other weapon”). See *Candies in Hell*, *supra* note 122, at 1595 (identifying “extreme jealousy and control as constant features of the abusive relationship.”) Specifically, Amnesty International describes the violence against women in abusive relationships as recurring physical, sexual and psychological violence that causes injury. Physical violence comprises “assault and battery in the form of blows, kicks, boxes on the ears, shoving, strangleholds and the use of various objects and weapons. Sexual violence includes sexual touching and degrading sexual acts and games that a man inflicts upon a woman or forces her to take part in, rape and violence to the breasts and genitals. Psychological violence consists, i.e., of threats of physical and/or sexual violence, death threats, constant insults and abusive language, controlling behaviour, threats against other persons who are important to the woman (for example, her children or parents), imposed and degrading acts and behaviour, restraining the woman from comforting her crying children or preventing her from seeking help and treatment. Injuries caused by physical assault are most often localised to the head, followed by the arms, the neck and the abdomen.” Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 6.

Dividing violence according to degrees of severity is intuitively problematic.<sup>505</sup> How does one begin to grade levels of harm? However, other social disciplines have engaged in such a categorization process; for example, by using scales of aggression to assess the extent of physical violence, “ranging from throwing objects to the use of a weapon”<sup>506</sup> and analysts have relied on tables of abuse which distinguish between “moderate” and “severe” violence.<sup>507</sup>

The distinction between types of domestic violence is addressed by sociology theorist, Michael Johnson.<sup>508</sup> Johnson employs a distinction between “patriarchal terrorism” on the one hand and “common couple violence” on the other.<sup>509</sup> Johnson uses the term “patriarchal terrorism” to refer to “a product of patriarchal traditions of men’s right to control ‘their’ women” that results in “a form of terroristic control of wives by their husbands that involves the systematic use of not only violence, but economic subordination, threats, isolation, and other control tactics.”<sup>510</sup> The second category of common couple violence “is less a product of patriarchy, and more a product of the less-gendered causal process... in which conflict occasionally ‘gets out of hand,’ leading usually to ‘minor’ forms of violence...”<sup>511</sup> Therefore, only harm that is severe qualifies as systemic intimate violence.

On this basis, this thesis proposes that acts of violence do in fact fall along a spectrum of severity. Such categorization is uncomfortable, but necessary for the purposes of establishing an international legal right. Therefore, in addition to the elements discussed in this chapter, the violence must meet a certain threshold of severity in order to trigger the provisions of international law.

A one-off incident of violence by a male partner, which leaves no lasting physical or emotional damage and does not create a climate of fear, for example, will not require state intervention. A state cannot reasonably be blamed for the act of violence because, as will be discussed in chapter three, such act is neither the act of the state nor can it be attributable to the state. By contrast, where a victim suffers long-term, systematic violence, and the state fails to provide effective police intervention and basic shelters to help mitigate the consequences thereof, the state reasonably can, and should, be held accountable for its failings. On this basis, only severe harm qualifies as systemic intimate violence.

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<sup>505</sup> However, this is the very nature of the work conducted by the United Nations Committee against Torture, established to monitor and enforce the provisions of the Convention against Torture. See generally U.N. High Commissioner for Human Rights, U.N. Fact Sheet No. 17, U.N. CHR, <http://www.unhchr.ch/html/menu6/2/fs17.htm> (last visited Oct. 24, 2003) (observing that the Committee monitors compliance with the United Nations standards of what constitutes torture and other inhuman behavior).

<sup>506</sup> *Candies in Hell*, *supra* note 122, at 1597. The existence and extent of physical violence sometimes is determined with reference to the Conflict Tactics Scale (CTS). This scale of aggression lists eight acts of physical harm in order of severity. There is much contention regarding the use of this scale. See for example, Johnson, *Patriarchal Terrorism*, *supra* note 122, at 285-6.

<sup>507</sup> The most frequent violence includes pushing, punching and kicks, followed by slaps and thrown objects. *Candies in Hell*, *supra* note 122, at 1600.

<sup>508</sup> Johnson, *Patriarchal Terrorism*, *supra* note 122, at 283.

<sup>509</sup> *Id.* at 284.

<sup>510</sup> *Id.* Johnson explains that the “term *patriarchal terrorism* has the advantage of keeping the focus on the perpetrator and of keeping our attention on the systematic, intentional nature of this form of violence.”

<sup>511</sup> *Id.*

#### 4.1.4 Determining Severity

In determining the severity of the harm, it is necessary to weigh the severity of the conduct together with the frequency of the acts of violence. As discussed above, it is unlikely that a one-off incident of relatively minor violence, which leaves no lasting physical or emotional damage, would be sufficiently severe to qualify as systemic, unless that one-off incident induces an ongoing environment of fear and control from which the victim is unable to escape. However, one-off incidents of severe forms of violence, or prolonged, serious and tolerated violence, will fall within the definition of systemic intimate violence provided they occur within a context of systemic state failure.

Physical injury is rarely external or identifiable, especially in respect of sexual violence.<sup>512</sup> Because the violence is incremental in nature, injuries are normalized, causing victims to ‘down play’ the violence or its consequences as insufficiently ‘serious’ to warrant hospitalization or police intervention.<sup>513</sup> This is distinct from violence which occurs infrequently and which is not sufficiently intense to cause either long-term physical damage or to induce an environment of fear and apprehension regarding the recurrence of the violence.<sup>514</sup>

Therefore, the distinction is a fluid one; the severity of the violence involved should be weighed on a case by case basis, together with the past frequency and severity of that (or any other) form of violence, to determine whether the cycle of violence as a whole is such that it satisfies the threshold for international intervention.

#### 4.2 Continuum of Harm

Systemic intimate violence is a continuum of harm; it is a hybrid of physical, emotional and sexual harm, the effects of which are often invisible. Not only can various incidences of violence against women be extreme, but it is also clear that different acts, perpetrated by one’s intimate partner, while individually not alarming, may accumulate to make a cycle of harm that is impenetrable and debilitating.<sup>515</sup>

The notion of a continuum of harm is necessary because it is difficult to determine the extent of the violence based on one incident alone.<sup>516</sup> Often a bout of violence may appear erratic or

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<sup>512</sup> “Most frequent injuries are not [] serious enough to require treatment in hospital... In approximately 50 per cent of all rape cases the woman incurs no physical injury at all.” Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 6. “Injuries caused by rape vary considerably, from no injuries at all, to internal injuries, injuries to the head or the anus, unwanted pregnancies and HIV infection.”

<sup>513</sup> See *Captured Queen Report*, *supra* note 123, at 65, describing the tendency of abused women in Sweden to describe their state of health in positive terms, whereas “it turns out that physical and psychological orders are fairly widespread.” See also Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 6 (The most frequent injuries are not, however, serious enough to require treatment in hospital.”)

<sup>514</sup> Indeed, this is the notion underpinning crimes against humanity. Crimes against humanity are crimes that take place on a scale that transcends individuals and isolated incidents and relate to violence that is systematic, repeated, and/or of such large proportions that its commission exceeds the ambit of domestic laws in their current forms.

<sup>515</sup> See *Captured Queen Report*, *supra* note 123, at 17 (discussing the notion of a continuum of violence, which “is not to be used as a method of creating hierarchies of more or less serious abuse”).

<sup>516</sup> Johnson describes the same difference between patriarchal terrorism and common couple violence, the former evidencing an escalation in frequency and intensity over time. See Johnson, *Patriarchal Terrorism*, *supra* notex, at

sublime in a vacuum, but if it is brought into the context of a continuum, it takes on a far more pernicious character.<sup>517</sup> Emotional and physical harm may operate separately, but generally are combined to spin a web of abuse in which the exigency of violence escalates.<sup>518</sup> Threats, violence and sexual abuse are “impossible to isolate from one another; characteristically the boundaries between them are fluid and actions merge into one another.”<sup>519</sup>

This is referred to as a cycle of abuse. Theorists first identified the so-called cycle of abuse as containing instances of violence, followed by apologies, gifts, and expressions of remorse.<sup>520</sup> Slowly, the tension intensifies and rebuilds itself; first in the form of verbal denigration and ultimately resulting in another episode of anger and physical violence.<sup>521</sup> As the cycle repeats itself, the severity of the violence intensifies and there are fewer and shorter periods of

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286. See SCHNEIDER, *supra* note 57, at 65–66. See also Copelon, *Intimate Terror*, *supra* notex, at 116–33. Copelon deftly parallels the physical and mental harm caused by domestic violence to the combination of physical and mental harm used in official torture. *Id.* at 121. In Nicaragua, analysts identify a “series of characteristics which define the experience of battering for women, and conceptualize violent relationships as an ongoing process of entrapment and diminished coping capacity.” *Candies in Hell*, *supra* notex, at 1596.

<sup>517</sup> The Captured Queen Report and Amnesty International Report on Intimate Violence in Sweden describe domestic violence as forming a continuum of harm, involving many stages and not a single episode. See Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 6 (“The demarcation lines between the different forms of violence are vague, and gender-based violence is often described as a continuum where men expose women to a continuous sequence of psychological, physical and sexual violations, such as controlling behaviour, threats, restriction of the freedom of movement, sexual harassment, battering, sexual violations and rape. Psychological assault often includes threats of physical and sexual violence. Sexual violations and rape often involve both physical and psychological violence. Physical abuse is often combined with threats and sexual violations or rape.”) See also Captured Queen Report, *supra* note 123, at 17 (indicating that the continuum approach to gender-related violence “views threats, violence and sexual abuse as actions impossible to isolate from one another; characteristically the boundaries between them are fluid and actions merge into one another.”)

<sup>518</sup> In Nicaragua, 94% of physically abused women reported that verbal abuse and insults usually accompanied the physical violence. *Candies in Hell*, *supra* note 122, at 1600-1. The report indicated a significant overlap between physical and emotional violence and 21% of ever-abused women reported all three kinds of abuse (i.e. physical, emotional and sexual). 36% of abused women reported that they were forced to have sex while being beaten. See *Candies in Hell*, *supra* note 122, at 1601. This is evidenced by the description of the continuum of violence in the *Candies in Hell* report on domestic violence in Nicaragua. *Candies in Hell*, *supra* note 122, at 1602 (“physical abuse is so often intertwined with acts of psychological and sexual degradation as to be virtually indistinguishable.”). Ninety four per cent of the abused women in Nicaragua reported that physical violence had been accompanied by verbal humiliation and control of daily activities. OMCT CEDAW Report on Nicaragua, *supra* notex, at 12. See SCHNEIDER, *supra* note 57, at 65–66. See also Captured Queen Report, *supra* notex, at 17 (describing the continuum of violence that “enables us to see the linkages between its various forms, putting serious violence on the same scale as acts which are less serious, perhaps not criminalized, or even considered acceptable. The concept thus links together commonly used expressions of sexism and acts of criminal violence”).

<sup>519</sup> Captured Queen Report, *supra* note 123, at 17.

<sup>520</sup> The cycle is described as having three components, namely, tension-building, followed by an incident of violence, and then seduction, which ultimately leads to a renewed period of tension. See LENORE E. WALKER, *TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS* 42-47 (1989) [hereinafter WALKER] (providing a detailed analysis of the “cycle of violence”). See also Captured Queen Report, *supra* note 123, at 17 (describing how “actions which the law defines as minor may signify an explicit or implicit threat to an abused woman, i.e. that they are anything but minor to her”).

<sup>521</sup> WALKER, *supra* note 127, at 42–45.

remorse.<sup>522</sup> The emotional stress caused by this cycle results in dependency, depression, sleeplessness and symptoms of post-traumatic stress disorder.<sup>523</sup>

The continual nature of systemic intimate violence has been recognized to varying degrees in the ‘domestic violence’ legislation of foreign jurisdictions. Mexico and Nicaragua have defined domestic violence with reference to acts that are recurring, intentional and cyclical.<sup>524</sup> The South African Constitutional Court has stated that what distinguishes domestic violence from other crime “is its hidden, repetitive character and its immeasurable ripple effects on our society and, in particular, on family life.”<sup>525</sup> In Sweden also, new domestic violence legislation recognizes that “(g)ross physical violence is a part of a pattern, a notch on a sliding scale, a continuum, rather than an isolated and inexplicable incident”<sup>526</sup> The legislation targets not only physical violence but the full fabric of harm which results in the “gross violation of a woman’s integrity.”<sup>527</sup>

The continuum of violence inherent in systemic intimate violence demonstrates the seriousness of the harm in question and reveals the infrastructural component. If a victim is unable to procure help from state sources, there is a clear deficiency on the part of the state’s service provision. This may be due to an inability to provide resources, but often also is the result of the state mis-conceptualizing the fluid and cyclical pattern of systemic intimate violence.

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<sup>522</sup> Id. at 46.

<sup>523</sup> The violence “often produces anxiety, depression, and sleeplessness. It can produce extreme states of dependency, debility, and dread as well as the same intense symptoms that comprise the post-traumatic stress disorders experienced by victims of official violence as well as by victims of rape.” Copelon, *Intimate Terror*, *supra* notex, at 125. Often women find the psychological terror the most unbearable and will “precipitate battering as opposed to enduring the fear.” Id. at 124.

<sup>524</sup> Article 1 of the Law of Assistance and Prevention of Domestic Violence, Decree of the Assembly of Representatives of the federal District, promulgated April 26, 1996 and published on July 9, 1996 in the Daily Gazette [hereinafter Law of Assistance and Prevention of Domestic Violence, Mexico], cited in Women’s Reproductive Rights in Mexico: A Shadow Report, *supra* notex, at 23. In Mexico, the Law of Assistance and Prevention of Domestic Violence defines the violence as “an act of power or omission that is recurring, intentional and cyclical, and is aimed at dominating, subordinating, controlling or harming any member of the family through physical, verbal, psycho-emotional, or sexual violence.” Article 1 of the Law of Assistance and Prevention of Domestic Violence, Mexico, *supra* note 131. *Candies in Hell*, *supra* note 122, at 1596.

<sup>525</sup> State v. Baloyi, *supra* note 119, at paragraph 11.

<sup>526</sup> Two years later, Amnesty International conducted an investigation of domestic violence in Sweden. This report also highlighted the nature of domestic violence as a continuum, indicating that the violence against women in abusive relationships “is often recurrent and has almost always been preceded by a pattern of increasing dominance and control over the woman by the man. Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 6.

<sup>527</sup> In an attempt to target domestic violence more precisely, Sweden appointed a committee to “scrutinize all sex crime legislation [for the] protection for women and children exposed to violence.” The committee proposed the introduction of a new crime entitled “Protection of Women’s Integrity.” Captured Queen Report, *supra* note 123, at 13. The objective of the legislation is to mitigate the “effects of the normalization process and the impact of repeated violations on women subjected to them.” The legislation takes account of “the changes which a woman gradually experiences while being subjected to violence.” Captured Queen Report, *supra* note 123, at 13. It also takes the position that “violations which may seem fairly minor when viewed separately have a grave negative effect on a woman when they are part of a process, thus meriting severe punishment.” This is reinforced in the punitive component of the legislation, which penalizes acts which, “viewed separately, are relatively minor but when repeated may lead to substantial violation of the victim’s integrity.” Captured Queen Report, *supra* note 123, at 13.

### 4.3 Between Intimates

Systemic intimate violence is characterized by the dichotomy between love and pain. Generally, it is an incomprehensible thought that within the boundaries of an ostensibly loving relationship exists one of the most acute manifestations of violence. Yet the reality is that the highest rate of violence against women occurs in private relationships.<sup>528</sup> It is this element that distinguishes domestic violence from other forms of violence in society.

The intimacy complicates the victim's understanding of the violence, her ability to escape it and the approach of society to her experience.<sup>529</sup> The pattern of systemic intimate violence may be discernable by experts but rarely by laypeople, not least of all by the victim herself. Beginning with an imperceptible degradation, the abuser, at times unknowingly, primes his partner for the first onslaught of violence. The shock is debilitating, almost as crushing as the aftermath of sorrow and shame. The abuser's subsequent remorse may be genuine but is temporary; its presence deteriorates, transforming once more into the subtle, slightly more perceptible disdain that precedes the attack. As the cycle evolves, the chapters of harm intensify until the abused is imprisoned in a combination of physical disability and mental despair.<sup>530</sup> Encapsulated within the relationship, the recurrent violence becomes normalized, preventing the abused from reporting the violence and the authorities from recognizing it.<sup>531</sup>

A further complication is the principle of privacy and the constitutional injunction against state interference with one's personal affairs. It is difficult to draw a line between an improper state presence in one's personal affairs, on the one hand, and necessary state protection, on the other. This sensitivity also arises in other contexts, such as regulations concerning child pornography or dangerous political dissidents. It is crucial that proper procedural guidelines are employed when asking for state intervention, albeit for protective purposes. But state intervention remains necessary, especially in light of the fact that the predominant harm for women emanates from her private, and not public, world.<sup>532</sup>

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<sup>528</sup> See Annexure 1 hereto.

<sup>529</sup> Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 12 (describing that domestic violence is different from other forms of violent crime because "the woman has an emotional relationship with the perpetrator and ... because the violence is generally planned, controlled and carried out in the home, out of sight of other people").

<sup>530</sup> Captured Queen Report, *supra* note 123, at 77: "The violence is committed in the woman's home, in indoor and outdoor public places and at women's places of work. The results seem to show that there are no free zones for women." Systemic intimate violence "compels many women to change their ways of life and to limit their freedom of movement in order to avoid or reduce the risk of being subjected to abuse." Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 23.

<sup>531</sup> She may have become accustomed to the abuse and through the process of 'normalization' she no longer is able to distinguish between acceptable and unacceptable behavior. For a lengthier discussion of the process of normalization and its impact on reporting domestic violence, see Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 8 (describing the dynamic process by which the violence becomes a normal way of life for both the abused and the abuser: "For the woman, the process of normalization means ... that her own limits gradually disappear and that the man's violence becomes a normal part of everyday life... her sense of reality is blurred and she starts seeing herself through the eyes of the man, blaming herself as the cause of the.") *Id* 8.

<sup>532</sup> "Despite the high value set on the privacy of the home and the centrality attributed to intimate relations, all too often the privacy and intimacy end up providing both the opportunity for violence and the justification for non-interference." *State v. Baloyi*, *supra* note 119, at 20, paragraph 16.

Therefore, not only is the cycle of abuse pernicious because of the almost subliminal increment of harm but also the context of the relationship masks the harm; distorts the victim's and society's view of the violence; and, divorces the abused in her private world from the remedies that exist in the public one.<sup>533</sup>

#### 4.4 Group Vulnerability of Women

The fourth element is the vulnerability of women, as a group, to systemic intimate violence. The vulnerability is the result of a combination of the following factors: (1) traditional views about male and female roles often result in distance between the abused and the public world; (2) violence tends to escalate upon separation; (3) the nature of systemic intimate violence tends to remove the abused, and signs of the abuse, from the purview of society; (4) economic difficulties restrain women's freedom; and (5) communities ignore or acquiesce to the violence.

##### 4.4.1 The Private Lives of Women

For the reasons described below, victims of systemic intimate violence often are isolated from society.<sup>534</sup> This is compounded for women who operate more within a private, and by extension, socially disconnected environment. A significant cause of the vulnerability, therefore, is the normalcy attached to women's submergence into private, domestic and non-public activities.

Traditional social demarcation between the genders has led to different roles and needs for men and women. However, this difference is not always taken into account when formulating legal protection. The result is that women often are unable to procure legal assistance which targets the specific difficulties women face.<sup>535</sup>

This deficiency has been remedied in some spheres of life. For example, thirty years ago women employees endured acts of intimidation in the workplace, which limited their earning potential, professional development and general wellbeing. It was only when the conduct was examined through the lens of systemic difference between men and women that the harm was identified as sexual harassment. Today almost every major corporation has a sexual harassment policy, based in part on the better legal analysis of this phenomenon. Therefore, identifying the vulnerabilities that are peculiar to women is a necessary precondition to formulating applicable legal remedies, not least of all in respect of systemic intimate violence.

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<sup>533</sup> Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 633 (2001) [hereinafter Resnik] ("A locked room denotes a safe space, a home").

<sup>534</sup> The reasons for this are discussed below.

<sup>535</sup> Okin maintains that the gender has been excluded from development studies and theories of justice (in the same way that, until recently, it has been excluded from discussions of war) because: (i) due to the dichotomy between public and private, only the public sphere has been examined for the purposes of development analysis; and, (ii) the family is assumed to have a natural hierarchy and even where that hierarchy may be unjust or damaging, it is legitimized by its assumed position as an inextricable component of private family lives. Okin, *supra* note 593, at 279 and 281-3. [Note: Citation to follow] [Note: add in the citation of Catherine MacKinnon, *Toward a Feminist Theory of the State*, 1989 Cambridge Harvard University Press; Hilary Charlesworth, *What are 'Women's International Human Rights?'* in *Human Rights of Women: National and International Perspectives* 58-84 (Rebecca J. Cook, ed. (1994); and Martha Fineman, *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies*, 1995 New York: Routledge. ]

Systemic intimate violence against women is not a case by case peculiarity but in many ways is a manifestation of social views, perceptions, priorities, and custom.<sup>536</sup> The intimate context of the violence produces an almost visceral reaction that what happens within the boundaries of a home is venerable, impervious to the strictures of law and law enforcement. The opposite, however, is true. Women particularly are vulnerable to systemic intimate violence, which, as the main cause of women's ill-health worldwide, is neither harmless nor gender-neutral.<sup>537</sup>

#### 4.4.2 Why Doesn't She Just Leave?

While it appears that abused women have the freedom to leave, this is a myth. Flight is a fallacy. At times, victims of systemic intimate violence quite literally are imprisoned and held against their will.<sup>538</sup> However, abusers also implement a more subtle procession of isolating factors: the abuser may control the daily activities of the abused and prevent her from visiting family, friends or neighbors; receiving visitors; working outside the home; studying; or using contraceptives.<sup>539</sup> Therefore, factors other than direct force prevent escape.<sup>540</sup>

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<sup>536</sup> Copelon, *Intimate Terror*, *supra* notex, at 120: It is "systemic and structural . . . built on . . . economic, social, and political predominance of men and dependency of women."

<sup>537</sup> See Annexure 1 hereto.

<sup>538</sup> The violence targeted by the Mexican legislation includes acts of power or omission that dominate, subordinate, control or harm individuals "through physical, verbal, psycho-emotional, or sexual violence." Article 1 of the Law of Assistance and Prevention of Domestic Violence, Mexico, *supra* note 131.

<sup>539</sup> According to the report, 71% of abused women had endured controlling acts of emotional aggression including "insults, humiliations and threats of physical violence." *Candies in Hell*, *supra* note 122, at 1597-1600. This form of control leads to "periods of denial, self-blame and endurance." *Candies in Hell*, *supra* note 122, at 1605. Other common forms of domestic violence in Mexico include verbal aggression, confinement to the home, prohibitions on seeing family members or working, and forced sexual relations." *Women's Reproductive Rights in Mexico: A Shadow Report*, *supra* note 131, at 24. *Candies in Hell*, *supra* note 122, at 1603, (relating how an interviewee's husband was so jealous that his "demands and accusations made it impossible for her to work. Eventually she was forced to give up her job, thereby losing her social contacts and economic freedom." One interviewee describes the manifestation of her husband's jealousy as follows: "...He didn't always beat me, but he was constantly saying 'what man have you been with now' and 'where are you coming from' and he would touch me to see if I was wet, or he would check my underpants...")

<sup>540</sup> It is an important aspect of systemic intimate violence that the abuser usually is in control of his actions, evidenced by the fact that the violence takes place in private, out of the public eye. See Amnesty International Report on Intimate Violence in Sweden, *supra* notex, at 29. See *Candies in Hell*, 1601 (indicating that much domestic violence in Nicaragua takes place on the weekends or in the evenings. The report included an investigation into the time and place in which the abuse occurred. Nearly all 188 women reported being beaten in the house. This is important information substantiating the isolating component of domestic violence). Jane Maslow Cohen, *Regimes of Private Tyranny: What Do They Mean to Morality and for the Criminal Law?*, 57 U. PITT. L. REV. 757 (1996) (distinguishing between abusers who employ "a far more controlled and generally infrequent for of violence that is calibrated to do only as much physical and emotional damage as necessary to instill fear, obedience or any other reaction that is desired in the subject..." and those whose "goal, control, is of crucial value; violence and the infliction of pain are not, Because of this conjunction, the efficient tyrant is able to rule with, as it were, a light hand. What matters is the maintenance of fear, or even terror, as a steady-state phenomenon. It may be possible to achieve this state through only the most occasional demonstration of force, perhaps early in the relationship. Afterwards, threats alone may do the necessary work, provided that they suitably manipulate the subject's mental state.")



Escape may also precipitates escalated violence against the woman or her children. It is at the point of leaving when many women die at the hands of their abusive partners.<sup>541</sup> Faced with the

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<sup>541</sup> Many women experience the most intense violence at the point when they leave their partners or seek outside help. Women who have left the relationship report higher instances of violence than women who are in relationships. This may be due to a higher level of violence or the tendency to create a more favorable description “of current relationships compared with relationships that the women have terminated.” See Captured Queen Report, *supra* note 123, at 81. Mahoney refers to this as “separation assault. Martha R. Mahoney, *Victimization or Oppression? Women’s Lives, Violence, and Agency*, in THE PUBLIC NATURE OF PRIVATE VIOLENCE THE DISCOVERY OF DOMESTIC ABUSE, 59, 78-81 (Martha A. Fineman & Roxanne Mykitiuk eds., 1994). The Mexican legal provisions seem deficient in this regard. The procedures established for cases of domestic violence include conciliation, friendly settlement, and arbitration. The failure to respect the orders generated by this process is penalized with a fine of 30 to 180 days’ of the minimum salary in the Federal District, or its equivalent, and the incommutable administrative arrest of the offender for a period of no more than 36 hours. The Candies in Hell report confirms that the “strong association found between marital control and physical abuse is consistent with international research suggesting that acts of physical violence do not represent isolated events but rather a relationship based on dominations.” *Candies in Hell*, *supra* note 122, at 1604. SCHNEIDER, *supra* note 57, at 77 (“Leaving provides battered women no assurance of separation or safety; the stories of battered women who have been hunted down across state lines and harassed or killed are legion.”). See also BROKEN BODIES, SHATTERED MINDS, *supra* note 98, at 1 (“When she was 20, she ran away with her two children, but her parents and husband found her, and her mother held her down while her husband beat her with a stick. He took the children, whom she has not seen since.”). See also Captured Queen Report, *supra* note 123, at 27 (concluding that women in Sweden who were not living with a man at the time of the survey reported “a higher level of experiences of violence on the part of former husbands/cohabitant partners than do women who are currently living with a man.” The Captured Queen Report also indicates how violence may escalate when a woman leaves the abusive situation: “it does happen that women who are murdered by men have left or been about to leave the man in question. In other cases, the man continues to molest and harm the woman by pursuing her and threatening her, with or without physical attacks.” *Id* at 35). See *Candies in Hell*, *supra* note 122, at 1602 (describing how the “involvement of children in the violence is a particular source of anguish for women, possibly more distressing than her own abuse...” The report also demonstrates how abused women’s day to day activities were constrained and controlled by abusive husbands or partners. Controlled activities include visiting friends and the use of birth control. The intensity of the controlling nature of jealousy was described by an interview as follows: “He was so jealous, my grandmother used to say, ‘if you stay with him he’s going to put blinders on you like the horses that pull carriages.’ I couldn’t look at anyone on the street, nor have either men or women friends, nor greet anyone. And if a man looked at me, he would smack me right there on the street.”) See Martha R. Mahoney, *Victimization or Oppression? Women’s Lives, Violence, and Agency*, in THE PUBLIC NATURE OF PRIVATE VIOLENCE THE DISCOVERY OF DOMESTIC ABUSE, 59, 73-74 (Martha A. Fineman & Roxanne Mykitiuk eds., 1994) (describing the factors that inhibit escape: “resistance becomes the project of staying alive, which will only involve flight when it seems either possible or safer than staying.”). See also Martha R. Mahoney, *Victimization or Oppression? Women’s Lives, Violence, and Agency*, in THE PUBLIC NATURE OF PRIVATE VIOLENCE THE DISCOVERY OF DOMESTIC ABUSE, 59, 60 (Martha A. Fineman & Roxanne Mykitiuk eds., 1994): describing the danger of leaving an abusive relationship: “Staying is a socially suspect choice – often perceived as acceptance of violence – though ‘leaving’ is often unsafe.” Mahoney argues that the issue of domestic violence is part of a system, a sequence of factors that all lead into the prolongation of domestic violence. This is enhanced by denial of such violence and social stigma attached to the victims. *Id* at 62. There are instances where women do leave abusive situations. Reasons for finally leaving may vary and include the fear of actually getting killed; going mad; fear that a child will be killed; and the revelation of an opportunity to escape. Most often, however, the dynamics of the violence and infrastructural deficiencies restrict, at times to the point of eliminating, the victim’s ability to leave. See, for example, Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 10; WALLACE, *FAMILY VIOLENCE*, *supra* notex, at 180 (indicating that “men have far greater opportunities to leave the abusive situation than women.”).

Even in the most sophisticated legal and institutional systems, officials may fail to protect the abused from the violence of her abusive partner who is subject to a restraining order. For example, in Sweden in 2002, only one fourth (approximately 24 per cent) of the cases of assault against women, which were reported to the police, resulted in prosecution. Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 24. It is also interesting to note that in 75 per cent of all reported cases of gang rape in Sweden in 2000, the charges were dropped either by the

reality of a loss of control and seeking to re-establish dominance, the aggressor tends to use force, either against the abused or her children.<sup>542</sup> The abuser may also threaten to take away her children or harm her family members, companion animals or work colleagues. The victim's 'choice' dissipates and, in reality, she is left with only one course of action, that is, to stay. The threats of violence form a barrier to liberation that can be as equally restrictive as prison walls.<sup>543</sup>

In cases of immigrant women, the fear of deportation may restrain them from seeking assistance from any official government body.<sup>544</sup> In this way, the abuser removes the possibility of seeking outside assistance by linking her call for help with the certainty of harm to her or a third person. This is confirmed if the authorities have been contacted before and either have not demonstrated sufficient commitment to assisting her or have been unable to prevent further incidences of harm. In such a situation, the abused may decide either to live with the violence to avoid bringing harm to third parties or, in certain cases, to take independent action, such as hurting the abuser or herself. Women who are sex workers, alcoholics, drug abusers and lesbians may feel disempowered to engage the law at all.<sup>545</sup>

Psychologically, abused women are threatened, shamed and manipulated into believing that they deserve violent treatment and are unable to leave.<sup>546</sup> Perpetual violence exhausts the abused, leaving her too tired and depressed to take action. If she has been denied hospital treatment her injuries may become debilitating. It is increasingly difficult, if not indeed impossible, to reason

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police or the prosecutor. Only 10 cases per year led to legal proceedings. Most often a woman is afraid to leave her partner because she has not received institutional help when she has sought it. She may be told by police or hospital officials that there is nothing they can (or will) do. This will decrease the options she has to leave. Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 10 ("In extreme cases, women who have survived violence become refugees in their own countries..."). It is also interesting to note that most women in Sweden who are able to turn to a shelter for assistance have not in fact reported the perpetrator to the police or been in contact with the authorities. See Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 28.

<sup>542</sup> See Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 10 (stating that the "single most frequent motive behind fatal violence against women by men close to them is 'the problems in conjunction with separation,' where the man's perception that he risks losing control over the woman is seen as the triggering factor").

<sup>543</sup> Telephones are disconnected and windows are often sealed. One POWA client could only communicate to her sister through the letter opening in the front door. See also DWORKIN, *LIFE AND DEATH*, *supra* note 92, at 115–16 ("When you look at what happened to these women, you want to say, 'Amnesty International, where are you?'—because the prisons for women are our homes. We live under martial law. We live in a rape culture. Men have to be sent to prison to live in a culture that is as rapist as the normal home in North America.").

<sup>544</sup> For example, the abuser may threaten that a "court is not going to award custody to a lunatic like you" or "Call the police, see if I care - do you think a policeman doesn't beat his wife?." Fedler, *supra* note, at 235.

<sup>545</sup> *Id.*

<sup>546</sup> *Id.* See also Captured Queen Report, *supra* note 123, at 18 (explaining that many women do not report incidence of violence due to their experience of "fear, guilt and shame").

in the face of violence.<sup>547</sup> The power of self-blame and shame contributes to the entrapment process.<sup>548</sup>

The onset of depression is one of the side effects of repeated acts of assault. This clinical condition reduces an individual's ability to perform ordinary daily functions and long term planning becomes a task that is beyond the victim's ability. Merely making a phone call can take significant energy. Accepting one's situation and not involving the authorities may be the easiest way of surviving.<sup>549</sup>

By cutting a woman off from her personal support system the abuser reduces the victim's sphere of public interaction. The isolation deflates hope of intervention, confirming the seemingly omnipotent control of the abuser.<sup>550</sup> Women may "survive their situation by avoiding adversarial encounters and by actively shunning legal assistance."<sup>551</sup> Shut off from the outside world, the wave of physical abuse intensifies and progresses without the impediment of social or communal admonishment.

#### 4.4.3 Economics

Women may be compelled to remain in violent relationships for economic reasons. A victim simply may not be able to survive without the income of her abuser, especially if she is responsible for children. The fact that most women worldwide earn less than men, decreases women's earning potential and, therefore, their ability to sustain themselves and dependents.<sup>552</sup> Leaving a relationship, abusive or otherwise, is a costly effort, entailing moving and travel expenses, which may be high if the abused needs to move states to escape her abuser.

In addition, women are most often the primary care-giver, and their ability to enter or re-enter the workforce is undermined by the opportunity cost and lack of experience incurred by

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<sup>547</sup> KATHLEEN B. JONES, *LIVING BETWEEN DANGER AND LOVE THE LIMITS OF CHOICE*, (Rutgers University Press New Brunswick, New Jersey, and London) 2-3, 2000 ("Being unable to reason, you are unable to believe, once and for all, that one purpose for living is much better than another. All of a sudden the arguments you can muster for going in one direction or another start to pull and tug at you equally and turn you inside out with indecision until you feel, quite literally, as if the edges of your world have disappeared. And you want nothing more than to be freed from having to choose at all.")

<sup>548</sup> *Candies in Hell*, *supra* note 122, at 1605 (describing the universal nature of research "which suggests that shame and self-blame are powerful mechanisms keeping many women entrapped in violent relationships.")

<sup>549</sup> See Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 9 (describing the effort it takes to keep the violence a secret in order to ensure appearances of "working order. Her own needs are restrained, she tries to avoid annoying the man, controls her facial expressions and body language. Enormous amounts of activity, planning and strength are required, simply to cope with everyday life"). See also Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 31 (describing the results of a study of a psychiatric facility in Sweden showing that "as many as 70 per cent of the women interviewed (1,382) stated that they had at some point been subjected to physical, sexual or psychological abuse. Among those who indicated that they had experiences of violence, some 70 per cent believed that their mental illness was linked to the violence").

<sup>550</sup> *Candies in Hell*, *supra* note 122, at 1605.

<sup>551</sup> Fedler, *supra* note 179, at 235.

<sup>552</sup> See Sen, Nussbaum, MacDougal, Lasswell and Chen, Okin, U.N. reports *note citation to follow*.

their non-remunerated work in the private sphere. In many instances a victim may be unable to return to her place of employment for fear of being traced by her abuser.<sup>553</sup>

#### 4.4.4 Social Factors Leading to Isolation

The existence of social support plays an important role in the escape, recovery and readjustment of an abused woman.<sup>554</sup> Where there is a lack of social assistance, abused women often do not seek help for their situation due to shame, fear of reprisals or because the abuse itself seems disproportionate in their minds to calling the police i.e. it was not sufficiently serious.<sup>555</sup> In this way, part of the harm exists in society's stigma against an abused woman.

In some instances an abused woman may fear social recrimination for the failure of her marriage to meet an ideal standard. The response of the community may condition the way in which she determines her own self-worth and culpability.<sup>556</sup> This is particularly acute in communities where authority of the family vests in men.<sup>557</sup> In Nicaragua, for example, the notions of *Machismo* (male strength and dominance) and *Marianismo* (female maternity and chastity) are cultural imperatives that often guide women's behavior in an abusive situation. The allocated role of a demure, submissive and devout wife will require subservient behavior, with a concomitant "duty to put up with the abuse and keep your family together."<sup>558</sup> On the other hand, the equivalent role for men is that of power, strength and authority, legitimizing the expression of these qualities, even when they manifest in violence.<sup>559</sup>

In other situations, ironically, the emphasis on the empowerment of women may make women reluctant to reveal their own victim status for fear of failing to comply with the perception of equality.<sup>560</sup> The perceived equality of women in Sweden may deter women from reporting the violence since it "conflicts with strong normative conceptions of what a modern Swedish heterosexual partner relationship is supposed to be like..."<sup>561</sup>

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<sup>553</sup> Abused women often lack the "resources, legal and community support and alternative means to survive" Report of the Special Rapporteur on violence against women, *supra* note 58, at 13.

<sup>554</sup> *Candies in Hell*, *supra* note 122, at 1604 ("When friends or family are unavailable or indifferent, this may be more distressing than the initial victimizing experience, because it reinforces the victim's perception of deviance and self-blame.")

<sup>555</sup> *Candies in Hell*, *supra* note 122, at 1604, describing how 80% of women did not report the abuse if there were no social services ("26% of women who had suffered severe violence felt that they did not need help").

<sup>556</sup> Nicaraguan women appear to have limited knowledge about their rights and their enforcement and domestic violence is so commonplace that many Nicaraguan women refer to it as "the cross one must carry." OMCT CEDAW Report on Nicaragua, *supra* note 123, at 11-12. There is the common and socially condoned position that violence is a normal part of a woman's life. OMCT CEDAW Report on Nicaragua, *supra* note 123, at 14. Sweden has a similar view. See footnote \_\_\_ above. *Candies in Hell*, *supra* note 122, at 1604 (describing the series of isolating factors endured by an interviewee who was very young, had two small children and no education or income. Her shock at the onset of violence was augmented by an unsympathetic mother-in-law.)

<sup>557</sup> Social data confirms that abused women in Nicaragua have less interaction with friends, neighbors and relatives. *Candies in Hell*, *supra* note 122, at 1604.

<sup>558</sup> *Candies in Hell*, *supra* note 122, at 1606.

<sup>559</sup> For a detailed discussion of this cultural dichotomy see *Candies in Hell*, *supra* note 122, at 1606.

<sup>560</sup> Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 10 (describing how some women may be embarrassed at how their violent relationship contradicts the perception of Sweden as an equal and ideal society).

<sup>561</sup> "The normative character of the Swedish equality ideology may mean as far as women are concerned that they shrink from interpretations of their partners that deviate from the ideal of an equal relationship." In a culture whose

Cultural imperatives often discourage discussion about one's private affairs. Sexual abuse, while a common component of systemic intimate violence, is reported the least.<sup>562</sup> The stereotypical image of rape is by an unknown stranger, upon a woman who has abandoned the so-called 'precautions' of staying at home or wearing demure clothing. Because of this erroneous perception, a victim or her society may not recognize the crime of rape when her sexual partner of many years demands sex without her consent.<sup>563</sup>

In such environments, abused women encounter oppressive externalities, which contribute to their retraction away from the public into the private.<sup>564</sup>

#### 4.5 State Failure

The failure of states to intervene in cases of systemic intimate violence is the fifth element and a key ingredient in the perpetuation of violence against women.<sup>565</sup> State omission, the theory of which I discuss in chapter three, usually manifests in deficient police services, inaccessible or inefficient court processes, poor health services and a lack of economic assistance, either in the form of welfare systems or protective labor laws.

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official message is that equality shall prevail between the sexes, it may be presumed that both men and women will develop a propensity to interpret their lives in conformity with this norm. In other words, the Swedish self-image, and Sweden's very strong tradition as 'the most equal country in the world', may set their impress on how women view and interpret their experiences of life. Gender equality can here be seen as a *discursive truth*, a discourse that functions as a standard for the interpretation of social life. Captured Queen Report, *supra* note 123, at 84.

<sup>562</sup> Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 10. This makes sense since sex is not a subject that is easily discussed. Few contexts allow for an open and frank discussion about one's sexual activities. And then there is the component of humiliation. The literature on and understanding of the crime of rape reveals that the victim internalizes a sense of shame and humiliation that rightly belongs to the abuser. It is stated that conceptions about sex and violence "are thus intimately linked and all societies have their own ways of excusing or legitimizing gender-based violence." *Id.* at 7.

<sup>563</sup> For example, some women report waking up while their partners are having sexual intercourse with them. When asked to stop, the man persists.

<sup>564</sup> "If a woman leaves her husband, she risks not only economic hardship, but also dealing with the social stigma of having failed as a wife and mother. On the other hand, if she doesn't leave, it may be assumed that she is somehow to blame for provoking her partner's violent behaviour..." *Candies in Hell*, *supra* note 122, at 1606. The policy of the Swedish Government in addressing systemic intimate violence is to take into account all aspects of the equal opportunities policy in order to bring about changed patterns of behaviour in all fields. Cedaw Concluding Observations: Sweden, *supra* note 119, at paragraph 503.

<sup>565</sup> [Note: citation to follow] special rapporteur report; inoconti report. See also Celina Romany, *Killing "The Angel in the House": Digging for the Political Vortex of Male Violence against Women*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE THE DISCOVERY OF DOMESTIC ABUSE*, 285, 293 (Martha A. Fineman & Roxanne Mykitiuk eds., 1994) (describing the deficiency of Puerto Rico's domestic violence legislation: "The experience with protective orders is a showcase of the resistance displayed by enforcement agents. Women engage in forum shopping for sympathetic judges, since they are frequently confronted with judges' reluctance to deal with the serious implications of violence with its lethal nature. At times judges make derogatory comments about Law 54, revoke orders granted by other courts, while granting the batterer temporary custody of the children. They attempt to reconcile the couple, advising women to give their husbands or partners another opportunity; grant the order for a relatively short period of time; grant 'mutual orders of protection' ordering both parties 'to refrain from harming each other.' In short, battered women are not given adequate protection.").

In many countries the courtroom is no friend to women, let alone women who are survivors of systemic intimate violence. Women experience explicit and implicit discrimination in the legal system: they are humiliated, re-victimized, misunderstood, and patronized.<sup>566</sup>

The systemic failure of the state to protect victims of systemic intimate violence and punish the perpetrators, constitutes an endorsement of the harm, implicit or otherwise. The conduct of the state, therefore, by virtue of its omission to act, perpetuates the violence, creating an atmosphere of impunity.

Systemic failure is the key element of the definition which distinguishes systemic intimate violence from domestic violence generally. It is the element which most significantly justifies international intervention.

## 5 Summation of the Right

Systemic intimate violence is a phenomenon replete with the strangeness of human nature, where love meets violence at a juncture of incomprehensible pain. Understanding the intricacies of this violence reveals how an abused woman has little, if any, access to traditional legal mechanisms. Simply escaping the physical control of an abuser is a challenge. The fact that something so nebulous occurs in private serves to increase the difficulty in harnessing systemic intimate violence within the current legal structure.<sup>567</sup> Therefore, procuring help from public structures such as police, courts or hospitals is not the automatic remedy we would like it to be. It is the exception.<sup>568</sup>

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<sup>566</sup> See Vicki Jackson, *What Judges Can Learn from Gender Bias Task Force Studies*, 81 JUDICATURE 15 (July-August 1997) (describing sexist conduct such as addressing female witnesses and attorneys by their first names or as ‘pretty’, ‘young’, or ‘girls.’ Jackson maintains that the “perception of gender bias in a judge is more harmful to the legal system than its appearance in other participants.”). *Id.* at 16. See also Celina Romany, *Killing “The Angel in the House”*: Digging for the Political Vortex of Male Violence against Women, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE THE DISCOVERY OF DOMESTIC ABUSE*, 285, 289 (Martha A. Fineman & Roxanne Mykitiuk eds., 1994) (explaining that what drives judicial officers in their discrimination against women in cases of domestic violence is the need to preserve, at all costs, the family unit, the most revered of all social institutions).

<sup>567</sup> Amnesty International defines men’s violence against women in intimate relationships as “psychological, physical and sexual violence committed by a man with whom the woman has, or has had an intimate relationship. It may be her current or former husband, cohabitant/partner or boyfriend.” Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 6. The Amnesty International Report on Intimate Violence in Sweden combines the definition of cyclical harm with the intimate and gendered component of the violence, largely absent from many other definitions. This is probably preferable from the point of view of legislation since many men and boys suffer from domestic violence and, while they may have better access to legal and social facilities, they may be prevented from utilizing them due to the stigma that inheres in such abuse.

<sup>568</sup> In 1995, statistics indicated that every second woman in Nicaragua had been physically mistreated at some point by her husband or companion, and one in four women had been the recipient of physical violence within the preceding year. UN 1998 Nicaragua Report, *supra* notex. See specifically the country report on Nicaragua 1, available at <http://www.undp.org/rblac/gender/nicaragua.htm> [hereinafter UN 1998 Nicaragua Report], citing (“*Confites en el infierno*” or “Candies in Hell”). In 1997, “70% of all women had experienced physical violence some time in their lives, while 3% had been subjected to violence in the past year.” UN 1998 Nicaragua Report, *supra* note 197. 94% of mistreated women indicated that the physical violence was accompanied by insults and humiliation and that 20% had suffered all three forms of abuse (physical, psychological and sexual). 31% of abused women had been hit while pregnant, almost half of them suffering blows to the abdomen. One in three of the abused women had been forced to have sexual relations. In 80% of the cases, violence began within the first four years of marriage. 70% of the acts of violence were classified as “severe (blows with the fist, threat or use of arms”). Half of

In the darkness and detachment of such isolation, acts of violence are carried out, implemented, and executed in silence. This silence effectively removes the existence of the harm from the realm of reality. As far as the state is concerned, the abuse disappears.

### **Part C: The International Law Prohibition**

#### **6 Steps Required in International Law**

##### **6.1 General**

As described in chapter one above, there already is evidence of international legal prohibitions against systemic intimate violence. However, taking into account the slow development in international law, these prohibitions do not yet ensure protection against the precise nature of the right described above.

To achieve the effective delineation of systemic intimate violence as an international human rights violation I propose three steps to be taken in international law.

First, a specific, express and authoritative prohibition against systemic intimate violence must be adopted and developed in international law. Second, the ramifications of systemic intimate violence must be incorporated into the political, economic and health-related components of international dialogues.<sup>569</sup> Mainstream international bodies, such as the torture and refugee committees, need to consider systemic intimate violence as a human rights violation for which such committees are responsible. Finally, the right to be free from systemic intimate violence, and the corresponding duty of states to uphold this right, require greater theoretical substantiation and practical direction in international law.

After the adoption of these measures at international law, it will be up to states to take positive steps to satisfy their duties to help remedy systemic intimate violence. The proposed development of international law should be considered within the context of the transnational legal process, which I discuss in chapter five. I do not maintain that change will come about at the hand of an international policing authority. This is historically inaccurate and conceptually improbable. Rather, this thesis proposes that the enunciation of a specific legal right to be free from systemic intimate violence would advance the infiltration of women's rights norms into national legal systems. This, in turn, would help improve state-sponsored infrastructural support and help generate the necessary social reform to prevent systemic intimate violence and protect its victims.

The remainder of this chapter discusses the need for a specific and authoritative prohibition against systemic intimate violence at international law, and the need for main-stream

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the abused women stated that the violence against them was generally witnessed by their children. UN 1998 Nicaragua Report, *supra* note 197, at 1, citing the “Candies in Hell” report.

<sup>569</sup> See Violence against Women: The Health Sector Responds, *supra* notex. at 7 (“...intervention by health providers can potentially mitigate both the short –and long-term health effects of gender-based violence on women and their families.”).

international bodies to take into account women's violence in the context of broader social and political problems. This chapter then discusses in detail the numerous practical steps which states should take to meet their international legal duties. That is, the steps necessary to help remedy systemic intimate violence.

The rest of this thesis then provides the legal, theoretical substantiation for: (1) why the right to be free from systemic intimate violence is an international legal right, thereby providing the jurisprudential justification for the development of specific and authoritative prohibition against such violence at international law; (2) why states have a duty under the doctrine of state responsibility to take positive steps to help remedy such violence; and, (3) the process by which an articulated international legal right to be free from such violence can filter down into, and reform, domestic legal and political systems. These issues are addressed in chapters 3, 4, and 5 respectively.

## 6.2 The Enunciation of a Specific Legal Right

Current statements in international law provide overarching principles regarding violence against women generally. Where statements mention domestic violence specifically, the uncertainties of CIL discussed in chapter one undermine the efficacy of these statements. Therefore, there needs to be an express legal statement which describes the precise contours of the right of women to be free from systemic intimate violence and the conjoint obligation of states to ensure safety in intimate, as well as public, settings.

The most certain and authoritative method through which new rights can be recognized is via the creation and endorsement of treaties, which would be a coup for the women's rights movement. However, I do not claim that the creation of a treaty in international law to prevent systemic intimate violence would yield decisive benefits, nor do I believe it is a realistic objective. A preferable short term goal would be the enunciation by the U.N. Security Council that systemic intimate violence is a function of government conduct, by virtue of states' omissions, and that states have a concomitant right to assuage it, through the adoption of specified steps.

The enunciation of systemic intimate violence in international law would translate into better formulated and implemented legislation in national legal systems. This can be affected through the process of norm infiltration; the potential for national reform through impact litigation; and, the granting of asylum to victims of systemic intimate violence, factors which I discuss in chapter four.<sup>570</sup>

The enunciation of this right would pave the way for the second method of improving international law, namely, the mainstreaming of systemic intimate violence.

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<sup>570</sup> [Note: add in Neuwirth's suggestion of a Special Rapporteur on Laws that Discriminate against Women @ 21; also see her discussion on pg 47, fn 177 where she cites Heyns and Viljoen as saying that treaty bodies must be visible. Look at these authors' recommendations that treaty bodies should travel more and meetings should be held outside of Geneva and New York].



### 6.3 Bringing the Consequences of Systemic Intimate Violence into Mainstream Issues

In terms of political agendas, domestic violence takes a back seat to more mainstream political issues, such as economic, health and foreign policy concerns. Therefore, it is necessary to connect systemic intimate violence to mainstream concerns, with a view to raising the public's political awareness of these issues, and therefore, placing political pressure on governments to create change. This can be achieved by highlighting the economic and health consequences of systemic intimate violence. However, this is not to say that systemic intimate violence should fall within the category of negative socio-economic rights in international law. The economic and health consequences are part of a larger story of political marginalization of abused women as a group suffering from systemic intimate violence.

The economic expense of systemic intimate violence is substantial and involves both implicit and explicit costs. Implicit costs include missed work days, poor work performance and the loss of potential labor. Explicit costs include the expenses of hospitalization, police and criminal institutions, homelessness and child welfare. As the primary cause of harm to women, systemic intimate violence also is a significant health hazard. It is a cause of child mortality, high rates of HIV AIDS and mental diseases.

As the primary cause of harm to women, systemic intimate violence is a health hazard. It is a cause of child mortality, high rates of HIV AIDS and mental diseases.

Linking systemic intimate violence to these so-called 'mainstream' phenomena would help bring this violence into political discourse and demonstrate the seriousness of what traditionally has been perceived only as a nucleus concern.

The politicization of systemic intimate violence is necessary to propel continued incorporation of this gender-specific harm into the decision-making process of 'mainstream' international bodies, such as the refugee committee, the torture committee, and the EU. The importance of incorporating these themes into the work of mainstream bodies is evident from the case of *A. v. The United Kingdom*.<sup>571</sup> The court held that child abuse had reached the level of severity prohibited by article 3, which deals with torture.<sup>572</sup> The extrapolation of the definition of torture to circumstances of unrestrained child abuse allowed the European Court of Human Rights to place positive obligations on the state to take positive steps into protect children in accordance with states' international obligations to prevent torture.

Until recently, 'mainstream' human rights bodies had not addressed women's rights *per se*. Notwithstanding the framing of systemic intimate violence as a form of torture and terror, the torture committee has not addressed such violence as a form of torture and there are very few successful asylum claims based on systemic intimate violence.<sup>573</sup> However, this is changing and increasingly international bodies which are not gender-specific are taking violence against

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<sup>571</sup> *A. v. The United Kingdom*, *supra* note 78.

<sup>572</sup> *A. v. The United Kingdom*, *supra* note 78, at paragraph 21.

<sup>573</sup> See Laura S. Adams, *Beyond Gender: State Failure to Protect Domestic Violence Victims as a Basis for Granting Refugee Status*, 24 T. JEFFERSON L. REV. 239, 240 (2002).

women into account in their activities.<sup>574</sup> This thesis proposes that this process needs to be developed further. The augmentation of this process could yield fruitful developments both nationally and internationally. Specifically, the framing of violence against women as torture, terrorism and a basis for asylum, is a feature of claims which activists are pursuing, and international bodies should be challenged to incorporate into their activities.

I now turn to discuss the steps states ought to take to mitigate systemic intimate violence.

## 7 Prohibiting Systemic Intimate Violence in National Law

### 7.1 General

Whether a state has violated its international legal obligations towards its (predominantly) female citizens depends on the precise contours of the obligation, the extent to which the state has attempted to fulfill its obligation and the facts of systemic intimate violence in the country in question.<sup>575</sup>

There are three core minimum steps states should take to prevent and remedy the incidence of systemic intimate violence. These steps are: (1) the enactment of legislation addressing such violence; (2) the implementation of such legislation; and, (3) the restructuring of the distribution of resources and the allocation of institutional tasks to help remedy such violence.<sup>576</sup> I deal with each of these three steps in detail below.<sup>577</sup>

States are obliged to take the aforementioned steps, subject to economic constraints and political stability. Where a state's resources are so few that it struggles to meet primary needs, or if the state is fractured by internal or external conflict, it may well be excused from allocating

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<sup>574</sup> See Amnesty International, *Broken bodies, shattered minds: Torture and ill-treatment of women* (2001), available at <http://web.amnesty.org/library/Index/engact400012001> (last visited Nov. 11, 2003) [hereinafter *Broken bodies, shattered minds*] (documenting the worldwide torture of women, observing that “states all around the world have allowed beatings, rape and other acts of torture to continue unchecked”).

<sup>575</sup> JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY*, 124 [hereinafter *CRAWFORD*] (“... in the final analysis, whether and when there has been a breach of an obligation depends on the precise terms of the obligation, its interpretation and application, taking into account its object and purpose and the facts of the case.”).

<sup>576</sup> These steps are logical requirements for states to ensure the protection of the international human rights of their citizens and can be extrapolated from a number of international instruments. MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW*, 29 (1988) [hereinafter *JANIS*] (confirming the possibility of interpreting treaties as a basis for determining state liability). I base these steps in part on the discussions which arose during the CEDAW committee meetings in respect of domestic violence. The CEDAW committee has encouraged governments to “consider the possibility of implementing an integrated, long-term plan for combating domestic violence. Such a plan could include taking legal action, training judicial, law enforcement and health personnel, informing women about their rights and about the Convention and strengthening victims’ services.” 1998 CEDAW report, *supra* note, at paragraph 412, page 35. The CEDAW committee has suggested that “strong action be taken against persons who commit violence against women, and that it should be made easier for women to bring court actions against offenders.” 1998 CEDAW report, *supra* note 204, at 35.

<sup>577</sup> The ideological underpinning of these steps is nugatory without a conjoint analysis of their efficacy. Do these steps work as a standard against which to measure a state's compliance with its international obligations? In performing this pragmatic investigation I include descriptions of the steps take in differing jurisdictions.

sufficient budget to prevent systemic intimate violence.<sup>578</sup> However, these factors would be a defense to the failure to comply with an international obligation on a case by case basis, and are not reasons why the obligation should not exist. Therefore, as with any international obligation, the relevant circumstances will determine the extent of the state's accountability.

The underlying barometer, taking into account the relevant factors described above, would be whether "a more active and more efficient course of procedure might have been pursued" where in fact there was a lack of "diligence and intelligent investigation as constitutes an international delinquency."<sup>579</sup>

## 7.2 Legislative Steps

### 7.2.1 Legislative Amendment as a Requirement of International Law

The first basic step is the enactment of legislation prohibiting systemic intimate violence.<sup>580</sup> In most instances, the amendment of legislation is the first step required in complying with any international obligations. This is evident in numerous international instruments including the ICCPR, the ICESCR and the Inter-American Convention on Enforced Disappearances.<sup>581</sup> The CEDAW committee has required state parties to enact federal and state laws to criminalize and

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<sup>578</sup> Circumstances that would preclude responsibility may range in type and intensity. While a full discussion of these factors exceeds the ambit of this analysis, it is of seminal importance to the proposal of international responsibility for systemic intimate violence.

<sup>579</sup> ALWYN V. FREEMAN, *THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE* 380 (Longmans, Green and Co. 1938) [hereinafter FREEMAN] (citing *Neer* (72-74 (U.S. v. Mexico *Opinions*) case). The commission in this case laid down two grounds on which international responsibility could be founded for an omission to provide justice: "(1) that the authorities administering the [ ] law acted in an outrageous way, in bad faith, in willful neglect of their duties, or in a pronounced degree of improper action, or (2) that Mexican law rendered it impossible for them properly to fulfil their task."

<sup>580</sup> The international obligation to enact enabling legislation exists in several international instruments. Article 2 of DEVAW, *supra* note 22, provides that all appropriate measures be taken to abolish existing laws "...which are discriminatory against women, and to establish adequate legal protection for equal rights of men and women." Article 4(1) of the Torture Convention, *supra* note 5, requires State parties to "ensure that all acts of torture are offences under its criminal law." Article 4(1) of the Torture Convention, *supra* note 5,, which goes on to provide that the "same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture." [Note: cite authority which argues that Convention against Torture applies to acts of private individuals too] Cf. DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* 27, footnote 97 and 31 (Oxford University Press, 1999) [hereinafter SHELTON] (discussing the notion of an ineffective internal remedial system. Shelton suggests that states have an obligation to change their laws where they are deficient).

<sup>581</sup> See ICSCER, *supra* note 13, article 2(1), in terms of which state parties undertake to "to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." See also ICCPR, *supra* note 4, article 2(2): "Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant." Article 1(d) of the Inter-American Convention on Enforced Disappearances [hereinafter, Inter-American Convention on Enforced Disappearances] requires states to "take legislative, administrative, judicial, and any other measures necessary to comply with the commitments undertaken in this Convention."

punish systemic intimate violence and the perpetrators thereof, and to “take steps to ensure that women victims of such violence can obtain reparation and immediate protection...”<sup>582</sup>

The creation of model legislation regarding violence against women was a priority for the former Special Rapporteur for Violence against Women, Radhika Coomaraswamy.<sup>583</sup> The model legislation includes draft definitions, complaint mechanisms, civil and criminal provisions, a description of judicial responsibilities and sentencing guidelines.

On several occasions the European Court of Human Rights has compelled states to adopt protective legislation in the context of sexual violence. The international legal imperative to enact corrective legislation was discussed in the case of *MC v. Bulgaria*, where the European Court of Human Rights required the amendment of Bulgaria’s penal system to criminalize rape in instances where the victim displays no act of physical resistance due to silent shock. In the case of *X and Y v. the Netherlands*, the ECHR held that the Government of the Netherlands had failed to provide “practical and effective protection” for mentally handicapped women (over the age of sixteen) who had been sexually abused.<sup>584</sup> The court held that “in such cases, this system meets a procedural obstacle which the Netherlands legislature had apparently not foreseen.” Finally, in *A v. The United Kingdom*, the European Court of Human Rights recalled the international law of torture to compel states to amend laws, which currently fail “to provide adequate protection to children” who had been severely abused under the guise of corporal punishment.<sup>585</sup>

Therefore, the need for states to adopt or amend legislation to comply with their international legal obligations is well settled. The next section discusses the types of legislation which should be adopted to combat systemic intimate violence in particular.

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<sup>582</sup> The CEDAW committee referred particularly to “establishing 24-hour telephone hotlines, increasing the number of shelters and conducting zero-tolerance campaigns on violence against women, in order that it may be recognized as an unacceptable social and moral problem. The Committee also considers it especially important that steps be taken to train health-care workers, police officers and staff of special prosecutors’ offices in human rights and dealing with violence against women.” 2002 CEDAW report, *supra* notex, at page 209, paragraph 432.

<sup>583</sup> See Report of the Special Rapporteur on Violence against Women, *supra* notex. Coomaraswamy submitted a framework for model legislation on domestic violence, Distr. GENERAL E/CN.4/1996/53/Add.2, 2 February 1996, Commission on Human Rights, Fifty-second session, Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission; Alternative Approaches and Ways and Means within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms, *available at*

<http://193.194.138.190/Huridocda/Huridoca.nsf/TestFrame/0a7aa1c3f8de6f9a802566d700530914?Opendocument>. Report of the Special Rapporteur on violence against women, *supra* note 58.

<sup>584</sup> *X and Y v. The Netherlands* - 8978/80 [1985] ECHR 4, para 30, (26 March 1985) [hereinafter *X and Y v. The Netherlands*]

<sup>585</sup> *A v. The United Kingdom*, *supra* note 78, at paragraph 24 [*Note: check citation*]. “In the Court’s view, the law did not provide adequate protection to the applicant against treatment or punishment contrary to Article 3. Indeed, the Government have accepted that this law currently fails to provide adequate protection to children and should be amended. In the circumstances of the present case, the failure to provide adequate protection constitutes a violation of Article 3 of the Convention.”

## 7.2.2 Types of Legislation

### a. Uniformity

It is not possible to require states to adopt uniform legislation. Because there is a multitude of legal systems with varying degrees of resources and enforcement capabilities, certain legislative steps in one system may be nugatory or even counter-productive in another. Legislation instead should facilitate the creation of state infrastructures, which, based on the specificities of the country in question, can provide victims with nuanced help.

Whatever the structure of the legislation, it should take into account the specific elements of systemic intimate violence described above. In addition, to the extent that a state's legal system is based on the principle of a fair trial, it is seminal that the rights of the abuser are not diluted.

### b. Anti-Discrimination Legislation

Depending on the status of a country's human rights legislation, a state may be required to adopt preliminary anti-discrimination legislation or incorporate the equality principle into its legal system by abolishing discriminatory laws and adopting appropriate ones that prevent and punish unfair discrimination against women.<sup>586</sup> South Africa, for example, has injected the notion of equality between men and women in its Constitution, which, as supreme law, requires the incorporation of equality into other national and provincial legislation.<sup>587</sup>

### c. Criminal Versus Civil Sanctions

Initially, domestic violence advocates called for criminal sanctions for domestic violence.<sup>588</sup> General Recommendation 19, for example, refers to both criminal and civil laws. It requires governments to make laws that ensure punitive, preventive and rehabilitative provisions, including refuges, specially trained health workers, rehabilitation and counseling.<sup>589</sup> However, this is changing and one of the dominant debates regarding intimate violence legislation is whether domestic violence should be a criminal or civil violation.

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<sup>586</sup> Article 2(a), (b), (c), (f), (d), 3, 6, 11(3), 15(1) and (4), 16(1)(f) and (2) and 18 of CEDAW, *supra* note 21. Cf. SHELTON, *supra* note 209, at 27 footnotes 97 and 31 (discussing the notion of an ineffective internal remedial system. Shelton suggests that states have an obligation to change their laws where they are deficient).

<sup>587</sup> See article 5 of the South African Constitution. *[Note: Cite supremacy clause of the Constitution.]* This was followed by additional legislation that reveals the egalitarian policy adopted by government. See, for example, the following South African legislation: the Alteration of Sex Description and Sex Status Act, no. 49 of 2003, which seeks to dismantle gender stereotypes; the Promotion of Equality and Prevention of Unfair Discrimination Act, no.4 of 2000 and the Promotion of Equality and Prevention of Unfair Discrimination Amendment Act 52 of 2002, which provide for the inculcation of gender and sex equality within governmental and other institutions, including the establishment of the Commission for Gender Equality.

<sup>588</sup> In most jurisdictions, intimate violence is not a criminal offence in and of itself. Spousal violence may be construed as assault and battery, but for the reasons described below, this generic legal categorization is inappropriate.

<sup>589</sup> Articles 24(k) and 24(t)(iii). For example, governments should take specific preventive and punitive measures for trafficking and sexual exploitation §(g) and (h); sexual harassment §(j); female circumcision §(l); reproductive rights §(m); rural women §(o) and (q); and domestic workers §(p).

There are two main advantages to criminalizing systemic intimate violence. Firstly, creating a specific crime (independent of assault and battery) may confer a higher status on the conduct, removing it from its designation as a ‘family’ matter and placing it within the objectionable realm of criminal conduct. Secondly, if the crime of systemic intimate violence is proved, a prison term may ensue, ensuring that the victim is no longer threatened by the abuser.

In 1993, the CEDAW committee endorsed the notion of criminalizing intimate violence on the basis that if such cases “were treated as other criminal offences were, with the police being obliged to arrest and prosecute the perpetrators regardless of whether the women wished to prosecute or not, and with therapy provided for the perpetrator, the positive outcome would be a changed social attitude towards domestic violence.”<sup>590</sup>

The European Court of Human Rights supported the criminalization of sexual violence on the basis that “the need for protection existed *erga omnes*, whilst an injunction could only be directed to a limited circle of persons.”<sup>591</sup> The holding of the ECHR that “civil law lacked the deterrent effect that was inherent in the criminal law” is appealing.<sup>592</sup> As with sexual abuse, systemic intimate violence “is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal law provisions; indeed, it is by such provisions that the matter is normally regulated.”<sup>593</sup>

However, the criminalization of intimate violence is not necessarily appropriate for all jurisdictions and there are disadvantages in employing the criminal system. Given the complexity of intimate violence, the victim’s emotional commitment to her abuser may deter her from taking such drastic steps as having him arrested. She may want the violence to stop but may not necessarily desire the imprisonment of her partner. This is exacerbated if the abuser is the primary or only earner in the home. The abused, therefore, may be reluctant to report the abuse for fear of losing the financial support her partner provides, particularly if the support includes financial care for her children.

In addition, in most common law and civil law jurisdictions, the standard of proof in criminal matters is much higher than in civil cases. The chances of ensuring a successful claim, therefore, would be lower. Moreover, criminal matters are often time consuming and inappropriate for the urgent attention required in cases of systemic intimate violence.

Finally, if a prosecutor is responsible for running the case against the abuser, all power is taken out of the hands of the abused. This has advantages because, as has been discussed, the psychological damage caused by the violence may reduce the ability of the individual to engage

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590 CEDAW Concluding Observations: Sweden, *supra* note 119, at paragraph 502.

<sup>591</sup> These were the statements of the Commission, which were adopted by the ECHR. *X and Y v. The Netherlands*, *supra* note 213, at para 26-27.

<sup>592</sup> *X and Y v. The Netherlands*, *supra* note 213, at 26-27.

<sup>593</sup> *X and Y v. The Netherlands*, *supra* note 213, at para 27. It is important to note that the ECHR did not base its decision on a violation of article 13 of the Convention, which enjoins States to provide effective remedies for a violation of a right in the Convention. Rather, it found that because there was a clear violation of the victim’s right to family integrity for which no remedy was available, it did not have to pursue a similar analysis in terms of article 13.

in legal action. Therefore, placing the decision to prosecute in the hands of the prosecutor (or having a system of mandatory prosecution or arrest) may better facilitate the safety of the abused. On the other hand, if a victim knows that by calling the police she triggers an unstoppable series of legal events, which could culminate in the long-term imprisonment of her intimate partner, she may be daunted by the prospect and refrain from contacting the police at all.

A balance needs to be struck and it makes more sense to have an interactive process between the abused and the official legal services. For example, in Norway, violence against women is a criminal offence but the abuser may be prosecuted only at the instigation of the injured party. Norway also facilitates the appointment of an intermediary to advise the abused of her options, which enhances the sense of choice the abused may experience.<sup>594</sup>

In 1998, as part of the country's progress towards gender equality, South Africa enacted the Domestic Violence Act which provided for urgent temporary restraining orders, which can be given in the absence of the defendant, and greater scope to the type of maintenance orders judges could make.<sup>595</sup>

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<sup>594</sup> See 1984 CEDAW report, *supra* note, at pages 37-45, paragraph 277-338.

<sup>595</sup> South African Domestic Violence Act, *supra* note 141. This replaced the 1993 Prevention of Family Violence Act 133 of 1993 ('Prevention of Family Violence Act'). The South African Domestic Violence Act is a considerable improvement on its predecessor, the 1993 Prevention of Family Violence Act. The 1993 Act was criticized as an "electioneering strategy undertaken in haste." Elsje Bonthuys, *The Solution? Project 100 - Domestic Violence*, 114 S. AFR. L.J. 371, 372 (1997) [hereinafter Bonthuys]. One of the most problematic aspects of the original Prevention of Family Violence Act was the lack of an interim protection order. The rules of procedure and evidence surrounding the issuing of a protection order were necessarily more restrictive. I would submit that many of the problems which existed in the 1993 Act to some extent have been alleviated by the 1998 Act. The obtaining of a protection order is divided into a two stage process in the South African Domestic Violence Act. The first leg of the process involves the application for an interim protection order (Section 5 of the South African Domestic Violence Act). The second leg envisages the granting of a final protection order (section 6 of the South African Domestic Violence Act). A civil protection order has been described as a "legally binding court order that prohibits an individual who has committed an act of domestic violence from further abusing the victim." Cf. Harvard Law Review, *Legal Responses to Domestic Violence*, *supra* note, at 1501 (citing PETER FINN & SARAH COLSON, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT v (1990)). In light of the exigency of systemic intimate violence the interim protection order exists to provide immediate relief. An application for an interim protection order must be heard as soon as is reasonably possible, even in the absence of the respondent. Section 5(1) of the South African Domestic Violence Act, *supra* note 141. Subsection 2 indicates that an interim protection order can be granted notwithstanding the fact that the respondent may not have been given notice of the proceedings. This is a decidedly uneasy element since the abandonment of the audi alteram partem principle compromises the core of equitable justice. However, the South African Domestic Violence Act balances the need for an urgent remedy with the basic principles of legal proceedings. By allowing a return date where the respondent's presence is required, the Act provides the immediate and necessary relief without infringing too greatly into the procedural rights of the respondent. The South African Domestic Violence Act, however, is an improvement on the old Act in which the court was required to make a final protection order against the respondent potentially without having heard him. Therefore, although an application for a protection order can be made ex parte, only an interim protection order will be granted and the respondent has an opportunity to contest the provisional order on a return date. South African Domestic Violence Act, *supra* note 141, section 5(6). See Brigitte Clerk and Lirieka Meintjies-Van Der Walt, *The New Domestic Violence Bill: Rhetoric or Reality?*, 115 S. AFR. L.J. 760 (1998). This aspect of the protection order also helps to quell an additional concern: what if the applicant is lying. The division of the protection order into two parts can inject a type of equity into a situation where a respondent may have a legitimate defense but was not aware of the proceedings against him. The onus of proof is another characteristic of the South African Domestic Violence Act worthy of mention. The complainant must satisfy the court that there is prima facie evidence of domestic violence perpetrated by the respondent and that "undue hardship may be suffered

Sweden also has adopted some of the most advanced legislation in respect of systemic intimate violence, namely, the Law on Gross Violation of Integrity and Gross Violation of a Woman's Integrity. This legislation includes a myriad of criminal and civil provisions that take into account many of the elements of systemic intimate violence.<sup>596</sup> The law applies where an abuser commits "repeated acts of harassment or abuse against a woman with whom he is, or has been, in an intimate relationship."<sup>597</sup> The provision applies to offences such as assault, molestation, violation of the privacy of the home and sexual coercion, all with the aim of filling a vacuum where assault may not apply.<sup>598</sup>

The original objective of this law was to take into account repeated violations of a woman's integrity jointly. This gave a context to seemingly 'minor' incidents of harm, revealing the continuum of danger. This results in a more stringent sentence than would be the case if the acts were considered separately.<sup>599</sup> The legislation also recognizes that intimate violence

is often systematic and it may be difficult for the victim to keep track of the events and dates when the crimes were committed. The law on violation of a woman's integrity takes into consideration all aspects of the abused woman's life, characterised by threats, assault and mental stress, and has been drawn up so as to facilitate prosecution of perpetrators who repeatedly have violated the integrity of a woman with whom they are in an intimate relationship.<sup>600</sup>

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by the complainant as a result of such domestic violence if a protection order is not issued immediately." Section 5(2)(a) - (b). This onus of proof may have acted harshly against an innocent respondent had it applied in a hearing for a final protection order; however, the opportunity of a final hearing negates this concern. This neatly demonstrates the purpose of the interim protection order, namely, to allow for fast and efficient relief which can later be tested in a hearing for a final protection order. At the final hearing, if certain requirements have been met, then "the court must issue a protection order against the respondent, in the prescribed manner." The mandate is found in section 5(2). The interim protection order must then be served on the respondent (Section (5)(6)) and a return date of no less than ten days must be specified in the order (violence). The court's power in respect of a protection order is outlined in section 7 of the South African Domestic Violence Act, *supra* note 141. Once again there is a compulsory duty on the court, if it finds on a balance of probabilities that the respondent is committing or has committed an act of domestic violence, to issue a protection order in terms of section 6(4). The protection order can consist of an order regarding no further abuse [Subsec (1)(a), (b), (g) and (h)], no further contact or restraining orders [Subsec (1)(c), (d), (e) and (f)], seizure of weapons [Subsec 2(a)], police assistance [Subsec 2(b)], confidentiality [Subsec 5(a) and (b)], monetary orders [Subsecs 3 and 4] and eviction orders [Subsec 1(c)]. A very interesting aspect of the final hearing provides that if the respondent is not represented by a legal representative, then such respondent "is not entitled to cross-examine directly a person who is in a domestic relationship with the respondent and shall put any question to such witness by stating the question to the court, and the court is to repeat the question accurately to the respondent." Section 6(3) of the South African Domestic Violence Act, *supra* note 141. This section recognizes the unusual fear involved in an intimate crime. The accused abuser may not have direct interaction with the applicant since to allow otherwise would place the victim back in her largely impotent and defenseless position.

<sup>596</sup> Chapter 4, section 4a of the Swedish Penal Code, cited in Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 19. See also Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 35, footnote 45 ("Gross violation of a woman's integrity accounted for 1,840 cases of suspected crime").

<sup>597</sup> Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 19.

<sup>598</sup> *Id.*

<sup>599</sup> *Id.* at 20.

<sup>600</sup> *Id.* at 20. An extract from the Swedish Penal Code: Law on Gross Violation of Integrity and Gross Violation of a Woman's Integrity, Chapter 4, Section 4a is cited by Amnesty International and reads as follows: "A person who commits criminal acts as defined in Chapters 3, 4 or 6 against another person having, or have had, an intimate relationship to the perpetrator shall, if the acts form a part of a repeated violation of that person's integrity and suited



#### d. Restraining Orders

Many states have enacted some form of protection or restraining order facility, falling within the realm of civil law.<sup>601</sup> Ideally, this facility allows an individual to seek an urgent restraining order, which does not require the presence of the abuser or the rigorous evidentiary requirements of criminal law. The urgent restraining order should be temporary, allowing for a return date when the abuser may be present and a higher standard of proof may be required. This allows for an individual to seek immediate redress, without having to incur the cost or emotional strain of proving the abuse beyond a reasonable doubt. At the same time, the temporary nature of the restraining order with a return date ensures that proper evidentiary requirements are met, thereby ensuring the restraints of fairness inherent in the rules of evidence.

Although a final protection order may be issued imposing the most rigid constraints on the abuser, there is the very real possibility that the abuser will simply ignore the order. While the law does have remedies for such an event, namely arrest for violating a court order, it is not unusual for the enforcement process to be lengthy and, often, too late. Furthermore, the issuing of an order may not serve to intimidate the abuser. Instead, by disempowering him, it may enrage him to an extent that initiates a new cycle of violence.<sup>602</sup>

If this is the case in a particular instance, then the only real remedy available to the victim is to escape the abuser completely by seeking refuge in a safe house such as a shelter where her abuser cannot find her.<sup>603</sup>

#### e. Labor Laws

Intimate violence may affect the employment of an abused woman. Usually, employers do not allow days off to go to court to obtain or enforce a protection order. As it is, women's role in the business world is unstable at best and the discriminatory impact of systemic intimate violence only adds to the unsteadiness of a woman's economic position.<sup>604</sup>

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to severely damage that person's self-confidence, be sentenced for gross violation of integrity to imprisonment for at least six months and at most six years. If the acts described in the first paragraph were committed by a man against a woman to whom he is, or has been, married or with whom he is, or has been cohabiting under circumstances comparable to marriage, he shall be sentenced for gross violation of a woman's integrity to the same punishment." Originally, the legislative provision stated that the separate acts had to "form part of a repeated violation." In 1999, this was construed by the Supreme Court of Sweden as meaning "that the man had to be convicted of similar offences against the woman after the law had entered into force." The number of reported cases of violation of a woman's integrity halved, until the legislation was amended so that no previous conviction would be necessary in order for a court to convict an individual for gross violation of a woman's integrity and the current charges would suffice. Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 36.

<sup>601</sup> [Note: citation to follow] no. of state which have enacted domestic violence legislation. One of the most progressive definitions is in the South African Domestic Violence Act, *supra* note 141.

<sup>602</sup> Fedler, *supra* note 179, at 246.

<sup>603</sup> Admittedly, this too is not full proof since the shelter remains ineffective for a woman with children or a woman who holds down a daily job where her partner can easily find her.

<sup>604</sup> Mason, *Buying Time for Survivors of Domestic Violence*, *supra* notex, at 642.

Furthermore, studies show that one third of women who are killed by their husbands have already left their partners and that the dangers of homicide actually increase after a woman has ended the abusive relationship.<sup>605</sup> Consequently, many women cannot remain in one place for any length of time and continually have to move around to avoid detection by their intimate abusers. This prevents them from continuing with their employment, and from accepting long-term positions.

In such circumstances, the victim is prevented from gaining experience; her résumé may become disjointed; and a reference from a previous employer or any contact with a past life is simply not a viable option.<sup>606</sup> The impact that this would have on a person's career is evident and the integration of labor and welfare laws in respect of systemic intimate violence could help mitigate the economic complications of systemic intimate violence.

Labor laws could also be amended to allow women to cite systemic intimate violence as a reason for long-term absence from work. Ideally, the employer ought to assist in protecting the abused from her the abuser. This can be done, for example, by preventing the abuser from entering the premises and refusing to give any information regarding the abused. However, the size of employer's organization should be taken into account when imposing such an obligation. Small firms with few resources may not be able to protect the abused or fellow employees, under which circumstances dismissal may be unavoidable.

#### f. Summation

Enacting appropriate legislation is the first basic step states should take to comply with their international obligation to help remedy systemic intimate violence. A balance must be struck between sufficient state protection and excessive state intervention.<sup>607</sup> An attempt to subvert the latter cannot justify the abrogation of the former. At the very least, victims of violent conduct should be able to trigger the effective legal provisions of their state, through a combination of civil, criminal and other laws that take into account the unique environment of the jurisdiction in question.

### 7.3 Implementation

The second core step for states is that of implementation. It is not enough that states introduce appropriate legislation. Such legislation must be implemented effectively.

#### 7.3.1 Implementation through the Police Force

The first and perhaps the most obvious tool of implementation is the police force. According to the doctrine of denial of justice, international law will impose responsibility on a state where there is "a failure to provide adequate police protection before a crime has been

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<sup>605</sup> Catherine Humphreys, *Judicial Alienation Syndrome - Failures to Respond to Post-Separation Violence*, 29 FAMILY LAW, 313 (1999).

<sup>606</sup> Mason, *Buying Time for Survivors of Domestic Violence*, *supra* notex, at 642.

<sup>607</sup> X and Y v. The Netherlands, *supra* note 213, at para 25.

committed, as well as by proven deficiencies in connection with apprehending and punishing the culprits.”<sup>608</sup>

Due to ignorance and prejudice, police apathy may lead to the breakdown of the protection order and other aspects of a protective system.<sup>609</sup> Ignorant and uneducated officers who perfunctorily intervene and give ineffectual and inappropriate advice could perpetuate the result that the abuser feels “reinforced about the normalcy of his conduct. Conversely the victim might believe that society offers no recourse and tacitly condones the conduct.”<sup>610</sup>

At what point can one say that a state has failed to provide proper measures of police protection? Certainly not every unanswered call for help or deficient police conduct would trigger international responsibility. The absence of police protection must be sustained and systematic, and its repetition must follow a particular pattern; a pattern that remains unaddressed by state authorities. Where, in specific circumstances, police consistently fail to address harm perpetrated against specific members of a society, a failure by the state to compel police protection constitutes an omission, the nature of which is sufficiently serious to constitute a breach of its international obligation to protect its citizens.

In certain parts of Sweden, for example, the police have established specialized ‘domestic violence’ units.<sup>611</sup> These units have specially trained officials and enhanced methods of cooperation with the prosecutor and other relevant authorities.<sup>612</sup> Investigators in these units attend two week special training sessions on male violence against women.<sup>613</sup>

In South Africa the role of the police is pivotal to the success of restraining orders.<sup>614</sup> The South African police have been described as “the weakest link in the interdict structure.”<sup>615</sup>

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<sup>608</sup> FREEMAN, *supra* note 207, at 368.

<sup>609</sup> HUMAN RIGHTS WATCH/AFRICA, VIOLENCE AGAINST WOMEN IN SOUTH AFRICA—STATE RESPONSE TO DOMESTIC VIOLENCE AND RAPE 44 (1995) in SOUTH AFRICAN LAW COMMISSION RESEARCH PAPER ON DOMESTIC VIOLENCE 72-3 (1999) [hereinafter SOUTH AFRICAN LAW COMMISSION RESEARCH PAPER ON DOMESTIC VIOLENCE]

<sup>610</sup> EVE BUZAWA AND CARL BUZAWA, DOMESTIC VIOLENCE THE CRIMINAL JUSTICE RESPONSE 52 (1990) [hereinafter DOMESTIC VIOLENCE THE CRIMINAL JUSTICE RESPONSE] (“If the police don’t offer unconditional protection to women, they are in fact condoning the violence.”). See also David Hirschel & Ira W. Hutchison, III, *Female Spouse Abuse and the Police Response: The Charlotte, North Carolina Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 73, 81 (1992) [hereinafter *The Charlotte, North Carolina Experiment*]: (describing how “responding officers, who were usually male, typically sided with the offenders. This taking of sides reinforced a cultural norm which stressed male superiority.”).

<sup>611</sup> Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 40.

<sup>612</sup> *Id.*

<sup>613</sup> *Id.* According to Amnesty International, where prosecutor districts introduce family violence units, the highest prosecution rates are registered.

<sup>614</sup> Practice indicates that most police departments are reluctant to adopt arrest policies. *The Charlotte, North Carolina Experiment*, *supra* note 246, at 85. This has been remedied to a certain extent by section 8(4)(b) of the South African Domestic Violence Act, *supra* note 141, which constitutes an arrest provision and provides that ‘(i) if it appears to the member (of the police force) concerned that, subject to subsection 5, there are reasonable grounds to suspect that the complainant may suffer imminent harm as a result of the alleged breach of the protection order by the respondent, the member must forthwith arrest the respondent for allegedly committing the offence referred to in section 17(a).’ While, section 18(4)(a) of the Domestic Violence Act does penalize failure on the part of a police officer to comply with obligations in terms of the Act, the perception that intervention in domestic violence does not ‘constitute real police work’ adds to the general debilitation of the efficacy of the Act. The creation of awareness and the education of the police is not provided for in the Act. South African Domestic Violence Act, *supra* note 141

There is a common sentiment among police officers that “domestic violence and other ‘private misconduct’ should not be subject to public intervention”<sup>616</sup> To remedy this, the South Africa Domestic Violence Act imposes extensive obligations on police officers. The Act states that:

(w) whenever a warrant of arrest is handed to a member of the South African Police Service... the member must inform the complainant of his or her right to simultaneously lay a criminal charge against the respondent, if applicable, and explain to the complainant how to lay such a charge.<sup>617</sup>

However, the officer also may arrest the abuser for allegedly committing an offence if “there are reasonable grounds to suspect that the complainant may suffer imminent harm as a result of the alleged breach of the protection order by the respondent...”<sup>618</sup>

The aspiration to achieve a co-operative relationship between the judiciary, welfare department, health care and the police is evident in section 2 of the South African Domestic Violence Act. Section 2 imposes a duty on the police to inform the victim of her rights in terms of the Act and to help her to access a place of safety where reasonably possible to do so. Furthermore, section 2(a) requires the police to make “arrangements for the complainant to find a suitable shelter and to obtain medical treatment.” The Act goes even further and stipulates that failure to comply with the terms of the Act “constitutes misconduct as contemplated in the South African Police Service Act, 1995.”<sup>619</sup> This provision in relation to police culpability takes cognizance of the reality that these crimes are disliked by the police and a greater imperative is needed to ensure that the police provide the legally required protection.

This thesis proposes that similar measures should be taken by all states to ensure the effective implementation of police intervention.

### 7.3.2 Implementation through the Judiciary and State Agents

Law enforcement officers and public officials are responsible for implementing laws and policies aimed at reducing, preventing or remedying systemic intimate violence. Failure to fulfill this function should result in some form of accountability and/or penalty.<sup>620</sup> For example, ongoing preventative government involvement, particularly in the form of monitoring and enforcing compliance with protection orders, could be one of the missing links in implementing effective legislation.<sup>621</sup>

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<sup>615</sup> Fedler, *supra* note 179, at 246.

<sup>616</sup> DOMESTIC VIOLENCE THE CRIMINAL JUSTICE RESPONSE, *supra* note 246, at 31

<sup>617</sup> Section 8(6) of the South African Domestic Violence Act, *supra* note 141.

<sup>618</sup> Section 8(4)(b) of the South African Domestic Violence Act, *supra* note 141.

<sup>619</sup> Section 18(4)(a) of the South African Domestic Violence Act, *supra* note 141.

<sup>620</sup> See article 4(i) of DEVAW, *supra* note 22. See also the decision of the European Court of Human Rights in *M.C. v. Bulg.*, App. No. 39272/98 (Dec. 4, 2003, final judgment Mar. 4, 2004), 152, available at <http://www.echr.coe.int/Eng/Judgments.htm> [hereinafter *M.C. v. Bulgaria*] (“Further, the Court has not excluded the possibility that the State's positive obligation under Article 8 to safeguard the individual's physical integrity may extend to questions relating to the effectiveness of a criminal investigation.”).

<sup>621</sup> *Legal Responses to Domestic Violence*, *supra* note 218, at 1512

There is precedent for the fact that a failure by a state to give effect to a civil judgment (as opposed to enforcing criminal laws) would also constitute a denial of justice.<sup>622</sup> This is important in the context of systemic intimate violence since in many (if not most) state jurisdictions, intimate violence itself is not a crime; rather, the criminal justice system is triggered when a protection order is violated (a form of contempt of court that carries criminal penalties for the failure to comply with a civil judgment). This responsibility arises irrespective of whether the state was responsible for the initial violation or not.<sup>623</sup>

This is underscored by the CEDAW committee, which invoked Recommendation No. 19 to compel states to “take the steps required to ensure that the law provides appropriate penalties for all forms of violence against women and that appropriate procedures exist for investigating and prosecuting such offences.”<sup>624</sup>

In South Africa enforcement “is the principal weakness” of laws.<sup>625</sup> If a judge is not sympathetic but hostile, or even merely insensitive, to the dynamics of intimate violence, the attempt that the Domestic Violence Act makes to reduce the inequality and fear characteristic of an abusive relationship may be rendered nugatory. The attitude of a judge may influence a victim’s decision to use or reject the law in future cases of abuse. Hostility in the court room could dissuade the victim employing the law in future violent situations. Therefore, it is important that the atmosphere in the court room aspires towards neutralizing gender inequality in accordance with the Domestic Violence Act. A further potential obstacle which may undermine the efficacy of these orders is reticence on the part of a judge to impose legal restrictions on the family nucleus.<sup>626</sup>

### 7.3.3 Equality

It is impossible to use the law and legal apparatus to confront gender-based hegemony without concurrent social change, spearheaded by a visible government force.<sup>627</sup> Social and cultural structures are

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<sup>622</sup> FREEMAN, *supra* note 207, at 392-399.

<sup>623</sup> FREEMAN, *supra* note 207, at 395.

<sup>624</sup> 2002 CEDAW report, *supra* note 210, at 209, paragraph 432.

<sup>625</sup> *Legal Responses to Domestic Violence*, *supra* note 218, at 1511.

<sup>626</sup> Bonthuys, *supra* note 218, at 385: Bonthuys also adds that alteration of the law is inadequate ‘as long as women cannot in practice afford to leave abusive situations’.

<sup>627</sup> E. DOBASH AND R. DOBASH, *WOMEN, VIOLENCE AND SOCIAL CHANGE*, 147 (1992). The realization that progressive domestic violence legislation is crippled without the concurrent progression of the adjudicators' views has been confirmed as late as 1993 in America where legislators began to recognize the inefficacy of their laws without the conjoint exorcising of stereotypes within the minds of the court officials. *Legal Responses to Domestic Violence*, *supra* note 218, at 1503. In the 1997 Draft Discussion Paper for Public Consultation on Gender Policy Considerations, an undertaking was made, in recognition of the fact “that women have largely been rendered invisible in the legal system.” See Gender Policy Considerations June 1997 Draft Discussion Paper for Public Consultation 3, Developed by the South African Gender Unit, in consultation with the Department of Justice. Published by Dr M E Tshabalala-Msimang, the then Deputy Minister of Justice of South Africa, available at <http://www.polity.org.za/html/govdocs/discuss/gender.html?rebookmark=1>. This entails a firm and public initiative by the State and a persistent commitment to helping those who are harmed. Such an unveiling meets with the approval of Romany who points out that male suppression of women must be exposed, dealt with and not ignored. Bonthuys also refers to this approach which was adopted by the Australian Law Reform Commission which “draws attention to the connection between the social and legal inequality of women.” Bonthuys, *supra* note 218, at 379.

the framework within which the violations are made possible and carried out, and subsequently interpreted and reacted to by the outside world... It affects the criminal evidence and the legal proceedings, including the interpretation of the legal prerequisites, the evaluation of evidence and the possibility of treating victims of sex-related crimes with greater respect.<sup>628</sup>

Many states' judicial officers, police, health services and other relevant agents are immersed in the misconceptions surrounding systemic intimate violence. Educating service providers is not a new recommendation but it cannot be stressed strongly enough.<sup>629</sup>

International instruments are replete with provisions that require policy amendments to ensure that governments endorse the principle of equality and equivalency between men and women, which includes the reduction of violence perpetrated by one gender against the other.<sup>630</sup> For example, CEDAW binds states to implement policy changes that take effect not only in the political sphere but also in the more intimate compartments of private life.<sup>631</sup> DEVAW also provides that all appropriate measures, including education, should be taken by states to abolish existing prejudicial customs and practices that mitigate the implementation of safety for women.<sup>632</sup> General Recommendation 19 requires states to undertake research to "identify the nature and extent of attitudes, customs and practices that perpetuate violence against women and the kinds of violence that results."<sup>633</sup> This includes the "compilation of statistics and research on the extent, causes and effects of violence, and on the effectiveness of measures to prevent and deal with violence."<sup>634</sup>

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One therefore cannot continue to use the mechanisms of a male-dominated system. But before this can happen the patriarchy of our country and legal system must be labeled since it has been recognized that violence against women should be viewed as a "subproblem in the wider context of gender inequality." *Id.*

<sup>628</sup> Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 38.

<sup>629</sup> Romany points out that part of a woman's struggle for equality, dignity and justice is to capture the attention of legislatures and adjudicators and to reveal the global structure of gender subordination. Celina Romany, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 85, 90 (Rebecca J. Cook ed., 1994) [hereinafter Romany, *State Responsibility Goes Private*]. Celina Romany, *Killing "The Angel in the House": Digging for the Political Vortex of Male Violence against Women*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE THE DISCOVERY OF DOMESTIC ABUSE*, 285, 298 (Martha A. Fineman & Roxanne Mykitiuk eds., 1994) (arguing for rehab for qualifying batterers and education in schools).

<sup>630</sup> For example: article 7 of CEDAW, *supra* note 21, and article 4 of DEVAW, *supra* note 22, address political equality; article 8 of CEDAW, *supra* note 21, deals with the role of women in international organizations; article 10 of CEDAW, *supra* note 21, and article 9 of DEVAW, *supra* note 22, deal with equality in education; article 11 of CEDAW, *supra* note 21, and article 10 of DEVAW, *supra* note 22, prescribe equality in the workplace; article 13 of CEDAW, *supra* note 21, protects economic, family and recreational equality; article 14 of CEDAW, *supra* note 21, focuses on the peculiar difficulties faced by rural women; and article 16 of CEDAW, *supra* note 21, and article 6 of DEVAW, *supra* note 22, deal with equality within marriage.

<sup>631</sup> This is clear from article 5 which enjoins states to "modify the social and cultural patterns of conduct of men and women with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. Article 5(a) of CEDAW, *supra* note 21.

<sup>632</sup> Article 2-3 DEVAW, *supra* note 22.

<sup>633</sup> Article 24(e).

<sup>634</sup> Article 24(c).

These instruments target not only government but also cultural practices. While the debate regarding cultural autonomy rages intensely within the context of women's rights, I maintain that the complexities of this debate are not triggered by the proposal that governments are responsible under international law to protect women from gender-specific violence.<sup>635</sup> If the notion of cultural autonomy is raised as an excuse not to protect women against systemic intimate violence, international law would face an alarming contradiction: to hate a black man is a prejudice; but to hate a woman is a culture.

#### 7.4 Allocation of Financial and Institutional Resources

The third core step, the allocation of financial and institutional resources, helps to assess the government's commitment to complying with its international obligation to prevent and mitigate systemic intimate violence.

##### 7.4.1 Shelters

Ideally, governments should be required to allocate a percentage of their annual budget to aid victims of systemic intimate violence. General Recommendation No. 19 requires states to establish or support bodies that provide protection or safe haven for women who have been abused (including assistance to refugees).<sup>636</sup> Often, the victim's first port of call is a shelter.<sup>637</sup> An examination of the role of the shelter in conjunction the protection order is necessary as the victim or the abuser may have to be removed from particularly volatile environments. Unlike any other violent crime, the victim of systemic intimate violence has no place of refuge. Her home is the locus of the crime.

As a basic principle, state facilities should help the victim break the cycle of violence. This is necessary both to secure her physical safety and to allow her sufficient distance from the violence to adjust to the fact that what has happened to her is not 'normal' or acceptable.<sup>638</sup> The South African Domestic Violence Act, for example, empowers the court, when making a protection order, "to prohibit the respondent from ... entering a residence shared by the complainant and the respondent: Provided that the court may impose this prohibition only if it appears to be in the best interests of the complainant."<sup>639</sup> This therefore prevents an abuser following his victim into a safety shelter.

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<sup>635</sup> Radhika Coomaraswamy, *Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women*, 34 GWILR 483, 494 (2002) [hereinafter Coomaraswamy, *Identity Within*].

<sup>636</sup> [Note: citation to follow] Amnesty International proposes that municipalities create specific action programs as a guide to social services when handling cases of domestic violence. This includes being able to identify and communicate with the appropriate local authorities and non-governmental services. Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 43.

<sup>637</sup> *Legal Responses to Domestic Violence*, *supra* note 218, at 1506: The shelter has been identified as "the battered woman's first encounter with the legal system after she flees her assailant."

<sup>638</sup> The Captured Queen Report has referred to this as the "denormalization process" which requires an end to the isolation of the victim and removing the control that her abuser may exercise over her. Captured Queen Report, *supra* note 123, at 18. The survival and recovery process of abused women largely depends on the emotional support provided by family, friends and social services. Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 43.

<sup>639</sup> Section 7(1)(c) of the South African Domestic Violence Act, *supra* note 141.

Non-profit women's shelters "are still the most important actors in providing help, support and protection to women who survive violence – even though the municipal authorities and the social services bear the ultimate responsibility."<sup>640</sup> In Sweden, one third of women who have suffered systemic intimate violence have turned to agencies other than the police for assistance, including hospitals, psychiatric clinics, non-governmental women's shelters, crime-victim centers and emergency social services.<sup>641</sup> Therefore, where shelters are run by private organizations or non-governmental institutions, the governments should provide financial support.

Ideally, shelters should be accessible within a limited radius to enable victims of abuse to seek confidential and temporary safety. However, in rural areas, comprised of small communities, shelters may not provide the required remedy and specific remedies need to be created for alternative environments. It is also important that shelters are open to women with children, that they have medical and psychological facilities and that they are functioning as well as any government hospital.<sup>642</sup>

I recommend support of shelters with one caveat. It remains problematic that when a woman is abused it is she who must leave the home and not the abuser. However, forcing the abuser to leave, and stay away from, the home requires the implementation of criminal resources, which trigger a host of difficulties for the abused. Moreover, shelters are necessary because their locations can be secret and in theory the abused can choose when to expose herself to her abuser once again.

This takes resources. In countries where the necessary money and/or interest are scarce, lobbyists could challenge international organizations and the private sector to contribute towards developing a network of shelters. This is a practical measure but its theoretical efficacy should not be discounted. Bringing women together in shelters allows for formal and informal education, and facilitates a link between the abused and the public world, which is especially important given the isolating nature of systemic intimate violence. Moreover, she should be allowed to return to, and escape from, her abuser as many times as is necessary until she decides to leave for good, if that in fact is her decision. The human characteristic of relationships and love cannot be ignored in this context.

#### 7.4.2 Other: Health, Tax, Education

Another avenue of enforcement is through health services. This includes the training of health care staff and the provision of rehabilitation and counseling services.<sup>643</sup> The education of

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<sup>640</sup> Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 43.

<sup>641</sup> *Id.*

<sup>642</sup> The shelter offers legal, physical, financial and emotional help which the victim may not necessarily receive staying at home. An ultimate goal would be to develop a support system in which the shelter would act as a point of access to "other tangible physical services, such as child care, housing access, job referral, food and clothing, transportation and case monitoring". While an overriding problem is obviously lack of funds, it is interesting to note that a solution has been found by some American States which use marriage license fees and fines for violations of protection orders to fund such structures. *Legal Responses to Domestic Violence*, *supra* note 218, at 1507

<sup>643</sup> See Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 14. See Irma MacKay, *Educating the Professional to Aid Abuse Victims in Achieving Human Rights*, in *INTIMATE VIOLENCE: INTERDISCIPLINARY*



health care professionals is “decisive for the early detection of acts of aggression and for handling these women with competence and referring them on for further help and care.”<sup>644</sup> Many health professionals will come into contact with abused women regularly, either in respect of a manifestation of the violence or for other health-related issues, such as gynecological, dental, pre- or post-natal or psychological needs.<sup>645</sup> It is of great value if such professionals are able to identify, understand and provide advice in respect of the abuse. For example, women in Sweden who require assistance receive more satisfactory assistance when they approach hospitals, lawyers, women’s shelters or crime-victim centers than when they attempt to utilize governmental services.<sup>646</sup>

Sweden has proposed the inclusion of compulsory training programs regarding violence against women in the education of professionals who are likely to come into contact with abused women, including lawyers, physicians, midwives, nurses, psychologists, psychotherapists, dentists, social workers and others employed in the social services, teachers and educational staff.<sup>647</sup> It is also necessary to have enhanced cooperation and communication between the different authorities within the state, from the police, prosecutors, health and social services.

However, it makes little sense to have an array of legal, health and social services if women are unaware of their existence. States are responsible for making women aware of two things. First, she should know what her rights are: she should know that physical, psychological or sexual violence, albeit in the context of an intimate relationship, is against the law and an actionable violation of her being. Second, she should also know what her remedies are. This could be achieved through any number of mechanisms, ranging in efficacy and cost. A state may, for example: require all hospitals to have information regarding systemic intimate violence; require all health officials, especially emergency, dental and gynecological professionals, to screen every patient for abuse and be required by law to advise the patient on her rights and options; and compel the police, court clerks and judges to advise women of their rights regarding systemic intimate violence whenever they have such cases before them.

The government should be responsible for inculcating a norm of equality within its society. This includes educating legal, police and other officials to “ensure that the re-victimization of women does not occur because of laws insensitive to gender considerations, enforcement practices or other interventions.”<sup>648</sup> This applies equally to judges who should be educated in a

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PERSPECTIVES 203 (Emilio C. Viano ed., 1992) [hereinafter MacKay, *Educating the Professional*] (“Her inner pain only deepened as she left the emergency department that night, but in many ways she was relieved that her family life had remained private. She deserved it, didn’t she? And the hope of any change seemed so remote. The professionals with whom she had an encounter that day did not ask the question. Was it because they did not want to know, or, maybe, they did not know what to say when she would reply ‘yes’ to the question?”).

<sup>644</sup> Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 43.

<sup>645</sup> *Id.*

<sup>646</sup> *Id.*

<sup>647</sup> Amnesty International endorses the notion of a degree ordinance. Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 49 and 56.

<sup>648</sup> Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 14. See also article 4(j) of DEVAW, *supra* note 22 (enjoining governments to adopt measures, “especially in the field of education, to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary practices and all other practices based on the idea of the inferiority or the superiority of either of the sexes and on the stereotyped roles for men and women.” This briefing list is somewhat disconcerting, not least of all because it is unlikely to occur. Many

basic understanding of “gender theory, gender discrimination and society’s gender power structure.”<sup>649</sup> Indeed, it has been recognized that knowledge “is the most important instrument in changing outdated attitudes and combating prejudices among law enforcement authorities.”<sup>650</sup>

Statistics on the prevalence, causes and effects of gender-based violence are valuable for determining what steps are required and what differences may apply in different states, provinces or regions. States should devote resources towards generating, compiling and using statistics and social surveys aimed at combating systemic intimate violence in the context of that state’s unique social settings and infrastructures. Sweden also has posited the notion of a ‘domestic violence’ tax, imposed on men who have committed acts of violence against women.<sup>651</sup> This would help internalize on abusers the external costs borne by society in trying to remedy the effects of systemic intimate violence.

## 7.5 Theoretical Justifications

### 7.5.1 Using the Theory of Denial of Justice

There are several ways in which a state could ensure the effective implementation of protective legislation. The requirement that states properly implement laws is not new in international law. The effective implementation of legislation was a principle of the theory of denial of justice and the treatment by states of aliens within their territories.

The theory of denial of justice focuses on inadequate measures to apprehend, prosecute and punish persons guilty of crimes against aliens. The requirement is not that the state agents are flawless in their execution of the law; this would be impossible.<sup>652</sup> Rather, the discussion focuses on reasonable and basic remedies, the absence of which is unsustainable in light of the social, political and economic circumstances of the state in question. This thesis proposes that the justification for, and the principles embedded in, the notion of denial of justice may be extrapolated equally to instances where *citizens*, and not aliens, are unable to access legal assistance in the event of egregious physical violation.

The standard demanded of states is high but it does not include *ad hoc* or incidental incidences of maladministration of justice. Professor Freeman, an authority on the theory of

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countries may refuse to recognize the provisions of DEVAW simply because they refuse to abandon all cultural practices that rely on role allocation based on gender. While this may be an ideal, it should be recognized as such. Moreover, the articulation of role allocation as automatically dysfunctional is problematic since this may offend the cultural imperatives of certain communities.

<sup>649</sup> Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 40.

<sup>650</sup> *Id.* at 41. General Recommendation 19 includes educational recommendations which are based on the notion that states should take “effective measures” to mitigate attitudes and practices that discriminate against women. Article 24(f). These should be tempered through public programs and education, and the dissemination of information through the media to promote respect for women. Reference is made to the use of educational programs “to change attitudes concerning the roles and status of men and women.” Article 24(t)(ii). *See also* article 24(d).

<sup>651</sup> *See* Sweden Debates Hitting Men with Domestic Violence Tax, October 6 2004, in the Sydney Morning Herald, available at <http://www.smh.com.au/articles/2004/10/05/1096949511735.html> hereinafter Sweden Debates Hitting Men with Domestic Violence Tax]. The newspaper article describes a proposal in Swedish courts to impose a tax on men to cover the cost of domestic violence against women in Sweden.

<sup>652</sup> FREEMAN, *supra* note 207, at 367.

denial of justice, acknowledges this berth of reasonableness, pointing out that, assuming “proper measures of police protection have been taken, there is clearly no duty incumbent upon members of the family of nations to answer for the injuries which resident aliens may suffer at the hands of individuals unconnected with the State or acting in a purely private capacity.”<sup>653</sup> His initial assumption, however, is crucial and it is only *if* proper measures of police protection have been taken that a state can discharge its duty in international law. If not, even if the suffering is induced by an individual in a purely private capacity, the state would fail to fulfill its duty and it would be responsible for a breach of its international obligation.

Of course, effective police protection is nugatory without concomitant judicial enforcement. As Freeman points out, the state has an “irrefutable duty to take adequate steps aiming at the apprehension and punishment of the guilty parties. It may have been unable to prevent commission of the crime complained of... Its duty subsists none the less.”<sup>654</sup> Moreover, not only should unlawful activity trigger the judicial mechanism, but the penalty imposed by the judiciary must be reasonable (in that it is proportionate to the misconduct)<sup>655</sup> and it must be implemented in full (in that the sentence is served).<sup>656</sup>

The state’s obligation to protect survivors of systemic intimate violence does not stop with the passing of legislation, nor is it fulfilled by the issuance of a protection order. Continued government assessment is necessary to determine that the legislation is implemented in a meaningful way and that the circumstances that are peculiar to the state are taken into account when combating systemic intimate violence.

The requirement of legislative implementation is important for a number of reasons. Firstly, the victim will see some sort of state intervention and begin to believe that there is an external concurring belief that what her abuser is doing to her is wrong. Secondly, government action could begin to influence societal perceptions and lead to the view that non-stranger abuse is unacceptable. This in turn will help to dilute the abuser’s confidence that his exertion of physical and mental control over his victim is justifiable. The action of a government, as is evident in the South African constitutional age, has a deep impact on the behavior of the society it governs. Whereas South Africa was previously steeped in discriminatory legislation and custom, today many South Africans seem to be emulating their government in an attempt to develop new equitable norms. Finally, on a practical level, continued preventative involvement is

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<sup>653</sup> FREEMAN, *supra* note 207, at 368.

<sup>654</sup> FREEMAN, *supra* note 207, at 369. Once again in the realm of denial of justice, Freeman acknowledges that the State is not, in principle, under an obligation to prevent harm occurring to aliens, but it is under a duty to punish harm where it occurs. It is interesting to note that this obligation pertains irrespective of the political makeup of the State in question. In the case of a federal system such as the United States, the federal government will remain answerable in international law for the actions of the member States. FREEMAN, *supra* note 207, at 370.

<sup>655</sup> Freeman points out that there is also a requirement that adequate penalties be imposed. FREEMAN, *supra* note 207, at 383-4. This pertains even where the judicial process transpires efficiently and adequately since the ultimate imposition of a penalty must be proportionate to the violation.

<sup>656</sup> See in general FREEMAN, *supra* note 207, at 374-5. In the two cases referred to by Freeman, the courts found the accused parties guilty. The guilty parties, however, escaped with the result that both governments paid damages to the State of the injured alien (the cases are *Frank W Lenz* and *Charles W. Renton*). Freeman confirms that punishment must be executed and a failure to give effect to the penalty “will produce the same international consequences as though the State’s machinery of criminal justice had not been put into operation at all.” FREEMAN, *supra* note 207, at 385.

... advisable because of the general tenacity of batterers, their resistance to control, and the historical failings of protection orders as applied to persistent batterers. Systematic and strict punishments for order violations are desirable to incapacitate the recalcitrant batterer ... and in a broader sense, to convey a stern message of disapproval of the batterers' conduct to the individual and society.<sup>657</sup>

This is particularly relevant in respect of civil remedies. The protection order without continued state intervention is not only potentially ineffective, but possibly extremely dangerous.<sup>658</sup>

### 7.5.2 Philosophical Justification

At some point we are moved to ask: "but why?" Why concern ourselves with the private lives of individuals? In public life, and especially in poor or politically unstable countries, so many issues compete for attention, including famine, war, environmental decay, politics, commerce, and globalization. It would not be unreasonable to suggest that tensions between intimates simply do not warrant comparable consideration.

An alternative view, however, is that stable, non-violent private lives are essential for international development. If citizens' private lives are infected by violence, states will be far less likely to achieve the development that internationalization offers. If we accept the enormity of systemic intimate violence, both in its occurrence and in its composition, it becomes clear that the response of many states is grossly inadequate, and disproportionate to what is required.

It is necessary to draw a distinction between developed and developing societies. In the former, many states have domestic violence legislation; in the latter, many do not. Self-evidently, different actions are necessary by these different types of societies. Developing countries that allocate few rights to women need to improve their protection of women at the most basic level, such as by enacting anti-discrimination legislation. In developed states, the requirement is less raw and may instead involve the refinement of pre-existing legislation and the allocation of resources towards, for example, additional shelters.<sup>659</sup>

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<sup>657</sup> Fedler recognizes that the efficacy of a protection order often depends on the character of the abusive partner. Fedler, *supra* note 179, at 233: 'It may be useful for practitioners to assess the suitability of the interdict on the basis of the particular personality-type of the abusive partner.' If the batterer has no respect for the law, abuses when he is inebriated or high, has an exaggerated sense of self power ('suffers from a God - complex') and is generally determined to continue to manifest his control in a violent way, then a protection order may serve only to anger the abuser to the point where the abuse becomes more severe. Fedler, *supra* note 179, at 250. Furthermore, where the abuser views the protection order or general legal intervention as a threat to his control, he could begin to look for other modes of asserting his domination, namely, murder.

<sup>658</sup> This is confirmed by the statement that 'the order will not adequately protect the victim from renewed attack absent provisions for immediate police response'. *Legal Responses to Domestic Violence*, *supra* note 218, at 1514

<sup>659</sup> For example, in South Africa, as of 2004, the South African government had enacted domestic violence legislation, implemented education and awareness-raising programs to combat domestic violence and dedicated a 16 days in September of 2004 to combating domestic violence. However, only 25 shelters exist in South Africa where approximately one woman is killed every 6 hours as a result of intimate violence and one out of four women, is beaten every week by her boyfriend or spouse. For statistics see <http://www.tricky.org/POWA/stats.htm>. See also the United States government, Bureau of Democracy, Human Rights and Labor, Country Reports on Human Rights Practices, February 28, 2005, available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41627.htm>.

The allocation of resources to alleviate gender-based violence and discrimination in general is a call that has been made many times before. Political philosopher, Amartya Sen, argues that both biological and social differences between men and women should be taken into account if a fair distribution of resources is to be achieved.<sup>660</sup> However, Sen also recognizes the social imperatives that impede the wellbeing of women. He identifies “[s]ocial conventions and implicit acceptance of ‘natural’ roles [which] have a major influence on what people can or cannot do with their lives. ... The sources of pervasive social discouragement are often hard to trace and harder to separate out.”<sup>661</sup> On this basis, Sen calls for gender to be taken into account in the distribution of resources.

I propose a similar consideration in respect of systemic intimate violence. Because systemic intimate violence is so prevalent and severe, health and safety resources need to be better equipped (i.e. extra resources given to shelters and hospitals) to address a need that is peculiar to women for *both* biological and social reasons. Sen points out how the “behavioral constraints related to perceptions of legitimacy and correctness can strongly affect the relationship between primary goods and the freedoms that can be generated with their use. If women are restrained from using the primary goods within their command for generating appropriate capabilities, this disadvantage would not be observed within the space of primary goods.”<sup>662</sup>

In other words, the security and protection required for women is different to that required by men. There are social rules, norms and inequities that generate different lives for the two genders. While these differences are unfortunate, they are a reality that will continue to pervade national laws unless international law requires alternative action.

In Rawls’ depiction of the social contract, he omits (either deliberately or not) gender as a criterion for consideration. This is not irremediable but it is necessary to examine the consequences of such an omission.<sup>663</sup> If one fails to take into account an individual’s particular experience based, for example, on gender, the implications of certain legal rules for such an individual are not considered when deliberating behind the veil of ignorance.<sup>664</sup> Laws that

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<sup>660</sup> Sen, *Gender Inequality and Theories of Justice*, *supra* note 118, at 264. For example, Sen proposes that a pregnant woman may need a greater range of nutrition than a man. Therefore, if gender is not taken into account, “a pregnant woman may be at a disadvantage vis-à-vis a man of the same age in having the freedom to achieve adequate nutritional well-being. The differential demands imposed by neo-natal care of children also have considerable bearing on what a woman at a particular stage of life can or cannot achieve with the same command over primary goods as a man might have at the corresponding stage of his life.”

<sup>661</sup> Sen, *Gender Inequality and Theories of Justice*, *supra* note 118, at 265.

<sup>662</sup> Sen, *Gender Inequality and Theories of Justice*, *supra* note 118, at 265.

<sup>663</sup> Rawls himself acknowledges this. See JOHN RAWLS, A THEORY OF JUSTICE, 20 (Revised Edition, The Belknap Press of Harvard University Press Cambridge, Massachusetts, 1971) [hereinafter RAWLS, A THEORY OF JUSTICE] (“...we have a choice. We can either modify the account of the initial situation or we can revise our existing judgments, for even the judgments we take provisionally as fixed points are liable to revision. By going back and forth, sometimes altering the conditions of the contractual circumstances, at others withdrawing our judgments and conforming them to principle, I assume that eventually we shall find a description of the initial situation that both expresses reasonable conditions and yields principles which match our considered judgments duly pruned and adjusted.”).

<sup>664</sup> See, for example, JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM THE POWER OF JUDICIAL RESPONSES, 120 (1999) [hereinafter PTACEK]: “...there are a variety of feelings that women experience at the point when they claim their legal rights or take other actions to stop the violence.... indifferent responses by the courts and police

traditionally have failed to help women therefore risk perpetuation. Gender, no less than race or economic status, contributes to an individual's ability (or lack thereof) to engage the law and benefit from the structures of social communities.<sup>665</sup> The hypothetical philosopher, however, potentially does not know that or how gender permeates a person's interaction with society.<sup>666</sup> Women, as a marginalized sector of society (even a democratic or liberal one as Rawls requires) may not benefit from the analysis of the hypothetical philosopher and the Theory of Justice, at least superficially, proves to be deficient in this regard.<sup>667</sup>

Take, by way of example, the following hypothetical scenario. The individual in the original position (we can refer to her/him as the draftsperson) must create rules to govern the administration of public hospitals. S/he must create a rule that will not prejudice one individual unduly, unless it will improve the situation of the least privileged in society. The draftsperson creates a rule stipulating that patients seeking urgent medical care, whose condition is not terminal, are required to register their personal information upon arriving at the hospital. The motivation for such a rule is, for arguments sake, to create a data bank of information about the citizens in the area, their medical needs, financial capabilities and criminal records.

After the implementation of this rule, there is a radical decline in the number of reported cases of domestic violence at public hospitals. It transpires that women who seek hospitalization for domestic violence are afraid to register their personal details for fear of recrimination from their abusive partners or for fear of being identified by an abusive partner from whom they are fleeing. Moreover, even if the draftsperson was sufficiently sensitive to include a caveat that exempted the personal registration under certain circumstances, many women still may be

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heighten feelings of isolation and desperation, narrowing women's ability to escape." McKinnon provides the following example of a misguided legal solution to the crime of rape: "Rape cases finding insufficient evidence of force reveal that acceptable sex, in the legal perspective, can entail a lot of force. This is both a result of the way specific facts are perceived and interpreted within the legal system and the way the injury is defined by law. The level of acceptable force is adjudicated starting just above the level set by what is seen as normal male sexual behavior, including the normal level of force, rather than at the victim's, or women's, point of violation."

CATHERINE A. MCKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 173 (Harvard University Press, 1989) [hereinafter MCKINNON, *TOWARD A FEMINIST THEORY OF THE STATE*].

<sup>665</sup> [Note: citation to follow]

<sup>666</sup> Nor does it make sense to suggest that it is implicit, since Rawls so thoroughly designates other individual characteristics for consideration. McKinnon describes the danger in a male-centric jurisprudence as being inattentive to gender inequality in society and continuing to require a government to be negative in its regulation of society rather than fulfill positive obligations to ensure rights are fulfilled and not only refrain from violating them. See MCKINNON, *TOWARD A FEMINIST THEORY OF THE STATE*, *supra* note 275, at 163-164. Some argue that non-human animals should also be taken into account in the formulation of rules in the original position. See Martha C. Nussbaum, *Beyond "Compassion and Humanity" Justice for Non-Human Animals*, in *ANIMAL RIGHTS CURRENT DEBATES AND NEW DIRECTIONS* 299 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) [hereinafter Nussbaum, *Beyond "Compassion and Humanity"*].

<sup>667</sup> See MCKINNON, *TOWARD A FEMINIST THEORY OF THE STATE*, *supra* note 275, at 159. A similar criticism is raised by McKinnon in discussing feminism and the liberal State: "Feminism has not confronted on its own terms, the relation between the state and society within a theory of social determination specific to sex. As a result, it lacks a jurisprudence, that is, a theory of the substance of law, its relation to society, and the relationship between the two. Such a theory would comprehend how law works as a form of state power in a social context in which power is gendered. It would answer the questions: What is state power? Where, socially, does it come from? How do women encounter it? What is the law for women? How does law work to legitimate the state, male power, itself? Can law do anything for women? Can it do anything about women's status? Does how the law is used matter?"

dissuaded from attending a hospital if they do not know about the exemption or are fearful that they will not be entitled to it.

Of course, there are innumerable problems of this type within any given scenario using the original position. Any draftsman creating a rule on any social issue is liable to make such an error. However, the likelihood of enacting deficient regulations decreases the more the draftsman takes account of the types of problems that affect certain groups more than others. For this reason, gender, family dynamics and police attitude are a few characteristics of systemic intimate violence that simply cannot be excluded from consideration. Rawls does not explicitly rebut this and, therefore, his Theory of Justice is not inaccurate; it is merely incomplete as regards the type of factors that should pertain in the original position.

A remedy to this deficiency is proffered by theorists Martha Nussbaum and Amartya Sen who developed the notion of human capabilities.<sup>668</sup> In general, the capability approach asks, to what extent an individual is free to lead different types of life and the answer, according to Sen, “is reflected in the person’s capability set.”<sup>669</sup> Sen recognizes that a person’s capability is influenced by *both* personal characteristics and social arrangements.<sup>670</sup> This acknowledgement immediately brings us closer to taking account of the various permutations that affect women who suffer systemic intimate violence.

For example, we could understand the prolonged victimization of a woman who is slight of body and illiterate. She might be too physically weak to defend herself against her abuser and, because she cannot read, she is unable to follow street signs or even find a police station. We might have less tolerance, though, for a woman who is both physically strong and educated. If she is being abused on a long-term basis, we might be tempted to judge her lack of courage to leave, since her personal characteristics seem to empower her to do so. However, if we also consider relevant social arrangements, as Sen proposes, we would see that many women are raised in a culture of submission to men, as a child may be raised in culture of submission to her/his parents. When the woman is beaten, therefore, she has a strong social imperative that prevents her from protecting herself (assuming she is physically capable of doing so) or of seeking help. Another important social component may be the fact that filing a police claim will bring shame to her and her children or trigger further violence on the part of her abuser. Therefore, through Sen’s invocation of capabilities, a more informed picture of domestic violence emerges.<sup>671</sup>

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<sup>668</sup> See Amartya K. Sen, *Equality of What*, in EQUAL FREEDOM: SELECTED TANNER LECTURE ON HUMAN VALUES 307 (Stephen Darwell ed., 1995) (arguing that utilitarian equality, total utility equality and Rawlsian equality are deficient and do not provide a sufficient basis for ensuring moral equality. In response, Sen proffers the thesis of basic capability equality). Sen extends this thesis in Amartya Sen, *Capability and Well-Being*, in THE QUALITY OF LIFE 30 (Martha C. Nussbaum and Amartya Sen eds., 1993) [hereinafter Sen, *Capability and Well-Being*] (describing the capability approach as an evaluation of a person’s advantage “in terms of his or her actual ability to achieve various valuable functionings as a part of living.” The capability approach was refined in Martha C. Nussbaum, *Human Capabilities, Female Beings*, in WOMEN, CULTURE AND DEVELOPMENT A STUDY OF HUMAN CAPABILITIES 61 (Martha C. Nussbaum and Jonathan Glover eds., 1995).

<sup>669</sup> Sen, *Capability and Well-Being*, *supra* note 279, at 33.

<sup>670</sup> Sen, *Capability and Well-Being*, *supra* note 279, at 33.

<sup>671</sup> For Sen, however, Rawls’ Theory of Justice does not remedy gender inequality because of the difference between freedoms and the means to freedoms. Sen describes the difficulty arising from the fact that “primary goods are the *means* to the freedom to achieve, and cannot be taken as indicators of freedom themselves. The gap between

## 8 Conclusion

For these reasons, systemic intimate violence can and should be defined as a form of harm against women with specific components. It comprises severe acts of harm between intimates, which operate on a continuum and to which women are especially vulnerable. Due to inert and/or inappropriate state response, the violence becomes systemic, normalized and condoned. While there is little the law can do to change individual human behavior, it can require the state to create better facilities to respond to pain when it is caused.

As an international human rights violation, systemic intimate violence must be prohibited by states. In this chapter I have attempted to reveal the various elements and effects of systemic intimate violence in society by describing its integral components. I argued that these elements should be articulated in international law together with the corresponding obligation on states to take core steps to mitigate systemic intimate violence.

The failure of states to take these practical steps constitutes an internationally wrongful act. The remainder of this thesis is devoted to substantiating the legal arguments that systemic intimate violence is such that it can legally be addressed in international law, and that, given that international obligation, states can and should be required to take positive steps to address such violence. The theory underpinning this notion of state responsibility, the test determining the application of international law to systemic intimate violence and the benefits of internationalizing systemic intimate violence are discussed in chapters three, four and five respectively.

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freedoms and means to freedoms would not have been of great practical significance if the transformation possibility of means into actual freedoms were identical for all human beings.” From this point, Sen goes on to discuss the biological and social factors that lead to gender inequality, concluding that the Rawlsian theory of justice is deficient in ensuring equality for women. Sen, *Gender Inequality and Theories of Justice*, *supra* note 118, at 264.



## Chapter Three

### Can the Theory of International Human Rights Law Apply to Systemic Intimate Violence?

I was lying on the floor, two guards held my legs while another kicked me in the testicles. I would lose consciousness and come to, I lost consciousness four times. They hit me around the head, there was blood. They would beat me unconscious and wait until I came round: “He’s woken up,” and they would come in and beat me [again].

Chechnyan survivor of torture by the Russian Army<sup>672</sup>

From the moment Rodi Adalí Alvorada Peña married a Guatemalan army officer at the age of 16, she was subjected to intensive abuse, and all her efforts to get help were unsuccessful. Her husband raped her repeatedly, attempted to abort their second child by kicking her in the spine, dislocated her jaw, tried to cut off her hands with a machete, kicked her in the vagina and used her head to break windows.

Guatemalan Woman<sup>673</sup>

[F]irst they would beat you and then you would have to lie down on the floor and crawl to them. You would have to say, “Request permission to crawl.” Me personally, they beat me on the knees, with clubs, and on the kidneys.

Chechnyan survivor of torture by the Russian Army<sup>674</sup>

He was sittin’ on the bed. Had his .357 Magnum. He said, “June, you get down on this floor right now. You crawl to me.” And when I got to his feet he took that pistol and hit me right alongside of the head. I thought I was gonna die. I still got the knot from it. He said, “if you even act like you’re gonna run I’ll blow your brains all over this wall.”

American Woman<sup>675</sup>

### Part A: Introductory Comments

#### 1. Description of this Chapter

The purpose of this chapter is to propose the theoretical basis for why freedom from systemic intimate violence is a human right under international law. To this end, I apply a test consisting of four elements: (i) the first element is *fundamentality*, showing that systemic intimate violence is of the same substance as other human rights violations; (ii) the second considers the

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<sup>672</sup> Human Rights Watch, “*Welcome to Hell*”: *Arbitrary Detention, Torture, and Extortion in Chechnya*, 35 (2000) [hereinafter Human Rights Watch, “*Welcome to Hell*”].

<sup>673</sup> BROKEN BODIES, SHATTERED MINDS, *supra* note 98, at 23.

<sup>674</sup> Human Rights Watch, “*Welcome to Hell*”, *supra* note 529, at 39.

<sup>675</sup> NEIL WEBSDALE, RURAL WOMAN BATTERING AND THE JUSTICE SYSTEM: AN ETHNOGRAPHY 10 (1998).

*universality*, showing that the rights violated by systemic intimate violence are universal; (iii) the third element is vulnerability, showing that the victims of systemic intimate violence belong to a vulnerable group; and, (iv) the final element is a consideration of the state accountability, comprising a systemic failure on the part of states to protect victims of systemic intimate violence.

This chapter comprises two parts. The first part distils the elements of international human rights in general. The second part, in turn, applies these elements specifically to systemic intimate violence. The chapter therefore: (1) begins with a summary of the claim I make in the chapter as a whole; (2) describes the academic theory used to identify human rights; (3) by extracting core themes from this theory, creates a test to identify human rights; (4) applies each element of this test to systemic intimate violence; (5) addresses miscellaneous issues and (6) concludes that systemic intimate violence is a human rights violation.

## 2. Claim

International human rights law does not protect all our interests. Only core, fundamental interests are protected as ‘human rights’. My claim in this chapter is that the right to be free from systemic intimate violence qualifies as such a right, thereby triggering the rules of international law. In particular, I propose that the status of systemic intimate violence as an international human right violation requires states to act *proactively*. States are obliged to take positive steps to help remedy such violence and curb its consequences, pursuant to the doctrine of state responsibility, which I discuss in chapter four.

Even though domestic violence has received some international recognition, as described in chapter one, current statements against systemic intimate violence are deficient. In an attempt to reduce some of the confusion and skepticism in this area of law, this chapter proposes a clear, theoretical explanation of why systemic intimate violence constitutes a human rights violation.

## 3. Identifying Human Rights

### 3.1 General

Human rights are *rights*; they are not merely aspirations, or assertions of the good... by appeal to grace, or charity, or brotherhood, or love; ... The idea of rights implies entitlement.

Louis Henkin<sup>676</sup>

#### 3.1.1 The Problem

Intuitively we understand that our interests in becoming a rock star, climbing a mountain, or having loyal friends are not human rights. They may be needs, interests and desires but they are not ‘rights’ we can demand from our governments.<sup>677</sup> On the other hand, our interest in being free to have a relationship with a person of a different race, in practicing our religion, in

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<sup>676</sup> LOUIS HENKIN, *THE AGE OF RIGHTS*, 2 (New York: Columbia Univ. Press, 1990) [hereinafter HENKIN].

<sup>677</sup> This statement is not intended to ignore claims of the capabilities theory, discussed below.

education, or in being treated with dignity by the police, *are* rights which are enforceable against the state.

Apart from intuition, how do we determine what is a right and what simply is an interest? In this part, I discuss the various ways in which *human interests* are recognized as *human rights* under international law, and provide the theoretical analysis to justify the application of international human rights law to systemic intimate violence. Throughout this chapter I distinguish between ‘interests’ or ‘claims,’ on the one hand, and ‘rights,’ ‘human rights’ or ‘international rights’ on the other. Interests or claims are aspirant rights; that is, issues which benefit human beings but have not gained international recognition or do not warrant the application of international law. Rights, human rights and international rights, by contrast, are recognized and protected by international law.

### 3.1.2 Why Have a Rights-Theory?

Henkin explains that casting an interest as a human rights violation is:

an assertion of fact about human psychology and emotion, that human beings cannot close their minds and hearts to mistreatment or suffering of other human beings; a moral statement that mistreatment or suffering of other human beings violates a common morality (perhaps also natural law or divine law) and that all human beings are morally obligated to do something about such mistreatment or suffering, both individually and through their political and social institutions; ... that governments will attend to such mistreatment or suffering in other countries through international institutions and will take account of them also in their relations with other states.<sup>678</sup>

Declaring an interest to be an international human right, therefore, should not be done lightly.<sup>679</sup> There are several reasons why every individual’s interest is not necessarily a protected human right. Firstly, there are insufficient resources to realize every person’s interests and secondly, the absence of standards by which interests become rights would dilute “the integrity of the entire process of recognizing human rights.”<sup>680</sup> The ideal is to achieve:

an appropriate balance between, on the one hand, the need to maintain the integrity and credibility of the human rights tradition, and on the other hand, the need to adopt a dynamic approach that fully reflects changing needs and perspectives and responds to the emergence of new threats to human dignity and well-being.<sup>681</sup>

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<sup>678</sup> HENKIN, *supra* note 426, at 16.

<sup>679</sup> Philip Alston, *Conjuring Up New Human Rights: A Proposal For Quality Control*, 78 A.J.I.L. 607, 607 (1984) [hereinafter Alston] (Arguing that the proliferation of rights has diluted the importance and effect of human rights law).

<sup>680</sup> Alston proposes that the proclamation of new rights which are not recognized in either the Universal Declaration of Human Rights or the two International Human Rights Covenants, the recognition of rights by bodies other than the General Assembly, and the ease with and “haphazard and anarchic manner” in which these rights have been recognized have threatened the respected status of human rights. Alston, *supra* note 477, at 607.

<sup>681</sup> Alston, *supra* note 477, at 607.

Therefore, I attempt to find some framework of a rights-theory to determine whether systemic intimate violence is an international human rights violation without compromising the “integrity and credibility of the human rights tradition.”<sup>682</sup>

### 3.1.3 Evaluating Different Theories to Extract Core Themes

Philosophers and lawyers, amongst others, have given a great deal of consideration to the theory underlying this intuitive distinction. Decades of thought have spawned a multitude of theories attempting to identify the elements of human rights.<sup>683</sup> However, no one definitive test exists in international human rights law to determine what constitutes a right.<sup>684</sup>

Since there is no one standard definition of human rights, I examine below a cross section of philosophical and jurisprudential theories on human rights.<sup>685</sup> Many of these theories, while differing in the particular, have general themes in common. By identifying these common themes I am able to: (1) extract elements of human rights; and (2) using these elements, create a framework in which to determine whether systemic intimate violence qualifies as an international human rights violation.<sup>686</sup> In other words: a range of theorists identify factors A, B and C as prerequisite elements of human rights; I extract factors A, B and C; and, determine whether A, B and C are features of systemic intimate violence. I conclude that elements A, B and C inhere in systemic intimate violence; QED systemic intimate violence is an international human rights violation.

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<sup>682</sup> Alston, *supra* note 477, at 607.

<sup>683</sup> See for example, Shestack, *supra* notex, at 70 (describing the abundance of theories on the meaning of human rights).

<sup>684</sup> McDougal, Lasswell and Chen state that “[i]t is in the substantive definition of human rights that the greatest confusion and inadequacy prevail.” WORLD PUBLIC ORDER, *supra* notex, at 64. See also Oscar Schachter, *United Nations Law*, 88 AM. J. INT’L L. 1, 2 (1994) (“The processes of lawmaking have not been simple, nor free from serious controversy. Scholarly writings have revealed the gradations and subtleties in the conceptions of authoritative law, the wavering lines between peremptory “hard” law and the varieties of “soft” law. Rules have emerged from practice and interpretations of officials, as well as from pronouncements of organs composed of member states.”). Henkin claims that human rights are a product of politicians and not philosophers. Philosophers, according to Henkin, are trying to build philosophical justifications for human rights but the “international expression of rights themselves claims no philosophical foundation, nor do they reflect any clear philosophical assumptions.” HENKIN, *supra* note 426, at 5. See also Louis Henkin, *International Human Rights and Rights in the United States*, in HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 25, 32 (Theodor Meron ed., Clarendon Press Oxford 1984) [hereinafter Henkin, *Human Rights in International Law*] (stating that “international human rights reflect no single, comprehensive theory of the relation of the individual to society.”). See also MOSES MOSKOWITZ, *THE POLITICS AND DYNAMICS OF HUMAN RIGHTS*, 98-99 (1968), cited by Jerome J. Shestack, *The Jurisprudence of Human Rights*, in HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 69, 69 (Theodor Meron ed., Clarendon Press Oxford 1984) [hereinafter Shestack]. As Shestack points out, the relevant question is what the source of these rights is, i.e. is the fundamentality of rights found in religion, natural law, positivism or the authority of the state? Shestack, *supra* notex, at 75-85.

<sup>685</sup> Nickels reminds us that in defining human rights, “one should not focus exclusively on legal rights.” JAMES W. NICKEL, *MAKING SENSE OF HUMAN RIGHTS PHILOSOPHICAL REFLECTIONS ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 13, (University of California Press, 1987) [hereinafter NICKEL].

<sup>686</sup> Buchanan has engaged this process of showing “a widely shared conception of human rights that is already partly implemented in international law...” ALLEN BUCHANAN, *JUSTICE, LEGITIMACY, AND SELF-DETERMINATION* 74 (Oxford University Press, 2006) [hereinafter BUCHANAN].

## 4 Philosophical and Jurisprudential Considerations

### 4.1 General

The primary theories on human rights have been classified, more or less, as: the theological approach; the natural law approach; the historical approach; the positivist approach; the Marxist (or communist) approach; the social science approach; utilitarianism; the approach of justice; libertarianism or laissez-faire theory; the policy oriented approach; liberal equality; communitarianism; the capabilities theory; and, feminism.<sup>687</sup> I attempt, as far as possible, to represent each of these theories in formulating common themes.

It is important to note that the purpose of this analysis is not to compare, study, or examine the philosophy of rights.<sup>688</sup> I do not propose that all theories are represented or that the theories I cite are described conclusively. Rather, I simply note some of the leading rights-theorists and extract themes which, on the whole, are common to them all for the purpose of determining the international status of systemic intimate violence.

Based on this analysis, I identify four common themes: (1) fundamentality; (2) universality; (3) group vulnerability; and (4) state accountability. I discuss each element below, providing first a description of the element and then the sources from which I distilled that element.

### 4.2 Fundamentality

Does There Exist a Rule of Conduct or Law of Nature?  
There Does.

John Locke<sup>689</sup>

#### 4.2.1 Description

The first element that appears in an array of human rights-theories is fundamentality. This is the idea every right relates to something basic, foundational or elemental. Some theorists frame fundamentality with reference to humanity, some to the natural order of the world and others to religion. Many labels are used to describe fundamentality, including, ‘morality,’ ‘generality,’ ‘legal,’ or ‘intrinsic.’

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<sup>687</sup> See WORLD PUBLIC ORDER, *supra* notex, at 68-82; Shestack, *supra* notex, at 75-101; WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY AN INTRODUCTION (Clarendon Press Oxford, 1990) [hereinafter KYMLICKA]; and BUCHANAN, *supra* notex, at 80-88.

<sup>688</sup> Such a task would exceed greatly the ambit of this thesis. As McDougal, Lasswell and Chen note, the confusion and breadth of rights-theories is vast, ranging from “natural law absolutes ... buttressed by transempirical justifications, both theological and metaphysical” to “demands which particular peoples make at particular times in their particular , unique communities” to “rights which a particular system of law in a particular state in fact protects.” WORLD PUBLIC ORDER, *supra* notex, at 65.

<sup>689</sup> JOHN LOCKE, QUESTIONS CONCERNING THE LAW OF NATURE WITH AN INTRODUCTION, TEXT, AND TRANSLATION BY ROBERT HORWITZ, JENNY STRAUSS CLAY AND, DISKIN CLAY 95 (Cornell University Press, 1990) [hereinafter LOCKE].

The concept, however phrased, refers to the fact that rights relate to the essence of us and the way we live our lives. It is the center, around which all other facts of life revolve; it is uncompromisable; it is basic; it is, shall we say, fundamental.

The legal investigation into the fundamental nature of laws developed in part when states sought to protect their own nationals living in other countries and insisted that the basic rights of their citizens be protected when living abroad.<sup>690</sup> The initial objective was to ensure a standard of treatment of foreign citizens, which “was often higher than that – if any – applied by these countries to their own citizens at home.”<sup>691</sup> As a result, the standard of what is ‘fundamental’ or ‘basic’ was created in the absence of philosophical foundations or agreed principles of universal fairness.

In the discussion below, I harness a variety of theoretical sources on fundamentality and divide them into two groups: (1) theories which make specific statements about the fundamentality of rights; and, (2) theories which investigate fundamental rights in pursuit of a theory of distributive or social justice. I propose that each of these theories embraces the concept that certain interests are so fundamental that they take on the status of rights requiring enforcement by states. In Part B, I demonstrate that, based on these theories, the rights to equality; physical integrity; and, dignity, which are each violated in the context of systemic intimate violence, are fundamental human rights.

#### 4.2.2 Theoretical Source

##### *Specific Statements about Fundamentality*

In the 1600s, John Locke stated that human beings are said to possess certain inalienable natural rights.<sup>692</sup> Locke’s notion of the inalienability and naturalness of rights is evident in the theories of the 19<sup>th</sup> century philosopher, Thomas Hobbes. Hobbes concluded that “any man in the state of nature (which... is a condition of mutual hostility) has a right of nature to do whatever is necessary for his preservation.”<sup>693</sup> The ‘state of nature’ according to Hobbes is “the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life.”<sup>694</sup> While Locke invokes generic themes of fundamentality in rights that are inalienable or natural, Hobbes specifies fundamentality in the right to defend oneself according to the human being’s state of nature. Both philosophers echo the theme of fundamentality.

The notion of fundamentality in rights pertains no less in modern philosophies, particularly in relation to people’s rights to equality, physical integrity and dignity. American philosopher, Richard Rorty alludes to fundamentality in his argument that social concern for the impotent’s

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<sup>690</sup> See HENKIN, *supra* note 426, at 14.

<sup>691</sup> HENKIN, *supra* note 426, at 14.

<sup>692</sup> LOCKE, *supra* notex, at 1, citing JOHN LOCKE, TWO TREATIES OF GOVERNMENT, (Peter Laslett, ed., New York: Cambridge University Press, 1960).

<sup>693</sup> W. VON LEYDEN, HOBBS AND LOCKE THE POLITICS OF FREEDOM AND OBLIGATION 9 (St. Martin’s Press New York (1982) [hereinafter HOBBS AND LOCKE].

<sup>694</sup> HOBBS AND LOCKE, *supra* notex, at 10]

basic rights has brought us “to a moment in human history in which it is plausible ... that the human rights phenomenon is a ‘fact of the world.’”<sup>695</sup>

Shestack, for example, identifies fundamentality as a trend in so-called modern human rights-theories, which posit some manifestation of fundamental principles as their point of departure, be it the “equal right of all people to be free” (as expounded by the positivist Hart) or the “morality of personhood” and the “autonomy of the individual in choosing his or her ends” (as expounded by John Rawls and Alan Gewirth respectively). According to Shestack, these concepts consist of a “natural necessity, *i.e.*, necessity in the sense of prescribing a minimum definition of what it means to be human in society.”<sup>696</sup>

Professor Louis Henkin is clear and sober in his application of fundamentality. He argues that when a society recognizes that a person has a right, it affirms, legitimates, and justifies that entitlement, and incorporates and establishes it in the society’s system of values, giving it important weight in competition with other societal values.<sup>697</sup> Tom Campbell alludes to the same sense of fundamentality in his description that “[t]he rhetoric of human rights draws on the moral resources of our belief in the significance of an underlying common humanity, and points us in the direction of a type of society which ensures that the basic human needs and reasonable aspirations of all its members are effectively realized in, and protected by, law.”<sup>698</sup>

One of the more comprehensive definitions of human rights is given by Philip Alston who states that a human right should “[r]eflect a fundamentally important social value.”<sup>699</sup> Ramcharan too confirms that human rights possess “certain qualitative characteristics.”<sup>700</sup> Included in these

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<sup>695</sup> Rorty, *supra* note 464, at 134.

<sup>696</sup> Shestack, *supra* notex, at 87.

<sup>697</sup> LOUIS HENKIN, *THE AGE OF RIGHTS*, 2 (New York: Columbia Univ. Press, 1990) [hereinafter HENKIN].

<sup>698</sup> Tom Campbell, *Introduction: Realizing Human Rights*, in *Human Rights: From Rhetoric to Reality* 1,1 (Tom Campbell, David Goldberg, Sheila McClean and Tom Mullen eds., Basil Blackwell, 1986).

<sup>699</sup> Philip Alston, *Conjuring Up New Human Rights: A Proposal For Quality Control*, 78, A.J.I.L. 607, 614 (1984) [hereinafter Alston]. Alston states that a proposed human right should: “Reflect a fundamentally important social value; Be relevant, inevitably to varying degrees, throughout a world of diverse value systems; Be eligible for recognition on the grounds that it is an interpretation of UN Charter obligations, a reflection of customary law rules or a formulation that is declaratory of general principles of law; Be consistent with, but not merely repetitive of, the existing body of international human rights law; Be capable of achieving a very high degree of international consensus; Be compatible or at least not clearly incompatible with the general practice of states; and Be sufficiently precise as to give rise to identifiable rights and obligations. *Id.* While Alston’s concern is primarily with the process by which rights become international human rights, I will address his concerns regarding the substance of rights and what criteria should be applied in elevating some claims to rights rather than others. Alston, *supra* note 477, at 616. Alston maintains that the right must be precise. I address this issue below. Alston proposes that the proclamation of new rights which are not recognized in either the Universal Declaration of Human Rights or the two International Human Rights Covenants, the recognition of rights by bodies other than the General Assembly and the ease with and “haphazard and anarchic manner” in which these rights have been recognized have threatened “the integrity of the entire process of recognizing human rights”.

<sup>700</sup> Alston, *supra* note 477, at 621. [Note: get original citation for Ramcharan] Ramcharan’s synopsis is that “human rights are legal rights which possess one or more of certain qualitative characteristics, such as: appurtenance to the human person or group; universality; essentiality to human life, security, survival, dignity, liberty, equality, essentiality for international order; essentiality in the conscience of mankind; essentiality for the protection of vulnerable groups.” *Id.*

characteristics is the element of “essentiality to human life, security, survival, dignity, liberty, equality, essentiality for international order; essentiality in the conscience of mankind.”<sup>701</sup>

Nickel also lists generic elements, of which he maintains all rights are constituted.<sup>702</sup> Nickel’s second element is that “rights are *to* some freedom or benefit.”<sup>703</sup> This entails the scope of the right; that is, what is included in its content and the conditions of its operability.<sup>704</sup> Nickel’s reference to fundamentality is implicit, evident in the notion that only interests with a particular content will qualify as human ‘rights,’ such content being that which is basic or fundamental to human beings.

The theory of McDougal, Lasswell, and Chen, in what has become known as the New Haven School, is a value-oriented approach based on the protection of human dignity.<sup>705</sup> McDougal, Lasswell and Chen search for the fundamentality of human rights by offering “an itemization in terms of the principal features of a number of representative value processes, believed to be indigenous in varying forms of equivalency in most contemporary cultures.”<sup>706</sup> Framed as the values upon which human rights depend, the itemized values are demands relating to respect, power, enlightenment, well-being, wealth, skill, affection, and, rectitude.<sup>707</sup> Ultimately, the foundation or distillation of these is the basic value of dignity.<sup>708</sup>

#### *Fundamentality in Theories of Justice*

Many rights-theorists use a principle of fundamentality from which to develop a theory of governance or distributive justice. In determining how to engineer the structures and order of society, philosophers determine which rights are “absolute, which are universal, which should be given priority, which can be overruled by other interests, which call for international pressures, which can demand programs for implementation, and which will be fought for.”<sup>709</sup> In this process, fundamentality appears in that which is absolute, “important, moral, and universal.”<sup>710</sup>

Jeremy Bentham, the exponent of classic utilitarianism, centered his philosophy of governance on the human being’s calculation of pleasure and pain. In developing the theory of maximization, Bentham operates on the basis of a core minimum human condition. He breaks down the complexity of the human being to arrive at its fundamental needs. While the utilitarian approach is criticized as hedonic, seeking “to define notions of right solely in terms of tendencies

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<sup>701</sup> Alston, *supra* note 477, at 621. [Note: get original citation for Ramcharan].

<sup>702</sup> NICKEL, *supra* notex, at 13. These are: (1) conditions of possession; (2) scope; (3) addressees; and, (4) weight. *Id* at 13-14.

<sup>703</sup> NICKEL, *supra* notex, at 13.

<sup>704</sup> NICKEL, *supra* notex, at 13-14.

<sup>705</sup> See in general MYRES S. MCDUGAL, HAROLD D. LASSWELL, AND LUNG-CHU CHEN, HUMAN RIGHTS AND THE WORLD PUBLIC ORDER THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY (New Haven and London, Yale University Press, 1980) [hereinafter WORLD PUBLIC ORDER]. For a brief description of this theory, see Shestack, *supra* notex, at 96.

<sup>706</sup> WORLD PUBLIC ORDER, *supra* notex, at 7.

<sup>707</sup> WORLD PUBLIC ORDER, *supra* notex, at 7-13.

<sup>708</sup> Shestack, *supra* notex, at 96.

<sup>709</sup> Shestack, *supra* notex, at 70.

<sup>710</sup> Shestack, *supra* notex, at 74.



to promote certain specified ends, *e.g.*, [the] common good,” it nonetheless operates on the basis of the fundamentality of the human being’s need to limit pain and expand pleasure.<sup>711</sup>

Rawls’ Theory of Justice is the linchpin of modern discourse on political philosophy and in part, is a methodology of how to deduce the fundamentality of human rights or needs.<sup>712</sup> Rawls adopts an altered form of the contract theory of Locke, Rousseau and Kant and asks what “free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association.”<sup>713</sup> To ensure that people in the original position are neutral and do not promote their own particular interests, Rawls designs the famous “veil of ignorance,” creating a “hypothetical situation” where “no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like... The principles of justice are chosen behind a veil of ignorance.”<sup>714</sup>

Thus, by ensuring fairness in the original position, one ensures justice in society. The terms of this justice are determined by ignorant equals acting rationally.<sup>715</sup> For Rawls, therefore, the fundamentality of rights is the goal to which the aforementioned mechanisms aspire.

Cahn’s formulation of justice “is the active process of remedying or preventing what arouses the sense of injustice. An examination of the instances that will be considered injustice thereby allows a positive formulation of justice.”<sup>716</sup> Cahn therefore seeks a type of fundamentality, which would be evident from the “‘emotional force and practical urgency’ to press for the satisfaction or repair of some need, deprivation, threat, or insecurity.”<sup>717</sup>

In pursuing a theory of justice based on equality for men and women, feminist theorist Catherine MacKinnon also demonstrates how fundamentality currently is *absent* from our notion

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<sup>711</sup> Shestack, *supra* notex, at 88. Although, as Shestack points out, “[i]n an era characterized by man’s inhumanity to man, the dark side of utilitarianism made it too suspect to be accepted as a prevailing philosophy.” *Id* at 89. Sen, for example, criticizes utilitarianism as “an efficiency-oriented approach, concentrating on promoting the maximum sum total of utilities, no matter how unequally that sum total may be distributed. If equity is central to justice, utilitarianism starts off somewhere at the periphery of it.” Sen, *Gender Inequality and Theories of Justice*, *supra* note 118, at 262.

<sup>712</sup> RAWLS, A THEORY OF JUSTICE *supra* note 274, at 7 (“The justice of a social scheme depends essentially on how fundamental rights and duties are assigned and on the economic opportunities and social conditions in the various sectors of society.”).

<sup>713</sup> RAWLS, A THEORY OF JUSTICE *supra* note 274, at 10. In attempting to define elusive basic rights, Rawls “effects a reconciliation of the tensions between egalitarianism and noninterference, between demands for freedom by the advantaged and demands for equality by the less advantaged. His structure of social justice maximizes liberty and the worth of liberty to both groups.” Shestack, *supra* notex, at 92-93.

<sup>714</sup> RAWLS, A THEORY OF JUSTICE *supra* note 274, at 11, 17.

<sup>715</sup> RAWLS, A THEORY OF JUSTICE *supra* note 274, at 17. Rawls articulates two principles which he suggests would emanate from the original position. The first is the principle of equal basic liberties. The second principle is that socio-economic inequalities should be arranged in a way that both advantages everyone and to which everyone has access. *Id*, 53. In discussing these principles, Rawls takes us to the point where he asserts that “[i]njustice, then, is simply inequalities that are not to the benefit of all.” *Id*, 54.

<sup>716</sup> Shestack, *supra* notex, at 93 citing E. CAHN, THE SENSE OF INJUSTICE (1949).

<sup>717</sup> Shestack, *supra* notex, at 93 (explaining how this formulation could be used to explain the injustice of disappearances in Argentina).

of human rights, since those rights are framed only in terms of male needs and experiences.<sup>718</sup> Her point of departure is her quest to identify the fundamental, the basic, which is representative of the experiences of women and men, leading to “a new jurisprudence, a new relation between life and law.”<sup>719</sup>

Fundamentality is evident in Walzer’s notion of moral minimalism.<sup>720</sup> For Walzer, this minimal morality is “‘truth’ and ‘justice,’ minimally understood. The minimal demands that we make on one another are, when denied, repeated with passionate insistence.”<sup>721</sup> Walzer suggests that to understand what the fundamental demands of human beings are, we should make a list of occasions we all have experienced, cataloguing our responses thereto and try “to figure out what the occasion and the responses have in common. Perhaps the end product of this effort will be a set of standards to which all societies can be held – negative injunctions, most likely, rules against murder, deceit, torture, oppression, and tyranny.”<sup>722</sup>

Professor Robert Nozick seeks fundamentality in what he identifies as core individual rights: “the rights not to be killed, robbed, assaulted or defrauded; the right to acquire, retain and transfer property; the right to the performance of contracts; and, most importantly, the right to do as one chooses, so long as one does not violate the same right of others... moral wrongdoing has one form – violation of these rights.”<sup>723</sup> While these rights are minimal (constituting what has been called a “barren morality”), Nozick nonetheless seeks and develops a notion of fundamentality in the theory of rights.<sup>724</sup>

Professor Ronald Dworkin, in proposing a theoretical reconciliation between liberty and equality, encapsulates fundamentality in those liberties which require “special protection against government interference.”<sup>725</sup> While Dworkin justifies this selection on a procedural rather than a value judgment, his theorizing nonetheless involves the process of identifying the basic, fundamental or core components of citizen rights.<sup>726</sup>

The notion of fundamentality is captured in Buchanan’s discussion of the “generality” of human rights.<sup>727</sup> According to Buchanan’s Moral Equality Argument, human rights “are the most

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<sup>718</sup> MacKinnon, *Crimes of War, Crimes of Peace*, *supra* note 114, at 84-85: “Human rights principles are based on experience, but not that of women. It is not that women’s human rights have not been violated. When women are violated like men who are otherwise like them – when women’s arms and legs bleed when severed, when women are shot in pits and gassed in vans, when women’s bodies are hidden at the bottom of abandoned mines... this is not recorded as the history of human rights atrocities to women... When no war has been declared and still women are beaten by men with whom they are close, when wives disappear from supermarket parking lots, when prostitutes float up in rivers or turn up under piles of rags in abandoned buildings, this is overlooked entirely in the record of human suffering because the victims are women and it smells of sex.”

<sup>719</sup> MacKinnon, *Towards a Feminist Theory of the State*, *supra* notex, at 249.

<sup>720</sup> WALZER, *supra* notex, at 6.

<sup>721</sup> WALZER, *supra* notex, at 6.

<sup>722</sup> WALZER, *supra* notex, at 10.

<sup>723</sup> Shestack, *supra* notex, at 94.

<sup>724</sup> Shestack, *supra* notex, at 95.

<sup>725</sup> Shestack, *supra* notex, at 97.

<sup>726</sup> Shestack, *supra* notex, at 97.

<sup>727</sup> BUCHANAN, *supra* notex, at 76.

general moral rights that can be ascribed to us”<sup>728</sup> and they “represent the most fundamental institutional constraints by which equal consideration for persons is to be achieved.”<sup>729</sup> He further expands his notion of fundamentality and maintains that “there are some interests common to all persons that are of such great moral concern that the very character of our most important institutions should be such as to afford them special protection. These interests are shared by all persons because they are constitutive of a decent life; they are necessary conditions for human flourishing.”<sup>730</sup>

This aspiration of “human flourishing” emanates from the capabilities theory, originated and developed by philosophers Amartya Sen and Martha Nussbaum. Nussbaum raises the standard of fundamentality, arguing that “[t]he questions that should be asked when assessing quality of life in a country are ... ‘How well have the people of the country been able to perform the central human functions?’ and ‘Have they been put in a position of mere human subsistence with respect to the functions, or have they been enabled to live well?’”<sup>731</sup> Therefore, Nussbaum utilizes fundamentality in identifying core capabilities, which include “[b]eing able to avoid unnecessary and non-beneficial pain, so far as possible, and to have pleasurable experiences.”<sup>732</sup>

This broader notion of fundamentality appears also in Sen’s notion of a web of rights:

a remarkable empirical connection that links freedoms of different kinds with one another. Political freedoms (in the form of free speech and elections) help to promote economic security. Social opportunities (in the form of education and health facilities) facilitate economic participation. Economic facilities (in the form of opportunities for participation in trade and production) can help to generate personal abundance as well as public resources for social facilities. Freedoms of different kinds can strengthen one another.<sup>733</sup>

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<sup>728</sup> BUCHANAN, *supra* notex, at 76.

<sup>729</sup> BUCHANAN, *supra* notex, at 83.

<sup>730</sup> BUCHANAN, *supra* notex, at 79. The most basic rights, for Buchanan, are: the right to life; the right to security of the person, which includes the right to bodily integrity, the right against torture, and the right not to be subject to arbitrary arrest, detention, or imprisonment; the right against enslavement and involuntary servitude; the right to resources for subsistence; the most fundamental rights of due process and equality before the law; the right to freedom from religious persecution and against at least the more damaging and systemic forms of religious discrimination; the right to freedom of expression; the right to association; and, the right against persecution and against the “the more damaging and systemic forms of discrimination on grounds of ethnicity, race, gender, or sexual preference.” BUCHANAN, *supra* notex, at 81.

<sup>731</sup> Nussbaum, *Human Capabilities*, *supra* notex, at 87.

<sup>732</sup> Nussbaum, *Human Capabilities*, *supra* notex, at 83. Nussbaum also identifies the following capabilities which are relevant to the right to be free from systemic intimate violence: “Being able to form a conception of the good and to engage in critical reflection about the planning of one’s own life. This includes, today, being able to seek employment outside the home and to participate in political life... Being able to live for and to others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another and to have compassion for that situation; to have the capability for both justice and friendship. Protecting this capability means, once again, protecting institutions that constitute such forms of affiliation, and also protecting the freedoms of assembly and political speech... Being able to laugh, to play, to enjoy recreational activities... Being able to live one’s own life and nobody else’s...” *Id.* According to Nussbaum, these are the qualities of human beings that should be nurtured: “My claim is that a life that lacks any one of these capabilities, no matter what else it has, will fall short of being a good human life. So it will be reasonable to take these things as a focus for concern in assessing the quality of life in a country and asking about the role of public policy in meeting human needs.” *Id.* at 85.

<sup>733</sup> SEN, *DEVELOPMENT AS FREEDOM*, *supra* note 470, at 10.

In this interactive description, Sen both justifies and describes the fundamentality of human rights.

The notion of fundamentality is summarized succinctly by the Rev. Canon Sydney Hall Evans:

Sometimes attempts to give expression to the content of this fundamental intuition have been made academically in the study by moralists, jurists or theologians. Sometimes they have been hammered out in the heat of political upheaval. But always they express this basic human hope, this basic human vision in which men reach beyond themselves towards a better life for man in society: a reaching out which expresses a concern both for the better ordering of society and for the good life of individual persons within society.<sup>734</sup>

Therefore, the concept of fundamentality appears in diverging jurisprudential and philosophical rights-theories. For this reason, I include an examination of fundamentality in determining whether systemic intimate violence is a human rights violation. In Part B of this chapter, I apply this theory of fundamentality to systemic intimate violence, concluding that systemic intimate violence violates the fundamental human rights to equality, dignity and physical autonomy.

### 4.3 Universality

Is the obligation of the law of nature perpetual and universal? It is.

John Locke<sup>735</sup>

#### 4.3.1 Description

If human rights are ‘fundamental’ to human beings, they must apply to every human being, everywhere; that is, in order for an ‘interest’ to be a ‘right,’ it must also be universal. This does not require that every state recognizes and adopts that right. Rather, the element of universality requires that the ‘right’ must be “relevant, to varying degrees, throughout the world of diverse value systems.”<sup>736</sup>

As described in chapter one, however, not everyone agrees that all human rights are universal. Some argue that rights are not universally relevant, but vary from culture to culture. Others counter argue, saying that it is the very fundamentality of rights that underpins difference and pervades all cultures, irrespective of their structural differences. Culture, according to this argument, does not preclude universality.

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<sup>734</sup> The Rev. Canon Sydney Hall Evans, *Christianity and Human Rights*, in AN INTRODUCTION TO THE STUDY OF HUMAN RIGHTS 1, 7 (Sir Francis Vallat ed., Europa Publications: London, 1970) [hereinafter Evans].

<sup>735</sup> LOCKE, *supra* notex, at 217.

<sup>736</sup> Alston, *supra* note 477, at 614. See also HENKIN, *supra* note 426, at 20. International human rights law specifically attempts to articulate certain norms which, even if they contradict a belief system or require the amendment of a culture’s way of life, will be considered universal because of their so-called fundamentality. The question of what constitute a fundamental norm is the subject of an entirely independent yet important discussion.

Nevertheless, in the analysis that follows, universality appears as a consistent theme. Some theorists qualify universality on the basis that rights manifest differently in different societies. In other words that even if an interest is ‘fundamental,’ a society or culture can choose whether or not to accept that interest as being of relevance in that society or culture. Most, however, maintain that if a right relates to the essence of human beings, every being that is human has this right. QED: human rights are of universal relevance.

The theories relating to universality can be divided into three groups: (1) theories which address the universality of rights specifically; (2) theories which approach the principle of universal rights by examining what is common or universal in diversity; and, (3) theories which attempt to reconcile the universal with the specific.

#### 4.3.2 Theoretical Source

##### *Theories which Address Universality Specifically*

Locke maintains that the law of nature is both perpetual, “that is, that there is not time in which a man would be permitted to violate the precepts of this law,” and universal.<sup>737</sup> For Locke, universality refers to those precepts of the law of nature which are absolute... [and] equally binding on all men wherever men exist, kings as well as subjects, senators together with the commoners, parents and children together, barbarians no less than Greeks.<sup>738</sup>

Rawls describes human rights as “a special class of rights of universal application and hardly controversial in their general intention.”<sup>739</sup> For Buchanan also, universality is implicit in human rights, which “as the name implies, are ascribed to all human beings simply by virtue of their humanity or personhood, regardless of whatever other characteristics differentiate them from one another, and regardless of where they live.”<sup>740</sup>

Ramcharan identifies universality as an element of human rights, stating that “[t]he history of the human rights movement, the experience of the League of Nations, and the philosophy of the United Nations, reach out towards the concept of the universality of rights.”<sup>741</sup> His synopsis of human rights includes “...universality; essentiality to human life...essentiality for international order; essentiality in the conscience of mankind.”<sup>742</sup> Nickel’s elements of human rights also

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<sup>737</sup> LOCKE, *supra* notex, at 217-225.

<sup>738</sup> LOCKE, *supra* notex, at 225.

<sup>739</sup> John Rawls, *The Law of Peoples*, in ON HUMAN RIGHTS THE OXFORD AMNESTY LECTURES, 41, 70 (Stephen Shute and Susan Hurley eds., 1993) [hereinafter Rawls, *The Law of Peoples*].

<sup>740</sup> BUCHANAN, *supra* notex, at 76.

<sup>741</sup> Ramcharan, *Universality of Human Rights*, *supra* notex at 24 (“If we take universality to mean things shared by all human beings together, is the concept of universality valid as an idea? Do we not all breathe the same air, need food and water for survival and want to live our lives in peace and in happiness? Do we not have physical attributes which are common to all of us as human beings? And if yes, then is not the idea of universality a valid one in the sense that all human beings share some things in common?” *Id* at 25.

<sup>742</sup> Alston, *supra* note 477, at 621. [Note: get original citation for Ramcharan]. Ramcharan, however, also recognizes the contribution diversity makes to universality. See B. Ramcharan, in UNIVERSALITY OF HUMAN RIGHTS IN A PLURALISTIC WORLD 138, 138-139 (Proceedings of the Colloquy organised by the Council of Europe in co-operation with the International Institute of Human Rights, Council of Europe, N.P. Engel, Publisher, 1989)

include the principle of universality evident in his argument that a right can apply narrowly to one person or to the human race as a whole.<sup>743</sup>

Finally, Alston is explicit that human rights must be “relevant, inevitably to varying degrees, throughout a world of diverse value systems.”<sup>744</sup>

*Theories which Express Universality in Seeking the Common in the Diverse*

The element of universality is problematic since different people will have different views of what is fundamental to them. Rights therefore depend on certain informational input. The result is that for some, the right to private property is fundamental whereas to others unrestrained property rights are considered dangerous.<sup>745</sup> Does this mean that the right to property is not fundamental or does it mean that rights in general, demonstrated by the differing approaches to property, are not in fact universal?<sup>746</sup> In response to this question, theorists have attempted to investigate a commonality that would justify the conclusion that a right for one is a right for all.

An honest answer to this quandary is provided in the very vivid inculcation of universality provided by Walzer. In his discussion of moral minimalism, Walzer grapples with his sense of universality in a description of:

a picture of people marching in the streets of Prague; they carry signs, some of which say, simply, ‘Truth’ and other ‘Justice.’ When I saw the pictures, I knew immediately what the signs meant – and so did everyone else who saw the same picture. Not only that: I also recognized and acknowledged the values that the marchers were defending – and so did (almost) everyone else. Is there any recent account... that can explain this understanding and acknowledgement? How could I penetrate so quickly and join so unreservedly in the language game or the power play of a distant demonstration? The marchers shared a culture with which I was largely unfamiliar; they

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[hereinafter Ramcharan, *Universality of Human Rights*] (stating that “the substance of the universal principles is constantly evolving and is enriched by the experience of individuals throughout the world.”).

<sup>743</sup> NICKEL, *supra* note, at 13. The addressee can be “the entire world” or “specific parties.” *Id.* at 14.

<sup>744</sup> Alston, *supra* note 477, at 614.

<sup>745</sup> SEN, *DEVELOPMENT AS FREEDOM*, *supra* note 470, at 56-61 (“One can indeed entertain different views on the intrinsic attractions or repulsive features of private property. The consequentialist approach [*focus on the consequential outcomes social arrangements rather than their constitutive features*] suggests that we must not be swayed only by these features, and must examine the consequences of having – or not having – property rights. Indeed, the more influential defenses of private property tend to come from pointers to its positive consequences. It is pointed out that private property has proved to be, in terms of results, quite a powerful engine of economic expansion and general prosperity. In the consequentialist perspective that fact must occupy a central position in assessing the merits of private property. On the other side, once again in terms of results, there is also much evidence to suggest that unconstrained use of private property – without restrictions and taxes – can contribute to entrenched poverty and make it difficult to have social support for those who fall behind for reasons beyond their control (including disability, age, illness and economic and social misfortune). It can also be defective in ensuing environmental preservation and in the development of social infrastructure.”).

<sup>746</sup> Elaine Pagels poses the following question: “Advocates of human rights policy claim not only that there are human rights but also that these rights have universal applicability. What – if anything – justifies this claim?” (Elaine Pagels, *The Roots and Origins of Human Rights*, in *HUMAN DIGNITY THE INTERNATIONALIZATION OF HUMAN RIGHTS* 1, 1 (Alice Henkin ed., Aspen Institute for Humanistic Studies, 1979) [hereinafter Pagels]).

were responding to an experience I had never had. And yet, I could have walked comfortably in their midst. I could carry the same signs.”<sup>747</sup>

Rorty identifies universality in “‘a progress of sentiments,’ which consists in an increasing ability to see the similarities between ourselves and people very unlike us as outweighing the differences.”<sup>748</sup> On the other hand, Sen states that “[w]hile there is some danger in ignoring uniqueness of cultures, there is also the possibility of being deceived by the presumption of ubiquitous insularity.”<sup>749</sup>

Many authors argue specifically that gender equality is of a universal nature. Cultural relativity and the justification of gender-differentiation in societies are addressed by McDougal, Lasswell and Chen. They maintain that the:

justifications offered for sex-based discrimination, subordinating women, are traditionally that it is ‘natural or necessary or divinely ordained.’ Sometimes it is argued that discrimination is inherent ‘in the divine ordinance, as well as in the nature of things.’ At other times it is asserted that simply out of the social necessity of functional division of activities, there exists ‘a wide difference in the respective spheres and destinies of man and woman.’ The ‘domestic sphere,’ it is said, ‘properly belongs to the domain and function of womanhood.’ The boldest of discriminators may on occasion argue that women are inherently inferior to men.”<sup>750</sup>

For the authors, therefore, “[i]n a global community aspiring toward human dignity, a basic policy should, accordingly, be to make the social roles of the two sexes, with the notable exception of childbearing, as nearly interchangeable or equivalent as possible.”<sup>751</sup>

MacKinnon’s feminist theory, contrary to the implication of the label, is not exclusive to women. It is an analysis of the legal, social and political coexistence of women together with men. The element of universality is evident from MacKinnon’s assertion that women around the globe are denied equivalency and equality in the way states currently are structured. In formulating her challenge to the construction of states, she argues that

guarantees women specifically need, due to sex inequality in society, in order to live to a standard defined as human – like freedom from being bought and sold as sexual chattel, autonomous economic means, reproductive control, personal security from intimate invasion, a credible voice in public life, a nonderivative place in the world – were not considered at all.<sup>752</sup>

For Nussbaum, the convergence of cultures “gives us some reason for optimism, that if we proceed in this way, using our imaginations, we will have in the end a theory that is not the mere

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<sup>747</sup> MICHAEL WALZER, *THICK AND THIN MORAL ARGUMENT AT HOME AND ABROAD I* (University of Notre Dame Press, 1994) [hereinafter WALZER].

<sup>748</sup> Rorty, *supra* note 464, at 129. Relying on the arguments of Annette Baier, Rorty concludes that we should view “the spread of the human rights culture not as a matter of our becoming more aware of the requirements of the moral law, but rather as what Baier calls ‘a progress of sentiments.’” *Id.*

<sup>749</sup> SEN, *DEVELOPMENT AS FREEDOM*, *supra* note 470, at 242.

<sup>750</sup> WORLD PUBLIC ORDER, *supra* notex, at 624.

<sup>751</sup> WORLD PUBLIC ORDER, *supra* notex, at 624-625.

<sup>752</sup> MacKinnon, *Crimes of War, Crimes of Peace*, *supra* note 114, at 96.

projection of local preferences, but is fully international and a basis for cross-cultural attunement.”<sup>753</sup>

### *Theories which Reconcile the Universal and the Specific*

Walzer explains that there are broad overarching principles which are universal (what he refers to as “common, garden variety justice.”)<sup>754</sup> When it comes to the details justice, such as “designing a health care system or an educational system” the marchers in Prague “will not be universalists: they will aim at what is best for themselves, what fits their history and culture, and won’t insist that all the rest of us endorse or reiterate their decisions.”<sup>755</sup> Walzer sees this as moral dualism, which we should embrace. We can imagine universal principles and we can imagine applying them to the specificity of our lives. Walzer describes this as “reiteratively particularist and locally significant, intimately bound up with the maximal moralities created here and here and here, in specific times and places.”<sup>756</sup>

Walzer’s argument turns on the coexistence of that which is fundamental, and therefore universal, with that which is particular to a specific society, and therefore relative.<sup>757</sup> For Walzer, this dualism is definitive of human society, which is “universal because it is human, particular because it is a society.”<sup>758</sup>

While McDougal, Lasswell and Chen point out that different people “will assert these fundamental demands in many different modalities and nuances of institutional practice,” the authors nonetheless locate fundamentality in

an overriding insistence, transcending all cultures and climes, upon the greater production and wider distribution of all basic values, accompanied by increasing recognition that a world public order of human dignity can tolerate wide differences in the specific practices by which values are shaped and shared, so long as all demands and practices are effectively appraised and accommodated in terms of common interest.<sup>759</sup>

Buchanan identifies the importance of universality in discussing the way human rights develop. He argues that because an increasing number of countries and non-governmental organizations are participants in international law, the “processes that specify the content of human rights has been greatly broadened.”<sup>760</sup> Buchanan “welcome[s] these developments” because, *inter alia*, “broader participation can be expected to reduce the risk of parochial biases in moral reasoning about which rights are truly human rights and how their content is to be

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<sup>753</sup> Nussbaum, *Human Capabilities*, *supra* notex, at 74.

<sup>754</sup> WALZER, *supra* notex, at 2.

<sup>755</sup> WALZER, *supra* notex, at 4.

<sup>756</sup> WALZER, *supra* notex, at 7.

<sup>757</sup> WALZER, *supra* notex, at 8.

<sup>758</sup> WALZER, *supra* notex, at 8.

<sup>759</sup> WORLD PUBLIC ORDER, *supra* notex, at 6.

<sup>760</sup> BUCHANAN, *supra* notex, at 75.



understood.”<sup>761</sup> Therefore, in praising the diversity and legitimacy of this “broad participation” Buchanan endorses the notion of universality of rights consistent with the details of local lives.<sup>762</sup>

Nussbaum engages the more fraught question of whether women’s rights are universal. She focuses on women’s commonalities, rather than their differences (although she acknowledges that differences exist).<sup>763</sup> She concludes optimistically that universality enhances the notion of rights, answering the question that the formation of fundamental rights should take into account differences which will “allow explicitly for the possibility that we will learn from our encounters with other human societies to recognize things about ourselves that we had not seen before, or even to change in certain ways, according more importance to something we had thought more peripheral.”<sup>764</sup>

Universality, therefore, is an element of human rights, which, as described by Henkin, are:

a moral statement that mistreatment or suffering of other human beings violates a common morality (perhaps also natural law or divine law) and that all human beings are morally obligated to do something about such mistreatment or suffering, both individually and through their political and social institutions; ... that governments will attend to such mistreatment or suffering in other countries through international institutions and will take account of them also in their relations with other states.<sup>765</sup>

#### 4.4 Vulnerability

[N]o legal order, international or other, is true to its essential function if it fails to protect effectively the ultimate unit of all law – the individual human being.

H. Lauterpacht<sup>766</sup>

Human rights are worth only as much as it is worth to be human.

A. Kaplan<sup>767</sup>

##### 4.4.1 Description

In most rights formulations there is a notion of rights recipients or right-holders.<sup>768</sup> However, not all such right-holders may look to international law for the enforcement of their rights. For a right to be one which invokes an international response, I propose that the right-holder must be ‘vulnerable’ in the sense that, as a result of physical, cultural, socio-economic or other factors, that right-holder is more at risk of losing her or his right than a “reasonably empowered” person

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<sup>761</sup> BUCHANAN, *supra* notex, at 75.

<sup>762</sup> BUCHANAN, *supra* notex, at 75. It should be noted, however, that Buchanan does not conclude that all western values are automatically universal. *Id.*

<sup>763</sup> Nussbaum, Human Capabilities, *supra* notex, at 63, 72-74.

<sup>764</sup> Nussbaum, Human Capabilities, *supra* notex, at 74.

<sup>765</sup> HENKIN, *supra* note 426, at 16.

<sup>766</sup> LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS, *supra* notex, at 78-79.

<sup>767</sup> Abraham Kaplan, *Human Relations and Human Rights in Judaism*, in THE PHILOSOPHY OF HUMAN RIGHTS INTERNATIONAL PERSPECTIVES 53, 54 (Alan S. Rosenbaum ed., Greenwood Press, 1980).

<sup>768</sup> See for example, BUCHANAN, *supra* notex, at 77 (identifying the right-holder as “whoever is said to have the right.”).

falling within less vulnerable groups. For example, if an individual, in the suburbs of Connecticut, is robbed, his right to property has been violated. This violation, however, does not constitute an international human rights violation, even if the Connecticut police are unable to reclaim his car. Contrast this to the 'land grabs' in Zimbabwe, where war veterans have taken control of large tracts of lands in the possession of the white farmers. In the latter instance, the farmers' property rights take on an international dimension because they are suffering *as a group* (white farmers) which is particularly *vulnerable*. Therefore, the state's failure to remedy the violation of the property rights in Zimbabwe is an international human rights violation. In the former example, the Connecticut citizen is more reasonably empowered in her/his state than the white farmer in Zimbabwe.

I divide the theories evidencing this element of vulnerability into two groups: (1) theories which refer to right-holders; and (2) theories which expand or explain the notion of vulnerability.

#### 4.4.2 Theoretical Source

##### *Theories Referencing Right-Holders*

Hobbes' theory of rights focuses more on the individual self, rather than the plight of others. According to Hobbes, the fundamentality of rights exists in the essential nature of humankind as being belligerent, constantly on the defense against attack. The entire basis of Hobbes's theory is that the individual is always prepared for aggression in order to protect itself. Hobbes, therefore, develops a system of governance based on the perceived or actual vulnerability of human beings.<sup>769</sup>

At first blush a theorist such as Nozick may seem to preclude the vulnerable from his minimalist morality, which requires as little state involvement in private affairs as possible. However, his narrow carving out of core rights does not discount vulnerability; rather, it limits the occasions when the *state* is responsible for the vulnerability of individuals. In the appropriate circumstances, vulnerability is a key ingredient of his rights-theory, triggering the responsibility of the state to protect individuals because "each person is separate and 'his is the only life he has.'" <sup>770</sup>

Nickel's list of elements begins with the requirement of a right-holder. Every right "identifies some party as its possessor or holder," be it one or many individuals.<sup>771</sup> Buchanan also emphasizes that human beings are "subjects of primary moral importance, as the ground or source of especially weighty obligations. The focus on the right-holder captures the common belief, expressed in most human rights declarations and conventions, that to recognize human rights is to acknowledge the inherent dignity of persons."<sup>772</sup>

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<sup>769</sup> HOBBS AND LOCKE, *supra* notex, at 10.

<sup>770</sup> Shestack, *supra* notex, at 95, citing NOZICK, ANARCHY, STATE AND UTOPIA (1974).

<sup>771</sup> NICKEL, *supra* notex, at 13.

<sup>772</sup> BUCHANAN, *supra* notex, at 77.

Ramcharan too identifies elements of human rights, which include “appurtenance to the human person or group... and essentiality for the protection of vulnerable groups.”<sup>773</sup> Finally, Henkin recognizes that “political society must also act to protect the individual's rights against private invasion... For Buchanan, too, the “idea that the obligation is owed to the right-holder is also essential to human rights.”<sup>774</sup>

### *Theories Expanding or Explaining Vulnerability*

At the core of the jurisprudence of feminism is the notion of vulnerability. Its formulation is intended to deconstruct the dominance of man at the expense of women. This relevance of the element of vulnerability in developing feminism is evident in MacKinnon's statement that:

Those who most need equal treatment will be the least similar, socially, to those whose situation sets the standard as against which one's entitlement to be equally treated is measured. Doctrinally speaking, the deepest problems of sex inequality will not find women 'similarly situated' to men.<sup>775</sup>

Rorty, however, asks the more difficult question of human rights: “Why should I care about a stranger, a person who is no kin to me, a person whose habits I find disgusting?”<sup>776</sup> Rorty finds the answer in the notion of the:

sentimental story which begins ‘Because this is what it is like to be in her situation – to be far from home, among strangers,’ or ‘Because her mother would grieve for her.’ Such stories, repeated and varied over the centuries, have induced us... to tolerate, and even to cherish, powerless people.

The answer he proffers is in being able to identify with the vulnerable, to imagine a person's suffering or pain, and wanting to prevent it. According to Rorty, an evolution of sentiment has taken place, allowing us to identify with the humanity and needs of others.<sup>777</sup> Rorty, therefore, identifies the same phenomenon as MacKinnon, namely that perpetrators of human rights violations often commit such acts because they see their victims as something less than human. That is, they do not consider their victims to be holders of human rights.

For MacKinnon, the distinguishing factor is gender: men see women as falling outside the scope of human rights law. For Rorty, Serbs were able to violate Muslims in the way they did (through internment in concentration camps, mutilation, rape and murder) because they “discriminate between the true humans and the pseudohumans.”<sup>778</sup> However, in both cases, the victims involved are vulnerable, and suffer a deprivation of their human rights.

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<sup>773</sup> Alston, *supra* note 477, at 621. [Note: get original citation for Ramcharan]

<sup>774</sup> BUCHANAN, *supra* notex, at 77.

<sup>775</sup> CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 44 (Harvard University Press, Cambridge, Mass, 1987), cited by KYMLICKA, *supra* notex, at 244-245.

<sup>776</sup> Richard Rorty, *Human Rights, Rationality, and Sentimentality*, in *ON HUMAN RIGHTS THE OXFORD AMNESTY LECTURES*, 111, 133 (Stephen Shute and Susan Hurley eds., 1993) [hereinafter Rorty].

<sup>777</sup> Rorty, *supra* note 464, at 134.

<sup>778</sup> Rorty, *supra* note 464, at 112.

Professor Lukes suggests a scheme of human rights which echoes Rorty's sentimentality. For Lukes, human rights involve "seeing persons behind their identifying (even their self-identifying) labels and securing them a protected space within which to live their lives from the inside, whether in conformity with or deviation from the life their community requires of or seeks to impose on them."<sup>779</sup> Therefore, similarly to Rawls, Lukes urges us to look to human needs *behind* the labels which ordinarily influence the allocation of resources and creation of laws. It is this approach of looking at needs behind labels, which evidences the element of fundamentality, and the corresponding need to recognize vulnerability and universality in the upholding and enforcement of human rights.

Ramcharan also recognizes this element of vulnerability. He attributes much of the development of the human rights movement to "the existence of a cause for complaint, the voicing of claims based thereon and the resultant recognition of rights."<sup>780</sup> As a result, Ramcharan notes that the "universal movement has a duty of solidarity with those whose rights are not respected or are violated."<sup>781</sup>

One of the rigorous advocates of the vulnerable is Sen. Arguing against utilitarianism as a basis of political philosophy, Sen notes that the:

utility calculus can be deeply unfair to those who are persistently deprived... the usual underdogs in stratified societies, perennially oppressed minorities in intolerant communities, traditionally precarious sharecroppers living in a world of uncertainty, routinely overworked sweatshop employee in exploitative economic arrangements, hopelessly subdued housewives in severely sexist cultures... The mental metric of pleasure or desire is just too malleable to be a firm guide to deprivation and disadvantage.<sup>782</sup>

For Sen, the purpose of a political philosophy is the protection of the marginalized, victimized or vulnerable. To this end, he advocates a combination of theories, "which acknowledges the possibility of real conflict of interests... coexisting with a socially conditioned perception of harmony... that give stability to extreme inequalities in traditional societies."<sup>783</sup>

For Nussbaum, the capabilities theory is linked to the eradication of vulnerability. This is evident from her articulated need to determine, when assessing quality of life in a country, the extent to which its population has been placed in a position of mere human subsistence as opposed to being given the rights and freedoms necessary to reach an acceptable standard of living.<sup>784</sup>

Sociologist, Professor Lukes, echoes the entitlement notion and maintains:

that human rights presuppose a set of permanent existential facts about the human condition: that human beings will always face the malevolence and cruelty of others, that there will always be

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<sup>779</sup> Lukes, *supra* note 474, at 29-30.

<sup>780</sup> Ramcharan, *Universality of Human Rights, supra* notex at 139.

<sup>781</sup> Ramcharan, *Universality of Human Rights, supra* notex at 139.

<sup>782</sup> SEN, *DEVELOPMENT AS FREEDOM, supra* note 470, at 63.

<sup>783</sup> Sen, *Gender Inequality and Theories of Justice, supra* note 118, at 261.

<sup>784</sup> Nussbaum, *Human Capabilities, supra* notex, at 87.

scarcity of resources, that human beings will always give priority to the interests of themselves and those close to them, that there will always be imperfect rationality in the pursuit of individual and collective aims, and that there will never be an unforced convergence in ways of life and conceptions of what makes it valuable. In the face of these facts, if all individuals are to be equally respected, they will need public protection from injury and degradation; and from unfairness and arbitrariness in the allocation of basic resources and in the operation of the laws and rules of social life.<sup>785</sup>

## 4.5 State Accountability

The purpose of the State is to safeguard the interests of the individual human being and to render possible the fulfilment, through freedom, of his wider duty to man and society.

H. Lauterpacht<sup>786</sup>

### 4.5.1 Description

It is a basic premise of many legal and social systems that individuals have rights and duties.<sup>787</sup> Not every duty is owed by the state.<sup>788</sup> However, where human rights are concerned, the duty is either owed by individuals and enforceable by the state; or owed directly by the state. For example, respect for human dignity is a duty with which all human beings are required to comply. If an individual fails to comply with this duty, the state steps in to enforce it.

Rights-theories usually view the articulation, development and protection of rights from the point of view of a political system. Therefore, the obligation of the state vis-à-vis the individual is one of the more common elements of rights-theories.<sup>789</sup> However, the role of the state is understood very differently by the varying theorists, who tend to approach the obligations of the state from one of two directions: either to limit its intervention with private life or to promote its involvement in improving private life.

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<sup>785</sup> Stephen Lukes, *Five Fables About Human Rights*, in *ON HUMAN RIGHTS THE OXFORD AMNESTY LECTURES* 1993, 19, 29-30 (Stephen Shute and Susan Hurley, eds., 1993) [hereinafter Lukes].

<sup>786</sup> H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 68 (Archon Books, 1950) [hereinafter LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS*].

<sup>787</sup> See HENKIN, *supra* note 426, at 9 (noting that the creation of a human rights system implies “that the basic human needs of those unable to provide for themselves are the responsibility of all...”).

<sup>788</sup> This is not to say that a right does not exist just because it is not fulfilled as it is “possible for us to distinguish between a right that a person has which has not been fulfilled and a right that the person does not have.” AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 227-228 (1999) [hereinafter SEN, *DEVELOPMENT AS FREEDOM*]. (ALFRED A. KNOFF) Sen distinguishes between “aspiring legal entities, pre-legal moral claims” and “justiciable rights in courts and other institutions of enforcement.” Sen draws a distinction between human rights as a set of ethical claims which are distinct from legislated legal rights. For Sen, the “demand for legality is no more than just that – a demand – which is justified by the ethical importance of acknowledging that certain rights are appropriate entitlements of all human beings... In this sense, human rights may stand for claims, powers and immunities (and other forms of warranty associated with the concept of rights) supported by ethical judgments, which attach intrinsic importance to these warranties.” SEN, *DEVELOPMENT AS FREEDOM*, *supra* note 470, at 229.

<sup>789</sup> See, for example, *WORLD PUBLIC ORDER*, *supra* notex, at 5 (noting that the development of human rights “can be traced in the changing relation of the individual to the state: from the absolutist state, through the liberal or laissez-faire state to the welfare or socialist state, with an increasing perception of political organization as an instrument of all values.”)

Setting aside such differences in approach, a common theme of theorists is that rights are linked, either negatively or positively, to the state. This means simply that a human right relates to something which is the business of the state. Either the state is enjoined to do something for the individual or to refrain from doing something which will harm the individual. The fact that there are two sides of the coin – two opposing components of the same element – does not negate it as a prerequisite element of human rights.

I divide the theories into three categories: (1) neutral statements about state accountability; (2) theories that advocate for a conservative role of the state in facilitating individual rights; and, (2) theories arguing for greater involvement of the state in the pursuit of human rights. Based on these theories, I propose that when a vulnerable individual or group is harmed, the state has a positive duty to take steps to help remedy that harm. As discussed later in this chapter, this principle is applicable directly in the case of systemic intimate violence.

#### 4.5.2 Theoretical Source

##### *The Principle*

Henkin identifies the state as the regulator of rights and duties.<sup>790</sup> According to Henkin, the “state may arrange to satisfy my claims by maintaining domestic laws and institutions that give me... rights and remedies... Those legal rights and remedies within society give effect to my human rights claims upon society.”<sup>791</sup>

Ronald Dworkin and John Rawls, leading theorists of political philosophy, have taken us to the point of concluding that states have obligations to their citizens and each theorist, spawning a range of subsequent ideas, has developed theories for identifying the most pressing needs and the way states should operate to ensure the fulfillment of such needs.<sup>792</sup> In determining the extent of a state’s responsibility to its citizens, Rawls looks to justice and famously suggests that what is just is that which is fair.<sup>793</sup> For Rawls, social justice (or justice as fairness) is achieved by “the way in which the major social institutions distribute fundamental rights and duties...”<sup>794</sup>

Buchanan notes that human rights have two essential elements: “a permission or liberty and a correlative obligation.”<sup>795</sup> The obligation, according to Buchanan, is “especially weighty.”<sup>796</sup> For Buchanan “it is misleading to think of our understanding of human rights and the attempt to

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<sup>790</sup> According to Henkin, human rights “imply the obligation of society to satisfy those claims.” HENKIN, *supra* note 426, at 3.

<sup>791</sup> HENKIN, *supra* note 426, at 3.

<sup>792</sup> Any satisfactory discussion of these theorists exceeds the ambit of this thesis. For an initial study of these authors’ theories, see Ronald Dworkin, *What Is Equality? Part I: Equality of Welfare*, PHILOSOPHY AND PUBLIC AFFAIRS, VOL. 10, NO. 3, 185-246 AND 191-192 (1981); RAWLS, A THEORY OF JUSTICE *supra* note 274. See also BUCHANAN, *supra* notex, at 77 (confirming Dworkin’s point that the state’s “correlative obligation ‘trumps’ appeals to what would maximize utility.”).

<sup>793</sup> RAWLS, A THEORY OF JUSTICE *supra* note 274, at 3-6.

<sup>794</sup> RAWLS, A THEORY OF JUSTICE *supra* note 274, at 6.

<sup>795</sup> BUCHANAN, *supra* notex, at 77.

<sup>796</sup> BUCHANAN, *supra* notex, at 77.

implement them in a legal system as entirely independent. Even if the existence and basic determination of human rights can be determined by moral reasoning without reference to the particular features of any legal system, institutionalized efforts to monitor and improve compliance with these rights are needed to specify their content, if they are to provide practical guidance and these must be context specific.”<sup>797</sup>

Ramcharan is explicit in this regard and states that “[e]ach State should, on the basis of international human rights charters, set up an effective and appropriate national monitoring system comprising constitutional, legislative, judicial, administrative, teaching and information branches.”<sup>798</sup> For Rawls, human rights “specify limits on the domestic institutions required of all peoples by that law. In this sense they specify the outer boundary of admissible domestic law of societies in good standing in a just society of peoples.”<sup>799</sup>

Alston’s definition of human rights requires that human rights be “capable of achieving a very high degree of international consensus” and “compatible or at least not clearly incompatible with the general practice of states.”<sup>800</sup> Furthermore, his requirement that rights be precise is aimed at the development of obligations, which include the obligations of the state, “not only the absence of restraint but ‘also the positive organization of the social and economic conditions within which men can participate to a maximum as active members of the community at the highest level permitted by the material development of the society.’”<sup>801</sup>

Nickel’s list of human rights elements requires the identification of “a party or parties who must act to make available the freedom or benefit identified by the right’s scope.”<sup>802</sup> Nickel invokes the state as one of the addressees of rights. These addressees, which include “local, state, national and international legal systems,” are responsible for protecting “important freedoms, powers, immunities, protections, opportunities and benefits.”<sup>803</sup>

### *The Abstaining State*

Locke’s philosophy of law entwines the state, the individual and the deity throughout. In analyzing whether law is binding on men, Locke states that as far as the government is concerned, it is bound not to act capriciously towards its citizens. However, while all [divine] law must be obeyed, it is not necessary to obey “a king out of fear, because he is more powerful and can compel us. For this would be to establish the power of tyrants, thieves, and pirates.”<sup>804</sup> Locke, therefore, imports the state into his discussion of rights and the limitations on state power.

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<sup>797</sup> BUCHANAN, *supra* notex, at 74-75.

<sup>798</sup> Ramcharan, *Universality of Human Rights*, *supra* notex at 139.

<sup>799</sup> John Rawls, *The Law of Peoples*, in *ON HUMAN RIGHTS THE OXFORD AMNESTY LECTURES*, 41, 70 (Stephen Shute and Susan Hurley eds., 1993) [hereinafter Rawls, *The Law of Peoples*].

<sup>800</sup> Alston, *supra* note 477, at 621.

<sup>801</sup> Alston, *supra* notex, at 614.

<sup>802</sup> NICKEL, *supra* notex, at 14. Nickel states that “[l]egal enforcement is often important to making rights effective, but such enforcement is not essential to the existence of rights.” NICKEL, *supra* notex, at 35.

<sup>803</sup> NICKEL, *supra* notex, at 35.

<sup>804</sup> LOCKE, *supra* notex, at 213.

Nozick, whose theory is characterized by the least possible state intervention, identifies the role of the state as minimal, mostly abstaining, and intervening only “to protect citizens against force, fraud, theft, and breach of contracts, to settle disputes, and to punish violations.”<sup>805</sup> Even at this minimalist level, Nozick recognizes that the state has a duty to intervene to protect its citizens against force. I propose that this is directly applicable when such force is exercised against a particularly vulnerable subset of society, and therefore requires states to take positive action to help remedy systemic intimate violence.

### *The Proactive State*

Nussbaum, by contrast, argues expressly for positive state intervention. She proposes that “human capabilities exert a moral claim that they should be developed.”<sup>806</sup> She posits the state as a facilitating structure, one that develops institutions to draw on the capacity of each individual to reach her/his potential.<sup>807</sup> Nussbaum states the belief that:

certain basic and central human endowments have a claim to be assisted in developing, and exert that claim on others, and especially, as Aristotle saw, on government... in thinking of political planning we begin from this notion, thinking of the basic capabilities of human beings as needs for functioning, which give rise to correlated political duties.<sup>808</sup>

According to Nussbaum, therefore, “capability, not actual functioning, should be the goal of public policy.”<sup>809</sup>

Henkin also proposes that the “rights deemed to be fundamental include not only freedoms which government must not invade, but also rights to what is essential for human well-being, which government must actively provide or promote.”<sup>810</sup> Even in respect of the less enforceable socio-economic rights, Henkin reminds us that the ICESCR “uses the language of right, not merely of hope; of undertaking and commitment by governments, not merely of aspiration and goal... the language of rights is increasingly used and the sense of entitlement to such benefits is becoming pervasive.”<sup>811</sup>

In the same vein as Nussbaum, Sen raises the standard of the state’s obligations to its citizens to ensure social opportunities. Social opportunities, according to Sen:

refer to the arrangements that society makes for education, health care and so on, which influence the individual’s substantive freedom to live better. These facilities are important not only for the conduct of private lives (such as living a health life and avoiding preventable

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<sup>805</sup> Shestack, *supra* notex, at 94. However, the state “should *not* relieve poverty, provide for general welfare, or produce distributive justice.”

<sup>806</sup> Nussbaum, *Human Capabilities*, *supra* notex, at 88.

<sup>807</sup> Nussbaum, *Human Capabilities*, *supra* notex, at 88 (“Human beings are creatures such that, provided with the right educational and material support, they can become fully capable of the major human functions...”).

<sup>808</sup> Nussbaum, *Human Capabilities*, *supra* notex, at 88.

<sup>809</sup> Nussbaum, *Human Capabilities*, *supra* notex, at 83. According to Nussbaum “[i]t is the gap between potential humanness and its full realization that exerts a moral claim [on states].” *Id* at 89.

<sup>810</sup> Henkin, *Human Rights in International Law*, *supra* notex, at 33-34.

<sup>811</sup> Henkin, *Human Rights in International Law*, *supra* notex, at 43.



morbidity and premature mortality), but also for more effective participation in economic and political activities.<sup>812</sup>

Therefore, Sen argues for positive state action in the form of “social support, public regulation, or statecraft” to “enrich – rather than impoverish – human lives.”<sup>813</sup>

For these reasons, I adopt the approach that states have a duty not just to refrain from directly violating the ‘fundamental’ and ‘universal’ rights of ‘vulnerable’ members of its society (as these terms are defined in this chapter), but also to take positive steps to prevent and help remedy such violations when faced with the knowledge thereof. When a state fails to protect this right, the omission triggers international law. For the purposes of this chapter, this principle is referred to as the notion of ‘state accountability.’

## 5 Formulation of the Test for Determining ‘Human Rights’

Against this theoretical background, I now consider whether freedom from systemic intimate violence is an interest that is capable of being cast as an international human right. Based on philosophical and legal discussions above, I propose that the test to determine whether an *interest* is a *right* is as follows: (1) is the interest fundamental; (2) is it universal; (3) does it protect the vulnerable; and, (4) is the state accountable for its violation? If the answer is affirmative and each of these elements is fulfilled, the interest is a human right protected in international law.<sup>814</sup> However, I do not propose this as a test for determining whether an

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<sup>812</sup> SEN, DEVELOPMENT AS FREEDOM, *supra* note 470, at 39.

<sup>813</sup> SEN, DEVELOPMENT AS FREEDOM, *supra* note 470, at 5. Sen identifies five social institutions that are integral to achieving freedom, and thus development. They are: political freedoms; economic facilities; social opportunities; transparency guarantees and protective security. It is the latter that is applicable to the justification of the right to be free from systemic intimate violence. Without institutional remedies for physical violence, irrespective of whether the violence emanates from a public or private source (i.e. without protective security), both individuals and their society will be impeded in their development and attainment of comprehensive and meaningful liberty. SEN, DEVELOPMENT AS FREEDOM, *supra* note 470, at 10.

<sup>814</sup> The first factor relates to the fundamental nature of the interest: it is necessary to prove that the claim relates to a universally important social value or common morality. The interest must be global and applicable to varying degrees, in a world of diverse nations. The claim must be precise and designate a clear behavioral requirement. There must be a likelihood of compliance with or recognition of the claim on the part of states. There must be an objective, normally the elimination of harm or suffering. While I address each criterion within the framework of these three themes, I do not maintain that this is the sole manner in which one determines the international nature of a right. Alston himself acknowledges that this is neither a closed list of criteria nor an accurate one. The patriarchy of Alston’s international law regime is evident in the following extracts quoted by Alston. Alston refers to a UNESCO Committee on the Theoretical Bases of Human Rights which defined a “right” as a “condition of living, without which in any given historical stage of a society, men cannot give the best of themselves as active members of the community because they are deprived of the means to fulfill themselves as human beings”. Furthermore, “‘Liberty’ was defined to mean not only the absence of restraint but ‘also the positive organization of the social and economic conditions within which men can participate to a maximum as active members of the community at the highest level permitted by the material development of the society’”. Much more is contained in these statements than mere terminology. The reference to “men” in both conceptualizations is not simply a universal term employed for the sake of linguistic convenience; it is a reflection of a status quo which recognized (and recognizes) men “as active members of the community” and the sole beneficiaries of the system of “positive organization of ... social and economic conditions...”. This is not to say that women are helpless victims of a regime run by and for men. Different women in different countries enjoy varying degrees of empowerment and occupy different levels socio-economic fulfillment. However, this project is not seeking either to reify a perception of subjugation and

international human right should *remain* a right. I offer this test merely as an instrument for determining whether a *new* claim should be acknowledged as a human right under international law.

The four parts of the test are linked and the answer to all questions must be in the affirmative in order for the interest to qualify as an international human right.<sup>815</sup> I now proceed to apply the test to systemic intimate violence.

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victimization or to laude any particular fabricated quality of women which resists such subjugation; it merely seeks to consider whether the factual instances of harm inflicted upon a significant portion of the world's population by virtue of its gender has been adequately described, properly understood and correctly categorized. The remaining factors within these descriptions can be used to interpret these themes. For example, the fundamental nature of a claim can be proved by showing that it is eligible for recognition in international law and that it is consistent with, but does not repeat, current international human rights. The global relevance of the claim can be proved by the fact it is capable of achieving a high degree of international consensus and that it is compatible, or not clearly incompatible, with the practice of States. Finally, the precision of the claim will emanate from the proof used to describe its fundamental and global relevance. His list is a guide of what a list of criteria "might look" like and not what such a list ought to look like. Alston, *supra* note 477, at 614. Alston's list assumes the paradigm in which the Universal Declaration was born. This paradigm developed (and hence the Universal Declaration developed) because of the worst possible incidences of cruelty effected under and condoned on the basis of ethnic divisions. Most of our modern human rights discourse developed as a result of the ethnic cleansing, genocide, torture, inhumanness and indescribable cruelty of the Holocaust. Little in our history at all has matched the meticulous and reviled evil of Hitler's regime. It is natural and correct that from this cesspool of violation should develop the iridescence of a human rights order. It is therefore necessary to understand the broad backdrop to and the global influences of international law.

<sup>815</sup> I do not propose this as a test for determining whether an international human right should *remain* a right. I offer this test merely as an instrument for determining whether a *new* claim should be acknowledged as an international human right.

## Part B: Applying the Test to Systemic Intimate Violence

As described in chapter two, the elements of systemic intimate violence are: (i) severe emotional or physical harm, or the threat thereof; (ii) a continuum of violence as opposed to a one-off incident; (iii) committed predominantly by men against women within an intimate relationship; (iv) where the victim is unable to procure traditional legal assistance due to her isolation, incapacitation or general vulnerability; and (v) the violence is ‘systemic’ in the sense that it occurs in a society in which the state in question has failed to supply the minimum facilities necessary to address such violence appropriately.

Given these elements, I propose that systemic intimate violence satisfies the requirements of fundamentality, universality, vulnerability and state accountability necessary to trigger international law.

### 6 Fundamentality

#### 6.1 General

Systemic intimate violence is a violation of the following fundamental human rights: equality; physical integrity; and, dignity. While a slew of other rights is violated by systemic intimate violence, I make my claim on the basis of these three rights because there is little contention as to their fundamentality, or to the universal application thereof.

I therefore propose that the nature of systemic intimate violence is such that freedom from such violence is an international human right requiring positive state enforcement. In the following discussion I demonstrate how: (1) each of the fundamental human rights to equality, physical integrity and dignity has been interpreted and applied in international law;<sup>816</sup> and, (2) how each such right is violated by systemic intimate violence.

#### 6.2 The Right to Equality

##### 6.2.1 Meaning and Application in International Law

*Whereas* recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world

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<sup>816</sup> Systemic intimate violence has many of the same components as official torture, mass rape, FGC, and disappearances. I do not suggest that all these violations are the same; however, they share core elements which are constituent components of systemic intimate violence. Article 1 of the Convention against Torture defines torture as: “Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” Torture Convention, *supra* note 5.

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in ... the equal rights of men and women

## Universal Declaration of Human Rights<sup>817</sup>

Equality is a “principal theme” of international human rights and appears in several binding international instruments.<sup>818</sup> The UN Charter, augmented by the UDHR, commits states to protect human rights on the basis of equality.<sup>819</sup> This is confirmed expressly in the ICCPR and the ICESCR<sup>820</sup> and most international instruments include a non-discrimination clause regarding the application and implementation of treaty provisions.<sup>821</sup>

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<sup>817</sup> Paragraph 1 of the preamble to the UDHR, *supra* notex.

<sup>818</sup> Henkin, *Human Rights in International Law*, *supra* notex, at 42 (“The major U.N. covenants are permeated with the commitment to equality. Discrimination on grounds of race, color, sex, language, religion, and other such characteristics is prohibited again and again, even in times of public emergency.”).

<sup>819</sup> The UN Charter refers to the rights set forth in the UDHR. *See* U.N. Charter, *supra* note 508. For a discussion of the binding status of the UDHR, *see* Hannum, *supra* note 492, at 287. Chapter nine of the UN Charter commits the UN to promoting, *inter alia*, “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to ... sex.” Article 55(c) of the U.N. Charter, *supra* note 508. Article 2 of the UDHR, *supra* note 4: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Article 7 provides that “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.” This is an important provision in that it calls on States to act positively to protect individuals against acts of discrimination. *See* also article 3 of the UDHR, *supra* note 4: “Everyone has the right to life, liberty and security of person.” Article 4 prohibits slavery: “No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.” Finally, article 5 prohibits torture: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” For a discussion of the political and intellectual background to the UDHR, *see* the address by Oscar Schachter at the *Pace International Law Review* in 1999, 11 *PACE INT’L L. REV.* 51 (1999).

<sup>820</sup> ICCPR, *supra* notex, *see*: the preamble, paragraph 1: “Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world;” article 3: “The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant;” article 14(1): “All persons shall be equal before the courts and tribunals;” article 14(3): “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality;” article 23(4): “States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution;” article 25(b): protecting “universal and equal suffrage;” article 25(c): “To have access, on general terms of equality, to public service in his country;” and, article 26: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” As regards the ICESCR, *supra* note 13, *see*: the preamble, paragraph 1: “Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world;” article 3: “The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant;” article 7(a)(i): “Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;” article 7(c): “Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;” and, article 13(2)(c): “Higher education shall be made equally accessible to all.”

<sup>821</sup> Torture Convention, *supra* note 5.

In particular, this right to equality in international law includes the right not to be discriminated against on the grounds of sex. The primary examples of binding regional and international instruments incorporating gender equality are the UDHR, the ICCPR, the ICESCR, CEDAW, DEVAW, the Belem Do Para and the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>822</sup>

Moreover, there is further evidence of gender equality as a norm of international law. The ‘fundamental’ importance of combating gender discrimination (and gender-based violence specifically) was confirmed at Beijing +10 in March 2005, when the Beijing Platform for Action was unequivocally reaffirmed.<sup>823</sup> The UN has endorsed the worldwide Sixteen Days of Activism against Gender Violence Campaign,<sup>824</sup> emphasizing “the connections between women’s human rights, violence against women and women’s health, and the detrimental consequences violence against women has on the well-being of the world as a whole.”<sup>825</sup>

A large collection of nations’ representatives demonstrated a commitment to the fundamentality of gender equality in the articulation of the third goal of the Millennium Development Goals to “promote gender equality and empower women.”<sup>826</sup> The UN Department of Economic and Social Affairs has confirmed this link, indicating that gender equality is a prerequisite to achieving the other Millennium Development Goals.<sup>827</sup> This lead was taken up by United Nations Secretary General Kofi Annan who confirmed the connection between combating violence against girls and women to the achievement of the Millennium Development Goals.

## 6.2.2 The Violation of Equality by Systemic Intimate Violence

Systemic intimate violence is colored by gender delineations. This is not to say that such violence does not include victims and perpetrators of both genders against both genders;

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<sup>822</sup> Article 8 of the European Convention, *supra* note 74. The fundamentality of the right to gender equality is evident in international instruments, but less clear from the practice of nations. Both mainstream human rights instruments and women’s rights instruments attest to the development of a rights-based system which includes the right to enjoy civil and political rights, and socio-economic rights, without regard to gender. It is argued that in order to end discrimination against women, gender in fact should be taken into account on the basis that inequalities can only be remedied when one acknowledges the difference in the first place. See, for example, the discussion by Jennifer L. Ulrich, *Confronting Gender-Based Violence with International Instruments: Is a Solution to the Pandemic within Reach?* 7 *IND. J. GLOBAL LEGAL STUD.* 629 (arguing that various instruments in international law, when read together, incorporate a norm against violence against women and that positive steps need to be taken in societies to extricate the roots of violence against women).

<sup>823</sup> See The Office of the United Nations High Commissioner for Human Rights 2005 Theme Announcement for the Sixteen Days of Activism against Gender Violence Campaign, *available at* [http://www.ohchr.org/english/events/16\\_days/theme.htm](http://www.ohchr.org/english/events/16_days/theme.htm) [hereinafter Sixteen Days of Activism].

<sup>824</sup> This is an international campaign originating from the first Women’s Global Leadership Institute in 1991. Since 1991 approximately 1700 organizations in 130 countries have participated in the campaign. See Sixteen Days of Activism, *supra* note 514.

<sup>825</sup> See Sixteen Days of Activism, *supra* note 514.

<sup>826</sup> The U.N. Development Goals, *available at*, <http://www.un.org/millenniumgoals/#>.

<sup>827</sup> See U.N. Department of Economic and Social Affairs Statistics Division Progress Towards the Millennium Development Goals 1990-2005, *available at*, [http://unstats.un.org/unsd/mi/goals\\_2005/goal\\_3.pdf](http://unstats.un.org/unsd/mi/goals_2005/goal_3.pdf).

however, both the statistics and the limited extent to which women enjoy their fundamental rights and freedoms evidences an indisputable intersection between violence and their gender.

It is within this context that I claim that individuals have a justiciable right to be treated equally, and a right, enforceable against the state, to safety, not only in public, but also in private.<sup>828</sup> In particular, since women suffer the most (although certainly not exclusively) from systemic intimate violence, and systemic intimate violence is the primary cause of injury to women, women constitute a group that is particularly vulnerable.

While many perceive gender differentiation as normal or harmless, the perpetuation of separateness – as was the case with the racial system of ‘separate but equal’ – manifests in explicit and implicit social subjugation, limited political power and the submergence of women’s individual autonomy.

Richard Rorty describes some of the discriminating institutions which use:

simpler ways of excluding them from humanity: for example, using ‘man’ as a synonym of ‘human being.’ As feminists have pointed out, such usages reinforce the average male’s thankfulness that he was not born a woman, as well as his fear of the ultimate degradation: feminization... [Rieff] confirms Catherine McKinnon’s claim that, for most men, being a woman does not count as a way of being human. Being a nonmale is the third main way of being nonhuman.<sup>829</sup>

McDougal, Lasswell and Chen confirm that “the existence and perpetuation of distinct sex roles, as dictated mostly by men, have characteristically resulted in male-dominated societies in which women are regarded as ‘the subordinate sex,’ ‘the second sex,’ ‘the weaker sex,’ or ‘the Other.’”<sup>830</sup> This perception justifies the expression of dominance by male family members over female family members through violence. Therefore, when women are subjected to systemic intimate violence, both their communities and the state perceive their experience as ranking lower than public violence.

The result of this perception is that difference becomes discrimination and the class of women becomes “that of a caste.”<sup>831</sup> This leads to a lack of “support for fundamental functions of a human life.”<sup>832</sup> Women are

less well nourished than men, less healthy than men, more vulnerable to physical violence and sexual abuse. They are much less likely than men to be literate, and still less likely have preprofessional or technical education. Should they attempt to enter the workplace, they face

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<sup>828</sup> For a discussion regarding the absence of household gender inequality in law and policy making, see Okin, *supra* note 593, at 279-289.

<sup>829</sup> Rorty, *supra* note 464, at 114.

<sup>830</sup> WORLD PUBLIC ORDER, *supra* notex, at 614, citing, *inter alia*, SIMONE DE BEAUVOIR, THE SECOND SEX, xvi (H. Parshley trans. & ed. Bantam ed. 1961).

<sup>831</sup> WORLD PUBLIC ORDER, *supra* notex, at 615-616.

<sup>832</sup> BUCHANAN, *supra* notex, at 79, citing MARTHA NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT I (Cambridge University Press, Cambridge, 2000).

greater obstacles, including intimidation from family or spouse, sex-discrimination in hiring, and sexual harassment in the workplace...<sup>833</sup>

As McDougal, Lasswell and Chen indicate, “[s]ex, like race, offers no rational criterion for ‘classification’ in ‘determining the legal rights of women, or of men.’<sup>834</sup> Therefore, according to McDougal, Lasswell and Chen, “the most rational general community policy requires the complete emancipation of women, without countenancing the subordination of men.”<sup>835</sup>

The separateness of men and women, therefore, has not led to equality between the two genders but to inequality and, in part, to a situation where one in three women worldwide is a victim of systemic intimate violence. Such violence is an extension of gender discrimination and inequality, and for that reason constitutes a breach of the fundamental right of women to be treated equal. On this basis, I propose that the ‘fundamentality’ element of international human rights is satisfied. However, there is further evidence of fundamentality in the right to physical integrity, which I now turn to discuss.

### 6.3 The Right to Physical Integrity

#### 6.3.1 Meaning and Application in International Law

Physical integrity is a fundamental human right. All states are required to protect the security of the person.<sup>836</sup> The underlying premise is that each person has an interest in the maintenance of her or his physical autonomy and an essential right to be free from fear.<sup>837</sup> This is reflected in international treaties, declarations, other international instruments and many nations’ constitutional and legal systems.<sup>838</sup> The legitimate violation of this right takes place under very rare circumstances.<sup>839</sup> For the rest, physical harm is prohibited and its perpetrators punished.<sup>840</sup>

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<sup>833</sup> BUCHANAN, *supra* note, at 79, citing MARTHA NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT 1* (Cambridge University Press, Cambridge, 2000).

<sup>834</sup> WORLD PUBLIC ORDER, *supra* note, at 623-624.

<sup>835</sup> WORLD PUBLIC ORDER, *supra* note, at 625.

<sup>836</sup> Article 3 of the UDHR, *supra* note 4: “Everyone has the right to life, liberty and security of person.” Article 4 prohibits slavery: “No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.” Finally, article 5 prohibits torture: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Article 22 enjoins States to dedicate resources to ensuring the flourishing of individuals’ dignity and personality.

<sup>837</sup> The principles of safety and equality that are violated by domestic violence are rooted in articles 2 and 3 of the UDHR, *supra* note 4. See also Franklin D. Roosevelt, “Four Freedoms Speech,” Annual Message to Congress January 6, 1941, available at <http://www.fdrlibrary.marist.edu/4free.html> (“The fourth is freedom from fear, which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor --anywhere in the world... To that new order we oppose the greater conception --the moral order. A good society is able to face schemes of world domination and foreign revolutions alike without fear. Since the beginning of our American history we have been engaged in change, in a perpetual, peaceful revolution, a revolution which goes on steadily, quietly, adjusting itself to changing conditions without the concentration camp or the quicklime in the ditch. The world order which we seek is the cooperation of free countries, working together in a friendly, civilized society.”) Eleanor Roosevelt, a historic figure in constructing the UDHR, emphasized the so-called four freedoms, as articulated by former President Franklin D. Roosevelt. This included the freedom from fear. The freedoms became a fundamental value around which many of the principles of international human rights law have developed.

<sup>838</sup> See for example, the Torture Convention, *supra* note 5, and its regional equivalents; CEDAW, DEVAW and their regional equivalents; the ICCPR and its regional equivalents; the Banjul Charter, and more. The rights to physical

In order to trigger international law, physical harm must attain “a minimum level of severity.”<sup>841</sup> The assessment of this minimum is both relative and objective. According to the European Court of Human Rights, the severity of the harm depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim.<sup>842</sup>

One of the more recent specifications of the right to physical integrity is the harm caused by mass rape. Mass rape is characterized by the seriousness of harm, in that “it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim.”<sup>843</sup> The ICTY, in its consideration of acts of mass rape, adopted an objective test to determine whether such acts violated the international principle protecting physical autonomy. It held that violence should be deliberate and cause “serious mental or physical suffering or injury or constitutes a serious attack on human dignity.”<sup>844</sup> The ICTY concluded that “the humiliation to the victim must be so intense that the reasonable person would be outraged.”<sup>845</sup>

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autonomy and dignity are also reflected in many nations’ constitutions, which may also constitute a form of evidence of customary international law. See Hannum, *supra* note 492, at 322. Physical integrity is an element of crimes against humanity as defined in the Rome Statute. See Rome Statute, *supra* note (including in the definition of crimes against humanity: article 7(e) “Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; article 7(f) Torture; article 7(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; and, article 7(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

<sup>839</sup> As far as the protection of an individual’s physical integrity is concerned, there are instances where physical or emotional invasive conduct is permissible. For example, punitive incarceration and violence in self defense are considered to be justifiable and proportionate forms of invasive conduct. There are also practices, which, while less mainstream, in certain regions are still viewed as acceptable inroads to an individual’s physical autonomy, for example, female genital cutting, widow burning and the death penalty. The death penalty is the subject of much debate and continues to be implemented by several countries, including China and the United States. For an analysis of the international trends of and attitudes towards capital punishment, see AMNESTY INTERNATIONAL, *WHEN THE STATE KILLS... THE DEATH PENALTY V. HUMAN RIGHTS* (1989). The explanations used to justify these practices are largely rejected by international law. Therefore, it is at least possible to conclude that the violation of an individual’s physical integrity is permissible in international law under rare circumstances, and that systemic intimate violence is not such a circumstance.

<sup>840</sup> This is true of both common law and civil law countries.

<sup>841</sup> A. v. The United Kingdom, *supra* note 78.

<sup>842</sup> A. v. The United Kingdom, *supra* note 78.

<sup>843</sup> “Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” Prosecutor v. Akayesu, *supra* note 109, at paragraph 597. In determining whether the rapes in the Former Yugoslavia constituted a violation of international humanitarian law, the ICTY held that “rape, torture and outrages upon personal dignity, no doubt constituting serious violations of common Article 3, entail criminal responsibility under customary international law.” The tribunal held that the charges of “rape, torture and outrages upon personal dignity... are serious offences.” Prosecutor v. Kunarac, *supra* note 2, at paragraphs 407(iii) and 408.

<sup>844</sup> Prosecutor v. Kunarac, *supra* note 2, at paragraph 502, citing *Prosecutor v. Delalic and Others*, Case No 96-21-T, Judgement, 16 Nov 1998, par 543.

<sup>845</sup> Prosecutor v. Kunarac, *supra* note 2, at paragraph 504, citing *Prosecutor v. Aleksovski*, Case No IT-95-14/1-T, Judgement, 25 June 1999, par 54 [hereinafter *Prosecutor v. Aleksovski*] (“The Trial Chamber in the *Aleksovski* case also considered the question of how the existence of humiliation or degradation could be measured and concluded that a purely subjective assessment would be unfair to the accused because the accused’s culpability would be made to depend not on the gravity of the act but on the sensitivity of the victim. Therefore it was concluded that “[...] an objective component to the *actus reus* is apposite...”).



On this basis, I propose that the mental and physical suffering of women victims of systemic intimate violence is sufficiently severe that it satisfies the objective test set forth by the ICTY. By examining below the acts of harm inherent in systemic intimate violence, I propose that, objectively and relatively, systemic intimate violence reaches a ‘minimum level of severity’ and, therefore, is a violation of the international right to physical integrity.

### 6.3.2 The Violation of Physical Integrity by Systemic Intimate Violence

The harm caused by systemic intimate violence can be grouped into three categories: (1) physical or mental harm; (2) threats of harm; and, (3) the continuum of harm. Each of these three categories of harm have been prohibited in international law in respect of other human rights violations, and on this basis I propose that such harm should be prohibited in the context of systemic intimate violence. Where a victim experiences any of these forms of harm, a violation of the international right to physical integrity occurs.

#### *Acts Causing Physical or Mental Harm*

I discuss in detail the extreme forms of physical and psychological harm suffered as a result of systemic intimate violence in chapter two, and do not repeat that discussion here. However, I believe it suffices to say that such violence, and the intent with which it is executed, often mirrors accounts of other violations of victims’ right to physical integrity, such as mass rape, FGC, enforced disappearances and official torture.<sup>846</sup>

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<sup>846</sup> Acts of systemic intimate violence cause “severe pain or suffering, whether physical or mental,” and which are “intentionally inflicted.” There are instances where abusers are intoxicated or high when carrying out acts of abuse; however, in most instances the abuse is not limited to these periods of insobriety. Moreover, the abuser is aware of his propensity for belligerence and aggression when inebriated and such foresight could constitute the intent element envisaged by the Convention against Torture. Torture Convention, *supra* note 5. The abuser has full emotional, psychological, and physical control over his victim. Isolating one’s intimate partner from family, friends, society and, most importantly, State authorities, is one of the key characteristics of domestic torture. See Joyce McCarl Nielson ET AL., *Social Isolation and Wife Abuse: A Research Report*, in INTIMATE VIOLENCE: INTERDISCIPLINARY PERSPECTIVES 49 (Emilio C. Viano ed., 1992) (providing a detailed discussion and analysis of isolation and domestic violence). The purpose of the infliction of pain differs widely and includes theories of social inferiority, psychology and sexism. See WHITE, *supra* note 135, at 20–21. White explains that African-American men are so demoralized in the public world that violence against their intimate partners is sought as an outlet for suppressed anger and humiliation. Id. See, e.g., Fedler, *supra* note 179, at 250–251 & n.77. The first two categories of abusers—type “A” and “B”—generally possess some fear of the law or have a social profile which they wish to protect. The third, or type “C”, abuser is one who has no fear of the police or the law and as such will have no respect for any court order which may be made. In such a case the victim’s only alternative is suicide or murder of the abuser. Id. See also Renata Vassel-Augenstein & Annette Ehrlich, *Male Batterers: Evidence for Psychopathology*, in INTIMATE VIOLENCE: INTERDISCIPLINARY PERSPECTIVES 139 (Emilio C. Viano ed., 1992) (developing a psychological profile that is believed to be common to many batterer’s based upon the responses of batterer’s in psychological testing). See WALKER, *supra* note 127, at 71. See also Noel A. Cazenave & Margaret A. Zahn, *Women, Murder, and Male Domination: Police Reports of Domestic Violence in Chicago and Philadelphia*, in INTIMATE VIOLENCE: INTERDISCIPLINARY PERSPECTIVES 83, 85 (Emilio C. Viano ed., 1992) (arguing that the ultimate cause of battering is sexual inequality). Most importantly, the perpetuation of systemic intimate violence involves either the omission or acquiescence of public officials or persons acting in an official capacity. Report of the Special Rapporteur on violence against women, *supra* note 58, at 12 (“Torture, as defined in international human rights law, generally involves four critical elements: (a) it causes severe physical and/or mental pain, it is (b)

Applying the ICTY's severity standard, it is possible to conclude that prohibited acts are those which constitute inhumane treatment, leading to grave consequences and include serious suffering or humiliation.<sup>847</sup> The required intensity of the harm, according to the ICTY, is not a question of inconvenience or discomfort but rather consists of "physical and psychological abuse and outrages *that any human being would have experienced as such.*"<sup>848</sup>

Moreover, this test of severity has been applied successfully in other contexts of gender-based violence, namely, FGC. FGC qualifies as a violation of physical integrity. Notwithstanding the private nature of the violence, the severity triggered the attention and approbation of international law.<sup>849</sup> While the process of FGC ranges in severity, in general, the removal of healthy bodily tissue impedes a woman's ability to attain the highest standard of mental and physical health.<sup>850</sup>

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intentionally inflicted, (c) for specified purposes and (d) with some form of official involvement, whether active or passive.").

<sup>847</sup> Prosecutor v. Kunarac, *supra* note 2, at paragraph 503. The ICTY applied the *actus reus* requirement of inhumane treatment in common Article 3 of the Geneva Conventions. Prosecutor v. Kunarac, *supra* note 2, at paragraph 502.

<sup>848</sup> Prosecutor v. Kunarac, *supra* note 2, at paragraph 505, citing, *Prosecutor v. Aleksovski*, *supra* note 527. For a discussion of the *mens rea* component relevant criminal liability, see Prosecutor v. Kunarac, *supra* note 2, at paragraphs 508-514. While mass rape differs from systemic intimate violence in its organized and systematic execution, the relevant characteristic it shares with systemic intimate violence is the extent and severity of the harm in question. Rape in the conflict of Bosnia-Herzegovina was "deliberate, massive and egregious." It was used as an instrument of ethnic cleansing, intended to degrade and humiliate members of the victim's ethnic group and, through enforced impregnation, literally dilute the ethnic gene pool of the victim's ethnicity. See Theodor Meron, *Rape as a Crime under International Law*, 87 AM. J. INT'L L. 424, 425 (1993) [hereinafter Meron].

<sup>849</sup> FGC involves severe and often irreparable harm and is a major cause of ill health for millions of women. It and "can result in death through severe bleeding leading to hemorrhagic shock, neurogenic shock as a result of pain and trauma, and severe, overwhelming infection and septicemia." UNICEF Fact Sheet, *available at*, [http://www.unicef.org/protection/index\\_genitalmutilation.html](http://www.unicef.org/protection/index_genitalmutilation.html) [hereinafter UNICEF Fact Sheet]. ("Other harmful effects include: failure to heal; abscess formation; cysts; excessive growth of scar tissue; urinary tract infection; painful sexual intercourse; increased susceptibility to HIV AIDS, hepatitis and other blood-borne diseases; reproductive tract infection; pelvic inflammatory diseases; infertility; painful menstruation; chronic urinary tract obstruction/bladder stones; urinary incontinence; obstructed labour; increased risk of bleeding and infection during childbirth.") FGC and other harmful practices against women are prolific. They occur in some form in almost every region. FGC involves entails the cutting away of various parts of the sexual organs with the purpose of reducing the sexual drive of the victim. The cutting is performed by a woman, trained in the procedure but not a medical practitioner, and the procedure has remedial purpose or health benefits. No anesthesia is provided during the procedure and after care is minimal. The invasion, therefore, yields no physical benefit to the woman upon whom it is performed. See Catherine L. Annas, *Irreversible Error: The Power and Prejudice of Female Genital Mutilation*, 12 J. CONTEMP. HEALTH L. & POL'Y 325, 327-332 (1996) [hereinafter Annas] (describing the various aspects of a woman's dignity which are violated by the procedure.)

<sup>850</sup> The most minimal damage is the cutting away of the hood of the clitoris. At the other end of the spectrum is infibulation, which involves the complete removal of the labia minora, labia majora and the clitoris and the sowing together of the seams of the vagina allowing a small hole for the escape of fluids. Female genital cutting refers to the practice of "cutting away part or all of a girl's external genitalia." UNICEF Fact Sheet, *supra* note 537. For a detailed description of the various forms of FC/FGM and the health implications see FEMALE GENITAL MUTILATION: A GUIDE TO LAWS & POLICIES, *supra* note 57. Early marriage is another form of harmful practices against women that correlates with the substance of systemic intimate violence. "I was married when I reached the age of ten. At thirteen, my son was born." Mulugoja Ashebir is 21 years old. "I was married at the age of seven. My husband was much older than me. He waited until I was nine years old before intercourse." Weinshet Makonnen, 16 years old. See <http://www.unicef.org.uk/news/Presscentre/emfeature.htm>. The early marriage of girls will almost

Also, in the case of enforced disappearances, the deflation of the victim's humanness and dignity has been considered by the international community to be part of its internationalizing nature. The injury caused to a disappeared individual includes: her/his abduction, incarceration and denial of freedom without due process; severe physical harm; psychological aggression; and, often, death.<sup>851</sup> On this basis, such disappearances are considered to involve a level of harm sufficient to satisfy the necessary threshold to constitute a breach of the victims' international human right to physical integrity

For these reasons, it is clear that the 'minimum severity' standard set forth by the ICTY has been applied more broadly to other types of violence. Therefore, I propose that such a test also is applicable in the context of systemic intimate violence.

I do not raise the examples of mass rape, FGC and enforced disappearances to argue that these crimes are directly analogous to incidents of systemic intimate violence. However, strong in respect of the violation of acts of physical and psychological harm, similarities do exist. In the case of systemic intimate violence, individual acts of violence include battery, burning, electrocuting, starvation, mutilation, sleep deprivation, forced sexual encounters, poisoning, exposure, murder, and associated threats. In particular, as required by the test laid down by the ICTY, and the approaches taken in FGC and enforced disappearances, incidents of systemic intimate violence cause serious suffering or humiliation; physiological and physical abuse that would outrage any human being who experiences it; physically invasive acts which impede the

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certainly mean premature pregnancy and childbearing, and is likely to lead to a lifetime of domestic and sexual subservience over which they have no control. Early marriage is a practice of giving away or transferring girls for marriage between the ages of seven to twelve years, at which time they must engage in sexual intercourse and are expected to start producing children. UNITED NATIONS CHILDREN'S FUND INNOCENTI RESEARCH CENTER, EARLY MARRIAGE CHILD SPOUSES, 8 (2001) available at <http://www.unicef.org.uk/news/pdf%20files/digestfinal.pdf> [hereinafter UNICEF, EARLY MARRIAGE] ("The Inter-African Committee (IAC) on Traditional Practices Affecting the Health of Women and Children states that early marriage is: 'Any marriage carried out below the age of 18 years, before the girl is physically, physiologically and psychologically ready to shoulder the responsibilities of marriage and childbearing.' The Forum of Marriage echoes this position."). This practice is prevalent amongst certain population groups in Asia and Africa. Early marriage is widely practiced in many parts of Ethiopia: 82% in Amhara, 79% in Tigray, 64% in Benishangul/Gumuz, 64% in Gambella and 46% in Afar. See <http://www.unicef.org.uk/news/Presscentre/emfeature.htm>. Early marriage compromises the health of the child brides. Health risks include the likelihood of operative delivery, low weight and malnutrition resulting from frequent pregnancies and lactation in a period of life when the young mothers are themselves still growing. Some women suffer permanent paralysis of parts of their body. In many instances, either the girl or the fetus will not survive the birth. See <http://www.unicef.org.uk/news/Presscentre/emfeature.htm>. In addition, pregnancy at such an early age is dramatically more dangerous than when a woman has completed her own development into maturity. The health risks are exacerbated where girls have undergone some form of FGC. Given the young age of child brides, FGC often takes place soon before the marriage and this is especially serious in the case of infibulation, which is designed to make penetration more difficult. Childbirth is particularly compromised by FC/FGM. Millions of women are required to resume sexual relations within two or three days after childbirth, even if there has been vaginal cutting during the delivery and regardless of the pain it causes. UNICEF, EARLY MARRIAGE, *supra* note 538, at 10. Article 10(2) of the ICSCER, *supra* note 13 ("Special protection should be accorded to mothers during a reasonable period before and after childbirth.").

<sup>851</sup> Juan E. Mendez and Jose Miguel, *Disappearances and the Inter-American Court: Reflections on a Litigation Experience*, 13 HAML 507, 511 (1990) [hereinafter Mendez & Miguel, *supra* note 539] ("The authorities take their victims to secret detention centers where they subject them to interrogation and to without fear of judicial or other controls.")

women's ability to attain the highest standard of mental and physical health; the deflation of the victims' humanness; and incarceration and the denial of freedom.

### *Threats*

The right to physical integrity is violated by threats of harm. The disabling effect of threats of violence was recognized by the ICTR, which held that sexual violence is not "limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact."<sup>852</sup> Moreover, it was recognized that coercion need not manifest in physical force but includes threats, intimidation, extortion and "other forms of duress which prey on fear or desperation."<sup>853</sup>

For these reasons, I propose that systemic intimate violence will breach the victims' international human right to physical integrity even where the violence comprises in part an atmosphere of fear and threats, especially where such threats are in fact carried out. Therefore, severe emotional violence comprising of a combination of intense and persistent verbal abuse, insults, derision, threats of harm, intimidation, is sufficient to result in a violation of physical integrity.

### *Continuum*

Finally, the continuation of physical or psychological harm over a period of time has also been considered in international law to constitute a violation of the victims' right to physical integrity. This is evident, for example, in the case of enforced disappearances.<sup>854</sup> The period of

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<sup>852</sup> Prosecutor v. Akayesu, *supra* note 109, at paragraph 688.

<sup>853</sup> Prosecutor v. Akayesu, *supra* note 109, at paragraph 688.

<sup>854</sup> Declaration on the Protection of All Persons from Enforced Disappearances, G.A. res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (1992). Adopted by General Assembly resolution 47/133 of 18 December 1992 [hereinafter U.N. Declaration on Enforced Disappearances] refers to disappearances as occurring in a persistent manner "in the sense that persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the person concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law." Preamble to the U.N. Declaration on Enforced Disappearances, *supra* note 542. For a discussion of the historical development of the legal prohibition of enforced disappearances, see Mendez & Miguel, *supra* note 539, at 556-7. The Rome Statute includes "enforced disappearances" as part of a widespread or systematic attack against a civilian population in its definition of crimes against humanity. Rome Statute, *supra* note 9, art. 7(1)(i). It further defines enforced disappearances as "the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time." Rome Statute, *supra* note 9, art. 7(2)(i). These definitions are mirrored in the Inter-American Convention on Enforced Disappearances, *supra* note 209, which defines enforced disappearances as "the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees."

time involved in the detention of the disappeared is a seminal component of the crime.<sup>855</sup> Trafficking is another example of a continuum of harm, involving the abduction, abuse and the forced transfer from one place to another. In this way, the harm manifests in a continuum and not only in a single act of abduction.

FGC also provides a relevant example of a continuum of violence which a violation of physical integrity in terms of international law. The long-term impact of FGC precludes sexual enjoyment and normal urinary and menstrual activity for the rest of the victim's life.<sup>856</sup> During childbirth and during sexual intercourse, the closure is opened and, after the event, the procedure is repeated. Over a period of time, the one act of cutting can lead to a range of infections, tetanus, extreme blood loss, depression, loss of sexuality, infection of the internal organs and death due to hemorrhaging and other forms of severe infections.<sup>857</sup> The original act of harm, therefore, is part of a continuum of pain. It is this continuum which violates the right to physical integrity.

The notion of a continuum is also evident in the context of mass rape.<sup>858</sup> The ICTY confirmed that it was "sufficient to show that the act took place in the context of an accumulation

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<sup>855</sup> Mendez & Miguel, *supra* note 539, at 552-553 (discussing disappearances as a crime "that involves multiple and continuous violations of rights ... the effects of which are prolonged over time."). See the European Convention, *supra* note 74. See *Kurt v. Turkey* in the European Court of Human Rights, Application No. 24276/94, Judgment of 25 May 1998, where the European Court of Human Rights found that while the mother of the deceased, who had brought the application, was victim of the authorities' complacency and her anguish and distress endured over a prolonged period of time, constituting ill-treatment within the scope of Article 3 of the European Convention, *supra* note 74. See also *Hector Perez Salazar v. Peru*, Case 10.562, Report N° 43/97, Inter-Am. C. H. R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 771 (1997). Report N° 43/97 Case 10.562 Hector Perez Salazar Perú February 19, 1998, paragraph 19 [hereinafter *Hector Perez Salazar v. Peru*] (the disappeared individual had been disappeared for eight years). See also the discussion by Javier Leon Diaz Human, available at [http://www.javier-leon-diaz.com/docs/enf\\_disappearances.htm](http://www.javier-leon-diaz.com/docs/enf_disappearances.htm) ("Different perspectives need to be taken into account in order to make a clear distinction with other similar situations as for instance an unacknowledged detention. The time element is of paramount importance; whereas a secret detention, lasting for a couple of hours cannot be regarded as 'disappearance,' the unacknowledged detention of a person during a couple of weeks is clearly something else. It is very hard to draw the border; the time factor remains elusive."). Finally, see UNHCHR Fact Sheet No. 6 (Rev.2), Enforced or Involuntary Disappearances available at <http://www.ohchr.org/english/about/publications/docs/fs6.htm#introduction> [hereinafter UNHCHR Fact Sheet No. 6] (describing the functions of the working group, which includes attending to the needs of the left-behind families, who may lose a breadwinner, and therefore a source of income, during the absence of the disappeared). One of the most important cases regarding enforced disappearances is that of Velásquez Rodríguez case, *supra* note 408. In this case the Inter-American Court of Human Rights found the government of Honduras responsible for the disappearance of Velásquez Rodríguez, a Honduran student activist.

<sup>856</sup> FGC entails both physical and emotional harm, which continue over time. See Okwubanego, *supra* note 111, at 169-171 (describing the consequences of FGC as death; physical trauma due to infection, inability to urinate, painful sexual encounters; and psychological scarring such as a sense of betrayal, anxiety, depression, social insecurity and fear.) Infibulation is performed on 80% of the women in Somalia. These are the numbers proffered by Waris Dirie, a survivor of FC/FGM who was appointed as the United Nations Population Development Fund's special ambassador <http://www.fgmnetwork.org/articles/Waris.htm>. For a detailed description of the various forms of FC/FGM and the health implications see FEMALE GENITAL MUTILATION: A GUIDE TO LAWS & POLICIES, *supra* note 57. See also Okwubanego, *supra* note 111, at 162-166.

<sup>857</sup> See Annas, *supra* note 537, at 327-332.

<sup>858</sup> The ICTY referred to one of its previous decisions, indicating that a crime against humanity is not "one particular act but, instead, a course of conduct." *Prosecutor v. Kunarac*, *supra* note 2, at paragraph 415. The Tribunal cited *Prosecutor v. Tadic*, Case IT-94-1-A, Decision on the Form of the Indictment, 14 Nov 1995, par 11. Therefore, an

of acts of violence which, individually, may vary greatly in nature and gravity.”<sup>859</sup> Therefore, not every rape committed during the conflicts in the former Yugoslavia or Rwanda had to fulfill a standard of extremity.<sup>860</sup> It was the unbridled commission of rape, over an extended period of time and the creation of an environment of terror that distinguished mass rape from random instances of rape (which at the time did not constitute a violation of international law).<sup>861</sup>

While these mass rape decisions focused on the continuum of violence over time of crimes across the whole country, rather than in the context of an individual victim suffering repeated acts of violence, I propose that a similar approach can be applied equally on an individual victim basis. That is, for the purpose of satisfying the ‘minimum severity,’ it is (to use the phraseology of the ICTY) sufficient to show that the act took place in the context of an accumulation of acts of violence which, while individually may vary greatly in nature and gravity, in aggregate are sufficiently severe to constitute a human rights violation.<sup>862</sup>

It is clear, therefore, that international law has embraced the principles that a continuum of violence can constitute, in aggregate, conduct which is sufficiently severe to constitute a

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attack “can be described as a course of conduct involving the commission of acts of violence.” Prosecutor v. Kunarac, *supra* note 2, at paragraph 415.

<sup>859</sup> Prosecutor v. Kunarac, *supra* note 2, at paragraph 419.

<sup>860</sup> Mass rape, in order to constitute a crime against humanity, had to be widespread or systematic. I do not maintain that private violence is a crime against humanity; notwithstanding, however, private violence certainly is widespread. The fact that it does not take place during war time precludes it from designation as a war crime, but it places it within the same context as mass rape, since both are widespread and, in the case of private violence, there is a uniformity that applies worldwide. Prosecutor v. Kunarac, *supra* note 2, at paragraph 417. The acts affect a wide range of victims and the perpetrators of systemic intimate violence are not acting under color of war. But I am not aiming to prove that systemic intimate violence is a war crime, or even a crime against humanity. I am showing merely that it has the substantive components to be a violation of a human right. According to the ICTY, the adjective ‘widespread’ “connotes the large-scale nature of the attack and the number of its victims.” Prosecutor v. Kunarac, *supra* note 2, at paragraph 428, citing The Commentary of the International Law Commission in its Draft Code of Crimes against Peace and Security of Mankind. The adjective ‘systematic’ “signifies the organised nature of the acts of violence and the improbability of their random occurrence.” Prosecutor v. Kunarac, *supra* note 2, at paragraph 429. Once again, while there is a distinction between the contexts of war time rape and systemic intimate violence, the relevant overlapping characteristic is the perpetual nature of the harm that reveals something systemic, and therefore public and political, about the violence.

<sup>861</sup> The ICTY went further and stated that the attack must be “either ‘widespread’ or ‘systematic,’ thereby excluding isolated and random acts.” Prosecutor v. Kunarac, *supra* note 2, at paragraph 427.

<sup>862</sup> Mass rape, in order to constitute a crime against humanity, had to be widespread or systematic. I do not maintain that private violence is a crime against humanity; notwithstanding, however, private violence certainly is widespread. The fact that it does not take place during war time precludes it from designation as a war crime, but it places it within the same context as mass rape, since both are widespread and, in the case of private violence, there is a uniformity that applies worldwide. Prosecutor v. Kunarac, *supra* note 2, at paragraph 417. The acts affect a wide range of victims and the perpetrators of systemic intimate violence are not acting under color of war. But I am not aiming to prove that systemic intimate violence is a war crime, or even a crime against humanity. I am showing merely that it has the substantive components to be a violation of a human right. According to the ICTY, the adjective ‘widespread’ “connotes the large-scale nature of the attack and the number of its victims.” Prosecutor v. Kunarac, *supra* note 2, at paragraph 428, citing The Commentary of the International Law Commission in its Draft Code of Crimes against Peace and Security of Mankind. The adjective ‘systematic’ “signifies the organised nature of the acts of violence and the improbability of their random occurrence.” Prosecutor v. Kunarac, *supra* note 2, at paragraph 429. Once again, while there is a distinction between the contexts of war time rape and systemic intimate violence, the relevant overlapping characteristic is the perpetual nature of the harm that reveals something systemic, and therefore public and political, about the violence.

violation of human rights. On this basis, I propose that a similar approach should apply to incidents of systemic intimate violence. Even where individual incidents of systemic intimate violence are not sufficiently severe in themselves to satisfy the ‘sufficiently severe’ standard set forth by the ICTY, such incidents will constitute a violation of the victim’s right to physical integrity where they accumulate and satisfy the severity threshold in the aggregate.

## 6.4 The Right to Dignity

### 6.4.1 Meaning and Application in International Law

The right to dignity is the fundamental premise upon which the UDHR was created and acts as the root of almost all human rights norms.<sup>863</sup> Dignity is associated with the “worth of the human person.”<sup>864</sup> The right to work is framed by the right to an “existence worthy of human dignity;”<sup>865</sup> the rights of an accused are founded on the principle that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person;”<sup>866</sup> and torture violates the individual’s right to dignity as much as racial discrimination or religious intolerance.

Because human beings are “born free and equal in dignity and rights” and because they are “endowed with reason and conscience” our dignity requires that we “should act towards one

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<sup>863</sup> See the Preamble to the U.N. Charter, *supra* note 508, which compels states “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.” The UDHR opens by recognizing “the inherent dignity and [ ] the equal and inalienable rights of all members of the human family” as the “foundation of freedom, justice and peace in the world.” UDHR, *supra* note 4. Article 1 of the UDHR states that “[a]ll human beings are born free and equal in dignity and rights.” *Id.* Paragraphs 1 and 2 of the ICCPR “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world” and that “these rights derive from the inherent dignity of the human person.” Article 6 of the Banjul Charter, *supra* note 22, provides that “[e]very individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.” The preambles to the ICSCER, *supra* note 13 and ICCPR recognize that all rights emanate from the inherent dignity of human beings. *See* Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT’L L. 848, 848-849 (1983) [hereinafter Schachter, *Human Dignity*] (indicating that the principle of human dignity is found in international treaties, resolutions, and declarations, and in national constitutions. The value of human dignity is the foundation of international law, which is constructed to “uphold the inherent dignity of the individual.”). *Prosecutor v. Kunarac*, *supra* note 2, at paragraph 499, citing *Prosecutor v. Aleksovski*, *supra* note 527, at 21-22. This is also a component of mass rape and it is similar to the statement about the gross violation of a woman’s integrity in the Swedish legislation. The ICTY enunciated the requirement that the harm “outrages upon personal dignity, in particular humiliating and degrading treatment.” This forms part of the *actus reus* in common Article 3 of the Geneva Conventions prohibiting inhumane treatment. *See Prosecutor v. Kunarac*, *supra* note 2, at paragraph 498. “The Prosecutor charged outrages upon personal dignity under Article 3 of the Statute on the basis of common Article 3 of the 1949 Geneva Conventions. It is clearly established in the Tribunal’s jurisprudence that Article 3 of the Statute permits the prosecution of offences falling under common Article 3 of the Geneva Conventions of 1949. The specific offence of outrages upon personal dignity is found in common Article 3(1)(c) which prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment”. This specific offence of outrages upon personal dignity has been recognised at both Appeals Chamber and Trial Chamber level to constitute an offence which may be prosecuted pursuant to Article 3 of the Statute.”

<sup>864</sup> Paragraph 5 of the preamble to the UDHR, *supra* note 4.

<sup>865</sup> Article 23(2) of the UDHR, *supra* note 4.

<sup>866</sup> Article 10(1) of the ICCPR, *supra* note 4.



another in a spirit of brotherhood.”<sup>867</sup> The right to personal dignity describes something essential in the being, the personality and the wholeness of the individual.<sup>868</sup>

Human dignity “has acquired a resonance that leads it to be invoked widely as a legal and moral ground for protest against degrading and abusive treatment. No other ideal seems so clearly accepted as a universal social good.”<sup>869</sup> Conduct that violates this principle is “animated by contempt for the human dignity of another person.”<sup>870</sup> McDougal, Lasswell and Chen note that “the peoples of the world, whatever their differences in cultural traditions and styles of justification, are today increasingly demanding the enhanced protection of all those basic rights, commonly characterized in empirical reference as those of human dignity...”<sup>871</sup>

#### 6.4.2 The Violation of Dignity by Systemic Intimate Violence

One day Jim came home and caught Molly in the backyard talking to a neighbor woman. He began hitting Molly with his fists, throwing her against cabinets and appliances, knocking her to the floor, pulling her up, and hitting her again. He threw everything in the kitchen that was moveable, saying over and over, “I can’t trust you.” Then Jim dragged Molly into the living room and demanded that she take off all her clothes. He burned them together with her clothes from the closet, saying she wouldn’t be needing them if she was going to be a whore. He yelled and yelled at her about being outside, screaming, biting, pinching, pulling hair, kicking her in the legs and back. Molly held her breath and prayed it would be over soon. This time she thought she might die. After about an hour, Jim seemed to wear out. Molly pulled herself to the bathroom and tried to stop shaking. But Jim burst in and accused her of trying to hide something, saying this proved she had been unfaithful. He pushed her forward over the sink and raped her anally, pounding her head against the mirror as he did so. Molly started throwing up, but he continued. Then he grabbed the scissors and began shearing off Molly’s long dark beautiful hair, scraping her scalp with the blades, ripping out handfuls, shaking her violently, saying, “How do you like how you look now? No one will look at you now, will they? No one will ever want you now!”<sup>872</sup>

Each person has a right to human dignity. This is no less true in the context of systemic intimate violence. I do not repeat the nature of such violence here, but propose that the nature of the harm, as articulated above, is such that it is disturbed deeply by the infractions of gender

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<sup>867</sup> Article 1 of the UDHR, *supra* note 4.

<sup>868</sup> Article 22 of the UDHR requires states to secure “social and cultural rights indispensable for his dignity and the free development of his personality.” UDHR, *supra* note 4.

<sup>869</sup> See Schachter, *Human Dignity*, *supra* note 556, at 848-849.

<sup>870</sup> *Prosecutor v. Kunarac*, *supra* note 2, at paragraph 500, citing *Prosecutor v. Aleksovski*, *supra* note 527, at 56. The *actus reus* of this crime entails “an act which is animated by contempt for the human dignity of another person. The corollary is that the act must cause serious humiliation or degradation to the victim. It is not necessary for the act to directly harm the physical or mental well-being of the victim. It is enough that the act causes real and lasting suffering to the individual arising from the humiliation or ridicule.” However, the Tribunal in the Kunarac decision parts way with the *Aleksovski* decision, stating that it is not necessary that the humiliation be lasting. See *Prosecutor v. Kunarac*, *supra* note 2, at paragraph 501. Acts of mass rape are outrageous violations of a person’s dignity. *Prosecutor v. Kunarac*, *supra* note 2, at paragraph 498. This factor was one of the driving forces in the internationalization of mass rape and FGC. FGC and mass rape reached international proportions, in part because of the severity of the harm committed to individuals.

<sup>871</sup> WORLD PUBLIC ORDER, *supra* notex, at 6.

<sup>872</sup> Copelon, *Intimate Terror*, *supra* notex, at 119.



inequality and violations of physical integrity. These breaches also constitute violations of those victims' overarching right to be free from human indignity. The rights to equality and personal integrity are founded on, and are extensions of, the right to human dignity. Therefore, violations of those rights must also constitute a violation of the victims' right to human dignity.

## 6.5 Application of Fundamentality to Systemic Intimate Violence

On this basis, I propose that incidents of systemic intimate violence violate each of the fundamental human rights to equality, physical integrity and human dignity, thereby satisfying the 'fundamentality' element of the test for determining whether systemic intimate violence involves a violation of a human right enforceable in international law. The next section discusses whether the 'universality' requirement also is satisfied.

## 7 Universality

### 7.1 Background

In order for an 'interest' to be a 'right,' apart from being *fundamental*, the right in question must also be universal. That is, it must be "relevant, to varying degrees, throughout the world of diverse value systems."<sup>873</sup>

While the rights to dignity, equality and physical integrity may be described as fundamental, it is not clear that the prevention of systemic intimate violence and the protection of its victims are universal objectives in a diverse world. As described in chapter one, the behavior of many states suggests that the protection of women against systemic intimate violence is *not* a universal norm.

Therefore, the question is: given the diverse approaches by states to violence against women, is the eradication of systemic intimate violence, a relevant objective in international human rights law? I propose that it is.

### 7.2 The Tension

The theory of universality, as described above, reveals the tension in applying 'universal norms' to a heterogeneous world. The bulk of the theory also indicates that this is the challenge of international human rights law: its purpose, for better or for worse, is to prescribe and implement a set of uniform norms for the protection of human beings.

However, the waters are muddied by two historical questions: who gets to make the rules, and why? Given the fact that the UDHR was born out of the Holocaust and drafted by the victors

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<sup>873</sup> Alston, *supra* note 477, at 614. See also HENKIN, *supra* note 426, at 20. International human rights law specifically attempts to articulate certain norms which, even if they contradict a belief system or require the amendment of a culture's way of life, will be considered universal because of their so-called fundamentality. The question of what constitute a fundamental norm is the subject of an entirely independent yet important discussion.

of World War II, the document, and its values, tend to represent so-called western values. As the number and diversity of states within the international community grow, the universality of human rights increasingly is questioned.<sup>874</sup> The tension between the current framework of human rights and those who resist its original formulation is known as cultural relativism.

### 7.3 Cultural Relativism

Universalists “believe that human rights do not vary in their application, regardless of the country or culture in which they are applied.”<sup>875</sup> Relativists, on the other hand, “believe that the contents of human rights should be understood through the cultural setting in question.”<sup>876</sup>

This stand off is fuelled by the fact that international human rights law protects the rights of both individuals and groups.<sup>877</sup> In some regions, the status of women is framed by cultural, religious, political or social imperatives which may preclude the protection of women’s individual rights. Such societies generally are structured on the basis that women are designated a role for the benefit of family order, discipline or other communal imperatives. In some instances, even where a practice is harmful, there are those who insist on its role as an essential part of a communal practice, the abolition of which “will destroy the tribal system.”<sup>878</sup> Where collective and individual interests do not coalesce, the debate develops into one of the thornier issues in international law.<sup>879</sup>

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<sup>874</sup> Koskenniemi explains the condescension inherent in the notion of universality: “Universality still seems an essential part of progressive thought – but it also implies an imperial logic of identity: I will accept you, but only on the condition that I may think of you as I think of myself.” MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960*, 515 (Cambridge U. Press, 2001) [hereinafter KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS*].

<sup>875</sup> Jo Lynn Southard, *Protection of Women’s Human Rights Under the Convention on the Elimination of All Forms of Discrimination against Women*, 8 PACE INT’L L. REV. 1, 4 (1996).

<sup>876</sup> Jo Lynn Southard, *Protection of Women’s Human Rights Under the Convention on the Elimination of All Forms of Discrimination against Women*, 8 PACE INT’L L. REV. 1, 4 (1996).

<sup>877</sup> Article 27 of the ICCPR provides that in states “in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.” ICCPR, *supra* note 4.

<sup>878</sup> See Bowman, *supra* note 112, at [page 3], citing the late president of Kenya and his view of FGC/M. See, for example, the discussion of role allocation based on gender in the Philippines in the 1984 CEDAW report, *supra* notex, at 10-17, paragraphs 69-124. The report shows a clear disjuncture between the terms of CEDAW as interpreted by the CEDAW committee member and the notion of women’s rights as interpreted by the Philippine government. When the Philippine representative was asked to clarify certain aspects of the country’s initial report, including the severe rape laws, the representative replied that “there were cultural and traditional aspects in every country which could not be legislated. His culture regarded both sexes not as equal but as complementary to each other.” In respect of the severe punishment for the rape of children and adolescents his reply was that “honour and family were the highest concepts of life in his culture and the honour of a husband, father or brother was affected if such a thing happened to a woman in the family” Id. at page 14, paragraph 100. The representative of the Philippines argued that the reason why no women’s liberation movement had developed in the Philippines was because “it was preferred that its [Philippine] women retain their femininity and gentleness because, in such a way, they had obtained many advantages and progress.” Id. at paragraph 105.

<sup>879</sup> Some maintain that cultural relativism, which balances the interests of the individual against the communal interests of the group, has slowed the impetus of asserting certain values as universal. The issue of cultural relativism came before the CEDAW committee in 1984 during Egypt’s country report. 1984 CEDAW report, *supra* notex, at page 28, paragraph 209 (“There was no reference in the report to the incidence of prostitution and rape, and questions were asked as to rehabilitation of victims and sanctions for those offences.”) One of the opening

One cannot ignore the claim of cultural preservation.<sup>880</sup> Taking an unfiltered, pejorative view of cultural autonomy is dangerous, not only because the value of tradition deserves respect, but also because disregarding the cultural context of practices feeds a rift between non-western communities and the UN system, potentially alienating victims from international assistance.<sup>881</sup>

The rift between traditional communities and international law should not be underestimated. Some communities view international law with suspicion, especially former colonies, where

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comments made by the representative for Egypt related to the intersection between Shari'a law and women's rights. "Islam, she stated, attached great importance to the protection of women and guaranteed their rights and responsibilities as daughters, sisters, mothers and wives." 1984 CEDAW report, *supra* note, at 25, paragraph 183. The representative explained that "the Shari'a preceded the Convention, and it embodied many precepts which protected women and guaranteed their equality with men." 1984 CEDAW report, *supra* note, at 28, paragraph 211. In a later extract of the report the representative explained that "Islamic law had given a prominent position to all women and liberated them from any form of discrimination." 1984 CEDAW report, *supra* note, at 29, paragraph 215. However, the representative did point out that there were a number of differences between Islamic law and the Convention as regards marriage (this being the only manifestation of difference between the two bodies of law). 1984 CEDAW report, *supra* note, at 29, paragraph 216. A similar issue arose in respect of Bangladesh. CEDAW committee Forty-Second Session, *supra* note, at paragraphs 503-572, pages 69-76. It is interesting to note a stark comment made by the CEDAW Committee members regarding Islam and women: "It was suggested that the part of the report on Islamic law could have been more clearly presented and that there was not sufficient emphasis on the effect of Islam on the situation and rights of women in Bangladesh. It was considered that Islam had often been misinterpreted by men in their own interests and that that could be dangerous in a country with a high level of illiteracy such as Bangladesh; new developments in the world should force a new interpretation of Islam to be made." CEDAW committee Forty-Second Session, *supra* note 587, at 71, paragraph 517. Even where a specific culture does not oppose the substance of a 'western' right, there are "overtones of moral arrogance" which hinder the communication of human rights. See Pagels, *supra* note, at 1, citing Abraham Sirkin.

<sup>880</sup> Rawls, *The Law of Peoples*, *supra* note 480, at 43 ("Just as a citizen in a liberal society must respect other persons' comprehensive religious, philosophical, and moral doctrines provided they are pursued in accordance with a reasonable political conception of justice, so a liberal society must respect other societies organized by comprehensive doctrines, provided their political and social institutions meet certain conditions that lead the society to adhere to a reasonable law of peoples.") However, what happens when a society does not act in accordance with our understanding of reasonableness? This does not allow us to dismiss such society nor should it. The repercussions would be highly problematic if we were to simply dismiss any country that abided by different values and political themes. Rather, a human rights framework should apply universally, notwithstanding political differences. What can be extracted from Rawls' statement is that there has to be a core minimum standard according to which governments treat people. If it has institutions that embody different political ideologies but retains the basic level of treatment, ought not that to be acceptable? Rawls does address this to some extent and suggests that certain nonliberal societies will respect human rights as much as liberal ones, provided it is a well-ordered society, defined by Rawls as "being peaceful and not expansionist; its legal system satisfies certain requisite conditions of legitimacy in the eyes of its own people; and, as a consequence of this, it honors basic human rights." I am not sure that his notion of a nonliberal society is satisfactorily broad. However, he at least acknowledges the need to include other types of societies in his notion of a well-ordered state, even if we disagree on the type.

<sup>881</sup> See Bowman, *supra* note 112, at [page 4-5] (summarizing the two sides of the cultural relativism debate, and indicating how victims find it difficult to embrace so-called 'universal norms' without being disloyal to their homes, families and communities). The analysis from an international law perspective is whether the consequences of a way of life are harmful to individuals but only those individuals can assess that. See Bowman, *supra* note 112 (describing the debate regarding cultural autonomy: "Why do western women believe that they have any sort of right to speak with even a hint of authority on the subject of Female Genital Cutting?"). For a discussion of the tension between an individual's rights and cultural autonomy see Coomaraswamy, *Identity Within*, *supra* note 269, at 494.

foreign intervention connotes oppression and disrespect.<sup>882</sup> In an effort to maintain cultural longevity, such societies may reject international law *in toto*.

On the other hand, opponents of culturally endorsed gender-based violence reject the claim of cultural preservation, arguing that there is no justification for harming an individual.<sup>883</sup> Renowned feminist theorist, Professor MacKinnon, points out how human rights experiences are molded according to the male perspective, with the result that violence against women “is either too particular to be universal or too universal to be particular, meaning either too human to be female or too female to be human.”<sup>884</sup>

Therefore, the universality of human rights, the notion that “how human beings are treated anywhere, concerns everyone, everywhere”<sup>885</sup> needs to be balanced against the fact that for some, their practices, community and way of life, are linked inextricably to their own humanness. Finding the balance between respecting culture and ousting cruelty is at the heart of universality and, not surprisingly, arises in the context of systemic intimate violence.

#### 7.4 The Impact of Cultural Relativism on Systemic Intimate Violence

Uniform principles regarding women’s rights need not comply with every culture in order to be relevant to that culture. Countries as diverse as the United States, Hungary, the Philippines, and Canada participate in the process (such as it is currently developing in international law) against systemic intimate violence and they all have widely different cultures and perceptions of women. The existence of alternative practices, therefore, is not incompatible with the protection of women from systemic intimate violence in international law.<sup>886</sup> Diversity does not bar the formulation of principles that could be universally adopted *within* the contours of a country’s

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<sup>882</sup> Especially in light of the fact that most international human rights as understood today emanate from western-based thought, even though their substance inheres in the most ancient of philosophies from across the globe. Cite Sen. [Note: citation to follow]. The imposition of western values is strongly connotative (if not denotative) of colonialism, elitism, and imperialism. The fact that these values are framed in a rights discourse (rather than one of ‘civilization’) does not disconnect them, either in perception or, at times, in substance, from the west’s dark history of abuse of power. It is not surprising, therefore, that ‘global’ human rights as an institution, is viewed with suspicion from many quarters.

<sup>883</sup> For a discussion of this debate see Joel Richard Paul, *Cultural Resistance to Global Governance*, 22 MICH. J. INT. L. 1, 9 (2000) [hereinafter Paul, *Cultural Resistance to Global Governance*]. See also John D. McCarthy, *The Globalization of Social Movement Theory*, in TRANSNATIONAL SOCIAL MOVEMENTS AND GLOBAL POLITICS: SOLIDARITY BEYOND THE STATE, 243, 245 (Jackie Smith, Charles Chatfield, and Ron Pagnucco eds., 1997) [hereinafter McCarthy, *The Globalization of Social Movement Theory*] (“Movements attempting to construct frames that resonate in diverse cultural settings and to promote frame bridging... confront great obstacles.”)

<sup>884</sup> MacKinnon, *Crimes of War, Crimes of Peace*, *supra* note 114, at 84-85: “Human rights principles are based on experience, but not that of women. It is not that women’s human rights have not been violated. When women are violated like men who are otherwise like them – when women’s arms and legs bleed when severed, when women are shot in pits and gassed in vans, when women’s bodies are hidden at the bottom of abandoned mines... this is not recorded as the history of human rights atrocities to women... When no war has been declared and still women are beaten by men with whom they are close, when wives disappear from supermarket parking lots, when prostitutes float up in rivers or turn up under piles of rags in abandoned buildings, this is overlooked entirely in the record of human suffering because the victims are women and it smells of sex.”

<sup>885</sup> HENKIN, *supra* note 426, at 16.

<sup>886</sup> See Martha C. Nussbaum, *Introduction*, in WOMEN, CULTURE AND DEVELOPMENT A STUDY OF HUMAN CAPABILITIES 1, 13 (Martha C. Nussbaum and Jonathan Glover eds., 1995).

specific cultural and traditional imperatives.<sup>887</sup> Rather, even very diverse nations should view the interest of remedying systemic intimate violence as conforming to the ethos of the international legal system, the function of which is to “convert misfortune to be endured into injustice to be remedied.”<sup>888</sup>

However, even if we accept that many states do *not* endorse the claim for prevention of systemic intimate violence directly, it is possible to show that those states oppose certain of the *effects* of systemic intimate violence, and, therefore, indirectly agree to its prevention. Systemic intimate violence causes damage not only to the individual but also to broader communities. The violence impedes economic growth, reduces human longevity, increases child mortality and, as the highest cause of injury to women, constitutes a significant global health problem:

The immediate costs of violence are those physical and mental costs borne first by the women themselves.<sup>889</sup> It has been recorded that in the UK alone, monetary costs are estimated at a billion pounds per year. This includes “consultation with health practitioners, prescription costs, costs incurred by the police and the criminal justice system, and the cost of social services support, re-housing, security protection, the loss in economic productivity and reduced income to the family. [The authors’] accounts explicitly point to the lack of co-ordination on part of those agencies working to assist victims of violence, meaning any assistance or support to victims of violence is significantly compromised. It also shows that women are suffering routinely from the effects of violence, but that this is not dealt with in a systematised way, service providers duplicate efforts wasting resources and obviously compromising their own efficiency.”<sup>890</sup>

For these reasons, I propose that, once states appreciate the real consequences and costs that systemic intimate violence imposes on each state, many states will be more willing to consent to, and take positive actions to assist, the curtailment of such violence.

Moreover, in terms of assessing whether the prevention of systemic intimate violence satisfies the universality principle of being “relevant” to states of diverse value systems, it is important to realize that such universality does not require universal adoption of this principle; it requires only universal relevance. Even if a number of states continue to reject claims to stop gender discrimination and to take positive steps to help remedy systemic intimate violence, the

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<sup>887</sup> See for example, BUCHANAN, *supra* notex, at 76 (“It may be difficult, and in some cases arbitrary, to say precisely when a change in our conception of human rights, as opposed to our views about which sorts of institutional arrangements would best respect them, has occurred.”).

<sup>888</sup> State v. Baloyi, *supra* note 119, at 15, paragraph 12 (basing its decision on, *inter alia*, DEVAW, CEDAW and the Banjul Charter). See, for example, Hilary Charlesworth, *The Unbearable Lightness of Customary International Law*, 92 AM. SOC’Y INT’L L. PROC. 44, 47 (1998): Describing Webber’s argument that “a member of one community might have multiple allegiances and memberships in other communities, each with its own normative discourse.” This acknowledges that there are instances where a person can belong to two communities – the one being the cultural and the other being the international.

<sup>889</sup> The Cost of Violence Against Women and Girls, WOMANKIND Worldwide 6 (July 2002), available at: <http://www.fourliterations.org/Research.htm> [hereinafter The Cost of Violence against Women] (At its most severe, violence against women results in death – one every six days in South Africa. Amna Hassan’s paper (pg. 52) documents how harmful traditional practices can result in exceptionally severe and persistent damage to women’s health. Other papers testify to the litany of personal injuries resulting from violence including bruises, cuts, broken bones, burns, miscarriages, mobility problems and increased risk to HIV/AIDS).

<sup>890</sup> The Cost of Violence against Women, *supra* notex, at 7 and 11-19.

existence of such violence nevertheless will be of relevance to those states. Such violence results in various, broader social, economic and cultural repercussions. On this basis, I propose that the right to be free from systemic intimate violence satisfies the universality element of the test for determining whether systemic intimate violence involves a violation of a human right enforceable in international law.

In respect of each cultural practice that conflicts with international law, be it gender discrimination, racism, environmental protection or forms of punishment, the value of the one will outweigh that of the other. In other words, a choice will have to be made. Calling for the liberation of women from violence, from oppression and from marginalization, is not necessarily the plea of the righteous to the regressive; nor is it the plea of the regressive to the righteous. Each call, regarding each value, each practice within each context is unique. Understanding this is difficult but the degree of the challenge is by no means a reason to withdraw from the analysis. The truth may be hard to determine and the balancing of values is precarious, but it is possible to do, and it is necessary.

The intention behind those calling for human rights and those rejecting them should never be assumed; each camp has objectives that are praiseworthy and others that are pernicious. However, if the cultural autonomy debate continues to oscillate around the hub of gender equality, we need to ask why it is that to hate a black man is a prejudice, but to hate a woman is a custom.

## 7.5 Application of Universality to Systemic Intimate Violence

It is possible to conclude that, the universality of a right is not *absolute* but rather a question of degree.<sup>891</sup> Notwithstanding diversity, there is sufficient evidence in the practice and theory of international law to support that the existence of systemic intimate violence results in broader social, economic and cultural repercussions thereby ensuring that the remedying of such violence is of universal relevance even to states that currently refuse to curb gender discrimination.<sup>892</sup>

The claim to remedy such violence does not have to accord with *all* cultures, beliefs and systems. It need only be relevant to those cultures. I now turn to the requirement that the right to be free from systemic intimate violence involves the claims of a vulnerable subset of right-holders.

## 8 Vulnerability

### 8.1 General

As described in chapter one, the vulnerability of women as a group is a definitional element of systemic intimate violence. This vulnerability is caused by a combination of: (1) traditional

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<sup>891</sup> Id. Alston acknowledges that some belief, cultural or political systems may reject certain basic international law values.

<sup>892</sup> For a detailed analysis of the cultural relativism debate and its impact on women's rights throughout the world see WOMEN, CULTURE AND DEVELOPMENT A STUDY OF HUMAN CAPABILITIES 274, 279-289 (Martha C. Nussbaum and Jonathan Glover eds., 1995).

views about male and female roles, which justify the victims' limited presence in the public world; (2) the escalation of extreme violence upon separation; (3) the nature of systemic intimate violence, which tends to remove the abused, and signs of the abuse, from the purview of society; (4) economic difficulties restraining women's freedom; and (5) the acquiescence of communities to the violence.

I propose that these factors result in women being 'vulnerable' in the sense that, due to gender discrimination and inequality, and the particular nature of the violence suffered, they are at risk of violence to a greater degree than the reasonably protected or empowered person in society. On this basis, the 'vulnerability' element of the test for determining the existence of a 'human right' enforceable in international law is satisfied.

## 8.2 Vulnerability in International Human Rights Law

International human rights law generally applies to people in circumstances which render them vulnerable. For example, the Convention against Torture protects detainees who are subject to the control of the state. The Convention against Racial Discrimination protects racial minorities and, in the same way, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion protects religious groups from persecution.<sup>893</sup> The same concept applies to children who are subject to the control of their parents and to civilians detained as prisoners. People who are uneducated, hungry or homeless benefit from the assistance of international bodies in part because their power to remedy their situation is limited. In all these examples, there is a particular vulnerability on the part of the right holder.

A common feature of these victims of human rights violations is the difficulty such individuals have in negotiating the enforcement of their rights. External norms, therefore, are required to ensure that the rights in question are protected. By placing an obligation on the state or controlling entity to ensure such protection, international law attempts to reduce the impotency of the victims of the violation in question. This applies equally in the case of private relations, as is evidenced by the Child Convention.

I propose that an analogous, and equally deserving, vulnerability arises in the context of gender discrimination. Vulnerability due to gender discrimination has been identified as a factor in the internationalization of certain human rights. For example, the social abjection of women is very much a component of mass rape. The rapes in Rwanda, Darfur and the Former Yugoslavia were (and are) intended to 'spoil' the purity of women, to offend the honor of men and to impregnate the victims, resulting in the birth of children of enemy ethnicity.<sup>894</sup>

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<sup>893</sup> See the Convention against Racial Discrimination, *supra* note 3, at 47 and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. res. 36/55, 36 U.N. GAOR Supp. (No. 51) at 171, U.N. Doc. A/36/684 (1981). See also the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, G.A. res. 47/135, annex, 47 U.N. GAOR Supp. (No. 49) at 210, U.N. Doc. A/47/49 (1993).

<sup>894</sup> All of these factors are strong incentives to remain silent about the harm, if that is at all possible. See Short, *supra* note 573. See also Russell-Brown, *supra* note 109.

Sexual discrimination is evident also in the case of FGC, which is mandated for religious or cultural reasons, with a view to delineating a norm of sexual appropriateness for women.<sup>895</sup> Generally, the objective is to control women's sexuality as a way of ensuring both their sexual subservience and the family honor. The cutting is linked to a girl's gendered identity within her social group and is quite independent of her personal or individual characteristics. Mostly, FGC is practiced on women in order to prepare them for marriage. Without the procedure, a woman may be deemed impure or unsuitable for marriage. Since marriage provides a livelihood for many women, remaining unmarried is neither economically nor socially viable. The fact that the procedure is a necessary precondition to marriage, confirms the role of society in enforcing the harm and reveals the vulnerability of girls to this harm.<sup>896</sup>

These vulnerability factors can be grouped into one of two categories: (1) vulnerability due to sex discrimination; and (2) vulnerability due to intimacy. I address each component below.

### 8.3 Vulnerability due to Sex Discrimination

#### 8.3.1 Women Are Vulnerable to Systemic Intimate Violence

Women are particularly vulnerable to systemic intimate violence, thereby satisfying the 'vulnerability' element of the test for determining the existence of a human 'right' enforceable under international law.

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<sup>895</sup> Some maintain that the Qu'ran prescribes FGC although this is a hotly contested position. Often, women may not marry unless they have undergone this procedure. In addition, the closing of the vaginal opening makes a woman "tighter" thereby increasing the sexual enjoyment for men.

<sup>896</sup> The same is true of honor crimes. Other harmful practices against women are generally understood as practices that form part of a ritual ceremony or rite of passage. While the type of harmful practices against women may differ, in general they constitute the physical (and more often the sexual) control by men of women. Such practices involve bodily harm that has no medical or therapeutic benefit but receives social, legal and political approbation. Harmful practices against women are often enforced at a community level and even though a State's government does not impose these practices, they are no less mandatory. The economic and political subordination of women, together with the government inertia in preventing such conduct, inhibits the structural and attitudinal changes necessary to eliminate these types of practices. So-called 'crimes of honor' receive lower penalties than murder committed without such motivation. This reinforces the perception that women, their bodies and their sexuality, belong to their husbands, brothers and fathers in that the dignity of a man is linked to the virginal conduct of a woman. This not only controls the activity of a woman, but the punishment for her failing to comply with her allotted role are decidedly disproportionate to the perceived anti-social behavior. OMCT CEDAW Report on Nicaragua, *supra* note 123, at 15 (If a man kills a woman while surprising her in illicit intimate relations, he may be sentenced to 2-5 years of imprisonment, "while the standard punishment for homicide is 6-14 years.") Both private violence and harmful practices against women violate an individual's physical and psychological wellbeing. *See* UNICEF, EARLY MARRIAGE, *supra* note 538. Early marriage deprives a girl of her childhood. This not only affects her emotional and mental development, but causes serious physical setbacks. Most child brides are simply not sufficiently developed either physically or emotionally, to endure sexual intercourse and even less so childbirth. Early marriage inflicts great emotional stress as the young girl is removed from her parents' home and transferred to the home of her husband and in-laws. The husband of a child bride is invariably many years her senior and generally will have little in common with a young girl. It is this strange and older man with whom she is required to develop an intimate emotional and physical relationship.



One of the causes of the high levels of systemic intimate violence against women is the effect of sex discrimination. While the reiteration of the vulnerability of women risks the reification thereof, it is necessary to consider how the history of segregation has endorsed gender-based violence today. I do so below.

### 8.3.2 History of Gender Segregation and Vulnerability

The physical and social differences between men and women, on the whole, have resulted in a very different quality of life for the two genders.<sup>897</sup> It is important to acknowledge that the social abasement of women has been diluted. As the feminist movement, particularly in the west, developed and grew, women obtained greater civil liberties and individual freedoms. These movements were responsible for the progression from disenfranchisement and the legal incompetence of women, to access for women to political processes, economic fora, and public life in general.<sup>898</sup> However, the residue of inequality lingers in the shadows of the home and work. Feminists have made strides but society has lagged behind, continuing to demarcate the role of women within domesticity and as a satellite to men.<sup>899</sup>

The social inferiority of women has manifested itself in various communal structures. In the workplace, women face sexual harassment, prejudice, lower pay, harder work, and little concern for the duality of roles many women experience as both workers and mothers.<sup>900</sup> Politically, women are striving ahead as first ladies, ministers, and cabinet members but few countries boast female leaders.<sup>901</sup> Socially, women continue to be the predominant gender responsible for child rearing and concomitant household responsibilities, irrespective of whether such women hold other jobs or pursue other careers.<sup>902</sup>

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<sup>897</sup> This is endorsed by Amartya Sen who is careful to merge both biological/physical attributes with social considerations when analyzing gender inequality. He states that “To assume that difference away [*biological difference*] would immediately induce some systematic errors in understanding the correspondence between the space of primary goods and that of freedoms to achieve.” Therefore, while certain aspects of development are relevant generically to men and women, others are not. Sen, *Gender Inequality and Theories of Justice*, *supra* note 118, at 264.

<sup>898</sup> See Reva B. Siegel, “The Rule of Love”: Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2117, 2127-30 (1996) [hereinafter Siegel] (discussing the role of the women’s movement in the repudiation of the right of chastisement). SCHNEIDER, *supra* note 57, at 4–5.

<sup>899</sup> Charlotte Bunch, *Transforming Human Rights from a Feminist Perspective*, in WOMEN’S RIGHTS HUMAN RIGHTS INTERNATIONAL FEMINIST PERSPECTIVES 11, 12 (Julie Peters & Andrea Wolper eds., 1995) (“The exclusion of any group—whether on the basis of gender, class, sexual orientation, religion, or race—involves cultural definitions of the members of that group as less than fully human.” *Id.* at 12.).

<sup>900</sup> Vicki Schultz, *Life’s Work*, 100 COLUM. L. REV. 1881, 1883 (2000) (“[U]nless we pay attention to the institutional contexts through which housework is valued and individual choice realized, stubborn patterns of gender inequality will continue to reassert themselves—including the gender-based distribution of work that is at the root of women’s disadvantage.” *Id.* at 1883.).

<sup>901</sup> Notable exceptions to the male domination of leadership include Margaret Thatcher of England, Mary Robinson of Ireland, Golda Meir of Israel, Acting Head of State, Sühbaataryn Yanjmaa of Mongolia, Acting Head of State, Song Qingling of China, President Maria Estella Martínez Cartas de Perón of Argentina, President Chandrika Bandaranaike Kumaratunga of Sri Lanka, and Lydia Gueiler Tejada of Bolivia. *Worldwide Guide to Women in Leadership*, available at <http://www.guide2womenleaders.com/Presidents.htm> (last visited Oct. 29, 2003).

<sup>902</sup> See Gwendolyn Mikell, *Introduction*, AFRICAN FEMINISM: THE POLITICS OF SURVIVAL IN SUB-SAHARAN AFRICA 1 (Gwendolyn Mikell ed., 1997) [hereinafter Mikell]. The link between gender and family has minimized the importance of female education, particularly in developing regions. “African women’s struggle against gender asymmetry and inequality is often described in terms of the relationship between public and private spheres, or what

The correlation between violence and sex-discrimination is widely acknowledged and is “predicated upon economic dependency, acculturation to sex roles, and legal and political inequality.”<sup>903</sup> Therefore, the inheritance of gender discrimination is a key reason for the vulnerability of women and explains why women suffer systemic intimate violence disproportionately to men.<sup>904</sup> Sex-discrimination, at some point and in some way, has infiltrated, affected and, at times, corrupted many national laws vis-à-vis women.<sup>905</sup> The discrimination that segregates men and women also distinguishes between their respective needs, with the result that certain forms of violence are more readily addressed by laws than others.

### 8.3.3 General Effects of Gender Segregation and Vulnerability

According to Sen it is “in the continued inequality in the division of food – and (perhaps even more) that of health care – that gender inequality manifests itself most blatantly and persistently in poor societies with strong anti-female bias.”<sup>906</sup> This view is echoed by other theorists. McDougal, Lasswell and Chen refer to many manifestations of discrimination against women, including disproportionate wealth, noting that “[s]ex bias takes a greater economic toll

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we may call the “domestic versus public” distinctions in gender roles in Africa. Female subordination, often implemented through this domestic-public dichotomy, tends to be linked with sex roles and relationships in most parts of the world . . . [and] were exaggerated by colonial, Western, and hegemonic contacts.” Id. at 3. For an examination of the intersection between the inferior treatment of women in society and the greater degree of exposure to violence for such women, see also Donna Sullivan, *The Public/Private Distinction in International Human Rights Law*, in *WOMEN’S RIGHTS HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES* 126, 133-4 (Julie Peters & Andrea Wolper eds., 1995) [hereinafter Sullivan].

<sup>903</sup> Resnik, *supra* note 159, at 658. See also UNICEF, *DOMESTIC VIOLENCE AGAINST WOMEN AND GIRLS*, *supra* note 65, at 7–8. In reality, women remain second class citizens in many communities. This disparity is manifested into extreme and often sanctioned physical violence. See generally Peters & Wolper, *supra* note 620. See STANLEY G. FRENCH, WANDA TEAYS & LAURA M. PURDY, *VIOLENCE AGAINST WOMEN: PHILOSOPHICAL PERSPECTIVES* 1–2 (1998) (“Women are the victims of widespread personal and systemic violence . . . . The sweep of violence—overt or subtle—is striking: common in North America and elsewhere are sexual assault and rape, wife battering, sexual harassment, prostitution, sadistic pornography, and sexual exploitation by medical personnel. Cultures beyond these shores add their own forms of violence such as dowry death and female genital mutilation . . . . [Violence against women] knows neither racial nor ethnic limitations—only cultural variations, such as female genital mutilation or dowry burnings.” Id.). See also Resnik, *supra* note 159, at 641 (recognizing that legal change is required to “achieve a categorical shift of women from dependent householders to physically secure equal citizens”). See generally CARIN BENNINGER-BUDEL, *supra* note 61. Over 95% of reported spousal abuse cases involve men attacking women. Mason, *Buying Time for Survivors of Domestic Violence*, *supra* notex, at 640 footnote 117. See also Jo Dixon, *The Nexus of Sex, Spousal Violence, and the State*, 29 *LAW & SOC. REV.* 359, 367 (1995) [hereinafter Dixon]. This is especially true of post-conflict or transitional regions with high levels of crime and desensitization to violence in general. In such societies, women “are disproportionately likely to be victims of that violence.” See SOUTH AFRICAN LAW COMMISSION RESEARCH PAPER ON DOMESTIC VIOLENCE, *supra* note 245, at para. 1.2. See also UNICEF, *DOMESTIC VIOLENCE AGAINST WOMEN AND GIRLS*, *supra* note 65, at 8.

<sup>904</sup> In order for systemic intimate violence to fulfill this component, it is necessary to accept that it is a manifestation of gender discrimination. If this assumption is incorrect and there is no particular group which is affected by this harm, it is less likely that systemic intimate violence will constitute an international human rights violation. This is so because it is necessary to create a narrow recognition rule for human rights. If the next is cast too widely, the test becomes nugatory because almost all claims could be admissible into the human rights framework.

<sup>905</sup> See, e.g., Julie Peters & Andrea Wolper, *Introduction*, in *WOMEN’S RIGHTS HUMAN RIGHTS, INTERNATIONAL FEMINIST PERSPECTIVES* 1, 2 (Julie Peters & Andrea Wolper eds., 1995) [hereinafter Peters & Wolper] (“While men may care about reproductive freedom, their lives are not actually threatened by its absence . . . .” Id. at 2.).

<sup>906</sup> SEN, *DEVELOPMENT AS FREEDOM*, *supra* note 470, at 194.

than racial bias.”<sup>907</sup> Okin also describes the economic costs of systemic intimate violence, demonstrating that the “power differential extends beyond the abuse and overwork of women to deprivation in terms of feeding, healthcare, and education of female children.”<sup>908</sup>

This view is expressed by several theorists. Nussbaum explains that if “women are held to be bearers of a different ‘nature’ from unmarked ‘human nature,’ or whether they are simply said to be degenerate and substandard exemplars of the same ‘nature,’ the result is usually the same: a judgment of female inferiority, which can then be used to justify and stabilize oppression.”<sup>909</sup> Sen also describes how “inequality between men and women afflicts – and sometimes prematurely ends – the lives of millions of women, and, in different ways, severely restricts the substantive freedoms that women enjoy.”<sup>910</sup>

Okin maintains that the “devaluation of women’s work, as well as their lesser physical strength and economic dependence upon men, in turn allows them to be subject to physical, sexual and/or psychological abuse by their husbands or other male partners”<sup>911</sup> McDougal, Lasswell and Chen point out that the most distinguishing feature of sex-discrimination is “the prevalence of double standards. What is permissible for men is often made impermissible for women... The cumulative impact of the various deprivations... further handicap women’s capabilities to participate effectively and responsibly in the social process and fosters what is called the ‘syndrome of social marginality,’ such as ‘withdrawal, submission, inferiority, passivity.”<sup>912</sup>

Therefore, while the social, political and economic equality and equivalency of women has been achieved to varying degrees throughout the world, true choice regarding personal priorities and life ambition, unfettered equality, and de-gendered expectations remain an objective and not an achievement, thus perpetuating the social and legal abjection, and vulnerability, of women.<sup>913</sup>

## 8.4 Vulnerability Due To Intimacy

### 8.4.1 Application of Vulnerability to Systemic Intimate Violence

The above sections explain why, given gender discrimination and gender inequality in society generally, women constitute a vulnerable subset of society. The following section discusses why victims of systemic intimate violence in particular face even greater disadvantages

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<sup>907</sup> WORLD PUBLIC ORDER, *supra* notex, at 619, citing PRESIDENT’S TASK FORCE ON WOMEN’S RIGHTS AND RESPONSIBILITIES, A MATTER OF SIMPLE JUSTICE 18 (1970).

<sup>908</sup> Okin, *supra* note 593, at 284.

<sup>909</sup> Martha C. Nussbaum, *Human Capabilities*, in WOMEN, CULTURE AND DEVELOPMENT A STUDY OF HUMAN CAPABILITIES 62, 62 (Martha C. Nussbaum and Jonathan Glover eds., 1995) [hereinafter Nussbaum, *Human Capabilities*].

<sup>910</sup> SEN, DEVELOPMENT AS FREEDOM, *supra* note 470, at 15.

<sup>911</sup> Okin, *supra* note 593, at 284.

<sup>912</sup> WORLD PUBLIC ORDER, *supra* notex, at 623.

<sup>913</sup> CARIN BENNINGER-BUDEL, *supra* note 61, at 279. “Moreover, women victims of violence in general, and of domestic violence in particular, are still reported to face hostility when dealing with the police as well as discriminatory and sexist assumptions when dealing with the judicial system.” *Id.* See generally SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN ix-xxiii (1991).

because the privacy of their home, and the nature of the violence itself, often prevent them from accessing outside assistance even where such assistance is available.

In the case of systemic intimate violence, even if the violence is visibly severe (either initially or after a series of more subtle incidents of harm), the abused victim may still not recognize the abnormality of the abusive behavior. The abuser may convince her that the violence is somehow acceptable or not serious. She also may believe her abuser's accusations that she is responsible for the violence and that it is perhaps proportionate to whatever conduct allegedly triggered the act of aggression. Perhaps most obviously, no-one readily believes that an intimate relationship, which connotes warmth, support and love, could be the context in which such violence takes place.

The nature of systemic intimate violence also often involves the enforced physical isolation and effective imprisonment of victims. Given the degree of violence and the isolating effect of the action conducted within the realm of intimacy, the vulnerability of the victims of systemic intimate violence is acute.<sup>914</sup> The literal removal of the abused from her community and her isolating imprisonment are disquietingly synonymous with the structure of torture and disappearances, which use isolation both to mask the ferine effects of their execution and as a psychological force against the victims. Even where an abuser allows his victim to leave their home, the victim often is sufficiently scared of subsequent violence, whether as a result of direct or implied threats of violence against that victim, her children, companion animals, personal property or otherwise, that she feels unable to access outside help.

For these reasons, victims of systemic intimate violence constitute a particularly vulnerable subset of society. Victims of other social crimes such as isolated and random incidents of common assault are better able comparatively to access state laws, infrastructures and resources to help remedy the effects of such crimes. For these reasons, international law excuses itself and leaves the prevention of such crimes to domestic criminal legislation. By stark contrast, however, victims of systemic intimate violence (1) due to social gender discrimination and inequality are at greater risk of violence and (2) in the face of such violence, are unable relatively to obtain such outside assistance.

Therefore, I propose that the 'vulnerability' element of the test to determine the existence of an international 'human right' is satisfied. International law can, and should, intervene to protect victims of systemic intimate violence. Moreover, as discussed below, such intervention in private contexts is not unprecedented. International law already intervenes to prevent a number of forms of private, intimate violence.

#### 8.4.2 Examples of International Law Regulating Private Relationships

While international law originally governed state conduct exclusively, it has extended to individuals (the theory of which I discuss in chapter four below). Therefore, there are a number

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<sup>914</sup> The victim of systemic intimate violence, as in cases of official torture, mass rape, FGC, and disappearances, is subject to the complete control of the abuser and is either physically unable to escape or is imprisoned by the threat of harm to her or third parties. In this way, "marital control, physical abuse and the lack of social support interact to maintain women in abusive relationships." *Candies in Hell*, *supra* note 122, at 1605.

of private contexts which form the subject-matter of international law. The most obvious example of a private relationship regulated by international law is that between the child and her/his parents or caregivers. This relationship was triggered by the procedure of FGC.<sup>915</sup> In most incidents, FGC is performed upon young girls who are not old enough to consent to the procedure. The cutting takes place within a family structure where the exercise of parental control over the child impedes the child from accessing state resources, to the extent that such exist. This structure is endorsed by social and cultural imperatives, which afford profound respect to the family unit.<sup>916</sup> The fact that the cutting occurs in an intimate context complicates the victim's perception of the harm.

A similar set of difficulties exists in respect of mass rape. The ICTR, in identifying rape as a crime against humanity, compared the purpose of rape to that of torture as intimidation,

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<sup>915</sup> The social construction was a factor which led to the internationalization of FGC. FGC is a manifestation of a series of acts of harm known as harmful practices against women. See G.A. Res. 128, U.N. GOAR, 56<sup>th</sup> Sess., at 4, U.N. Doc. A/RES/56/128 (2002). In September 1997 a legal symposium was organized for legislators and legal experts in collaboration with the then Organization of African Unity (the OAU) and its African Center for Women. The symposium resulted in the Addis Ababa Declaration, followed by the OAU convention in 1999. In February 2000, the United Nations General Assembly adopted a resolution entitled Traditional or Customary Practices Affecting the Health of Women or Girls. See G.A. Res. 133, U.N. GOAR, 54<sup>th</sup> Sess., at 1, U.N. Doc. A/54/598 (2000). In April 2000, as a meeting with the African Commission for Human and Peoples' Rights, Women, Gender and Development Division, Legal Division and Political Department of the OAU, the Draft African Charter Protocol on the Rights of Women was adopted, Draft African Charter Protocol on the Rights of Women, *supra* note 87. This culminated in the adoption of the African Charter Protocol on the Rights of Women in July 2003. See Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, *as adopted by the meeting of government experts in Addis Ababa* November 16, 2001, CAB/LEG/66.6/ REV.1 available at <http://www.wcwonline.org/pdf/p-wact.pdf> or [http://www.hrea.org/erc/Library/display.php?doc\\_id=806&category\\_id=31&category\\_type=3](http://www.hrea.org/erc/Library/display.php?doc_id=806&category_id=31&category_type=3) [hereinafter Draft Harmful Practices Protocol]. The concept of Harmful Practices against Women has many different labels. Some international and regional instruments and reports refer to these practices as Harmful Traditional or Customary Practices while others refer to them simply as Harmful Practices. I have adopted the term, 'harmful practices against women' on the basis that some of these practices are not necessarily components of a particular culture or tradition but nonetheless receive social and legal sanction. Draft African Charter Protocol on the Rights of Women, *supra* note 87, defines harmful practices as "all behavior, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, and physical integrity." See article I(e) of Draft Harmful Practices Protocol, *supra* note 642. The 1997 United Nations General Assembly draft resolution on Traditional or Customary Practices Affecting the Health of Women and Girls provides a tentative definition of harmful practices against women. It suggests that while Harmful Practices against Women arises out of the concept of FGC, it has come to include a broad range of harm conducted against women. See Draft Resolution on Traditional or Customary Practices Affecting the Health of Women and Girls, at 4, U.N. Doc. A/C.3/52/L.21 (1997) available at <http://www.undp.org/missions/netherlands/harmreso.htm>. While the term "Female Genital Mutilation" is the term most commonly used by advocates of women's rights and health who wish to emphasize the damage caused by the procedure, it can be offensive to women in communities in which the practice is prevalent. Out of respect and sensitivity, many organizations have opted to use local terminology or more neutral terms such as "female circumcision" or "female genital cutting." In recognition of these two approaches, CRR uses the dual term, FC/FGM.

<sup>916</sup> See Okwubanego, *supra* note 111, at 160-161 (describing the social structure in which FGC takes place, including how "a girl must be circumcised before she is socially accepted as a member of her ethnic group, free to enjoy all the benefits of membership, including marriage, through which her father extracts a very handsome bride price."). See also Alexi Nicole Wood, *A Cultural Rite of Passage or a Form of Torture: Female Genital Mutilation From an International Law Perspective*, 12 HASTINGS WOMEN'S L.J. 347, 374-376 (2001) ("The international community has tended to relegate sexual abuse to the 'private' or 'domestic' sphere, over which it has no jurisdiction.")

degradation, humiliation, discrimination, punishment, control or destruction of a person in a most intimate and personal context.<sup>917</sup> In a sense, the act of sex intrinsically is private. Therefore, in order to distinguish the mass rapes from other forms of “isolated or random acts” of violence which fall outside the ambit of international law, the ICTR reconsidered the intimate nature of the sexual act. It divorced the traditional intimacy of the act from the public context in which it was taking place and viewed the mass rapes as constituting acts of violence against a sufficiently ‘vulnerable’ subset of society.<sup>918</sup>

The same adjustment of the perception of violence in a relationship is required. Clearly, the context of war is a public one, which is different from the private nature of systemic intimate violence. However, the objective of creating a context is to exclude “isolated or random acts” from the scope of the applicable provision of international law and to change the way in which we see the harm.<sup>919</sup>

I propose that the approach of international law to FGC and mass rape is equally applicable to incidents of systemic intimate violence. All three examples involve acts of violence which, at a base level, are private or occur in an intimate context. However, as with these other crimes, acts of systemic intimate violence are not “isolated and random.” They are acts of violence committed against a subset of society who are particularly vulnerable, and their perpetuation occurs *because of* the groups’ vulnerability. Due to social gender discrimination and inequality, and the nature of the particular violence suffered, those women are at a greater risk of violence than the person belonging to the potent segments of society.

In the case of systemic intimate violence where, even if the violence is visibly severe (either initially or after a series of more subtle incidents of harm) the abused may still not recognize the abnormality of the abusive behavior. The abuser may convince her that the violence is somehow acceptable or not serious. She also may believe her abuser’s accusations that she is responsible for the violence and that it is perhaps proportionate to whatever conduct allegedly triggered the act of aggression. Perhaps most obviously, no-one readily believes that an intimate relationship, which connotes warmth, support and love, could be the context in which such violence takes place.

Given the degree of violence and the isolating effect of the action conducted within the realm of intimacy, the vulnerability of the victims of systemic intimate violence is acute.<sup>920</sup> The literal removal of the abused from her community and her isolating imprisonment are disquietingly

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<sup>917</sup> Prosecutor v. Akayesu, *supra* note 109, at paragraphs 596-598. The ICTR stated that “the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts... The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual frame work of state sanctioned violence. This approach is more useful in international law.” Paragraphs 596-598. Moreover, mass rape occurs within the particular context of an armed conflict. Prosecutor v. Kunarac, *supra* note 2, at paragraph 420-421.

<sup>918</sup> Prosecutor v. Kunarac, *supra* note 2, at paragraph 422.

<sup>919</sup> Prosecutor v. Kunarac, *supra* note 2, at paragraph 422.

<sup>920</sup> The victim of systemic intimate violence, as in cases of official torture, mass rape, FGC, and disappearances, is subject to the complete control of the abuser and is either physically unable to escape or is imprisoned by the threat of harm to her or third parties. In this way, “marital control, physical abuse and the lack of social support interact to maintain women in abusive relationships.” *Candies in Hell*, *supra* note 122, at 1605.

synonymous with the structure of torture and disappearances, which use isolation both to mask the ferine effects of their execution and as a psychological force against the victims. It is arguable that within a domestic setting, the abused is attacked in isolation, much as a prisoner is tortured behind official doors.

## 9 State Accountability

No country has come close to achieving gender equality, but even those that have achieved relative equality still experience violence against women.<sup>921</sup>

### 9.1 The International Obligation of States to Protect Citizens

Under what circumstances does international law intervene to augment a state's local laws? There generally are three circumstances where international law will intervene to address a state's failure to address human rights violations: first, where the violation consists of conduct which crosses states' borders, making it impossible for one state to address the harm without the cooperation of another; second, where the violation consists of conduct that, while contained within domestic borders, has externalities which spill over or have the potential to spill over into other countries, thereby making it impossible for the state to address the harm; and, third, where the violation consists of conduct that does not cross boundaries but which, for social or political reasons, is not regulated (or not adequately regulated) by domestic laws.<sup>922</sup>

The common theme is that international law intervenes when, for one of these three reasons, the state is unable or unwilling to regulate the harm in question. Systemic intimate violence falls into the last category.<sup>923</sup>

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<sup>921</sup> SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 77 (2006).

<sup>922</sup> This was not always the role of international law. For a brief synopsis of the development of international human rights, see HENKIN, *supra* note 426, at 16. Originally, the international community was concerned only with the conduct of states vis-à-vis other states. The conduct of the state towards its own citizens was unregulated. HENKIN, *supra* note 426, at 14-15 ("...concern for individual welfare was framed and confined within the state system. That concern could not spill over state borders except in ways and by means that were consistent with the assumptions of that system, that is, when a state identified with inhabitants of other states on recognized grounds, and that identification threatened international order; when the condition of individuals inside a country impinged on the economic interests of other countries." Id. at 15). Human trafficking is an example of prohibited conduct which crosses borders. International law will intervene in cases of torture but not homicide. Both torture and murder exceed a threshold of violence which is rejected by society and, therefore, criminalized. However, torture, as opposed to murder, is internationalized because domestic laws are inadequate or inappropriate to address the harm, usually because torture is perpetrated by the government, the very entity that ought to prohibit it. In the case of murder, though, all things being equal, the criminal justice system will respond, prosecute and punish. Moreover, the poor prosecution of homicide does not necessarily trigger the provisions of international law whereas in the case of official torture, the system itself is, by definition, incapable of redress and the international community steps in to fill the void. However, if there is a spate of murders where the victims all share an identifiable group characteristic, and the State fails to take meaningful steps to address such murders, that would change the nature of the homicide from a purely national issue to one that triggers international attention.

<sup>923</sup> The first two categories do not apply since systemic intimate violence and its externalities cannot be said to transcend the borders of a particular country. Therefore, while systemic intimate violence may have externalities which lead to global problems, it more naturally falls within the third category of regulation, namely, harm which

On the basis of the principles of state accountability discussed in Part A of this chapter, when the fundamental and universal rights of a vulnerable individual or group are violated, states have a duty to take positive steps to prevent and help remedy such violations when faced with the knowledge of such violations. That is, states do not merely have a duty not to cause such violations directly. They must also, when charged with knowledge of such violations, positively act to help protect the rights of its citizens.<sup>924</sup> When a state fails to satisfy that duty, the right in question becomes one which is enforceable in international law.

This proposition is supported by the actions of states historically. As described in chapter four, the duty of states to take positive steps to protect citizens' rights originated when, as the first incursion into national sovereignty, states were held responsible for the way in which they treated citizens of other countries. If a state failed to protect a foreign national living in its territory, it was responsible for a denial of justice. The state would be compelled in international law to remedy this deficiency.<sup>925</sup>

Increasingly, the international community became concerned with whether governments protect their citizens from harm perpetrated by fellow citizens. For example, in 1969, the U.N. adopted the International Convention on the Elimination of All Forms of Racial Discrimination, which prohibits states from prejudicial conduct, and also requires states to “prohibit and bring to an end... racial discrimination by any persons, group or organization.”<sup>926</sup> In 1989, the Children's Convention was adopted, in terms of which governments undertook “to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.”<sup>927</sup>

For these reasons, I propose that a state has a duty to take positive steps to enforce the rights of individual citizens when that state has knowledge that such rights are being violated. In the context of systemic intimate violence, however, I propose that states, almost categorically, have failed to satisfy this duty.

As discussed below, there is strong evidence that systemic intimate violence is a worldwide phenomenon, affecting women in every country.<sup>928</sup> This evidence arguably is known to states, through state actors such as the police, social workers and public hospitals, or through the

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does not cross borders or affect other countries but which nonetheless triggers the provisions of international human rights law due to deficient state attention.

<sup>924</sup> HENKIN, *supra* note 426, at 44 (“State boundaries... are not definitive for human rights purposes. State boundaries do not define the moral obligations and rights that underlie human rights.”).

<sup>925</sup> [Note: Discussion to be expanded] [Note: Use the case law that has come before the European Court of Human Rights on the lack of lack of an effective remedy because the proceedings, either civil or criminal or constitutional, are too lengthy. See [http://www.echr.coe.int/NR/rdonlyres/6FF7A3DB-D885-41A4-9E4C-88DDF7F22C8C/0/MicrosoftWordSUBJECT\\_MATTER\\_2004.pdf](http://www.echr.coe.int/NR/rdonlyres/6FF7A3DB-D885-41A4-9E4C-88DDF7F22C8C/0/MicrosoftWordSUBJECT_MATTER_2004.pdf). See particularly case no. 44 in the table: *Sorrentino Protta v. Italy* (N° 40465/98) 29 January 2004 [Section I], which deals with a prolonged non-enforcement of an eviction order.]

<sup>926</sup> Article 2(d) of the Convention against Racial Discrimination, *supra* note 3.

<sup>927</sup> Article 3(2) of the Children's Convention, *supra* note 7.

<sup>928</sup> The U.N. states that “between 20 and 50 per cent of women have experienced physical violence at the hands of an intimate partner or family member.” UNICEF, EARLY MARRIAGE, *supra* note 538, at 3.



reporting of non-governmental organizations. The lack of knowledge, therefore, cannot be a bar to the duty to protect.

This section of the thesis discusses why the social gender discrimination and inequality affecting female victims of systemic intimate violence generally has resulted in inaction and apathy on the part of states to take positive steps to help remedy such violence. States have failed to enact the anti-domestic violence legislation appropriate to address systemic intimate violence, and where such legislation exists, have failed to provide sufficient resources and infrastructure to enforce that legislation and help remedy such violence. For these reasons, I propose that the 'state accountability' element of the test to determine the existence of an internationally protected human right is satisfied.

## 9.2 The Failure of the State to Protect Victims of Systemic Intimate Violence

As discussed above, there is evidence that systemic intimate violence is a worldwide phenomenon, affecting women in every country.<sup>929</sup> Almost every state, however, fails to protect victims of systemic intimate violence effectively.<sup>930</sup> Many legal systems fail to punish the perpetrators or assist the victims.<sup>931</sup> This alienates victims of systemic intimate violence from the

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<sup>929</sup> The U.N. states that "between 20 and 50 per cent of women have experienced physical violence at the hands of an intimate partner or family member." UNICEF, EARLY MARRIAGE, *supra* note 538, at 3.

<sup>930</sup> See UNICEF, DOMESTIC VIOLENCE AGAINST WOMEN AND GIRLS, *supra* note 65, at 3 ("The global dimensions of this violence are alarming, as highlighted by studies on its incidence and prevalence. No society can claim to be free of such violence, the only variation is in the patterns and trends that exist in countries and regions... domestic violence [is] the most prevalent yet relatively hidden and ignored form of violence against women and girls."). The report describes the magnitude of physical violence and cites data confirming "the prevalence of physical violence in all parts of the globe, including the estimates of 20 to 50 per cent of women from country to country who have experienced domestic violence. Statistics are grim no matter where in the world one looks." page 4. See also Schneider, *The Violence of Privacy*, *supra* notex, at 44 ("arguing that the failure to respond to violence against women in the home is not a passive act but an "affirmative political decision that has serious public consequences.").

<sup>931</sup> See the United Nations Report of the Ad Hoc Committee of the Whole of the twenty-third special session of the General Assembly, General Assembly Official Records Twenty-third special session Supplement No. 3 (A/S-23/10/Rev.1), 2000, available at <http://www.un.org/womenwatch/daw/followup/as2310rev1.pdf>, paragraph 14 ("Women continue to be victims of various forms of violence. Inadequate understanding of the root causes of all forms of violence against women and girls hinders efforts to eliminate violence against women and girls. There is a lack of comprehensive programmes dealing with the perpetrators, including programmes, where appropriate, which would enable them to solve problems without violence. Inadequate data on violence further impedes informed policymaking and analysis. Sociocultural attitudes which are discriminatory and economic inequalities reinforce women's subordinate place in society. This makes women and girls vulnerable to many forms of violence, such as physical, sexual and psychological violence occurring in the family, including battering... In many countries, a coordinated multidisciplinary approach to responding to violence which includes the health system, workplaces, the media, the education system, as well as the justice system, is still limited. Domestic violence, including sexual violence in marriage, is still treated as a private matter in some countries. Insufficient awareness of the consequences of domestic violence, how to prevent it and the rights of victims still exists. Although improving, the legal and legislative measures, especially in the criminal justice area, to eliminate different forms of violence against women and children, including domestic violence ... are weak in many countries. Prevention strategies also remain fragmented and reactive and there is a lack of programmes on these issues."). There are cases, however, where no legal system can prevent domestic violence. Fedler discusses the situation where the law can provide no remedy for a victim. Fedler categorizes abusers according to three types. The first two abusers generally possess some fear of the law or have a social profile which they wish to protect. The type C abuser is one who has no fear of the police or the law and as such will have no respect for any court order which may be made. In such a case the victim's only

law, and the law from such victims.<sup>932</sup> This deficiency is due to two factors. The first is a misunderstanding of domestic violence and the dangers that privacy presents for women. The second is a lack of infrastructural support, which hinders the implementation of many nations' domestic violence laws.<sup>933</sup>

Sex-discrimination, at some point and in some way, has infiltrated, affected and, at times, corrupted many national laws vis-à-vis women.<sup>934</sup> The discrimination that segregates men and women also distinguishes between their respective needs, with the result that certain forms of violence are more readily addressed by national laws than others. In many cases, with uniform similarity, effective remedies against systemic intimate violence are absent from such domestic laws.

### 9.3 International Law and Private Relationships

To effect the amplification of women's rights in international law, one must reconcile the intuitive disjuncture between the extremely private nature of systemic intimate violence, and the distant and decidedly public nature of international law. This is difficult since, unlike 'classic' human rights violations, the perpetrators of systemic intimate violence are private individuals who act independently of the state. However, systemic intimate violence is sustained by a social structure that is larger than the individuals involved in each case.<sup>935</sup> This structure inheres in the state's failure to alleviate the invasions that occur in the protected 'privacy' of domesticity and intimate relationships.<sup>936</sup> This will be discussed in greater detail below.<sup>937</sup>

### 9.4 Exclusion of Law from Private Relationships

Often national laws are neither the result, nor the reflection, of universal needs; they are the result, and reflection, of a culture, an order, a way of life.<sup>938</sup> An adherence to law in its current

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alternative is suicide. Fedler, *supra* note 179, at 234 and 251. In almost all countries, at each stage of the legal process women encounter impediments to their call for protection. SCHNEIDER, *supra* note 57, at 92 ("Yet, on the level of practice, it is questionable which remedies, if any, are likely to provide real protection for those women who are abused . . .").

<sup>932</sup> Fedler, *supra* note 179, at 251. Notwithstanding the new legislation in South Africa, domestic violence continues rampant. There appears to be a tragic "reality that disconcertingly elucidates the truth about domestic violence: that the [current domestic] law does not, cannot, prevent it." *Id.*

<sup>933</sup> In some countries, the official structures are conducive to or supportive of violence as a means of subduing female family members. Laura S. Adams, Beyond Gender: State Failure to Protect Domestic Violence Victims as a Basis for Granting Refugee Status, 24 T. JEFFERSON L. REV. 239, 240 (2002).

<sup>934</sup> See, e.g., Julie Peters & Andrea Wolper, *Introduction*, in WOMEN'S RIGHTS HUMAN RIGHTS, INTERNATIONAL FEMINIST PERSPECTIVES 1, 2 (Julie Peters & Andrea Wolper eds., 1995) [hereinafter Peters & Wolper] ("While men may care about reproductive freedom, their lives are not actually threatened by its absence . . ." *Id.* at 2.).

<sup>935</sup> See CARIN BENNINGER-BUDEL, *supra* note 61.

<sup>936</sup> Therefore, "one can argue that a state's passive attitude or even tolerance regarding human rights violations by private actors can be considered as 'consent or acquiescence of a public official or other person acting in an official capacity.'" CARIN BENNINGER-BUDEL, *supra* note 61, at 10. See article 2(2) of CEDAW, *supra* note 21, stating *inter alia*, that States undertake to advance equality and the protection of women and "to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise."

<sup>937</sup> See the discussion of state accountability as a component of human rights.

<sup>938</sup> See Anthony V. Alfieri, *Retrying Race*, 101 MICH. L. REV. 1141, 1145 (2003) (demonstrating that race as a social factor, "colors law, crime, and community. It shadows the performance of public and private roles. It shades the

form may constitute “our deepest political myth,”<sup>939</sup> which allows us to ignore the “‘invisible’ pattern of order in law,”<sup>940</sup> a pattern that facilitates a discord between legal and actual redress for many harmed women. This “pattern of order” is historically hierarchical, placing the empowered in positions to retain power and the disempowered in a correspondingly weak position. According to Professor Kahn, when embarking on an analysis of legal doctrine, it is necessary to “examin[e] . . . the rule of law as an expression of our political culture.”<sup>941</sup>

In the case of law and gender, the distinction between the public and the private sphere historically has correlated with the role differentiation between genders—the public sphere being male dominated; the private sphere allocated to women.<sup>942</sup> Although gender differentiation may be denied in many legal systems today, the public/private distinction endures and thus informs the reconstruction of facts after they have passed through the apparently neutral filtering process of the legal mechanism. In many ways, current state law regulating private affairs stems from a culture in which, for a host of reasons, the parity of male and female citizens is still to be realized.

If one is not an equal member of society, whether by express law or implied habits, one is not able to utilize the instruments of that society equally. Therefore, the existence of gender discrimination, be it latent or patent, affects negatively the ability of women to engage public assistance. In this way, female victims of systemic intimate violence are restricted from accessing state resources, infrastructure and assistance.

Therefore, it is hardly surprising that one of the prevalent misconceptions is that systemic intimate violence is a private affair that does not warrant state interference. Traditionally, women have suffered systemic intimate violence silently, believing perversely that this was a characteristic requirement of the relationship into which they had entered.<sup>943</sup> This is compounded by the fact that the conduct between intimates is seldom open to examination or intervention.<sup>944</sup>

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meaning of relationships. And it stains the operating norms of institutions.”). I propose that the same infiltrating tendency exists with respect to gender.

<sup>939</sup> PAUL W. KAHN, *THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA* xi (1997) [hereinafter KAHN].

<sup>940</sup> Bernhard Grossfeld & Edward J. Eberle, *Patterns of Order in Comparative Law: Discovering and Decoding Invisible Powers*, 38 *TEX. INT’L L.J.* 291, 294 (2003) (maintaining that invisible phenomena that influence the path of law include a range of tangible, intangible, intuitional or rational factors).

<sup>941</sup> KAHN, *supra* note 629, at x–xi.

<sup>942</sup> The role distinctions between men and women were explicitly linked to a separation between the public and private spheres in the past. Judith Resnik points out that while “[b]oundaries of role are . . . shifting, . . . [g]ender systems work through assumptions about the intelligibility of the categories of ‘women’ and ‘men,’ which in turn depend upon demarcations of ‘the family’ from ‘the market’ and of ‘the private’ from ‘the public.’” Resnik, *supra* note 159, at 620–621. See Susan B. Boyd, *Challenging the Public/Private Divide: An Overview*, in *CHALLENGING THE PUBLIC/PRIVATE DIVIDE: FEMINISM, LAW, AND PUBLIC POLICY* 5–7, 9 (Susan B. Boyd ed., 1997) [hereinafter Boyd]. Boyd describes the various manifestations of the public/private dyad and refers to the example of “the state’s failure to deal with men’s violence against women in the ‘private’ sphere of family relations” that rests “on a ratification of unequal power relations between men and women in heterosexual families.” *Id.* at 10.

<sup>943</sup> A vast array of cultures relegates the role of housekeeper and child-minder to women. This role is associated with subservience and dependency. Eekelaar & Katz, *supra* note 92, at iii: According to academics, “[f]amily violence usually takes place in secret” and “[t]he sufferings of its victims take place in silence.”

<sup>944</sup> Sullivan, *supra* note 615. The statistics and nature of domestic violence throughout the world are controversial and unreliable given “the extent to which the state and society conceal domestic violence.” *Id.* at 132.

It is only recently that the law has actively begun to accept domestic violence as “a serious social evil,”<sup>945</sup> understanding that “[a] psychological rationale is not sufficient to explain such a prevalent problem.”<sup>946</sup> Nonetheless, systemic intimate violence rarely is perceived as a political concern and its intimate context has had a disturbing impact on the translation of such violence by legislators.<sup>947</sup>

The resistance to regulating private matters stems in part from the difficulty in penetrating the private realm which continues to be guarded by these “invisible” assumptions.<sup>948</sup> Progressive legislation (where such exists) still meets the difficulties imposed by the division, in many societies, between private and public and the concomitant allocation of gendered roles to the two spheres.<sup>949</sup> This departmentalizing reflects a well-documented stratification that places women throughout the world in a weaker vulnerable position.<sup>950</sup>

It is tempting to discount this phenomenon as a characteristic of the past, an abandoned mode of living that exited societies when inclusive and transparent governance entered. However, true equality, meaningful choice, and a sophisticated equivalency between men and women do not exist, even in the most “egalitarian” of societies. This is evidenced by a decision on November 3, 2003, in Sweden where the Stockholm appeals court acquitted four men accused of gang raping a

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<sup>945</sup> Preamble to South African Domestic Violence Act, *supra* note 141.

<sup>946</sup> MacKay, *Educating the Professional*, *supra* note 290, at 204. See also Captured Queen Report, *supra* note 123, at 11-12 (describing the development of research regarding domestic violence from focusing on “deviant personal attributes of the man which were able to explain what he did” to the currently accepted explanation that violence against women is not only about the individuals involved in the immediate conflict, but also is an issue that should be tackled at the political level).

<sup>947</sup> This view is typical of many sex-based crimes. For example, in various parts of India—and in many other countries throughout the world—girls who are raped refuse to report the crime since the act is deemed to shame the victim and her family, not the rapist. Indira Jaising, *Violence Against Women: The Indian Perspective*, in *WOMEN’S RIGHTS HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES* 51, 52 (Julie Peters & Andrea Wolper eds., 1995) [hereinafter Jaising]. See, e.g., Resnik, *supra* note 159, at 635 (making the point that violence against women is perceived by some courts as falling within “a sphere of human activity inappropriate for national legislation”).

<sup>948</sup> Where States have taken legislative and policy steps to counteract gender inequality, a distinction is drawn between protection of equality between genders on a public level and the enforcement of equality in the privacy of the home. The former is easier to regulate and therefore better addressed by domestic law. However, to focus merely on the public realm of equality between genders, such as employment equity, equal opportunity or public violence is to pronounce and denounce domestic inequality to a category of harm that falls within family law but not criminal law. See generally Romany, *State Responsibility Goes Private*, *supra* note 265, at 99; Dixon, *supra* note 621, at 359 (demonstrating the “silence of the social and legal system” by quoting one court’s sentiments on spousal violence, “if no permanent injury has been inflicted, nor malice, cruelty, nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forgive and forget”).

<sup>949</sup> Resnik, *supra* note 159, at 649 (indicating that in early Federal family policy, “[f]athers were identified as the primary wage earners; mothers were situated as caregivers”). Resnik also cites Ruth Bader Ginsburg and Deborah Jones Merritt who explain that “for every one man who is illiterate around the world, two women are, and seventy percent of the world’s poor are women. Women’s risk of violence, their poverty, and their high illiteracy rates relate to women’s roles within families.” *Id.* at 658.

<sup>950</sup> See MACKINNON, *SEXUAL HARASSMENT*, *supra* note 120, at 20–24, 88–94 (2001): “The notion that women and men are defined as gendered by their differences from one another, and the equation of women’s so-called differences with inferiority or naturally lower status, has pervaded philosophy and law. . . . Gender in most societies has defined women as such in terms of differences, real and imagined, from men—usually to women’s detriment in resources, roles, respect, and rights.” *Id.* at 20.

woman for five hours on the basis that the victim's "prior sexual experiences led the men to believe that she was game for their sexual advances."<sup>951</sup>

In the following section I describe in more detail the ways in which violence against women is inadequately addressed by state structures, with particular reference to Mexico, Sweden, Nicaragua and the United States. In particular, I discuss how the systematic failure of states to assist victims of systemic intimate violence is evidenced by: (1) deficient laws; (2) poor police protection; (3) deficient judiciaries; and (4) the absence of other infrastructural protection.

## 9.5 Deficiencies of State Laws to Protect against Systemic Intimate Violence

Any special protection of rights as human rights presupposes some identification of those rights by the law.<sup>952</sup>

### 9.5.1 General

The test for determining whether an act of violence within a nation state falls within the scope of international law is whether the failure on the part of the state to prevent the harm is systematic.<sup>953</sup>

Disparate treatment of women has manifested itself in almost every society in the world.<sup>954</sup> Almost all communities from almost all regions have transgressed or allow the transgression of

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<sup>951</sup> See THEY SAID, SHE SAID in Swedish rape outrage, IOL, Nov. 5, 2003, at [http://www.iol.co.za/index.php?click\\_id=3&art\\_id=iol1068028343530S352&set\\_id=1](http://www.iol.co.za/index.php?click_id=3&art_id=iol1068028343530S352&set_id=1) (last visited Nov. 17, 2003). Judge Bengt Sjoegren responded to criticism of the decision by stating: "Even if it would be very strange for a woman to want to subject herself to this kind of treatment, it is still not so abnormal that the men would have had to realize that . . . . Given the circumstances, we came to the conclusion that it was not clear that the men realized that the woman was in a helpless state. Acquittal in Swedish gang rape trial sparks uproar." ClariNet, Nov. 5, 2003, at [http://quickstart.clari.net/qs\\_se/webnews/wed/ca/Qsweden-justice.Rz-q\\_DN5.html](http://quickstart.clari.net/qs_se/webnews/wed/ca/Qsweden-justice.Rz-q_DN5.html) (last visited Nov. 17, 2003)).

<sup>952</sup> Waldock, *supra* notex, at 87.

<sup>953</sup> See Dorothy Q. Thomas & Michele E. Beasley, Esq, *Domestic Violence as a Human Rights Issue*, 15 HUMAN RIGHTS QUARTERLY 36, 46 (1993) ("Evidence of a state's failure to prosecute is not sufficient [to position domestic violence within the human rights framework] unless a pattern can be shown that reveals the failure to be gender discriminatory and thereby a violation of the internationally guaranteed right to equal protection of the law.")

<sup>954</sup> World Report on Violence and Health, *supra* notex, at 1 (citing intimate partner violence as "[o]ne of the most common forms of violence against women . . . .") Id. See also, Jaising, *supra* note 637, at 51 ("The persistence in India of cultural practices that discriminate against girls and women means not only the abuse of but, finally, the deaths of countless women."). In Pakistan, the mother of a rape victim whose perpetrators were not prosecuted or even charged stated that "[t]hese men who have ruined my daughter's life should be hanged. Instead, they went totally unpunished. Why is there one justice for men and another justice for women?" See id. at 54. Group delineation exists; the remaining question is whether it will be acknowledged by the powers that can help prevent it.

the rights of women.<sup>955</sup> No matter how progressive a society, country, or region may deem itself to be, women continue to receive lesser benefits, status, and respect in the public sphere.<sup>956</sup>

Moreover, the harm committed against women is not peculiar to a particular place. It is an active practice throughout the world. Against this backdrop of universal social imparity, the inadequacy of current domestic laws and legal structures in addressing systemic intimate violence comes a little more clearly into focus.<sup>957</sup> Prohibiting systemic intimate violence through legislation is the first step governments should take to reduce such violence.<sup>958</sup> Too often, generic anti-violence laws are deficient.<sup>959</sup>

According to MacKinnon, international law “fosters human rights less through mandating governmental intervention than through enforcing governmental abstinence. In other words, if your human rights are going to be violated, pray it is by someone who looks likes a government, and that he already acted, and acted wrong.”

MacKinnon’s words are harshly prerogative but not inaccurate. This complaint is one that emanates not only in the field of women’s rights. It is the primary theme of the movement to enforce socio-economic rights. There are several reasons why international law has developed in such a ‘hands-off’ manner. Indeed, keeping *out* of a government’s affairs was a seminal part of the development of international law post-1945, manifesting in the period of de-colonialization. However, both our world and its emphasis have changed; political affiliations, globalization and environmental and humanitarian law have all contributed to a modicum of intervention by the so-called ‘international community’ into the affairs of individual states.

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<sup>955</sup> See The Human Rights Watch, World Report of 2002: Women’s Human Rights, (2002), available at <http://www.hrw.org/wr2k2/women.html#Violence%20Against%20Women> (last visited Oct. 25, 2003) (citing Zimbabwe, the United States, Uzbekistan, Turkey and Jordan as examples in which women’s physical and sexual integrity is at risk).

<sup>956</sup> See SCHNEIDER, *supra* note 57, at 90–97. See also BROKEN BODIES, SHATTERED MINDS, *supra* note 98, at 3 (reporting that “much of the violence faced by women in everyday life is at the hands of the people with whom they share their lives”); Dorothy Q. Thomas & Michele E. Beasley, *Domestic Violence as a Human Rights Issue*, 58 ALB. L. REV. 1119, 1129 (1995) (“If violence against women in the home is inherent in all societies, then it can no longer be dismissed as something private and beyond the scope of state responsibility.”).

<sup>957</sup> Indeed, in many jurisdictions systemic intimate violence or domestic violence is not, in and of itself, unlawful. Domestic violence may be prohibited in terms of legislation; however, a criminal offence only arises where a victim has obtained a protection order, which is breached by the aggressor. In such instances, the aggressor will be guilty for contempt of court but not for the violence itself.

<sup>958</sup> This includes the creation of judicial remedies, such as protection orders and police protection. For a full discussion of what this step entails, see chapter two.

<sup>959</sup> See, for example, Celina Romany, *Killing “The Angel in the House”*: Digging for the Political Vortex of Male Violence against Women, in THE PUBLIC NATURE OF PRIVATE VIOLENCE THE DISCOVERY OF DOMESTIC ABUSE, 285, 288-289 (Martha A. Fineman & Roxanne Mykitiuk eds., 1994) (maintaining that the criminalization of domestic violence tends to focus on the rehabilitation of the accused in the interests of family sanctity, rather than remedying the circumstances for the victim. She insists that the “backdrop of women’s experience” must be taken into account when considering the criminalization of domestic violence. She bases this on the philosophy that “[l]egal responsibility in no way denies the social ramifications of violence. Rather it deals with the exercise of the coercive power of the state to control conduct that infringe society’s shared values. The infringement of social norms by those under the influence of alcohol or other substances continues to be subject to coercive social control without contradicting their diagnosis as social ills; why should violence against women be different?”

MacKinnon takes this argument further and shows how it manifests in a most pernicious way for women who have been traditionally excluded as a group from the formulation of human rights violations. She maintains that as a result of this, “when men use their liberties socially to deprive women of theirs, it does not look like a human rights violation. But when men are deprived of theirs by governments, it does. The violations of the human rights of men better fit the paradigm of human rights violations because that paradigm has been based on the experience of men.”<sup>960</sup>

MacKinnon identifies the stratification of women, which the state incorporates “in and as law. Two things happen: law becomes legitimate, and social dominance becomes invisible.”<sup>961</sup> Therefore, MacKinnon points out how explicit laws discriminating against women are not the only way in which the law violates women’s equality. Implicit violations are endorsed by gaps in the law, or the enforcement thereof:

Structurally, only when the state has acted can constitutional equality guarantees be invoked. But no law gives men the right to rape women. This has not been necessary, since no rape law has ever seriously undermined the terms of men’s entitlement to sexual access to women. No government is, yet, in the pornography business. This has not been necessary, since no man who wants pornography encounters serious trouble getting it, regardless of obscenity laws. No law gives fathers the right to abuse their daughters sexually. This has not been necessary, since no state has ever systematically intervened in their social possession of and access to them. No law gives husbands the right to batter their wives. This has not been necessary, since there is nothing to stop them. No law silences women. This has not been necessary, for women are previously silenced in society – by sexual abuse, by not being heard, by not being believed, by poverty, by illiteracy, by a language that provides only unspeakable vocabulary for their most formative traumas, by a publishing industry that virtually guarantees that if they ever find a voice it leaves no trace in the world. No law takes away women’s privacy. Most women do not have any to take, and no law gives them what they do not already have. No law guarantees that women will forever remain the social unequals of men. This is not necessary, because the law guaranteeing sex equality requires, in an unequal society, that before one can be equal legally, one must be equal socially.<sup>962</sup>

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<sup>960</sup> MacKinnon, *Crimes of War, Crimes of Peace*, *supra* note 114, at 92. Now that this paradigm is open for re-assessment, it is necessary to identify what women’s experiences are and how they should be translated into laws, both nationally and internationally. If the largest form of violence experienced by women is systemic intimate violence, this should not be omitted from the human rights framework. If it is, it simply means that once again, women are omitted from the process, and surely we are beyond that point. As MacKinnon says, “guarantees women specifically need, due to sex inequality in society, in order to live to a standard defined as human – like freedom from being bought and sold as sexual chattel, autonomous economic means, reproductive control, personal security from intimate invasion, a credible voice in public life, a nonderivative place in the world – were not considered at all.” (96) Once the problem has been identified, its solution should be achieved. The only reason why women would no longer receive the benefits identified by MacKinnon is if, indeed, those in power retain the status quo. I doubt seriously whether any institution that has progressive aspirations would adopt such a position and therefore, change is possible, of course with the necessary economic commitment.

<sup>961</sup> CATHERINE A. MACKINNON, *TOWARDS A FEMINIST THEORY OF THE STATE* 237 (Harvard University Press, 1989) [hereinafter MACKINNON, *TOWARDS A FEMINIST THEORY OF THE STATE*].

<sup>962</sup> MACKINNON, *TOWARDS A FEMINIST THEORY OF THE STATE*, *supra* note, at 239.

## 9.5.2 Country Examples

### *United States*

The ill-fit of anti-violence laws and the needs of victims of systemic intimate violence is evidenced in particular by four decisions of the United States courts,<sup>963</sup> namely *DeShaney v. Winnebago County Dep't of Soc. Serv.* (hereinafter referred to as the “DeShaney case”),<sup>964</sup> *Town of Castle Rock v. Gonzales*,<sup>965</sup> and *Riss v. City of New York*.<sup>966</sup>

In *DeShaney*, the United States Supreme Court adjudicated whether a state has a duty to intervene in a case of acute child abuse that resulted in the brain damage of a minor child. The Supreme Court held that the failure of the Winnebago County Department of Social Services to protect a minor child from severe beatings by his father did not constitute an actionable claim under the due process provisions of the 14th Amendment of the United States Constitution.<sup>967</sup> The court held that: “[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security.”<sup>968</sup>

This case demonstrates a judicial reticence to impose a positive duty on states to intervene in the family or private sphere.<sup>969</sup> *DeShaney* was confirmed in the *Castle Rock* decision, where the United States Supreme Court confirmed that “the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due

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<sup>963</sup> The United States is an example of a sophisticated legal jurisdiction, renowned for its egalitarian progress. *A fortiori*, other jurisdictions may provide considerably less protection for women.

<sup>964</sup> *DeShaney v. Winnebago County Dep't of Soc. Serv.*, 489 U.S. 189 (1989) [hereinafter the *DeShaney case*].

<sup>965</sup> *Town of Castle Rock v. Gonzales* 125 S.Ct. 2796 (2005) [hereinafter the *Castle Rock case*].

<sup>966</sup> *Riss v. City of New York*, 22 N.Y.2d 579 (1968) [hereinafter *Riss case*].

<sup>967</sup> *DeShaney case*, *supra* note 677, at 191. The department knew of the beatings; the hospitals knew of the beatings; the parents knew of the beatings. *Id.* at 192–93. Everyone who could have prevented the brain damage of a young child was informed. Notwithstanding this information, there was no legal obligation on the department to assist the minor child nor was the department, or any other institution, held liable for the omission to prevent the battering of a minor child to the point of brain damage. *Id.* at 196–97. The essential rationale of the court was that socio-economic rights are not positive rights with a concomitant positive obligation on government to deliver associated services. *Id.*

<sup>968</sup> *Id.* at 195.

<sup>969</sup> This case contradicts the position taken by a United States Court of Appeals nine years earlier in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). In this case, the Second Circuit recognized its jurisdiction to determine whether Americo Norberto Pena-Irala (a Paraguayan citizen) had wrongfully caused the death of Dr. Joel Filartiga’s son (Dr. Filartiga and his son were also Paraguayan citizens). The court noted Filartiga’s claim that further pursuit of the action in Paraguay was futile and that there had been no credible authoritative process in Paraguay regarding the death of the appellant’s son. *Id.* at 878. The tenor of such a decision is an acknowledgement that acts of harm require a form of State intervention, either post-intervention through the judiciary, or prior prevention. And yet, nine years later, when deciding the *DeShaney case*, *supra* note 677, the United States Supreme Court held that, notwithstanding that the authority failed to investigate and prevent the torture of a child, no-one was culpable. In spirit at least, *DeShaney* oppugns Filartiga’s reference to “humanitarian and practical considerations [that] have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest.” *Id.* at 890.



Process Clause, neither in its procedural nor in its ‘substantive’ manifestations.”<sup>970</sup> In this case, the claimant had asked the police several times during the course of an evening to look for her estranged husband who had taken their children in violation of a protection order. The police failed to act and the estranged husband killed all three children.

In *Riss*, Linda Riss had been stalked and threatened by a former suitor. Notwithstanding repeated complaints to the police, the aggressor was never apprehended and he ultimately hired a “thug [to] throw lye in Linda’s face.”<sup>971</sup> The court held that it could afford Linda sympathy but not legal redress.<sup>972</sup> It based its decision on resource scarcity, holding that “[t]he amount of protection that may be provided is limited by the resources of the community and by a considered legislative-executive decision as to how those resources may be deployed.”<sup>973</sup> However, as Judge Keating pointed out in his dissent, if there is a scarcity of resources then liability should be imposed on public officials for failing to provide a minimum level of protection for the more vulnerable members of society.<sup>974</sup>

This case raises the speculation that the reticence of governments to provide a core minimum of laws and enforcement efforts to preventing violence against women is not only due to resource scarcity; it appears that the entrenched hierarchy within both law and society which places women on a lower rung of the social ladder, with lesser needs and arguably, with less relevance in the public realm, also plays a role in the allocation of limited resources.<sup>975</sup>

### *Mexico*

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<sup>970</sup> Id. at paragraph 12.

<sup>971</sup> *Riss* case, *supra* note 679, at 584. It is interesting to note that the court refers to the complainant as “Linda” whereas judicial bodies generally—and especially those dealing with mainstream human rights issues, such as the International Criminal Tribunal for the Former Yugoslavia—refer to the parties not by their first names but rather by their legal position as either appellants or defendants. See, e.g., *Prosecutor v. Dusko Tadic*, 36 I.L.M. 908 (ICTY 1997).

<sup>972</sup> *Riss* case, *supra* note 679, at 581.

<sup>973</sup> Id. at 581–82.

<sup>974</sup> Id. at 589. (Keating, J. dissenting)

<sup>975</sup> For a discussion of the manner in which States should be compelled to address women who are victims and survivors of domestic violence, see FAMILY VIOLENCE PREVENTION FUND, Health Report Card 2001: Introduction and Methodology, available at <http://endabuse.org/statereport/intro.php3> (last visited Nov. 2, 2003) [hereinafter FAMILY VIOLENCE PREVENTION FUND] (“This issue is critically important, because health care providers are often in the best position to help victims of abuse and their children, if they are trained to screen for domestic violence, to recognize signs of abuse, and to intervene effectively. States can take action that will dramatically improve the ability of doctors, nurses and other health care providers to help victims of domestic violence. But no state has done nearly all that it can in this area, and just a few states took any meaningful action in the last year.” Id.). The cases cited are at the very least indicative of the inadequacy of domestic law within the United States to address gender-based crimes. While the United States is one example of a domestic legal system which is unable to cope with the exigency of systemic intimate violence, other regions and countries with far less accessible and transparent legal systems may provide even less effective legal redress for women. According to feminist theorist Gwendolyn Mikell, many developing States within Africa stand indicted for the systematic disregard for and opposition to women. Mikell, *supra* note 615, at 1 (describing how African women suffer lower education levels and higher levels of malnutrition). For a discussion of ineffective laws in other countries from GLOBAL REPORT ON WOMEN’S HUMAN RIGHTS, *supra* note (discussing domestic violence in Russia: “The law doesn’t protect women. If a woman goes to the police and tells them that she is being beaten by her husband or partner, the police say, “But he didn’t kill you yet.”).

Systemic intimate violence is not categorized as a separate offence in Mexico but falls within the category of general abuse and misconduct.<sup>976</sup> In Mexico, prior to 1997, rape between spouses was not a criminal offence.<sup>977</sup> Indeed, the Mexican Supreme Court of Justice “established that sexual relations between spouses that are the result of violence do not constitute a crime but the ‘undue exercise of a right.’”<sup>978</sup> In 1995 only one state in Mexico had criminalized marital rape.<sup>979</sup>

### *Nicaragua*

The same is true of Nicaragua’s Criminal Code, which, as of the writing of this thesis, did not preclude marital rape.<sup>980</sup> While intimacy between the victim and the defendant are taken into account by the court as ‘aggravating circumstances,’ it only relates to past relationships and not relationships that are current.<sup>981</sup> This reinforces the social norm that women should be obedient to their husbands in all respects, including sexual relations, making marital rape a “well kept secret.”<sup>982</sup> Even though the criminal code has been augmented to address violence against women, it has been criticized for its failure to “consider the particularities of violence when it occurs within the family.”<sup>983</sup>

The Nicaraguan government has taken steps to reform its legislation, including the introduction of restraining orders and the criminalization of psychological harm.<sup>984</sup> However, the reform has preventative and punitive deficiencies, resulting in the persistence of violence against women “in everyday life in both the private and public spheres.”<sup>985</sup> Notwithstanding active non-governmental presence and improved legislation, “women remain unlikely to press charges and when victims do take perpetrators to court, most receive a verdict of not guilty because of a weak judicial system with little experience dealing with GBV [gender based violence].”<sup>986</sup> This is due in part to a lack of government will to implement the legislation.<sup>987</sup>

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<sup>976</sup> Mexico does have a Law of Assistance and Prevention of Domestic Violence which defines violence as “an act of power or omission” including sexual mistreatment “denying ‘sexual affective’ needs and inducing sexual practices that are not desired or that harm the victim. Law of Assistance and Prevention of Domestic Violence, Mexico, *supra* note 131. However, this law ‘may only be used as a means to secure prevention’ in respect of the provisions of the FD Penal Code, particularly those related to sexual crimes. Article 1 of the Law of Assistance and Prevention of Domestic Violence, Mexico, *supra* note 131.

<sup>977</sup> *Women’s Reproductive Rights in Mexico: A Shadow Report*, *supra* note 131, at 23.

<sup>978</sup> *Id.* According to the 1998 CEDAW Report, marital rape was penalized by this time. 1998 CEDAW report, *supra* note 204, at 34.

<sup>979</sup> That is the state of Querétaro. *Women’s Reproductive Rights in Mexico: A Shadow Report*, *supra* note 131, at 23.

<sup>980</sup> OMCT CEDAW Report on Nicaragua, *supra* note 123, at 14.

<sup>981</sup> OMCT CEDAW Report on Nicaragua, *supra* note 123, at 14.

<sup>982</sup> OMCT CEDAW Report on Nicaragua, *supra* note 123, at 14.

<sup>983</sup> OMCT CEDAW Report on Nicaragua, *supra* note 123, at 12.

<sup>984</sup> OMCT CEDAW Report on Nicaragua, *supra* note 123, at 13.

<sup>985</sup> The security measures lack a preventative component and only have a punitive effect. Both human and material resources are insufficient to establish the presence of psychological harm. Only ten days is given to determine the presence of this type of injury and this is generally considered to be deficient. There is also a lack of adequate forensic and medical psychologists, which contributes to the low level of enforcement of the provisions regarding psychological harm. While psychological harm has been criminalized, it does not lead to a specific punishment. OMCT CEDAW Report on Nicaragua, *supra* note 123, at 13.

<sup>986</sup> RHR Nicaragua Report, *supra* notex, at 120-121.

<sup>987</sup> Other reasons include a lack of coordination between NGOs and the government sector and difficulty in obtaining accurate data. RHR Nicaragua Report, *supra* note 705, at 121. See also Maria Luiza Aboim, Brazil and Domestic Violence and the Women’s Movement, in *Ending Domestic Violence Report from the Global Front Lines*,

## Sweden

Developed countries, such as Sweden, are not exempt.<sup>988</sup> In a recent New York Times article, the extent of domestic violence in Sweden was described in the bold exposition of the “Secret Side of Women’s Lives.”<sup>989</sup> While Swedish women experience a variety of forms of violence, “most of the violence against women in Sweden is perpetrated in the women’s own or somebody else’s home.”<sup>990</sup>

One of the main reasons for the high level of systemic intimate violence is not a propensity for violence on the part of Swedish men; rather, it seems that it “has simply been easier for them to get away with violence against wives and girlfriends ... and harder for women to get the help they need.”<sup>991</sup> While Sweden has criminalized marital rape (it was one of the first countries to do so) and FGC/M,<sup>992</sup> it appears that “much of the violence inflicted on women is never reported since this kind of violence is quite commonly committed by a woman’s partner in their joint home.”<sup>993</sup> Moreover, because domestic violence occurs in contexts about which we normally do not speak, namely, sex and marriage, it is even more difficult to discuss experiences, which victims view as an aberration of the norm.

### 9.6 Deficiencies of State Police Protection to Protect against Systemic Intimate Violence

One of the most important requirements for any victim is protection. Ideally, a victim of systemic intimate violence should know that the harm is a violation (which would be the result of an educational campaign implemented by a state complying with its international obligations) and, if she deems it necessary, she ought to be able to call for assistance to prevent the occurrence or repeat of violence.

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Produced by the Family Violence Prevention Fund 7 (eds., Leni Marin, Helen Zia and Esta Soler, 1998) (explaining that in the late 80s and 90s women victims had their lives scrutinized to find blame for the attacks of violence against them: “The ‘defense of honor’ although not part of the legal code, was commonly accepted by the courts.” 10. The Supreme Court ruled this defense inadmissible in 1991. Notion of women’s police station. 11.

<sup>988</sup> Sweden has a reputation as a world leader in equality legislation and combating gender discrimination. Sweden has been recognized for its advanced position in combating trafficking in women, which it links to domestic violence. See OPDV Bulletin: Swedish Deputy Prime Minister Focuses on Domestic Violence, 2003, available at [http://www.opdv.state.ny.us/public\\_awareness/bulletins/spring2003/swedishdpm.html](http://www.opdv.state.ny.us/public_awareness/bulletins/spring2003/swedishdpm.html). In general, Sweden is recognized as one of the most advanced countries in achieving meaningful equality between men and women. See Letter from Europe; Sweden Boldly Exposes a Secret Side of Women’s Lives, by Lizette Alvarez, April 6 2005, New York Times [hereinafter Secret Side of Women’s Lives] (“Sweden ranks at the top (or near it) in the number of women who hold public office, serve as cabinet ministers, graduate from college and hold jobs.”).

<sup>989</sup> See Secret Side of Women’s Lives, *supra* note 732 (describing domestic violence as the “one significant blot on the record of women’s empowerment.”).

<sup>990</sup> Amnesty International, Intimate Violence in Sweden, *supra* note 98, at 6.

<sup>991</sup> Secret Side of Women’s Lives, *supra* note 732.

<sup>992</sup> Amnesty International, Intimate Violence in Sweden, *supra* note 98, at 20. It is interesting to note that the laws criminalizing genital cutting allows for the conviction of a person “in Sweden of a crime committed abroad, even if the act is not classified as punishable in the other country.”

<sup>993</sup> Captured Queen Report, *supra* note 123, at 14.

However, this is not the norm. There are several striking incidences where police functionaries either have evidenced actionable neglect or, through prejudicial and accusatory conduct, have alienated the victim from state protection.<sup>994</sup>

In the case of systemic intimate violence, victims require “immediate police action the very first time the man infringes the restraining order.”<sup>995</sup> Yet, in many countries the police often are unable or unwilling to respond to calls for help, even if a protection order has been provided.<sup>996</sup> This is so even in jurisdictions where the police are legally required to assist victims of domestic violence and inform them of their rights.<sup>997</sup>

There are several reasons why police officials are reluctant to intervene in cases of domestic violence. Part of their aversion stems from a common social perception that the family is a hallowed realm, surrounded by a barrier of privacy that warrants respect and distance.<sup>998</sup> When a

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<sup>994</sup> In one alarming case, due to the failure of the police to take her pleas for help seriously, an American woman “ended up partially paralyzed and permanently disfigured,” sustaining her worst injuries in the yard of her home while the police waited in their vehicle on the street. RAOUL FELDER & BARBARA VICTOR, *GETTING AWAY WITH MURDER: WEAPONS FOR THE WAR AGAINST DOMESTIC VIOLENCE* 13–17 (1996). The authors describe the abuse inflicted upon Tracey Thurman by her estranged husband Charles. *Id.* Due to the failure of the police to take her pleas for help seriously, Tracey “ended up partially paralyzed and permanently disfigured,” sustaining her worst injuries in the yard of her home while the police waited in their vehicle on the street. *Id.* at 17. Russia is another pressing example of poor legislative and administrative facilities. See GLOBAL REPORT ON WOMEN’S HUMAN RIGHTS, *supra* note 694 (“Despite official acknowledgment that domestic violence affects the lives of thousands of women in Russia, the official and societal response to women’s reports of spousal abuse indicates that such assault is considered a “family affair” rather than a problem for law enforcement. Reports gathered by Human Rights Watch indicate that individual police share the widely-held view that spousal abuse is a private matter in which the police should not or need not intervene. As a consequence, police often fail to respond to reports of domestic violence, or, if they do respond, take no action against the abuser. A founder of a St. Petersburg hotline for women told us: ‘It’s traumatizing for women to go to the police. We’ve been studying the police and their responses to violence against women. They have very sexist attitudes. They think of domestic violence as the problem of women, that women provoke violence with their behavior. The generally dismissive attitude of the police toward reports of domestic abuse permits men to beat their wives or domestic partners with impunity. ... Yevgenii Riabtsev, the head of the ministry of the interior’s public relations section... shifted the blame for the violence itself to its victims, stating, “After marriage, many women don’t look after themselves. They let themselves go physically, and their husbands lose interest.””).

<sup>995</sup> Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 36.

<sup>996</sup> PTACEK, *supra* note 275, at 143: “Before they went to court to file for restraining orders, the majority of the women interviewed had already sought assistance from a range of other institutions... The most common institutional resource sought was the police; 78 percent had called the police before seeking orders.” See generally Report of the Special Rapporteur on violence against women, *supra* note 58, at 33 (indicating that while there is increased recognition of violence against women, legal relief continues to be underdeveloped in most jurisdictions).

<sup>997</sup> In Sweden and South Africa, police have a legal obligation to assist victims of domestic violence. In Sweden, the police are “legally bound to investigate reports of assault and rape, even when the injured party objects to the investigation. Nor can the injured party withdraw a police report that he or she has filed. In most cases, it is the woman herself who reports the assault to the police.” Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 38. However, because there are no witnesses to the abuse, if the woman withdraws the complaint, the case is almost always closed. Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 38.

<sup>998</sup> Many women will make a conscious decision not to ask for help in instances of violence due to a sense of shame, judgment and financial dependency. See for example, CARIN BENNINGER-BUDEL, *supra* note 61, at 116: “For example, in South Asia, the dominant discourse situates women as dependent on men. In her role as wife and mother, ‘[A woman] is expected to possess the qualities of obedience, patience, endurance and sacrifice – failing which she is liable to reactions amounting to any degree of violence.’ Women may seen (sic) as deserving of violent treatment when others perceive that they have failed in their prescribed role in some way.... Some respondents did

victim calls for help, the perception that she has broken a rule of sanctity feeds the reticence of many police officials.<sup>999</sup> However, police acquiescence arises from more than just perception; ironically, domestic violence calls are among the most dangerous police work. Because violence within an intimate context is so incongruous, many victims will call police only in the most exigent and unstable of circumstances, when they fear a complete lack of control.<sup>1000</sup> The violence in these cases is indeed extreme and presents a threat not only to the victim but to anyone who intervenes.

In South Africa, for example, while the Domestic Violence Act penalizes police officials for failing to comply with the Act by refusing to intervene in cases of domestic violence, the perception that intervention in domestic violence does not ‘constitute real police work’ perpetuates police apathy.<sup>1001</sup> The same phenomenon exists in Sweden, where “women do not consider it to be of any use to seek help from the police by reporting the violence to which they

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not identify with other women who faced marital violence, stressing that women who were beaten had disobeyed norms of female virtue, and had therefore brought their trouble on themselves.” (citations omitted).

<sup>999</sup> CARIN BENNINGER-BUDEL, *supra* note 61, at 279: “Moreover, women victims of violence in general, and of domestic violence in particular, are still reported to face hostility when dealing with the police as well as discriminatory and sexist assumptions when dealing with the judicial system... As a consequence, a limited number of women press complaints under the law...”

<sup>1000</sup> CARIN BENNINGER-BUDEL, *supra* note 61, at 77 (“Forms of violence that are part of many women’s daily lives, such as domestic violence, may be perceived as a result of women’s failure to fulfil their roles as wife or mother in some way.” See also *Anieta Natasha Ferreira v. The State*, The Supreme Court of Appeal of South Africa, Case No. 245/03, 22 March 2004. “The appellant called for police assistance on three occasions. Only once did they arrive. They said the deceased was drunk and that the appellant should get him to sober up.”) *Id* at paragraph 25.

<sup>1001</sup> Section 18(4)(a) of the South African Domestic Violence Act, *supra* note 141. The creation of awareness and the education of the police are not provided for in this Act.

have been subjected.”<sup>1002</sup> As a result, Sweden has a particularly low rate of reporting systemic intimate violence.<sup>1003</sup>

There are a number of reasons for this low rate of reported abuse, including: the victims’ fear that the police will not believe the complaint; the victims’ intuition that the police will not be able to do anything; feelings of shame or guilt; fear of revenge from the abuser; resistance to involving the police; and fear that triggering the legal process will result in the incarceration of the abusive intimate. In particular, nearly half the women who do not report the violence to the police, did so on the basis that they feel the incident too trivial to justify police intervention for the reasons described in chapter two above.<sup>1004</sup> Therefore, Sweden’s legal infrastructures, while impressive in comparison to many other states, remain deficient in implementation.<sup>1005</sup>

In Nicaragua, only two out of every ten abused women contact the police.<sup>1006</sup> Reasons for this under-reporting include: fear of further violence; shame; feelings of isolation; difficulties in attending the hearings (especially for women living in rural areas); difficulties in preparing evidentiary documents; a lack of economic resources to pay for legal representation; and the

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<sup>1002</sup> Only 5 percent of women who experienced abuse reported the most recent incident of the abuse to the police. Captured Queen Report, *supra* note 123, at 54. It is interesting to note that the “propensity to make a report is low regardless of the kind of perpetrator i.e. whether the perpetrator was a husband, boyfriend or former husband or former boyfriend. However, it appears that sexual violence was the least commonly reported. Captured Queen Report, *supra* note 123, at 52 and 54. In Sweden police are disinclined to apply the law, although this varies dramatically between the different municipalities. Only “about 25 per cent of all violent crimes come to the notice of the police. It is generally thought by criminologists that many causes of violence against women go unrecorded.” Captured Queen Report, *supra* note 123, at 51. In 1999, 19,982 reports of violence against women were filed with the police. This is confirmed by Amnesty International. *See* Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 23: (“In fact, it is estimated that the number of reported violent crimes “only corresponds to between 20 and 25 per cent of the crimes actually committed.”) As a result, “much violent crime against women remains unknown to the police and the judiciary.” Captured Queen Report, *supra* note 123, at 51. One third of the women who reported being in or having been in a violent relationship reported that they sought help from some service or agency, other than the police. Captured Queen Report, *supra* note 123, at 54. Most commonly, women sought help from medical services, including psychiatric assistance. Captured Queen Report, *supra* note 123, at 54-5. This indicates that most of the women view the violence as a psychiatric disorder or physical illness. It is also possible that women only actually seek help when the violence is so severe that it leads to acute psychological and/or physical effects. Other forms of assistance include family counseling services, lawyers and social welfare secretaries. The most satisfying form of help was from the medical sector (excluding psychiatric assistance). The highest level of dissatisfaction was experienced by women who sought assistance from social services. *Id* at 55. This is due in part to the location of the violence since “crimes committed indoors also tend to be reported less frequently than crimes committed out of doors.” Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 7 and 24.

<sup>1003</sup> It is estimated that only 20-25 per cent of violent crimes in Sweden are actually reported, especially where the violence is perpetrated between intimates. Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 24.

<sup>1004</sup> Captured Queen Report, *supra* note 123, at 52. The report is based on a questionnaire which asks interviewees why they would not report violence and included the following reasons:

<sup>1005</sup> The report indicates that as of 2004, there was limited change in the actual status quo for women who survive domestic violence. Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 44 (“it emerged that no major changes had been made in the work to help abused women”).

<sup>1006</sup> OMCT CEDAW Report on Nicaragua, *supra* note 123, at 13.

failure of the Nicaraguan government to enforce protections for potential victims and to prosecute perpetrators.<sup>1007</sup>

The lack of effective policing is particularly acute in immigrant and minority communities. Minority communities often view the police and prison system as external to their world. For example, members of enclosed religious groups such as Mormons, Mennonites or Amish in the United States, or Muslim and Turkish communities in Germany and France, view police services as alien to their society. Much of their survival as a homogenous group is dependent on a sense of group loyalty. Calling the police may constitute an infraction of their survival code, which is far worse for many religious groups than the individual violation a person may endure.

Immigrant women also fear deportation if they contact authorities. Even if they are legally present in a country, they may be dependent on their partners for financial support and linguistic and cultural guidance.<sup>1008</sup> Therefore, women of religious, ethnic or national minorities may suffer so-called double discrimination making the services and support the state offers inappropriate for their specific needs.

### 9.7 Deficiencies of State Court Proceedings to Protect against Systemic Intimate Violence

There are several deficiencies as regards the prosecution of domestic violence offenders. This is another factor inhibiting the effective prevention of systemic intimate violence. The crucial moment for a successful prosecution is at the initial stage of the investigation, immediately after the complaint has been lodged when evidence and testimonies are most reliable.<sup>1009</sup> If too long a

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<sup>1007</sup> OMCT CEDAW Report on Nicaragua, *supra* note 123, at 13. RHR Nicaragua Report, *supra* note 705, at 118-9. A Nicaraguan court refused to allow an accusation of sexual abuse against the former Nicaraguan President and Sandinista leader, Ortega, by his step-daughter. When an abused Nicaraguan woman sought assistance from the police, she encountered an affiliation between the abuser and the police, and since “he was in the military they let him go right away and gave him a ride back to my house. That time he kicked down my door... After that I didn’t know what to do. I felt trapped, a prisoner and I couldn’t escape...” *Candies in Hell*, *supra* note 122, at 1604-5. The fact that both officials and abusers are predominantly male reinforces the mantra of the abuser that the law will never help the abused. See SCHNEIDER, *supra* note 57, at 91 (“The reports of the many state task forces on gender bias in the courts have painstakingly recorded judicial attitudes of denial.”). See, e.g., PTACEK, *supra* note 275, at 169–70. Ptacek describes how a protection or restraining order is viewed as “just a piece of paper” that can be ripped up. *Id.* at 169. This is a view held by the abusers and often court officials. *Id.* at 170. CARIN BENNINGER-BUDEL, *supra* note 61, at 123: “...women are uncomfortable discussing these issue with men. Although the government acknowledges that the police force is predominantly male, it has not reported any steps taken to hire more female police officers in order to address these victims’ needs.” In Nicaragua, due to prejudicial and ignorant behavior on the part of the police and the judiciary, women lack confidence in the judicial response to their claims, especially when the abused is in a position of power. OMCT CEDAW Report on Nicaragua, *supra* note 123, at 14. See Inter-American Commission on Human Rights, Report No. 118/01 Case 12.230 Zoilamérica Narváez Murillo Nicaragua October 15, 2001, available at <http://www.cidh.oas.org/annualrep/2001eng/Nicaragua12230.htm>, in terms of which Murillo, the adopted daughter of former President Ortega and leader of the opposition party in Nicaragua at the time, laid charges of sexual assault and abuse against him. The charges were dropped due to Ortega’s claim of congressional immunity. The plaintiff and her lawyer approached the Inter-American Commission on Human Rights, alleging that Nicaragua “had violated Narváez’s right to be heard by a competent court or judge.” (§ I). The Inter-American Commission declared the case admissible to the Inter-American Court of Human Rights.

<sup>1008</sup> Amnesty International, Intimate Violence in Sweden, *supra* note 98, at 32. Sweden has implemented a new reform in terms of which, “women who have been abused by men may be allowed to stay in Sweden, even if the relationship has lasted less than two years.”

<sup>1009</sup> Amnesty International, Intimate Violence in Sweden, *supra* note 98, at 39.

period passes, the recollection of the violence may be dulled, and police and victim interviews may be sketchy and insubstantial.<sup>1010</sup> There also may be a lack of documentation regarding the injuries sustained by the abused and long delays in summoning the injured party for an interview.<sup>1011</sup>

In light of the cumulative nature of systemic intimate violence, often one incident of violence in isolation will be perceived as insufficiently serious to justify criminal prosecution, to the extent that criminal prosecution is appropriate. In the context of an accumulation of violence, physical, emotional and threats thereof, the seriousness is more obvious. It is important, therefore, although hardly implemented, to charge the accuser for the multiple acts of violence, which, as described above, creates a continuum of harm.<sup>1012</sup>

However, often the claim cannot be substantiated by anyone other than the claimant.<sup>1013</sup> In some instances, a claimant may be reluctant to participate in an investigation for fear that it may increase the level of violence against her, her children or her family, or because she feels partly responsible for the abuse. Finally, the abused simply may lack the financial and emotional support to cope with the legal proceedings.<sup>1014</sup> If the police do assist the victim, it is rare for her claim to reach fruition since few reports of violence actually lead to legal proceedings.<sup>1015</sup>

In 2003 in Sweden, for example, only three in ten acts of violence against women led to prosecution or other legal proceedings, in part because the violent crimes are hard to prove due to a lack of witnesses.<sup>1016</sup> In 2003, of the 14,802 processed suspicions of acts of violence against women handled by a prosecutor, only 32 per cent (4,808) resulted in some sort of legal action, including a decision to waive prosecution.<sup>1017</sup> Of the requests for restraining orders lodged with the public prosecution authorities in 2003,<sup>1018</sup> more than half were dismissed, mostly because of a lack of evidence.<sup>1019</sup>

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<sup>1010</sup> Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 39.

<sup>1011</sup> This is problematic since many abused women engage the law only when the violence is at its most intense. Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 39.

<sup>1012</sup> See Martha R. Mahoney, *Victimization or Oppression? Women's Lives, Violence, and Agency*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE THE DISCOVERY OF DOMESTIC ABUSE*, 59, 83 (Martha A. Fineman & Roxanne Mykitiuk eds., 1994) (referring to the "Power and Control Wheel" developed by Ellen Pence and the Daluth Abuse Intervention Project. She then describes a case where, taking the cyclical nature of violence into account, the prosecutor charged the accused abuser for each independent act of abuse as a separate crime. (83-84). The Power and Control Wheel also shows how each incident forms part of a process that culminates in a "state of siege."

<sup>1013</sup> Insufficient evidence is one of the main reasons for the dismissal of a case. Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 39.

<sup>1014</sup> *Id.*

<sup>1015</sup> *Id.* at 35 and 23 (indicating that there is an under-reporting of violence against women in Sweden and therefore all statistics should be viewed as conservative figures).

<sup>1016</sup> *Id.* at 40. This is particularly problematic when compared to the rate of legal proceedings being instituted for crimes of violence in general, which is close to 45 per cent. In 2002, it was reported that only a quarter of reported assaults against women led to prosecution. Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 35.

<sup>1017</sup> *Id.*

<sup>1018</sup> *Id.* at 36.

<sup>1019</sup> Legal action was taken against an average of 620 individuals a year for violating restraining orders. *Id.* at 36. Of the protection orders granted, nearly 30 per cent were violated within one year of the date of issue. Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 36. Ten per cent of the reported cases of rape were



## 9.8 Deficiencies of State Infrastructures to Protect against Systemic Intimate Violence

Individual gender discrimination also feeds, and is fed by, institutional discrimination. McDougal, Lasswell and Chen note that the “processes of government, national and local, are often employed to sustain and institutionalize discriminations against women.”<sup>1020</sup> Sen also confirms the intersection between the structural difficulties women face and the broader social problems they, and others, endure (such as child mortality and infertility). This threatens not only individual autonomy, dignity and worth, but also the wellbeing of the social puzzle in which we live and hope to lead fulfilled lives.<sup>1021</sup>

Therefore, “[t]ackling violence against women requires the engagement of state actors, of men and society at large. The cost of not engaging will be the continued cost of violence.”<sup>1022</sup> However, given the complexity of systemic intimate violence, the law and its officers are not necessarily the ideal remedy. Often, the abused needs alternative residence for her and her children, a source of income and security from continued threats by the abuser. However, there is a radical deficiency of such services in many developed and developing countries.

In Sweden, for example, government agencies actually refer abused women to non-governmental women’s shelters.<sup>1023</sup> However, there are non-profit women’s shelters in only 150 of Sweden’s 290 municipalities.<sup>1024</sup> Most of the shelters have no paid staff, no professionals and are run entirely by volunteer staff.<sup>1025</sup> In 2001, a particular shelter received 3,000 incoming calls (from both individual women and governmental agencies); they were able to assist fifteen women, ten children and nine girls in that year.<sup>1026</sup> In 2002, one group of shelters recorded

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dismissed immediately, without any investigation being initiated. Only six of 89 reported rapes in central Stockholm resulted in convictions. *Id.* at 37. A specific study indicated that less than 6 per cent of indoor rapes had led to prosecution. Between 15 and 30 per cent of the known suspects were never questioned. A lack of resources, insufficient knowledge and attitude problems are cited as reasons why so few cases of rape are solved. Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 38. In Sweden in 2003, 22,400 cases of domestic violence were reported to the police, although it is recognized that this figure is probably conservative since many women do not report violence they experience. *Sweden Debates Hitting Men with Domestic Violence Tax*, *supra* note 298.

<sup>1020</sup> WORLD PUBLIC ORDER, *supra* notex, at 617.

<sup>1021</sup> SEN, DEVELOPMENT AS FREEDOM, *supra* note 470, at 229.

<sup>1022</sup> The Cost of Violence against Women, *supra* note, at 9.

<sup>1023</sup> Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 44. This is problematic, not only because the government is not doing its job, but also because there are not enough shelters to service the number of women seeking assistance.

<sup>1024</sup> *Id.* at 47. The shelters in Sweden are organized into two different national associations, namely, the National Organization for Women’s Shelters and Young Women’s Shelters.

<sup>1025</sup> AMNESTY INTERNATIONAL, INTIMATE VIOLENCE IN SWEDEN, *supra* note 98, at 47.

<sup>1026</sup> In the year 2000 the municipalities contributed a total of SEK 24 million to women’s shelters, although the amounts provided by individual municipalities varied and as many as “68 municipalities did not contribute at all.” AMNESTY INTERNATIONAL, INTIMATE VIOLENCE IN SWEDEN, *supra* note 98, at 47. See Maria Luiza Aboim, *Brazil and Domestic Violence and the Women’s Movement*, in ENDING DOMESTIC VIOLENCE REPORT FROM THE GLOBAL FRONT LINES, PRODUCED BY THE FAMILY VIOLENCE PREVENTION FUND 8 (eds., Leni Marin, Helen Zia and Esta Soler, 1998): Shelters must be more than 3 meals a day and a bed. Women need a place of safety and recovery to ensure the victim’s ability to re-enter society.

12,630 requests for assistance from abused women. The shelters managed to provide 367 women and 316 children with sheltered accommodation.<sup>1027</sup>

## 9.9 Summation

The non-sexist society premised in the foundational clauses of the Constitution, and the right to equality and non-discrimination..., are undermined when spouse-batterers enjoy impunity.<sup>1028</sup>

How is it possible that in such countries even seemingly progressive laws and state measures remain nugatory? I propose that while states may have taken positive steps, in form, to address systemic intimate violence, the substance of such measures remains lacking.

The judicial decision- and law-making structures serve as a mechanism to filter the facts of a conflict, rejecting those facts that are irrelevant and retaining the ones that are relevant. However, historically, these legal mechanisms were based on certain assumptions that directed the outcome of the legal process. These assumptions included the underlying social ordering, which, as described above, discriminates between men and women in the provision of social benefits. While the broad structure of these legal mechanisms may have changed in some societies, the assumptions on which they are based have not. These assumptions subliminally continue to inform legal outcomes notwithstanding structural alterations.<sup>1029</sup> The result is that the mechanism of law may appear to have changed but its composite assumptions survive and continue to pervade legal decisions. Therefore, under the guise of an egalitarian legal system, discriminatory decisions and views persist.<sup>1030</sup>

Clearly the above analysis does not prove a world-wide failure of states to take appropriate positive steps to help prevent and remedy systemic intimate violence. However, it does indicate that in the cross section of societies investigated, a hegemony persists which contributes to the powerlessness of women with the result that women continue to suffer at the hands of men.<sup>1031</sup> The result is that there is weak intervention by the police, public, and other legal authorities in instances of systemic intimate violence, which accentuates the isolation of victims, and removes the nature and extent of such violence from the public eye.<sup>1032</sup>

In addition, while not all domestic violence laws are ineffective, many are not suited to address systemic intimate violence. The current structure of many laws operate most effectively against a so-called ideal abuser: a sober, law-abiding, reputable man, who is classified as lower to middle class, attends a religious institution, is insightful, remorseful and preferably

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<sup>1027</sup> AMNESTY INTERNATIONAL, INTIMATE VIOLENCE IN SWEDEN, *supra* note 98, at 47. Another group of shelters received 54,675 requests for assistance and they were able to assist 48,467 of these calls. They referred 1,216 women to other places due to a lack of vacancies. AMNESTY INTERNATIONAL, INTIMATE VIOLENCE IN SWEDEN, *supra* note 98, at.

<sup>1028</sup> State v. Baloyi, *supra* note 119, at 14, paragraph 12.

<sup>1029</sup> See Boyd, *supra* note 632.

<sup>1030</sup> See Boyd, *supra* note 632, at 5–7.

<sup>1031</sup> See GOODWIN, *supra* note 594, at 54 (examining the oppression and subordination of Muslim women by Muslim men).

<sup>1032</sup> SCHNEIDER, *supra* note 57, at 12. Schneider remarks how a colleague of hers, “after seeing a televised public service announcement on battering featuring photographs of women bruised and beaten, said to [her]: ‘I didn’t know this is what they looked like.’” *Id.*

employed.<sup>1033</sup> These characteristics indicate that the abuser has some type of reputation to protect and to some degree is concerned about his society. In such cases, criminal sanctions may be effective, and the abuser may be unlikely to go on abusing his partner for fear of further legal and social repercussions.

However, where the abuser instead has served prison time, has already increased the intensity of the beatings, has raped his partner, suffers from a “God-complex,” is connected to “friends in high places,” and/or has threatened to kidnap/hurt the children or other family members, “[l]awyers can never assure a woman whose abuser fits this profile that she will be safe from him. Legal solutions in this case will often only inflame an already volatile situation.”<sup>1034</sup>

Setting aside the nuances of domestic violence laws, the fact remains that, notwithstanding the nature of the harm committed against women in intimate contexts, as of 2000, only “44 countries... have adopted specific legislation to address domestic violence.”<sup>1035</sup>

Therefore, notwithstanding the heterogeneity that characterizes contemporary societies, many women across an array of countries continue to experience gender-based violence.<sup>1036</sup> While the degree of harm varies, systemic intimate violence exists in almost every country.<sup>1037</sup> What makes the suffering different is the extent to which women are able to turn to their state for protection. The conduct of the state and its agents in the face of this violence, therefore, is an integral part of the experience for women who endure systemic intimate violence.<sup>1038</sup>

For the reasons discussed above, there is enough information of systemic intimate violence, which evidences grossly inadequate national systems, either because no such laws exist in the

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<sup>1033</sup> Fedler, *supra* note 179, at 250. This is a generalized statement. Not all abusers who match these characteristics would be apprehended by the law. The corollary is also true and abusers who do not fit this personality may in fact be apprehended by the law. *Id.* However, the predominant view is that this statement reflects a constant reality.

<sup>1034</sup> Fedler, *supra* note 179, at 250–51 & n.77.

<sup>1035</sup> UNICEF, DOMESTIC VIOLENCE AGAINST WOMEN AND GIRLS, *supra* note 65, at 1.

<sup>1036</sup> CLARE DALTON & ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND THE LAW 1031 (2001) [hereinafter DALTON & SCHNEIDER]: “The World Health Organization asserted that violence against women causes more death and disability among women aged fifteen to forty-four than cancer, malaria, traffic accidents, and war. . . . In Kenya, for example, the U.N. estimated that 42 percent of women were battered by husbands or partners. Kenyan laws do not specifically criminalize domestic violence, and offenders were seldom punished. In Pakistan, estimates of spousal abuse ranged as high as 90 percent of all married women. Despite occasional signs of progress . . . everyday violence and discrimination against women remained among the most flagrant and overlooked of human rights abuses.” *Id.* (quoting HUMAN RIGHTS WATCH, WOMEN’S HUMAN RIGHTS, WORLD REPORT 2000). See also CARIN BENNINGER-BUDEL, *supra* note 61, at 123. (Identifying the three levels at which law may contribute to the oppression of women, namely, the substantive level - the substance of the laws themselves, a structural level – the structures and organizations that enforce the law, and the cultural level – the culture and beliefs that inform the people who comprise the society and its law makers and enforcers).

<sup>1037</sup> SCHNEIDER, *supra* note 57. DALTON & SCHNEIDER, *supra* note 616, at 1031: “The World Health Organization asserted that violence against women causes more death and disability among women aged fifteen to forty-four than cancer, malaria, traffic accidents, and war.” *Id.* (quoting HUMAN RIGHTS WATCH, WOMEN’S HUMAN RIGHTS, WORLD REPORT 2000).

<sup>1038</sup> See AMNESTY INTERNATIONAL, INTIMATE VIOLENCE IN SWEDEN, *supra* note 98, at 7: “It is not the structures that abuse women. Individual perpetrators must of course be held responsible for the violence committed against the woman. It is, however, also incumbent upon the state to take all the necessary measures to prevent, investigate and punish men’s violence against women and to prevent and combat gender-based violence in other ways. The state also has an obligation to provide support, assistance and protection for abused women and their children.”

particular state, or because, due to the social reinforcement of gender inequality, such laws do not fit the harm they are required to meet. This generally is because states have failed to conceptualize the seriousness and frequency of such violence, or otherwise have failed to make remedying such violence a political priority. Women suffering from systemic intimate violence, therefore, lack access to adequate social and legal infrastructures.

On this basis, I propose that states, despite having knowledge of the nature and extent of systemic intimate violence, have failed systemically to satisfy their duties to take positive steps to help prevent and remedy the consequences of such violence. Therefore, I propose that this systemic failure satisfies the ‘state accountability’ element of the test for determining the existence of an international human right, thereby triggering enforceability in international law of women’s rights to be free from systemic intimate violence.

## 10 Miscellaneous Issues

My discussion above lays down the theoretical basis for the internationalization of systemic intimate violence. The remainder of this chapter deals with a number of miscellaneous issues which arise from such categorization.

### 10.1 Precision

Alston argues that human rights norms should be precise.<sup>1039</sup> This point accords with the jurisprudential requirement that the law be certain so that individuals and states are able to foresee whether their actions will constitute a violation of law.<sup>1040</sup>

However, human rights violations, such as torture and genocide, are particularly difficult to define, their content being the subject of much debate, speculation and nuance.<sup>1041</sup> Therefore, it is arguable that Alston’s reference to precision does not require absolute certainty. Rather, it requires only that the norm (in this case, freedom from systemic intimate violence) should have clearly identifiable elements, which can be investigated and developed on a case by case basis.

The fluidity of human rights norms is identified by philosopher Nickel. According to Nickel, human rights “range from abstract to specific (or from general to precise) according to how fully their parts are specified. But indeterminacy can occur not only in regard to scope and weight but also in regard to conditions of possession and operability and in regard to the addressees and their burdens.”<sup>1042</sup> Nickels gives the example of the right to equal protection of the law which is “vague and abstract, but the principle it states is extremely important. The moral and legal roles of abstract rights are often just as significant as the roles of very specific rights, so we simply have to come to terms with abstractness in rights rather than proposing to get rid of it to achieve some philosophical ideal of precision.”<sup>1043</sup>

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<sup>1039</sup> Alston, *supra* note 477, at 607.

<sup>1040</sup> Known as “*nulla crimen sine lege*.”

<sup>1041</sup> [Note: citation to follow] Sudan; United States torture debates

<sup>1042</sup> NICKEL, *supra* notex, at 15.

<sup>1043</sup> NICKEL, *supra* notex, at 15.

Therefore, precision does not seem to be a general theme carried through the philosophers and legal theorists described in Part A of this chapter.<sup>1044</sup> Nonetheless, I do maintain that the aspiration to clear and precise definitions of human rights would only help the development of this field. Therefore, as far as possible, I have attempted to be quite precise with the definition of systemic intimate violence, proposed in chapter two.

As described in chapter two, there are delineated elements inherent in systemic intimate violence. Systemic intimate violence is repetitive emotional or physical harm, or the threat thereof, committed between intimates, which forms a continuum of violence from which the victim, due to his or her isolation and/or incapacitation, is unable to procure traditional legal assistance.<sup>1045</sup> The combination of these factors creates a severe form of harm, which, in the face of endorsed impunity by the state, results in the systemic nature of such violence.<sup>1046</sup>

For the purposes of satisfying the requirement for precision, therefore, I propose that these elements are no more or less precise than those of other international human rights violations and would be susceptible to judicial analysis and development on a case by case basis with the necessary certainty required in law.

## 10.2 If It Is a Human Rights Violation, Why Articulate It Any further?

### 10.2.1 The Tension

If systemic intimate violence fulfills all the elements of an international human rights violation, why repeat it through specific articulation? Having established that the claim against systemic intimate violence is consistent with and extends from the fundamental rights recognized in the UN Charter, is its specific enunciation (either in a treaty or through decisions of international tribunals and fora) an unnecessarily duplication of international law?

A tension arises: in order for an interest to be recognized as an international right, it must extend from one of the overarching broad principles in international law.<sup>1047</sup> However, while the value in question should reflect the tenets of international law, it cannot merely repeat an existing right.<sup>1048</sup> The potential problem is that if the interest does extend from an international principle then, by definition, the express statement of that interest at international law must be a repetition (at least in part) of the relevant broad overarching principle. If repetitive restatements are

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<sup>1044</sup> Moreover, Alston himself acknowledges that this is neither a closed list of criteria nor an accurate one. His list is a guide of what a list of criteria “might look” like and not what such a list ought to look like. Alston, *supra* note, at 614.

<sup>1045</sup> See DOMESTIC VIOLENCE CASES: HANDLING THEM EFFECTIVELY, *supra* note 2, at 5.

<sup>1046</sup> As described in chapter two, the elements of systemic intimate violence include: harmful conduct, operating on a continuum; between intimates; and, perpetuated by virtue of state inertia. The characteristics of each element are described in chapter two.

<sup>1047</sup> Based on the hierarchy of UN treaties and treaty bodies, I consider first the U.N. Charter, *supra* note 508, then the UDHR, *supra* note 4, the ICCPR and ICSCER, *supra* note 13, followed by CEDAW, the Torture Convention, *supra* note 5, and the other principal UN rights treaties. For a discussion of the development of these bodies and concomitant treaties, see INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL, *supra* note 493, at 27-133.

<sup>1048</sup> Alston, *supra* note 477, at [Note: citation to follow].

prohibited, however, how does one demonstrate that a principle is extrapolated from the UDHR (or any other authoritative source) but at the same time is not a repetition thereof?

A possible answer to this tension is that international law can, and should, expressly articulate a right which extends from one of the overarching principles of international law when either (1) states are failing to uphold and enforce that right adequately, and such articulation could remedy that failing and/or (2) states have misconceptualized that right, which undermines the enforcement thereof. That is, where the overarching principles of international law are ineffective for the purposes of enforcing that right, the international community should state that right separately to make clear that states are bound to recognize and uphold that right. In addition, where states have recognized the need to uphold the right in question, but in practice have misinterpreted that right, a clear and separate articulation is required.

Most treaties which stem from a general principle of the UN Charter make reference to the question of practical enforcement. The Convention against Torture, for example, cites the UN Charter's commitment to universal human rights and the prohibition against torture in the UDHR.<sup>1049</sup> However, in explaining the need for a specific convention against torture, it sets forth the desire to "make more effective the struggle against torture ... throughout the world," thereby justifying the specific articulation of the torture prohibition in the UDHR through the Convention against Torture.

CEDAW, another example, is based on the principles in the UDHR which protect equality, dignity and privacy.<sup>1050</sup> CEDAW sought to create a binding instrument that would "implement the principles set forth in the Declaration on the Elimination of Discrimination against Women..."<sup>1051</sup> However, its creation was not merely a repetition of the right to equality because it recreated and refined equality in respect of women's lives in a way that was absent from the UDHR and the principles of international law at the time. CEDAW, in other words, filled a gap. This is confirmed in its preamble which acknowledges that, notwithstanding the commitment to sex equality in the UN Charter, the UDHR and other international instruments, sex discrimination continued to exist,<sup>1052</sup> and a more specific understanding of the right to sex equality was needed.<sup>1053</sup> I propose the same rationale in respect of systemic intimate violence.

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<sup>1049</sup> Preamble to the Torture Convention, *supra* note 5.

<sup>1050</sup> Preamble to CEDAW, *supra* note 21.

<sup>1051</sup> Preamble to CEDAW, *supra* note 21.

<sup>1052</sup> Preamble to CEDAW, *supra* note 21.

<sup>1053</sup> See the Preamble to CEDAW, *supra* note 21, stating that, while the UN Charter, the UDHR and other international legal instruments cite equality between the sexes, sex discrimination continues to exist and something more is needed:

“Noting that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women,

Noting that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex,

Noting that the States Parties to the International Covenants on Human Rights have the obligation to ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights,

Considering the international conventions concluded under the auspices of the United Nations and the specialized agencies promoting equality of rights of men and women,

The Torture Convention and CEDAW are examples of my claim that a separate articulation of a UDHR right is possible where it achieves the better protection of a specific right. In the case of the Torture Convention, a treaty was needed to create a binding instrument, detailing the substance of States' obligations.<sup>1054</sup> In the case of CEDAW, a treaty was needed to facilitate "change in the traditional role of men as well as the role of women in society and in the family."<sup>1055</sup> Further examples of the specific development of UDHR rights include: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, stemming from the prohibition against slavery;<sup>1056</sup> the Declaration on the Protection of All Persons from Enforced Disappearances, stemming from the rights of detainees;<sup>1057</sup> and the prohibition against rape as a weapon of war in the Rome Statute of the International Criminal Court, emanating from the international rules of war and the Geneva Conventions.<sup>1058</sup>

For the reasons discussed in this chapter, I argue for the further specification of the right to protection from systemic intimate violence. While the fundamental rights of equality, physical integrity and dignity, on which the internationalization of systemic intimate violence is based, exist already in the UDHR (and other binding instruments), the existing international law is not serving to protect the specific manner in which these rights are violated by systemic intimate violence.

Therefore, the failure of states in practice to enforce women's rights to be free from such violence evidences either: (1) that they have misconceptualized the severity and frequency of such violence; and/or (2) that they have failed (whether as a result of gender discrimination or otherwise) to extrapolate this right from the existing international law principles. A separate and binding articulation of this right is required. Moreover, a similar approach has already occurred in the context of other forms of violence against women.

### 10.2.2 Recent Specifications of Women's Rights in International Law

My proposal for a separate and binding articulation of women's right to be free from systemic intimate violence is not unprecedented, and in fact follows a recent trend in international law. Mass rape and FGC have both been identified as manifestations of violence against women which required specific and independent attention in international law.

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Noting also the resolutions, declarations and recommendations adopted by the United Nations and the specialized agencies promoting equality of rights of men and women,  
Concerned, however, that despite these various instruments extensive discrimination against women continues to exist."

<sup>1054</sup> See Lene Wendland for the Association of the Prevention of Torture, *A Handbook on State Obligations under the UN Convention against Torture*, Geneva May 2002, available at <http://www.ap.t.ch/pub/library/A%20Handbook%20on%20State%20Obligations%20under%20the%20UN%20CAT.pdf>.

<sup>1055</sup> Preamble to CEDAW, *supra* note 21.

<sup>1056</sup> Trafficking Protocol, *supra* note 22.

<sup>1057</sup> U.N. Declaration on Enforced Disappearances, *supra* note 542.

<sup>1058</sup> Article \_ of the Rome Statute, *supra* note 9. [**Note: find section**]

The ICTY's Kunarac decision demonstrates how a norm, which is grounded in international law, can be extended to create a newly enunciated legal provision. Kunarac was convicted of sexual enslavement. Enslavement had been designated as a crime against humanity in the Nuremberg Trials, and was prohibited in terms of the UDHR. However, the ICTY identified mass rape as constituting a more narrow and precise crime, a "specific type of enslavement (i.e. sexual enslavement),"<sup>1059</sup> in part because the crime in question was not considered to be addressed properly under the current laws.<sup>1060</sup>

Another example of the specification of rights is FGC.<sup>1061</sup> Initially, the international position regarding FGC was based on established norms in the UDHR, the Convention for the Rights of the Child,<sup>1062</sup> CEDAW,<sup>1063</sup> and the Convention against Torture.<sup>1064</sup> However, notwithstanding that the general tenets of established international law were applicable, and therefore could be extrapolated, to FGC, the international community recognized that a deficiency remained since "international law failed to provide a strong, feasible solution for the eradication of the practice."<sup>1065</sup>

Based on these developments in respect of mass rape and FGC, I propose that systemic intimate violence warrants a similar, separate specification.

## 11 Conclusion

I propose that women's interest to be free from systemic intimate violence is an international human right, enforceable in international law. The theorizing of philosophers and jurists reveal four elements inherent in human rights violations, namely, fundamentality, universality, vulnerability and state accountability.

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<sup>1059</sup> See Mchenry, *The Prosecution of Rape under International Law*, *supra* notex, at 1285. However, the tribunal's categorization of mass rape as a crime against humanity was more difficult. In order to found jurisdiction, the ICTY determined that the rapes in Foca: took place during an armed conflict; constituted an attack directed against a civilian population; in that the acts of the accused formed part of an attack directed against the civilian population; where the attack was widespread or systematic; and the accused knew of the wider context in which the attack took place. For a discussion of these elements see Mchenry, *The Prosecution of Rape under International Law*, *supra* notex, at 1285-1290.

<sup>1060</sup> This is why rape was criminalized specifically, but not death by a machete, which was an unusual tool for genocide. The reason why a new rule against genocide by a machete was not created is because the current laws were sufficient to address this particular crime. For a discussion of the advancement of international law by the tribunal decisions, and the definitions it adopted, see Jonathan M.H. Short, *Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court*, 8 MICH. J. RACE & L. 503 (2003) [hereinafter Short, *supra* note 573].

<sup>1061</sup> For a discussion of female genital cutting see FEMALE GENITAL MUTILATION: A GUIDE TO LAWS & POLICIES, *supra* note 57. See also Bowman, *supra* note 112.

<sup>1062</sup> Children's Convention, *supra* note 7.

<sup>1063</sup> See Bowman, *supra* note 112, at [page 7] (indicating the deficiencies of CEDAW in that countries would enter reservations against the treaty, having been "offended by the notion that their customs and traditions are seemingly disposable...")

<sup>1064</sup> Since the mid-1980s, the UN has made several attempts to mitigate the harm of FGC, predominantly through education and awareness-raising. See Bowman, *supra* note 112, at [page 6-7].

<sup>1065</sup> Bowman, *supra* note 112, at [page 6]. Of course, it is unclear that the internationalization of FGC has achieved such opposition, but this will be discussed in the context of the benefit of international law below.



The rights violated by systemic intimate violence are fundamental. The uninterrupted violence, perpetrated by one individual upon another, violates the victim's fundamental rights to equality, physical integrity, and dignity. In addition, notwithstanding the practice of some states to the contrary, the norm against systemic intimate violence is universal. Women as a group are vulnerable to systemic intimate violence because of ingrained sex inequality and the very private nature of the violence involved. Finally, the state, having knowledge of perpetual harm wrought upon women as a group, is required to react. Its failure to do so renders it accountable for the continued violence.

Therefore, the four elements of international human rights pertain to the violation caused by systemic intimate violence. Therefore, systemic intimate violence is a human rights violation warranting the application of international law. What, however, does the application of international law actually mean?

The next chapter turns to discuss the principles of state responsibility in international law. These principles apply whenever a state violates an international obligation, *inter alia*, to protect human rights. Having established the existence of a right in international law to protection against systemic intimate violence, I now address the theoretical consequences of a states' omission to comply with its concomitant obligation.

## Chapter Four

### State Responsibility in International Law for Systemic Intimate Violence

The fury of persecution receives an impetus not only from acquiescence, but also from the hesitation and reserve of foreign intercession coupled with courteous admission that there is no right of intercession.

H. Lauterpacht<sup>1066</sup>

In 2001 it was reported that 45 countries had laws that explicitly discriminate against women.<sup>1067</sup>

#### Part A: Introductory Comments

##### 1. Description of this Chapter

This chapter analyzes the principles of state responsibility in international law and applies them to the notion that states have an international obligation to protect women from systemic intimate violence. The study of state responsibility deals with the “principle[s] which establishes an obligation to make good any violation of international law producing injury...”<sup>1068</sup>

The chapter is divided into two parts. The first part: (1) summarizes the claim I make in the chapter as a whole; (2) provides an historical overview of the development of the law of state responsibility in international law; and, (3) distinguishes between primary and secondary obligations in international law.

The second part is a discussion of the elements of state responsibility. That is, the factual circumstances that are necessary in order for a state to be held liable for an international obligation. I break the elements down into three categories: (1) conduct; (2) wrongfulness; and, (3) miscellaneous. I propose that where a country allows systemic intimate violence, the elements of state responsibility are triggered.

Therefore, based on chapters two, which identifies the right to be free from systemic intimate violence, chapter three, providing the jurisprudential justification for the right, and this chapter, which argues that states have an international obligation to protect women from systemic

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<sup>1066</sup> H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 32 (1968) [hereinafter LAUTERPACHT].

<sup>1067</sup> Kerri L. Ritz, *Soft Enforcement: Inadequacies of Optional Protocol as a Remedy for the Convention on the Elimination of All Forms of Discrimination against Women*, 25 SUFFOLK TRANSNAT'L L. REV. 191 (2001).

<sup>1068</sup> EAGLETON, *supra* note 303, at 22.

intimate violence, I conclude that systemic intimate violence is an international human rights violation.

## 2. The Claim

### 2.1 Purpose

Creating a standard of state responsibility is the primary purpose of internationalizing systemic intimate violence. If the substance of systemic intimate violence is such that the harm factually falls within international human rights law, an omission by governments to assist abused women would fall within the purview of the rules of state responsibility.<sup>1069</sup> States then would be compelled to amend their breach of international law and take positive steps to protect women, including those discussed in chapter 2.<sup>1070</sup>

The pivotal issue, however, is whether it is possible to hold states liable for conduct that is perpetrated by private individuals who have nothing to do with the state. I maintain that, based on the progression of international legal theory, it is “now recognized that not only governments, but also corporations, private death squads, and other groups, as well as individuals, violate human rights. Most recently, various forms of violence against women by spouses, partners, and other family members, are recognized to be human rights violations.”<sup>1071</sup>

### 2.2 States Should Be Responsible for the Actions of Their Citizens

I propose that if a state knows that a segment of its population is subject to persistent abuse, and fails to prevent harm to this group of people, the state has participated in the violation of that segment’s human right to live without violence.<sup>1072</sup> Moreover, if there is a type of harm that human beings have a right not to experience, states have the corresponding obligation to protect their citizens from the violation of such a right, even where the violation is caused directly by private citizens and not by state actors.

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<sup>1069</sup> Christian Tomuschat, *Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law*, in STATE RESPONSIBILITY AND THE INDIVIDUAL REPARATIONS IN INSTANCES OF GRAVE VIOLATIONS OF HUMAN RIGHTS 4, (Ed.s Albrecht Randelzhofer and Christian Tomuschat 1999) [hereinafter Tomuschat, *Individual Reparation Claims*] (maintaining that governments may be reluctant to accept a diminished role in international affairs and this translates into an opposition to granting individuals rights as subjects in international law). Crawford makes the point that the violation of a duty imposed by an international legal standard will give rise to state responsibility. CRAWFORD, *supra* note 203, at 126. See also footnotes 210-212.

<sup>1070</sup> The principles of state responsibility maintain that only states can hold other states responsible for a breach of an international obligation. Therefore, the principles of state responsibility vis-à-vis systemic intimate violence would have to be enforced by other states. See Part Three, Chapter One of the ICL articles, *supra* n.

<sup>1071</sup> See BUCHANAN, *supra* notex, at 77 (“...human rights were originally conceived as being addressed to governments, and hence the correlative obligations were thought to be obligations of governments. There is a growing tendency, however, to view the obligations that human rights carry as entirely general, even if it is assumed that governments have the chief responsibility for ensuring that these obligations are met.”).

<sup>1072</sup> For authority for the notion that states are responsible for their international wrongful acts, see CRAWFORD, *supra* note 203, at 77-78 point 2.

To date, most international law applies to the conduct of states in respect of other states or the citizens of other states.<sup>1073</sup> However, international law is transmogrifying; as it grows in size and stature, the realm of its application broadens and conduct that previously went unchecked is increasingly regulated. Through an examination of the history of state responsibility in international law, it is clear that the development of this area of law allows for the imposition of liability on states, not for their actions, but for their *inaction* towards repeated harm.

The question, therefore, is whether one can hold the state responsible for its failure to provide protection to women in the face of immediate and predictable harm by their intimate partners. This chapter proposes that states can, and should, be held responsible in such circumstances.

### 2.3 Origin of the State's International Obligation is Irrelevant

A state commits a breach of an international obligation when the act in question is not in conformity with what is required by that obligation. The origin of the obligation, namely, whether it was created by a treaty or is a principle of customary international law, is irrelevant.<sup>1074</sup> The principles that pertain to state responsibility “are equally applicable in the case of breach of treaty obligation, since in the international law field there is no distinction between contractual and tortious responsibility, so that any violation by a State of any obligation, of whatever origin, gives rise to State responsibility....”<sup>1075</sup> Therefore, a state may be responsible

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<sup>1073</sup> This refers to the system of Denial of Justice. For a thorough examination of this notion, see FREEMAN, *supra* note 207 and CLYDE EAGLETON, *THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW* (The New York University Press, 1928) [hereinafter, EAGLETON]. Historically, the debate regarding the role of an individual as a rights bearer in international law is contentious. See Albrecht Randelzhofer, *The Legal Position of the Individual under Present International Law*, in *STATE RESPONSIBILITY AND THE INDIVIDUAL REPARATIONS IN INSTANCES OF GRAVE VIOLATIONS OF HUMAN RIGHTS*, 231 (ed.s Albrecht Randelzhofer and Christian Tomuschat 1999) (“Up to now I do not see any right of the individual under public international law being granted by customary law.” *Id* at 235 point 3(a)). However, it has become an accepted norm that an individual is a subject of international law and not only the states acting on her/his behalf. See paragraph 5 of the Commentaries to the ILC articles, *supra* note 300, at 5 (stating that ILC articles “apply to the whole field of the international obligations of States, whether the obligation is owed to one or several States, to an individual or group, or to the international community as a whole.”).

<sup>1074</sup> Article 12 of the ILC articles state that there “is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.” See also the Commentaries to the ILC articles, *supra* note 300, at 65 and 126-127 (The rules of State responsibility “apply to all international obligations of States... established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order. States may assume international obligations by a unilateral act. An international obligation may arise from provisions stipulated in a treaty (a decision of an organ of an international organization competent in the matter, a judgment given between two States by the International Court of Justice or another tribunal, etc.). ... The formula, regardless of its origin, refers to all possible sources of international obligations, that is to say, to all processes for creating legal obligations recognized by international law... Moreover these various grounds of obligation interact with each other, as practice clearly shows. Treaties, especially multilateral treaties, can contribute to the formation of general international law; customary law may assist in the interpretation of treaties; an obligation contained in a treaty may be applicable to a State by reason of its unilateral act, and so on. Thus international courts and tribunals have treated responsibility as arising for a State by reason of any violation of a duty imposed by an international juridical standard.”).

<sup>1075</sup> Rainbow Warrior Affair, UNRIAA, vol. XX, 217, 251, para. 75 (1990) [hereinafter Rainbow Warrior Affair].

for the violation of a right that is articulated in a treaty, founded in CIL or that forms part of the range of peremptory norms.<sup>1076</sup>

On this basis, while the authority for the right to be free from systemic intimate violence does not subsist in a treaty *per se*, to the extent that it exists in CIL or by virtue of an extrapolation of the principles of international law, or is subsequently articulated as a specific, authoritative and binding statement in international law, the obligation to protect women from such harm still exists, because the origin of the obligation is irrelevant for the purposes of assessing responsibility.<sup>1077</sup>

## 2.4 Summary

The exact contours of state responsibility for systemic intimate violence are discussed below. As a principle, however, it is clear that the framework of state responsibility in international law acknowledges two factors that are essential to imputing state responsibility for systemic intimate violence: first, state responsibility may subsist in an omission; and second, a state may be responsible for an obligation emanating from various origins in international law and not necessarily from a treaty it has signed.

I am not suggesting that each incident of severe woman abuse means that the state has committed an internationally wrongful act; nor that there should be a state presence in the home to stay the thrust of a violent fist. I am advocating merely that states have an obligation to meet basic standards to provide safety and the redemption of dignity for those who endure systemic intimate violence, including by taking the positive steps discussed in chapter 2. Indeed, the reader may be alarmed (and perhaps cynical) that international legal standards are necessary to compel states to perform even minimum steps. However, for those who experience systemic intimate violence, the realization is that domestic legal systems too often are apathetic, inappropriate and, ultimately, unavailable.

## 3. History of State Responsibility

Human society has long recognized certain rights as accruing to its members – rights which prescribe correlative duties on the part of others. *Hodie mihi, cras tibi* [what is my lot today is your lot tomorrow].

Obligation, simply put, is the owing of a duty; and behind it, claiming the performance of that duty, is responsibility.

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<sup>1076</sup> Rainbow Warrior Affair, *supra* note 305, at 550. In holding that both the provisions of the agreements concluded between France and New Zealand did not preclude the application of the customary Law of Treaties (as codified in the Vienna Convention) and the customary law of state responsibility, the Tribunal stated that the provisions of the Vienna Convention are “applicable to the determination whether there have been violations of that principle, and in particular, whether material breaches of treaty obligations have been committed.” (para 75 pg 550 of ILR). Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force Jan. 27, 1980 [hereinafter the Vienna Convention]. See also MALCOLM N. SHAW QC, INTERNATIONAL LAW 694-5 (2003) [hereinafter SHAW].

<sup>1077</sup> The word “origin” is used in article 12 of the ILC articles instead of “source” to avoid categorizing “source” as something distinct from a treaty as is the case in the preamble to the Charter of the United Nations. See CRAWFORD, *supra* note 203, at 126 point 3.

### 3.1 Regulation of State Conduct vis-à-vis Other States

Historically, international law was premised on the need for states to regulate their behavior *inter se*, benefiting from a mutual compliance with rules and regulations.<sup>1079</sup> The formulation and development of international law focused on state conduct with the result that only states, and not individuals, were considered subjects of international law.<sup>1080</sup>

The global regulation of a state's behavior was limited by the notion of sovereign immunity that what happens within the boundaries of a state is the exclusive concern of that state. This was challenged to some extent by the rules of diplomatic immunity and the ability of states to intervene to protect the interests (economic and otherwise) of their own nationals who were living and operating in another state.<sup>1081</sup> These were the first real incursions into the doctrinal stronghold of sovereign immunity.<sup>1082</sup> However, mostly, it was with extreme caution that the international community would intervene in the internal affairs of a state. As long as states or their citizens were not affected by the internal workings of a third state, it would evade the application and obligations of international law.<sup>1083</sup>

### 3.2 Regulation of State Conduct vis-à-vis Its Citizens

In the mid-1940s, this trend began to change with the regeneration of international humanitarian and human rights law.<sup>1084</sup> According to these doctrines, a state is liable in international law not only for conduct committed against other states, but also for conduct

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<sup>1078</sup> EAGLETON, *supra* note 303, at 3.

<sup>1079</sup> The aspiration was (and is) that states are required to do good to one another. JANIS, *supra* note 206, at 2 (“That nations ought to do to one another in peace, the most good, and in war, the least evil possible.”).

<sup>1080</sup> Prior to 1945 and the subsequent Charter of the United Nations, the individual was at best the object of international law and not the subject. Tomuschat, *Individual Reparation Claims*, *supra* note 299, at 2. See also LAUTERPACHT, *supra* note 309, at 5 (describing the controversy whether or not only states but also individuals are subjects of the law of nations).

<sup>1081</sup> FREEMAN, *supra* note 207 and EAGLETON, *supra* note 303.

<sup>1082</sup> An argument raised in favor of the status of an individual in international law is that international law developed as the law of nations, governing the rights and obligations of “a surprisingly small number of artificial, politico-legal corporate entities known as state” and that this narrow focus should be amended to include the broader notion of human individuals. See JOHN H. CURRIE, *PUBLIC INTERNATIONAL LAW*, 18 2001.

<sup>1083</sup> Eagleton elegantly sets the stage for the balancing test inherent in state responsibility, namely: “The investigation involves, upon the one hand, the control which a state, as a member of the international community, is expected to maintain within its own territory; and, on the other hand, the degree to which external restraints may have been established over that state, thereby hampering its freedom of action, and the control which it may be able to exercise.” EAGLETON, *supra* note 303 at 27.

<sup>1084</sup> Lauterpacht, cites the law of humanitarian intervention as one of the earliest manifestations of international recognition of individual rights, especially in cases “in which a State maltreats its subjects in a manner which shocks the conscience of mankind.” LAUTERPACHT, *supra* note 309, at 32. Janis provides an important introduction to the notion of individuals as rights-bearers in international law. JANIS, *supra* note 206, at 253.

committed against its own citizens.<sup>1085</sup> As a result, the international community now can compel a delinquent state to treat its own citizens according to the tenets of international law.<sup>1086</sup>

This shift led to the question whether an individual possesses, or can possess, rights given to her or him directly by customary international law or by treaties.<sup>1087</sup> Underlying this movement was the issue of so-called fundamental rights of the individual; rights that could be protected by international law as against the sovereign power of the state.<sup>1088</sup>

This question reached its pinnacle after the Holocaust. The culmination of World War II and the revelation of the full extent of the Holocaust placed renewed and serious focus on human rights or the so-called rights of man.<sup>1089</sup> Having taken humankind to the brink of inhumanity and beyond, the events of the Holocaust inculcated a fresh need to articulate rights of individuals and groups and identify corresponding obligations. This development coincided with the establishment of the United Nations, charged with the creation of a supra-standard of order, a standard to which states could aspire and on which individuals could rely.<sup>1090</sup> The reverberation of “never again” resulted in the tapestry of the Universal Declaration of Human Rights in 1948<sup>1091</sup> and, in 1956, the two rights covenants, namely the International Covenant on Civil and Political Rights<sup>1092</sup> and the International Covenant on Economic, Social and Cultural Rights.<sup>1093</sup>

### 3.3 The Status of the Individual in International Law

As the application of rights broadened, so did the question of duties. The proposition that individuals could be subjects of international rights triggered the corollary conclusion that they

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<sup>1085</sup> The State is obligated to investigate every situation involving a violation of the rights protected by the [Inter-American] Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim’s full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. *Velasquez Rodriguez Case Inter-American Court of Human Rights Judgment of July 29, 1988 at 176.*

<sup>1086</sup> *Velasquez Rodriguez Case Inter-American Court of Human Rights Judgment of July 29, 1988 at 134* (“The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible.”).

<sup>1087</sup> LAUTERPACHT, *supra* note 309, at 5. Freeman argued that “[f]rom a technical legal standpoint responsibility ... is simply a quality of relationship between a certain individual and a sanction – in other words, a state of facts designating that relation which arises between him who commits an unlawful act, and the sanction established for it. And in the international sphere, the situation is much the same instead that we are dealing with collectivities instead of individuals.” FREEMAN, *supra* note 207 at 18.

<sup>1088</sup> *Id.*

<sup>1089</sup> The application of public international law to individuals authoritatively began with the Nuremburg Trials. JANIS, *supra* note 206, at 259: “Crimes against international law are committed by men and not by abstract entities and only by punishing individuals can we enforce the law.” *The corollary to this statement is that crimes in international law are committed against women and only protecting individuals can the law be enforced.*

<sup>1090</sup> According to Lauterpacht “It is in the Charter of the United Nations that the individual human being first appears as entitled to fundamental human rights and freedoms” and that the enactment of crimes against humanity “constitutes the recognition of fundamental human rights superior to the law of the sovereign State.” LAUTERPACHT, *supra* note 309, at 38.

<sup>1091</sup> UDHR, *supra* note 4.

<sup>1092</sup> ICCPR, *supra* note 4.

<sup>1093</sup> ICSCER, *supra* note 13.

also could be the holders of international duties.<sup>1094</sup> Some argued that unless legal duties are accepted as resting upon the individual being, they do not in practice nor in law obligate anyone.<sup>1095</sup> Certainly, by the late nineteenth century it was recognized that there are acts or omissions for which international law imposes criminal responsibility on individuals and for which punishment may be applied.<sup>1096</sup>

The prolonged debate regarding the status of an individual in international law continues today.<sup>1097</sup> However, while many still maintain that an individual is not a subject of international law and that international law concerns itself only with states (whose interests are to protect its own citizens),<sup>1098</sup> it is widely accepted that an individual is very much the subject of the rules of international law.<sup>1099</sup> For example, in 1949 the International Court of Justice authoritatively

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<sup>1094</sup> The assertion that duties prescribed by international law are binding upon the impersonal entity of States as distinguished from the individuals who compose them and act on their behalf would open the door wide for acceptance, in relation to States, of standards of morality different from those applying among individuals. See the preamble to the ICSCER, *supra* note 13: "...that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant." LAUTERPACHT, *supra* note 309, at 5: "the cogency of the claim to the former gains by admission of the latter."

<sup>1095</sup> *Id.*

<sup>1096</sup> IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 565 (5<sup>th</sup> Edition 1998) [hereinafter BROWNLIE].

<sup>1097</sup> This was particularly evident in European community law. In 1961 in the case of Van Gend and Loos, the Court of Justice of the European Communities ruled that a community citizen had the right to see the law protecting her/his status respected by community institutions as well as community states. This was so irrespective of the wording of the rule. See Tomuschat, *Individual Reparation Claims*, *supra* note 299, at 8. See Andrea Francovich and Danila Bonifaci and others v Italian Republic [1991] ECR I-5357 EU: Case C-6/90 at 31 [hereinafter Francovich case]: "The subjects of that legal system [the legal system of the European community] are not only the Member States but also their nationals." In the Francovich case the individual was granted reparations directly. This led to the establishment of the principle that "since the individual is deemed to be placed at the same level as the States which have created the Community legal order, no differentiation seems justifiable, provided that the rules in issue are clearly intended to benefit the Community citizen." Tomuschat, *Individual Reparation Claims*, *supra* note 299, at 8.

<sup>1098</sup> See A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Change, UN SECURE WORLD REPORT, 23 (2003) available at <http://www.un.org/secureworld/report.pdf>: "...the concept of State and international responsibility to protect civilians from the effects of war and human rights abuses has yet to truly overcome the tension between the competing claims of sovereign inviolability and the right to intervene." For a discussion of the positivist theory of international law see JANIS, *supra* note 206, at 248.

<sup>1099</sup> Lauterpacht makes the point that the positivist doctrine that only states are subjects of international law has been largely rejected by the majority of international law theorists and practitioners. See LAUTERPACHT, *supra* note 309, at 6, footnote 2 and 9: "Like various other tenets of the positivist creed, the doctrine that only State are subjects of international law is unable to stand the test of actual practice." This is enforced by the monist position that "national and international law both are part of the same legal order and international law can, without any specific transformation, be directly applied by a national court." CARL AAGE NØRGAARD, *THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW*, at 25-6 (Munksgaard Copenhagen, 1962). In this sense the individual is a subject of international law by virtue of the fact that her/his membership in the national legal system translates into a synonymous membership in the international legal system. On the other hand, the dualist school maintains that "national and international law are two separate legal orders. International law is never applied directly by national courts, but must be transformed in one way or another to national law before it can be applied by national organs." The position of the individual as a subject of law, therefore, is exclusively within the realm of national law. On However, the latter theory fails to survive the empirical reality of that individuals are treated as subjects in international law.



accepted “instances of action upon the international plane by certain entities which are not States.”<sup>1100</sup> In response to this decision, Lauterpacht maintains that by:

...thus laying down, with emphatic clarity, that States are not the only subjects of international law the Court did as much for liberating international law from the shackles of an obsolete and retrogressive doctrine as did its predecessor in rejecting the view that individuals cannot directly acquire international rights under treaties.<sup>1101</sup>

There are compelling arguments to posit the individual not only as a subject of international law, but also as the *de facto* actor in international law, deserving of protection notwithstanding the source of violence suffered by that individual. Support for this position can be found in proponents of both positive and natural law.<sup>1102</sup> Renowned critical legal positivist, Hans Kelsen, argues that international law constitutes the regulation of human conduct:

It is to men (*sic*) that the norms of international law apply; it is against men (*sic*) that they provide sanctions; it is to men (*sic*) that they entrust the competence of creating the norms of the order. If international law lays down duties, responsibilities, and rights (it must do so if it is a legal order), these duties, responsibilities, and rights can have only human conduct for content... If duty, responsibility, and right do not refer to the conduct of men (*sic*), duty, responsibility, and right would be only empty formulas, meaningless words.<sup>1103</sup>

Lauterpacht, the preeminent expounder of natural law, maintains similarly that since international law:

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<sup>1100</sup> The Advisory Opinion of the International Court of Justice of 11 April 1949 at page 178 (discussing whether the UN constitutes a legal subject in international law).

<sup>1101</sup> LAUTERPACHT, *supra* note 309, at 23.

<sup>1102</sup> Hans Kelsen and Lauterpacht may be cited as authority on positivist and naturalist legal thinking respectively. See KELSEN, PRINCIPLES OF INTERNATIONAL LAW 217-221 [hereinafter KELSEN], maintaining that “The validity of a positive legal order cannot be denied because of the content of its norms... The Pure Theory describes the positive law as an objectively valid normative order and states that this interpretation is possible only under the condition that a basic norm is pre-supposed according to which the subject meaning of the law-creating acts is also their objective meaning.” **Note: confirm that this is an appropriate extract as support for Kelsen as a positivist.** See also KELSEN, *supra* note 336, at 151: “This version of the natural-law doctrine [*that the fundamental right of the State can be deduced from the nature of international law*] is logically just as impossible as the classical version of that doctrine. Legal principles can never be presupposed by a legal order; they can only be created in conformity with this order. For they are ‘legal’ only because and insofar as they are established on the basis of a positive legal order. The only principle which may and must be presupposed is the fundamental principle determining the first constitution of the legal order, ‘constitution’ meaning the rules determining the methods by which the law is to be created.” Lauterpacht, on the other hand, states that “Inasmuch as, upon final analysis, they (*the law of nature and natural rights*) are an expression of moral claims, they are a powerful lever of legal reform. The moral claims of today are often the legal rights of tomorrow. The law of nature, even when conceived as an expression of mere ethical postulates, is an inarticulate but powerful element in the interpretation of existing law. Even after human rights and freedoms have become part of the positive fundamental law of mankind (*sic*), the ideas of natural law and natural rights which underlie them will constitute that higher law which must forever remain the ultimate standard of fitness of all positive law, whether national or international.” LAUTERPACHT, *supra* note 309, at 74. For a more extensive summary of Kelsen’s positivist views vs. those of Lauterpacht see SHAW, *supra* note 306, at 48-53.

<sup>1103</sup> KELSEN, *supra* note 336, at 97.

...incorporates obligations to respect the fundamental human rights and freedoms it amounts to recognition of individuals as subjects of international law. These obligations and ... their effectiveness will depend to some extent on the final abandonment of the doctrine of the inherently inferior status of individuals in the sphere of international law.<sup>1104</sup>

These uniform theories from diametrically opposed jurisprudential ideologies represent a theme in the development of international law, which is evident from several international instruments. In 1980 the Vienna Convention on the Law of Treaties came into force,<sup>1105</sup> compelling states to comply with treaties, including human rights treaties that focus on individuals.<sup>1106</sup> Henkin echoes this principle and maintains that the concept of human rights in international law requires the state “not only to respect but to ensure rights, that is, ensure respect for them by private persons.”<sup>1107</sup> The result is that

[e]very legal right of the individual is by definition an interest which in greater or lesser degree has the protection of the law. The protection is in the first instance against the violation of his rights by other individuals; and this is true of what we consider as human rights no less than of other rights.<sup>1108</sup>

### 3.4 The ICL Articles

In 2001, the International Law Commission (“the ILC”) adopted the Draft Articles on Responsibility of States for Internationally Wrongful Acts, (hereinafter “the ILC articles”). The ILC articles are an attempt “to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of states for their internationally wrongful acts.”<sup>1109</sup> The arguments in this chapter are based on the ILC’s work on state responsibility, which has “become widely invoked evidence of general international law.”<sup>1110</sup>

The ILC articles represent nearly forty years of work by the ILC guided by five special rapporteurs.<sup>1111</sup> It provides a comprehensive description of the circumstances in which a state is

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<sup>1104</sup> LAUTERPACHT, *supra* note 309, at 35.

<sup>1105</sup> Vienna Convention, *supra* note 306.

<sup>1106</sup> Vienna Convention, *supra* note 306, at article 18: “a State is obliged to refrain from acts which would defeat the object and purpose of a treaty...”

<sup>1107</sup> HENKIN, *supra* note 426, at 8.

<sup>1108</sup> Professor Sir Humphrey Waldock, *The Legal Protection of Human Rights – National and International*, in AN INTRODUCTION TO THE STUDY OF HUMAN RIGHTS 83, 83 (Sir Francis Vallat ed., Europa Publications: London, 1970) [hereinafter Waldock].

<sup>1109</sup> Draft Articles of Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission of the General Assembly, U.N. GAOR, 56th Sess., Supp. No. 10 at 43, U.N. Doc. A/56/10 (2001), available at <http://www.un.org/law/ilc/sessions/53/53sess.htm> [hereinafter ILC articles].

<sup>1110</sup> Oscar Schachter, *United Nations Law*, 88 AM. J. INT’L L. 5 (1994).

<sup>1111</sup> CRAWFORD, *supra* note 203, at ix. Article 33 is one of the few articles to expressly reveal the role of the individual. Crawford points out that “a State’s responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights.” CRAWFORD, *supra* note 203, at 209. However, as Crawford points out, para 1 of article 33 merely makes scope for the possibility of a claim by an individual but it does not govern it. This will be a matter for the particular primary rule to determine. CRAWFORD, *supra* note 203, at 210.

liable for internationally wrongful acts, the duties that arise upon the commission of such acts and applicable reparations. While the ILC articles do not make an express link between states and individuals, the commentaries to the ILC articles do make it clear that states can hold each other responsible for internationally wrongful acts which may affect individuals as well as states.<sup>1112</sup>

Chapter III of the ILC articles defines a breach of an international obligation with reference to a two step process. First, it is necessary to determine whether there is an obligation in international law (the primary obligation). The second question is whether the particular state in question has in fact breached its obligation to satisfy that primary obligation (the secondary obligation). If the answer to both questions is yes, there is an internationally wrongful act for which the state is responsible. Therefore, for the purpose of determining whether systemic intimate violence is a human rights violation for which states are responsible, it is necessary to distinguish between primary and secondary obligations in international law.<sup>1113</sup>

### 3.5 Primary and Secondary Obligations

Primary obligations of states relate to the content of a right.<sup>1114</sup> When determining whether a state is responsible for a breach, the initial analysis focuses on the primary obligation “which has to be interpreted and applied to the situation, determining thereby the substance of the conduct required, the standard to be observed, the result to be achieved.”<sup>1115</sup> The codification and/or enunciation of primary rules is found in the various sources of international law, namely, treaties, tribunal and court decisions, CIL and scholastic work.<sup>1116</sup> Primary obligations, therefore, relate to a specific right.

Secondary obligations of states are the “general conditions under international law for the state to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom.”<sup>1117</sup> Secondary obligations, therefore, are general principles, which apply when a specific right has been breached. These principles are generic and apply equally in respect of the breach of any right. Secondary obligations, in turn, apply when a state, either in the form of an omission or commission, violates, or causes the violation of, an identified human right. Therefore, while the primary-rule analysis looks to specific aspects of the right, the secondary-rule refers to generic state conduct, applicable in all instances of breach.

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<sup>1112</sup> The ILC articles do not impose responsibility on states or other non-state actors. Articles 57 and 58 of the ILC Articles and Commentaries to the ILC articles, *supra* note 300, at 62. However, all states are able to intervene to protect the violation of basic human rights. Commentaries to the ILC articles, *supra* note 300, at 66 (“Every State, by virtue of its membership in the international community, has a legal interest in the protection of certain basic rights and the fulfilment of certain essential obligations.”).

<sup>1113</sup> BROWNIE, *supra* note 329, at 436.

<sup>1114</sup> CRAWFORD, *supra* note 203, at 74.

<sup>1115</sup> CRAWFORD, *supra* note 203, at 124.

<sup>1116</sup> Article 38(1) of the ICJ Statute, *supra* note 10 (“The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”)

<sup>1117</sup> CRAWFORD, *supra* note 203, at 74. See point three for the role of secondary rules.

It should be noted that while the seriousness of a state's breach may be relevant when determining remedies, it is irrelevant for ascertaining state responsibility.<sup>1118</sup> For example, a state will be responsible equally for an internationally wrongful act irrespective of whether that wrongful act involves the violation of a bi-lateral trade treaty by providing preferential treatment to its own nationals, or the violation of the genocide convention. Both acts result in the responsibility of a state for non-compliance with an international obligation, notwithstanding their marked difference in gravity. Therefore, in the context of assiduous systemic intimate violence, liability would attach to the violation itself, requiring the state to obviate the effects of the international obligation it has breached.<sup>1119</sup>

The two obligations are linked inextricably and both must sustain examination in order to prove that systemic intimate violence is a human rights violation for which states are responsible.

Chapter three provided the legal theoretical basis for why freedom from systemic intimate violence is a human rights at international law. That is, it discussed the basis on which states have a primary obligation to address systemic intimate violence. The remainder of this chapter, in turn, discusses the secondary obligation of states, in practice, to satisfy that primary obligation. The emphasis of the ILC articles is on these secondary rules of state responsibility, namely, "the general conditions under international law for the state to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom."<sup>1120</sup> It is this that I now address.

## Part B: Elements of State Responsibility

### 4. General

In order to establish state responsibility for systemic intimate violence in international law, the following elements must exist. First, there must be *state conduct*, either in the form of an omission or a commission.<sup>1121</sup> The conduct must be carried out by the state or the conduct in question must be *attributable* to the state.<sup>1122</sup> Second, the conduct must be *wrongful* in that it

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<sup>1118</sup> EAGLETON, *supra* note 303, at 23 (distinguishing between the existence of an internationally wrongful act and the steps a State may take to remedy it). A similar distinction is drawn by both Eagleton and Freeman between the existence of an internationally wrongful act and the steps a State may take to remedy it. Eagleton discusses the distinction between state liability as a substantive imposition of responsibility as opposed to the exhaustion of local remedies rule which arises in the procedural component of determining responsibility of a State: "The rule of local redress is the dividing line between the substantive and the procedural aspects of responsibility." EAGLETON, *supra* note 303, at 23.

<sup>1119</sup> This is confirmed by Crawford: "Individual breaches of international law can vary across a wide spectrum from the comparatively trivial or minor up to cases which imperil the survival of communities and people..." CRAWFORD, *supra* note 203, at 191-2.

<sup>1120</sup> *Id.*

<sup>1121</sup> Article 2 refers to "conduct consisting of an action or omission;" article 15(1) allows for a breach through a series of omissions "defined in the aggregate as wrongful." ILC articles, *supra* note 300.

<sup>1122</sup> Which, according to Kelsen, is the only way in which a state can act since it consists of individuals acting according to a certain norm or set of rules. KELSEN, *supra* note 336, at 97-9. Article 2(a) of the ILC articles provides that conduct must be "attributable to the State under international law." The notion of attribution is detailed in

breaches a primary obligation of the state.<sup>1123</sup> It is important to note that, subject to the content of the primary obligation, fault and harm are not necessary to trigger state responsibility.<sup>1124</sup>

The following sections discuss these elements, proposing that a state's omission to take certain minimum positive steps to protect individuals from systemic intimate violence is "conduct", which is "wrongful" in that it breaches that state's primary international obligation to help remedy such violence.

## 5. The Element of Conduct

Finally, in so far as responsibility growing out of the uncontrollable, independent acts of private individuals is concerned, the rule may be thus stated: Although such acts cannot be imputed to the State, the latter is not free to regard them with utter indifference.

Freeman<sup>1125</sup>

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chapter III of the ILC articles. ILC articles, *supra* note 300. For a criticism of 'imputability' see BROWNLIE, *supra* note 329, at 438. See also CRAWFORD, *supra* note 203, at 4 (Confirming the notion that the conduct of persons can be attributed to the State).

<sup>1123</sup> Article 1 states that "every internationally wrongful act of a State entails the international responsibility of that State;" article 2(b): there is an internationally wrongful act when there is a breach of an international obligation of the State. ILC articles, *supra* note 300. See also the Commentaries to the ILC articles, *supra* note 300, at 68 ("Two elements are identified. First, the conduct in question must be attributable to the State under international law. Secondly, for responsibility to attach to the act of the State, the conduct must constitute a breach of an international legal obligation in force for that State at that time."). See also United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980, p. 3. (pointing out that, in order to establish the responsibility of Iran "[f]irst, it must determine how far, legally, the acts in question may be regarded as imputable to the Iranian State. Secondly, it must consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable." See also the Dickson Car Wheel Company case, the Mexico-United States General Claims Commission UNRIAA, vol. IV, p. 669 (1931), at p. 678 (noting that the condition required for a State to incur international responsibility is "that an unlawful international act be imputed to it, that is, that there exist a violation of a duty imposed by an international juridical standard.").

As regards wrongfulness, see the Commentaries to the ILC articles, *supra* note 300, at 71 ("The second condition for the existence of an internationally wrongful act of the State is that the conduct attributable to the State should constitute a breach of an international obligation of that State. The terminology of breach of an international obligation of the State is long established and is used to cover both treaty and non-treaty obligations."). See also Factory at Chorzów, Merits, 1928, P.C.I.J., Series A, No. 17, p. 29 and Rainbow Warrior (New Zealand/France), UNRIAA, vol. XX, p. 217 (1990), at p. 251, para. 75.

<sup>1124</sup> See SHAW, *supra* note 306, at 696-698. See also BROWNLIE, *supra* note 329, at 436: "...the law of responsibility is concerned with the incidence and consequences of illegal acts...." Harm is *not* a requirement in the ILC articles, *supra* note 300. See also the Commentaries to the ILC articles, *supra* note 300, at 73 ("It is sometimes said that international responsibility is not engaged by conduct of a State in disregard of its obligations unless some further element exists, in particular, "damage" to another State. But whether such elements are required depends on the content of the primary obligation, and there is no general rule in this respect. For example, the obligation under a treaty to enact a uniform law is breached by the failure to enact the law, and it is not necessary for another State party to point to any specific damage it has suffered by reason of that failure. Whether a particular obligation is breached forthwith upon a failure to act on the part of the responsible State, or whether some further event must occur, depends on the content and interpretation of the primary obligation and cannot be determined in the abstract.").

<sup>1125</sup> FREEMAN, *supra* note 207, at 27

## 5.1 Introduction

State responsibility is triggered when a state commits an internationally wrongful act,<sup>1126</sup> which includes “conduct consisting of an action or omission.”<sup>1127</sup>

Below, I discuss the following aspects of the conduct element in the context of systemic intimate violence: (1) for the purposes of state responsibility, state conduct includes an omission to protect individual citizens from the acts of other individual citizens; (2) such omissions are made by state officials; (3) states must be proactive and take steps to enforce both negative and positive rights; and (4) states which fail to ensure that state officials protect women from systemic intimate violence commit an internationally wrongful act.

## 5.2 Conduct by virtue of an Omission to Protect

### 5.2.1 Description

I propose that it is the conduct of the state itself, in the form of an omission, which constitutes an internationally wrongful act.<sup>1128</sup> In particular, it is the state’s inertia to the recurrence of systemic intimate violence which constitutes “conduct” for the purposes of state responsibility.<sup>1129</sup>

No “attribution” issue arises in this case. It is not necessary to attribute the act of the individual abuser to the state because the required “conduct” element is satisfied by the omission by the state itself.<sup>1130</sup> As will be discussed below, conduct includes omissions made by state agencies, such as the police and judiciary. The notion of complicity also is not necessary to my argument.<sup>1131</sup> The doctrine of complicity maintains that where a state fails to apprehend or punish unlawful conduct perpetrated against an alien, the state becomes an accomplice to the original unlawful act. On this basis, the responsibility of the state is triggered. However, I maintain that this doctrine is not necessary. It is potentially unwieldy, and is a product of the common law approach to attribution of guilt in criminal law.

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<sup>1126</sup> Article 1 of the ILC articles (“Every internationally wrongful act of a State entails the international responsibility of that State.”).

<sup>1127</sup> Article 2 of the ILC articles.

<sup>1128</sup> General Recommendation 19, *supra* note 35, calls on states to take necessary and effective measures to combat all forms of gender-based violence, irrespective of who the perpetrator is. General Recommendation No. 19 also confirms that the CEDAW provisions are not restricted to actions by or on behalf of governments and that in terms of general international law and specific conventions, “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 for providing compensation.” General Recommendation 19, *supra* note 35.

<sup>1129</sup> BROWNLIE, *supra* note 329, at 453: “In international relations as in other social relations, the invasion of the legal interest of one subject of the law by another legal person creates responsibility in various forms determined by the particular legal system.”

<sup>1130</sup> EAGLETON, *supra* note 303, at 77 (arguing that “the state is never responsible for the act of an individual as such: the act of the individual merely occasions the responsibility of the state in an illegality of its own – an omission to prevent or punish, or positive encouragement of, the act of the individual.”).

<sup>1131</sup> For a discussion of the complicity doctrine *see* FREEMAN, *supra* note 207, at 370-372.

The responsibility of a State does not need to be grounded in such a legal fiction. There is a closer, more direct and more logically sustainable basis from which state responsibility arises, namely the State's *omission*. It is its failure to take steps to help remedy systemic intimate violence that is itself unlawful and there is no need to correlate the original unlawful act with the state.<sup>1132</sup> The state has its own, independent conduct which amounts to an internationally wrongful act, namely, its failure to do justice in accordance with its duty to women.

Therefore, the element of conduct is not grounded in the individual abuser's behavior, but rather in the conduct, by way of omission, of the state itself. Also, given the nature of the primary rule and systemic intimate violence, where the state fails to satisfy its primary obligations to protect its citizens from such violence, that failure results directly in harm and damage to the victims.

### 5.2.2 Primary Source Authority for Responsibility for Omissions in International Law

International law is well accustomed to proscribing certain forms of government omissions, which are so pervasive and result in such objectionable harm, that the failure of states to act is a violation of an international legal obligation. Such government omissions include: the failure to intervene in cases of persecution of racial minorities;<sup>1133</sup> the failure to apply the law equally to all citizens;<sup>1134</sup> the failure to prevent acts of torture;<sup>1135</sup> the failure to provide a transparent criminal

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<sup>1132</sup> This is confirmed by FREEMAN, *supra* note 207, at 372 ("The act itself can never charge the State; only the latter's independent failure to observe its repressive duties is capable of so doing.").

<sup>1133</sup> See the International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force Jan. 4, 1969 [hereinafter the Convention against Racial Discrimination]. Article 2(1) provides that states are obliged to "condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races." State failure to take the prescribed steps constitutes a violation of an international obligation.

<sup>1134</sup> Article 6 of the Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), adopted and proclaimed on 10 December 1948 [hereinafter the UDHR], provides that "[e]veryone has the right to recognition everywhere as a person before the law." Article 14(1) of the International Covenant on Civil and Political Rights, G.A. Res., 21 U.N. GAOR, 21<sup>st</sup> Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, 175 (entered into force Mar. 23, 1976) [hereinafter the ICCPR] provides that "[a]ll persons shall be equal before the courts and tribunals."

<sup>1135</sup> Article 2(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment G.A. res. 3452 (XXX), annex, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975) [hereinafter the Torture Convention] provides that "[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."

justice system;<sup>1136</sup> the failure to prevent child abuse;<sup>1137</sup> the failure to prevent the trafficking of human beings;<sup>1138</sup> and, the failure to prevent mass rape.<sup>1139</sup>

The ILC articles provide that “[c]onduct attributable to the State can consist of actions or omissions. Cases in which the international responsibility of a State has been invoked on the basis of an omission are at least as numerous as those based on positive acts, and no difference in principle exists between the two.”<sup>1140</sup>

The Convention on the Rights of the Child requires states parties to “take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.”<sup>1141</sup>

The International Convention on the Elimination of All Forms of Racial Discrimination extends the responsibility of the state to end discrimination between “any persons, group or organization.”<sup>1142</sup> Moreover, the state is obliged to ensure “effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his (sic) human rights and fundamental freedoms contrary to this Convention...”<sup>1143</sup>

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<sup>1136</sup> Article 14(1) of the ICCPR provides that “[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” Article 14(2) of the ICCPR states that “[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.” ICCPR, *supra* note 4.

<sup>1137</sup> Article 2(2) of the Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2 1990 [hereinafter the Children’s Convention], requires states to “take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment...”

<sup>1138</sup> Article 1 of the Trafficking Convention, *supra* note, requires states “to punish any person who, to gratify the passions of another: (1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person; (2) Exploits the prostitution of another person, even with the consent of that person.”

<sup>1139</sup> See the Rome Statute, *supra* note 9. Article 7(1)(g) of the Rome Statute, read together with the Prosecutor v. Akayesu, *supra* note, place an obligation on states and combating parties to refrain from and prevent “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.”

<sup>1140</sup> Commentaries to the ILC articles, *supra* note 300, at 70. The commentaries to the ILC articles cite the Corfu Channel case, “where the International Court of Justice held that it was a sufficient basis for Albanian responsibility that it knew, or must have known, of the presence of the mines in its territorial waters and did nothing to warn third States of their presence.” It also makes reference to the Diplomatic and Consular Staff, I.C.J. Reports 1980, p. 3, at pp. 31-32, paras. 63, 67 (where the International Court of Justice concluded that the responsibility of Iran was entailed by the “inaction” of its authorities, which “failed to take appropriate steps” in circumstances where such steps were evidently necessary). Commentaries to the ILC articles, *supra* note 300, at 70.

<sup>1141</sup> “Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.” Article 2(2).

<sup>1142</sup> Article 2(1)(d) of the Convention against Racial Discrimination, *supra* note 3, at 47 (“Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization.”).

<sup>1143</sup> Article 6 of the Convention against Racial Discrimination, *supra* note 3.



The definition of torture in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>1144</sup> includes conduct in the form of “consent or acquiescence of a public official or other person acting in an official capacity.”<sup>1145</sup> It further requires states to criminalize “all acts of torture” including “an act by any person which constitutes complicity or participation in torture.”<sup>1146</sup>

A similar obligation exists in the European Economic Community. In Europe, the 1992 Treaty Establishing the European Economic Community enjoins member states to “take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community.”<sup>1147</sup>

CEDAW provides that a government’s duty to prevent discriminatory conduct extends to discriminatory conduct on the part of individuals, organizations and enterprises.<sup>1148</sup> General Recommendation 9 stipulates that CEDAW “applies to violence perpetrated by public authorities”<sup>1149</sup> and emphasizes that state conduct “is not restricted to action by or on behalf of governments;” a state “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...”<sup>1150</sup> This definition undoubtedly extends the obligation of states to address the conduct of its officials, either in the form of harmful action or pernicious inaction.

### 5.2.3 Secondary Source Authority for Responsibility for Omissions in International Law

International courts, tribunals and scholars also have advocated for states to be held responsible for the harmful conduct of their citizens where a state has been complicit, has acquiesced to or has remained passive in the face of such behavior.<sup>1151</sup>

In 1982 the United Nations Human Rights Committee interpreted article 7 of the International Covenant on Civil and Political Rights, which prohibits torture or cruel, inhuman, or degrading treatment or punishment,<sup>1152</sup> and stated that:

The scope of protection required goes far beyond torture as normally understood. . . . [T]he prohibition must extend to corporal punishment, including excessive chastisement as an educational or disciplinary measure. . . . Finally, it is also the duty of public authorities to ensure protection by the law against such treatment even when committed by persons acting outside or without any official authority.<sup>1153</sup>

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<sup>1144</sup> Torture Convention, *supra* note 5.

<sup>1145</sup> Article 1 of the Torture Convention, *supra* note 5.

<sup>1146</sup> Article 4(1) of the Torture Convention, *supra* note 5.

<sup>1147</sup> **[Note: citation to follow]**

<sup>1148</sup> Article 2(e) of CEDAW, *supra* note 21.

<sup>1149</sup> General Recommendation 19, *supra* note 35, at paragraph 19.

<sup>1150</sup> *Id.*

<sup>1151</sup> This is confirmed by CRAWFORD, *supra* note 203, at 80.

<sup>1152</sup> ICCPR, *supra* note 4, at 52.

<sup>1153</sup> **[Note: citation to follow]**

The Human Rights Committee further developed the enunciation of the positive duty of states vis-à-vis their citizens in the context of the ICESCR:

[I]t follows from article 7, read together with article 2 of the Covenant, that States must ensure an effective protection through some machinery of control. Complaints about ill-treatment must be investigated effectively by competent authorities. Those found guilty must be held responsible, and the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation.<sup>1154</sup>

In the case of Ciudad Juárez, Chihuahua, the overall inefficacy of the administration of justice<sup>1155</sup> and political will to improve the status quo was seemingly absent.<sup>1156</sup> It was this absence which triggered international concern, and not only the heinous nature of the killings.

Authority on denial of justice and state responsibility, Freeman, maintains that a state can be responsible for conduct “where the original source of the injury was the act of some individual acting in a private capacity and where the State subsequently failed in the duties incumbent upon it as a consequence of an earlier wrong.”<sup>1157</sup> On this basis, this thesis proposes that the failure of the state to prevent predictable and extreme harm to an identifiable portion of the population constitutes an internationally wrongful act.<sup>1158</sup>

Therefore, the failure of the state to prevent predictable and extreme harm to an identifiable portion of the population constitutes an internationally wrongful act.<sup>1159</sup>

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<sup>1154</sup> General Comment 7, *supra* note 357.

<sup>1155</sup> OAS Report on the Situation of Women in Ciudad Juárez, paragraph 34. Many families had requested DNA tests to determine and/or confirm the identity of a deceased and either waited without response or their requests were denied immediately. See OAS Report on the Situation of Women in Ciudad Juárez, paragraph 47: “...even with a missing person’s report, the response was neither rapid nor comprehensive.” It should be noted, however, that the Chihuahua officials have taken steps to improve the facilities and capabilities of the Unit for Attention to Victims of the Special Prosecutor’s Office. See OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraph 55.

<sup>1156</sup> OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraph 34.

<sup>1157</sup> FREEMAN, *supra* note 207, at 19 (“...whether the source of the original injury be a private wrong or not, international responsibility can never be anything else but direct in the sense that it can only arise after a failure on the part of the State organs to observe some international obligation incumbent upon them.” While Freeman makes this claim in rejecting the distinction between direct and indirect responsibility, he affirms my claim, namely that responsibility can arise by virtue of an omission *and* it is in fact the conduct of the State, only the conduct manifests itself in omission rather than a commission). FREEMAN, *supra* note 207, at 21.

<sup>1158</sup> This approach has been used in respect of trafficking. See for example, Joan Fitzpatrick, Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking, 24 *Much. J. Int’l L.* 1143, 1157-58 (2003) (describing the amendment of asylum laws to acknowledge the “harm threatened directly by non-state actors, against a backdrop of state indifference or ineffectuality in controlling the violence or protecting similarly situated victims.”).

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### 5.3 The Requirement to Take Steps: Positive Enforcement of a Negative Right

States are required to enforce both positive and negative rights. Historically, however, positive rights, such as civil and political rights, have been better enforced, requiring the state to *abstain* from action. In the case of negative rights, however, enforcement requires positive state action, which usually translates into providing funds and resources for socio-economic needs, such as health, education and welfare.

At first blush, the right to be free from systemic intimate violence may appear to be a negative right because its enforcement requires positive state action. However, the right to physical safety is a negative right, a freedom *from* and not necessarily a freedom *to*. The immediacy and group vulnerability which are characteristic of systemic intimate violence are a manifestation, not only of limited resources (as is the case with the right to food or health), but rather of discrimination. It is arguable, therefore, that the right to systemic intimate violence is not a socio-economic right, but a civil and political right; a negative right, but one which requires positive state action to ensure its enforcement.

Certain steps are required in international law to protect so-called negative rights. For example in 1982 the United Nations Human Rights Committee interpreted article 7 of the ICCPR, which prohibits torture, as including “the duty of public authorities to ensure protection by the law against such treatment even when committed by persons acting outside or without any official authority.”<sup>1160</sup> The same committee enunciated the positive duty of states vis-à-vis their citizens in the context of the ICESCR, instructing states that “[C]omplaints about ill-treatment must be investigated effectively by competent authorities. Those found guilty must be held responsible, and the alleged victims must themselves have effective remedies at their disposal...”<sup>1161</sup>

In addition, international law theorists have identified the obligation of states to respect and to *ensure respect* for human rights.<sup>1162</sup> This so-called ‘positive obligation’ applies to negative as well as positive rights. For example, states must take certain steps to ensure that elections are free and fair; and in guaranteeing free speech, the state must intervene when an individual’s right to speak freely is curbed unlawfully by another individual. The same notion applies to systemic intimate violence. On the basis that individuals have an international legal right to be free from systemic intimate violence, as discussed in detail in chapter three, states must take certain minimum positive steps – as articulated in chapter two – to uphold that negative right.

International case law too has supported this approach. As early as 1923, in the more conservative *Tellini* case, the former Permanent Court of Justice acknowledged the importance of attributing responsibility to a state where it fails to take measures to protect its citizens:

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<sup>1160</sup> [Note: citation to follow]

<sup>1161</sup> Report of the Human Rights Committee, Official Records of the General Assembly, 37<sup>th</sup> Sess., Supp. No. 40, at 94–95, Annex. 5, General Comment 7 (16), (A/37/40) (1982) at 94 [hereinafter General Comment 7] [Note: check citation format].

<sup>1162</sup> See the Preamble to the UDHR (“Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms.”). UDHR, *supra* note 4.

The responsibility of a State is only involved ... if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal.<sup>1163</sup>

In the case of *X and Y v. the Netherlands* discussed above, the ECHR considered article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”), which guarantees the right to respect for one’s private and family life.<sup>1164</sup> The court described the objective of article 8 as not only protecting the individual against arbitrary interference by public authorities but “in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life... These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.”<sup>1165</sup>

In the case of *Mc v. Bulgaria* the ECHR stated clearly that:

Positive obligations on the State are inherent in the right to effective respect for private life under Article 8; these obligations may involve the adoption of measures even in the sphere of the relations of individuals between themselves. While the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is in principle within the State's margin of appreciation, effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions. Children and other vulnerable individuals, in particular, are entitled to effective protection.<sup>1166</sup>

The court held that the positive obligation to launch an official investigation into accusations of torturous conduct “cannot be considered in principle to be limited solely to cases of ill-treatment by State agents.”<sup>1167</sup> The Court emphasized that “the obligation of the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals.”<sup>1168</sup> Therefore, within the context of rape, the ECHR held that “States have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution.”<sup>1169</sup>

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<sup>1163</sup> *Id* at 92. League of Nations, *Official Journal*, 4<sup>th</sup> Year, No. 11, (November 1923), p. 1349. While the court held that acts of individuals may not be attributable to the State, it nevertheless recognized that a State could be liable for an omission to act in accordance with its international obligations. While this statement relates to the central issue of foreigners in another State, I propose it can and should be extrapolated to a State’s own citizens. The holding that “... a State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects” [*Id* at 92 point 4] is not limited by the court to the facts of the case (i.e. how a State treats the citizens of another State).

<sup>1164</sup> *X and Y v. The Netherlands*, *supra* note 213, at paras 21-30. Article 8 of the Convention states that: “Everyone has the right to respect for his private and family life, his home and his correspondence.”

<sup>1165</sup> *X and Y v. The Netherlands*, *supra* note 213, at para 23.

<sup>1166</sup> *M.C. v. Bulgaria*, *supra* note 256, at paragraph 150.

<sup>1167</sup> *M.C. v. Bulgaria*, *supra* note 256, at paragraph 151.

<sup>1168</sup> *M.C. v. Bulgaria*, *supra* note 256, at paragraph 150.

<sup>1169</sup> *M.C. v. Bulgaria*, *supra* note 256, at paragraph 153.

Ignoring the violation of human rights by non-state actors arguably constitutes a failure of states to ensure the respect for human rights within their borders and, as has been stated, any failure to comply with an obligation in international law is an internationally wrongful act and a breach of international law.<sup>1170</sup> On this basis, a failure by states to uphold their female citizens' international legal right to be free from systemic intimate violence is an internationally wrongful act. However, this begs the question as to who constitutes the 'state' for the purpose of determining state omissions. This issue of attribution is discussed below.

## 5.4 Attribution: Omission by Whom

### 5.4.1 State Organs and Officials

The notion of state conduct in international law includes an omission on the part of state organs and officials.<sup>1171</sup> Article 4 of the ILC articles provides that "[T]he conduct of a State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions..."<sup>1172</sup> Article 4(2) of the ILC articles provides that "an organ includes any person or entity which has that status in accordance with the internal law of the State."<sup>1173</sup>

According to Crawford, the general rule is that conduct is attributed to the state internationally where the conduct is that of "its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e., as agents of the State."<sup>1174</sup> This confirms the notion that "[e]xternally, the state speaks with one voice, and it does not matter from which agent the voice emanates."<sup>1175</sup>

The ambit of entities that could constitute a state organ for the purposes of state responsibility is wide and would include police, state lawyers and prosecutors, court administrative officials such as court clerks, judges, welfare departments and public hospitals.<sup>1176</sup> Freeman states that a "failure to provide adequate police protection against impending violence, inadequate steps to punish the perpetrators of crimes against aliens, or an infraction of the State's fundamental duty to operate properly its machinery of judicial protection for remedying private

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<sup>1170</sup> Tomuschat, *Individual Reparation Claims*, *supra* note 299, at 283, discussing the draft basic principles and guidelines for reparations.

<sup>1171</sup> CRAWFORD, *supra* note 203, at 94.

<sup>1172</sup> Article 4(1) of the ILC articles, *supra* note 300.

<sup>1173</sup> Article 4(2) of the ILC articles, *supra* note 300. *See also* CRAWFORD, *supra* note 203, at 83: "In speaking of attribution to the State what is meant is the State as a subject of international law. Under many legal systems, the State organs consist of different legal persons (ministries or other legal entities), which are regarded as having distinct rights and obligations for which they alone can be sued and are responsible. For the purpose of the international law of State responsibility the position is different. The State is treated as a unity, consistent with its recognition as a single legal person in international law."

<sup>1174</sup> CRAWFORD, *supra* note 203, at 91 and footnote 97.

<sup>1175</sup> EAGLETON, *supra* note 303, at 74.

<sup>1176</sup> Article 11(2) of DEVAW, *supra* note 22. A similar approach is evident in DEVAW, which urges government, non-governmental organizations and individuals to implement its provisions. The notion of individual liability is also underscored in the preamble of the ICSCER, *supra* note 13: "Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant."

wrongs will entail international responsibility.”<sup>1177</sup> In respect of courts, Eagleton maintains that “[t]here can be no doubt that a court, as any other agency of the state, may, through an internationally illegal act, bring responsibility upon its state.”<sup>1178</sup>

The principles of denial of justice, which originally applied to aliens living in foreign states, can be used to understand the content of a state’s obligation to its own citizens. Freeman defines denial of justice as “a concept designating some failure on the part of authorities charged with administering justice to comply with the State’s general, very fundamental obligation of providing an adequate legal protection for the rights of aliens...”<sup>1179</sup> The same theory applies to the obligation of states to provide “adequate legal protection for the rights of” women. This is confirmed by Eagleton who states that, if an organ of state (in particular a court) “directly collides with international law, or if it is guilty of denial of justice, through fraud, excess of jurisdiction, improper process, or otherwise, it has committed an internationally illegal act for which the state may be held responsible.”<sup>1180</sup>

#### 5.4.2 Scope of activity

In order to attribute responsibility of inert officials to the state, the act must fall within the scope of the capacity of the official in question.<sup>1181</sup> Where a state has a duty vis-à-vis its citizens, the power to fulfill that obligation devolves to state officials. Therefore, where an official unreasonably fails to utilize this power for the protection of an individual s/he has committed an omission, which constitutes an omission on the part of the state.<sup>1182</sup> This is premised on the notion that when

the state invests such an individual [*as an agent*] with its authority, his (sic) acts become the acts of the state itself, for which the state must accept responsibility under international law....<sup>1183</sup>

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<sup>1177</sup> FREEMAN, *supra* note 207, at 27.

<sup>1178</sup> EAGLETON, *supra* note 303, at 71.

<sup>1179</sup> FREEMAN, *supra* note 207, at 41.

<sup>1180</sup> EAGLETON, *supra* note 303, at 71.

<sup>1181</sup> CRAWFORD, *supra* note 203, at point 13. [**Note: get page number**] According to Brownlie, objective tests of responsibility were applied by the General Claims Commission set up by the Convention between Mexico and the United States in 1923: BROWNIE, *supra* note 329, at 440 (In the *Caire* claim (1929 RIAA v. 516 at 529-31 the President of the Franco-Mexican Claims Commission, applied the objective test as “the doctrine of the objective responsibility of the State, that is to say, a responsibility for those acts committed by its officials or its organs, and which they are bound to perform, despite the absence of *faute* peremptory norms their part... The State also bears an international responsibility for all acts committed by its officials or its organs which are delictual according to international law, regardless of whether the official organ has acted within the limits of his competency or has exceeded those limits... However, in order to justify the admission of this objective responsibility of the State for acts committed by its officials or organs outside their competence, it is necessary that they should have acted, at least apparently, as authorized officials or organs, or that, in acting, they should have used powers or measures appropriate to their official character.”).

<sup>1182</sup> The notion of agency is summarized by Eagleton who states that “the state may be held responsible for the acts of any of its agents, if such acts violate international law to the detriment of a foreign state or citizen thereof. Since his power is put into his hands by his state, the acts performed by him in the discharge of the functions of the office must be attributed to his state...Externally, the state speaks with one voice, and it does not matter from which agent the voice emanates.” EAGLETON, *supra* note 303, at 73-74.

<sup>1183</sup> EAGLETON, *supra* note 303, at 45.

All organs of state are bound by international obligations, irrespective of whether they are “engaged in enacting, executing, or construing the law.”<sup>1184</sup> Article 5 of the ILC articles provides that where a person or entity is not an organ of state but is empowered to exercise elements of governmental authority, that person’s actions may be attributed to the state.<sup>1185</sup>

As described in chapter two, systemic intimate violence arises when there is a grand failure of government to protect women from intimate violence. Freeman, in writing on the principles of denial of justice, notes that a state is responsible for an internationally wrongful act where there is a “failure of authorities responsible for law and order to take prompt and necessary steps to apprehend criminals; an inordinate lapse of time without offenders being brought to trial; as well as negligence, laxity, and undue delay in their prosecution...”<sup>1186</sup> On this basis, this thesis proposes that where any person who is empowered to exercise elements of governmental authority – such as police, state lawyers and prosecutors, court administrative officials and public hospital staff – ignores incidents of systemic intimate violence and fails to take action to help remedy that violence, that person’s omission is the conduct of the state.

## 5.5 Application of the Conduct Element to Systemic Intimate Violence

In the *Corfu Channel* case Albania was held responsible for the harm caused by the laying of mines in its territorial waters. Although Albania did not itself lay the mines, it was held responsible “on the basis of knowledge possessed by that State as to the presence of such mines, even though there was no finding as to who had actually laid the mines.”<sup>1187</sup> Albania’s responsibility was premised *not* on its actions but rather on its *omission* to advise third party states of the presence of mines in its territorial waters.<sup>1188</sup>

I propose that these principles, and this conclusion, are directly analogous to failures by state actors to take steps to help remedy systemic intimate violence. Let us extrapolate this decision to a scenario of systemic intimate violence that took place in South Africa in 1995:

My husband has always abused me... I stayed because I am Catholic and because we have six children, until he kicked me out. He used to tie me to the bed so I couldn’t go out. I wasn’t allowed to answer the phone. One time, he beat me so bad, he cracked my

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<sup>1184</sup> FREEMAN, *supra* note 207, at 29.

<sup>1185</sup> CRAWFORD, *supra* note 203, at 100.

<sup>1186</sup> FREEMAN, *supra* note 207, at 378.

<sup>1187</sup> *Corfu Channel* Case (United Kingdom v. Albania) ICJ Reports, 1949, p.4; 16 AD, p.155 [hereinafter *Corfu Channel* case]. SHAW, *supra* note 306, at 701. *Corfu Channel* case, *supra* note 395, at 4 (“The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in times of war, but on certain general and well recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war...”). See also the discussion in by H. Lauterpacht, in ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES, 155-170 (Ed. H. Lauterpacht, London, 1949).

<sup>1188</sup> See also *Diplomatic and Consular Staff*, I.C.J. Reports 1980, p. 3, at pp. 31-32, paras. 63, 67 where the court held Iran responsible for the “inaction” of its authorities which “failed to take appropriate steps” in circumstances where such steps were reasonably required. [*Note: re-read case.*] [*Note: check citation format*]

head and broke one of my fingers. Another time, he burned me with boiling water. Once he put an electric shock through my fingers. I got a peace order [restraining order] against my husband while I was married, but when they came to the house, the police said all they could do was warn my husband. Since my divorce four years ago, my husband harasses me all the time... The police arrested him for trespassing three times, but he was immediately released. The police told me that they could not do anything more since we were divorced. In January 1995, I went to get an interdict and the court clerk told me that they couldn't give me one because "everybody's free to walk the streets and live their lives." Soon after, he threw a burning towel through the window of the house which burnt the curtains and started a fire. Now he is in prison for two months for damaging property.<sup>1189</sup>

In both situations the state had knowledge of potential harm. In the *Corfu Channel* case the court held that Albania knew about the existence of mines in its territorial waters.<sup>1190</sup> In the systemic intimate violence case, the South African police knew about the existence of ongoing and systemic bodily attacks against the narrator. Since the rules of international law provide that state agents include organs of government or those who have control over such organs, both the actors in Albania (the government) and South Africa (the police) would constitute 'the state.'

Neither case suggests that the state was responsible for the initial act of violence. Rather, Albania was responsible for its inaction.<sup>1191</sup> The ICJ held that it was irrelevant *who* actually laid the mines; all that was applicable was that the Albanian government had failed to act upon the knowledge it surely had about the existence of the mines. Similarly, I propose that a similar result should hold in the case of systemic intimate violence. The police and court officials did not inflict violence upon the victim but they did fail to act upon their knowledge of the victim's circumstances.

In both instances there was a failure to act: Albania omitted to provide the necessary warning and the South African police failed to protect the narrator or imprison her husband.<sup>1192</sup> Indeed, the only time the abuser was imprisoned was for damage to property.

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<sup>1189</sup> Interview with survivor of systemic intimate violence in Durban, South Africa, February 3, 1995, cited in GLOBAL REPORT ON WOMEN'S HUMAN RIGHTS, *supra* notex, at 383.

<sup>1190</sup> *Corfu Channel* case, *supra* note 395. Knowledge on the part of the Albanian government was necessary to hold it liable for the explosion of mines in its territorial waters. The Court held that even if there was no connivance between Yugoslavia (or any other party who may have laid the mines) and Albania, there was sufficient evidence that Albania had a view of and kept a vigil over the relevant waters, which precluded its claim of ignorance. *Id* at 18. Knowledge on the part of the Albanian government was essential in order to hold it liable for the damage and loss caused by the explosion of the mines in its territorial waters. The Court discussed extensively the fact that even if there was no connivance between Yugoslavia (or any other party who may have laid the mines) and Albania, there was sufficient evidence that Albania had a view of and kept a vigil over the relevant waters that precluded its claim of ignorance. Based on the admission of so-called "indirect evidence," the court held that proof of knowledge may be drawn from an inference of facts "provided that they leave *no room* for reasonable doubt." *Corfu Channel* case, *supra* note 395, at 18.

<sup>1191</sup> *Corfu Channel* case, *supra* note 395, at 23: "In fact, nothing was attempted by the Albanian authorities to prevent the disaster. These grave omissions involve the international responsibility of Albania." Furthermore, there had been an exhaustion of local remedies in both cases.

<sup>1192</sup> *Corfu Channel* case, *supra* note 395, at 23: "In fact, nothing was attempted by the Albanian authorities to prevent the disaster. These grave omissions involve the international responsibility of Albania." Furthermore, there had been an exhaustion of local remedies in both cases.



In both cases there was harm. This harm could have been prevented had the respective state agents acted in accordance with their mandate.

The most important difference between these two cases is the nature of the victim. In the *Corfu Channel* case the victims were nationals of the United Kingdom, harmed in the territorial waters of Albania. In the systemic intimate violence case, the narrator is a national of the state of South Africa, harmed by a fellow national. However, I propose that this distinction cannot withstand the compelling humanitarian values that underpin international human rights law nor the development in the principles of state responsibility that holds states liable for their behavior vis-à-vis their own nationals.<sup>1193</sup>

Therefore, the conduct element of state responsibility applies in cases of systemic intimate violence because: (1) there is conduct in the form of an omission to take positive steps to prevent or mitigate systemic intimate violence; (2) that omission is made by state organs and/or state officials; and (3) that omission is made by those state organs or officials acting within their scope as state agents.

I now turn to examine the “wrongfulness” element of state responsibility.

## 6. Wrongfulness

In this section I discuss the following aspects of the wrongfulness element: (1) the definition of wrongfulness; (2) the due diligence standard; and, (3) the circumstances precluding wrongfulness.

### 6.1 Definition of Wrongfulness

Article 1 of the ILC articles provides that the commission of an internationally wrongful act by a state “entails the international responsibility of that State.”<sup>1194</sup>

An internationally wrongful act is conduct that “constitutes a breach of an international obligation of the State.”<sup>1195</sup> A breach of an international obligation is an act of a state that is “not in conformity with what is required of it by that obligation...”<sup>1196</sup> The former Special Rapporteur for state responsibility, Professor Crawford, explains that “an internationally wrongful act lies in the non-conformity of the State’s actual conduct with the conduct it ought to have adopted in order to comply with a particular international obligation.”

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<sup>1193</sup> It is entirely plausible that the tenets of the doctrine of denial of justice in respect of aliens may be extended to citizens of a state too.

<sup>1194</sup> Article 1 of the ILC articles, *supra* note 300: “Every internationally wrongful act of a State entails the international responsibility of that State.” At this stage, we are dealing with the responsibility of the primary State, i.e. the State itself which commits the human rights violation either through a commission or an omission. A further possibility may be imposing obligations on third party states to ensure that a state protects its citizens from systemic intimate violence.

<sup>1195</sup> Article 2 of the ILC articles, *supra* note 300.

<sup>1196</sup> Article 12 of the ILC articles, *supra* note 300.

Therefore, if a state fails to act where it has an international duty to perform, it commits an internationally wrongful act.<sup>1197</sup> State responsibility for failure “to take reasonable steps to prevent or respond to an abuse” has been framed as a “failure to exercise due diligence and to provide equal protection in preventing and punishing such abuses by private individuals.”<sup>1198</sup>

The analysis, therefore, is a comparative one that can be broken down into two issues. First, an examination of what constitutes the standard expected of a state in order to fulfill its primary obligation. That is, what is the level of diligence required of the state? Second, an examination of whether the state conformed to this expectation<sup>1199</sup> I discuss each of these issues below.

## 6.2 The Due Diligence Standard

International law, anticipating unlawful acts by private persons, requires the State to fulfil certain duties in relation thereto.

These duties are, generally speaking, two: the use of due diligence in the prevention of injury to foreigners; and proper measures of repressing crime, or remedying wrong, as the case may be, in the event that such acts nevertheless occur.

Alwyn Freeman<sup>1200</sup>

### 6.2.1 Background to the Due Diligence Standard

When a state has a duty to take steps to fulfill an international obligation, it is natural to ask how much it should do to be deemed to have fulfilled that obligation. For example, if a state has an international obligation to eradicate gender discrimination, racism, or pollution, at what stage has it ‘done enough’ to comply with its obligations?

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<sup>1197</sup> Just as the use of State power for pernicious or wrongful purposes (such as official torture) is an internationally wrongful act.

<sup>1198</sup> BROKEN BODIES, SHATTERED MINDS, *supra* note 98, at 6 (documenting the worldwide torture of women, observing that “states all around the world have allowed beatings, rape and other acts of torture to continue unchecked”).

<sup>1199</sup> CRAWFORD, *supra* note 203, at 124. *See also* SHAW, *supra* note 306, at 694: Shaw points out that the focus of state responsibility “is upon principles concerned with second order issues, in other words, the procedural and other consequences flowing from the breach of a substantive rule of international law.” In considering these two questions, it is important to recall that the test of State responsibility arises only once a specific right has been identified and the origin of the substantive right is irrelevant. *Id* at 124: “Chapter III can only play an ancillary role in determining whether there has been such a breach, or the time at which it occurred, or its duration.” Rainbow Warrior Affair, *supra* note 305, at 26: “... the attack carried out against the ‘Rainbow Warrior’ took place in violation of the territorial sovereignty of New Zealand and [ ] it was therefore committed in violation of international law. New Zealand consequently has a right to compensation for the harm which it directly suffered from that attack.” Assuming, then, that there is a right in international law to be free from extreme harm perpetrated by an individual, the next question is what type of conduct is required by the State to avoid its complicity with or acquiescence to such harm? It is this step that I now proceed to analyze. It is the author’s proposal that the composite elements of the right to be free from systemic intimate violence are synonymous with the constitutive parts of other human rights violations in international human rights law. Cf. Meyersfeld, *supra* note 349 and Report of the Special Rapporteur on violence against women, *supra* note 58.

<sup>1200</sup> FREEMAN, *supra* note 207, at 27

The standard of ‘due diligence’ developed in response to this question. In 1988, the Inter-American Court of Human Rights established the due diligence standard for states, holding that:

An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person...) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the [American Convention on Human Rights].<sup>1201</sup> \*\*

In 1993, the U.N. General Assembly applied the due diligence standard in DEVAW, enjoining states to “[e]xercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.”<sup>1202</sup> This standard was utilized once again in respect of violence against women by the first Special Rapporteur on Violence against Women, Radhika Coomaraswamy. In her report against violence against women, she confirmed that domestic violence is an underestimated cause of poor health, continued economic and social hardship and mortality of women. She demonstrated that the harm that is the most serious for women is that which has been the most neglected by states.<sup>1203</sup>

In her final report to the U.N. Dr Coomaraswamy revitalized the due diligence standard as follows:

[T]he standard for establishing State complicity in violations committed by private actors is more relative. Complicity must be demonstrated by establishing that the State condones a pattern of abuse through pervasive non-action. Where States do not actively engage in acts of systemic intimate violence or routinely disregard evidence of murder, rape or assault of women by their intimate partners, States generally fail to take the minimum steps necessary to protect their female citizens’ rights to physical integrity and, in extreme cases, to life. This sends a message that such attacks are justified and will not be punished. To avoid such complicity, States must demonstrate due diligence by taking active measures to protect, prosecute and punish private actors who commit abuses.<sup>1204</sup>

### 6.2.2 ‘Due Diligence’ or ‘Complicity’

Increasingly, a failure to comply with a due diligence standard is being framed as complicity with those who perform the original act of harm. Coomaraswamy, for example,

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<sup>1201</sup> Velásquez Rodríguez v. Honduras, case 7920, Inter-Am. C.H.R. 35, OEA/ser.L./V./III.19, doc. 13, para. 172 (1988) [hereinafter Velásquez Rodríguez case].

<sup>1202</sup> Article 4(c) of DEVAW, *supra* note 22.

<sup>1203</sup> Report of the Special Rapporteur on violence against women, *supra* note 58, at 16–18 (presenting statistical data on the battering of women in various countries in accordance with Commission on Human Rights resolution 1995/85 and detailing the extent of violence against women, the inadequacy of governmental and societal response, and providing recommendations for reform).

<sup>1204</sup> *Id.* This echoes the Special Rapporteur on State Responsibility, James Crawford, who stated that “the state has a positive duty not to authorize or allow torture...” James Crawford, *Revising the Draft Articles on State Responsibility*, 10 EUR. J. INT’L L. 435, 440 (1999). For a brief discussion of the due diligence standard within the context of systemic intimate violence see AMNESTY INTERNATIONAL, INTIMATE VIOLENCE IN SWEDEN, *supra* note 98, at 13 (describing the due diligence standard as obliging the state “to take all the necessary measures to combat violence against women, whoever the perpetrator may be).

claims that states are obliged to take basic steps to stop domestic violence and “a State can be held complicit where it fails systematically to provide protection from private actors who deprive any person of his/her human rights.”<sup>1205</sup>

However, not all commentators agree. Freeman, for example, denounces the argument that state inertia constitutes *complicity*, referring to it as an “utterly fictitious theory of implied State *complicity* in what seems clearly a politico-legal effort to render more palatable the postulate of State responsibility in these cases.”<sup>1206</sup> Instead, he proposes, an omission to take basic steps with due diligence leads to an independent internationally wrongful act.<sup>1207</sup>

While moral imperatives certainly require us to view the state as complicit in acts of intimate violence, it is important to distinguish between the abuser’s act of violence and the state’s *own* conduct, in the form of an omission, to prevent the violence, protect the victim and, where necessary, prosecute the abuser. For these reasons, this thesis takes the view that a failure of a state to take positive steps to prevent or help remedy systemic intimate violence does not render the state complicit with that violence. Instead, the state’s omission itself constitutes an internationally wrongful act in violation of international law.

### 6.2.3 Identifying the Failure to Conform to the Due Diligence Standard

In general, states are required to be proactive within their society to guarantee and *ensure respect* for human rights.<sup>1208</sup> The fulfillment of this objective, however, is amorphous, especially in the case of systemic intimate violence, where it is difficult to measure a state’s performance without a precise standard of compliance.

The due diligence standard assists in ‘quantifying’ the fulfillment of these human rights obligations. The circumstances of each state, the nature of the systemic intimate violence involved, and the state’s response to such violence, will be different in every case. Therefore, there are a number of factors relevant on a case by case basis to determining the appropriate minimum threshold of conduct required for a state to meet its due diligence standard, and to indicate a failure to comply therewith.

Any failure by a state to take action to meet its international legal obligations is adjudicated with regard to “the degree of protection required under the particular circumstances; the practical factors going to render such protection possible or impossible; and finally the ensuing neglect to

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<sup>1205</sup> Report of the Special Rapporteur on violence against women, *supra* note 58. The appointment of the Special Rapporteur also represented an important step for the incorporation of women’s rights into so-called ‘mainstream’ human rights since her appointment was mandated by the UN Human Rights Committee.

<sup>1206</sup> FREEMAN, *supra* note 207, at 20. According to Freeman, citizens abroad “may fall victim to an initial wrong, perpetrated by a private person against whom they subsequently seek relief in the courts. For the act itself, the State is not answerable; but if the conduct of the proceedings in this private litigation is internationally deficient, a duty to make reparation for the denial of justice will arise under the law of nations.” *Id.* at 372.

<sup>1207</sup> EAGLETON, *supra* note 303, at 24: “The responsibility of the state... is always present ... but the measure of reparation due therefore may be diminished, even to the vanishing point, by the proof of a due diligence ... .”

<sup>1208</sup> Louis Henkin, *Human Rights and State Sovereignty*, 25 GA. J. INT’L & COMP. L. 31, 34-6 (1994). Ignoring the violation of human rights, by state or non-state actors, constitutes a failure of governments to ensure the respect for human rights within their borders. Such a failure is an internationally wrongful act and a breach of international law. Tomuschat, *Individual Reparation Claims*, *supra* note 299, at 283.

undertake the requisite steps of pursuit prescribed by the law of nations.”<sup>1209</sup> On this basis, I discuss below three factors which can be extrapolated from these considerations to identify the fulfillment or otherwise of the due diligence standard: (1) the nature of the right involved; (2) the practical resources and capabilities of the country in question; and (3) the repetition of aggregate omissions.

#### a. The Nature of the Right

The precise content of the due diligence standard depends on the primary obligation in question.<sup>1210</sup> Conformity with international obligations has been described as “the provision of facilities, or the taking of precautions or the enforcement of a prohibition.”<sup>1211</sup> Therefore, the nature of the right as described in chapter two will have to be addressed by states in accordance with the obligations also described in chapter two.

#### b. The Practical Resources and Capabilities of the Country

Intuitively, one must also take into account the particular resources and capabilities of a state when determining the level of conduct required for it to meet its due diligence standard vis-à-vis the prevention and remedy of systemic intimate violence. Each country will have practical exigencies that may make it difficult to render specific protection, and this is recognized by international law, which “takes into consideration [ ] the impossibility of a state’s being able to prevent all such injurious acts... It is possible, therefore, that circumstances which might produce responsibility in one state would not do so in another.”<sup>1212</sup>

The standards of due diligence will fluctuate depending on the circumstances of each state, particularly with reference to the availability of resources and social, political and/or economic exigencies that reasonably mitigate a state’s ability to protect women from systemic intimate violence.

However, states will be compelled to prioritize the interests of women where it is reasonable and progressive to do so. For example:

the degree of general lawlessness prevailing in a given community may bear with more or less force upon the extent and nature of the measures required of a given State in fulfilment of its duty; but the mere fact that in a certain nation or specific region thereof a high coefficient of criminality may exist, is no proof, by itself, that the government of such nation has failed in its duty of maintaining an adequate police force for the prosecution and punishment of criminals.<sup>1213</sup>

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<sup>1209</sup> FREEMAN, *supra* note 207, at 373.

<sup>1210</sup> According to the Commentaries to the ILC articles the standard of compliance with international obligations, including the due diligence standard, vary based on the context and substance of the primary obligation. Commentaries to the ILC articles, *supra* note 300, at 70.

<sup>1211</sup> CRAWFORD, *supra* note 203, at 125-6.

<sup>1212</sup> EAGLETON, *supra* note 303, at 79 (stating that international law “is concerned only to the extent of maintaining a general standard for the administration of justice...”). See also FREEMAN, *supra* note 207, at 376.

<sup>1213</sup> FREEMAN, *supra* note 207, at 373.

This contextual caveat is necessary, both intellectually and practically, to delineate the nature of the liability and lend it viability and perpetuity. Each country will have practical exigencies that render specific protection relatively more or less possible.<sup>1214</sup>

### c. Aggregate Omissions

Given this caveat of state resources, together with the complexity of systemic intimate violence, how do we carve out the content of an actionable omission? I propose that continuing neglect to undertake the requisite minimum steps prescribed by international law will trigger a state's responsibility.<sup>1215</sup> Often, it is not one organ but a combination of several organs of state that fail to protect women from systemic intimate violence, either through the alienation of the victim or through negligence.<sup>1216</sup> Clearly it would be untenable to hold a state liable if its police, judiciary or politicians are unable to protect individuals in their society from all violence. However, it is the inveterate and virulent gender-based violence that calls for state consideration.

Article 15 of the ILC articles allows for the breach of an international obligation to lie in a series of acts defined in the aggregate as wrongful.<sup>1217</sup> The repeated omission by states actively to assist women who suffer systemic intimate violence may be construed as an implied sanction of this behavior.<sup>1218</sup> Therefore, it is not simply one omission of a state to protect women from abusers but a series of omissions that trigger state responsibility. So long as a state conducts itself contrary to its international obligations, even where such conduct inheres in a series of omissions, it will be in breach.<sup>1219</sup>

The isolation of victims of systemic intimate violence demonstrates that, while their abusers may be private individuals, the conduct itself takes place within a structure of hegemony, which both mirrors and incorporates the power disparity between a state and its citizens. When, with knowledge of protracted, generic violence, a state persistently fails to take basic steps, such as providing training to police officials, establishing shelters and prosecuting repeat abusers, the international standards of fundamental human dignity should pertain.

Ultimately, the application of the due diligence standard to systemic intimate violence will require an analysis, on a case by case basis, of the available resources of the state in question, the practical factors that would be available to protect victims, the resources available to the state and the level of neglect. These considerations would form part of the recipe for determining when a state has failed to comply with its international obligation to protect women from systemic intimate violence. However, to the extent that a state has the ability to assist abused

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<sup>1214</sup> FREEMAN, *supra* note 207, at 376.

<sup>1215</sup> *Id* at 376: "...negligent or dilatory measures in investigating the circumstances of a criminal offense, whereupon the culprits are never brought to justice, will justify the complaint that international law has been affronted."

<sup>1216</sup> CRAWFORD, *supra* note 203, at 95.

<sup>1217</sup> Article 15 of the ILC articles, *supra* note 300.

<sup>1218</sup> CARIN BENNINGER-BUDEL, *supra* note 61, at 10: The result is that "a State's lack of exercising due diligence in preventing, investigating, prosecuting and punishing violence against women at the hands of private actors can result in finding a State responsible for torture..." The essence here is "a series of acts or omissions defined in aggregate as wrongful." CRAWFORD, *supra* note 203, at 141.

<sup>1219</sup> SHAW, *supra* note 306, at 697-8 (discussing the duration of the breach).

women, its sustained inaction constitutes a violation of its international legal obligations, which triggers the provisions of the ILC articles.

### 6.3 Circumstances Precluding Wrongfulness

#### 6.3.1 Types of Circumstances Precluding Wrongfulness

Systemic intimate violence represents one of the more complex and complicated human rights violations. Victims often retract their charges, and the privacy in which the violence takes place impedes the investigation of the violence. At times it is unclear who is the victim and who the perpetrator. These difficulties must also be considered when assessing the wrongfulness of a state's perpetuation of violence against its female citizens because "there must be taken into account the circumstances, which can limit or even nullify the activity of the State."<sup>1220</sup>

Chapter five of the ILC articles identifies six instances where wrongfulness is precluded: (1) consent (article 20); self-defense (article 21); countermeasures (article 22); force majeure (article 23); distress (article 24); and, necessity (article 25).<sup>1221</sup>

These circumstances do not annul or terminate a state's international obligation to take positive steps to prevent and help remedy systemic intimate violence, but instead provide "a justification or excuse for non-performance while the circumstance in question subsists."<sup>1222</sup> This was confirmed by the International Court of Justice in the *Gabčíkovo-Nagymaros Project* case. The court, in rejecting Hungary's claim that necessity precluded its obligation to continue work in accordance with its obligations under the 1977 Treaty, held that:

[t]he state of necessity claimed by Hungary ... could not permit of the conclusion that ... it had acted in accordance with its obligations ... or that those obligations had ceased to be binding upon it. It would only permit the affirmation that, under the circumstances, Hungary would not incur international responsibility by acting as it did."<sup>1223</sup>

I do not discuss all six exceptions to wrongfulness. However, the following section addresses those that may be relevant to systemic intimate violence, namely: (1) force majeure; (2) distress; and, (3) necessity.<sup>1224</sup> In respect of each one I describe the concept, summarize the relevant theory and apply the concept to systemic intimate violence.

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<sup>1220</sup> This is underscored by Freeman's citation of Huber who remarks that "penal and civil proceedings are necessarily dependent on the means at the disposal of the State and on the degree of authority which it is able to exert... It is not possible to demand the uniform application in all cases of a system of justice which satisfies the minimum standards, (*critères minima*), of international law. As in the case of preventive action, there must be taken into account the circumstances, which can limit or even nullify the activity of the State." See Freeman's citation of Huber in FREEMAN, *supra* note 207, at 373.

<sup>1221</sup> For a detailed discussion of these circumstances *see* the commentaries to the ILC articles, *supra* note 300, at 169.

<sup>1222</sup> Commentaries to the ILC articles, *supra* note 300, at 169.

<sup>1223</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Reports 1997, p. 7, at p. 39, para. 48.

<sup>1224</sup> I do not deal with countermeasures, since these are acts which a state takes to ensure the compliance of a third state with its international obligations. Consent is a nullity since a state cannot consent to another state's non-compliance with obligations *erga omnes* i.e. owing to everyone. Finally, self-defense is inapplicable since a state could not argue that it allowed the perpetuation of systemic intimate violence because it was defending itself against

## 6.3.2 Distress

### a. Concept

The wrongfulness of a state's failure to comply with its international obligation will be precluded "if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care."<sup>1225</sup>

### b. Theory

The Commentaries to the ILC articles describe this preclusion as a "specific case where an individual whose acts are attributable to the State is in a situation of peril, either personally or in relation to persons under his or her care."<sup>1226</sup> Usually, the peril that would prevent the state's agent from fulfilling the state's obligation is the "immediate [interest] of saving people's lives" and "where the agent had no other reasonable way of saving life."<sup>1227</sup> As opposed to force majeure, the act is not an involuntary one but rather a choice is made, even if "the choice is effectively nullified by the situation of peril."<sup>1228</sup>

The evaluation of distress was raised in the Rainbow Warrior arbitration where France sought to justify its conduct in removing the two officers from the island of Hao on the ground of "circumstances of distress in a case of extreme urgency involving elementary humanitarian considerations affecting the acting organs of the State."<sup>1229</sup> According to this case, three factors must be shown in order to demonstrate distress: (1) "the existence of very exceptional circumstances of extreme urgency involving medical or other considerations of an elementary nature,"<sup>1230</sup> (2) the "re-establishment of the original situation of compliance... as soon as the

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the victims. If a state is under attack by another state, that would constitute one of the other preclusions, namely, distress, necessity or force majeure.

<sup>1225</sup> Article 24 of the ILC articles. The plea of distress is also accepted in many treaties as a circumstance justifying conduct which would otherwise be wrongful for example, "the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, United Nations, Treaty Series, vol. 1046, p. 138, art V (1), which provides that the prohibition on dumping of wastes does not apply when it is "necessary to secure the safety of human life or of vessels, aircraft, platforms or other man-made structures at sea." Commentaries to the ILC articles, supra note 300, at 192.

<sup>1226</sup> Commentaries to the ILC articles, supra note 300, at 189.

<sup>1227</sup> Commentaries to the ILC articles, supra note 300, at 189 ("In practice, cases of distress have mostly involved aircraft or ships entering State territory under stress of weather or following mechanical or navigational failure."). The commentaries to the ILC articles interpret article 24 as "limited to cases where human life is at stake." Commentaries to the ILC articles, supra note 300, at 192.

<sup>1228</sup> Commentaries to the ILC articles, supra note 300, at 189.

<sup>1229</sup> Rainbow Warrior (New Zealand/France), UNRIAA, vol. XX, p. 217 (1990), at pp. 254-255, para. 78. See also the commentaries to the ILC articles, supra note 300, at 191. According to the commentaries to the ILC articles "the Tribunal in the Rainbow Warrior arbitration appeared to take a broader view of the circumstances justifying a plea of distress, apparently accepting that a serious health risk would suffice. The problem with extending article 24 to less than life-threatening situations is where to place any lower limit." Commentaries to the ILC articles, supra note 300, at 192.

<sup>1230</sup> Rainbow Warrior (New Zealand/France), UNRIAA, vol. XX, p. 217 (1990), at pp. 254-255, para. 79.



reasons of the emergency ... had disappeared;”<sup>1231</sup> and (3) the “existence of good faith effort” to obtain the consent of the injured state to the non-compliance.<sup>1232</sup>

### c. Application to Systemic Intimate Violence

If a state fails to protect the right of women to be free from systemic intimate violence, it would have to demonstrate the three factors cited above in order to make out a claim to a defense of distress.

#### *Very Exceptional Circumstances*

“Very exceptional circumstances of extreme urgency involving medical or other considerations of an elementary nature” is a very high standard.<sup>1233</sup> A state would have to show that: (1) its resources were required to mitigate the “circumstances of extreme urgency;” and (2) the urgency was such that it absorbed all of its attention and resources. If one considers that systemic intimate violence manifests in a continuum, it would be difficult (although not impossible) to prove the existence of such extremely urgent circumstances over a long period of time.

This element also entails a balancing investigation. Inherent in the concept of distress is the notion that certain interests “clearly outweigh the other interests at stake in the circumstances.”<sup>1234</sup> According to a strict application of the ILC articles and commentaries, it is unlikely, however, that a state could claim economic or political distress as a reason for its failure to protect women from systemic intimate violence. It appears that the only interest which would outweigh an international obligation is the need to save life where “there is no other reasonable way” of doing so other than to pause in the fulfillment of the obligation.<sup>1235</sup>

A state may not rely on emergency or exceptional circumstances if the situation was caused or induced by that state.<sup>1236</sup>

#### *Re-establishment of Compliance*

The state must re-establish “the original situation of compliance... as soon as the reasons of the emergency ... had disappeared.”<sup>1237</sup> Therefore, if there was an acceptable degree of urgency

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<sup>1231</sup> Rainbow Warrior (New Zealand/France), UNRIAA, vol. XX, p. 217 (1990), at pp. 254-255, para. 79.

<sup>1232</sup> Rainbow Warrior (New Zealand/France), UNRIAA, vol. XX, p. 217 (1990), at pp. 254-255, para. 79.

<sup>1233</sup> Rainbow Warrior (New Zealand/France), UNRIAA, vol. XX, p. 217 (1990), at pp. 254-255, para. 79.

<sup>1234</sup> Commentaries to the ILC articles, supra note 300, at 194.

<sup>1235</sup> Subparagraph 2 (b) of article 24 of the ILC articles stipulates that distress does not apply if the act in question is likely to create a comparable or greater peril. This is consistent with paragraph 1, which in asking whether the agent had “no other reasonable way” to save life establishes an objective test. The words “comparable or greater peril” must be assessed in the context of the overall purpose of saving lives.

<sup>1236</sup> Article 24(2)(a) of the ILC articles. See also Commentaries to the ILC articles, supra note 300, at 193 (“As in the case of force majeure, a situation which has been caused or induced by the invoking State is not one of distress. In many cases the State invoking distress may well have contributed, even if indirectly, to the situation. Priority should be given to necessary life-saving measures, however, and under subparagraph (2) (a), distress is only excluded if the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it.”).

preventing the state from protecting victims of systemic intimate violence, as soon as the situation is over it must resume or begin compliance with its duties.

### *Good Faith Effort to Obtain Consent for the Breach*

This requirement does not apply neatly to systemic intimate violence. While the content of the international obligation applies to individual citizens, the principles of state responsibility, unless determined otherwise by a treaty, apply vis-à-vis other states.

It seems incongruent to require a state to obtain consent from other states for its high rates of systemic intimate violence. Within the context of protecting human rights, this element may demand that a non-complying state inform other states and request their assistance but it is unlikely that another state can consent to a situation in which systemic intimate violence perpetuates.

### 6.3.3 Force Majeure

#### a. Concept

Wrongfulness may be precluded where the omission “is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.”<sup>1238</sup> Force majeure will not apply if the state caused the circumstances or the state assumed the risk of that situation occurring.<sup>1239</sup>

#### b. Theory

Force majeure is characterized by the notion of compulsion and the absence of choice. The internationally wrongful act is involuntary and on this basis wrongfulness is precluded.<sup>1240</sup>

Three elements must be met in order to raise a successful plea of force majeure: (1) “the act in question must be brought about by an irresistible force or an unforeseen event;” (2) “which is beyond the control of the State concerned;” and, (3) “which makes it materially impossible in the circumstances to perform the obligation.”<sup>1241</sup>

A breach will not be wrongful if a state was prevented from compliance by “a constraint which the State was unable to avoid or oppose by its own means.”<sup>1242</sup> This event must have been unforeseen or not of a foreseeable kind and must be linked to the “situation of material impossibility.”<sup>1243</sup> Such material impossibility may be due to natural events, for example,

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<sup>1237</sup> Rainbow Warrior (New Zealand/France), UNRIAA, vol. XX, p. 217 (1990), at pp. 254-255, para. 79.

<sup>1238</sup> Article 23(1) of the ILC articles.

<sup>1239</sup> Article 23(2) of the ILC articles.

<sup>1240</sup> See Commentaries to the ILC articles, supra note 300, at 183-4.

<sup>1241</sup> See Commentaries to the ILC articles, supra note 300, at 183-4.

<sup>1242</sup> See Commentaries to the ILC articles, supra note 300, at 183-4.

<sup>1243</sup> See Commentaries to the ILC articles, supra note 300, at 183-4.

weather, earthquakes, floods or drought, or to human acts or a combination of the two.<sup>1244</sup> The essence of this requirement is that the situation “must be irresistible, so that the State concerned has no real possibility of escaping its effects.”<sup>1245</sup> However, this does not include circumstances where the performance of the obligation has become difficult due to a political or economic crisis.<sup>1246</sup>

### c. Application to Systemic Intimate Violence

Any circumstances which would preclude the wrongfulness of a state’s failure to prevent systemic intimate violence would have to be unforeseen and beyond the control of the state, making it impossible for it to comply with its obligation. The standard is high and there must be a material impossibility of performance.<sup>1247</sup> Again, however, given that systemic intimate violence exists in a continuum, it will be rare indeed that an event of force majeure will outlast that violence. Once the force majeure has ceased, the state will be required again to meet its international obligations to take positive steps to prevent and help remedy the violence.

## 6.3.4 Necessity

### a. Concept

Necessity validly precludes wrongfulness if: (1) non-compliance is the only way for the state “to safeguard an essential interest against a grave and imminent peril;”<sup>1248</sup> and (2) the non-compliance does not “seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.”<sup>1249</sup>

As with force majeure and distress, the state may not rely on necessity where it has contributed to the occurrence of such events.<sup>1250</sup>

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<sup>1244</sup> Commentaries to the ILC articles, *supra* note 300, at 184.

<sup>1245</sup> Commentaries to the ILC articles, *supra* note 300, at 184.

<sup>1246</sup> Commentaries to the ILC articles, *supra* note 300, at 184.

<sup>1247</sup> The type of claims that might be accepted is attacks by rebels or the collapse of a government. Commentaries to the ILC articles, *supra* note 300, at 186 (“The principle has also been accepted by international tribunals. Mixed claims commissions have frequently cited the unforeseeability of attacks by rebels in denying the responsibility of the territorial State for resulting damage suffered by foreigners.”). The commentaries to the ILC articles cite the decision of the American-British Claims Commission in the Saint Albans Raid case (1873), Moore, *International Arbitrations*, vol. IV, p. 4042; Secretariat Survey, para. 339; the decisions of the United States/Venezuelan Claims Commission in the Wipperman case, Moore, *International Arbitrations*, vol. III, p. 3039; Secretariat Survey, paras. 349-350; De Brissot and others cases, Moore, *International Arbitrations*, vol III, p. 2967; Secretariat Survey, para. 352; and the decision of the British Mexican Claims Commission in the Gill case: UNRIAA, vol. V, p. 157 (1931); Secretariat Survey, para. 463. *Id.*

<sup>1248</sup> Article 25(1) of the ILC articles.

<sup>1249</sup> Article 25(1) of the ILC articles. *See also* the Commentaries to the ILC articles, *supra* note 300, at 194 (“The term ‘necessity’ (‘état de nécessité’) is used to denote those exceptional cases where the only way a State can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other international obligation of lesser weight or urgency. Under conditions narrowly defined in article 25, such a plea is recognized as a circumstance precluding wrongfulness.”).

<sup>1250</sup> Article 25(2) of the ILC articles.

## b. Theory

Necessity arises where there is “an irreconcilable conflict between an essential interest on the one hand and an obligation of the State” on the other.<sup>1251</sup>

The plea of necessity was raised in the *Caroline* incident of 1837, where the British armed forces entered United States territory and destroyed a vessel owned by American citizens which was carrying recruits and military material to Canadian insurgents.<sup>1252</sup> The British defended its actions by citing the “necessity of self-defence and self-preservation” which, it claimed, trumped the territorial integrity of the United States.<sup>1253</sup>

Another example of necessity is the “Russian Fur Seals” controversy of 1893. In this matter the “essential interest” of protecting an endangered fur seal population against the “grave and imminent peril” of extermination caused the Russian government to prohibit sealing in the high seas, which was not subject to the jurisdiction of any state.<sup>1254</sup>

In the in the Gabčíkovo-Nagymaros Project case, the International Court of Justice accepted the principle of necessity.<sup>1255</sup> The International Court of Justice articulated the following conditions for the case in question, which provide useful generic guides: “the omission must have been occasioned by an ‘essential interest’ of the State which is the author of the act conflicting with one of its international obligations; the act being challenged must have been the ‘only means’ of safeguarding that interest; that act must not have ‘seriously impair[ed] an essential interest’ of the State towards which the obligation existed; and the State which is the author of that act must not have ‘contributed to the occurrence of the state of necessity.’”<sup>1256</sup>

As a result of these requirements, the necessity plea is used rarely and is subject to “strict limitations to safeguard against possible abuse.”<sup>1257</sup>

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<sup>1251</sup> Commentaries to the ILC articles, *supra* note 300, at 195.

<sup>1252</sup> *See* Commentaries to the ILC articles, *supra* note 300, at 196, citing respectively W.R. Manning (ed.), *Diplomatic Correspondence of the United States: Canadian Relations 1784-1860* (Washington, Carnegie Endowment for International Peace, 1943), vol. III, p. 422; A.D. McNair (ed.), *International Law Opinions* (Cambridge, University Press, 1956), vol. II, p. 22.

<sup>1253</sup> *Id.*

<sup>1254</sup> Commentaries to the ILC articles, *supra* note 300, at 197 (“Facing the danger of extermination of a fur seal population by unrestricted hunting, the Russian Government issued a decree prohibiting sealing in an area of the high seas. In a letter to the British Ambassador dated 12/24 February 1893, the Russian Minister for Foreign Affairs explained that the action had been taken because of the ‘absolute necessity of immediate provisional measures’ in view of the imminence of the hunting season. He ‘emphasize[d] the essentially precautionary character of the above-mentioned measures, which were taken under the pressure of exceptional circumstances’ and declared his willingness to conclude an agreement with the British Government with a view to a longer-term settlement of the question of sealing in the area.”).

<sup>1255</sup> Gabčíkovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 1997, p. 7. *See also* Commentaries to the ILC articles, *supra* note 300, at 199.

<sup>1256</sup> Gabčíkovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 1997, pp. 40-41, paras. 51-52.

<sup>1257</sup> Commentaries to the ILC articles, *supra* note 300, at 195.

### c. Application to Systemic Intimate Violence

In order for a state to rely on necessity as a preclusion of wrongfulness there must be: (1) an irreconcilable tension between the needs of abused women and another interest of the state; (2) that other interest must be essential; (3) it must be threatened by a grave and imminent peril; (4) non-compliance with the state's obligation to address systemic intimate violence must have been the only means of safeguarding that other interest; (5) the state must not have impaired an essential interest of another state; and, (6) it must not have contributed to the circumstances of necessity. On this basis, I propose that it will be very rare that the principles of 'necessity' will act to immunize a state against its obligation to prevent and help remedy systemic intimate violence. In particular, it is difficult to envisage a competing interest for which non-compliance with the state's obligations in respect of systemic intimate violence will be the *only* way in which the state can protect that other interest.

Therefore, in order for state responsibility to arise, both the elements of conduct and wrongfulness must pertain, and subject to the unlikely exceptions to wrongfulness discussed above, will pertain in the context of systemic intimate violence. On this basis, the next section discusses some resulting miscellaneous, but related, issues regarding internationally wrongful acts.

## 7. Miscellaneous

### 7.1 Consequences of an Internationally Wrongful Act

If a state commits an internationally wrongful act: (1) it remains obliged to comply with its international obligation;<sup>1258</sup> (2) it must cease the conduct causing the breach and offer assurances of non-repetition;<sup>1259</sup> it is obliged to make full reparation for the injury it has caused, be it moral or material;<sup>1260</sup> and it may not rely on the provisions of its internal law to justify its omission;<sup>1261</sup>

Part II of the ILC articles addresses the consequences of an internationally wrongful act. I do not address them here because they deal with issues of compensation and reparation. While these consequences certainly would apply to systemic intimate violence, I maintain that the primary purpose of understanding the international right and obligation vis-à-vis systemic intimate violence is its ability to change state laws to address systemic intimate violence. I therefore discuss the resulting consequences of an internationally wrongful omission to prevent and help remedy such violence in chapter five.

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<sup>1258</sup> Article 29 of the ILC articles.

<sup>1259</sup> Article 30 of the ILC articles.

<sup>1260</sup> Article 31 of the ILC articles (although reparation is made to the injured state, so it is unlikely that it would apply to systemic intimate violence, unless states agreed to create a fund for victims of systemic intimate violence to which offending states would be obliged to contribute as a form of reparation).

<sup>1261</sup> Article 32 of the ILC articles. The government of a federal state remains responsible for the activities of its individual member states in international law and "the central government is unable to avoid responsibility on the plea of lack of control over its constituent parts." EAGLETON, *supra* note 303, at 32.

## 7.2 Enforcement by Whom

States' responsibility for *inaction* raises the issue of enforcement. That is, can an individual hold her or his own state liable either at an international tribunal or at a national court?

According to the ILC articles, a state is responsible to one or more states or to the international community as a whole.<sup>1262</sup> However, this “is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.”<sup>1263</sup> Therefore, where a state's international obligation is owed to its citizens, such citizens may enforce the principles of state responsibility themselves and that those citizens accordingly may enforce the principles of state responsibility and bring an enforcement action against that state for any breach of that duty. As discussed below, this proposition is supported at international law.

In *Steiner and Gross v. Polish State*, a Czechoslovak citizen brought an action against the Polish State before the Upper Silesian Arbitral Tribunal in terms of the German-Polish Convention of May 15, 1922.<sup>1264</sup> The tribunal allowed the claim, in part on the basis that a guiding aspect of the convention was respect for private rights. Therefore, it would be incompatible with the tenor of the Convention to exclude a claim solely because of the nationality of the claimant.<sup>1265</sup>

In 1926, in the case of *Menge v. Polish Railway Administration*,<sup>1266</sup> the High Court of Danzig held that, in order to give effect to the purpose of the treaty concluded between Poland and the Free City of Danzig (concerning railways within the City of Danzig), it was necessary “to construe the provisions of a treaty regulating private rights of individuals in such a manner as to recognize claims grounded directly in the treaty and put forward by private persons without interposition on the part of their State.”<sup>1267</sup>

After the Second World War, the Convention on the Settlement of Matters arising out of the War and the Occupation, signed on 26 May 1952, incorporated a Charter allowing direct legal access by nationals or residents of the states or territorial entities referred to in the Charter.<sup>1268</sup> This was a phenomenon repeated by the Iran-US Claims Tribunal which allowed claims by nationals of both the United States and Iran.<sup>1269</sup>

These principles have continued to be upheld recently. In 1991, in the Francovich case, the European Court of Justice posed the question whether an individual citizen can bring a claim in

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<sup>1262</sup> Article 33(1) of the ILC articles.

<sup>1263</sup> Article 33(2) of the ILC articles.

<sup>1264</sup> *Steiner and Gross v. Polish State* Annual Digest 1927-1928, Case No. 188 [hereinafter *Steiner and Gross*].

<sup>1265</sup> See KELSEN, *supra* note 336, at 142, footnote 31, citing *Steiner and Gross*, *supra* note 429.

<sup>1266</sup> *Menge v. Polish Railway Administration* Annual Digest 1925-1926, Case No. 258. See KELSEN, *supra* note 336, at 143 footnote 32.

<sup>1267</sup> See KELSEN, *supra* note 336, at 143 footnote 32.

<sup>1268</sup> See BROWNLIE, *supra* note 329, at 589 footnote 136.

<sup>1269</sup> BROWNLIE, *supra* note 329, at 589.

international law against its own state for failure to implement European community law.<sup>1270</sup> The European Court of Justice held that, based on broad principles of state responsibility, the plaintiffs were entitled to redress since,

(T)he possibility of obtaining redress from the Member State is particularly indispensable where... the full effectiveness of Community rules is subject to prior action on the part of the State... It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty.<sup>1271</sup>

On this basis, I propose that an individual may hold her state directly responsible for its omission to protect her from systemic intimate violence, and may bring an enforcement action accordingly.

### 7.3 Fault

An element of liability under most legal systems is the delineation of fault. The notion of fault as classically understood in common law systems is notably absent from the text of the ILC articles. Crawford maintains that it is only the act of wrongfulness that constitutes liability and no fault element appears to exist.<sup>1272</sup> This echoes the principle of objective liability, which maintains that the responsibility of the state is strict and that “[o]nce an unlawful act has taken place, which has caused injury and which has been committed by an agent of the state, the state will be responsible in international law....”<sup>1273</sup> The competing theory is that there must be fault, either in the form of intent or negligence, in order for a state to be held responsible for the breach.<sup>1274</sup>

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<sup>1270</sup> Francovich case, *supra* note 330, at 7(1) (“Under the system of Community law in force, is a private individual who has been adversely affected by the failure of a Member State to implement Directive 80/897 – a failure confirmed by a judgment of the Court of Justice – entitled to require the State itself to give effect to those provisions of that directive which are sufficiently precise and unconditional, by directly invoking the Community legislation against the Member State in default so as to obtain the guarantees which that State itself should have provided . . .?”).

<sup>1271</sup> Francovich case, *supra* note 330, at 34. While the thrust of this decision targets the ability of a citizen to sue its own State in the *European Court of Justice specifically* (as opposed to in her/his own national courts), it nonetheless provides stable authority for the principle that a citizen can in fact hold its own State liable for non-compliance with Community law.

<sup>1272</sup> CRAWFORD, *supra* note 203, at 84. However, Crawford does recognize the role of fault in international law. He makes the point that different primary rules of international law give rise to different degrees of responsibility, ranging from “due diligence” to strict liability. *Id.* at 13. This was not the position adopted by Lauterpacht in his discussions of state liability and comparing state liability to tortious liability: “Any such development (*i.e. extending tortious liability to individuals*) would be in accordance with what must be regarded as a well-established feature of the law of State responsibility, namely, that liability is not absolute, but depends upon the existence of fault in the person or persons of the State organs responsible for the act or omission in question.” LAUTERPACHT, *supra* note 309, at 42.

<sup>1273</sup> SHAW, *supra* note 306, at 698-9: describing the competing theories of fault in the realm of state responsibility. See also the *Claire* claim 5RIAA pp. 516-31 1929, , holding that the responsibility for acts of officials or organs of a State devolve upon the government of the State “in the absence of any ‘fault’ of its own.”

<sup>1274</sup> See *Id.* See also the *Home Missionary Society* Claim 6 RIAA p. 42 1920; 1 AD p. 173 (holding that no government can be responsible for the acts of rebel groups within its borders.).

However, even if one accepts Crawford's argument, and accepts that fault is unnecessary for the purposes of state responsibility, this proposition is relevant only to the generic principles of the secondary obligation. Fault, either in the form of intent or the mental knowledge of the breach, may well be a specific requirement of states' primary obligation.<sup>1275</sup>

It is most unlikely that any principle of law, even within the nebulous body of international human rights law, could omit fault entirely from the determination of state responsibility. I propose that perhaps it is within the notion of attribution that the question of knowledge, and hence fault, exists. That is, in order to impute liability, it is necessary to ask whether a state knows about the degree of harm (or, if a lower standard of fault is adopted, whether it reasonably could have foreseen the degree of harm) perpetrated upon its citizens and whether it has taken reasonable steps to alleviate that harm.<sup>1276</sup>

In the context of imposing liability for systemic intimate violence, two competing principles come into play. On the one hand, it is arguably necessary to impose a form of strict liability on states since, given the size and structure of most government hierarchies, proving knowledge definitively would be an arduous task.<sup>1277</sup> On the other hand, it could be highly problematic to impose liability on states for *private* violence in the absence of demonstrating that, at least, state agents knew of the violence or ought reasonably to have known thereof.<sup>1278</sup> It is therefore necessary to strike a balance between holding states responsible for a valid omission as opposed to imputing responsibility for conduct that is fuelled by neither intention nor neglect.

These issues currently are unclear in international law. However, I propose that even if an element of fault, probably in the form of negligence, is required to trigger the responsibility of states in the context of systemic intimate violence, such a requirement likely will be satisfied for most states. The evidence of the extremity, nature and proliferation of extreme forms of systemic intimate violence in almost every country worldwide is staggering.<sup>1279</sup> On this basis, I propose

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<sup>1275</sup> See the commentaries to the ILC articles, *supra* note 300, at 70 (explaining that the standards of fault "vary from one context to another for reasons which essentially relate to the object and purpose of the treaty provision or other rule giving rise to the primary obligation... Establishing these is a matter for the interpretation and application of the primary rules engaged in the given case.").

<sup>1276</sup> The commentaries to the text of the ILC articles expressly allow for either a subjective or objective approach, without stipulating a rule or preference in respect of either. Commentaries to the ILC articles, *supra* note 300, at 70. They do state, however, that whether "the responsibility is 'objective' or subjective"... depends on the circumstances, including the content of the primary obligation in question." *Id.*

<sup>1277</sup> SHAW, *supra* note 306, at 700. Shaw offers additional support for the imposition of state liability: "Imposing on the state absolute liability wherever an official is involved encourages that state to exercise greater control over its various departments and representatives. *Id.* It also stimulates moves towards complying with objective standards of conduct in international relations." See also BROWNLIE, *supra* note 329, at 440: "In the conditions of international life, which involve relations between highly complex communities, acting through a variety of institutions and agencies, the public law analogy of the *ultra vires* act is more realistic than a seeking for subject *culpa* in specific natural persons or may, or may not, 'represent' the legal person (the state) in terms of wrongdoing."

<sup>1278</sup> States have been held responsible, however, for *ultra vires* acts, i.e. conduct of officials where the officials exceeded the ambit of their capacity or where the State had little if any control over the activity of the officials. If this is the case, *a fortiori* a State can be held liable for the conduct of its police officials who fail to protect its citizens systematically, for its judges who fail to take certain claims of violence seriously and for politicians who fail to address high levels of violence perpetrated predominantly against one category of their population. In general see SHAW, *supra* note 306, at 702-3.

<sup>1279</sup> [Note: citation to follow]



that any government or state agent that, in the face of such evidence, fails to take reasonable steps to prevent and help remedy such violence is likely, at the very least, to be negligent for such failure.<sup>1280</sup>

#### 7.4 Privacy

Increasing state intervention against systemic intimate violence also raises privacy issues. On face value, it appears necessary to balance the victim's right to physical safety against the abuser's right to privacy.<sup>1281</sup> Whether such a balancing of rights exercise is necessary is debatable. However, even if one were to insist on positing the right to privacy against the right to bodily integrity, life and liberty, the latter rights, at the very least, would constitute non-arbitrary interests that the state may protect and balance when determining whether to intervene.

Moreover, I propose that a woman's rights to bodily integrity, life and liberty should outweigh an abuser's right to privacy. A person's right to privacy is not absolute. Respect for privacy is a right recognized in article 12 of the UN Declaration which states that "No-one shall be subjected to arbitrary interference with his privacy (sic), family, home or correspondence...." Therefore, only *arbitrary* interference is prohibited. The tenor of the right is that the state should be reluctant to interfere in activities which occur in private, especially where such interference would tarnish the honor of the occupant. However, where intervention is not arbitrary but instead is necessary to protect an individual from harm (as is accepted in the case of child abuse<sup>1282</sup>), not only should the right to privacy be curtailed, but it becomes the responsibility of the state to intervene.

In South Africa, the right to privacy may be limited in order to protect the right "to be free from all forms of violence from either public *or private* sources."<sup>1283</sup> The South African Constitution proffers the following factors to consider when determining whether the limitation of a right is equitable, namely: the nature of the right;<sup>1284</sup> the importance of the purpose of the limitation;<sup>1285</sup> the nature and extent of the limitation;<sup>1286</sup> the relation between the limitation and its purpose;<sup>1287</sup> and whether there are less restrictive means to achieve the purpose.<sup>1288</sup>

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<sup>1280</sup> **Note:** consider this: Clarify whether or not fault is required. Be easier to prove the state is negligent or had knowledge that systemic intimate violence is a general problem in society, rather than to prove that it was negligent or had knowledge of a particular case of systemic intimate violence. Are you talking about fault on a case by case basis, or fault at a level of overall society – i.e. it may What's the standard for other forms of state intervention – e.g. police intervention? Is fault required? I would have thought the wrongfulness would be sufficient. And if at least negligence or intent is required, this would rule out all one-off systemic intimate violence, and would require possibly knowledge on a case by case basis or regarding society generally.

<sup>1281</sup> Some academics when discussing systemic intimate violence reject the employment of the competing rights claim in its entirety, as undermining the extremity of harm. Romany, *Women as Aliens*, *supra* note 92.

<sup>1282</sup> Children's Convention, *supra* note 7. [**Note: get article number**]

<sup>1283</sup> Section 12(1)(c) of the South African Constitution, 108 of 1996 [hereinafter South African Constitution]. This problem was identified in the case of *Rutenberg v Magistrate Wynberg* 1997 (4) SA 735 (C) at 753 where the court, when dealing with an order barring the respondent from the matrimonial home in terms of the 1993 South African legislation, pointed out that where such an order is a permanent one "it is tantamount to an *ex parte* ejection of the respondent forever from what may be his or her own property."

<sup>1284</sup> Section 36(1)(a) of the South African Constitution, *supra* note 447.

<sup>1285</sup> Section 36(1)(b) of the South African Constitution, *supra* note 447.

<sup>1286</sup> Section 36(1)(c) of the South African Constitution, *supra* note 447.

<sup>1287</sup> Section 36(1)(d) of the South African Constitution, *supra* note 447.

This perpetual question in constitutional law can be addressed also by describing the roles that an abuser and a victim play. The abuser is the aggressor and thus actively violates the rights of the victim. In the context of systemic intimate violence, there is no rational explanation that justifies the violence and the fury of the abuser remains disproportionate to the conduct of the abused. Where an individual so clearly abrogates her/his duties to respect the bodily rights of others, s/he places him or herself within the realm of criminality and state investigation.

In and of itself the respect for privacy is a cornerstone of any democracy. I do not propose encroaching on this right. However, where an exaggerated respect for familial sanctity is cited as a justification for the refusal to assist women in the most egregious of situations, its integrity and applicability are impoverished. It is generally recognized that the right to privacy is not a non-derogable right and may be limited where it is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom and taking into account all relevant factors...”<sup>1289</sup>

Therefore, while there are certain constitutional queries which should be considered when calling for a greater degree of state attention to private conduct, I propose that the potential limitation of the rights to privacy in the interests of preventing systemic intimate violence will survive constitutional muster. Indeed, failing to intervene to prevent or remedy acute harm not only constitutes a failure to protect, but augments the power of the violators and contributes to the dilution of the aspirational standards of humanity underpinning international law as well as democratic principles.<sup>1290</sup>

## 8. Summation

[T]he events of recent years have forced upon our attention again and again the fact that the protection of the individual *vis a vis* his fellow man is no less vital to the enjoyment of his human rights and freedoms than his protection against the state.

Sir Humphrey Waldock<sup>1291</sup>

In this chapter I claim that the principles of state responsibility, as codified in the ILC articles, apply in respect of systemic intimate violence. My claim is based on the fact that, if the right to be free from systemic intimate violence is an international human right, then states have an international obligation to prevent it. This constitutes a primary obligation.

Where a primary obligation is breached, secondary obligations come into play, which are recorded in the ILC articles. The ILC articles identify two requisite elements, namely, conduct and wrongfulness. As regards conduct, international law recognizes both acts and omissions as constituting conduct, which in turn can constitute an internationally wrongful act. States are

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<sup>1288</sup> Section 36(1)(e) of the South African Constitution, *supra* note 447.

<sup>1289</sup> Section 36(1) of the South African Constitution, *supra* note 447.

<sup>1290</sup> LAUTERPACHT, *supra* note 309, at 38.

<sup>1291</sup> Waldock, *supra* notex, at 83-84.

required to take positive steps to enforce negative rights and, therefore, the omission of a state's agents to assist victims of systemic intimate violence is an omission on the part of the state.

To determine wrongfulness, one asks whether the state's conduct is in conformity with what is required of it by the international obligation. Subject to extremely limited situations of distress, force majeure, or necessity, the due diligence standard is applied to determine whether the state has complied with its duties to protect women from systemic intimate violence. To this end, one takes into account the nature of the right, the circumstances of the state, and the aggregate nature of the omission.

Having considered the principles of state responsibility, it is clear that they apply to states which have failed to take the necessary minimum steps, articulated in chapter two, to mitigate systemic intimate violence. These principles do not apply only to the protection of airspace, the use of maritime facilities, or the invasion of countries. They apply *any time* an international obligation is breached, including the obligation to protect individuals from the continuum of harm that they face in their homes.

## Chapter Five

### Benefits of Using International Law to Regulate Systemic Intimate Violence

We are indeed witnessing a tremendous and popular movement for the advancement of human rights and democratic freedoms in the world. This movement has such moral force, that even determined governments and armies are incapable of suppressing it.

It is an encouraging indication of the triumph of the human spirit for freedom.

His Holiness The Dalai-Lama, Tenzin Gyatso Himachal Pradesh<sup>1292</sup>

#### Part A: Introductory Comments

##### 1. Description of this Chapter

In this chapter I argue that international human rights law is a useful instrument to mitigate systemic intimate violence. I do not maintain that international law has the same force as a state's domestic laws.<sup>1293</sup> Nor do I propose international human rights law as an additional body of law with which states must comply. Rather I turn to international law as an institution designed to induce states to remedy the deficiencies within their individual legal systems.<sup>1294</sup>

The chapter: (1) begins with a summary of the claim I make in this chapter as a whole; (2) describes the competing theories regarding the efficacy of international law; (3) based on the theories which maintain that international law is effective, identifies three broad functions of international human rights law; and, (4) demonstrates how these three functions operate in respect of systemic intimate violence.

I divide the chapter into two parts, the first addressing the theories of co-operative compliance and the second addressing the three functions of international law.

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<sup>1292</sup> His Holiness The Dalai-Lama, Tenzin Gyatso Himachal Pradesh, *Are Human Rights Truly Universal*, in UNIVERSALITY OF HUMAN RIGHTS IN A PLURALISTIC WORLD 19, 20-21 (Proceedings of the Colloquy organised by the Council of Europe in co-operation with the International Institute of Human Rights, Council of Europe, N.P. Engel, Publisher, 1989).

<sup>1293</sup> Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1938 (2002) [hereinafter Hathaway].

<sup>1294</sup> HENKIN, *supra* note 426, at 17.

## 2. The Claim

I claim that the enunciation of a norm in international law could act as a guide to be used by national governments to improve their legislation and policies in respect of systemic intimate violence. The claim is based on the proposal that international law influences the behavior of states and the way they treat their citizens through a cooperative rather than a coercive process.<sup>1295</sup>

This is a contentious proposal since many theorists reject international law as a fallacy, based on a spurious interpretation of international affairs as legal rather than political. *A fortiori*, how is it possible to use international law for systemic intimate violence, which is less political than many other under-enforced human rights violations? Increasingly, however, legal scholars are explaining how international law operates without central law-making and enforcement agencies. These theories maintain that, through varying processes, international law permeates states' boundaries, influencing their conduct vis-à-vis other states and vis-à-vis their own citizens.<sup>1296</sup>

The latter body of theory is supported by a new phenomenon of powerful non-governmental actors, coupled with the benefits of technology, which has oiled the gears of international law. International and local organizations are working in tandem to apply human rights in local settings. This vertical manifestation of the international to the national, effects incremental changes in national legal and policy systems.

Based on the theory of non-coercive state compliance, I argue that there are three ways in which international law serves to improve states' standard of conduct. (1) First, international law has an expressive value: it stipulates norms, which define the content of rights and concomitant state obligations. The expressive function of international law is exemplified by the specification of mass rape as a crime against humanity. (2) The second function of international law is its implementing capability. The process of international law compels states to modify their laws in accordance with international standards. An example of this is the increasing number of states which have amended their penal systems to prohibit female genital cutting. (3) Finally, international law facilitates the creation of new norms and laws to address harm, for which no regulation currently exists. This is the expansive function of international law and is exemplified by the creation of the prohibition against enforced disappearances.

In respect of systemic intimate violence, the expressive, implementing and expansive functions of international law have resulted in a certain degree of modified state behavior, which I describe with reference to Mexico, Nicaragua and Sweden.

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<sup>1295</sup> For a discussion of the various theories in support of and rejecting this notion, see Koh, *Why Do Nations Obey International Law*, *supra* note 496, at 2599 footnote 2.

<sup>1296</sup> Tarrow identifies three hypotheses explaining the rise in transnational politics: "The first is that the world economy is rapidly globalizing along with its attendant system of communications; the second that these changes open up enhanced possibilities for transnational collective action; and the third that – knit together by international institutions and transnational social movements – something resembling a transnational civil society is developing." SIDNEY TARROW, *POWER IN MOVEMENT: SOCIAL MOVEMENTS IN CONTENTIOUS POLITICS*, 178 (1998) [hereinafter TARROW].

I conclude that, despite the absence of an international legislature, judiciary or policing institution, international law is a legal structure, which does regulate state behavior, albeit through non-traditional mechanisms and by non-traditional agents. These processes and agents are not necessarily beyond criticism, not least of all because of their non-democratic nature; however, their existence demonstrates that using international human rights law to mitigate violence is beneficial and valuable, even in the most intimate of contexts.

### 3. The Great Debate: Is International Law Effective?

#### 3.1 General

There are theories which reject international law and those which support it.<sup>1297</sup> I apply the latter theories for the following reasons: (1) firstly, while it is true that international law has failed miserably in many instances, it is equally true that it has succeeded. The success is less high-profile and certainly less traditional, but it constitutes effective law making nonetheless; (2) secondly, as Professor Koh points out, our domestic legal systems are immensely flawed, yet we do not reject the entire concept of national law. By the same logic, the deficiencies of international law – and there are many – does not require us to abandon it as a source of law but rather to work towards its improvement; and (3) finally, if we abandon the internationalization of norms, where does that leave us as regards the impotent, the powerless, the weak? If we become the impotent, the powerless and the weak, would we nod our heads in agreement that, yes, international law is in fact a fiction and it is quite alright that we all go about the business that falls exclusively within our own borders. The answer to that question was a resounding no in 1945 and continues, in my opinion, in the negative today.

I now proceed to describe briefly the theories which reject and accept international law respectively.

#### 3.2 Theories which Reject International Law

I do not turn lightly to international law as a remedy. Many perceive international law as a weak body of law. Such theorists argue that international law is either ‘soft law’ or not law at all but rather a vague and arbitrary alliance of states’ interests.<sup>1298</sup>

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<sup>1297</sup> Traditionally, there are two divergent claims regarding international law: “on the one hand, the realist charge that international law is not really law, because it cannot be enforced; on the other, the rationalistic claim that nations ‘obey’ international law only to the extent that it serves national self-interest.” Koh, *Why Do Nations Obey International Law*, *supra* note 496, at 2603. For a discussion of the early development of the discussion regarding compliance with international law, see Koh, *Why Do Nations Obey International Law*, *supra* note 496, at 2606-7 (concluding that Hugo Grotius was the first to demarcate international law as something other than natural / religious law; rather he saw international law “as the consequence of volitional acts, generated by independent operation of the human will.” *Id.*)

<sup>1298</sup> AUSTIN, *supra* note 756. Koh groups Austin’s contemporaries into four strands of thinking regarding the compliance question, namely, the “Austinian, positivistic realist strand, which suggests that nations never ‘obey’ international law because it is not really law.” The philosophical tradition of analyzing international law obligation had bifurcated into a Hobbesian utilitarian, rationalistic strand, which acknowledged that nations sometimes follow international law, but only when it serves their self-interest to do so, and a liberal Kantian strand, which assumed that nations generally obey international law, guided by a sense of moral and ethical obligation derived from considerations of natural law and justice. Bentham... suggested a fourth, process-based strand, which derived a

Other legal theorists reject international law on the basis that it has no effective enforcement mechanism. Law without mechanisms of enforcement, according to these theorists, results in neither compliance nor respect.<sup>1299</sup>

Still others maintain that ‘international law’ is nothing more than a coincidence of conduct. While it may appear that states act according to some standards, in fact this appearance is nothing more than states acting according to the regulation of “mutual relations of physical force.”<sup>1300</sup>

In addition, a common mistrust of international law stems from the perception that the individual is too removed from international law to benefit from its precepts and that international law is unsuitable for national systems characterized by different cultural values.<sup>1301</sup>

The rejection of international law emanates from the accurate assessment that international legal principles neither prevent human rights disasters nor effectively control the conduct of states. To a certain extent, this is accurate. Historically, there are few examples of international norms “successfully socialized into domestic societies without the exercise of agency.”<sup>1302</sup>

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nation’s incentive to obey from the encouragement and prodding of other nations with whom it is engaged in a discursive legal process.” Id. 2610-2611.

<sup>1299</sup> JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (Wilfred E. Rumble ed., Cambridge U. Press 1995) [hereinafter AUSTIN] (“The law obtaining between nations is law (improperly called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations; or by the fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected.”) This is cited by W. Michael Reisman, *How Shall We Conceive International Law?*, in *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVES* 1, 8 (W. Michael Reisman, Mahnoush H. Arsanjani, Siegfried Wiessner, and Gayl S. Westerman eds., 2004) [hereinafter Reisman, *How Shall We Conceive International Law*]. John Basset Moore, *Fifty Years of International Law*, 50 HARV. L. REV. 395, 397 (1937) (“By international law we mean the body of rules which regulate the intercourse of nations in war and peace.”). Cited by Reisman, *How Shall We Conceive International Law*, *supra* note 756, at 8. A contrary is expressed by George F. Kennan who stated that “No one who has spent many years of his life in practical contact with the workings of international affairs can fail to appreciate the immense and vital value of international law in assuring the smooth functioning of that part of international life that is not concerned with such things as vital interest and military security.” Cited by Reisman, *How Shall We Conceive International Law*, *supra* note 756, at 10. Franck refers to globalization as a reason for promoting international cooperation. FRANCK, *supra* note 754, at 3-6. Cited by Reisman, *How Shall We Conceive International Law*, *supra* note 756, at 11. Matti Koskenniemi takes the position that “doubt must remain that the abstract subject celebrated as the carrier of universal human rights is but a fabrication of the disciplinary techniques of Western ‘governmentality’ whose only reality lies in the imposition on social relations of a particular structure of domination.” KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS*, *supra* note 583, at 515. See also the analysis by Hathaway, *supra* note 750.

<sup>1300</sup> This is discussed by LAUTERPACHT, *FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY*, *supra* note, at 400.

<sup>1301</sup> For a discussion of this theme, see Guzman, *supra* note 492 (“Just as compliance with the promises at the domestic level requires the existence of damages, a model of compliance with international law requires a mechanism through which nations that violate an agreement are sanctioned... [it is possible] to generate a model of effective international law only if there exists an entity that can sanction those who violate international law, much like courts sanction domestic violations.” Id.). This theory is rejected by Hathaway, who engages the “broader perspective on the role that international law plays in shaping how states actually behave.” Oona A. Hathaway, *The Promise and Limits of the International Law of Torture*, in *FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS*, 228, 230 (Oona A. Hathaway & Harold Hongju Koh, eds., 2005) [hereinafter Hathaway, *The Promise and Limits*].

<sup>1302</sup> TARROW, *supra* note 752, at 183.

However, increasingly theorists are recognizing the non-coercive influence of international law.<sup>1303</sup> Its method of enforcement, according to such theorists, is by infiltration of international norms through national courts, legal systems and political lobbying.<sup>1304</sup>

### 3.3 Theories which Support International Law

#### 3.3.1 Unique Nature of International Human Rights Law

Many theorists argue that international law is a unique body of law, which cannot be compared to domestic law. They identify the uniqueness of international law in the following characteristics: (1) international law comprises norms which filter into national legal systems through a multi-faceted process; (2) international law in fact has forms of enforcement mechanisms which are not comparable with the enforcement mechanisms of national law. Therefore, the absence of traditional enforcement mechanisms does not negate the efficacy of international law; and, (3) the objective of international law and international bodies is not to impose law on nations but rather to work together with nations to improve their relations *inter se*, the way they treat their citizens, and their use of the environment; and, the deficiency of international law does negate its efficacy as a legal system.

#### 3.3.2 Multi-Faceted Process of International Law Infiltrating National Law

There are a multitude of moments and actors within local, regional and international authorities that apply and implement international law. McDougal, Lasswell and Chen state that the literature on international law “affords little recognition of the comprehensive, interpenetrating constitutive processes (global, regional, national, local) which identify authoritative decision makers, specify basic community policies, establish necessary structures of

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<sup>1303</sup> Koh explains this development as “characterized by the marked decline of national sovereignty; the concomitant proliferation of international regimes, institutions, and nonstate actors; the collapse of the public-private distinction; the rapid development of customary and treaty-based rules; and the increasing interpenetration of domestic and international systems.” Koh, *Why Do Nations Obey International Law*, *supra* note 496, at 2604. Michael Reisman, proponent of the New Haven School describes the process of international law “systematically in terms of those who engage in it (the participants), the subject dimensions that animate them (their perspectives), the situation in which they interact, the resources upon which they draw, the ways they manipulate those resources and the aggregate outcomes of the process of interaction, which are conceived in terms of a comprehensive set of values.” W. Michael Reisman, *The View from the New Haven School of International Law*, [86 AM. SOC’Y INT’L L. PROC. 118 (1992)] *in*, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVES 1, 4 (W. Michael Reisman, Mahnoush H. Arsanjani, Siegfried Wiessner, and Gayl S. Westerman eds., 2004) [hereinafter Reisman, *The View from the New Haven School of International Law*]. Another theory of why States comply with international law is expressed by Kenneth W. Abbott in the context of international humanitarian law: “States comply with humanitarian law primarily because of expectations of reciprocity, though other considerations, including concern for their international reputation and domestic political support, also come into play.” Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, *in* FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS, 324, 326 (Oona A. Hathaway & Harold Hongju Koh, eds., 2005) [hereinafter Abbott, *International Relations Theory*].

<sup>1304</sup> Koh, *Bringing International Law Home*, *supra* notex. For a brief description of the distinction between realists on the one hand and liberal and constructivists on the other, see Abbott, *International Relations Theory*, *supra* note 760, at 329.



authority, allocate bases of power, authorize appropriate procedures , and make provision for many different, indispensable types of decision.”<sup>1305</sup>

In examining how decisions are made in international law, Reisman identifies a process of factors, including the gathering and dissemination of information about an objectionable state of events; the galvanizing of community intervention and regulation; subsequent prescription or lawmaking; the “invocation or provisional characterization of a certain action as inconsistent with a prescription or law...;” the application of such prescription or law to a set of events (which may occur in formal settings such as courts or “in informal, unorganized situations”); the termination or abrogation of existing norms and the social arrangements based upon them;” and the appraisal of the decision in relation to the community’s needs.<sup>1306</sup>

### 3.3.3 Non-Traditional Enforcement Mechanisms

As regards the U.N. specifically, Oscar Schachter identifies a long list of unique enforcement mechanisms used by the U.N. to implement international law: (1) reporting and supervision procedures for example periodic reports, review by committees, special rapporteur assessment and committee reports noting discrepancies between the requirements of international law and state conduct. This is augmented by the complaints procedure for individual or governmental complaints such as those brought under the optional protocol; (2) ‘facilitative’ mechanisms for example armed peace-keeping forces and election observers; (3) penalizing measures in the form of expulsion from the community of nations; nonmilitary enforcement action, such as economic sanctions, severing communications and breaking diplomatic relations; (5) use of armed force pursuant to Chapter VII of the U.N. Charter; (6) judicial enforcement by national and international courts and tribunals; and (7) national courts interpreting and applying international law; (8) public opinion, expressed through the activities of NGOs.<sup>1307</sup>

In addition, “in practice, texts that are only recommendatory have as much effect as formal rules in channeling state conduct. ‘Codes’ that lay down standards and prescribe action, but are not legally mandatory, may be incorporated into domestic law by states. An example is the Codex Alimentarius produced jointly by the Food and Agricultural Organization of the World Health Organization prescribing standards ‘for all principal foods.’... The codex is a notable example of a formally nonbinding instrument that has become effective law for many countries throughout the world on a matter of practical importance to all peoples.”<sup>1308</sup>

Hathaway too rejects the argument that the absence of enforcement mechanisms renders international law nugatory. While she maintains that states which sign human rights treaties tend to violate human rights more than non-signatory states, she still references the “notion of ‘self-enforcement.’” International law, according to Hathaway, is obeyed “primarily because domestic institutions create mechanisms for ensuring that a state abides by its international legal commitments, whether or not particular governmental actors wish it to do so.”<sup>1309</sup>

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<sup>1305</sup> WORLD PUBLIC ORDER, *supra* notex, at 66.

<sup>1306</sup> Reisman, *The View from the New Haven School of International Law*, *supra* note 760, at 5-6.

<sup>1307</sup> Oscar Schachter, *United Nations Law*, 88 AM. J. INT’L L. 10-16 (1994)

<sup>1308</sup> Oscar Schachter, *United Nations Law*, 88 AM. J. INT’L L. 5 (1994).

<sup>1309</sup> Hathaway, *The Promise and Limits*, *supra* note 758, at 234.

### 3.3.4 International law Working Together With and Not Against National Law

Proponents of international law hold, *inter alia*, that international law augments domestic structures thereby providing greater legal redress for victims of human rights violations.<sup>1310</sup> Tom Campbell notes that human rights discourse can “serve both as a potent source for radical critiques of actual social arrangements and also as a powerful basis for working out and presenting alternative institutional practices.”<sup>1311</sup>

As regards international human rights law, Henkin states that:

In our international system of nation-states, human rights are to be enjoyed in national societies as rights under national law. The purpose of international law is to influence states to recognize and accept human rights, to reflect these rights in their national constitutions and laws, to respect and ensure their enjoyment through national institutions, and to incorporate them into national ways of life.<sup>1312</sup>

Anne-Marie Slaughter advances the liberal theory of international law from the point of view of liberal international relations theory. She maintains that an important function of international law “is not to create international institutions to perform functions that individual states cannot perform by themselves, but rather to influence and improve the functioning of domestic institutions.”<sup>1313</sup> This echoes Henkin’s view that international human rights law is effective because it does not operate independently of national legal systems, but rather in conjunction with them.<sup>1314</sup> He emphasizes that “... the question is not whether law is enforceable or even effectively enforced; rather the question is whether law is observed, whether it governs or influences behavior, whether international behavior reflects stability and order.”<sup>1315</sup>

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<sup>1310</sup> See JANIS, *supra* note 206, at 174 (“International human rights law posits the direct application of international law to individuals and in some instances even gives individuals direct access to international legal machinery.”). Traditionally, there are two divergent claims regarding international law: “on the one hand, the realist charge that international law is not really law, because it cannot be enforced; on the other, the rationalistic claim that nations ‘obey’ international law only to the extent that it serves national self-interest.” Koh, *Why Do Nations Obey International Law*, *supra* note 496, at 2603. For a discussion of the early development of the discussion regarding compliance with international law, see Koh, *Why Do Nations Obey International Law*, *supra* note 496, at 2606-7 (concluding that Hugo Grotius was the first to demarcate international law as something other than natural / religious law; rather he saw international law “as the consequence of volitional acts, generated by independent operation of the human will.” *Id.*)

<sup>1311</sup> Tom Campbell, *Introduction: Realizing Human Rights*, in HUMAN RIGHTS: FROM RHETORIC TO REALITY 1, 1 (Tom Campbell, David Goldberg, Sheila McClean and Tom Mullen eds., Basil Blackwell, 1986).

<sup>1312</sup> Henkin, *Human Rights in International Law*, *supra* notex, at 25.

<sup>1313</sup> Anne-Marie Slaughter, *A Liberal Theory of International Law*, in FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS, 95, 101 (Oona A. Hathaway & Harold Hongju Koh, eds., 2005). Slaughter maintains that this is particularly true of international human rights law, which “precisely about structuring state-society relations to ensure at least minimal individual flourishing.” *Id.*

<sup>1314</sup> See LOUIS HENKIN, HOW NATIONS BEHAVE, 225-226 (cited in Foundations of International Law and Politics, 168 (Oona A. Hathaway & Harold Hongju Koh eds., 2005) (Foundation Press, New York)) (“What matters is not whether the international system has legislative, judicial, or executive branches, corresponding to those we have become accustomed to seek in a domestic society; what matters is whether international law is reflected in the policies of nations and in relations between nations.”).

<sup>1315</sup> *Id.*

The underlying motivation for this ‘interactive process’ is explained by Koh’s transnational legal theory, which argues that states obey international human rights law because they “somehow internalized that rule and made it a part of their internal value system.”<sup>1316</sup> According to Koh, the internalization of international law into domestic law is a

process whereby an international law rule is interpreted through the interaction of transnational actors in a variety of law-declaring fora, then internalized into a nation’s domestic legal system. Through this three-part process of interaction, interpretation, and internalization, international legal rules become integrated into national law and assume the status of internally binding domestic legal obligations.<sup>1317</sup>

Therefore, through an “interactive process... law helps translate claims of legal authority into national behavior.”<sup>1318</sup>

### 3.3.5 Deficiency Does Not Equate to Nugatory

According to Lauterpacht, international law is peculiar and its implementation is not analogous to municipal legal orders.<sup>1319</sup>

Professor Koh analogizes this to the process of domestic law. He explains that although domestic laws may be violated we do not discard the entire system for its imperfection. Similarly, he maintains, we should approach international human rights norms which are:

underenforced, imperfectly enforced; but they are enforced through a complex, little understood legal process that I call transnational legal process[:]... the institutional interaction whereby global norms of international human rights law are debated, interpreted, and ultimately internalized by domestic legal systems. To claim that this complex transnational legal process of enforcing international human rights law ... exists is not to say that it always works or even that it works very well... But the process of enforcing international human rights law also sometimes has its successes, which give us reason not to ignore that process, but to try to develop and nurture it...<sup>1320</sup>

The distinction between the divergent views of the enforceability of international law is most relevant to whether international human rights law will advance the cause against systemic

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<sup>1316</sup> Koh, *How Is International Human Rights Law Enforced*, *supra* note 456, at 1400.

<sup>1317</sup> Koh, *Bringing International Law Home*, *supra* note 761, at 626. See also Koh, *Why Do Nations Obey International Law*, *supra* note 496, at 2646 (“...such a process can be viewed as having three phases. One or more transnational actors provokes an interaction (or series of interactions) with another, which forces an interpretation or enunciation of the global norm applicable to the situation. By so doing, the moving party seeks not simply to coerce the other party, but to internalize the new interpretation of the international norm into the other party’s internal normative system. The aim is to ‘bind’ that other party to obey the interpretation as part of its internal value set. Such a transnational legal process is normative, dynamic, and constitutive. The transaction generates a legal rule which will guide future transnational interactions between the parties; future transactions will further internalize those norms; and eventually, repeated participation in the process will help to reconstitute the interests and even the identities of the participants in the process.”)

<sup>1318</sup> Koh, *Why Do Nations Obey International Law*, *supra* note 496, at 2618.

<sup>1319</sup> Lauterpacht: *Function of Law in the International Community*, *supra* note 399.

<sup>1320</sup> Koh, *How Is International Human Rights Law Enforced*, *supra* note 456, at 1399. Koh emphasizes that the process may be wanting but it exists nonetheless.

intimate violence. Depending on the position one adopts, one's approach towards developing international law will differ. If one accepts the approach of the compliance based theory, as I do, the focus is not on the cost-benefit analysis of what international law yields, but rather on "designing social, political and institutional frameworks that help internalize norms..."<sup>1321</sup>

Therefore, I approach international law as a system that inculcates norms in national legal systems. I refer to this as co-operative compliance with international law.<sup>1322</sup> An inextricable component of co-operative compliance is the role of non-state actors in international law.

#### 4. Proliferation of Actors Who Facilitate Compliance with International Law

##### 4.1 General

Reisman refers to actors "who, though not endowed with formal competence, may nonetheless play important roles in influencing decisions."<sup>1323</sup> These actors include, *inter alia*, state agents, nongovernmental organizations, pressure groups and individuals.<sup>1324</sup>

This multiplicity of actors, which have the capability of incorporating international law into domestic law, helps to explain the co-operative compliance theories. According to Reisman international law is an anthropological process, and, therefore, theorists should take account of the "range of centralized and decentralized settings in which decisions are made, their varying degree of organization and formality, the extent to which they are specialized and the extent to which they are continuous or episodic."<sup>1325</sup>

It is possible to categorize international actors as: (1) non-governmental organizations or transnational social movements; and (3) international bodies. These entities have come to play a

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<sup>1321</sup> HATHAWAY & KOH, *supra* note 762, at 3. For the importance of choosing a position in respect of one's approach to international law, see Reisman, *The View from the New Haven School of International Law*, *supra* note 760 ("Both the reference and content of the term 'law' will vary depending on whether the standpoint is that of a member of elite or the rank-and-file, whether the observer is a member of the system observed, is an outsider or is on the margin. Perception of the same phenomenon may vary depending on the culture, class, gender, age, or crisis-experience of the observer. .. No standpoint is more authentic than another, but the scholar must be sensitive to the variations in perception that attend each perspective..."). Cited by Reisman, *How Shall We Conceive International Law*, *supra* note 756, at 3.

<sup>1322</sup> I use this phrase to distinguish between compliance as a result of force and compliance as a result of free will or self-interest. For a discussion of the motives driving States to comply with international law, see Koh's discussion of the Chayeses' 'managerial model' v. Franck's fairness theory, see Koh, *Why Do Nations Obey International Law*, *supra* note 496, at 2600-2603 (describing the Chayeses' view which holds that "nations obey international rules not because they are threatened with sanctions, but because they are persuaded to comply by the dynamic created by the treaty regimes to which they belong." Id. 2601. Koh describes Franck's view as asserting that "nations 'obey powerless rules' because they are pulled towards compliance by considerations of legitimacy... and distributive justice." Id. 2602). Cf. ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE HEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995) and THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995) [hereinafter FRANCK].

<sup>1323</sup> Reisman, *The View from the New Haven School of International Law*, *supra* note 760, at 4.

<sup>1324</sup> Reisman, *The View from the New Haven School of International Law*, *supra* note 760, at 4.

<sup>1325</sup> Reisman, *The View from the New Haven School of International Law*, *supra* note 760, at 5.

prominent role in the creation, implementation and enforcement of international human rights law.<sup>1326</sup>

## 4.2 Non-Governmental and Transnational Organizations

The NGOs which have provided information to the Committee are the forces which, for the longest time and with the greatest persistence, have taken the lead in reporting this clear violation of human rights and demanding justice. They are also a source of truthful, heartrending testimony, criteria and evidence which are essential to the effort to shed light on many of the circumstances under which the crimes have taken place.

CEDAW Committee Report on Ciudad Juárez, Chihuahua<sup>1327</sup>

### 4.2.1 General

This group of non-state actors includes non-governmental organizations, transnational advocacy networks, and transnational social movement organizations. While the specificity of these labels differ, for the purposes of understanding the broad role of non-state actors in international law I analyze them as one group and refer to them as TSMOs generically or NGOs specifically.

TSMOs, together with academics, have been responsible for the propulsion of women's rights in international law, succeeding in establishing meaningful facilities and legislation. Generally, they achieve this through a process of documenting and publicizing information; educating individuals, governments and other organizations; and, working with so-called grass-roots organizations in implementing the norms for which they or others have lobbied.<sup>1328</sup> This process is not always ideal; there are important arguments regarding the power of NGOs, their source of income, the agendas they pursue and the impact all of these factors may have on democratic values and cultural autonomy. However, in the context of systemic intimate violence, there is evidence of successful NGO work, which is a key driver in the argument for the internationalization of women's rights.

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<sup>1326</sup> Koh, *Why Do Nations Obey International Law*, *supra* note 496, at 2624 (stating that by the 1970s and 1980s “[m]ultinational enterprises, nongovernmental organizations, and private individuals reemerged as significant actors on the transnational stage.” *Id.*) See in general Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders*, in Foundations of International Law and Politics, 217, 217 (Oona A. Hathaway & Harold Hongju Koh eds., 2005) (Foundation Press, New York) [hereinafter Keck and Sikkink, *Activists Beyond Borders*, *extracts*]. McCarthy, *The Globalization of Social Movement Theory*, *supra* note 597, at 244 (“Social movements are ongoing collective efforts to bring about consequential social change... Movements are composed of a set of constituent elements, including activists, who devote extensive effort; ... groups that provide financial and other support; and adherents, people who support the goals of a movement but are not active”). See also Louis Kriesberg, *Social Movements and Global Transformation*, in TRANSNATIONAL SOCIAL MOVEMENTS AND GLOBAL POLITICS: SOLIDARITY BEYOND THE STATE, 3, 4 (Jackie Smith, Charles Chatfield, and Ron Pagnucco eds., 1997) [hereinafter Kriesberg] (“Global changes involve powerful, large-scale social forces, and even shifts that appear abrupt are typically products of slowly evolving changes that develop largely undetected.”).

<sup>1327</sup> CEDAW Committee Ciudad Juárez Report, *supra* notex, at 40.

<sup>1328</sup> TARROW, *supra* note 752, at 186-7. See also Kriesberg, *supra* note 776, at 4 (describing four interactive trends which have caused the increasing growth in number and potency of NGOs: “growing democratization, increasing global integration, converging and diffusing values, and proliferating transnational institutions”).

TSMOs are effective players in the implementation of international law for the following reasons: (1) they operate on the basis of ideological commitment; (2) they obtain and provide information by utilizing the media and information technology; (3) they are well connected, both politically and with local NGOs; (4) they are creative in the development of norm-changing tools, utilizing, *inter alia*, the method of naming and shaming to compel compliance with international law.

#### 4.2.2 Ideology

As opposed to states, non-governmental “advocates plead the causes of others ...

Keck and Sikkink<sup>1329</sup>

Ideological commitment to causes has galvanized the implementation of human rights in a range of countries and in respect of a multitude of issues. It has been stated that “one of the most successful transnational framing efforts in the recent period has been the creation of a common transnational conception of human rights,”<sup>1330</sup> a code of ideological advocates who “are bound together by shared values, a common discourse, and dense exchanges of information and services.”<sup>1331</sup>

Therefore, while TSMOs are slated as non-democratic bodies within international law, they often represent the needs of those who do not have a political voice.<sup>1332</sup> However, there is a very real criticism against the ideological commitment of NGOs. Some NGOs may pursue their own agenda, be it religious or political, under the auspices of protecting vulnerable groups, which can cause additional harm. This criticism aside, TSMOs are effective due to a combination of ideological commitment and a seemingly endless supply of ideological causes.<sup>1333</sup>

#### 4.2.3 Information, Media and Information Technology

One of the key activities of TSMOs is the transfer and free flow of information.<sup>1334</sup> They are able to effect norm implementation by framing and explaining a given set of facts. By

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<sup>1329</sup> “...they often involve individuals advocating policy changes that cannot be easily linked to a rationalist understanding of their ‘interests.’” Keck and Sikkink, *Activists Beyond Borders*, extracts, *supra* note 777, at 220.

<sup>1330</sup> McCarthy, *The Globalization of Social Movement Theory*, *supra* note 597, at 245.

<sup>1331</sup> Keck and Sikkink, *Activists Beyond Borders*, extracts, *supra* note 777, at 220-221 (describing a transnational advocacy network as comprising those relevant actors working internationally on an issue).

<sup>1332</sup> Or no voice at all, as is the case, for example, in respect of the environment or non-human animals.

<sup>1333</sup> Keck and Sikkink, *Activists Beyond Borders*, extracts, *supra* note 777, at 220-221 (describing a transnational advocacy network as comprising those relevant “actors working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchanges of information and services.”). Tarrow describes the phenomenon of cross-border diffusion as a form of transnational politics, comprising “the communication of movement ideas, forms of organization, or challenges to similar targets from one center of contention to another.”

<sup>1334</sup> Keck and Sikkink, *Activists Beyond Borders*, extracts, *supra* note 777, at 220-221 (describing a transnational advocacy network as comprising those relevant actors working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchanges of information and services.”). Tarrow describes phenomenon of cross-border diffusion as a form of transnational politics, comprising “the communication of movement ideas, forms of organization, or challenges to similar targets from one center of contention to another.” TARROW, *supra* note 752, at 186-7. See also Kriesberg, *supra* note 776, at 4 (describing four interactive trends which have caused the increasing growth in number and potency of NGOs: “growing democratization, increasing global integration, converging and diffusing values, and proliferating transnational institutions”).

“pressuring target actors to adopt new policies, and by monitoring compliance with international standards... they contribute to changing perceptions that both state and societal actors may have of their identities, interests, and preferences, to transforming their discursive positions, and ultimately to changing procedures, policies and behavior.”<sup>1335</sup>

Moreover, TSMOs have access to the resources and global networks necessary to obtain and transmit such information.<sup>1336</sup> This combination allows increasingly large and respected institutions to obtain information about factual scenarios, transmit such information to formal and informal authorities, and lobby for a proportionate reaction.<sup>1337</sup>

TSMOs are the political organisms of the age of globalization, creating unprecedented support for their causes through the use of the media, and particularly the internet.<sup>1338</sup> The explosive developments of “information technology and communications have greatly enhanced the ability of nongovernmental organizations to bring pressure to bear on governments.”<sup>1339</sup>

The publication of information triggers a number of factors: government officials and other relevant actors become educated in the issue and how to prevent it; this creates experts who may

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<sup>1335</sup> KECK AND SIKKINK, *ACTIVISTS BEYOND BORDERS*, *supra* note 784, at 3. For a discussion of the technique of framing issues for international attention, *see* KECK AND SIKKINK, *ACTIVISTS BEYOND BORDERS*, *supra* note 784, at 19 (“How does this process of persuasion occur? An effective frame must show that a given state of affairs is neither natural nor accidental, identify the responsible party or parties, and propose credible solutions.”).

<sup>1336</sup> *See* McCarthy, *The Globalization of Social Movement Theory*, *supra* note 597, at 253 (explaining that resource support for transnational social movement organizations include “at least the following: (1) international political authorities, (2) national political authorities, (3) international religious organizations, (4) national religious organizations, (5) INGOs, (6) NGOs, (7) foundations, (8) constituent organizations, and (9) members and sympathizers. The typical forms of support are direct financial aid and in-kind aid, such as office space, temporary grants of personnel, access to communications technology and other equipment, and public support.”)

<sup>1337</sup> *See* Chadwick F. Alger, *Transnational Social Movements, World Politics, and Global Governance*, in *TRANSNATIONAL SOCIAL MOVEMENTS AND GLOBAL POLITICS: SOLIDARITY BEYOND THE STATE*, 260, 263 (Jackie Smith, Charles Chatfield, and Ron Pagnucco eds., 1997) [hereinafter Alger].

<sup>1338</sup> Effective human rights campaigns by NGOs include the international boycott of Nestlé to prevent the corporation from promoting infant formula to poor women in the developing world. *See* Keck and Sikkink, *Activists Beyond Borders*, *extracts*, *supra* note 777, at 222. *See also* Peter J. Spiro’s description of the Brent Spar episode, in terms of which Greenpeace opposed the scuttling of rigs by Shell in the North Sea. Although Spiro criticizes this particular event, he does recognize “one might doubt that oil companies will dare undertake scuttlings so long as Greenpeace maintains its vigilance on the issue.” Peter J. Spiro, *New Global Potentates: Nongovernmental Organizations and the “Unregulated” Marketplace*, 18 *CARDOZO L. REV.* 957, 964-965 (1996). For a discussion of the benefits and drawbacks of the role of NGOs in international law, *see* Julie Mertus, *From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society*, 14 *AM. U. INT’L L. REV.* 1335, 1366 (1999). *See also* Abbott, *International Relations Theory*, *supra* note 760, at 330 (describing the role Amnesty International played in its campaign against torture enforced disappearances). Tarrow provides examples of transnational social movements, including campaigns to stop the construction of dams, the empowerment of environmental and workers’ groups in the establishment of the multi-lateral North American Free Trade Agreement, the organization of dissident groups under the rubric of the Helsinki Accords, and the impact of Greenpeace on reducing pollution and environmental destruction by multi-national corporations. TARRROW, *supra* note 752, at 178. An example of the impact of media reporting is the New York Times article, *Secret Side of Women’s Lives*, *supra* note 732, describing domestic violence as the “one significant blot on the record of women’s empowerment.” Finally, *see* Kriesberg, *supra* note 776, at 5 (“Movies, telephones, television, audio and video tape cassettes, fax, and electronic mail provide multiple sources of information ... [making] rapid exchange and sustained social interaction possible”).

<sup>1339</sup> Oscar Schachter, *United Nations Law*, 88 *AM. J. INT’L L.* 10-16 (1994)

interact with officials, dignitaries, advocates and politicians; who in turn facilitate agreement in formal and informal settings, from official meetings to informal discussions and agreements in the corridors of the U.N.<sup>1340</sup>

Therefore, TSMOs facilitate the implementation of international law through “forms of organization characterized by voluntary reciprocal, and horizontal patterns of communication and exchange.”<sup>1341</sup> In the context of human rights, these institutions are seminal “in situations where domestic access of claimants is blocked, or where those making claims are too weak politically for their voices to be heard... In such cases, international or foreign venues may be the only ones in which claims can be legitimately or safely presented.”<sup>1342</sup>

#### 4.2.4 Local and Political Connections

Members of leading TSMOs are politically respected and connected individuals.<sup>1343</sup> They have a great deal of interaction with government officials and, if the cause and its advocate are of a sufficiently high profile, governments’ attention may be obtained and circumstances altered.

TSMOs are connected to and work with local organizations. This connection between international and local organizations benefits both entities. TSMOs provide local organizations with funding, networks, personnel, publicity and, if necessary, protection.<sup>1344</sup> In turn, local organizations provide access to local information, local stories, individual witnesses and, in a sense, the local truth.

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<sup>1340</sup> See Alger, *supra* note 788, at 265-7.

<sup>1341</sup> Keck and Sikkink, *Activists Beyond Borders, extracts, supra* note 777, at 219. A transnational social movement can be described as “a collective challenge, based on common purposes and social solidarities, in sustained interaction with elites, opponents, and authorities.” TARROW, *supra* note 752, at 177. According to Keck and Sikkink, “international and domestic NGOs play a central role in all advocacy networks, usually initiating actions and pressuring more powerful actors to take positions.” MARGARET E. KECK AND KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS*, 9 (1998) [hereinafter KECK AND SIKKINK, *ACTIVISTS BEYOND BORDERS* ].

<sup>1342</sup> TARROW, *supra* note 752, at 190, citing Keck and Sikkink. For a discussion of the importance of activist organizations and individuals, see Keck and Sikkink, *Activists Beyond Borders, extracts, supra* note 777, at 217.

<sup>1343</sup> Keck and Sikkink, *Activists Beyond Borders, extracts, supra* note 777, at 220-221 (describing a transnational advocacy network as comprising those relevant actors working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchanges of information and services.”) See also McCarthy, *The Globalization of Social Movement Theory, supra* note 597, at 245 (“... one of the most successful transnational framing efforts in the recent period has been the creation of a common transnational conception of human rights.”). Tarrow describes phenomenon of cross-border diffusion as a form of transnational politics, comprising “the communication of movement ideas, forms of organization, or challenges to similar targets from one center of contention to another.” TARROW, *supra* note 752, at 186-7. See also Kriesberg, *supra* note 776, at 4 (describing four interactive trends which have caused the increasing growth in number and potency of NGOs: “growing democratization, increasing global integration, converging and diffusing values, and proliferating transnational institutions”).

<sup>1344</sup> See Alger, *supra* note 788, at 265-7.



#### 4.2.5 Creative Methodologies

TSMOs have developed original methodology in implementing their campaigns. Typical strategies include: education campaigns; conferences; direct aid to victims of injustice; public marches; and, changing structures directly through lobbying.<sup>1345</sup>

Another important mechanism is naming and shaming. Publicizing governments' poor human rights records triggers a type of international shame, especially where states "aspire to belong to a normative community of nations."<sup>1346</sup> In this sense, TSMOs provide a watch-dog service, reminding governments that "they are being watched."<sup>1347</sup> For example, in 2003, the Center for Reproductive Rights ("CRR") investigated the forced sterilization of so-called Roma women in Slovakia.<sup>1348</sup> The organization publicized the racial disparagement, poverty and non-consensual forced sterilization of Roma women. The CRR's exposure of the government's health care system's approach to Roma women triggered an international outcry. It also exposed a violation of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>1349</sup> which resulted in an investigation into the Slovak government's treatment of the Roma people and the re-evaluation of Slovak's entry into the European Union.<sup>1350</sup>

'Public opinion' manifests in institutions of civil society such as professional bodies, universities, and religious and communal institutions. These entities, together with international institutions, national and local governments, national, regional and international courts, and

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<sup>1345</sup> McCarthy, *The Globalization of Social Movement Theory*, *supra* note 597, at 257.

<sup>1346</sup> KECK AND SIKKINK, *ACTIVISTS BEYOND BORDERS*, *supra* note 784, at 29.

<sup>1347</sup> See Alger, *supra* note 788, at 267.

<sup>1348</sup> See CENTER FOR REPRODUCTIVE RIGHTS, *BODY AND SOUL, FORCED STERILIZATION AND OTHER ASSAULTS ON ROMA REPRODUCTIVE FREEDOM IN SLOVAKIA*, available at [http://www.crlp.org/pdf/bo\\_slov\\_part4.pdf](http://www.crlp.org/pdf/bo_slov_part4.pdf) (describing the conditions in which "Romani women unwittingly become victims of insidious, discriminatory behavior when they seek maternal health care in their public health systems. Their rights to informed consent to sterilization, accurate and comprehensive health information, non-discriminatory health services, and unimpeded access to their medical records have been blatantly violated. Romani women endure severe discrimination that is exacerbated by the intersection of their gender and racial identities. The inevitable results of such oppression are the extensive and unchecked human rights violations against them that are occurring in Slovakia today").

<sup>1349</sup> The European Convention, *supra* note 74.

<sup>1350</sup> See *The Slovak Government's Response to Reproductive Rights Violations against Romani Women: Analysis and Recommendations*, May 2003, available at [http://www.reproductiverights.org/pdf/report\\_slovakiafollowup\\_0603.pdf](http://www.reproductiverights.org/pdf/report_slovakiafollowup_0603.pdf). Similar concerns were raised in Germany in the 2004 Joint EU Monitoring and Advocacy Program / European Roma Rights Center Shadow Report, Provided to the CEDAW committee, Commenting on the fifth periodic report of the Federal Republic of Germany, Submitted under Article 18 of the United Nations Convention on the Elimination of All Forms of Discrimination against Women. The shadow report indicated that so-called Roma and Sinti women suffered forms of harm and discrimination which are prohibited by relevant EU regulations "The phenomenon of intersectional discrimination, the cumulated effects of both gender and ethnic or racial discrimination, is a particularly important factor for vulnerable minority groups such as Sinti and Roma women. At present, the German legislative framework does not provide adequate protection against intersectional discrimination. Full transposition of European Union anti-discrimination Directives into German law through the adoption of a comprehensive anti-discrimination law would provide important additional protections, which would significantly help this group of women counter discriminatory practices." *Id.* at 3-4.

powerful individuals, have the potential to effect improved conditions where necessary. These entities are the audience of TSMOs.<sup>1351</sup>

### 4.3 International Bodies

...the intervention of international human rights bodies is essential ... the latter's efforts and, in particular, those of the [CEDAW] Committee, are responsible for the Mexican authorities' recognition of the gravity of the situation...

in addition to advocating for an end to these crimes, the [CEDAW] Committee has an essential role to play with respect to the implementation of measures aimed at preventing and eliminating gender-based violence.

#### CEDAW Committee Report on Ciudad Juárez, Chihuahua<sup>1352</sup>

A significant change over the last four decades is the emergence of international bodies. International bodies include treaty monitoring bodies, regional political organizations and the numerous UN institutions, ranging from committees, commissions, to special rapporteurs.<sup>1353</sup> Schachter notes that "a large area of international regulation has been developed by the specialized [U.N.] agencies."<sup>1354</sup>

International treaty bodies monitor the compliance by states with various treaties. The most relevant treaty in respect of the consideration of women's rights is CEDAW. Countries that have signed or acceded to CEDAW technically are bound to implement its provisions. As Hathaway has indicated, however, the subscription to a treaty in no way ensures a state's compliance with its provisions.<sup>1355</sup> However, while CEDAW has the highest number of reservations and is violated regularly by party and non-party states, it does generate change in national legal systems.<sup>1356</sup>

One of the ways in which CEDAW can be said to have reformative effects, is through its reporting procedure. State parties are obliged to submit national reports, at least every four years,

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<sup>1351</sup> For a brief discussion of the efficacy of international law from the perspective of non-governmental organizations, see Amnesty International Report on Intimate Violence in Sweden, 13 [Note: ] [Note: Citation to follow] *Neuwirth's reference to Heyns and Viljoen on how CEDAW has not been implemented by many of the state parties 38*

<sup>1352</sup> CEDAW Committee Ciudad Juárez Report, *supra* notex, at 40.

<sup>1353</sup> International actors "mobilize information strategically to help create new issues and categories and to persuade, pressure and gain leverage over much more powerful organizations and governments. Activists... transform the terms and nature of the debate." Keck and Sikkink, *Activists Beyond Borders, extracts, supra* note 777, at 217-218.

<sup>1354</sup> Oscar Schachter, *United Nations Law*, 88 AM. J. INT'L L. 5 (1994).

<sup>1355</sup> In fact, Hathaway concludes that countries which protect human rights may in fact have a disincentive to join the treaty bodies. See Hathaway, *supra* note 750, at 1976-1988 and 1999- 2003 ("Contrary to the predictions of normative theory, treaty ratification appears to be frequently associated with worse, rather than better, human rights practices.").

<sup>1356</sup> It is very difficult to evaluate the efficacy of CEDAW and/or the extent to which it is implemented within a specific country without statistical data. 1984 CEDAW report, *supra* notex, at page 12, paragraph 70 ("...empirical data should accompany every country report.").

on measures they have taken to comply with their treaty obligations.<sup>1357</sup> Many states fail to change their laws, or even to submit reports. The CEDAW committee has no power other than exposing information, shaming and encouraging.<sup>1358</sup> All of these are weak forms of enforcement, if they are enforcement at all. Nonetheless, they serve a purpose by exposing problems and, especially if so-called shadow reports are submitted contemporaneously, shaming states.<sup>1359</sup>

## 5. Applying Theories of Non-Coercive Compliance to Systemic Intimate Violence

### 5.1 General

How do these theories operate to improve states' approaches towards systemic intimate violence? My proposal that systemic intimate violence is a contravention of international law is rooted in the notion that international law contributes to "a whole arsenal of methods and techniques" by which human rights are protected.<sup>1360</sup> I emphasize the functions of international law as a persuasive force in galvanizing change through so-called "assimilative reform strategies," in terms of which states are encouraged to adopt a particular practice or principle through a slow inculcation of the acceptance of the value without using coercive means.<sup>1361</sup>

Certain forms of state conduct are more susceptible to this form of non-coercive regulation than others. Keck and Sikkink explain that physical violence and issues of legal equality

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<sup>1357</sup> Article 18(1) of CEDAW, *supra* note 21, requires state parties to submit to the Secretary-General of the United Nations, for consideration by the Committee on the Elimination of Discrimination against Women, "a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect..." Article 18(2) allows States to justify their non-compliance by indicating "factors and difficulties affecting the degree of fulfillment of obligations under the present Convention."

<sup>1358</sup> See, for example, the CEDAW committee's reaction to the 1984 Hungary report on the status of women where the representative is praised for his "sincere and frank exposition of the situation of women in Hungary and for the clear and thought-provoking presentation of his country's initial report." 1984 CEDAW report, *supra* note 21, at 5, paragraph 27. Another example is in China's report to the CEDAW committee in the same session. 1984 CEDAW report, *supra* note 21, at 18, paragraph 134: "Some members of the Committee praised the report for its frankness, clarity and commitment, which reflected the will of China to implement the articles of the Convention, as well as to improve the condition of women. It was observed that that was a major task for such a vast country but remarkable efforts had been made and results were already being observed." See KECK AND SIKKINK, *ACTIVISTS BEYOND BORDERS*, *supra* note 784, at 23 ("Moral leverage involves what some commentators have called the 'mobilization of shame,' where the behavior of target actors is held up to the light of international scrutiny. Network activists exert moral leverage on the assumption that governments value the good opinion of others.").

<sup>1359</sup> For a discussion of the importance of 'naming and shaming' in international law, see Hathaway, *The Promise and Limits*, *supra* note 758, at 235 ("... reputational concerns often play a more significant role than do the much-studied sanctions imposed by a treaty in states' decisions to commit to international legal limits...").

<sup>1360</sup> Myres S. McDougal, *The Impact of International Law upon National Law: A Policy-Oriented Perspective*, 4 S.D. L. REV. 25, 36 (1959).

<sup>1361</sup> This may be achieved through discourse with nation-States or by working with local organizations to implement the value in question. For a discussion on the effect of such reform strategies in the case of FGC, see Elizabeth Heger Boyle, Sharon E. Preves, *National Politics as International Process: The Case of Anti-Female Genital Cutting Laws*, 34 LAW & SOC'Y REV. 703, 713 (2000) [hereinafter Boyle] ("Fundamentally, assimilative strategies seek to persuade nation-states to adopt the dominant cultural model by legitimating anti-FGC mobilization and deligitimating support for female genital cutting.") The idea that international law operates through several levels of actors and factors is evident in Kenneth Waltz's explanation of international relations, in terms of which the international system, the State and individuals and groups who make up the State, operate interactively and not exclusively, "like a layer cake." Koh, *Why Do Nations Obey International Law*, *supra* note 496, at 2649.

constitute the most successful TSMOs campaigns.<sup>1362</sup> Systemic intimate violence comprises both these components. Therefore, articulating a norm in international law prohibiting systemic intimate violence does not require the existence of a central legislative or enforcement agency; it can operate effectively through the channels described above, benefiting individuals through the establishment of legal and infrastructural support.<sup>1363</sup>

However, a clear norm remains necessary. This is evidenced in the way violence against women has been addressed by the CEDAW Committee over the years.

## 5.2 Analysis of CEDAW Country Reports Before and After CEDAW

The importance of internationalizing violence against women in general, and systemic intimate violence, specifically, is made clear by a ‘before’ and ‘after’ analysis.

I examine the work of the CEDAW Committee before and after the U.N.’s declaration on violence against women, DEVAW, in 1993.<sup>1364</sup> Prior to the early 1990s, the CEDAW Committee makes very little reference to violence against women, including systemic intimate violence.<sup>1365</sup> However, after DEVAW and the increasing exposure of violence against women globally, the focus of the CEDAW Committee began to change – and with it, the focus of state parties.

In most country reports presented to CEDAW in the mid-1980s there is very little evidence of violence against women. Where reference is made to violence against women, it usually is in the context of prostitution or rape (which are in the original CEDAW text).<sup>1366</sup>

In the reports submitted to the CEDAW Committee in 1984, many CEDAW committee members raise the issue of lower wages for traditionally female jobs, the double workload of women, and facilities to encourage men to play an equal role in the family. Little emphasis is placed on violence in the family.

For example, in 1984, in discussing the report of Hungary, the CEDAW Committee placed significant emphasis on the mutual support of spouses within the family.<sup>1367</sup> Aware of the difficulties women face in private, the CEDAW Committee nonetheless did not include violence

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<sup>1362</sup> KECK AND SIKKINK, *ACTIVISTS BEYOND BORDERS*, *supra* note 784, at 27 (describing two characteristics that appear most frequently in reformative campaigns, namely, “(1) issues involving bodily harm to vulnerable individuals, especially when there is a short and clear causal chain (or story) assigning responsibility; and (2) issues involving legal equality of opportunity”).

<sup>1363</sup> According to Keck and Sikkink, “(i)ssues involving physical harm to vulnerable or innocent individuals appear particularly compelling.” KECK AND SIKKINK, *ACTIVISTS BEYOND BORDERS*, *supra* note 784, at 27.

<sup>1364</sup> As discussed above, CEDAW had no provision relating directly to violence against women. While Recommendation 19 interprets the provisions of CEDAW as including violence against women, no prohibition exists in the text itself. The closest references to violence against women probably inhere in article 6 regarding prostitution and the trafficking of women: “State parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”

<sup>1365</sup> \*\*

<sup>1366</sup> See for example, the 1986 report of Mongolia: CEDAW Forty-First Session, *supra* note 800, at 14, paragraph 102.

<sup>1367</sup> See, for example, the CEDAW committee’s discussion of Hungary in 1984 CEDAW report, *supra* notex, at 4-10, paragraphs 18-68, 37-38.

in their investigation at this point. The same is true of the CEDAW committee's discussions in 1986 in respect of Mongolio, Ecuador, and El Salvador.<sup>1368</sup>

This is not to say that violence against women never arose during this period. The Norway report to CEDAW is one of the few that engages domestic violence.<sup>1369</sup> This is interesting since it is also one of the most impressive reports as far as progressive legislation and meaningful implementation of women's rights is concerned. For example, Norway had implemented an incentive for affirmative action in the private sector and "the Government had introduced the payment of a salary subsidy for six months to firms that employed women in fields heavily dominated by men."<sup>1370</sup>

Within the context of a comprehensive report on improving women's rights, it seems the CEDAW committee felt free to engage a less popular line of questioning that related to violence against women, including "violence against women both in the home and outside."<sup>1371</sup> Specifically, the CEDAW committee raised "the establishment of hot-line telephones and crisis centres... as a great step forward" and queried whether "education on family relations was being undertaken with the young population. It also asked whether those telephones were available only in big cities or also in rural areas."<sup>1372</sup>

It is not entirely clear why violence against women would be raised by the CEDAW committee in respect of Norway and not other countries, especially in light of the fact that most of the questions posed by the CEDAW committee to state members were quite uniform. It is possible that Norway had a sufficiently sophisticated report that enabled the Committee to consider its structures vis-à-vis violence against women. For the rest it seems that violence against women simply was not a dominant theme at the time, and only became a more popular focus with the increase in dialogue regarding violence and women in 1994.<sup>1373</sup>

While violence is rarely raised in the CEDAW discussions in the mid-1980s, the committee was not insensitive to many of the more opaque issues facing women within their private lives.<sup>1374</sup> The integrity in many of the CEDAW Committee reports evidences a meaningful commitment to a range of issues.

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<sup>1368</sup> Mongolio, Report of the Committee on the Elimination of Discrimination against Women, Fifth Session, General Assembly Official Records: Forty-First Session Supplement No. 45 (A/41/45) April 4 1986, paragraphs 69-110, pages 10-15 [hereinafter CEDAW Forty-First Session]; Ecuador, CEDAW Forty-First Session, *supra* note 800, at 30-34, paragraphs 226-264; and, El Salvador, CEDAW Forty-First Session, *supra* note 800, at 40-44, paragraphs 314-356.

<sup>1369</sup> For an exception to this norm, *see* 1984 CEDAW report, *supra* notex, at 37-45, paragraph 277-338.

<sup>1370</sup> *Id.* at page 38, paragraph 285.

<sup>1371</sup> *Id.* at page 40, paragraph 301.

<sup>1372</sup> *Id.* at page 40, paragraph 301.

<sup>1373</sup> DEVAW, *supra* note 22

<sup>1374</sup> See for example, the 1984 report on Egypt in the 1984 CEDAW report, *supra* notex, at 27, paragraph 203: "As to the provisions regarding the family, several experts requested more information on divorce, family planning programmes, pre- and post-natal counseling, abortion and assistance to working mothers. In that regard, it was asked whether the Government understood the dual function or the double burden of women and whether it had provided measures to equalize the situation at home."

Therefore, towards the end of the 1980s and beginning of the 1990s, the CEDAW committee began to raise violence against women, and domestic violence, in analyzing country reports.<sup>1375</sup> A wide range of countries are questioned about their domestic violence policies, including, Greece, Korea, Sri Lanka, and Spain.

This shift in focus coincided with increasing international attention on the issue of violence against women during the same period. In 1993, the activism around violence against women culminated in DEVAW. DEVAW is a successful articulation of the needs of women as regards their personal safety. While it is deficient in its enforcement capabilities, there is evidence that DEVAW did improve states' responses to systemic intimate violence. The improvement was slow and, at times, deficient; however, certain states began to improve their systemic intimate violence legislation and policies in the period following DEVAW.

In order to determine whether this change in focus by the CEDAW Committee and states was related to the international pressure surrounding violence against women, I examined the reports of three states before and after DEVAW. The states under examination are Mexico, Nicaragua and Sweden. I consider both state submissions and shadow reports.

The reports of all three states showed the same pattern: prior to 1993 domestic violence was a low profile concern. However, after 1993, it became a present and, at times, central focus of the reports. I conclude, therefore, that it is likely that the international evocation of a norm against violence against women affected the topics discussed in CEDAW Committee meetings and, most importantly, the changes implemented by the states themselves.

The analysis is not conclusive: it is limited to a cross section of three countries and is merely a superficial reading of what laws existed before and after DEVAW. However, it is possible to glean that there were changes in countries' public approach towards violence against women, due in part to the activities of NGOs, governments and/or international bodies. This substantiates the notion that the internationalization of systemic intimate violence may improve the manner in which states address systemic intimate violence, especially if one considers that change happens slowly and we are only in the third decade of creating laws to mitigate violence against women.

It should be noted that the purpose of this analysis is not to suggest that the CEDAW committee did not care about violence or that it incorrectly prioritized issues such as employment, reproductive health or political activity over violence. This would be incorrect since there can be no real hierarchy of women's rights; the violence that women face by virtue of domestic violence is only one manifestation of the harm they experience. The risk they endure through prostitution, trafficking, commodification and unequal labor standards are linked to, affect, and are affected by intimate violence. Moreover, even if there is a way to rank the difficulties endured by women, it is impossible to raise all matters, with equal attention,

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<sup>1375</sup> See for example: Greece, CEDAW committee Forty-Second Session, *supra* note 587, at 13-21, paragraphs 65-129; Korea, CEDAW committee Forty-Second Session, *supra* note 587, at 21-28, paragraphs 130-184; Sri Lanka, CEDAW committee Forty-Second Session, *supra* note 587, at 28-35, paragraphs 185-237; Spain, which at the time had established 17 shelters for abused women, CEDAW committee Forty-Second Session, *supra* note 587, at 35-44, paragraphs 238-304; and, France CEDAW committee Forty-Second Session, *supra* note 587, at 52-62, paragraphs 370-451.

especially when a movement is forming a tentative inroad into a formerly exclusive arena. Rather, the point of this analysis is to show how CEDAW was augmented by DEVAW, how international law and enunciation of norms, even in non-binding statements, can be effective and influence the standards applied by both national and international institutions.

I now turn to examine the three functions of international human rights law and how they have advanced human rights protection.

In respect of each function I: (1) discuss mass rape, FGC and enforced disappearances, as an example of the function's operability; and, (2) with respect to Mexico, Nicaragua, and Sweden, demonstrate how each function has furthered, and can further still, national laws against systemic intimate violence.

## **Part B: The Functions of International Human Rights Law**

### 6. Expressive Function of International Law

#### 6.1 Description

The expressive function of international law refers to the articulation of norms. This is the process by which international law draws a conceptual boundary around specific conduct and prohibits it.<sup>1376</sup>

At the heart of the transnational legal process is the circulation of ideas by international institutions, networks and actors, which in turn have the potential to impact on the behavior of local authorities and communities.<sup>1377</sup>

The express condemnation of certain conduct produces “cognitive ‘focal points’” around which international bodies, TSMOs, states and individuals can coalesce.<sup>1378</sup> International condemnation of certain behavior, as described above, infiltrates national law through local and national politicians, activists, policy makers and citizens. For this to occur, however, the articulation of a norm is necessary. Without such expression by authoritative international institutions this function of international human rights law is impeded.

#### 6.2 Effect of the Expressive Function

The expressive function is effective in three respects.

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<sup>1376</sup> An example of this is Raphael Lemkin's formulation of the word 'genocide' to articulate the loss occasioned by the Holocaust. See Abbott, *International Relations Theory*, *supra* note 760, at 330. TSMOs often are responsible for the expression of international norms. See KECK AND SIKKINK, *ACTIVISTS BEYOND BORDERS*, *supra* note 784, at 25 (“Networks generate attention to new issues and help set agendas when they provoke media attention... this stage of influence may require a modification of the ‘value context’ in which policy debates take place.”).

<sup>1377</sup> Boyle, *supra* note 806, at 704-705 (discussing law's social-construction capabilities): “law is a key ingredient in the social construction of reality”.

<sup>1378</sup> Abbott, *International Relations Theory*, *supra* note 760, at 330.

First, the international articulation of a prohibition changes the nature of behavior from acceptable to unlawful, and the articulation of a mandate changes inertia to wrongful omission. While the condemnation of conduct (in the form of either action or omission) by a U.N. or international body will not necessarily change the lawless actors into lawless ones, but it does set a standard. The purpose of standard setting brings us to the second purpose of the expressive function of international law.

Second, establishing a norm in international law is useful for national and international litigators and activists. It is necessary for litigators and activists to have external norms, clearly expressed by international law, for a number of reasons. First, in states that respect international law, a global set of standards would allow domestic courts to instruct the government to comply with such norms, without risking the collapse of the separation of powers. Second, individuals seeking asylum may be able to rely on such norms to substantiate their claims. Third, the repeated enunciation of norms by foreign and international courts could motivate the judicial and legislative branches of states to adopt such norms into their own systems.

Third, the international articulation of norms offsets the silence surrounding the violation of the rights of marginalized groups and individuals. Acting as a voice for the muted, international law is especially effective "...where governments are inaccessible or deaf to groups whose claims may nonetheless resonate elsewhere, international contacts can amplify the demands of domestic groups, pry open space for new issues, and then echo back these demands into the domestic arena."<sup>1379</sup>

Therefore, international condemnation usually occurs when "calamitous circumstances ... shock the public conscience into focusing on important, but neglected, areas of law..."<sup>1380</sup> This was evidenced by the internationalization and criminalization of mass rape against women.

## 6.3 Application of the Expressive Function to the Condemnation of Mass Rape

### 6.3.1 Background

The mass rape of women in war is historic.<sup>1381</sup> While rape in war has long been a prohibited act, it has been "given license, either as an encouragement for soldiers or as an instrument of policy."<sup>1382</sup> This is largely because, although it was actionable in theory under a broad construction of international law, rape was not covered by the Nuremberg Charter, nor was it

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<sup>1379</sup> Keck and Sikkink, *Activists Beyond Borders*, extracts, *supra* note 777, at 221.

<sup>1380</sup> See Meron, *supra* note 536.

<sup>1381</sup> For a detailed discussion of the background, development, elements and application of the crime of mass rape in international law, see: Askin, *Prosecuting Wartime Rape*, *supra* note 57; See Meron, *supra* note 536, at 425-427; Mchenry, *The Prosecution of Rape under International Law*, *supra* notex, at 109; GLOBAL REPORT ON WOMEN'S HUMAN RIGHTS, *supra* notex; Elizabeth A. Kohn, *Rape as a Weapon of War: Women's Human Rights During the Dissolution of Yugoslavia*, 24 GOLDEN GATE U. L. REV. 199 (1994).

<sup>1382</sup> See Meron, *supra* note 536, at 425-427 (Describing how rape by soldiers has been prohibited by the law of war for centuries, and "violators have been subjected to capital punishment under military codes, such as those of Richard II (1385) and Henry V (1419)." Id. 425.



prosecuted at Nuremberg (although it received more coverage in Japan).<sup>1383</sup> In reality, the rape of women was considered a side-effect of war, and remained unregulated.

The international rules of war prohibit attacks upon civilians and the use of certain ‘illegitimate’ weapons. The mass rape of civilian women violate both these principles but it was not until the wealth of academic and activist lobbying brought this to the attention of the world powers that the ICTR and ICTY recognized mass rape as an actionable offence in international criminal law. Primarily, it was the revelation of the number of rapes and their role in ethnic-cleansing which “was needed to shock the international community into rethinking the prohibition of rape as a crime under the laws of war.”<sup>1384</sup>

### 6.3.2 Mass Rape in Rwanda and the Former Yugoslavia

However, for a range of reasons, the mass rape of women in Rwanda and the Former Yugoslavia shocked the public conscience. The use of rape as a weapon of war, with the specific intent of linking sexual violence to social destruction, resulted in the prohibition of mass rape as a crime against humanity, a war crime and an instrument of genocide.<sup>1385</sup>

The ICTY and ICTR generated a number of successful prosecutions of mass rape, not only for the acts of rape but also for the incitement thereof.<sup>1386</sup> Through a process of publication, international lobbying, and decision-making, the harm of mass rape changed from non-justiciable form of violence, to an international human rights violation, a crime against humanity and a war crime.

It is useful to examine how the decisions of the temporary tribunals: (1) gave expression to behavior, the trauma and effect of which previously had not found expression in international

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<sup>1383</sup> See Meron, *supra* note 536, at 425-427.

<sup>1384</sup> Meron, *supra* note 536, at 425.

<sup>1385</sup> Both the ICTR and ICTY Statutes define rape as a crime against humanity when it is committed as part of an armed conflict, or a widespread or systematic attack against a particular segment of a civilian population. Statute of the International Criminal Tribunal for Rwanda, available at <http://65.18.216.88/ENGLISH/basicdocs/statute.html> [hereinafter the ICTR Statute]. Statute of the International Criminal Tribunal for the Former Yugoslavia, available at <http://www.un.org/icty/basic/statut/statute.htm> [hereinafter the ICTY Statute]. The ICTR Statute defines rape as a crime against humanity when it is “committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.” Article 3(g) of the ICTR Statute, *supra* note 821. The ICTR Statute also makes reference to the violations of Article 3 Common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977, which include “[o]utrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.” See article 4(e) of the ICTR Statute, *supra* note 821. The ICTY Statute includes rape as a crime against humanity when it is “committed in armed conflict, whether international or internal in character, and directed against any civilian population.” Article 5(g) of the ICTY Statute, *supra* note 821.

<sup>1386</sup> The International Criminal Tribunal for Rwanda was established in terms of United Nations Security Council Resolution 955 (1994), S/RES/955 (1994) 8 November 1994, available at <http://65.18.216.88/ENGLISH/Resolutions/955e.htm> (hereinafter the ICTR). See also the ICTR Statute, *supra* note 821. The International Criminal Tribunal for the Former Yugoslavia was established in terms of United Nations Security Council Resolution 808 (1993), S/RES/808 (808) 22 February 1993, available at <http://www.un.org/icty/legaldoc-e/basic/statut/808index.htm> and United Nations Security Council Resolution 827 (1993), S/RES/827 (1993) 25 May 1993, available at <http://www.un.org/icty/legaldoc-e/basic/statut/827index.htm> (hereinafter the ICTY). See also the ICTY Statute, *supra* note 821.

law; and (2) led to further prosecutions for mass rape and, ultimately, the confirmation of mass rape as a crime in the Rome Statute.

### 6.3.3 The Articulation of Mass Rape by the Temporary Criminal Tribunals

As described in chapter one, the ICTR was the first international tribunal to try and convict an accused for genocide and crimes against humanity based on his orchestration and encouragement of mass rape.<sup>1387</sup> The ICTR's Akayesu judgment "paved the way for later prosecutions of sexual crimes by international tribunals."<sup>1388</sup>

The expression of the norm against mass rape in the Akayesu judgment led to the judgment of the ICTY in the case of *Prosecutor v. Kunarac*, which, cementing the Akayesu precedent, confirmed widespread rape as a war crime and crime against humanity.<sup>1389</sup> By combining the provisions of common Article 3 of the Geneva Conventions and Article 3 of the ICTY Statute, the ICTY established the requisite elements in order for certain conduct to constitute mass rape under international criminal law.<sup>1390</sup> In essence, the systematic and widespread rape was linked to the objective of ethnic cleansing and genocide, which were prohibited in international law at the time, creating an understanding of how violent rape of enemy women facilitates the destruction of a people.<sup>1391</sup>

The ICTY also established that widespread rape comprised all the elements required to prove the commission of a crime against humanity.<sup>1392</sup> This culminated in the historic criminalization of mass rape in the Rome Statute, which, while it may not prevent the occurrence of mass rape, lays the groundwork for compelling international intervention and prosecution in respect of such crimes.<sup>1393</sup>

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<sup>1387</sup> *Prosecutor v. Akayesu*. See also Mchenry, *The Prosecution of Rape under International Law*, *supra* notex, at 1272. See also Sherrie L. Russell-Brown, *Rape as an Act of Genocide*, 21 BERKELEY J. INT'L. 350 (2003) [hereinafter Russell-Brown].

<sup>1388</sup> See Mchenry, *The Prosecution of Rape under International Law*, *supra* notex, at 1272.

<sup>1389</sup> *Prosecutor v. Kunarac*, *supra* note 2. Due to the lack of precedent and patchwork authority regarding mass rape in war, the ICTY was able to develop the principles of this crime based on the precedent of *Prosecutor v. Akayesu*. See Mchenry, *The Prosecution of Rape under International Law*, *supra* notex, at 1284.

<sup>1390</sup> For an analysis of this process see Mchenry, *The Prosecution of Rape under International Law*, *supra* notex, at 1290-1296.

<sup>1391</sup> See Mchenry, *The Prosecution of Rape under International Law*, *supra* notex, at 1271-1272. See also Kelly D. Askin, *Prosecuting Wartime Rape*, *supra* note 57, at 355 (stating that the rapes in Bosnia "were designed in large part to have the effect of impregnating the victim so that she would have a child that would be identified as being a member of the rapist's/enemy's ethnicity," resulting in the "prevention of births within the particular ethnic group of the victim, because the victim would either bear a child that would be recognized as having the ethnic identity of the rapist and/or as a result of the birth or the rape, the victim would no longer be a desirable candidate for having children of her own ethnicity.")

<sup>1392</sup> Namely, a widespread or systematic attack, directed against a civilian population, within the context of an armed conflict and where the accused knows that his conduct occurs within the context of a broader attack on a civilian population. Mchenry, *The Prosecution of Rape under International Law*, *supra* notex, at 1284-1291 (describing the reasoning of the ICTY Trial Chamber in casting widespread rape as a crime against humanity).

<sup>1393</sup> A similar sentiment is expressed by Richard Goldstone in respect of the International Criminal Court. See Richard Goldstone, *Justice Now, and For Posterity*, in the International Herald Tribune, October 14, 2005, available at <http://www.iht.com/articles/2005/10/14/opinion/edgold.php>.

[*Note: Citation to follow*] regarding Sierra Leone.

#### 6.3.4 Consequences of the Expression of a Norm against Mass Rape

By expressing a norm against mass rape and identifying its constitutive elements, the ICTY and the ICTR had the legal tool to hold officials responsible for their omission to protect individuals from mass rape, even if the accused himself had not committed the act.<sup>1394</sup> Today, the express norm against mass rape can lead to criminal responsibility if a commander “knowingly allowed the mass rape of hundreds of [] women.”<sup>1395</sup>

This will not prevent the crime of mass rape from happening in future; however, by establishing the clear boundaries for what is intolerable behavior, the decisions of the tribunals “suggest that such behavior is less likely to be tolerated or ignored by the international legal community.”<sup>1396</sup>

This expression also developed the law regarding state responsibility and sovereign immunity, confirming that “a state does not have the sovereignty to massacre its people under any kind of international legal standard.”<sup>1397</sup> The decisions expanded the trend of recognizing the legal personality and importance of individuals in international law, principles which are sourced in the general norms of the UDHR.<sup>1398</sup>

Therefore, the persistent (and admirable) efforts of activists, lawyers and journalists exposed the extent and severity of the mass rape of women in Rwanda and the former Yugoslavia. The publication of information and lobbying for justice placed the specific harm on the agendas of the judges of the ICTY and ICTY, receiving final confirmation in the Rome Statute. The result is that “...after Kunarac, there can be no more confusion or uncertainty regarding whether rape is to be tolerated or ignored as an act of war.”<sup>1399</sup>

The express articulation of the norm against mass rape in international law led to the amendment of rape laws of member states of the European Union. In the case of *MC v. Bulgaria*<sup>1400</sup> the ECHR held that Bulgaria’s rape laws had to be amended to take into account the silent shock of rape victims who display no signs of physical resistance. In the case before the Court, the applicant had been raped and had not cried out or struggled during the rape, resulting in the dismissal of the rape case by the Bulgarian courts. The applicant maintained that Bulgarian law was deficient because it failed to address certain forms of rape where the victim did not display physical resistance.<sup>1401</sup>

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<sup>1394</sup> See Mchenry, *The Prosecution of Rape under International Law*, *supra* notex, at 1272.

<sup>1395</sup> *Id.*

<sup>1396</sup> *Id.*, at 1296.

<sup>1397</sup> *Id.*, at 1297: “...these decisions represent a trade off between domestic state autonomy and the desire of the international community to effect justice following the commission of particularly inhumane crimes.” *Id.* 1296.

<sup>1398</sup> *Id.*, at 1299.

<sup>1399</sup> *Id.*, at 1304.

<sup>1400</sup> *M.C. v. Bulgaria*, *supra* note 256.

<sup>1401</sup> According to the applicant, “the prosecution of rape was only possible if there was evidence of the use of physical force and evidence of physical resistance. Lack of such evidence would lead to the conclusion that sexual intercourse had been consensual.” *M.C. v. Bulgaria*, *supra* note 256, at paragraph 111-113(i) (the applicant argued that she suffered from “frozen fright” and was therefore unable to resist. *Id.* 70).

The court was persuaded that “any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual’s sexual autonomy.”<sup>1402</sup>

The court substantiated its decision with reference to international criminal law, in terms of which “force is not an element of rape and [ ] taking advantage of coercive circumstances to proceed with sexual acts is also punishable.”<sup>1403</sup> The court referred expressly to the decision of the ICTY that “in international criminal law, any sexual penetration without the victim's consent constitutes rape and that consent must be given voluntarily, as a result of the person's free will, assessed in the context of the surrounding circumstances.”

The court also made the point that it is appropriate to extrapolate the law applying to mass rape in circumstances of armed conflict to the individual rape in question since the international norm “reflects a universal trend towards regarding lack of consent as the essential element of rape and sexual abuse.”<sup>1404</sup>

Therefore, the court held that in accordance with “contemporary standards and trends in that area,” the member states of the European Union were obliged to penalize and prosecute any non-consensual sexual act, including “in the absence of physical resistance by the victim.”<sup>1405</sup>

## 6.4 Application of the Expressive Function to Systemic Intimate Violence

### 6.4.1 General

If there is a supra-standard that prohibits systemic intimate violence, the tenets of such standard may be applied nationally through legislation and court decisions.<sup>1406</sup> However, if there is no enunciated universal standard regarding systemic intimate violence, the development of national legal systems loses a source of law that has become most relevant in the human rights context.<sup>1407</sup> It is for this reason that I turn to international law as a supplement to domestic law to ameliorate governments’ regulation of systemic intimate violence.<sup>1408</sup>

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<sup>1402</sup> M.C. v. Bulgaria, *supra* note 256, at paragraph 166

<sup>1403</sup> M.C. v. Bulgaria, *supra* note 256, at paragraph 163

<sup>1404</sup> M.C. v. Bulgaria, *supra* note 256, at paragraph 163

<sup>1405</sup> M.C. v. Bulgaria, *supra* note 256, at paragraph 166

<sup>1406</sup> For the most part, international human rights law is implemented by and through domestic courts. See Judge Edward D. Re, *The Universal Declaration of Human Rights: Effective Remedies and the Domestic Courts*, 33 CAL. W. INT’L L.J. 137, 153–56 (2003).

<sup>1407</sup> DANIEL G. PARTAN, *THE INTERNATIONAL LAW PROCESS: CASES AND MATERIALS*, 824–825 (1992).

<sup>1408</sup> Resnik, *supra* note 159, at 623 (“State, federal, and transnational laws are all likely to be relevant [to pursuing women’s rights to safety].”). The question of whether international law ‘works’ is widely debated. See Koh, *How Is International Human Rights Law Enforced*, *supra* note 456, at 1401 (proposing that the relationship between enforcement and obedience is premised on the notion “that the most effective form of law-enforcement is not the imposition of external sanction, but the inculcation of internal obedience”).

Part of the value in creating legal norms against systemic intimate violence is ending “the international community’s willingness to tolerate sexual abuse against women.”<sup>1409</sup> In the case of *M.C v. Bulgaria*, the ECHR drew on DEVAW and on the jurisprudence of the ICTY to embrace a broader definition of rape including “serious violations of sexual autonomy [which] is violated wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant.”<sup>1410</sup>

The Court, in finding that a state has a positive obligation to conduct effective criminal investigations in cases of rape where there is no physical resistance, made clear its reliance on international precedent in stating that “the development of law and practice ... reflects the evolution of societies towards effective equality and respect for each individual's sexual autonomy.”<sup>1411</sup>

The Court also drew on precedent confirming that states have a positive obligation to secure their citizens’ rights and freedoms as guaranteed by the European Charter.<sup>1412</sup> This included the obligation “to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals.”<sup>1413</sup>

Without the precedent of an express prohibition against mass rape as an international human rights violation, however, the doctrine of state responsibility could not have been utilized to advance the rape jurisprudence to include silent victims.

The importance of express norms was evidenced in 1999, when the South African Constitutional Court pointed out that “South Africa’s international obligations require effective measures to deal with the gross denial of human rights resulting from pervasive domestic violence.”<sup>1414</sup> The Constitutional Court determined that the imperatives of constitutional and international law oblige “the state directly to protect the right of everyone to be free from private or domestic violence. Indeed, the state is under a series of constitutional mandates which include the obligation to deal with domestic violence...”<sup>1415</sup>

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<sup>1409</sup> See Mchenry, *The Prosecution of Rape under International Law*, *supra* notex, at at 1307, citing Human Rights Watch, Global Report on Women’s HR, § 1, at <http://www.hrw.org/about/projects/womrep/>.

<sup>1410</sup> *M.C. v. Bulgaria*, *supra* note 256, at paragraph 106-108 (citing *Prosecutor v. Kunarac*, *supra* note 2). The Court also made reference to the requirement that international criminal law no longer required the element of force for the crime of rape: “In international criminal law, it has recently been recognised that force is not an element of rape and that taking advantage of coercive circumstances to proceed with sexual acts is also punishable. ... While the above definition was formulated in the particular context of rapes committed against the population in the conditions of an armed conflict, it also reflects a universal trend towards regarding lack of consent as the essential element of rape and sexual abuse.” *Id* at 163.

<sup>1411</sup> *M.C. v. Bulgaria*, *supra* note 256, at paragraph 165: “That was not done in the applicant's case. The Court finds that the failure of the authorities in the applicant's case to investigate sufficiently the surrounding circumstances was the result of their putting undue emphasis on ‘direct’ proof of rape. Their approach in the particular case was restrictive, practically elevating ‘resistance’ to the status of defining element of the offence.” *Id* at 182.

<sup>1412</sup> *M.C. v. Bulgaria*, *supra* note 256, at paragraph 149.

<sup>1413</sup> *Id*.

<sup>1414</sup> *State v. Baloyi*, *supra* note 119, at 21.

<sup>1415</sup> *State v. Baloyi*, *supra* note 119, at paragraph 9.

Therefore, the value of expressly prohibiting certain conduct and delineating the state's obligation in respect thereof provides a legal precedent and a more authoritative basis for reformative lobbying. The absence of such precedent is not detrimental to the development of national laws in respect of systemic intimate violence, nor is it a guarantee that nations will comply with the obligation; however, it fills a void and provides the basic tools for litigation, lobbying and policy reform in respect of protecting individuals from systemic intimate violence.

#### 6.4.2 Analysis of Domestic Violence in Mexico Before and After DEVAW

The expressive function of international law has set an overarching standard for government and non-governmental organizations to better address this violence at the state level. This process is evident from the changes in the national legal systems of Mexico before and after DEVAW, which was the first express statement against domestic violence.

In 1981 Mexico became a member of CEDAW and submitted its first report to the CEDAW committee in 1984.<sup>1416</sup> In its 1984 report, Mexico makes no reference to domestic violence against women. At this stage, Mexico had no specific mechanism to address violence against women and all forms of violence, public and private, gendered or otherwise, were treated uniformly.<sup>1417</sup> To the extent that violence was discussed in the 1984 CEDAW report, Mexico referred to the remedy of "amparo," which was designed to protect both men and women against arbitrary acts committed by the state.<sup>1418</sup> The violence women experience in private is not featured as a consideration, either by Mexico or by the CEDAW committee.

However, in 1996, after the approbation of violence against women expressed in DEVAW, Mexico passed federal legislation to "establish nonjudicial procedures to protect victims of domestic violence and to develop strategies to prevent such violence."<sup>1419</sup> This included the 1996

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<sup>1416</sup> See Parties who have signed and ratified CEDAW, available at <http://www.un.org/womenwatch/daw/cedaw/states.htm>. See also Parties who have entered reservations to CEDAW, available at, <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>. Mexico's reservation relates to the manner of implementation, which will be in accordance with Mexican legislation and available resources. Mexico signed CEDAW on 17 July 1980 and ratified it, with reservation, on 23 March 1981. Mexico signed the CEDAW Optional Protocol on 10 December 1999 and ratified it on 15 March 2002. See Signatures and Ratifications of the CEDAW Optional Protocol, available at <http://www.un.org/womenwatch/daw/cedaw/protocol/sigop.htm>. CEDAW Thirty-Ninth Session, *supra* note 798, at 12, paragraph 71 ("...there seemed to be no institution(s) to assist women in the exercise of their rights and there was no information on the capacity of the court system to provide remedies for women's grievances."). Mexico cited economic constraints as a reason for making a reservation in relation to article 10(c) when it ratified CEDAW. Reservations are a double-edged sword: they are necessary because they allow a country to enter into the circle of complying States. On the other hand, they lead to a weaker form of international law and, of course, potentially mock the virtue of universal norms.

<sup>1417</sup> The CEDAW committee expressed concerns regarding the difficulties women had in accessing the courts and legal system to enforce their rights. CEDAW Thirty-Ninth Session, *supra* note 798, at 12, paragraph 71 ("...there seemed to be no institution(s) to assist women in the exercise of their rights and there was no information on the capacity of the court system to provide remedies for women's grievances."). In general, Mexico expressed economic difficulties as a reason for its failure to achieve equality and to implement the provisions of CEDAW. CEDAW Thirty-Ninth Session, *supra* note 798, at 12, paragraph 69.

<sup>1418</sup> CEDAW Thirty-Ninth Session, *supra* note 798, at 14, paragraph 81.

<sup>1419</sup> The Law of Assistance and Prevention of Domestic Violence, Mexico, *supra* note 131.

Federal District Law to prevent and assist victims of “intrafamilial violence.”<sup>1420</sup> The CEDAW committee commended the progress but admonished the Mexican government for the fact that while Mexico had taken a number of legislative and administrative steps to improve the status of women,<sup>1421</sup> due to a lack of information and education, many women remained unaware of their rights and lacked the facilities to protect their rights.<sup>1422</sup>

In 1997, the Center for Reproductive Rights prepared a shadow report on the reproductive rights of women in Mexico.<sup>1423</sup> This included a discussion of the nature and extent of violence against women. The report revealed that gender-based violence continued to be prevalent, notwithstanding the passing of federal legislation to address it.<sup>1424</sup> It recognized that, because domestic violence comprises a peculiar form of harm, Mexico’s criminal law had failed to protect women from this violence.<sup>1425</sup>

The 1997 shadow report demonstrates two important points. First, it cites a study undertaken by the federal Ministry of Health containing statistics regarding the demographic and substantive nature of domestic violence in Mexico.<sup>1426</sup> This investigation by the Mexican government is a fulfillment of article 4(k) of DEVAW which enjoins states to “[p]romote research, collect data and compile statistics, especially concerning domestic violence, relating to the prevalence of different forms of violence against women and . . . those statistics and findings of the research will be made public.”<sup>1427</sup> Of course this does not solve the problem of systemic intimate violence in Mexico but it does lay the foundation of improved systemic intimate violence policies and it demonstrates that, on some level, Mexico was influenced by the international condemnation of violence against women and attempted to fulfill its international obligations.

The second factor emanating from the 1997 shadow report is the acknowledgement by the Mexican government of the obstacles impeding the implementation of legal remedies, mostly due to a lack of awareness regarding the nature of domestic violence and the available remedies.<sup>1428</sup> This echoes the CEDAW committee’s 1996 admonishment.

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<sup>1420</sup> 1998 CEDAW report, *supra* note 204, at 34.

<sup>1421</sup> See *Women’s Reproductive Rights in Mexico: A Shadow Report*, *supra* note 131, at 24 (describing the legislative and judicial action such as “the 1984 amendment of the Criminal Code for the Federal District so as to maximize punishment for rape; the creation, in 1989, of the Attorney General’s Special Agencies to deal with sex offenses, which operate within various bodies around the country; and the various amendments and repeals made to the Criminal Code and the Criminal Procedural Code for the Federal District in 1990 and 1991 relating to sex offenses.”

<sup>1422</sup> *Women’s Reproductive Rights in Mexico: A Shadow Report*, *supra* note 131, at 24.

<sup>1423</sup> *Women’s Reproductive Rights in Mexico: A Shadow Report*, *supra* note 131.

<sup>1424</sup> In 60 percent of the cases of rape of adolescent girls, “the aggressors are close relatives of the victim, including the victim’s father.” *Women’s Reproductive Rights in Mexico: A Shadow Report*, *supra* note 131, at 24.

<sup>1425</sup> *Id.*

<sup>1426</sup> Among women between the ages of 14 to 57 who were beaten by their partners “revealed that most victims were mothers between the ages of 22 and 29, and that 90 percent were beaten in front of their children. Twenty-two percent of the battered women were illiterate or had not completed primary school; 44 percent had finished primary school and/or some secondary school; and the remaining 34 percent had some post-high school education or were professionals. Other common forms of domestic violence in Mexico include verbal aggression, confinement to the home, prohibitions on seeing family members or working, and forced sexual relations.” *Women’s Reproductive Rights in Mexico: A Shadow Report*, *supra* note 131, at 24.

<sup>1427</sup> Article 4(k) of DEVAW, *supra* note 22.

<sup>1428</sup> *Women’s Reproductive Rights in Mexico: A Shadow Report*, *supra* note 154, at 24.

In the following year Mexico once again appeared before the CEDAW committee. At this stage, Mexico had also signed the Convention of Belem Do Para.<sup>1429</sup> The Mexican 1998 report described consultations “at the local level to reform the civil and criminal codes” and the creation of special programs to support female victims of violence.<sup>1430</sup> Mexico had also reformed its penal system “to facilitate proceedings with regard to violence against women in the family, including marital rape”<sup>1431</sup>

The CEDAW committee praised the Mexican government for its advances, admonished it for the continued high rate of violence against women and suggested that the government “continue to work for the adoption of nationwide legislation on all forms of violence against women, including domestic violence, adjusting state laws to national laws.”<sup>1432</sup> Specifically, the CEDAW committee suggested that the government “consider the possibility of implementing an integrated, long-term plan for combating domestic violence. Such a plan could include taking legal action, training judicial, law enforcement and health personnel, informing women about their rights and about the Convention and strengthening victims’ services.”<sup>1433</sup>

The positive permutations of the CEDAW committee’s remarks were evident in 2002 when Mexico once again addressed the CEDAW committee, indicating that combating violence against women “was one of the State’s priorities.”<sup>1434</sup> The National Women’s Institute had been established as “an autonomous, decentralized national mechanism with ministerial rank, its own budget and a cross-sectoral impact on all government institutions, thereby mainstreaming a gender perspective within national policy.”<sup>1435</sup> An Institutional Panel to Coordinate Preventive Action and Attention to Domestic Violence and Violence against Women was established, which provided a national framework for coordinated action against violence against women. Within the framework, a National Programme for a Life Without Violence 2002-2004 was under discussion with civil society, and legislation dealing with domestic violence had been passed in 15 states. Specific programs to deal with domestic violence in 16 states had also been created. Mexico also referred to various campaigns and national programs against domestic violence.<sup>1436</sup>

And then there is Ciudad Juárez, Chihuahua.

### 6.4.3 Analysis of the Case of Ciudad Juárez, Chihuahua

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<sup>1429</sup> 1998 CEDAW report, *supra* note 204, at 34.

<sup>1430</sup> *Id.* at 32.

<sup>1431</sup> 1998 CEDAW report, *supra* note 204, at 34. The CEDAW committee reacted with praise but also criticized Mexico for its failure to “describe cases where the Convention had been used to support claims for women’s human rights.” *Id.* It also raised concern that “in spite of legislative measures Mexico has taken, violence against women, particularly domestic violence, continues to be a serious problem in Mexican society.” *Id.*

<sup>1432</sup> 1998 CEDAW report, *supra* note 204, at 35.

<sup>1433</sup> In addition, the CEDAW committee suggested that “strong action be taken against persons who commit violence against women, and that it should be made easier for women to bring court actions against offenders.” 1998 CEDAW report, *supra* note 204, at 35.

<sup>1434</sup> Mexico had created a National Programme for Equal Opportunities and Non-Discrimination against Women, “PROEQUIDAD” (the “National Programme for Equal Opportunities and Non-Discrimination against Women, 2001-2006... the linchpin of national policy on gender”) and the National Women’s Institute (“INMUJERES”). *See* 2002 CEDAW report, *supra* note 210, at 208, paragraph 424.

<sup>1435</sup> *See* 2002 CEDAW report, *supra* note 210, at 208, paragraph 424.

<sup>1436</sup> 2002 CEDAW report, *supra* note 210, at 206, paragraph 414.



During the late 1990s, activists within and outside of Mexico brought the world's attention to a spate of gruesome murders of women in Ciudad Juárez. It appeared that the local authorities of Ciudad Juárez, Chihuahua had done very little to investigate the murders, apprehend the perpetrators or assist the victims.<sup>1437</sup> This triggered wide condemnation of the Mexican government.<sup>1438</sup> The rise of violence against women in Ciudad Juárez, Chihuahua reveals both the capabilities and deficiencies of international law. Nonetheless, the phenomenon does demonstrate the manner in which the expressive function of international law operates in respect of violence against women.<sup>1439</sup>

At this stage, the Beijing Declaration and Platform for Action had articulated the existence of physical, psychological and sexual violence that women experience by virtue of their gender.<sup>1440</sup> This international process revealed that the violence in Ciudad Juárez had yet “to be understood as the urgent risk for women that it presents.”<sup>1441</sup> The link between public and private violence, between regression and development, and between legislative equality and meaningful equivalency became increasingly clear.

The outcry against the violence revealed that a significant number of the killings in Ciudad Juárez took place at the hands of the victims' intimate partners. It was argued that the resolution of the killings required “attention to the root causes of violence against women – in all of its principle manifestations.”<sup>1442</sup> However, the significance of systemic intimate violence had yet to be acknowledged by local officials.<sup>1443</sup> Three manifestations of impunity were highlighted: the authorities who were responsible for investigating the crimes and prosecuting the perpetrators

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<sup>1437</sup> For the distinctions between the violence against women in Ciudad Juárez and the level of violence in Mexico in general see the OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraph 4 (“While the situation of women in Ciudad Juárez shares many aspects common to other cities in the United Mexican States and the region generally, it is different in certain important respects. First, the homicide rate for women experienced an unusually sharp rise in Ciudad Juárez in 1993, and the rate has remained elevated since that time. Second... the rate of homicides for women compared to that for men in Ciudad Juárez is significantly higher than for similarly situated cities or the national average. Third, the extremely brutal circumstances of many of the killings have served to focus attention on the situation in Ciudad Juárez... Fourth, the response of the authorities to these crimes has been markedly deficient.”)

<sup>1438</sup> OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraph 33 (“The victims were killed brutally: many were raped or beaten before being strangled or stabbed to death. A number of the bodies bore signs of torture or mutilation.”).

<sup>1439</sup> Ciudad Juárez is a living example of “violence against women, and the impunity in which most cases remain [showing]... that the gender dimensions of this violence have yet to be effectively addressed.” OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraph 28. Furthermore, the homicide rate for women between 1993 and 2001 rose at double the rate as that for men. See OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraph 42.

<sup>1440</sup> “The conclusions of Beijing+5 testify to the fact that gender-based violence against women is now viewed as a matter of serious concern by the international community, with many forms being regarded as serious violations of international legal standards. This represents a significant shift in attitude from that which existed within the United Nations when violence against women first emerged as a matter of international concern. This shift in approach has set the stage for the development of important international strategies to address the various forms of violence against women. It has also set the stage for legal and policy change at the domestic level.” Division for the Advancement of Women Information Note, *supra* note 23.

<sup>1441</sup> OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraph 12.

<sup>1442</sup> OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraph 11.

<sup>1443</sup> OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraph 12.

were reportedly negligent;<sup>1444</sup> there was a lack of support services for the relatives of those who had been killed;<sup>1445</sup> and there was a dearth of convictions or prosecutions of perpetrators. Advocates identified this omission as replete with “patterns of historical gender-based discrimination” as a result of which systemic intimate violence was not approached as a serious crime.<sup>1446</sup>

The publication of this inertia resulted in the creation of a Special Prosecutor’s Office in Ciudad Juárez, to deal with the killings.<sup>1447</sup> However, continued review by International Bodies and NGOs revealed that the officials in Chihuahua blamed victims for their disappearance, referring to their way of dress or lifestyles in a derogatory manner, revealing a lack of understanding regarding the exigency of economic conditions for many women, and betraying a sexist view regarding the choices women make and the extent to which they may or may not conform to the traditional roles expected of them.<sup>1448</sup>

As the murders normalized, crime in Ciudad Juárez rose. As long as the officials remained incapable or unwilling to address the source of and motive behind the violence behind the murders, the killings continued, apparently without abatement.<sup>1449</sup>

Towards the end of 2001, hundreds of nongovernmental organizations began contacting the Special Rapporteur about the situation of women in Ciudad Juárez.<sup>1450</sup> Only after an official visit by the Special Rapporteur, did the state of Chihuahua promise to establish a number of mechanisms to improve the way in which they attended to the violence. These included: a telephone hotline for emergency calls for women at risk of domestic violence and harassment in the street; the installation of more street lighting; establishing a new anonymous complaint program; and, ensuring that no woman is alone on a bus or public transport vehicle on the way to or from work.<sup>1451</sup>

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<sup>1444</sup> OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraph 34. See also OAS Report on the Situation of Women in Ciudad Juárez, paragraph 48 (“Because of the lack of basic information, family members . . . have expressed a profound lack of confidence in the willingness or the ability of the authorities to clarify what happened or pursue accountability.”) See also OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraph 54.

<sup>1445</sup> OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraph 70.

<sup>1446</sup> “The denial of an effective response both springs from and feeds back into the perception that violence against women – most illustratively domestic violence – is not a serious crime.” OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraph 36.

<sup>1447</sup> OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraph 33.

<sup>1448</sup> One of the problems highlighted by the OAS Report on the Situation of Women in Ciudad Juárez is the fact that the increased jobs for women was a change in cultural patterns that led to further tensions “in a society marked by historical inequalities between men and women and few resources to assist in changing those attitudes.” OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraph 40.

<sup>1449</sup> OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraph 34 (“The organizations indicated that, because the Mexican State was allowing these crimes to remain in impunity, it was encouraging their persistence.”).

<sup>1450</sup> OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraph 33 (“the key concern set forth was that the killing of over 200 women since 1993 had been left in impunity.”).

<sup>1451</sup> OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraphs 70 and 89. See [http://www.cidh.oas.org/annualrep/2002eng/chap\\_vi.juarez.3.htm](http://www.cidh.oas.org/annualrep/2002eng/chap_vi.juarez.3.htm) for a discussion on the international law that applies to such violence. This is most useful since it formulates the right and defines the corresponding obligation of the Mexican state.

As information about the killings and concomitant impunity grew, hundreds of nongovernmental organizations began contacting the Special Rapporteur about the situation of women in Ciudad Juárez. The key concern of these lobbyists “was that the killing of over 200 women since 1993 had been left in impunity.”<sup>1452</sup> The Special Rapporteur visited Ciudad Juárez and, in response, the officials in Chihuahua promised to improve the way in which they addressed the violence. Proposed mechanisms included: a telephone hotline for emergency calls for women at risk of domestic violence and harassment in the street;<sup>1453</sup> the installation of more street lighting;<sup>1454</sup> establishing a new anonymous complaint program,<sup>1455</sup> and ensuring that no woman is alone on a bus or public transport vehicle on the way to or from work.<sup>1456</sup>

Moreover, both the Mexican Government and non-governmental organizations agreed that most of the murders related to manifestations of violence with gender-specific causes and consequences.<sup>1457</sup> A substantial number were linked to domestic and intrafamilial violence.<sup>1458</sup> Therefore, while there was a public dimension to the murders, the violence was often also intimate, a fact brought out by the internationalization and subsequent discussion of the violence. This in turn revealed the Mexican government’s failure to devote sufficient attention to “the discrimination that underlies crimes of sexual or domestic violence.”<sup>1459</sup>

In 2002, Mexico once again addressed the CEDAW committee, expressing its concern at the escalation of violence against women in Ciudad Juárez. Mexico reported the creation of a special commission to investigate the murders of women in the region. A panel was also created to coordinate Mexico’s response to the violence “with the objective of designing a plan to restore the social fabric in Ciudad Juárez, and to improve the living conditions of the children of women who had been murdered, and the city’s residents as a whole.”<sup>1460</sup> While the evidence of violence is distressing, the report discusses the extent of domestic violence, its nature and the success or deficits of available legal remedies.

## 6.5 Evaluation

None of these factors eradicates systemic intimate violence in Mexico. Moreover, many theorists will still balk at the notion that systemic intimate violence is an international human rights violation, insisting that it falls to local authorities to prevent and punish. However, Mexico’s interaction with the CEDAW committee maps a very clear progression of factors,

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<sup>1452</sup> OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraph 33.

<sup>1453</sup> OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraph 89.

<sup>1454</sup> OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraph 70.

<sup>1455</sup> OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraph 70.

<sup>1456</sup> OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraph 70. See <http://www.cidh.oas.org/annualrep/2002eng/chap.vi.juarez.3.htm> for a discussion on the international law that applies to such violence. This is most useful since it formulates the right and defines the corresponding obligation of the Mexican state.

<sup>1457</sup> OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraphs 43 and 57.

<sup>1458</sup> OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraphs 43 and 57.

<sup>1459</sup> OAS Report on the Situation of Women in Ciudad Juárez, *supra* note 369, at paragraph 11. *See also* part three of the OAS Report on the Situation of Women in Ciudad Juárez, beginning paragraph 57 (“The killing of women in Ciudad Juárez is strongly linked to and influenced by the prevalence of domestic and intrafamilial violence.”).

<sup>1460</sup> 2002 CEDAW report, *supra* note 210, at 206, paragraph 415.

which today facilitate the creation, funding and support of institutions, as few as they are, which assist victims of systemic intimate violence.

Therefore, the expression of facts and the articulation of norms are part of a process of factors, which operate together to bring relief to individuals. Expressing norms is not a panacea in and of itself. Rather the international discussion of a particular situation can expose the harm, import relief to the victims, and impose shame upon inert governments. Through incremental steps, the views of the international community seep into the activity of the state, improving its response to those in need.

In this way, the internationalization of violence against women in Mexico laid the foundation for recognizing the existence and seriousness of systemic intimate violence. The violence has not ended completely but the power of story telling exposes the pain of victims, informs potential powerful actors and brings the proverbial spotlight onto an otherwise invisible harm.

## 7. Implementing Function

### 7.1 Description

The second function of international law is the actualization or implementation of norms in national legal systems. Usually, the implementation of international principles occurs through a political process, which is fed by both internal and international influences.<sup>1461</sup>

The actualization of international law occurs as a result of a progression of factors: the first is the publication by TSMOs of events, which either are recognized as a contravention of international law or shock the conscience of humankind;<sup>1462</sup> these organizations propel sentiment and galvanize public reaction or outcries;<sup>1463</sup> This is followed either a change in state law and policy or litigation in international courts, tribunals or national courts.

As described above, international law may be implemented through so-called assimilative means.<sup>1464</sup> Assimilative techniques include holding conferences, working with grass roots agencies and discussing legislative and political changes with governments.

The increasing prohibition in national legal systems against FGC is an example of this process.

### 7.2 Application of the Expressive Function to FGC

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<sup>1461</sup> Boyle, *supra* note 806, at 729-730 (demonstrating that “the ruling elites of countries are playing to a larger global community as much as a local audience.”)

<sup>1462</sup> See Meron, *supra* note 536 (describing the new role of the media and the benefits of instant reporting from the field, which “has resulted in rapid sensitization of public opinion, greatly reducing the time lapse between the perpetration of such tragedies and responses to them.”)

<sup>1463</sup> This was the case in the world’s reaction to the genocides in Rwanda and Yugoslavia and the call for “Gender Justice.” See Green *et al*, *supra* note 107, at 175: “A pronounced international outcry for action to punish the perpetrators of these brutal abuses placed tremendous pressure on the U.N. to establish an international tribunal.”

<sup>1464</sup> For a discussion of these mechanisms, see Boyle, *supra* note 806, at 713-715.

Although individual organizations had struggled to combat FGC for many years, it was only during the UN Decade for Women, from 1975 to 1985, that the issue became global.<sup>1465</sup> The procedure of genital cutting captured the attention of the international community and individual nations. Details were revealed of non-remedial surgery, performed without anesthetic and with the use of non-sterilized, rudimentary instruments. The violence caused to girls' sexual organs and its range of side-effects, including death, 'shocked the conscience of humankind.'

The international admonishment, however, triggered an intense debate regarding cultural autonomy and individual rights. Moreover, it exacerbated tensions between so-called 'non-western' states and the international community. Local communities which practiced FGC were indignant at the judgment and outraged when the procedure was framed as child abuse and the parents, child abusers.

The volley of debate between international and local players revealed the need to approach the issue with greater respect and understanding for the context in which the cutting takes place. It became clear that in many communities, the cutting could not be abandoned since an uncut woman is unable to marry and an unmarried woman is an undesirable status quo. The consequences of this are severe, for both the individual and her family. Without a husband, a woman is unable to experience social or economic normalcy that typifies her community. The practice is linked inextricably to community acceptance and its absence makes participation in communal life untenable.<sup>1466</sup>

TSMOs recognized the component of the practice that binds women to the male members of their community for protection, support and respect.<sup>1467</sup> They realized that simple solutions and traditional legal remedies were inadequate. The search for effective mitigation culminated in the implementation of a number of more creative remedies: discussions are held between local religious and cultural leaders and local developmental organizations,<sup>1468</sup> alternative sustainable sources of income are created for women who do not want to undergo the procedure and are able to escape it; and, the internationalization of FGC has enabled women who fear circumcision to obtain asylum in the United States and other countries.<sup>1469</sup>

In the case of *In Re Kasinga*, the practice of FGC was acknowledged as a possible basis for asylum due to the results of permanent disfigurement and the "risk of serious, potentially life-threatening complications."<sup>1470</sup> Without the internationalization of FGC, it is unlikely that these steps, incremental as they may be, would have occurred.

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<sup>1465</sup> See Bowman, *supra* note 112, at [page 6]. See also KECK AND SIKKINK, *ACTIVISTS BEYOND BORDERS*, *supra* note 784, at 20 (describing the background of the campaign against FGC).

<sup>1466</sup> See Bowman, *supra* note 112, at [page 9].

<sup>1467</sup> See Annas, *supra* note 537, at 349-350.

<sup>1468</sup> See Bowman, *supra* note 112, at [page 9].

<sup>1469</sup> For a discussion of the relevant case law and legal requirements, see Patricia A. Armstrong, *Female Genital Mutilation: The Move Toward the Recognition of Violence against Women as a Basis for Asylum in the United States*, 21 MD. J. INT'L L. & TRADE 95 (1997) [hereinafter Armstrong].

<sup>1470</sup> See *In re Kasinga*, Interim Dec. 3278, 1996 WL 379826 (BIA June 13, 1996). The basis of the Board of Immigration's decision was that the claimant could not escape the FGC procedure and could not expect assistance from her government. See Annitto, *supra* note 905, at 795.

While the practice continues, legal and extra-legal improvements have taken place. As of the date of writing, most western countries and many of the 28 countries in which FGC is prevalent have outlawed the practice.<sup>1471</sup>

### 7.3 Application of the Expressive Function of International Law to Systemic Intimate Violence

An international norm against systemic intimate violence can be implemented in national legal systems in the following ways.

The first mechanism is the inculcation of new trends by governments in to their states' policies. States which adhere to the enforcement of international human rights will have the necessary guidance from international sources on how to respond to and assist in preventing systemic intimate violence.

The second mechanism is national litigation. Individuals or organizations can bring claims in national courts to compel their governments to take steps against systemic intimate violence as required by international law.

The third mechanism is that of advocacy. TSMOs are better able to advocate for the rights of systemic intimate violence victims if there is a clear international norm to which they can refer. This would lend greater 'legitimacy' to their requests to the private sector for project funding and to their engagement with government institutions.

The fourth mechanism is international aid. States and TSMOs may appeal for international assistance in the form of financial aid, educational resources, and general expertise. Such aid assists in the improvement of a state's institutions and is more readily available if there is an accepted international norm underlying the request.

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<sup>1471</sup> For a discussion of the legal status of FGC/M in various regions, see Bowman, *supra* note 112, at [page 4], citing the late president of Kenya and his view of FGC/M. For a discussion of the history of opposition to FGC, see Boyle, *supra* note 806, at 708-710. A similar phenomenon occurred in respect of acid burning in Bangladesh. In response to high profile cases of violence against women, which received considerable media attention, Bangladesh revealed to the CEDAW committee that "disagreements over dowry, which was not allowed under Islam, were a significant source of violence, which sometimes resulted in death. The Government of Bangladesh had enacted severe punishments, including execution for murder of the wife. Those recent laws followed sensational media coverage of some cases of disfigurement by acid and violence and had considerably decreased instances of abuse against women." CEDAW committee Forty-Second Session, *supra* note 587, at 75, paragraph 565. Acid burning was phenomenon in Bangladesh that received international attention in the late 1970s early 1980s. This exposure culminated in a 1997 workshop for survivors of acid attacks and international assistance for plastic surgery recovery: "Acid attacks have been on the rise in Bangladesh since the first was reported in 1976. Naripokkho, a Dhaka-based women's activist organization founded in 1983, began in 1996 to track acid violence reported in local papers. The number--47 that year--surged to 130 two years later. In April 1997, Naripokkho sponsored a workshop for acid survivors. Bina, then 15, was among nine participants: Selina, 11, was the youngest, and Monira, 18, the eldest. Six girls, including Bina, were burned in incidents involving rejected suitors--the most common scenario--while two were burned by their husbands for not obtaining larger dowries. When Nargis, 14, refused to become her neighbor's second wife, he sprayed her genitals with acid while she was in the bathroom that she and her brother shared with the neighbor's family." See <http://www.msmagazine.com/jun99/uppitywomen-jun.asp>.

Finally, individuals can use the existence of an international norm against systemic intimate violence to ground asylum claims. Enunciating the right in international law creates scope for protection through asylum claims. A great number of asylum seekers are turned away on the basis that domestic violence is not state conduct and, therefore, does not qualify as a basis for asylum. However, if the state component of systemic intimate violence is understood by immigration officials, asylum could provide a further avenue of safety for women who are unable to escape the system of systemic intimate violence.<sup>1472</sup>

This has already occurred to some extent in the United States, where domestic violence is listed as a type of harm peculiar to women in the INS guidelines.<sup>1473</sup> In 1996 there was a brief moment when the possibility of asylum for domestic violence victims seemed possible. In the initial hearing of Rodi Adali Alvarado-Pena's asylum claim, the immigration judge granted asylum on the basis that the claimant's husband had abused her physically, emotionally and sexually, and that she could not rely on protection from the authorities by virtue of her sex.<sup>1474</sup> Most importantly, the immigration judge determined that the claimant's husband believed that women were inferior to men and that by resisting her husband, she was challenging his opinion, thereby demarcating the violence as persecution on account of her political opinion and her membership to a particular social group.<sup>1475</sup>

The decision was reversed and the claim reopened under the Convention against Torture. As of the date of this writing, the matter remains undecided.<sup>1476</sup>

## 7.4 Analysis of Domestic Violence in Nicaragua Before and After DEVAW

### 7.4.1 Historical Background

The internationalization of the particularly high rate of systemic intimate violence in Nicaragua, led to the implementation of certain reforms, which arguably would not have occurred but for the global discussion of systemic intimate violence.

Nicaragua's recent history, from the poverty induced by the Cold War in the early sixties, to the 1979 overthrowing of the US-supported Somoza government by Soviet-supported

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<sup>1472</sup> See Megan Annitto, *Asylum for Victims of Domestic Violence: Is Protection Possible After In Re R-A-?*, 49 CATH. U. L. REV. 785 (2000) [hereinafter Annitto].

<sup>1473</sup> Considerations for Asylum Officers Adjudicating Asylum Claims from Women, printed in 72 Interpreter Releases 757, June 5, 1995, at 772, cited by Armstrong, *supra* note 902 at [PAGE 6].

<sup>1474</sup> Alvarado's husband had raped and beaten her repeatedly. "During their ten years of marriage, he had dislocated her jaw, attempted to cut her hands off with a machete, nearly pushed her eye out, broke windows and mirrors with her head, and kicked her in the abdomen. During a pregnancy, he 'attempted to forcefully abort their second child by kicking her in the spine.'" See *In re Alvarado*, No. A73-753-922, slip op. at 13 (Immigr. Ct., South African Francisco, Cal., Sept. 20, 1996), rev'd, *In re R-A-*, Interim Dec. 3403 (BIA 1999). For a discussion of this case, see Annitto, *supra* note 905, at 801-804.

<sup>1475</sup> *Id.*

<sup>1476</sup> See Watch Post, Volume 13, Issue 2, Spring 2005, available at <http://www.watchmn.org/pdfs/newsletterS05.pdf>. Former attorney general John Ashcroft decided to determine the case himself but resigned without deciding it, leaving her status in limbo.



Sandinistas, has had a duplicitous effect, both empowering women and leaving them increasingly them vulnerable.<sup>1477</sup>

Notwithstanding an emphasis on traditional gender roles, Nicaragua's 1979 conflict was characterized by the dynamic and effective role played by women, who constituted thirty percent of the guerilla force.<sup>1478</sup> However, after the rise to power of the Sandinista there was a decrease in the power, and commensurate rights, of women.<sup>1479</sup> Reports of a disquieting rate of violence against women increased, with many concluding that violence against women in Nicaragua was a major obstacle to development.<sup>1480</sup> Women at this point constituted approximately 88 per cent of the poor in Nicaragua and were subject to increasing bouts of violence.<sup>1481</sup>

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<sup>1477</sup> RHR Nicaragua Report, *supra* note 705, at 117. Concerned about leftist activities in Nicaragua, the United States sponsored anti-Sandinista contra guerillas through most of the 1980s. Free elections were held in 1990, 1996 and 2001, all of which saw the defeat of the Sandinistas. The country slowly started to stabilize in the early 1990s but was devastated by Hurricane Mitch in 1998. See the CIA World Factbook, Nicaragua, available at <http://www.cia.gov/cia/publications/factbook/geos/nu.html>. [Note: check citation format]

<sup>1478</sup> Nicaragua is a predominantly Catholic country, with role allocations between men and women based, in part, on a culture of so-called machismo. See CIA World Factbook, Nicaragua, available at <http://www.cia.gov/cia/publications/factbook/geos/nu.html> (explaining that the majority religion in Nicaragua is Roman Catholicism). See also RHR Nicaragua Report, *supra* note 705, at 17 (“The Nicaraguan women’s group, the Asociación de Mujeres Ante la Problemática Nacional (Association of Nicaraguan Women Confronting the National Problem, or AMPRONAC), was formed in 1977 to provide civilian support to the Sandinista platform. Women actively participated in the early Sandinista government; they also benefited from literacy and health campaigns, as well as from inclusion in cooperatives and unions” and the needs of women were targeted by specific quasi-government groups. *Id* 117-118)).

<sup>1479</sup> Later, in the government regime following the Sandinista rule, the once powerful Nicaraguan Institute for Women was transformed into the generic Ministry of the Family, which was criticized for “promoting the traditional nuclear family and discriminating against families headed by single mothers and common law mothers.” RHR Nicaragua Report, *supra* note 705, at 118. This decline in attention to women’s interests was compounded by the economic devastation following Hurricane Mitch in 1998. RHR Nicaragua Report, *supra* note 705, at 118.

<sup>1480</sup> In total, almost 30 percent of women who have been married at some point in their lives have experienced sexual or physical abuse. Over half of such women endured the abuse in front of their children and 36% while they were pregnant. Fifth Nicaraguan CEDAW Report, *supra* notex (“29 per cent of women who have been married at some time have suffered some form of physical or sexual abuse at some point during their lives, with 57 per cent of abused women saying that the children were present when the abuse occurred. Incidents of this kind, taking place in front of the children, occur more frequently in urban areas, accounting for 59 per cent of all those reported by interviewees.”) See RHR Nicaragua Report, *supra* note 705, at 118 (describing evidence that “sexual violence became an endemic feature of postconflict Nicaragua, exacerbated by men returning from the war to a weak economy and high rates of unemployment. The post-war phenomenon of violence against women was formally recognized in 1992, when Nicaragua hosted a National Conference for Women in which GBV [gender-based violence] was identified as one of the main problems facing Nicaraguan women. Between 1990 and 1994, the number of reported rapes rose by 21 percent, and the number of reported attempted rapes increased by 27 percent.”). It is also interesting to note that women seemed to play a high-profile role in the liberation from the conflict and it was thought that there would be greater equality as a result. The high incidence of violence was therefore both problematic given the numbers and stark given the expectations. See for example, CEDAW committee Forty-Second Session, *supra* note 587, at 37, paragraph 196 (“Regarding the comment that had been made on the tendency, in times of peace, for the progress achieved by women during wartime to slow down, the representative stated that she shared that opinion. Women themselves were aware of that tendency and were trying to raise the general awareness of the work they did, of women’s subordinate position and of the need for women to organize themselves to balance the unequal position of women and men. She referred to the active role that women had played during wartime, which had made women question their traditional roles and see the need to change their lives in accordance with reality.”).

<sup>1481</sup> The number of reported rapes between 1990 and 1994 rose by 21 percent. RHR Nicaragua Report, *supra* note 705, at 118. One of the reasons cited for the alarming increase in sexual violence was the exacerbation caused “by



## 7.4.2 Legal Status Quo

Nicaragua is a constitutional democracy.<sup>1482</sup> Article 24 of the Nicaraguan Constitution provides that every person has rights and duties within the family.<sup>1483</sup> Article 36 ensures respect for the physical, psychological and moral integrity of the individual.<sup>1484</sup> Article 48 ensures political equality and obliges the state to remove any obstacles that may hinder economic, political or social wellbeing.<sup>1485</sup>

Protection of the family is an important component of the Nicaraguan Constitution, probably a result of the socialist imperatives in its history. So-called family rights are guaranteed by Chapter IV of the Nicaraguan Constitution, which obliges the state and society to protect the family and requires equality within the family, including with respect to domestic work.<sup>1486</sup>

## 7.4.3 Rate of Domestic Violence

As is the case with many countries, the disjuncture between the rhetoric of equality and reality of violence is acute. Nicaragua's high rate of violence against women began to receive international attention in the early 1980s. By 1981, Nicaragua had signed and ratified CEDAW.<sup>1487</sup> In 1984 Nicaragua appeared before the CEDAW committee, which, in an unusual line of questioning, examined the unduly high level of gender-based violence.<sup>1488</sup>

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men returning from the war to a weak economy and high rates of unemployment.” RHR Nicaragua Report, *supra* note 705, at 118.

<sup>1482</sup> OMCT CEDAW Report on Nicaragua, *supra* note 123, at 7. The Nicaraguan Constitution, which is supreme law of the country, provides for an independent judiciary. See OMCT CEDAW Report on Nicaragua, *supra* note 123, at 9.

<sup>1483</sup> OMCT CEDAW Report on Nicaragua, *supra* note 123, at 9. Article 24 of the Constitution of Nicaragua states as follows: “Toda persona tiene deberes para con la familia, la comunidad, la patria y la humanidad. Los derechos de cada persona están limitados por los derechos de los demás, por la seguridad de todos y por las justas exigencias del bien común.” See <http://www.georgetown.edu/pdba/Constitutions/Nica/nica87.html>. This can be translated as “All persons have duties to their families, the community, the Homeland and humanity. The rights of each person are limited by the rights of others, the collective security and the just requirements of the common good.” Translation available at <http://www.leftjustified.com/leftjust/lib/sc/ht/wtp/nicaragu.html>.

<sup>1484</sup> OMCT CEDAW Report on Nicaragua, *supra* note 123, at 9.

<sup>1485</sup> OMCT CEDAW Report on Nicaragua, *supra* note 123, at 9.

<sup>1486</sup> See OMCT CEDAW Report on Nicaragua, *supra* note 123, at 9-10 (making reference to articles 70, 72 and 73).

<sup>1487</sup> On 17 July 1980 Nicaragua signed CEDAW and ratified it, without reservation, on 27 October 1981. See Parties who have signed and ratified CEDAW, available at <http://www.un.org/womenwatch/daw/cedaw/states.htm>. See also Parties who have entered reservations to CEDAW, available at, <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>. Nicaragua has not signed the Optional Protocol. See Signatures and Ratifications of the Optional Protocol, available at <http://www.un.org/womenwatch/daw/cedaw/protocol/sigop.htm>.

<sup>1488</sup> The CEDAW committee probed the Nicaraguan representative regarding the existence of “obsolete and discriminatory laws” and the remedial measures the country was taking to address the abuse of women and children. In response to the questions the representative stated that rape would be penalized with “a sentence of between 6 and 12 years, particularly when the rape was considered to have been extremely cruel. An amendment of that rule was under consideration. She said that refuges or shelters for abused women existed in three regions of the country, which provided such women with counseling and psychological support.” CEDAW committee Forty-Second Session, *supra* note 587, at 37, paragraph 195 and at 35, paragraph 174. In a separate question, the CEDAW committee requested information regarding “any measures that had been taken to prevent or reduce the abuse of

In 1992, the post-war phenomenon of violence against women was recognized as one of the main problems facing Nicaraguan women.<sup>1489</sup> This status quo continued well into the late 1990s, when the Nicaraguan government began to identify domestic violence as a serious health problem for women.<sup>1490</sup> The Nicaraguan government acknowledged that the “grave shortcomings affecting women’s access to justice”<sup>1491</sup> were due to domestic violence, the absence of a family code, cumbersome procedures, ignorance of the law, paternal irresponsibility and a delay in the payment of alimony.<sup>1492</sup>

#### 7.4.4 Post-1993 Change in Nicaraguan Law and Policy

After 1993, however, the legal landscape changed. The Nicaraguan government began to implement certain policy and legislative amendments.<sup>1493</sup> After DEVAW and Nicaragua’s ratification of the Convention of Belem Do Paragraph in 1995,<sup>1494</sup> Nicaragua adopted the 1996 Law against Aggression against Women, which criminalized domestic violence, imposed a sentence of up to six years and instituted the restraining order.<sup>1495</sup> Several modifications and additions were made to the generic Nicaraguan Penal Code (Law 230) regarding the prevention and punishment of family violence.<sup>1496</sup> In 1997 the Penal Code was reformed to prohibit family violence, including physical and psychological violence. The government established committees to combat violence against women.<sup>1497</sup>

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young girls and women, including domestic violence and sexual assault, alcoholism and drug abuse, and the care of the victims of those social ills.” CEDAW committee Forty-Second Session, *supra* note 587, at 36, paragraph 184. This line of questioning was not characteristic of the CEDAW committee and probably arose as a result of the international exposure of violence against Nicaraguan women. Because CEDAW itself has no provision relating directly to violence against women, before DEVAW no clear prohibition existed and the CEDAW committee spent little time on the issue of violence in its discussions. The closest references to violence against women probably inhere in article 6 regarding prostitution and the trafficking of women: “State parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”

<sup>1489</sup> RHR Nicaragua Report, *supra* note 705, at 118. Notwithstanding, marital rape was not criminalized. RHR Nicaragua Report, *supra* note 705, at 118 (The rape laws were limited in that they did not apply to husbands, awarded paternity rights to rapists and sentences were as short as nine months).

<sup>1490</sup> Fourth Nicaraguan CEDAW Report, *supra* note, at 15. The Fifth Nicaraguan CEDAW Report describes the government’s focus on violence as a health problem in an attempt to mainstream gender issues. See Fifth Nicaraguan CEDAW Report, *supra* note 913, at 22.

<sup>1491</sup> Fifth Nicaraguan CEDAW Report, *supra* note 913, at 21.

<sup>1492</sup> Fifth Nicaraguan CEDAW Report, *supra* note 913, at 21-22.

<sup>1493</sup> The National Commission against Violence, an inter-institutional governmental agency was created in 1990 by government decree. UN 1998 Nicaragua Report, *supra* note 197, at 2.

<sup>1494</sup> Nicaragua has signed and ratified the Convention of Belem Do Para on June 9 1994 and October 6 1995. See General Information on the Convention of Belem Do Para available at <http://www.oas.org/juridico/english/Sigs/a-61.html>.

<sup>1495</sup> RHR Nicaragua Report, *supra* note 705, at 119.

<sup>1496</sup> UN 1998 Nicaragua Report, *supra* note 197, at 2. This was confirmed in 2001 when the representative of Nicaragua to the CEDAW committee made reference to draft revisions to the penal and family codes, which aimed to remove discriminatory provisions (which later became law). 2001 Nicaragua CEDAW Report, *supra* note 929. The CEDAW committee also applauded Nicaragua for its success in this regard. 2001 Nicaragua CEDAW Report, *supra* note 929, at 74, paragraph 292.

<sup>1497</sup> This included the 1999-2001 Strategic Plan of the Nicaraguan Institute for Women, a steering agency for public policy on women, whose principal mandate is the fight against violence directed against women. The National Commission against Violence was charged with the preparation of a National Plan against Violence Toward

For the most part, NGOs played a distinct role in exposing the extent of the problem and instigating legislative change, awareness raising campaigns and lobbying efforts.<sup>1498</sup> NGOs were also responsible for establishing shelters and services for survivors of domestic violence.<sup>1499</sup> In addition, Nicaragua developed a strong male-focused movement to reduce violence against women, offering training workshops on machismo and its connection to violence against women.<sup>1500</sup>

Towards the end of the 1990s, various government institutions adopted strategies to reduce violence against women, including the National Police Force,<sup>1501</sup> the Ministry of Health<sup>1502</sup> and the Ministry of the Family, which was responsible for formulating and coordinating government policy relating to the strengthening of the family unit.<sup>1503</sup> Nicaragua established the Nicaraguan Institute for Women as the national machinery charged with formulating and promoting public policies vis-à-vis women.<sup>1504</sup>

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Women, involving the integration of judicial, legislative and executive powers. UN 1998 Nicaragua Report, *supra* note 197, at 2.

<sup>1498</sup> RHR Nicaragua Report, *supra* note 705, at 119 (“most of the long-standing programming has been the result of action by local NGOs.”)

<sup>1499</sup> RHR Nicaragua Report, *supra* note 705, at 119.

<sup>1500</sup> RHR Nicaragua Report, *supra* note 705, at 120.

<sup>1501</sup> The police force established Consultative Council on Gender and the Commissariats for Women and Children to apply specific policy for addressing gender-based violence. UN 1998 Nicaragua Report, *supra* note 197, at 2. In 1995 the national police force established the Office for Women and Children, which involved the creation of a Central Coordinating Office, the purpose of which was to implement the objectives of the Office for Women and Children and to coordinate with the Nicaraguan Institute for Women. The Central Office became operational in 1997 and it was charged with the provision of “special care for cases of physical, emotional or sexual violence against women and children, through the criminal investigations department.” Fifth Nicaraguan CEDAW Report, *supra* note 913, at 35.

<sup>1502</sup> The Ministry of Health had a department called the Department of Comprehensive Attention for Women, which conducts an Intrafamily Violence Program (1990). UN 1998 Nicaragua Report, *supra* note 197, at 2. In the 1998 Demographic and Health Survey, a questionnaire based on specific methodological guidelines, was given to one woman, who was either married or had been married, from each home. The objective of the questionnaire was to assess the extent of violence against women. Fifth Nicaraguan CEDAW Report, *supra* note 913, at 31. (“Special methodological guidelines were followed in order to obtain this information, with respect both to the training of staff conducting the survey and to the procedures to be followed by interviewees and interviewers in the homes of women affected by this problem.”). Within certain regions (in León and Managua), the study revealed that on average half the women who had been married at some point had suffered some form of physical or sexual abuse. Within the preceding year, 25% of women had suffered some form of physical or sexual abuse. Fifth Nicaraguan CEDAW Report, *supra* note 913, at 31.

<sup>1503</sup> UN 1998 Nicaragua Report, *supra* note 197, at 2.

<sup>1504</sup> 2001 Nicaragua CEDAW Report, *supra* note 929, at 73, paragraph 280. This institute was formed in recognition of domestic violence “as a violation of the right to life and the right to security of person” Fourth Nicaraguan CEDAW Report, *supra* note 923, at 17. For a more detailed account of the advances made by the Nicaraguan Institute for Women, see Fifth Nicaraguan CEDAW Report, *supra* note 913, at 35-36. While the entity responsible for domestic violence remained the Ministry for the Family, it did spearhead some successful activities and advances, including the creation of “the Women’s Anti-Violence Network, an association that brings together organizations of civil society working to combat violence, the National Coordinator of NGOs working with children and young persons, the Ministry of Health, the Ministry of Education, INATEC, and the three State Authorities. This led to the creation of the National Commission on Violence against Women, Children and Young Persons.” Fifth Nicaraguan CEDAW Report, *supra* note 913, at 34. This was detailed in the 2001 CEDAW committee report: “The Government had created offices for women and children, as a result of the cooperative effort by the Nicaraguan Institute for Women, the Women’s Anti-violence Network, the secretariat of the National Plan to

In 1998 the National Commission on Violence against Women was created to plan and implement solutions, which would coordinate all government departments.<sup>1505</sup> The various agencies remain in the process of improving the political, technical and methodological conditions needed to implement this project.<sup>1506</sup> These advances realized material, albeit limited improvements for victims of systemic intimate violence.<sup>1507</sup>

In 2001, once again before the CEDAW committee, Nicaragua acknowledged the disproportionate effect of poverty on women and the harmful social and cultural perceptions of “machismo,” which had impeded the implementation of CEDAW.<sup>1508</sup> While, the non-equivalent roles of men and women undermined the legislative developments adopted by the government,<sup>1509</sup> Nicaragua claimed that since its adoption of CEDAW, the role of women had advanced, especially in light of the development of the country as a whole.<sup>1510</sup>

The substance of Nicaragua’s 2001 presentation to the CEDAW committee evidences an advanced understanding of systemic intimate violence. It notes the contradiction between the perception of the home as a place of safety and the destructive reality of a “climate of tension and aggression within the family [which] destroys the family’s meaning as a place of protection,

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Prevent Domestic and Sexual Violence (2001-2006) and the National Commission on Violence against Women, Children and Young Persons to address the problem. The Penal Code had also been reformed to provide greater protection for victims and women police stations (comisarias) had been established to combat gender violence. 2001 Nicaragua CEDAW Report, *supra* note 929, at 74, paragraph 292. Trafficking in all its forms was also prohibited by article 40 of the Constitution. 2001 Nicaragua CEDAW Report, *supra* note 929, at 73, paragraph 285. It seems the project was a cross-disciplinary effort, bringing together the police, judiciary and other non-governmental organizations, in recognition that “the problem [of domestic violence] was the responsibility not only of the Government but of society as a whole.” Fourth Nicaraguan CEDAW Report, 17. According to this report, the results of the institutional efforts “led the Government of Nicaragua, civil society, the judicial authority and external partners to support the extension of this project to other areas of the country, such as Estelí, Matagalpa, Masaya and Granada.”

<sup>1505</sup> Fifth Nicaraguan CEDAW Report, *supra* note 913, at 6. The Commission, which consists of a number of governmental and non-governmental organizations, was established to “help prevent, punish, and eradicate violence against women and children, with particular emphasis on intra-family and sexual violence, by institutionalizing effective coordination between the State and civil society with the creation of the National Commission on Violence, which will ensure that this problem is comprehensively addressed through the creation of a National Plan on Violence against Women, Children and Young Persons.” For a more detailed description of the Commission’s responsibilities, see the Fifth Nicaraguan CEDAW Report, *supra* note 913, at 37. At the end of 1998, Nicaragua began formulating this plan. Fifth Nicaraguan CEDAW Report, *supra* note 913, at 34.

<sup>1506</sup> Fifth Nicaraguan CEDAW Report, *supra* note 913, at 35-6.

<sup>1507</sup> The institutions “provided Nicaraguan women and children with a professional body which recognizes their rights and offers expertise in all cases of rape and physical abuse... The centres typically provide support to women who register their complaints. This successful work is accompanied by awareness and prevention campaigns in the media so that society, and especially women and children, will know when they are victims of physical or sexual abuse.” Fourth Nicaraguan CEDAW Report, *supra* note 923, at 17.

<sup>1508</sup> 2001 Nicaragua CEDAW Report, *supra* note 929, at 74-75 (expressing concern regarding the fact that men have replaced women in both the private and public sectors and are earning three times more than women).

Notwithstanding the activities of women during the 1979 battle for independence, the notion of “machismo” continued to dominate both public and private life. 2001 Nicaragua CEDAW Report, *supra* note 941, at 74.

<sup>1509</sup> 2001 Nicaragua CEDAW Report, *supra* note 941, at 74.

<sup>1510</sup> Fifth Nicaraguan CEDAW Report, *supra* note 913, at 4. While there was a lack of statistical data disaggregated by sex, Nicaragua had disseminated a handbook “explaining the provisions of the Convention.” 2001 Nicaragua CEDAW Report, paragraph 287-290, page 74.

security and support.”<sup>1511</sup> In its fourth and fifth CEDAW reports, Nicaragua describes domestic violence as a violation of the right to security of the person and the right to equality respectively, revealing that “intra-family violence and sexual crimes were the leading forms of crime in 1998.”<sup>1512</sup> The Nicaraguan representative acknowledged the isolation inherent in systemic intimate violence and the debilitating effects of the process of psychological and physical harm,<sup>1513</sup> factors which had led Nicaragua to develop a National Plan for the Prevention of Domestic and Sexual Violence 2001- 2006.<sup>1514</sup>

The Nicaraguan representative admitted to and explained the limitations to its efforts to reduce systemic intimate violence,<sup>1515</sup> claiming that the criminalization of domestic violence and the penalization of abusers, “led to a new openness in discussing and condemning domestic and sexual violence on the part of the Government.”<sup>1516</sup>

The Nicaraguan representative described some of the advances the government had made in addressing systemic intimate violence. There had been an increase in the role of female professionals and specialists with a scientific background in disseminating information regarding violence against women.<sup>1517</sup> A national program of offices for women and children had been created “to meet the needs of all those women who now have the courage to report situations of violence.”<sup>1518</sup> There were ten national offices funded by the Nicaraguan Institute for Women and

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<sup>1511</sup> The violence “affects the mental and emotional health of family members and their capacity to socialize with one another, and very often leads to the break-up of the family.” Fifth Nicaraguan CEDAW Report, *supra* note 913, at 30. The representative of Nicaragua commented specifically on domestic violence, pointing out that “domestic violence affected a large number of women in Nicaragua.” 2001 Nicaragua CEDAW Report, paragraph 285, page 73.

<sup>1512</sup> Domestic violence was addressed within the Fourth Nicaraguan CEDAW Report in the context of the right to the security of person. Fourth Nicaraguan CEDAW Report, *supra* note 923, at 17. The Fifth Nicaraguan CEDAW Report describes intra-family violence as “a phenomenon that affects all women around the world. It is based mostly on unequal relations between men and women, and is an expression of men's power over women. The violence is manifested at every level, whether economic, political, or social. It affects the entire family, but especially women, at every stage of their lives.” Fifth Nicaraguan CEDAW Report, *supra* note 913, at 30. According to the national police force, 7 66,064 crimes were recorded in the country as a whole. This was 3,436 more than in 1997, representing an increase of 5.5 per cent.” While property crimes made up the bulk of the reported criminal activity, “25,800 crimes against persons were recorded. The report refers to 15,820 cases of injury, of which 36 per cent were the result of intra-family violence, and of which 5,771 cases occurred in the family home. Most incidents took place on a Saturday or Sunday, and the aggressors were mostly drunk or under the influence of drugs at the time of the incidents.” Fifth Nicaraguan CEDAW Report, *supra* note 913, at 30.

<sup>1513</sup> This highlights the fact that due to the intimacy of the violence, there is often no escape from it and the home is not the place of safety we would like it to be. This is confirmed by the statement that “Nicaraguan homes are scenes of intra-family violence and sexual crimes.” Fifth Nicaraguan CEDAW Report, *supra* note 913, at 30. The Fifth CEDAW report states that, in Nicaragua, “the psychological consequences of intra-family violence have not been satisfactorily evaluated, because we lack the forensic and medical psychologists able to conduct such an evaluation. Most evaluations of the problem refer only to the physical consequences, but all physical abuse necessarily involves psychological abuse.” Fifth Nicaraguan CEDAW Report, *supra* note 913, at 30.

<sup>1514</sup> 2001 Nicaragua CEDAW Report, *supra* note 941, at 74, paragraph 292.

<sup>1515</sup> The Fourth and Fifth Nicaraguan CEDAW Reports acknowledged that there were contradictions and flaws within the legislation that impeded women’s full access to justice, including as regards domestic violence. Fourth Nicaraguan CEDAW Report, *supra* note 923, at 8 and Fifth Nicaraguan CEDAW Report, *supra* note 913, at 21.

<sup>1516</sup> Fourth Nicaraguan CEDAW Report, *supra* note 923, at 17.

<sup>1517</sup> Fourth Nicaraguan CEDAW Report, *supra* note 923, at 16.

<sup>1518</sup> Fifth Nicaraguan CEDAW Report, *supra* note 913, at 35.

eight offices funded by local initiatives.<sup>1519</sup> The state had also published police training manuals, entitled “Gender Violence and Citizen Security.”<sup>1520</sup> Perhaps the most pertinent development was Nicaragua’s emphasis on the role of women and civil society in developing remedies to domestic violence.<sup>1521</sup>

## 7.5 Evaluation

After DEVAW, Nicaragua improved its legislation and policies in respect of violence against women. However, systemic intimate violence persists. In part, this is due to Nicaragua’s poverty and the fact that many state institutions prioritize needs other than gender-based violence. In addition cultural reform, vis-à-vis gender roles, has been slow. This could be due to a rejection of western ideology, which, given the United States’ involvement in Nicaragua, is not improbable. Whatever the reason, though, the health and wellbeing of women is not a priority in many Nicaraguan communities. The state itself seems to have taken legislative steps to embrace women’s rights but the extent to which this has been backed up by resources is uncertain. Within this state of flux, international organizations and institutions continue to research, expose and help mitigate the very high level of systemic intimate violence against women in Nicaragua.

However, one cannot ignore the progress from the 1981 silence to the current day emphasis on systemic intimate violence in Nicaragua. The result of this emphasis is a slow but meaningful shift in the internalization of the norm against systemic intimate violence.

## 8. Expansive Function of International Law

### 8.1 Description

The third function of international law is its role of expanding rights and concomitant obligations. Certain acts of harm exist for which we have deficient language and law. These types of harm are peculiar and manifest in ways which appear to be remediable by existing law but in truth are not. They therefore fall outside the purview of existing laws and the harm continues without restraint. International law identifies such harm and develops appropriate restraints to prevent it.

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<sup>1519</sup> The report does not explain what services are provided by the offices but claims that the program “is highly pertinent to our country’s needs, representing a timely response to the problem of gender violence and intra-family violence that affect thousands of Nicaraguan families.” Fifth Nicaraguan CEDAW Report, *supra* note 913, at 35.

<sup>1520</sup> Fifth Nicaraguan CEDAW Report, *supra* note 913, at 38. This project was funded through the use of German aid. The texts are divided into five parts, namely, gender as a category for analysis for the police as an institution; the modernization of the police as an institution; gender and challenges to citizen security; gender violence; and police intervention in gender-based violence. *Id* at 38.

<sup>1521</sup> Fourth Nicaraguan CEDAW Report, *supra* note 923, at 19. See also page 58 of the Fifth Nicaraguan CEDAW Report (noting “the influence of the women university lecturers, professionals and specialists who have carried out research on women’s issues such as abuse, violence, laws that discriminate against women, the effect of adjustment policies, strategies adopted by women in response to the various development models, methods of training women, the evaluation of gender-based projects, the organization of projects of benefit to women, etc. This has all led to the publication of a great variety and number of documents on women’s issues, which are available at the Centre for Documentation on Women (CEDIM), at university and government documentation centres, and through NGOs.”).

For example, in certain circumstances, “[w]hen a government violates or refuses to recognize rights, individuals and domestic groups often have no recourse within domestic political or judicial arenas. They may seek international connections finally to express their concerns and even to protect their lives.”<sup>1522</sup> International law, through the efforts of TSMOs, creates a crime that otherwise would not exist so that the conduct in question is better addressed by national laws.

The expansive function of international law, together with “... the effects of transnational activism within domestic politics may be [its] most important function. Transnational advocacy networks can help resource-poor actors construct new *domestic* movements out of combinations of indigenous and imported materials.”<sup>1523</sup>

An example of this is the internationalization of enforced disappearances.

## 8.2 Application of the Expansive Function to Enforced Disappearances

Enforced disappearances are a peculiar harm, placing it outside the web of national legal mechanisms. While its occurrence has taken place historically, it has only recently been addressed by international law, which, through the process discussed below, has expanded: (1) the understanding of the rights violated by the crime of enforced disappearances; and, (2) the concomitant state obligation in respect thereof.

The expansion of international human rights law to include a prohibition against enforced disappearances was initiated predominantly by the events in Argentina after the military coup in 1976.<sup>1524</sup> From 1976 to 1983 the so-called Dirty War in Argentina resulted in the disappearance of over 9000 people (although many claim the figure is closer to 30 000). At the time, no label existed for the curious events comprising enforced disappearances: individuals were arrested or kidnapped based on allegations of political dissidence; no trials were held; and, when relatives and friends inquired after the detainee, the official state response was ignorance.

No legal remedies existed: the law against summary execution did not apply since there was no evidence that the disappeared individual had been killed; since an essential element of enforced disappearances is government denial of the abduction, “habeas corpus relief and other institutional safeguards to protect individuals from abuse are rendered completely ineffective;”<sup>1525</sup> and, often, attempts to obtain information about the disappeared were met with intimidation, creating an environment of fear for those left behind. Existing laws, therefore, were rendered nugatory.

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<sup>1522</sup> Keck and Sikkink, *Activists Beyond Borders*, extracts, *supra* note 777, at 221.

<sup>1523</sup> TARROW, *supra* note 752, at 177.

<sup>1524</sup> Keck and Sikkink describe the activities of Amnesty International in demonstrating that “disappearances were part of a deliberate government policy by which the military and the police kidnapped perceived opponents, took them to secret detention centers where they tortured, interrogated, and killed, then secretly disposed of their bodies.” Keck and Sikkink, *Activists Beyond Borders*, extracts, *supra* note 777, at 223-227. Amnesty International teamed up with music artists U2, resulting in U2’s rendition of the actions of the Mothers of Plaza De Mayo in the song “One Tree Hill.” *[Note: citation to follow]*

<sup>1525</sup> Mendez & Miguel, *supra* note 539, at 511.

Over time, however, an equally curious response emerged: the mothers of the disappeared, finding no assistance from the authorities, turned to the world in what became a weekly parade, held for the first time in the Plaza De Mayo. The women, who became known as the Mothers of Plaza De Mayo, rallied with signs asking the outside world to help because “[e]very place is closed to us. Everywhere they shut us out. We beg you to help us. We beg you.”<sup>1526</sup> International organizations, individuals and governments responded.<sup>1527</sup>

“Framing” the harm in the manner described above, resulted in an increased understanding of the peculiar manifestation of enforced disappearances, for which no legal remedy existed.<sup>1528</sup> Knowledge of the facts and an understanding of the harm led to international discussions, with the result that the internationalization of enforced disappearances gave a label to a previously amorphous phenomenon.

This led to the creation of the Inter-American Convention on Enforced Disappearances, which defined enforced disappearances as:

the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.<sup>1529</sup>

One of the seminal changes brought about by the expansion of law, was the recognition of the harm caused by the government’s *failure* to act, and not only by the initial positive conduct of abduction. Therefore, in the case of disappearances, the government is responsible not only for its actions, but also for its *inaction* and failure to take appropriate steps to remedy the array of violations triggered by the initial abduction.

In the landmark case of *Velásquez Rodríguez v. Honduras*, the Inter-American Court of Human Rights enunciated the due diligence standard in relation to governments’ obligations vis-à-vis their citizens.<sup>1530</sup> In response to the claims of enforced disappearances, the court held that the relevant acts of the public authorities consisted not the only in the state’s positive acts. It held that:

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<sup>1526</sup> See CNN World News Story Page, *Argentina’s Dirty War: An Ugly Episode that Won’t Die*, available at <http://www4.cnn.com/WORLD/9803/02/argentina.dirty.war/>.

<sup>1527</sup> “The Mothers of the Plaza de Mayo marched in circles in the central square in Buenos Aires wearing white handkerchiefs to draw symbolic attention to the plight of their missing children. The [transnational] network also tried to use both material and moral leverage against the Argentine regime, by pressuring the United States and other governments to cut off military and economic aid, and by efforts to get the UN and the Inter-American Commission on Human Rights to condemn Argentina’s human rights practices.” KECK AND SIKKINK, *ACTIVISTS BEYOND BORDERS*, *supra* note 784, at 17.

<sup>1528</sup> For a discussion of the importance and efficacy of properly ‘framing’ an issue see KECK AND SIKKINK, *ACTIVISTS BEYOND BORDERS*, *supra* note 784, at 17 & 27.

<sup>1529</sup> Article II of the Inter-American Convention on Enforced Disappearances, *supra* note 209.

<sup>1530</sup> *Velásquez Rodríguez* case, *supra* note 408, at paragraph 79 (indicating that the Honduran government and judicial officers did not act with due diligence).



[a]n illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.”<sup>1531</sup>

This case began a course of jurisprudence, which, while developing slowly, is providing a framework within which litigants, activists and victims can claim relief from both national and international facilities.<sup>1532</sup>

The lobbying and information-sharing on enforced disappearances led to the realization by the U.N. that the existing prohibitions against imprisonment, detention and extra-legal, arbitrary and summary executions were deficient.<sup>1533</sup> For this reason, the UN proclaimed the Declaration on the Protection of all Persons from Enforced Disappearance, “as a body of principles for all States”<sup>1534</sup> and urged “that all efforts be made so that the Declaration becomes generally known and respected.”<sup>1535</sup> It acknowledged the need to expand the provisions of international law vis-à-vis enforced disappearances because:

while the acts which comprise enforced disappearance constitute a violation of the prohibition found in the [other] international instruments, it is none the less important to devise an instrument which characterizes all acts of enforced disappearance of persons as very serious offences and sets forth standards designed to punish and prevent their commission.<sup>1536</sup>

In addition, the UN Human Rights Commission established the Working Group on Enforced or Involuntary Disappearances,<sup>1537</sup> which has become a global authority on enforced

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<sup>1531</sup> Velásquez Rodríguez case, *supra* note 408, at paragraph 172. This was confirmed in the case of *Hector Perez Salazar v. Peru*, *supra* note 544, at paragraph 28 (“This situation of impunity is incompatible with the State’s general obligation to respect and protect human rights. The jurisprudence of the Inter-American Court of Human Rights holds in this regard that the State has the legal duty to use the means within its reach to seriously investigate violations committed within its jurisdiction, in order to identify those responsible, impose the appropriate punishment, and ensure the victim adequate compensation.”).

<sup>1532</sup> An example of a relatively successful outcome is *Trujillo Oroza v. Bolivia* Judgment of 26 January 2000 before the Inter-American Court of Human Rights. In January 2000, at a public hearing Bolivia formally acknowledged its responsibility for the disappearance in question and apologized to the mother of the victim. It also indicated that it was in the process of amending domestic legislation to prevent the recurrence of such events in the future. For a discussion of this see [http://www.javier-leon-diaz.com/docs/Enforced\\_Case\\_Law.htm](http://www.javier-leon-diaz.com/docs/Enforced_Case_Law.htm).

<sup>1533</sup> See Preamble to the Preamble to the U.N. Declaration on Enforced Disappearances, *supra* note 542, referring to the “Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment ... contained in the annex to its resolution 43/173 of 9 December 1988, and with the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, set forth in the annex to Economic and Social Council resolution 1989/65 of 24 May 1989 and endorsed by the General Assembly in its resolution 44/162 of 15 December 1989.

<sup>1534</sup> See Preamble to the U.N. Declaration on Enforced Disappearances, *supra* note 542.

<sup>1535</sup> See Preamble to the U.N. Declaration on Enforced Disappearances, *supra* note 542.

<sup>1536</sup> Preamble to the Preamble to the U.N. Declaration on Enforced Disappearances, *supra* note 542.

<sup>1537</sup> The Working Group on Enforced and Involuntary Disappearances (WGEID) was established in 1980 by Commission on Human Rights resolution 20 (XXXVI). See <http://www.ohchr.org/english/issues/disappear/>.

disappearances and its mandate includes assisting families of individuals who have been ‘disappeared.’<sup>1538</sup>

International law, propelled by TSMOs, international bodies and local organizations, expanded existing international law to include enforced disappearances. The internationalization of enforced disappearances has not compelled governments to produce disappeared dissidents; nor will it prevent enforced disappearances from happening, no doubt, repeatedly. However, by expanding the legal notion of enforced disappearances, the structure of remedies increased, resulting in the channeling of resources and extra-state assistance for the individuals affected by the violation.

Expanding international law did not bring a cure to the crime; however, this is not necessarily the objective of international law. Its purpose includes the collaboration of powers to assist individuals who are vulnerable within their state. Therefore, notwithstanding that the working group has settled few cases, it is a significant presence in preventing new cases of disappearances and, at times, assisting in saving human lives.<sup>1539</sup>

### 8.3 Application of the Expressive Function of International Law to Systemic Intimate Violence

Systemic intimate violence and enforced disappearances are forms of harm which have peculiar qualities. These qualitative quirks, as discussed above, preclude the effective application of existing national laws. New policy and legislative mechanisms are required to circumvent these difficulties.

The expansive nature of international human rights law has benefited systemic intimate violence in a manner similar to that achieved in respect of enforced disappearances. This is evident in the approach of Sweden to systemic intimate violence and the creation of the crime against the integrity of women in Sweden.

### 8.4 Analysis of Domestic Violence in Sweden Before and After DEVAW

Historically, Sweden has taken an active position opposing gender discrimination. It was one of the first states to sign and ratify CEDAW (in 1980), objecting to several reservations made by

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<sup>1538</sup> See UNHCHR Fact Sheet No. 6, *supra* note 544.

<sup>1539</sup> See UNHCHR Fact Sheet No. 6, *supra* note 544 (“Nevertheless, the extent to which the Working Group, through its patient and persistent contacts with the Governments concerned, may have prevented more cases from occurring cannot be quantified. The fact that it was able to contribute to the clarification of cases, especially within the framework of its urgent action procedure ... and thus possibly to the saving of human lives, has been considered sufficient reason for its continued activity. Moreover, the mechanism of the Working Group should be seen as a reflection of international concern and action. It should equally be seen as forming part of a long-term process leading to the elimination of major human rights violations, a process which includes the creation of widespread public awareness of human rights-related issues and the provision of advisory services and technical assistance to Governments for the promotion and protection of human rights.”)

other state parties.<sup>1540</sup> However, in its 1984 report to CEDAW, Sweden made almost no reference to violence against women. While the CEDAW committee requested information regarding rape and battering, Sweden did not supply this information in its response.<sup>1541</sup>

In 1993, one year prior to DEVAW, Sweden once again appeared before the CEDAW committee.<sup>1542</sup> This time it described significant advances in respect of domestic violence.<sup>1543</sup> Sweden had enacted the new Equal Opportunities Act in 1992, which established a five year plan to achieve equality, recognizing that “[v]iolence, battering and other forms of physical abuse against women were considered to be serious expressions of the lack of equality and imbalance of power.”<sup>1544</sup> The Act also catered for the training of professional personnel such as police officers, judges, doctors and social welfare officers and improving coordination between the authorities at the local and regional levels.<sup>1545</sup> The most impressive component of the Act was the allocation of funds to the police to “provide technical equipment and bodyguards for women who were subjected to threats of violence.”<sup>1546</sup>

Since the beginning of the 1990s, Sweden has increased the number of protection orders, created government institutions and committees to examine and understand the permutations of violence against women, and passed some of the most progressive and insightful legislation in respect of systemic intimate violence. Possibly the most progressive legal provision is the

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<sup>1540</sup> Sweden signed CEDAW on 7 March 1980 and ratified it on 2 July 1980. *See* Parties who have signed and ratified CEDAW, available at <http://www.un.org/womenwatch/daw/cedaw/states.htm>. *See also* Parties who have entered reservations to CEDAW, available at, <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>. Sweden signed the CEDAW Optional Protocol on 10 December 1999 and ratified it on 24 April 2003. *See* Signatures and Ratifications of the Optional Protocol, available at <http://www.un.org/womenwatch/daw/cedaw/protocol/sigop.htm>.

<sup>1541</sup> CEDAW Thirty-Ninth Session, *supra* note 798, at 33, paragraphs 217.

<sup>1542</sup> CEDAW Concluding Observations: Sweden, *supra* note 119, at paragraphs 474 – 522. The CEDAW committee presented questions to the representative of Sweden regarding violence against women, and particular they asked about “the incidence of violence, statistics on the subject and recent trends, as well as the most frequent forms of violence...” CEDAW Concluding Observations: Sweden, *supra* note 119, at, paragraph 500. The representative stated that 14,285 cases of assault had been reported in 1991. The response demonstrated sensitivity to the lack of adequate statistics, due in part to the reluctance of victims to report incidences of abuse. CEDAW Concluding Observations: Sweden, *supra* note 119, at, paragraph 500: “There had been limited, inconclusive research on the reasons for male aggression, but there was a consensus that the overall explanation lay in the lack of equality and imbalance of power between men and women.”

<sup>1543</sup> Moreover, at this stage it is also clear that the CEDAW committee has a somewhat more holistic approach to violence, stating that “In a time of changing social patterns, the key questions were how to change the violent pattern of male behaviour and how to reach suffering women.” The CEDAW committee in fact suggested that a survey should be conducted among the battered women themselves. It is unclear entirely what this would involve. *See* Cedaw Concluding Observations: Sweden, *supra* note 119, at paragraph 501.

<sup>1544</sup> Cedaw Concluding Observations: Sweden, *supra* note 119, at, paragraph 480. The Act came into force in Sweden on 1 January 1992. Cedaw Concluding Observations: Sweden, *supra* note 119, at paragraph 477.

<sup>1545</sup> Cedaw Concluding Observations: Sweden, *supra* note 119, at paragraph 480.

<sup>1546</sup> Cedaw Concluding Observations: Sweden, *supra* note 119, at paragraph 480. If it was indeed carried out, it would contrast notably with the decision of the New York Supreme Court in the Riss case, *supra* note 679 (although this was in 1968). A somewhat less ideal provision is the increase of penalties for crimes of trivial assault from a fine to imprisonment for up to six months and the sentence for aggravated assault was at least one year and at the most 10 years. Provided that the period of incarceration is discretionary, this would be an improvement on the mere issuing of a fine, which is inherently disproportionate to the harm involved. On the other hand, however, incarceration is often problematic as is described in chapter four below. Cedaw Concluding Observations: Sweden, *supra* note 119, at paragraph 480.

revision of the Swedish Penal Code: Law on Gross Violation of Integrity and Gross Violation of a Woman's Integrity, intended to raise the "penalty value of acts which, viewed separately, are relatively minor but when repeated may lead to substantial violation of the victim's integrity."<sup>1547</sup> The Social Services Act was amended to oblige social services to facilitate a change of situation for women who have been subject to violence in their home.<sup>1548</sup> Sweden's laws makes provision for the protection of personal data to ensure the abused can retain her information and prevent the abuser from accessing her information and, most importantly, from finding out her whereabouts.<sup>1549</sup>

Notwithstanding these advances, however, the trend of violence in Sweden remained constant.<sup>1550</sup> To improve this situation, at the conclusion of the 1993 session, the CEDAW committee suggested that the Swedish government forge closer ties with grassroots organizations and facilitate the reporting of the violence.<sup>1551</sup>

In 1993, the Government of Sweden went on to appoint a Commission on Violence against Women, to review issues pertaining to violence against women and in particular "to present its proposals from a female perspective."<sup>1552</sup> The Commission proposed the establishment of a national center for battered and raped women.<sup>1553</sup> In response, the government allocated funds for the establishment of such a center, approximately 70 kilometers north of Stockholm, to provide "medical examination, treatment and support to women subjected to violence as well as

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<sup>1547</sup> The crime takes account of "the changes which a woman gradually experiences while being subjected to violence and of the fact that violations which may seem fairly minor when viewed separately have a grave negative effect on a woman when they are part of a process, thus meriting severe punishment." Captured Queen Report, *supra* note 123, at 13. AMNESTY INTERNATIONAL, INTIMATE VIOLENCE IN SWEDEN, *supra* note 98, at 20. The number of "visiting bans granted against men increased from 62 in 1988 to 2 295 in 1999. Captured Queen Report, *supra* note 123, at 12. The visiting ban was "imposed for the purpose of protecting people from harassment and persecution, 'particularly women who are being subjected to assault and other abuse.'" The Swedish government appointed a committee to "scrutinize all sex crime legislation, materially, systematically and technically, partly as a result of the Commission's comments concerning the lack of protection for women and children exposed to violence." Captured Queen Report, *supra* note 123, at 13. The Commission proposed the introduction of a new crime entitled "Protection of Women's Integrity." The proposal was adopted and termed the "*gross violation of a woman's integrity*," as discussed above. Captured Queen Report, *supra* note 123, at 13. Finally, the Commission proposed the enlargement of the definition of rape, the criminalization of the purchase of sexual services and the "tightening up of legislation relating to equality of the sexes." Captured Queen Report, *supra* note 123, at 13. Rape is a criminal offence in Sweden and Sweden was the first country to criminalize marital rape. AMNESTY INTERNATIONAL, INTIMATE VIOLENCE IN SWEDEN, *supra* note 98, at 20. Genital mutilation is also an offence in Sweden. AMNESTY INTERNATIONAL, INTIMATE VIOLENCE IN SWEDEN, *supra* note 98, at 20. It is interesting to note that the laws criminalizing genital cutting allows for the conviction of a person "in Sweden of a crime committed abroad, even if the act is not classified as punishable in the other country."

<sup>1548</sup> AMNESTY INTERNATIONAL, INTIMATE VIOLENCE IN SWEDEN, *supra* note 98, at 21.

<sup>1549</sup> AMNESTY INTERNATIONAL, INTIMATE VIOLENCE IN SWEDEN, *supra* note 98, at 21-22.

<sup>1550</sup> Cedaw Concluding Observations: Sweden, *supra* note 119, at paragraph 502.

<sup>1551</sup> Cedaw Concluding Observations: Sweden, *supra* note 119, at paragraph 502.

<sup>1552</sup> Fifth Periodic Report by Sweden to CEDAW, *supra* note, at 32. For an explanation of this phrase see the Captured Queen Report, *supra* note 123, at 13 (explaining that the term was clarified as "being synonymous with the perspective which has emerged from feminist studies of violence to women." Apparently, the result of this initiative was the creation of an alliance of gender-related studies, politics and the law, which gave Sweden a "leading position internationally in this field of legislation." *Id* at 13).

<sup>1553</sup> Fifth Periodic Report by Sweden to CEDAW, *supra* note 985, at 33.

counseling around the clock.”<sup>1554</sup> The center, known as the RKC, situated at the Academic Hospital of Uppsala, constitutes an “expert unit within the health and medical services for women who have been subjected to battering and sexual assaults (*sic*).”<sup>1555</sup>

The RKC in Sweden is a self-contained clinic, with independent staff, commissioned to offer and develop treatment services for women who have survived battering or rape.<sup>1556</sup> They also provide a consulting, educational, awareness-raising and research function.<sup>1557</sup> The RKC is also able to offer a modicum of protection to victims of abuse through cooperation with the police and social services.<sup>1558</sup> This assistance is viable due to an emphasis on cooperation with other services such as the police and immigration officials.<sup>1559</sup>

In 2000, once again before the CEDAW committee, Sweden affirmed its commitment to gender equality and described its role in the UN adoption of the Declaration of the Elimination of Violence against Women and the U.N.’s decision to appoint a Special Rapporteur on Violence against Women.<sup>1560</sup> It also described improved systems of support for domestic violence victims.<sup>1561</sup>

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<sup>1554</sup> Fifth Periodic Report by Sweden to CEDAW, *supra* note 985, at 33. See also the Captured Queen Report, *supra* note 123, at 22, footnote 11 and 12. The report also includes an informative history of the development of research and activism regarding violence against women in Sweden since the early 1980s. The RKC receives funding from the Uppsala County Council, the Swedish Government, Uppsala University, and Uppsala University Hospital. See National Center for Battered and Raped Women PDF, *supra* note 988, at 3. However, it appears that this Center (the RKC) is most impressive for the people who might be able to access it. See National Center for Battered and Raped Women, *supra* note 988. See also National Center for Battered and Raped Women PDF, *supra* note 988, at : “By the end of 2002 more than 1700 patients had been given medical and psychosocial help.” [Note: check citation format for all these web addresses. Get proper name]

<sup>1555</sup> Referred to as the National Center for Battered and Raped Women (Rikskvinnocentrum, RKC). See National Center for Battered and Raped Women, Uppsala University Hospital, available at [http://www.uas.se/templates/page\\_25859.aspx](http://www.uas.se/templates/page_25859.aspx) [hereinafter National Center for Battered and Raped Women]. Fifth Periodic Report by Sweden to CEDAW, *supra* note 985, at 33. It appears that there are five shelters within the County of Uppsala, see National Center for Battered and Raped Women, available at [http://www.uas.se/upload/RKC/rkc\\_engelsk\\_a5.pdf](http://www.uas.se/upload/RKC/rkc_engelsk_a5.pdf), at 6 [hereinafter National Center for Battered and Raped Women PDF]. It appears that there are also points of refuge referred to as “centres for victims of crime” although the extent to which these are used by victims of domestic violence is uncertain. See National Center for Battered and Raped Women PDF, *supra* note 988, at 6.

<sup>1556</sup> See National Center for Battered and Raped Women, *supra* note 988.

<sup>1557</sup> See National Center for Battered and Raped Women, *supra* note 988, at 3. See also National Center for Battered and Raped Women PDF, *supra* note 988. The RKC plays an important role regarding the obtaining and preservation of evidence. See National Center for Battered and Raped Women PDF, *supra* note 988, at 4: “Tests are taken to secure evidence. The injuries are photographed according to special rules. The medical examination may form the basis of a future legal certificate if the woman chooses to report the crime to the police so that an investigation and a legal process can begin.” The RKC also provides an educational facility, training professionals including lawyers and medical practitioners. See National Center for Battered and Raped Women PDF, *supra* note 988, at 6. As a research institute, the RSK has received study visits from more than 40 countries.

<sup>1558</sup> See National Center for Battered and Raped Women PDF, *supra* note 988, at 4 and 5.

<sup>1559</sup> See National Center for Battered and Raped Women PDF, *supra* note 988, at 6.

<sup>1560</sup> Fifth Periodic Report by Sweden to CEDAW, *supra* note 985, at 21.

<sup>1561</sup> As regards violence against women specifically, Sweden addresses this issue under the provisions of article 6 of CEDAW, *supra* note 21, which deals with trafficking and prostitution. Sweden indicates that violence against women was a priority, with reforms including “stricter penalties, procedural improvements, better support for victims of sexual crimes as well as preventive measures.” Fifth Periodic Report by Sweden to CEDAW, *supra* note 985, at 31. However, at the same time, the report indicates that “the maximum prison sentences for molestation and

## 8.5 Evaluation

It was therefore disconcerting when in 2005, the New York Times reported high levels of domestic violence in Sweden, described as the “Secret Side of Women’s Lives.”<sup>1562</sup> The article reveals that the reason for the high level of domestic violence is not a propensity for violence on the part of Swedish men but rather it “has simply been easier for them to get away with violence against wives and girlfriends ... and harder for women to get the help they need.”<sup>1563</sup>

At first blush one is tempted to conclude that both national and international efforts have failed. I proffer an alternative view: this is yet another step in the continued vigilance maintained by TSMOs and international bodies. True failure would be the continuation of secrecy, the abandonment of reform and the regression of law. The three functions of international law, expressive, implementing and expansive, prevent true failure.

## 9. Summation

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sexual molestation were at same time (*sic*) increased to 1 year (from 6 months) and two years (from 1 year) respectively (*sic*.” Fifth Periodic Report by Sweden to CEDAW, *supra* note 985, at 31. Victims of violence are entitled to free legal support. Fifth Periodic Report by Sweden to CEDAW, *supra* note 985, at 32. Amnesty International describes the legislation in Sweden as regards domestic violence. There are generic criminal provisions against assault that may be used to punish perpetrators of domestic violence. AMNESTY INTERNATIONAL, INTIMATE VIOLENCE IN SWEDEN, *supra* note 98, at 18 (The punishment for assault is imprisonment for a maximum of two years. There is an option of a fine or imprisonment for six months for less serious offences. The punishment for ‘gross’ assault is a minimum of one year and a maximum of ten years). Victims of the crime of domestic violence are entitled to request the appointment of a so-called “injured party counsel.” AMNESTY INTERNATIONAL, INTIMATE VIOLENCE IN SWEDEN, *supra* note 98, at 19. This counsel will defend the victim’s interests during the proceedings and provide support, assistance and accompaniment during the trial and during police interrogations.

<sup>1562</sup> See Secret Side of Women’s Lives, *supra* note 732 (describing domestic violence as the “one significant blot on the record of women’s empowerment.”).

<sup>1563</sup> Secret Side of Women’s Lives, *supra* note 732. In 1993, 1608 rapes were reported to the police, a majority of which were committed in doors. Fifth Periodic Report by Sweden to CEDAW, *supra* note 985, at 32. It is uncertain whether the reference to the location of the rapes implies that the rapes were not stranger-rapes but this is pure speculation and it is unclear. By the end of the 1990s, it was reported that almost every second woman in Sweden, i.e. 46 per cent, had been subjected to violence since her fifteenth birthday. Captured Queen Report, *supra* note 123, at 8 and 10. The Captured Queen Report provides the following statistics: 46% of interviewed women had experienced violence committed by a man since their fifteenth birthday; 25% had experienced physical violence committed by a man since their fifteenth birthday; 5% had been subjected to physical violence during the past year; 7% of the respondents who were married or cohabiting had been subjected to physical violence in their current marriage/cohabitation and 3% had been subjected to violence within the past year; 28% of the women who had previously been married or cohabiting had been subjected to physical violence in their previous marriage/relationship; 22% of the women between the ages of 18-24 had been subject to some form of physical violence during the past year, and 56% had experienced sexual harassment. Only 15% of the women who had experienced had filed a police report regarding the most recent violent event. Amnesty International summarizes the Captured Queen Report findings. See AMNESTY INTERNATIONAL, INTIMATE VIOLENCE IN SWEDEN, *supra* note 98, at 25. For a summary of these statistics see AMNESTY INTERNATIONAL, INTIMATE VIOLENCE IN SWEDEN, *supra* note 98, at 27. Together with reports of violence and sexual abuse, the number of women in Sweden aged 18-24 who have been abused because of their sex totals 67 per cent. 67 per cent of all women in Sweden experience danger, invasion and harm. A large percentage of these women experienced this harm within the last year. Captured Queen Report, *supra* note 123, at 10. In 2003, 22,400 cases of domestic violence were reported to the police. This is reported as a conservative figure since many women do not the report violence they experience. Sweden Debates Hitting Men with Domestic Violence Tax, *supra* note 298.

Historically, international law developed as an institution to prevent cruelty committed against identified groups and distinction between sexes was subsumed into racial or ethnic categories. It was assumed that nothing as heinous as the acts of torture committed in the name of ethnicity could be committed in the name of gender. While this is changing, it remains that to hate a black person is a crime; to hate a woman is a culture.

Therefore, the recognition of women's rights in international law continues to advance but with several impediments. In reality the legal category of women's rights is still marginalized and there is a continuing reticence to apply the generic provisions and mechanisms of international law to violations of women's rights.<sup>1564</sup> However, the careful cultivation of the law relating to women, including the right to be free from intimate harm, is a steady theme in international law and one that ought to be pursued in the interests of reducing the manifestation of systemic intimate violence.<sup>1565</sup>

In this chapter I have argued that international human rights law is an effective body of law.

I examined the theories which oppose and support international law, electing to base the discussion on the latter body of theory. This is because, while international human rights law is deficient in several respects, it nonetheless has been successful in a manner which is not high profile but effective. This is augmented by the role of non-state actors such as international bodies, NGOs and TSMOs.

Based on this literature, I proposed that there are three ways in which international human rights law is beneficial. I argued that it has: (1) an expressive function, in naming norms; (2) an implementing function, in manifesting norms in local settings; and, (3) an expansive function, in identifying harmful conduct which is not regulated by national laws and extending the principles of international law to such conduct.

In respect of each function I provided an example of a human rights phenomenon. The expressive function of international human rights law is evident in the case of mass rape, which,

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<sup>1564</sup> *[Note: citation to follow: see document regarding sexual violence in Sierra Leone]* Notwithstanding the revolution of crimes such as rape as a weapon of genocide and forced pregnancy, mass acts of harm against women fail to attract the same degree of international activity as so-called 'mainstream' acts of violence committed against population groups. One example is that of Sudan. The extent of women and children suffering in the crisis is almost unprecedented and, at least, unquestionably clear. However, while the Genocide Convention has (rightly) been raised for assessment, very little discussion has taken place about the Janjaweed's or the Sudanese government's violation of the international human rights instruments that pertain to women. See PHYSICIANS FOR HUMAN RIGHTS, PHR CALLS FOR INTERVENTION TO SAVE LIVES IN SUDAN: FIELD TEAM COMPILES INDICATORS OF GENOCIDE, 5, June 23 2004, available at <http://www.phrusa.org/research/sudan>: "At the first sign of a *Janjaweed* attack, survivors reported that men and women fled separately. The men in some circumstances fled first in order to escape what they perceived to be the certain fate of death. The men left women and children to fend for themselves, knowing, as they reported in PHR interviews, that the women would likely be raped, but probably would not be killed. In a society where great emphasis is placed on gender roles and the importance of male protection, it is highly significant of the fear and distress imposed by the *Janjaweed* attacks that the men in the community were driven to abandon their families, risking serious stigma and harm, in order to save their own lives."

<sup>1565</sup> See Report of the Special Rapporteur on violence against women, *supra* note 58 (*[Note: specific pages to follow]*).



after the enunciation of the norm by the *ad hoc* tribunals, it received international codification and approbation in the Rome Statute and affecting the laws against rape in national settings too. The implementing function of international human rights law is demonstrated by the prohibition against FGC, which, after a dialogue between the international and local communities, better facilities and laws are developing to mitigate the harm. Finally, as regards the expansive power of international human rights law, I looked to the phenomenon of enforced disappearances, demonstrating how prior to its internationalization it had been an amorphous conduct that simply did not fit into the framework of existing national laws.

Finally, I applied each function of international human rights law to systemic intimate violence using the before and after evaluation of Mexico, Nicaragua, and Sweden. I described the way in which these states have changed their policies and laws regarding systemic intimate violence due, in part, to the increased international attention of domestic violence in DEVAW and the concomitant international events at the time. I concluded that each state demonstrated a remarkable change in its approach to systemic intimate violence after 1993 and that this change could be attributed to the internationalization of systemic intimate violence.

Therefore, the further specification of this right by international authorities, the incorporation of systemic intimate violence into mainstream international affairs and the jurisprudential examination of the rights violated and state obligations triggered by systemic intimate violence, are not only necessary in theory, but practically can enhance the rubric of international law, which in turn can further amendment in states' laws, which ultimately, benefits the individual in her home.



## Conclusion

Do you know what Genocide is?... A cheese sandwich... Genocide is a cheese sandwich... What does anyone care about a cheese sandwich?... Genocide, Genocide, Genocide. Cheese sandwich, cheese sandwich, cheese sandwich. Who gives a shit? Crimes against humanity. Where's humanity? Who's humanity? You? Me? Did you see a crime committed against you? Hey, just a million Rwandans. Did you ever hear about the Genocide Convention?...

That convention... makes a nice wrapping for a cheese sandwich.<sup>1566</sup>

Everywhere and everything seems to say international human rights law does not work. Every slaughter in Rwanda and every slaughter in the Sudan confirms this. Or does it?

If we accept that there is an emptiness blowing where we thought there is law, where does that leave us? If we see only the failure, how do we go on? If we resign ourselves to the enormity and futility of massive crimes, we have to live in a world where there is a greater vacuum of humanity than a presence of human-kind.

I do not think this is our world. Neither did the Mothers of the Plaza De Mayo; neither did the judges of the immigration tribunal hearing *In Re Kasinga*; and neither did the judges of the ECHR considering the details of silent rape.

If Hobbes is correct, that the human nature is given to violence, that the breach of peace and the domain of hate is the norm within our species, what do we do? Do we accept our inherent flaw or do we garner all that is good, positive, and powerful to mitigate this violence? I have argued for, and propose, the latter – for freedom from violence in our countries, across our borders and, not least of all, in our homes.

Otherwise, all our lives can be summed up as: a cheese sandwich.

### 1. The Argument in Summary

In this thesis I have argued that certain forms of domestic violence, what I call 'systemic intimate violence,' constitute a violation of international law. Women suffer domestic violence disproportionately to men and it is the greatest cause of women's ill-health worldwide. Notwithstanding, states uniformly fail to provide the assistance women require to escape, or deal with the effects of, such violence. Given the severity of the violence, coupled with the systematic failure of states to take the steps necessary to help remedy the violence, systemic intimate violence has become a global epidemic warranting national and international attention.

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<sup>1566</sup> PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES*, 170-171 (Farrar Straus and Giroux, New York, 1998).

According to conservative statistics, 10 percent of women worldwide are living in a continuum of harm perpetrated by their intimates. While the geographical borders and social settings may differ, systemic intimate violence occurs globally; and, while the degree of official inertia may range, the violence progresses without effective state intervention. The pain that individuals face in their homes can, and does, escalate to an unconscionable level. And at this pinnacle of violence the state misunderstands, misconceives and turns its attentions to ‘other’ priorities.

The state, of course, cannot prevent incidents of violence. It is not, nor ought it to be, in the home, ready to regulate the interaction between cohabitants. Nonetheless, there is a great deal the state can do to mitigate the consequences of this violence and interrupt its evolution. A victim of systemic intimate violence needs a place to go, a shelter that will hide her identity, provide her with care and accept her with her children, be they healthy or disabled; or she may need a haven for her companion animals or protection for her family; or she may need the presence of an official, the police, a community leader, to translate the unlawfulness of the violence to the perpetrator; she may need a state-sponsored lawyer who will obtain protection orders, maintenance orders, custody orders and assist her when they are breached; and she may need her employer to provide her with sufficient time to pursue these legal remedies. State officials, on the other hand, need guidance: judges must be informed and understand the peculiarity of the continuum of violence, the power imbalance within the relationship and the economic consequences of legal decisions; police officials need preparation and resources to address the severity of the violence and the complexity of the intimacy. And the only way in which a state truly can assist victims of systemic intimate violence is by connecting all these agencies. A ‘domestic violence’ call, therefore, ought to trigger a series of options for the victim, options which work in tandem with the diverse needs of victims of systemic intimate violence. If this is achieved, systemic intimate violence really can be impeded.

However, many states will not change their laws, their policies and their institutions without a guide from an international norm. As stated throughout this thesis, international law is not implemented through some global policing agent. Rather, the growing force of TSMOs, NGOs and international bodies acts as a colony of agents, which, with fierce dedication, facilitates the three functions of international law, namely, the expression, implementation and expansion of norms. The failures in international law – and they have been grand – do not negate the use and purpose of this system. Rather, the failures of this system demand our further efforts in remedying the deficiencies, identifying the strengths and improving the structures by which international law becomes local lore.

Ironically, while the skeptic balks at using international law to regulate such private conduct, it is within the individual and the intimate that international law can be most effective. The developments in Mexico, Nicaragua and Sweden after DEVAW, reveals just how important the authoritative enunciation of a norm against systemic intimate violence is.

Systemic intimate violence is different from the many forms of violence in society, which are not, and should not be, addressed by international law. The substance of systemic intimate violence, in the face of persistent state inertia, differentiates this abuse from the murders of a serial killer or the crime of passion. When counselors, lawyers and doctors daily encounter the

same stories of violence, helplessness, fear, and confusion, one has to ask what has gone wrong with the system. This thesis is an attempt to find that answer. It draws back from the particular and, in examining the universal it sees an epidemic – an international human rights violation. The argument supporting this claim has been mapped out in five chapters.

Before I summarize these chapters, I reiterate the caveat drawn at the outset of this thesis. Intimate violence is not exclusively a violation of women's rights. Men endure this violence, as do children, the elderly and the disabled. I do not include these groups in my argument for two reasons. The first is, some of these groups, for example, children and the disabled, have their own niches in international law, which may overlap but benefit at this stage from separate, distinct analyses. Second, systemic intimate violence is defined around the elements of intimate violence perpetrated against women specifically. This is because the experiences of women are colored inevitably by the backdrop of gender discrimination that permeates the approach of the state and society *and* international law.

## 2. Chapter One

The first chapter is a discussion of the current state of international law on violence against women and, specifically, domestic violence. The chapter claims that there is evidence of a burgeoning norm in international law against domestic violence, but that it is still solidifying into a principle of CIL. Given the debate regarding what evidences CIL, I argue that the various international legal developments that have occurred are evidence of the ongoing crystallization of a norm against systemic intimate violence, but that more needs to be done to affirm this.

I argue that international law *vis-à-vis* systemic intimate violence is deficient for three reasons. First, I explain that there is no specific and authoritative statement in international law prohibiting systemic intimate violence. Current international law fails adequately to delineate the content of the right to be free from such violence, and does not, with sufficient precision, outline the nature of states' obligations to help remedy it. To the extent that international law refers to 'domestic violence,' such statements are subsumed into general discussions regarding violence against women, which is inadequate given the particular elements and nuances of systemic intimate violence. Second, I argue that systemic intimate violence is not yet part of mainstream international law. It has been dealt with only in the realm of women's rights and, in order to mitigate this type of harm adequately, general international bodies must be involved. Finally, currently there is an inadequate jurisprudential justification for the internationalization of domestic violence.

In the second part of chapter one I summarize in detail the existing international law on domestic violence and show how the prohibition against domestic violence has gained exposure over the last four decades. I argue that this development, together with the relatively recent specifications of mass rape, FGC, and trafficking in international law, indicates that the prohibition against systemic intimate violence is currently developing into a CIL principle.

The remainder of the thesis takes on board these articulated deficiencies in current international law, and proposes ways in which they should be rectified by the international community.

### 3. Chapter Two

Chapter two describes the definitional components of systemic intimate violence and articulates a number of steps which I propose states have a duty to take to uphold the rights of their citizens to be free from such violence.

I define systemic intimate violence as: severe forms of physical and non-physical harm (including emotional violence and threats of harm); occurring in a continuum; committed between intimates, predominantly against women; and, culminating in a form of harm from which women are unable to procure traditional state assistance. The elements of this definition indicate how the actual harm of systemic intimate violence is as severe as other human rights violations and how systemic elements of state power allow for the perpetuation of violence against a demarcated segment of society.

Both the international community and nation-states are obliged to intervene. The international community needs to express an authoritative and specific prohibition against systemic intimate violence and incorporate the phenomenon of systemic intimate violence into its mainstream operations, such as asylum and torture. One of the greatest uncertainties identified in this thesis is the degree to which there is a norm in international law against domestic violence. While there is evidence of a growing movement internationally to prohibit severe forms of such violence, it is unclear that there is yet a right to be free from such violence in CIL or other sources of binding international law. A clear and binding enunciation thereof is an essential step necessary to place pressure on nation states to help remedy such violence.

As far as states are concerned, I argue that countries are required to take three core minimum steps to improving their approach to systemic intimate violence. First, states must adopt legislation that, *inter alia*, prohibits systemic intimate violence, provides urgent restraining orders and imposes meaningful sanctions for their violation. Second, states must take practical steps to implement this legislation by educating the police and judiciary and imposing penalties for their failure to address systemic intimate violence in accordance with the provisions of governing legislation. Finally, depending on certain exigencies, states are required to allocate resources and redistribute institutional capacity to provide the infrastructural support necessary to help victims of systemic intimate violence by establishing shelters with facilities for children, crafting labor laws to recognize systemic intimate violence as a cause of legitimate absenteeism, and, through educational systems and campaigning, provide information about these facilities for women who find themselves victims of systemic intimate violence.

Chapters three and four, respectively, lay down the theoretical and legal basis for why these practical steps are necessary; that is, why the international community and nation states are required to help remedy systemic intimate violence.

### 4. Chapter Three

In chapter three I provide a theoretical analysis of international human rights, and propose that freedom from systemic intimate violence is an international human 'right' requiring

intervention and enforcement in international law. Based on an overview of rights-theories, I extract four elements common to these theories that distinguish human ‘interests’ from human ‘rights’ enforceable in international law.

The first such element is ‘fundamentality’, which is the notion that human rights relate to some essential functioning of the human being. The second is ‘universality’ and the principle that, because human rights emanate from the basic denominator of being human, all human rights must be universally relevant across countries and cultures. The third element is ‘vulnerability’, recognizing that international human rights law has developed in response to situations where a right-holder’s right is violated in circumstances where that right-holder is unable, as a result of societal, economic or other factors, to procure the necessary assistance to remedy that violation. The final element is that of ‘state accountability’, the notion that intervention in international law is triggered where a state is involved in the violation of a right of its citizens, or knowingly allows the perpetual violation of such right.

Adopting these elements as a test for determining the existence of an international human right, I conclude that each of these elements is present in incidents of systemic intimate violence. First, systemic intimate violence constitutes a violation, *inter alia*, of women’s fundamental rights to equality, physical integrity and dignity, thereby satisfying the fundamentality element. Second, I identify the element of universality in such violence, notwithstanding the debate regarding the status and importance of cultural autonomy. Third, I propose that women particularly are vulnerable to systemic intimate violence as a result of societal gender discrimination and inequality generally and because of the particular circumstances of victims of such violence, thereby satisfying the requirement of vulnerability. Finally, I demonstrate how the state, through perpetual omissions, endorses systemic intimate violence.

For these reasons, I conclude that the defining elements of systemic intimate violence are such that they constitute a human right violation enforceable in international law. On this basis, chapter four discusses why nation states are required under the doctrine of state responsibility to take the steps identified in chapter two to help remedy such violence.

## 5. Chapter Four

In chapter four I discuss the international obligation of states to intervene to help remedy systemic intimate violence. In particular, I apply the rules of state responsibility, emanating from the principles of denial of justice.

The rules of state responsibility are triggered where a state commits an internationally wrongful act. I demonstrate that the two requisite elements, namely, ‘conduct’ and ‘wrongfulness’, are fulfilled in the case of systemic intimate violence. As far as the conduct element is concerned, a state is responsible for both positive acts and omissions. Therefore, by failing consistently to assist women suffering systemic intimate violence, notwithstanding knowledge of such violence, a state has committed an act in the form of an omission. I then demonstrate that such an omission is wrongful in that it falls short of the due diligence standard established in international law. None of the traditional exceptions to this element of wrongfulness apply to preclude the wrongful nature of the state’s omission.

## 6. Chapter Five

Chapters one through four discuss why systemic intimate violence is a violation of women's international human rights, thereby requiring international intervention and enforcement. In chapter five I address the broader issue of whether international law is a useful tool for addressing such violence. I argue that it is; that international law has been, and is capable of being, an effective mechanism for improving the manner in which states protect women from violence.

This is based on the theory that international law is not enforced only through traditional policing mechanisms. Rather, through a variety of processes and actors, it infiltrates into the substance of state law and lore. One of the key factors in this vertical infiltration of norms from the international to the local level is the emergence of non-state actors. I refer in particular to TSMOs and NGOs, demonstrating how their networks, information and technology expose international human rights violations and trigger a variety of remedial responses.

Chapter five proposes that there are three functions of international law. The first is its expressive function through which international law gives a name and substance to specific human rights violations. This is exemplified by the specific enunciation of mass rape as a crime against humanity, a war crime and an instrument of genocide. The second is its implementing function. International law, through a web of international actors, including states, international bodies, TSMOs and NGOs, helps to implement principles of international law throughout local communities. I use the example of FGC to demonstrate how the interactive process between the international, national and local strata has led to change for individual women. The final function is its expansive element, whereby international law expands the notion of harm that justifies international intervention. I use the example of enforced disappearances to demonstrate how amorphous, nameless conduct was transformed into an identifiable crime in international law, and how this improved the lives of the individuals affected by this phenomenon.

Each function of international law is evident in the improved legislative and policy approaches of states to domestic violence before and after DEVAW. Specifically, I focus on the extent to which Mexico, Nicaragua and Sweden discuss domestic violence in their CEDAW reports. Prior to 1993, domestic violence rarely appears in the discussions between these states and the CEDAW Committee. However, after 1993, with ever-increasing importance and specificity, domestic violence is assessed in every report. If I am correct in my conclusion that this evidences the efficacy of international law, then our efforts in improving international law should not wane.

In conclusion, I believe that systemic intimate violence is far more than a cheese sandwich. Such violence is one of greatest plagues of harm faced by women internationally, and too long has been sidelined by the international community. For the reasons discussed in this thesis, I propose that international law can, and should, be used to place pressure on states to help remedy systemic intimate violence. The only barrier is one of political priority. However, I propose that the philosophical adherence to remedying human pain and suffering charges us to ask not why should we internationalize systemic intimate violence, but rather, how on earth can we not?

## Annexure One

### Authority for the Predominance of Women as Victims of Systemic Intimate Violence

1. The Human Rights Watch Global Report on Women's Human Rights, Human Rights Watch Women's Rights Project, August 1995 pages, 341 [hereinafter Human Rights Watch Global Report] ("In Japan, 58.7% of women reported physical abuse by a partner and 59.4% reported sexual abuse; in the Kissi district of Kenya, 42% of women reported in a survey that they had been beaten by their husbands; in Papua New Guinea, 67% of rural women and 56% of urban women had been victims of wife abuse.").
2. Noeleen Heyzer, *Violence Against Women Around the World*, ZONTIAN, 4 (Apr. 2003), [http://www.zonta.org/site/DocServer/Violence\\_Against\\_Women\\_Around\\_the\\_World\\_Zontian\\_April\\_20.pdf?docID=604](http://www.zonta.org/site/DocServer/Violence_Against_Women_Around_the_World_Zontian_April_20.pdf?docID=604) (last visited Dec. 15, 2003) ("In Cambodia, 16 percent of women are physically abused by their husbands; in the UK 30 percent are physically abused by partners or ex-partners; this figure is 52 percent in the West Bank; 21 percent in Nicaragua, 29 percent in Canada, and 22 percent in the US.").
3. See Ctr. for Health and Gender Equity, Population Reports, *Ending Violence Against Women* 4 tbl.1 (1999), <http://www.infoforhealth.org/pr/111/violence.pdf> (last visited Nov. 11, 2003) [hereinafter *Ending Violence Against Women*].
4. A United Nations international survey estimates that in each country, twenty to fifty percent of women suffer domestic violence. See UNICEF, *Domestic Violence against Women and Girls*, 1 (United Nations Children's Fund Innocenti Research Ctr., Innocenti Digest No. 6, 2000), <http://www.unicef-icdc.org/publications/pdf/digest6e.pdf> (last visited Nov. 11, 2003) [hereinafter UNICEF, *Domestic Violence against Women and Girls*].
5. Family Violence Prevention Fund, *Domestic Violence is a Serious, Widespread Social Problem in America: The Facts*, at <http://endabuse.org/resources/facts> (last visited Nov. 11, 2003): "Around the world, at least one in every three women has been beaten, coerced into sex or otherwise abused during her lifetime. . . . On average, more than three women are murdered by their husbands or boyfriends in . . . [America] every day. In 2000, 1,247 women were killed by an intimate partner. The same year, 440 men were killed by an intimate partner." Id. (citations omitted).
6. ReSPONSE, National Statistics, at <http://www.nmclites.edu/stuaffairs/response/NationalStatistics.html> (last visited Nov. 11, 2003).
7. Amnesty International, *Broken bodies, shattered minds: Torture and ill-treatment of women* (2001), available at <http://web.amnesty.org/library/Index/engact400012001> (last visited Nov. 11, 2003) [hereinafter *Broken bodies, shattered minds*] (documenting the worldwide torture of women, observing that "states all around the world have allowed beatings, rape and other acts of torture to continue unchecked")
8. Report of the Special Rapporteur on violence against women, its causes and consequences, U.N. ESCOR, 52d Sess., U.N. Doc. E/CN.4/1996/53 (1996) [hereinafter *Report of the Special Rapporteur on violence against women*] (submitted by Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1995/85).

9. Noeleen Heyzer, *Violence Against Women Around the World*, Zontian, 4 (Apr. 2003), [http://www.zonta.org/site/DocServer/Violence\\_Against\\_Women\\_Around\\_the\\_World\\_Zontian\\_April\\_20.pdf?docID=604](http://www.zonta.org/site/DocServer/Violence_Against_Women_Around_the_World_Zontian_April_20.pdf?docID=604) (last visited Dec. 15, 2003): “In no country in the world are women safe from this type of violence. In Cambodia, 16 percent of women are physically abused by their husbands; in the UK 30 percent are physically abused by partners or ex-partners; this figure is 52 percent in the West Bank; 21 percent in Nicaragua, 29 percent in Canada, and 22 percent in the US.” *Id.*
10. The Attorney General of North Dakota released statistics on March 11, 2003 indicating that 1,835 incidents of domestic violence were reported in 2001. State of North Dakota Office of Attorney General, *Domestic Violence Statistics Released*, (Mar. 11, 2003), <http://www.ag.state.nd.us/NewsReleases/2003/03-11-03.pdf> (last visited Nov. 11, 2003). Seventy percent of the victims were women. *Id.* Forty-nine percent of homicides in North Dakota resulted from domestic violence. *Id.*
11. Bureau of Justice Statistics, United States Department of Justice, *Intimate Partner Violence, 1993-2001* (2003), <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf> (last visited Nov. 11, 2003) (indicating that “[i]ntimate partner violence made up 20% of violent crime against women in 2001”).
12. *Ending Violence Against Women*, *supra*, at 5 (“In nearly 50 population-based surveys from around the world, 10% to over 50% of women report being hit or otherwise physically harmed by an intimate male partner at some point in their lives”).
13. United Nations, *Women 2000, Fact Sheet no.4, Violence against Women*, (2000), available at <http://www.un.org/womenwatch/daw/followup/session/presskit/fs4.htm> (last visited Nov. 11, 2003) (“Domestic violence, especially wife battering, is perhaps the most widespread form of violence against women. In countries where reliable, large-scale studies on gender violence are available, more than 20 per cent of women are reported to have been abused by the men with whom they live.”).
14. Amnesty International Report on *Intimate Violence in Sweden*, 4 (stating that “Gender-based violence occurs in every country in the world... Women of different nationalities or of varying ethnic, religious or cultural background or sexual identity are the victims of this crime. The violence is directed at women of all ages and social classes and represents one of the major threats to the lives and health of women.”)
15. *Candies in Hell*, 1596 (“It has been estimated that in most countries between 10-50% of women have experienced wife abuse.”).
16. In the United States between two and four million women are battered each year (MASON, *supra* note 32, at 640) and spouse abuse occurs once every eighteen seconds (David Scott-Macnab, *Mediation and Family Violence*, 109 S. AFR. L.J. 282, 285 (1992)).
17. Fourteen thousand women die in Russia every year—one woman dies of domestic violence every 40 minutes. Sylvie Briand, *Russian Women Die from Domestic Violence Every Forty Minutes*, AGENCE FRANCE-PRESSE, Mar. 8, 2003, 2003 WL 2747183.
18. In Mexico, it is estimated that “one-third to one-half of Mexican women living as part of a couple, suffered some form of abuse (physical, emotional, psychological, economic or sexual) at the hands of their partner. Women between the ages of 15 and 29, and pregnant, were reported as being especially affected.” The aggressors are most frequently men. OAS Report on the Situation of Women in Ciudad Juárez, paragraph 59.
19. A 1995 study revealed that “one out of every two women had been abused by their husband or companion at some point, and one out of three had been forced to have sex. A



later study determined that two out of ten women in Nicaragua had experienced physical or sexual violence in the preceding year. RHR Nicaragua Report 2002, 119.

20. A report of domestic violence in Nicaragua interviewed 488 women and 360 of the interviewees had been married or had cohabited with a man at some point (either before or during the currency of the interview). Among women who had been married, 188 or “52% reported having experienced physical partner abuse at some point in their lives. Median duration of abuse was five years. A considerable overlap was found between physical, emotional and sexual violence, with 21% of ever-married women reporting all three kinds of abuse. Thirty-one percent of abused women suffered severe physical violence during pregnancy. The latency period between the initiation or marriage or cohabitation and violence was short, with over 50% of the battered women reporting that the first act of violence took place within the first 2 years of marriage.” 20% of the ever-married women reported “experiencing severe violence during the previous 12 months.” Candies in Hell, 1599 and 1600. The Candies in Hell report tabulates the degrees/types of violence experienced by abused women. Under the heading of moderate violence, 50% of the abused women had objects thrown at them, 54% had been slapped, 81% had been pushed or shoved. Under the heading of severe violence, 60% had endured punches or kicks, 48% had received blows with an object, 29% had been beaten up, 25% had been threatened with a weapon and 12% had had a weapon used on them. The report included an investigation into the time and place in which the abuse occurred. Nearly all 188 women reported being beaten in the house and the violence was often accompanied by alcohol or substance abuse. Candies in Hell, 1600. Heimer, Gun; Lundgren, Eva; Westerstrand, Jenny; Kalliokoski, Anne-Marie, Captured Queen Men’s Violence against Women in “Equal” Sweden – a Prevalence Study Åströms tryckeri AB, Umeå, 2002, translated by Julia Mikaelsson and Geoffrey French *available at* <http://www.brottsoffermyndigheten.se/informationsmaterial/Captured%20queen.pdf/Captured%20Queen%20.pdf> [hereinafter the Captured Queen Report]. This report contains results of a study involving 7,000 respondents who answered an extensive questionnaire sent to a random sample of 10,000 women from the general population in Sweden, between the ages of 18 and 64. The report’s findings demonstrate that almost every second woman in Nicaragua, i.e. 46 per cent, had been subjected to violence by a man since her fifteenth birthday. Captured Queen Report. 8.
21. The Amnesty International Report on Intimate Violence in Sweden summarizes the Captured Queen Report findings. Amnesty International Report on Intimate Violence in Sweden, 25.
22. The Captured Queen Report provides the following statistics (For a summary of these statistics see Amnesty International Report on Intimate Violence in Sweden, 27): 46% of interviewed women had experienced violence committed by a man since their fifteenth birthday; 25% had experienced physical violence committed by a man since their fifteenth birthday; 5% had been subjected to physical violence during the past year; 7% of the respondents who were married or cohabiting had been subjected to physical violence in their current marriage/cohabitation and 3% had been subjected to violence within the past year; 28% of the women who had previously been married or cohabiting had been subjected to physical violence in their previous marriage/relationship; 22% of the women between the ages of 18-24 had been subject to some form of physical violence during the past year, and 56% had experienced sexual harassment. Only 15% of the women who had

- experienced had filed a police report regarding the most recent violent event. More than half the women in Sweden have been harassed on the basis of their sex. Captured Queen Report. 8 and 10.
23. Together with reports of violence and sexual abuse, the number of women in Sweden aged 18-24 who have been abused because of their sex totals 67 per cent. 67 per cent of all women in Sweden experience danger, invasion and harm. A large percentage of these women experienced this harm within the last year. Captured Queen Report. 10.
  24. It appears that many of the women who reported abuse as an adult had also experienced abuse prior to the age of fifteen years, indicating a correlation between the episodes of violence. The report concludes that this reveals a picture “in which violence against women is widespread, frequent and employed in private as well as in public. The men who employ it are partners, friends, acquaintances, colleagues and unknown men. In light of these facts, it would be somewhat surprising if women did not have experience of violence prior to the age of fifteen as well. Women are born into a society where violence to women is a common feature in all spheres and stages of life.” Captured Queen Report, 76. Captured Queen Report, 77: “Almost every other woman has experienced violence on the part of a man at some point since her fifteenth birthday... If nearly fifty per cent of women in Sweden have been subjected to violence since their fifteenth birthday – and close to one woman in three before that – and if such a large proportion of women report numerous experiences of violence and such a large proportion of these experiences are recent, as this study has shown, this means that violence is a widespread, frequent and topical phenomenon.”
  25. Maria Luiza Aboim, *Brazil and Domestic Violence and the Women’s Movement*, in ENDING DOMESTIC VIOLENCE REPORT FROM THE GLOBAL FRONT LINES, PRODUCED BY THE FAMILY VIOLENCE PREVENTION FUND 7 (eds., Leni Marin, Helen Zia and Esta Soler, 1998): “seventy percent of the crimes committed against women are committed inside the household.” (8) Notwithstanding that 52% of the Brazilian voting population is women, machismo and patriarchy persist. (8) At the time of this report, there were only two shelters operating in Brazil 8.
  26. It is reported that in Pakistan, approximately 70-90 per cent of women in Pakistan suffer from domestic violence. Daily Times Site Edition available at [www.dailytimes.com.pk/print.asp?page=2006\03\14\story\\_14-3-2006\\_pg7\\_12](http://www.dailytimes.com.pk/print.asp?page=2006\03\14\story_14-3-2006_pg7_12).
  27. MARIJKE VELZEBOER, MARY ELLSBERG; CARMEN CLAVEL ARCAS; CLAUDIA GARCÍA-MORENO, VIOLENCE AGAINST WOMEN: THE HEALTH SECTOR RESPONDS xi (Pan American Health Organization & Path (Program for Appropriate Technology in Health) 2003): Defining domestic violence as “one of the most widespread human rights abuses and public health problems in the world today, affecting as many as one out of every three women.” The report later states that “between 10% to 50% of women [around the world] have experienced some act of physical violence by an intimate partner at some point in their lives.” *Id* at 5.
  28. Elizabeth M. Schneider, *The Violence of Privacy*, in THE PUBLIC NATURE OF PRIVATE VIOLENCE THE DISCOVERY OF DOMESTIC ABUSE, 36, 41 (Martha A. Fineman & Roxanne Mykitiuk eds., 1994): “domestic violence is the leading cause of injury to women in the United States (U.S. House, 100<sup>th</sup> Congress, 1987). According to FBI statistics, one woman in the United States is beaten every eighteen seconds (*Report of the Gender Bias Study of the Supreme Judicial Court*, 1989, p. 584). Between two thousand and four

thousand women die every year from abuse. (Federal Bureau of Investigation, U.S. Department of Justice, 1984). Thirty percent of all women killed every year are slain by their partners (*Report of the Gender Bias Study of the Supreme Judicial Court*, 1989, p. 584). Battering of women by their husbands or men with whom they are in intimate relationships cuts across racial, class, ethnic, and economic lines. Police involvement, nationally, in cases of domestic violence exceeds involvement in murder, rape, and all forms of aggravated assault.

29. Every year in Sweden, approximately 20-40 women are subjected to fatal violence; on average, 16 women are killed every year by a man with whom they have / have had an intimate relationship. Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 25. In Sweden in 2002, approximately 21,500 reports of assault against women were filed. Approximately 35% of all cases of assault for which police reports are filed comprise assault against women. In approximately two thirds of reports of assaults against women, the perpetrator was somebody with whom the woman was acquainted. In 2003, 22,400 reports of assault against women were filed. In 16,780 of these cases the perpetrator was a person previously known to the victim. Approximately two thirds of these cases concerned assault against women by a perpetrator with whom the victim had had an intimate relationship. Amnesty International, *Intimate Violence in Sweden*, *supra* note 98, at 23. It appears that there has been an actual increase of violence against women in recent years, not only an increase in reporting thereof. The total population of Sweden is over 9 million. See <http://www.cia.gov/cia/publications/factbook/geos/sw.html>.
30. In Mexico, in 60 percent of the cases of rape of minors that are reported, “the aggressors are close relatives of the victim, including the victim’s father.” *Women’s Reproductive Rights in Mexico: A Shadow Report*, *supra* note 131, at 24.
31. Most of the violence experienced by women in Nicaragua occurs in the domestic sphere. 97% of the women reported that the violence was carried out by their current or former partner, and that the incidents generally occurred inside the home. One out of three women subjected to physical violence had also been forced to have sexual relations. 31% of the women suffered violence while being pregnant. OMCT CEDAW Report on Nicaragua, *supra* note 123, at 11-12. In Nicaragua in 1998, 29% of all women in Nicaragua who had cohabited with a partner had suffered some form of physical or sexual abuse. OMCT CEDAW Report on Nicaragua, *supra* note 123, at 12 (citing the official Demographic and Health Survey 9ENDESA) for 1998).
32. The cases cited are at the very least indicative of the inadequacy of domestic law within the United States to address gender-based crimes. While the United States is one example of a domestic legal system which is unable to cope with the exigency of systemic intimate violence, other regions and countries with far less accessible and transparent legal systems may provide even less effective legal redress for women. According to feminist theorist Gwendolyn Mikell, many developing States within Africa stand indicted for the systematic disregard for and opposition to women. Mikell, *supra* note 615, at 1 (describing how African women suffer lower education levels and higher levels of malnutrition). For a discussion of ineffective laws in other countries from HUMAN RIGHTS WATCH, GLOBAL REPORT ON WOMEN’S HUMAN RIGHTS, § 6, at <http://www.hrw.org/about/projects/womrep/> [hereinafter GLOBAL REPORT ON WOMEN’S HUMAN RIGHTS] (discussing domestic violence in Russia: “The law doesn't protect

women. If a woman goes to the police and tells them that she is being beaten by her husband or partner, the police say, "But he didn't kill you yet.").

33. The Candies in Hell interviewed 488 women and 360 of the interviewees had been married or had cohabited with a man at some point (either before or during the currency of the interview). Among women who had been married, 188 or "52% reported having experienced physical partner abuse at some point in their lives. Median duration of abuse was five years. A considerable overlap was found between physical, emotional and sexual violence, with 21% of ever-married women reporting all three kinds of abuse. Thirty-one percent of abused women suffered severe physical violence during pregnancy. The latency period between the initiation or marriage or cohabitation and violence was short, with over 50% of the battered women reporting that the first act of violence took place within the first 2 years of marriage." Twenty per cent of the ever-married women reported "experiencing severe violence during the previous 12 months." Candies in Hell, *supra* notex, at 1595.

## Bibliography