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# Important Steps and Instructive Models in the Fight to Eliminate Violence Against Women

Elizabeth M. Misiaveg\*

[V]iolence against women constitutes a violation of their human rights and fundamental freedoms, and impairs or nullifies the observance, enjoyment and exercise of such rights and freedoms <sup>1</sup>

[V]iolence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women <sup>2</sup>

## I. Introduction

The United Nations (UN) General Assembly adopted the Declaration on the Elimination of Violence against Women (UN Declaration) on December 20, 1993.<sup>3</sup> Six months later, on June 9, 1994, the General Assembly of the Organization of American States (OAS) adopted, by acclamation, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Inter-American Convention).<sup>4</sup> These human rights instruments mark an important achievement in the

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1. Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, "Convention of Belém do Pará," June 9, 1994, pmbl., 33 I.L.M. 1534 (1994) [hereinafter Inter-American Convention].

2. Declaration on the Elimination of Violence against Women, G.A. Res. 104, U.N. GAOR, 48th Sess., pmbl., U.N. Doc. A/RES/48/104 (1994) [hereinafter UN Declaration].

3. *Id.*

4. Inter-American Convention, *supra* note 1.

recognition of violence against women as a violation of basic human rights, and they signify an important step in the effort to eliminate violence against women.<sup>5</sup>

OAS member states may sign the Inter-American Convention,<sup>6</sup> and the convention has the binding force of a treaty on those states that sign and ratify it.<sup>7</sup> As a regional human rights instrument, the Inter-American Con-

5. See, e.g., *Priority Themes, Peace: Measures to Eradicate Violence Against Women in the Family and Society: Report by the Secretary-General*, Commission on the Status of Women, 38th Sess., Agenda Item 5(c), ¶ 15, U.N. Doc. E/CN.6/1994/4 (1994) (report on 1993 expert group meeting organized by UN Division for the Advancement of Women) (describing establishment of international norm that absolutely denounces violence against women as "obvious first step" in process of working toward elimination of violence against women, and giving UN Declaration as example of establishment of such norm); Layli Miller Bashir, *New Trend in Addressing Violence Against Women*, HUM. RTS. BRIEF (The American University Center for Human Rights and Humanitarian Law, Washington, D.C.), Fall 1994, at 2, 15 (stating that Inter-American Convention makes important contribution on issue of violence against women); Hilary Charlesworth, *The Declaration on the Elimination of All Forms of Violence Against Women*, ASIL INSIGHT (The American Society of International Law, Washington, D.C.), 1994, at 2 (pinpointing as most significant element of UN Declaration its unequivocal acknowledgement that violence against women is international issue and that states must make effort to eliminate violence against women); Rhonda Copelon, *Intimate Terror: Understanding Domestic Violence as Torture*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 116, 143 (Rebecca J. Cook ed., 1994) (stating that approval of Inter-American Convention is critical step in international recognition that violence against women is distinct human rights abuse); *UN Makes Strides on Violence Against Women*, DOCKET (International Human Rights Law Group, Washington, D.C.), June 1994, at 1 (quoting Donna Sullivan, Director of International Human Rights Law Group's Women in the Law Project, as stating that UN Declaration is first instrument expressly to define and denounce violence against women).

6. Inter-American Convention, *supra* note 1, at art. 15; see Joan Fitzpatrick, *The Use of International Human Rights Norms to Combat Violence Against Women*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 532, 557 (Rebecca J. Cook ed., 1994) (noting that Inter-American Convention would only be open to OAS states for signature and ratification). The Inter-American Convention is also "open to accession by any other state." Inter-American Convention, *supra* note 1, at art. 17

7 See Inter-American Convention, *supra* note 1, at art. 16 (stating that Inter-American Convention is subject to ratification). As of July 24, 1995, the following countries had signed the Inter-American Convention: Argentina, Bahamas, Barbados, Bolivia, Brazil, Chile, Costa Rica, Dominica, Dominican Republic, Ecuador, Guatemala, Guyana, Honduras, Mexico, Nicaragua, Panama, St. Lucia, St. Kitts and Nevis, Uruguay, and Venezuela. See Chart and Explanatory Notes on Status of Convention of Belém do Pará, from Mercedes L. Kremenetzky, *Comision Interamericana de Mujeres (CIM)*, Organization of American States 2-3 (July 24, 1995) (on file with the *Washington and Lee Law Review*). According to Article 21 of the Inter-American Convention, the Inter-American Convention enters into force 30 days after the second instrument of ratification is deposited with the OAS General Secretariat. Inter-American Convention, *supra* note 1, at art. 21. Pursuant to that provision, the Inter-

vention may be a particularly effective tool in combating violence against women;<sup>8</sup> a regional instrument can respond to the problem of violence against women as the problem exists within a particular part of the world and can use approaches that are particularly suited to that region.<sup>9</sup> Professor Joan Fitzpatrick notes that the Inter-American Convention "could provide an instructive precedent for standard-setting at the regional level as well as for further development of implementation measures by UN bodies."<sup>10</sup>

The UN Declaration, adopted by the UN General Assembly, has universal applicability<sup>11</sup> but lacks the binding force of a treaty. Still, even though it lacks a treaty's binding effect, a UN declaration does have the

American Convention entered into force on March 5, 1995. Chart and Explanatory Notes from Mercedes L. Kremenetzky, *supra* at 1. As of July 24, 1995, eleven countries had ratified the Inter-American Convention. *Id.* at 3.

8. See Fitzpatrick, *supra* note 6, at 557 (citing regional conventions on torture as demonstrating usefulness of regional focus on human rights issue). Specifically, Professor Fitzpatrick names, as examples of successful regional human rights efforts, the Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, Pan-Am U.T.S. 67, 25 I.L.M. 519 (1986), and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Nov. 26, 1987, Europ. T.S. No. 126. Fitzpatrick, *supra* note 6, at 571 n.209.

A lawyer consultation group gathered in 1992 at the University of Toronto to discuss women's international human rights law. Rebecca J. Cook, *Women's International Human Rights Law: The Way Forward*, 15 HUM. RTS. Q. 230, 231 (1993). One topic that the group covered was the question of the effectiveness of a "rights" strategy in meeting women's needs. *Id.* at 232-33. A Nigerian participant noted that a "basic needs" strategy would be a more relevant approach for Africa than a "rights" strategy. *Id.* at 232. See generally Adetoun O. Ilumoka, *African Women's Economic, Social, and Cultural Rights — Toward a Relevant Theory and Practice*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 307 (Rebecca J. Cook ed., 1994) (addressing significance to African women of "human rights discourse" and examining problems regarding enforcement on behalf of African women of internationally recognized rights). Another participant stated that "rights discourse" lacks strength in Asia partly because such discourse focuses on women's independence and not on the connectedness with community, caste, or ethnic group that is typically the reality of Asian women. Rebecca J. Cook, *supra*, at 232. A Sudanese participant of the consultation group, while recognizing that cultural factors play a role in determining how effective a particular strategy will be within a particular setting, stressed that "we must not lose sight of the fact that we are subordinated because we are women" and that the goal of ridding society of the subordination of women is universal. *Id.* at 233.

9. See Cook, *supra* note 8, at 256-57 (stating that regional advocacy has some assets that global measures lack, such as regional economic interdependence and cultural likeness, which can contribute to development and application of human rights norms).

10. Fitzpatrick, *supra* note 6, at 557

11. See Charlesworth, *supra* note 5, at 2 (stating that UN Declaration applies to all UN members); Fitzpatrick, *supra* note 6, at 557 (stating that UN Declaration would have universal coverage).

power to affect the behavior of member states.<sup>12</sup> For example, a UN declaration establishes the expectation that states will adhere to the responsibilities outlined in the declaration.<sup>13</sup> As state practice fortifies that general expectation, a declaration may become a part of binding customary law.<sup>14</sup> Moreover, a UN declaration possesses political force as an expression of international will.<sup>15</sup> Indeed, in commenting on the UN Declaration in its draft form, Donna J. Sullivan (Director of the Women in the Law Project of the International Human Rights Law Group) has suggested that people should view the UN Declaration as a manifestation of international political consensus that states have a responsibility to prevent and to redress gender-based violence.<sup>16</sup> In addition, a declaration is often the forerunner of a binding treaty covering the same issue.<sup>17</sup> Thus, the UN Declaration

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12. See Hurst Hannum, *Human Rights*, in 1 UNITED NATIONS LEGAL ORDER 319, 336-38 (Oscar Schachter & Christopher C. Joyner eds., 1995) (discussing impact of UN declarations in context of international human rights law); see also *infra* notes 13-16 and accompanying text (discussing ways in which UN declarations have influence on behavior of states).

13. See UNITED NATIONS, UNITED NATIONS ACTION IN THE FIELD OF HUMAN RIGHTS 309, ¶ 5 (1988) (quoting 1962 memorandum from UN Office of Legal Affairs, which explains that because United Nations organs adopt declarations only for issues of major importance, expectation is that states will adhere to that declaration).

14. See *id.* (explaining that "insofar as the expectation [of adherence to a UN declaration] is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon the States").

15. See Charlesworth, *supra* note 5, at 2 (stating that United Nations resolutions are significant statements of international views).

16. See Donna J. Sullivan, *Women's Human Rights and the 1993 World Conference on Human Rights*, 88 AM. J. INT'L L. 152, 164-65 (1994) (stating that UN Declaration draft shows international political consensus on recognition that states have duties to prevent and redress acts of gender-based violence). Justice Elizabeth Evatt suggests that proponents will have to persuade human rights treaty bodies to use the UN Declaration to interpret existing human rights norms as including acts of gender-based violence as violations. Elizabeth Evatt, Book Review, 7 HARV HUM. RTS. J. 295, 298 (1994) (reviewing OURS BY RIGHT: WOMEN'S RIGHTS AS HUMAN RIGHTS (Joanna Kerr ed., 1993)). Because the UN Declaration requires no additional ratifying act for a state to see it as a statement of generally accepted legal principles, Justice Evatt concludes that the UN Declaration may be most useful as a basis upon which activists can promote national reform. *Id.*

17. See, e.g., Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027 (1984), *as modified*, 24 I.L.M. 535 (1985) (referring in preamble to declaration on same subject as one factor underlying agreement of states parties to convention); Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 19 I.L.M. 33 (1980) [hereinafter Women's Convention] (same); see also Hannum, *supra* note 12, at 336 (noting that UN declarations are viewed as step in process toward adoption of binding convention).

might be a precursor to a UN convention on the elimination of violence against women.<sup>18</sup>

As the preceding paragraphs illustrate, the UN Declaration and the Inter-American Convention are important both in their own right and as instructive models for future human rights instruments on violence against women.<sup>19</sup> They are also invaluable touchstones for discussion on a number of significant issues in the on-going development of international law on women's rights.<sup>20</sup> For example, a comparison of the UN Declaration and the Inter-American Convention provides an instructive framework for analysis. Insights gained from this comparison could inform the drafting process of a later UN or regional convention on the elimination of violence against women.<sup>21</sup>

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18. See Fitzpatrick, *supra* note 6, at 557 (noting that UN Declaration could be precursor to UN convention on violence against women); Katherine M. Culliton, *Finding a Mechanism to Enforce Women's Right to State Protection from Domestic Violence in the Americas*, 34 HARV INT'L L.J. 507, 530 (1993) (stating that UN Declaration could lead to binding UN convention on elimination of violence against women). The desirability of drafting a UN convention on the subject of violence against women must be weighed against some risks: the risk of promoting confusion as to the coverage of violence against women by existing international human rights instruments; the risk of getting only limited ratification; and the costs of implementing a new international instrument. See Fitzpatrick, *supra* note 6, at 537-38 (listing aforementioned criticisms of drafting new instrument on violence against women).

19. See *supra* notes 10, 18 and accompanying text (indicating that UN Declaration could be precursor document for subsequent convention and that Inter-American Convention could be resource for future drafters).

20. See *infra* notes 32-44 and accompanying text (discussing "public-private distinction" and that distinction's relationship to theories of state accountability under international law). Another issue particularly relevant to the development of international law with respect to women's rights is the question of whether the international community should focus its efforts on placing women's rights into the work of "mainstream" international human rights bodies or whether it should create specialized mechanisms, such as the UN Declaration and the Inter-American Convention, to deal exclusively with women's rights. See Hilary Charlesworth, *What are "Women's International Human Rights"?*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 58, 58-59, 66 (Rebecca J. Cook ed., 1994) (discussing comparative worth of putting women's rights issues into work of mainstream human rights bodies and of creating specialized mechanisms for women's rights issues); Copelon, *supra* note 5, at 117 (stating that, in addition to recognizing gender-based violence as torture, it is essential to recognize expressly that violence against women is human rights violation in and of itself).

21. See *supra* note 10 and accompanying text (pointing out value of Inter-American Convention as informative precedent); *supra* notes 17-18 and accompanying text (discussing UN Declaration as possible forerunner to UN convention on elimination of violence against women).

One specific point of comparison, and this Note's focus, is the UN Declaration's qualifying references to national legislation in Articles 4(c) and 4(d) of the UN Declaration's list of state responsibilities<sup>22</sup> and the absence of such references to national legislation in the comparable provisions of the Inter-American Convention.<sup>23</sup> Commentators have suggested that the UN Declaration's references to national legislation allow the use of national, rather than international, standards to judge a state's fulfillment of its responsibilities under Articles 4(c) and 4(d) and that the references could weaken these UN Declaration provisions substantially.<sup>24</sup> The question arises whether a state could use the UN Declaration's references to national legislation to define its own standard of compliance regarding its responsibilities under the UN Declaration with respect to the punishment and the redress of violence against women. If that is the effect of the UN Declaration's references to national legislation, a state could justify a clearly inadequate effort at punishing and remedying acts of violence against women and, thereby, seriously impair the very rights that the UN Declaration seeks to protect.

In order to provide the necessary background for a comparative discussion of the UN Declaration and the Inter-American Convention, Part II of this Note looks briefly at the development of, and some of the issues that pertain to, international human rights law with respect to violence against women.<sup>25</sup> Part II also places the UN Declaration and the Inter-American Convention in the context of this developing area of international law.<sup>26</sup> In

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22. UN Declaration, *supra* note 2, at arts. 4(c), 4(d). Article 4(c) of the UN Declaration says that states should exercise due diligence to punish, "in accordance with national legislation," acts of violence against women. *Id.* at art. 4(c). Article 4(d) calls states to provide women subjected to violence with access, "as provided for by national legislation," to just and effective remedies. *Id.* at art. 4(d).

23. Inter-American Convention, *supra* note 1, at arts. 7(b), 7(g). Article 7(b) states, without qualification by way of reference to national legislation, that states parties undertake to use due diligence to impose penalties for violence against women. *Id.* at 7(b). Article 7(g) says that states parties undertake to "establish the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations or other just and effective remedies." *Id.* at art. 7(g).

24. See Charlesworth, *supra* note 5, at 3-4 (viewing UN Declaration's references to national, instead of international, standards as problematic); Sullivan, *supra* note 16, at 166 (stating that national legislation references undermine normative force of UN Declaration's state responsibility provision).

25. See *infra* part II (highlighting aspects of development of international human rights law in area of violence against women).

26. See *infra* part II (discussing UN Declaration and Inter-American Convention within context of developing area of international human rights law with respect to violence against

Part III, this Note contrasts the UN Declaration's inclusion of references to national legislation in its delineation of state responsibilities with the Inter-American Convention's lack of national legislation references in its comparable provisions.<sup>27</sup> Part III discusses the implications of interpreting the UN Declaration to defer to national standards.<sup>28</sup> Part III also suggests an alternative interpretation of the UN Declaration's references to national legislation simply as procedural provisos.<sup>29</sup> In Part IV, this Note concludes that one could interpret these references to national legislation as mere procedural provisos, rather than as loopholes that would allow individual states to evade their substantive responsibilities under the UN Declaration.<sup>30</sup> This Note also concludes that the dangers associated with interpreting the national legislation references as a means of evading genuine compliance are sufficiently grave to call for the exclusion of these references in future instruments.<sup>31</sup> To allow a state to define its own standard of compliance with an international human rights norm would weaken substantially that norm's effectiveness in fostering global change in the treatment of women.

## *II. Background: The Development of International Human Rights Law on Violence Against Women*

An issue particularly relevant to a discussion about international human rights law as it relates to the issue of violence against women centers on the "public-private distinction."<sup>32</sup> In the words of Professor Hilary Charles-

women).

27. See *infra* part III.A (contrasting UN Declaration's state duty provisions containing references to national legislation with comparable Inter-American provisions that do not have similar qualifying references to national legislation).

28. See *infra* part III.A.1-2 (examining implications of UN Declaration's references to national legislation in UN Declaration's list of state responsibilities).

29. See *infra* part III.B (discussing interpretation of references to national legislation as procedural provisos).

30. See *infra* part IV (concluding that UN Declaration's references to national legislation may be interpreted as merely proviso on exercise of rights in question, not as means of impairing substantive rights in UN Declaration).

31. See *infra* part IV (concluding that severe negative implications of interpretation of UN Declaration's references to national legislation as deferring to national standards to judge state compliance with UN Declaration responsibilities justify exclusion of such references in future instruments).

32. See, e.g., Bashir, *supra* note 5, at 2, 15 (noting women's rights activists' emphasis on importance of state accountability for private conduct that impairs human rights); Cook, *supra* note 8, at 234-35 (discussing public-private distinction and that distinction's relationship



worth, "all international human rights law rests on and reinforces a distinction between public and private worlds, and this distinction operates to muffle, and often completely silence, the voices of women."<sup>33</sup> There are distinct, yet interrelated, ways to formulate the public-private distinction.<sup>34</sup> First, one may view the public-private distinction as reflecting the traditional view that distinguishes between the private domestic world and the public world of legal and political order.<sup>35</sup> Generally, domestic life is deemed to be part of the private world, a world in which legal regulation is inappropriate.<sup>36</sup> Yet, as Professor Charlesworth notes, it is often in the domestic realm that women face the danger of violence.<sup>37</sup> Protection of privacy is the common justification for this superficially neutral governmental non-interference.<sup>38</sup> But a deeper look reveals the realistic effect of a government's inaction in this context: A reinforcement of an unjust status quo and a means of creating a "space into which the law's ordinary protections against violence will not be allowed to penetrate."<sup>39</sup>

A second and closely related way to formulate the public-private distinction is as international law's distinction between governments' acts and private individuals' acts and that distinction's relationship to theories of state accountability for violence perpetrated against women.<sup>40</sup> Under the traditional theory of state responsibility, international human rights law imposed a negative obligation on a state: A state had a duty not to interfere

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to women's international human rights); Charlesworth, *supra* note 20, at 58 (same); Kenneth Roth, *Domestic Violence as an International Human Rights Issue*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 326, 329-33 (Rebecca J. Cook ed., 1994) (same).

33. Charlesworth, *supra* note 20, at 68.

34. See Cook, *supra* note 8, at 234 (stating that at least two ways exist to conceptualize public-private distinctions).

35. *Id.*

36. Charlesworth, *supra* note 20, at 69; see Cook, *supra* note 8, at 234 (noting that private world comprised of home and family has been deemed inappropriate context for regulation).

37. Charlesworth, *supra* note 20, at 70.

38. *Id.*

39. *Id.* (quoting Robin West, *Feminism, Critical Social Theory and Law*, 1989 U. CHI. LEGAL F. 59, 65); see Cook, *supra* note 8, at 234 (pointing out that public-private distinction is gendered because women often act within private world where abuses are "invisible" and unregulated).

40. See Cook, *supra* note 8, at 234 (stating that second way to perceive public-private distinction is as distinction between public sector composed of state activities and private sector composed of nonstate activities).

with human rights.<sup>41</sup> Through an evolution of this theory of state accountability with respect to human rights, international law now additionally may require states to exercise due diligence in preventing and punishing systemic human rights violations that private, nonstate actors perpetrate.<sup>42</sup>

The UN Declaration and the Inter-American Convention broadly define violence against women to encompass physical, sexual, and psychological violence that occurs both in the family and in the general community, as well as such violence that a state perpetrates or condones.<sup>43</sup> In reaching violence against women within the family, the UN Declaration and the Inter-American Convention deal with a subject that international law formerly did not regulate because these human rights instruments encompass private, as well as state, conduct.<sup>44</sup>

41. *See id.* (describing traditional state duty as obligation not to interfere with individual's human rights).

42. *See id.* at 234-35 (containing explanation that international law now requires states to employ due diligence in order to prevent, investigate, and punish flagrant, systemic human rights violations committed by private actors); *infra* notes 108-22 and accompanying text (discussing impact on state accountability of provisions in international human rights instruments that obligate states to "ensure" rights recognized in those instruments).

43. *See* UN Declaration, *supra* note 2, at arts. 1, 2 (defining violence against women broadly); Inter-American Convention, *supra* note 1, at arts. 1, 2 (same). Article 2 of the UN Declaration provides a nonexhaustive list of examples that constitute violence against women within the meaning of the UN Declaration, including battering, sexual abuse of female children, marital rape, female genital mutilation, nonspousal violence, rape, sexual harassment, and forced prostitution. UN Declaration, *supra* note 2, at art. 2. Article 2 of the Inter-American Convention similarly gives examples of conduct that constitute violence against women. Inter-American Convention, *supra* note 1, at art. 2. Furthermore, Article 3 of the Inter-American Convention emphasizes that the coverage of the definition of violence against women includes private as well as state action: "Every woman has the right to be free from violence in both the public and private spheres." *Id.* at art. 3.

People in the human rights field often refer to violence against women as "gender-based violence," which includes violence perpetrated against women because they are women and violence that disproportionately affects women. *See* General Recommendation 19, U.N. GAOR, Committee on the Elimination of Discrimination Against Women, 11th Sess., ¶ 6, U.N. Doc. A/47/38 (1992) (defining "gender-based" violence as violence directed at women because they are women and as violence that disproportionately affects women); *Observations Received from Governments on the Preliminary Suggested Text of an Inter-American Convention Dealing with Women and Violence*, at 24, OEA/ser.L/II.7.5, CIM/RECOVI/doc. 5/93 (1993) (observations by United States) (describing "gender-based violence" as violence directed at women because they are women and as violence that disproportionately affects women); Charlesworth, *supra* note 5, at 1 (stating that violence against women is often conceptualized as "gendered violence" to stress fact that violence against women is not simply random aggression).

44. *See* Bashir, *supra* note 5, at 2 (stating that domestic violence traditionally is deemed

The Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention),<sup>45</sup> which the UN General Assembly adopted in 1979, is one of the key international human rights instruments on the protection of women's rights.<sup>46</sup> In 1992, the Committee on the Elimination of Discrimination Against Women (CEDAW)<sup>47</sup> adopted General Recommendation 19, which expressly recognized that the Women's Convention covers gender-based violence.<sup>48</sup> In General Recommendation 19, CEDAW stated that gender-based violence falls within the meaning of discrimination in Article 1 of the Women's Convention<sup>49</sup> and that gender-based violence may violate a provision of the Women's Convention even though the provision does not refer expressly to violence against women.<sup>50</sup>

CEDAW characterized violence against women as a type of discrimination because of the consequences of gender-based violence for women.<sup>51</sup>

to be outside scope of international law because domestic violence is perpetrated by private, not state, actors); *UN Makes Strides on Violence against Women*, *supra* note 5, at 1 (stating that international law usually involves state conduct and that UN Declaration enters "delicate, previously forbidden territory"); *see also* Charlesworth, *supra* note 5, at 1 (noting that violence against women traditionally is seen as beyond scope of international law).

45. Women's Convention, *supra* note 17; *see* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES app. A (Rebecca J. Cook ed., 1994) (listing states that had ratified Women's Convention as of January 21, 1994); NEW ZEALAND MINISTRY OF FOREIGN AFFAIRS AND TRADE, UNITED NATIONS HANDBOOK: 1994 56 (1994) (stating that, as of January 18, 1994, Women's Convention had 132 recorded ratifications and accessions).

46. Charlesworth, *supra* note 5, at 1 (identifying Women's Convention as major UN convention on women); Culliton, *supra* note 18, at 510-11 (describing Women's Convention as "hallmark of the United Nations' work on women's rights").

47. Article 17 of the Women's Convention established the Committee on the Elimination of Discrimination Against Women. NEW ZEALAND MINISTRY OF FOREIGN AFFAIRS AND TRADE, *supra* note 45, at 56. States parties to the Women's Convention elect the CEDAW members from their nationals with consideration paid to attaining equitable representation with respect to geography, cultures, and principal legal systems. *Id.* The CEDAW members are experts, who serve in their personal, rather than in an official, capacity. *Id.* The CEDAW considers reports of states parties to the Women's Convention and monitors the progress in implementation of the Women's Convention. *Id.* Each year the CEDAW reports to the UN General Assembly through the Economic and Social Council. *Id.*

48. General Recommendation 19, *supra* note 43, ¶¶ 6-7

49. *See id.* ¶ 7 (stating that gender-based violence is discrimination under Article 1 of Women's Convention).

50. *Id.* ¶ 6.

51. *See id.* ¶¶ 1, 11 (discussing discriminatory effect of violence against women, namely that gender-based violence deprives women of enjoyment of human rights and

Specifically, CEDAW described violence against women as significantly interfering with women's enjoyment of human rights and fundamental freedoms on an equal level with men.<sup>52</sup> Some of the specific rights of women that gender-based violence may impair include the right to life, the right to equality in the family, the right to liberty and security of person, and the right not to be subjected to torture or to cruel, inhuman, or degrading treatment.<sup>53</sup> In addition, CEDAW recognized the role that discrimination plays in the perpetuation of violence against women.<sup>54</sup> For example, CEDAW stated that traditional beliefs which accord women a subordinate status to men perpetuate and justify abusive conduct toward women, such as domestic violence and dowry-related deaths.<sup>55</sup> This relationship between discrimination against women and violence against women seems to be the essence of CEDAW's interpretation that gender-based violence falls within the definition of discrimination.<sup>56</sup> As CEDAW noted, only with efforts to eliminate violence against women can the Women's Convention fully achieve its purpose of eliminating all forms of discrimination against women.<sup>57</sup>

In General Recommendation 19, CEDAW stressed that the Women's Convention reaches not only violence perpetrated by or on behalf of a government, but also violence perpetrated by private persons.<sup>58</sup> Article 2(e) of the Women's Convention says that states parties should take the appropriate measures to eliminate gender-based discrimination by "any person, organization or enterprise."<sup>59</sup> CEDAW pointed to Article 2(e)'s

fundamental freedoms equal to that possessed by men).

52. *See id.* (stating that violence against women has practical effect of denying women equal enjoyment of their rights and freedoms).

53. *See id.* ¶ 7 (listing some human rights and fundamental freedoms that gender-based violence impairs or nullifies).

54. *See id.* ¶ 11 (stating that attitudes that subordinate women perpetuate violent practices against women).

55. *Id.*

56. *See id.* ¶ 4 (recognizing close relationship between discrimination against women, violence against women, and human rights violations).

57. *See id.* ¶ 5 (stating that full implementation of Women's Convention necessitates that states act affirmatively to eliminate violence against women).

58. *See id.* ¶ 9 (stating that Women's Convention does not reach only state-perpetrated violence). Katherine M. Culliton states that the Women's Convention and General Recommendation 19 "may be extremely useful as a means to overcome the argument that domestic violence is a 'private' issue beyond the reach of international enforcement mechanisms." Culliton, *supra* note 18, at 527

59. *See Women's Convention, supra* note 17, at art. 2(e) (stating that state has obligation to take all appropriate means to end discrimination against women that "any person,

language as part of its rationale for interpreting discrimination under the Women's Convention to extend beyond state action.<sup>60</sup> CEDAW concluded that "[u]nder general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation."<sup>61</sup>

Other notable achievements in the international human rights arena on the subject of violence against women have occurred in recent years. In 1985, the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women, which took place in Nairobi, adopted the Nairobi Forward-looking Strategies for the Advancement of Women.<sup>62</sup> The Nairobi Forward-looking Strategies for the Advancement of Women recognized violence against women as a major obstacle to equality, development, and peace.<sup>63</sup> In June 1993, the Second World Conference on

organization or enterprise" commits).

60. See General Recommendation 19, *supra* note 43, ¶ 9 (noting that Article 2(e) of Women's Convention requires states parties to take necessary measures to eliminate discrimination against women committed by any person, organization, or enterprise).

61. *Id.* ¶ 9 At the 1992 lawyer consultation group meeting at the University of Toronto, Manfred Nowak noted that, even given the evolution of international human rights law, state responsibility still arises at a level once removed from the perpetrator's act of violence. Cook, *supra* note 8, at 235. A state may bear responsibility for a failure to act with due diligence to prevent, investigate, punish, and remedy acts of violence against women, but current international law would not hold a state accountable for a specific act of domestic violence itself. See Velásquez Rodríguez Case, Inter-Am. Ct. H.R. (ser. C) No. 4, Annual Report of the Inter-American Court of Human Rights 35, ¶ 172 (saying that state may be accountable for private act that violates human rights that American Convention on Human Rights recognizes, "not because of the act itself," but for state's lack of due diligence to prevent or respond to the violation); INTERNATIONAL HUMAN RIGHTS LAW GROUP, WRITTEN COMMENTS TO THE INTER-SESSIONAL WORKING GROUP OF THE COMMISSION ON THE STATUS OF WOMEN TO FURTHER DEVELOP A DRAFT DECLARATION ON VIOLENCE AGAINST WOMEN 13 (1992) (commenting that duty to exercise "due diligence" imposes limits on when state is accountable under UN Declaration for violence against women perpetrated by private actors). Nowak stated that this limitation results not from gender bias, but from the nature of international law. Cook, *supra* note 8, at 235.

62. *Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace*, ch. I, sec. A, ¶ 258, A/CONF.116/28/Rev 1 (1986).

63. *Id.* ¶ 258; see UN Declaration, *supra* note 2, at pmbl. (acknowledging Nairobi Forward-looking Strategies for the Advancement of Women's recommendation of measures to fight gender-based violence and recognition of violence against women as major obstacle to equality, development, and peace); Charlesworth, *supra* note 5, at 1 (discussing Nairobi Forward-looking Strategies for the Advancement of Women).

Human Rights adopted the Vienna Declaration and Programme of Action.<sup>64</sup> In the Vienna Declaration, the World Conference on Human Rights urged the UN General Assembly to adopt the UN Declaration and emphasized the importance of eliminating violence against women in both the public and the private spheres.<sup>65</sup> In 1994, the UN Commission on Human Rights appointed Radhika Coomaraswamy as the Special Rapporteur on Violence Against Women.<sup>66</sup> Special rapporteurs, who investigate and report on particular human rights matters, are considered extremely valuable and effective human rights advocates.<sup>67</sup> In September 1995, the Fourth World Conference on Women in Beijing, China, will address violence against women.<sup>68</sup>

In summary, the continuing development of international human rights law in the area of violence against women requires work on a number of fronts, including work on theories of state accountability.<sup>69</sup> The Inter-American Convention and the UN Declaration are significant steps in, and will be instructive models for, this developing area of international human rights law

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64. Vienna Declaration and Programme of Action, U.N. Doc. A/CONF.157/24 (1993), reprinted in 32 I.L.M. 1661 (1993).

65. *Id.* ¶ 38, 32 I.L.M. 1678; see Charlesworth, *supra* note 5, at 4 (stating that Vienna Declaration on Human Rights declared that gender-based violence is human rights issue); Sullivan, *supra* note 16, at 152 (stating that Second World Conference on Human Rights crystallized consensus on need to examine gender-based violence in terms of human rights norms and gender discrimination).

66. Bashir, *supra* note 5, at 2, 15 (discussing UN Commission on Human Rights appointment of Special Rapporteur on Violence against Women); Charlesworth, *supra* note 5, at 4 (same); *UN Makes Strides on Violence against Women*, *supra* note 5, at 10 (same).

67. Bashir, *supra* note 5, at 15 (discussing view that special rapporteurs are extremely effective at putting particular human rights issues prominently in front of international community); Charlesworth, *supra* note 5, at 4 (stating that special rapporteurs are considered highly effective).

68. See *Commission on the Status of Women: Report on the Thirty-eighth Session*, U.N. ESCOR, Supp. No. 7, ch. V, ¶ 32, U.N. Doc. E/1994/27, E/CN.6/1994/14 (1994) (discussing preparations for Fourth World Conference on Women and noting that elimination of violence against women is "particularly crucial issue"); see also Charlesworth, *supra* note 5, at 4 (stating that violence against women will be major theme at Fourth World Conference on Women).

69. See Cook, *supra* note 8, at 250-51 (stating that consensus of lawyer consultation group was that more work is required regarding theories of state responsibility to hold state liable for not preventing, investigating, and punishing violations of women's rights); Culliton, *supra* note 18, at 511 (stating that public-private distinction is difficult to surmount, but that recent developments demonstrate expansion in concept of state responsibility under international human rights law).

*III. Comparison: The Inclusion of Qualifying References to National Legislation in the UN Declaration and the Absence of Such References in the Inter-American Convention*

*A. Interpretation of the UN Declaration as Deferring to National Standards*

The UN Declaration qualifies some state responsibilities with references to national legislation.<sup>70</sup> Specifically, Article 4(c) of the UN Declaration instructs states to "[e]xercise due diligence to prevent, investigate and, *in accordance with national legislation*, punish acts of violence against women."<sup>71</sup> Article 4(d) says, in part, that "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."<sup>72</sup> The Inter-American Convention states, without qualification by reference to national legislation, that the states parties undertake to "apply due diligence to prevent, investigate and impose penalties for violence against women"<sup>73</sup> and to "establish the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations or other just and effective remedies."<sup>74</sup>

An expert group, which met in November 1991, prepared a draft declaration on the elimination of violence against women.<sup>75</sup> This draft declaration did not include qualifying references to national legislation in its listing of state responsibilities.<sup>76</sup> An intersessional working group of the UN

70. See *infra* notes 71-72 and accompanying text (reciting UN Declaration language in Articles 4(c) and 4(d) that qualifies certain state responsibilities by reference to national legislation).

71. UN Declaration, *supra* note 2, at art. 4(c) (emphasis added).

72. *Id.* at art. 4(d) (emphasis added).

73. Inter-American Convention, *supra* note 1, at art. 7(b).

74. *Id.* at art. 7(g).

75. See *Priority Themes, Peace: Measures to Eradicate Violence Against Women in the Family and Society: Report by the Secretary-General*, *supra* note 5, ¶ 5 (summarizing drafting process of UN Declaration and calling draft declaration prepared by 1991 expert group "first" draft). For the text of the 1991 expert group meeting's draft declaration, see *Monitoring the Implementation of the Nairobi Forward-looking Strategies for the Advancement of Women, Violence Against Women in All Its Forms: Report of the Secretary-General*, Commission on the Status of Women, U.N. ESCOR, 36th Sess., app., Agenda Item 4, U.N. Doc. E/CN.6/1992/4 (1991) (initial draft of UN Declaration) [hereinafter 1991 Expert Group Draft Declaration].

76. See 1991 Expert Group Draft Declaration, *supra* note 75, at arts. 4(b), 4(f). The

Commission on the Status of Women<sup>77</sup> met from August 31 through September 4, 1992.<sup>78</sup> This working group drafted a final version of the UN Declaration that included the qualifying references to national legislation in Articles 4(c) and 4(d).<sup>79</sup> The Commission on the Status of Women subsequently recommended the final draft to the UN Economic and Social Council.<sup>80</sup> The Economic and Social Council, in turn, endorsed the draft,<sup>81</sup> and the General Assembly adopted the UN Declaration on December 20, 1993.<sup>82</sup>

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1991 draft's Article 4(b) called for states to "include in domestic legislation penal and civil sanctions to punish and redress the wrongs caused to women who are subjected to violence and to provide them with just and effective legal remedies, compensation and rehabilitation" and did not qualify this responsibility with the phrase "as provided for by national legislation." *Id.* at art. 4(b). Likewise, Article 4(f) of the 1991 draft says, without qualification, that states shall "exercise due diligence to prevent, investigate and punish acts of violence against women, whether those acts are perpetrated by the State or are acts by private persons condoned by the State." *Id.* at art. 4(f).

77. The Commission on the Status of Women prepares reports to the UN Economic and Social Council on the promotion of women's rights and makes recommendations to the Economic and Social Council on current, urgent problems in the area of women's rights. NEW ZEALAND MINISTRY OF FOREIGN AFFAIRS AND TRADE, *supra* note 45, at 101. The Working Group on Communications on the Status of Women considers communications that aid in the determination of trends that indicate pressing problems concerning women's rights. *Id.* at 104. The Economic and Social Council elects members to the Commission on the Status of Women as follows: 13 members from African states; 11 from Asian states; 4 from Eastern European states; 9 from Latin American and Caribbean states; and 8 from Western European and other states. *Id.* at 101.

78. See E.S.C. Res. 1992/18, U.N. ESCOR, Supp. No. 1, at 19-20, ¶ 5, U.N. Doc. E/1992/92 (1993) (deciding to convene intersessional working group of Commission on Status of Women to continue drafting declaration on elimination of violence against women, taking into account 1991 draft); see also *Monitoring the Implementation of the Nairobi Forward-looking Strategies for the Advancement of Women, Elimination of Violence Against Women: Report of the Secretary-General*, Commission on the Status of Women, U.N. ESCOR, 37th Sess., Agenda Item 4, U.N. Doc. E/CN.6/1993/12 (1992) (report of working group of Commission on the Status of Women that met in Vienna from August 31 to September 4, 1992) [hereinafter Report of 1992 CSW Working Group].

79. See Report of 1992 CSW Working Group, *supra* note 78, app. I, at arts. 4(c) and 4(d) (referencing national legislation with respect to state duties).

80. See *Report of the Commission on the Status of Women on Its Thirty-Seventh Session*, U.N. ESCOR, at 2, U.N. Doc. E/1993/27 (1993) (recommending that Economic and Social Council adopt draft declaration).

81. See *Violence Against Women in All Its Forms*, E.S.C. Res. 1993/26, U.N. ESCOR, Supp. No. 1, at 42-43, ¶ 3, U.N. Doc. E/1993/93 (1994) (urging states to support adoption in UN General Assembly of draft declaration on elimination of violence against women).

82. UN Declaration, *supra* note 2. The Third Committee of the UN General Assembly had recommended to the UN General Assembly adoption of the declaration on the elimination



Commentators have suggested that the UN Declaration's references to national legislation defer to national, rather than international, standards to judge a state's fulfillment of its responsibilities under Articles 4(c) and 4(d) and that these references weaken the UN Declaration.<sup>83</sup> The argument that the national legislation references defer to national standards to judge compliance is a straightforward one. By the language of Articles 4(c) and 4(d), a state should, in the manner that the state's legislation dictates, punish acts of violence against women and provide access to just and effective remedies for the harm that results from such violence.<sup>84</sup> A particular state thus arguably would fulfill these two significant responsibilities merely by following the state's own law when punishing gender-based violence and in providing access to remedies. Use of a national, rather than international, standard in this context carries severe negative implications.<sup>85</sup> First, deference to national standards poses the danger of permitting a government essentially to define for itself its compliance with the UN Declaration.<sup>86</sup> Second, particularly in an area still very much in the developmental process, deference to national standards threatens the development of international standards with respect to eliminating violence against women.<sup>87</sup>

### *1 Danger of Permitting a State to Define Its Compliance*

Deference to national standards would permit a government to define its own compliance with the UN Declaration;<sup>88</sup> should that state's legislation inadequately punish and insufficiently redress violence against women, the

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of violence against women. *Advancement of Women: Report of the Third Committee*, 48th Sess., Agenda Item 111, ¶ 23, U.N. Doc. A/48/629 (1993).

83. See *supra* note 24 (giving examples of commentators who view UN Declaration's references to national legislation as problematic).

84. See UN Declaration, *supra* note 2, at art. 4(c) (saying that states should exercise due diligence to punish "in accordance with national legislation" acts of violence against women); *id.* at art. 4(d) (saying that states should provide women subjected to violence with access "as provided for by national legislation" to just and effective remedies).

85. See Charlesworth, *supra* note 5, at 3-4 (viewing UN Declaration's references to national, instead of international, standards as problematic); Sullivan, *supra* note 16, at 166 (stating that national legislation references undermine normative force of UN Declaration's state responsibility provision).

86. See *infra* part III.A.1 (examining danger of allowing state to define its own compliance with UN Declaration).

87. See *infra* part III.A.2 (discussing need for development of standards on elimination of violence against women).

88. See generally *infra* notes 89-131 and accompanying text (examining problem of permitting state to define its own compliance with UN Declaration).

UN Declaration would fail to secure the rights and freedoms that the declaration seeks to protect. There would be no pressing need for international measures to protect women against violence if existing national structures were already doing a sufficient job; therefore, deference to national standards within the UN Declaration would have quite an undermining influence.<sup>89</sup> Essentially, the UN Declaration's statement that states should punish violence against women and provide access to remedies for violence would do little to foster those goals if a government merely could manipulate its own law to avoid its responsibilities under the UN Declaration. Moreover, such a loophole would run counter to the overall spirit of the UN Declaration, which calls states to develop all legal, political, administrative, and cultural measures to protect women against violence.<sup>90</sup>

Even if the UN Declaration's references to national legislation do provide a means of avoiding the UN Declaration's obligations for states, that does not mean that states therefore would be unaccountable on the international level for human rights offenses with respect to violence against women.<sup>91</sup> Overlaps exist between the UN Declaration's provisions and protections found in other human rights conventions.<sup>92</sup> The UN Declaration and the Inter-American Convention explicitly recognize that women have rights that violence implicates and that other "mainstream" human rights instruments already secure.<sup>93</sup> The Inter-American Convention states that every woman has the right to the protection and exercise of every human right found in regional and international human rights instruments.<sup>94</sup> For example, a woman possesses the

89. See Culliton, *supra* note 18, at 516-21 (examining domestic legal systems' inadequacy with respect to domestic violence problem); see also *infra* notes 124-26 and accompanying text (discussing current inadequate protection of women's rights).

90. See UN Declaration, *supra* note 2, at art. 4(f) (saying that states should develop comprehensively all measures to protect women from violence).

91. See *infra* notes 98-122 (discussing state accountability for tolerating violence against women under international human rights instruments other than UN Declaration).

92. *Id.*

93. See Inter-American Convention, *supra* note 1, at art. 4 (listing examples of rights to which women are entitled that regional and international human rights instruments embody); UN Declaration, *supra* note 2, at art. 3 (same).

94. Inter-American Convention, *supra* note 1, at art 4. For a look at the kinds of human rights instruments that the drafters of the Inter-American Convention considered while drafting that convention, see *Relevant Conventions, Protocols, Declarations and Resolutions of the United Nations*, Intergovernmental Meeting of Experts to Consider the Preliminary Draft of Inter-American Convention of Women and Violence, OEA/Ser.L/II.7.5, CIM/RECOVI/doc.9/93 (listing international human rights instruments of United Nations relevant to drafting of Inter-American Convention on violence against women); *Relevant Conventions, Protocols and Resolutions of the Organization of American States and the*

right to have her life and physical, mental, and moral integrity respected, the right to personal security, and the right to simple and timely recourse to a court for violations of such rights.<sup>95</sup> Similarly, the UN Declaration states that women have a right to equal protection of human rights and freedoms in every area — civil, political, economic, social, and cultural.<sup>96</sup> The UN Declaration cites several international human rights instruments that guarantee some of these human rights and fundamental freedoms, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>97</sup>

Existing human rights instruments arguably already protect human rights that are relevant to the protection of women from violence.<sup>98</sup> As discussed in Part II, CEDAW issued General Recommendation 19, an authoritative interpretation of the Women's Convention, which stated, in part, that gender-based violence may violate provisions of the Women's Convention even though those provisions do not refer explicitly to violence against women.<sup>99</sup> CEDAW also concluded that a state may be held account-

*Inter-American Commission of Women (CIM)*, Intergovernmental Meeting of Experts to Consider the Preliminary Draft of Inter-American Convention on Women and Violence, OEA/Ser.L/II.7.5, CIM/RECOVI/doc.8/93 (listing OAS measures relevant to drafting of Inter-American Convention on elimination of violence against women).

95. Inter-American Convention, *supra* note 1, at art. 4.

96. UN Declaration, *supra* note 2, at art. 3.

97. *Id.* at art. 3 nn.6-11.

98. See, e.g., Roth, *supra* note 32, at 326-35 (arguing, in part, that state may be accountable under International Covenant on Civil and Political Rights for failure to combat domestic violence based on broad language of Covenant and on movement toward holding states parties accountable for systemic inaction); Copelon, *supra* note 5, at 116-52 (discussing possibility of conceptualizing domestic violence as form of torture sanctionable under germane human rights conventions, as well as recognizing need to see domestic violence as distinct kind of human rights abuse); Culliton, *supra* note 18, at 526 (discussing state responsibility regarding domestic violence and explaining that rights to life, physical integrity, and equality before law, which international human rights instruments secure, imply right to be free from domestic violence). For a chart providing a nonexhaustive list of rights that international human rights conventions secure that are relevant to combating violence against women, see *Expert Group Meeting on Violence Against Women: Report* (Unedited), Division for the Advancement of Women, at Annex I, EGM/VAW/1991/1 (1991). Speaking about violence against women in the context of rape in armed conflicts, Françoise Krill has said that "[i]f women in real life are not always protected as they should be, it is not due to lack of a legal basis." Françoise Krill, *The Protection of Women in International Humanitarian Law*, 249 INT'L REV RED CROSS 337, 359 (1985).

99. See General Recommendation 19, *supra* note 43, ¶ 6 (stating that gender-based

able for private, as well as state, acts of violence against women if that state does not use due diligence to prevent, investigate, punish, and remedy gender-based violence.<sup>100</sup> Thus, even if the UN Declaration's references to national legislation provide a means of avoiding obligations enunciated in the UN Declaration, states parties to the Women's Convention retain comparable duties under that binding convention.<sup>101</sup> Similarly, the Inter-American Convention would bind states parties to that convention to the duties that the Inter-American Convention establishes regardless of whether the UN Declaration effectively secures the rights that the declaration seeks to protect.<sup>102</sup>

In addition, Article 5 of the American Convention on Human Rights<sup>103</sup> secures the rights to physical integrity and to humane treatment by stating that no person may be subjected to torture or to cruel, inhuman, or degrading treatment.<sup>104</sup> Article 4 of that convention recognizes the right to life,<sup>105</sup> and Article 7 recognizes the right to personal security.<sup>106</sup> These rights to

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violence may violate even those provisions of Women's Convention that do not refer explicitly to violence against women).

100. *Id.* ¶ 9.

101. *See* UN Declaration, *supra* note 2, at art. 6 (stating explicitly that UN Declaration does not affect provisions in state legislation or "any international convention, treaty or other instrument in force in a State" that can work more effectively to eliminate violence against women). Commentators have pointed out some limitations that arise in relying on the Women's Convention to address the issue of violence against women. *See* Charlesworth, *supra* note 5, at 2 (stating that impact of CEDAW's work on violence against women as discrimination under Women's Convention only affects states parties to Women's Convention); Culliton, *supra* note 18, at 528 (stating that Women's Convention is not best mechanism for enforcement of women's rights within international arena). Culliton notes that, although General Recommendation 19 is an authoritative interpretation of the Women's Convention, General Recommendation 19 does not bind the states parties. Culliton, *supra* note 18, at 528. In addition, Culliton points out the weak enforcement powers of CEDAW. *Id.* However, Culliton argues that, given increased enforcement power and/or increased voluntary compliance, the Women's Convention could be an effective means of confronting the problem of violence against women. *Id.* at 540.

102. *See* UN Declaration, *supra* note 2, at art. 6 (providing expressly that UN Declaration does not affect provisions in state legislation or "any international convention, treaty or other instrument in force in a State" more conducive to achieving elimination of violence against women).

103. American Convention on Human Rights, Nov 22, 1969, 9 I.L.M. 673 (1970).

104. *Id.* at art. 5(2). Article 5(2) states that "[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment." *Id.* Article 5(1) states that "[e]very person has the right to have his physical, mental, and moral integrity respected." *Id.* at art. 5(1).

105. *Id.* at art. 4.

106. *Id.* at art. 7

life, personal security, humane treatment, and respect of physical, mental, and moral integrity speak directly to the kinds of rights that a victim of violence loses.<sup>107</sup> Article 1(1) mandates that the states parties to the American Convention on Human Rights respect and ensure the rights and freedoms recognized in that convention.<sup>108</sup> In the *Velásquez Rodríguez Case*,<sup>109</sup> which involved the forcible detention and disappearance of a Honduran university student, the Inter-American Court of Human Rights stated that Article 1(1)'s duty to "ensure" rights, such as the right to humane treatment, implies a state obligation to take reasonable steps to prevent a human rights violation, to investigate the violation seriously, to impose an appropriate punishment, and to compensate the victim adequately.<sup>110</sup> The Inter-American Court said that the duty to ensure rights

107 See Roth, *supra* note 32, at 327 (stating that domestic violence arguably implicates right to life, right to security of person, and right not to be subjected to torture or to cruel, inhuman, or degrading treatment); Culliton, *supra* note 18, at 508 (arguing that state's tolerance of domestic violence violates right to life and right to freedom from torture). Culliton states that under any analysis of state accountability for domestic violence, the two fundamental rights implicated are the right to physical integrity and the right to equal protection of the law. Culliton, *supra* note 18, at 514.

108. American Convention on Human Rights, *supra* note 103, at art. 1(1).

109 Inter-Am. Ct. H.R. (ser. C) No. 4, 1988 Annual Report of the Inter-American Court of Human Rights 35 (1988) (judgment).

110. *Velásquez Rodríguez Case*, Inter-Am. Ct. H.R. (ser. C) No. 4, 1988 Annual Report of the Inter-American Court of Human Rights 35, ¶ 174 (1988) (judgment). In *Velásquez Rodríguez*, the Inter-American Court of Human Rights addressed the question of when a particular act that violates a right found in the American Convention on Human Rights (Convention) can be imputed to a state party, thereby making that state internationally accountable. *Id.* ¶ 160. The Inter-American Court of Human Rights concluded that a state may be held accountable under Article 1(1) of the Convention for failing to use due diligence to prevent or to respond to a private person's or state agent's violation of a right guaranteed in the Convention. *Id.* ¶ 172.

In *Velásquez Rodríguez*, the Secretariat of the Inter-American Commission on Human Rights (Commission) received a petition against the State of Honduras filed pursuant to Article 44 of the Convention. *Id.* ¶ 3. The petition alleged that members of the Honduran Office of Investigations and of the Honduran armed forces forcibly detained Angel Manfredo Velásquez Rodríguez (Manfredo Velásquez) on September 12, 1981. *Id.* The petition asserted that Manfredo Velásquez was accused of political crimes and tortured. *Id.* The police and security forces denied that they had detained Manfredo Velásquez. *Id.* Ultimately, after a process of inquiry seeking information from the Honduran government, the Commission concluded that the Honduran government's report on this matter was insufficient and that "all evidence shows that Angel Manfredo Velásquez Rodríguez is still missing and that the Government of Honduras has not offered convincing proof that would allow the Commission to determine that the allegations are not true." *Id.* ¶¶ 4-10. The Commission referred the case to the Inter-American Court on Human Rights (Court), which had juris-

recognized in the American Convention on Human Rights extends to human rights violations that private parties commit as well as to human rights violations that state agents perpetrate.<sup>111</sup> A state would not be held internationally responsible for the act of a private party in and of itself, but for the state's failure to use due diligence to prevent, investigate, punish, and provide a remedy for the violation.<sup>112</sup> Thus, one could argue that Article 1(1) makes a state party to the American Convention on Human Rights accountable when that state party does not use due diligence to prevent and respond to private acts of violence against women.<sup>113</sup> Then,

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diction over Honduras because Honduras had formally recognized that court's jurisdiction over it with respect to the interpretation and application of the American Convention on Human Rights. *Id.* ¶¶ 10-11.

The Commission asked the Court to find that Honduras had violated the rights that Articles 4 (right to life), 5 (right to humane treatment), and 7 (right to personal liberty) guaranteed to Manfredo Velásquez under the Convention. *Id.* ¶ 159. The Court examined Article 1(1) of the Convention, which describes the states parties' obligation to "respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms." *Id.* ¶ 161. Because a state party must respect and ensure the rights recognized by the Convention, a public authority's violation of the Convention is imputable to the state. *Id.* ¶¶ 169-72. The Court recognized, however, that a state party may be held responsible not only for failing to ensure that state agents do not commit human rights offenses, but also for failing to take reasonable steps to prevent, punish, and investigate a violative act that a private party perpetrates. *Id.* ¶ 172. The Court described a theory of accountability through complicity, stating that when private parties' violations of the Convention are not investigated seriously, those private persons are, in effect, being aided by the government. *Id.* ¶ 177. For that reason, the state is held responsible in the international arena. *Id.* After discussing the specific facts of the case and the inadequacy of the Honduran government's action to ensure the respect of Manfredo Velásquez's rights, the Court stated that it strongly believed that the detention and disappearance of Manfredo Velásquez was the work of agents acting under public authority. *Id.* ¶ 182. However, the Court also pointed out explicitly that even if public agents were not responsible for Manfredo Velásquez's disappearance, the proven failure of the Honduran state apparatus to act effectively constituted a failure to fulfill Honduras's duties under Article 1(1). *Id.* The Court concluded that Honduras violated Articles 4, 5, and 7 of the American Convention on Human Rights. *Id.* ¶ 185.

111. *Id.* ¶ 172. The Inter-American Court stated:

An illegal act which violates human rights and which is initially not directly imputable to a State (*for example, because it is the act of a private person* or because the person responsible has not been identified) can lead to international responsibility of the State, not because of 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.

*Id.* (emphasis added).

112. *Id.*

113. See Culliton, *supra* note 18, at 549-53 (making argument under American Convention on Human Rights, read in light of *Velásquez Rodríguez*, for state responsibility for

regardless of whether the UN Declaration's references to national legislation provide a means of avoiding the duty to punish and to provide access to just and effective remedies as enunciated in the UN Declaration, the American Convention on Human Rights would hold states parties to that convention accountable for the failure to exercise due diligence to prevent and remedy violence perpetrated against women.<sup>114</sup>

One can make a similar argument under the International Covenant on Civil and Political Rights.<sup>115</sup> Article 7 of the International Covenant on Civil and Political Rights states that no person may be subjected to torture or to cruel, inhuman, or degrading treatment.<sup>116</sup> The Human Rights Committee<sup>117</sup> has interpreted Article 7 to encompass acts perpetrated by private

failing to investigate and punish domestic violence).

114. See UN Declaration, *supra* note 2, at art. 6 (stating expressly that UN Declaration does not affect provisions in state legislation or "any international convention, treaty or other instrument in force in a State" more conducive to achieving elimination of violence against women).

115. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, see Copelon, *supra* note 5, at 140-41 (arguing for interpretation of Article 7 of International Covenant on Civil and Political Rights, which provides for right to be free from torture and cruel or degrading treatment, that would hold state accountable for human rights violation if that state fails to exercise due diligence in investigation and punishment of domestic violence); Roth, *supra* note 32, at 327 (stating that provisions of International Covenant on Civil and Political Rights that are arguably applicable to domestic violence include Article 6(1) (right to life), Article 7 (right not to be subjected to torture or cruel, inhuman, or degrading treatment), and Article 9(1) (right to security of person)). Roth makes the argument that the theory of state accountability by omission may apply to hold a state responsible for a human rights violation for systematic failure to prevent and respond to domestic violence appropriately Roth, *supra* note 32, at 331. In addition, Roth argues that a state is responsible under Article 2(1) and the antidiscrimination provisions of the International Covenant on Civil and Political Rights, such as Article 26, if it treats violence against women differently than other forms of violence. *Id.* at 333-35. Article 26 states that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law." International Covenant on Civil and Political Rights, *supra*, at art. 26. Roth sees the advantages of the antidiscrimination argument with respect to the Covenant's protection of women against violence as at least two-fold: First, this argument allows the international community to evaluate a state's efforts to confront violence against women even beyond the point at which a state is held accountable based on total inaction on its part with respect to violence perpetrated against women; second, a state would be accountable for discriminatory enforcement of a criminal law under Article 26 regardless of whether violence by private persons is ultimately found to violate the "physical-integrity" guarantees that the Covenant secures. Roth, *supra* note 32, at 333-35.

116. International Covenant on Civil and Political Rights, *supra* note 115, at art. 7

117. The Human Rights Committee is composed of nationals of states parties to the

persons.<sup>118</sup> Article 6 secures the right to life,<sup>119</sup> and Article 9 states that every person has the right to security of person.<sup>120</sup> In addition, like Article 1(1) of the American Convention on Human Rights,<sup>121</sup> Article 2 of the International Covenant on Civil and Political Rights states that every state party to that covenant agrees to respect and to "ensure" the rights that the International Covenant on Civil and Political Rights recognizes.<sup>122</sup>

Thus, even if the UN Declaration's references to national legislation are interpreted as providing states with a means to avoid some obligations listed in the UN Declaration, one can argue strongly that existing international human rights instruments apply to gender-based violence.<sup>123</sup> How-

International Covenant on Civil and Political Rights. NEW ZEALAND MINISTRY OF FOREIGN AFFAIRS AND TRADE, *supra* note 45, at 54. The Human Rights Committee members serve in their personal, rather than in their official, capacities. *Id.* The Human Rights Committee members have the power to consider reports of states parties on state compliance with the International Covenant on Civil and Political Rights. *Id.* Some of the states parties to the International Covenant on Civil and Political Rights have also recognized the Human Rights Committee as a competent body to consider communications from individuals on alleged human rights violations. *Id.* at 54-55.

118. See General Comment 20, U.N. GAOR, Hum. Rts. Comm., 44th Sess., [1992] COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES 29, 29 ¶ 2, U.N. Doc. HRI/GEN/1 (stating that states parties to International Covenant on Civil and Political Rights must give protection against acts that Article 7 bars, including acts perpetrated by private persons). Specifically, General Comment 20 states that "[i]t is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity." *Id.* (emphasis added); see also INTERNATIONAL HUMAN RIGHTS LAW GROUP, *supra* note 61, at 9-11 (pointing out that Human Rights Committee has interpreted Article 7 to reach private acts).

119. International Covenant on Civil and Political Rights, *supra* note 115, at art. 6.

120. *Id.* at art. 9.

121. See *supra* notes 108-14 and accompanying text (discussing implications of American Convention on Human Rights Article 1(1) guarantee that state party undertakes to respect and "ensure" rights recognized in that convention).

122. International Covenant on Civil and Political Rights, *supra* note 115, at art. 2.

123. See *supra* notes 98-122 and accompanying text (discussing arguments that existing human rights instruments encompass violence against women). In addition, Theo van Boven, as Special Rapporteur for the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, has conducted a study and written a report on the rights to restitution, compensation, and rehabilitation for victims of gross human rights violations. *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Final Report Submitted by Mr Theo van Boven, Special Rapporteur*, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 45th Sess., Item 4, U.N. Doc.



ever, one also must recognize the past shortcomings of generally applicable human rights instruments, such as the International Covenant on Civil and Political Rights and the American Covenant on Human Rights, with respect to the protection of women's rights.<sup>124</sup> It is undeniable that generally applicable human rights instruments have not protected women sufficiently up to this point.<sup>125</sup> As one commentator has stated, "the attempt to improve the position of women through more generally applicable measures has allowed women's concerns to be submerged by what are regarded as more 'global' issues."<sup>126</sup>

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E/CN.4/Sub.2/1993/8 (1993). In the final report, Mr. van Boven names violence against women as one especially relevant issue with respect to his study on the right to reparation. *Id.* ¶ 22. In the section of the report proposing basic principles and guidelines, Mr. van Boven submits as a proposal of basic principles that "[t]he obligation to ensure respect for human rights includes the duty to prevent violations, the duty to investigate violations, the duty to take appropriate action against the violators, and the duty to afford remedies to victims." *Id.* ¶ 137(2). Under this principle as proposed, states arguably would be accountable for failure to exercise appropriate care to punish those who commit acts of violence against women and for failure to provide access to remedies for victims of gender-based violence.

124. *See infra* notes 125-26 and accompanying text (pointing out that generally applicable human rights instruments have not been applied to prevent, punish, and eliminate violence against women).

125. *See Commission on the Status of Women: Report on the Thirty-Eighth Session, supra* note 68, ch. IV, ¶ 25 (observing that interpretation and application of universal human rights instruments have not resulted in protection of women's rights at same level as men's rights); *see also* Cook, *supra* note 8, at 252 (noting that, except for CEDAW, most UN committees' general comments do not integrate gender issues substantially into work of those bodies); Culliton, *supra* note 18, at 532 (pointing out that failure of traditional interpretations of international human rights law to acknowledge state duty to combat violence against women prompted drafting of Inter-American Convention); Fitzpatrick, *supra* note 6, at 558 (suggesting pressuring human rights bodies to address violence against women within respective scopes of authority). For suggestions on the integration of gender analysis into the work of the entire UN, especially UN human rights bodies, see *Priority Themes, Peace: Measures to Eradicate Violence Against Women in the Family and Society, Report by the Secretary-General, supra* note 5, at 12.

126. Charlesworth, *supra* note 20, at 66 (paraphrasing Laura Reanda, *The Commission on the Status of Women, in THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL* 267 (Philip Alston ed., 1992), on costs of relying on "mainstream" human rights bodies to address issues of particular concern to women). Charlesworth and Reanda also recognize the costs associated with the international community's concentrating on creating specialized mechanisms to deal with women's issues: "[T]he price of the creation of separate institutional mechanisms and special measures dealing with women within the United Nations system has typically been the creation of a 'women's ghetto,' given less power, fewer resources, and a lower priority than 'mainstream' human rights bodies." *Id.*

2. *Danger to the Development of International Standards with Respect to Eliminating Violence Against Women*

The international community has not yet fully developed standards with respect to violence against women.<sup>127</sup> An expert group that met in October 1993, through the efforts of the UN Division for the Advancement of Women, proposed the development of universal standards and minimum response guidelines for violence against women.<sup>128</sup> Governments probably would disfavor the application of fixed, mandated guidelines because states often try to insulate their national legislation from intrusion by international human rights norms.<sup>129</sup> Alternatively, a human rights instrument that seeks to eliminate violence against women could require states to "ensure" a certain result without specifically dictating the manner in which states obtain that result.<sup>130</sup> Regardless of the ultimate approach, in the final analysis the question of whether a state has complied with its international human rights responsibilities must be answered against the backdrop of an international, not national, standard.<sup>131</sup>

Moreover, given the developing nature of international human rights standards regarding the protection of women against violence, the references to national legislation in the UN Declaration pose an important, though subtle, danger. If the UN Declaration truly defers to national standards, this deference to individual state notions of responsibility may inhibit the development of international standards in the area of violence against women. The UN Declaration states that UN bodies should promote

127 See Cook, *supra* note 8, at 250-51 (stating that consensus of lawyer consultation group was that more work is required regarding theories of state responsibility to hold state liable for not preventing, investigating, and punishing violations of women's rights).

128. See *Priority Themes, Peace: Measures to Eradicate Violence Against Women in the Family and Society: Report by the Secretary-General*, *supra* note 5, at 12-13 (proposing development of universal guidelines regarding violence against women).

129. Cf. *Administration Submits Women's Convention to Senate; Hopes for Action Before Adjournment*, WASH. WKLY. REP. 3, 4 (United Nations Association of the United States of America ed., Sept. 23, 1994) (quoting one of Clinton Administration's proposed reservations to Women's Convention, which stated that United States would not accept obligation to enact legislation relating to private conduct). In 1994, when the Clinton Administration tried to obtain Senate ratification of the Women's Convention, it submitted a proposal to the Senate that included the following reservation: "[The United States] does not accept any obligation under the Convention to enact legislation or to take any other action with respect to private conduct except as mandated by the Constitution and laws of the United States." *Id.*

130. See *supra* notes 108-22 and accompanying text (discussing implications of provisions in human rights conventions that state must undertake to "ensure" rights).

131. See *supra* part III.A.1 (discussing dangers of deference to national standards).

the process of formulating guidelines with respect to violence against women.<sup>132</sup> However, the fact that the UN Declaration's references to national legislation may be read to permit a state to define its own compliance with the UN Declaration weakens the impetus to formulate international standards in this area and fosters diverging national practices. Thus, over time, reaching a consensus on meaningful international standards is made more difficult.

*B. Alternative Interpretation: The UN Declaration's References to National Legislation as Merely a Procedural Proviso*

The UN Declaration is not the only international human rights instrument that qualifies some state responsibilities with a reference to national legislation. A review of similar language in the International Covenant on Civil and Political Rights provides the basis for interpreting the UN Declaration in a manner that does not give states the ability to manipulate national legislation to avoid international human rights obligations.<sup>133</sup> Article 14(6) of the International Covenant on Civil and Political Rights provides, under certain circumstances, for the compensation "according to law" of persons who have suffered miscarriages of justice.<sup>134</sup> Similarly, Article 14(5) of the International Covenant on Civil and Political Rights secures the right of review of criminal convictions and sentences by higher tribunals "according

132. See UN Declaration, *supra* note 2, at 5(f) (encouraging UN organs and specialized agencies to formulate guidelines on violence against women). Specifically, Article 5(f) of the UN Declaration states that UN bodies within their particular areas of concern should "[p]romote the formulation of guidelines or manuals relating to violence against women, taking into account the measures referred to in the present Declaration." *Id.* In addition, the UN Declaration calls on states to encourage the development of guidelines for the implementation of the UN Declaration's principles. *Id.* at art. 4(n).

133. See generally *infra* notes 134-55 and accompanying text (discussing interpretation of "according to law" provisos in provisions of International Covenant on Civil and Political Rights).

134. International Covenant on Civil and Political Rights, *supra* note 115, at art. 14(6). Article 14(6) of the International Covenant on Civil and Political Rights provides:

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated *according to law*, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

*Id.* (emphasis added).

to law "<sup>135</sup> These provisions for compensation and review "according to law" are analogous to the UN Declaration's provisions that states should punish acts of violence against women "in accordance with national legislation" and that states should provide just and effective remedies "as provided for by national legislation."<sup>136</sup> The inclusion of the qualifier, "according to the law," in Articles 14(5) and 14(6) of the International Covenant on Civil and Political Rights is a recognition of the fact that providing appellate review in criminal cases and providing compensation for miscarriages of justice on a national level are not simple undertakings.<sup>137</sup> Consequently, a state would need some sort of statutory framework to detail the mechanisms for providing appellate review and for administering the task of providing compensation for a miscarriage of justice.<sup>138</sup> Punishing violence against women and providing women with access to remedies for harms suffered as a result of such violence similarly would require a statutory framework.

Manfred Nowak, in his commentary on the International Covenant on Civil and Political Rights, states that the "according to law" proviso in Article 14(5) of the International Covenant on Civil and Political Rights clearly does not allow a state party to impair the right of review itself.<sup>139</sup> Rather, Nowak argues that the proviso permits a state party to make decisions about how the right to appeal will be exercised in that state.<sup>140</sup> Indeed, the UN Human Rights Committee has acknowledged that Article 14(5)'s provision that review be "according to law" is just a procedural proviso on the exercise of that right of review.<sup>141</sup> In *Salgar de Montejo v Columbia*,<sup>142</sup> the Human Rights Committee stated:

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135. *Id.* at art. 14(5). Article 14(5) states that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal *according to law.*" *Id.* (emphasis added).

136. *See supra* notes 71-72 and accompanying text (quoting UN Declaration's references to national legislation in Articles 4(c) and 4(d)).

137. *See* MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 271 (1993) (stating that complexity of providing compensation for miscarriage of justice means that national implementation of right to compensation requires statutory measures; hence drafters included "according to law" proviso in Article 14(6) of International Covenant on Civil and Political Rights).

138. *Id.*

139. *Id.* at 267

140. *Id.*

141. *See id.* at 267 n.188 (citing Human Rights Committee decision that confirms interpretation that proviso only attaches to determinations on how right is exercised).

142. No. 64/1979 (1979), *reprinted in* [1985] HUMAN RIGHTS COMMITTEE: SELECTED DECISIONS UNDER THE OPTIONAL PROTOCOL, INTERNATIONAL COVENANT ON CIVIL AND

The Committee considers that the expression "according to law" in article 14(5) of the Covenant is not intended to leave the very existence of the right of review to the discretion of the States parties, since the rights are those recognized by the Covenant, and not merely those recognized by domestic law. Rather, what is to be determined "according to law" is the modalities by which the review by a higher tribunal is to be carried out.<sup>143</sup>

In *Salgar de Montejo*, the Human Rights Committee concluded that the Columbian government should change its laws to effectuate the right secured in Article 14(5) of the International Covenant on Civil and Political Rights.<sup>144</sup>

POLITICAL RIGHTS, U.N. Doc. CCPR/C/OP/1.

143. *Salgar de Montejo v Columbia*, No. 64/1979, at 127, 129-30 ¶ 10.4 (1979), reprinted in [1985] HUMAN RIGHTS COMMITTEE: SELECTED DECISIONS UNDER THE OPTIONAL PROTOCOL, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, U.N. Doc. CCPR/C/OP/1. In *Salgar de Montejo v Columbia*, the Human Rights Committee considered the question of whether the Columbian government breached Article 14(5)'s guarantee of a right to appeal because its Statute of Security did not make a particular offense subject to review by a higher tribunal. *Id.* at 127 ¶¶ 1.2, 1.5. On November 7, 1979, a Columbian military judge sentenced Consuelo Salgar de Montejo to one year of imprisonment for allegedly violating the Statute of Security by selling a gun. *Id.* at 127 ¶ 1.4. A week later, the same judge confirmed her sentence under the procedure known as the *recurso de reposición*, which was the sole procedural means of recourse that Salgar de Montejo had under the Statute of Security for the type of offense that she allegedly had committed. *Id.* at 127-28 ¶¶ 1.4, 7.1. On December 18, 1979, Salgar de Montejo submitted a communication to the Human Rights Committee alleging, in part, that the Colombian government had breached Article 14(5) of the International Covenant on Civil and Political Rights by enacting the Statute of Security. *Id.* at 127 ¶ 1.2.

The Human Rights Committee expressed its view that the "according to law" proviso in Article 14(5) was not meant to allow states parties the discretion to determine the substantive question of whether such a right exists because "the rights are those recognized by the Covenant, and not merely those recognized by domestic law." *Id.* at 129-30 ¶ 10.4. Instead, the Human Rights Committee read the "according to law" proviso as directed to the determination of the mechanisms used to effectuate the Article 14(5) right to review by a higher tribunal. *Id.* The Human Rights Committee then considered the fact that, whereas the English text of Article 14(5) refers to a "crime" and the French text to "une infraction," the Spanish text of Article 14(5) refers solely to "un delito." *Id.* Salgar de Montejo's sentence was for commission of an offense that Columbian law defined as "contravención," not "un delito." *Id.* Notwithstanding the Columbian law's definition of Salgar de Montejo's offense as "contravención," the Human Rights Committee concluded that the sentence that the military judge imposed on Salgar de Montejo was "serious enough, in all the circumstances," to necessitate that the government give Salgar de Montejo access to review by a higher tribunal. *Id.* Consequently, the Human Rights Committee found that Colombia had violated Article 14(5) and that Columbia should change its laws to secure Article 14(5)'s right to review by a higher tribunal. *Id.* at 130 ¶¶ 11, 12.

144. *Id.* at 130 ¶ 12.

The Human Rights Committee has sought information from states parties about their various procedures for review under Article 14(5).<sup>145</sup> In considering state reports on state review procedures, the Human Rights Committee has pointed out procedures that appeared inadequate to secure the protection of a person's right of review under Article 14(5).<sup>146</sup> When examining a state report of Iraq, for example, the Human Rights Committee looked specifically at the procedures that Iraq's Revolutionary Court employed.<sup>147</sup> The Revolutionary Court's findings were final; only in capital punishment cases did the accused have any right of appeal.<sup>148</sup> The representative of Iraq stated that, in practice, a condemned person could request Iraq's President to review his or her case and, in that way, the President constituted a quasi-court of appeal.<sup>149</sup> In response, a member of the Human Rights Committee noted that the Iraqi legislation did not adequately secure the full protection of Article 14(5) and stated that the Human Rights Committee would look forward to receiving information in the near future regarding Iraq's efforts to provide a procedure that fully protects Article 14(5)'s right of review.<sup>150</sup>

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145. DOMINIC MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* § 10.21 (1991).

146. *Id.*; see, e.g., *Summary Records of the Meetings of the Eleventh to the Sixteenth Sessions*, [1981-1982] 1 Y.B. HUM. RTS. COMM. 194, 196 ¶ 20, U.N. Doc. CCPR/3 (consideration of state report of Japan) (questioning whether particular Jokoku appeal of very limited scope met Article 14(5) requirements); *Summary Records of the Meetings of the Eleventh to the Sixteenth Sessions*, [1981-1982] 1 Y.B. HUM. RTS. COMM. 312, 314 ¶ 20, U.N. Doc. CCPR/3 (consideration of state report of Uruguay) (stating that right of appeal was not guaranteed in Uruguay); *Summary Records of the Meetings of the Sixth to the Tenth Sessions*, [1979-1980] 1 Y.B. HUM. RTS. COMM. 411, 414 ¶ 27, U.N. Doc. CCPR/2 (consideration of state report of Costa Rica) (noting Costa Rican report's (U.N. Doc. CCPR/C/1/Add.46 (1979)) acknowledgment of need for legislative reforms with respect to some unappealable sentences).

147. *Summary Records of the Meetings of the Sixth to the Tenth Sessions*, [1979-1980] 1 Y.B. HUM. RTS. COMM. 309, 314 ¶ 29, U.N. Doc. CCPR/2 (consideration of state report of Iraq) [hereinafter Human Rights Committee on Iraqi State Report]; see MCGOLDRICK, *supra* note 145, § 10.21 (stating that Human Rights Committee questioned procedures of Iraq's Revolutionary Court).

148. See Human Rights Committee on Iraqi State Report, *supra* note 147, at 314 ¶ 30 (pointing out apparent discrepancy between procedure of Revolutionary Court and Article 14(5)); see also MCGOLDRICK, *supra* note 145, § 10.21 (discussing same).

149. Human Rights Committee on Iraqi State Report, *supra* note 147, at 314 ¶ 31 (giving reply of Iraqi representative to effect that all Iraqi citizens could appeal to President of Republic from whom those citizens would have same protections and guarantees that courts provide); see also MCGOLDRICK, *supra* note 145, § 10.21 (stating substance of Iraqi representative's reply to question about compliance with Article 14(5)).

150. *Summary Records of the Meetings of the Sixth to the Tenth Sessions*, [1979-1980] 1 Y.B. HUM. RTS. COMM. 314, 316 ¶ 7, U.N. Doc. CCPR/2 (consideration of state report of

According to Manfred Nowak, the purpose of the "according to law" proviso in Article 14(6) of the International Covenant on Civil and Political Rights is the same as the "according to law" proviso in Article 14(5) of that instrument: The proviso addresses the exercise of the Article 14(6) right of compensation but does not permit states to change the substantive provisions of Article 14(6).<sup>151</sup> The proviso does not allow states parties to the International Covenant on Civil and Political Rights to avoid the obligation to provide compensation for miscarriages of justice simply by failing to enact the appropriate national legislation.<sup>152</sup> As with Article 14(5), state reports to the UN Human Rights Committee documented the inadequacy of state action with respect to Article 14(6)'s right to compensation for miscarriages of justice.<sup>153</sup> The Human Rights Committee determined that many states were failing to observe or to guarantee sufficiently the right to compensation in cases involving miscarriages of justice that fell under Article 14(6).<sup>154</sup>

Iraq). Specifically, Mr. Tomuschat of the Human Rights Committee stated that:

[D]espite the replies provided by the representative of Iraq, it still appeared that Iraqi legislation failed to provide the full coverage and protection of the rights of accused and convicted persons under article 14, paragraph 5, of the Covenant. He hoped that the Committee would soon obtain further information of Iraqi efforts to improve that situation.

*Id.*, see also MCGOLDRICK, *supra* note 145, § 10.21 (discussing Human Rights Committee's consideration of and reaction to Iraqi state report).

151. See NOWAK, *supra* note 137, at 271 (stating that Article 14(6) proviso addresses exercise of right of performance).

152. *Id.* at 271. Nowak adds that if a state believes that it cannot implement the right to compensation for a miscarriage of justice, then that state must submit a reservation to the International Covenant on Civil and Political Rights with respect to that provision. *Id.* Guyana, New Zealand, and Trinidad and Tobago have made such reservations. See *id.* at 757, 765, 768 (providing text of those reservations).

153. See General Comment 13 on Article 14 of the International Covenant on Civil and Political Rights, U.N. GAOR, Hum. Rts. Comm., 21st Sess., [1992] COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES 13, 16 ¶ 18, U.N. Doc. HRI/GEN/1 (commenting on inadequacy of state action with respect to Article 14(6)).

154. *Id.*, see also MCGOLDRICK, *supra* note 145, § 10.22 (stating that Human Rights Committee members have tried to obtain information on how, and if, right to compensation for miscarriages of justice has been put into force in domestic law). McGoldrick discusses specifically the questions of several members of the Human Rights Commission about whether the United Kingdom's previous system of *ex gratia* payments was in compliance with Article 14(6)'s right to compensation. *Id.* For a comment by a Human Rights Committee member on the United Kingdom's system for compensating people for miscarriages of justice, see *Summary Records of the Meetings of the Twenty-third to the Twenty-eighth Sessions*, [1985-1986] 1 Y.B. HUM. RTS. COMM. 202, 204 ¶ 20, U.N. Doc. CCPR/5.

These state reports prompted the Human Rights Committee to comment that states should supplement their domestic legislation, as needed, to fulfill the provisions of the International Covenant on Civil and Political Rights.<sup>155</sup>

Similarly, the reporting requirements in the UN Declaration may help to ensure the adequacy of a state's national legislation on the punishment of and remedies for violence perpetrated against women.<sup>156</sup> Article 4(m) provides that states should "[i]nclude, in submitting reports as required under relevant human rights instruments of the United Nations, information pertaining to violence against women and measures taken to implement the present Declaration."<sup>157</sup> Article 5(g) instructs the UN organs and specialized agencies to "[c]onsider the issue of the elimination of violence against women, as appropriate, in fulfilling their mandates with respect to the implementation of human rights instruments."<sup>158</sup> Reports to CEDAW under the Women's Convention may be particularly helpful in monitoring to ensure that states provide adequate punishment and remedies for violence against women. With its General Recommendation 12, adopted in 1989, CEDAW already has called states parties to the Women's Convention to provide information in their state reports to CEDAW on the occurrence of violence against women and the national measures used to fight violence against women.<sup>159</sup>

#### IV Conclusion

By analogy to Articles 14(5) and 14(6) of the International Covenant on Civil and Political Rights, one could interpret the UN Declaration's references to national legislation as a mere proviso on the procedures for the punishment of violence against women and the exercise of the right to just and effective remedies.<sup>160</sup> Under this interpretation, a state could not cir-

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155. General Comment 13 on Article 14 of the International Covenant on Civil and Political Rights, *supra* note 153, at 16 ¶ 18 (commenting that states, where needed, must enhance their national legislation to "bring it into line" with Article 14(6)).

156. See Charlesworth, *supra* note 5, at 3-4 (explaining that some international supervision on adequacy of national legislative remedies may be possible through UN Declaration's Articles 4(m) and 5(g)).

157. UN Declaration, *supra* note 2, at art. 4(m).

158. *Id.* at art. 5(g).

159. See Charlesworth, *supra* note 5, at 1 (discussing General Recommendation 12, in which CEDAW recommended to states parties to Women's Convention that they provide information on violence against women in their state reports).

160. See *supra* part III.B (drawing analogy between UN Declaration's references to national legislation and such references in Articles 14(5) and 14(6) of International Covenant on



cumvent its international human rights obligations under the UN Declaration through inaction or inadequate domestic legislation on violence against women.<sup>161</sup> On the other hand, one also could read the UN Declaration as deferring to national standards to judge a state's fulfillment of its responsibilities under the UN Declaration.<sup>162</sup> The implications of the latter interpretation include the possibility that a state could evade its international human rights responsibilities under the UN Declaration by manipulating its own domestic law.<sup>163</sup> Therefore, the wording of the Inter-American Convention, which does not use qualifying references to national legislation in its delineation of state responsibilities, is preferable for future conventions on violence against women. At the very least, if drafters of future conventions on violence against women use such references to national legislation, they should clarify within that same instrument the purpose of those references. Specifically, the drafters should document that the references act only as procedural provisos and that state conduct ultimately must measure up to international standards.

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Civil and Political Rights).

161. *See supra* notes 139-55 and accompanying text (examining implications of interpretation of UN Declaration's references to national legislation as being merely proviso regarding exercise of right and not means to impair substance of that right).

162. *See supra* part III.A (discussing interpretation of UN Declaration as deferring to national standards).

163. *See supra* part III.A (analyzing dangers associated with interpretation of UN Declaration's qualification of state duties by reference to national legislation as deference to national standards).

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# ARTICLES

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