

VIOLENCE AGAINST WOMEN IN THE UNITED STATES: AN INTERNATIONAL SOLUTION

Elizabeth Dietz

I. INTRODUCTION

- September 1, 1992, 7:30 a.m., a city in Nebraska.—Two women are playing tennis on a university campus. Three men attack them and use the women's clothing to tie them up. They are both violently raped.
- September 2, 1992, 6:30 p.m., a small city in Connecticut.—A 29-year-old woman is assaulted with an axe by her ex-husband; he threatens to kill her and then rapes her.
- September 2, 1992, time unknown, a small city in West Virginia.—A young woman is raped by an acquaintance while she is babysitting. The children witness the rape. Neighbors hear her screaming, but assume she is having a disagreement with the children. Charges are brought.
- September 3, 1992, 1 p.m., California.—An 18-year-old mentally disabled woman walks to a store to buy a soda; three men abduct her and take her to a town forty-five minutes away. She is sodomized by all three men, who leave her in a field.¹

Statistics on violence against women in the United States indicate alarming levels of abuse. Injuries to women as a result of violence occur more often than injuries due to automobile accidents, muggings, and cancer deaths combined.² Three out of four women become the victims of a violent crime sometime during

1. MAJORITY STAFF OF SENATE COMM. ON THE JUDICIARY, 101ST CONG., 2D SESS., REPORT ON VIOLENCE AGAINST WOMEN: A WEEK IN THE LIFE OF AMERICA 1 (1992). This report of one week of violence against women in 1992 came from 200 examples gathered from rape crisis centers, emergency rooms, shelters and police stations. The printed timeline takes 15 pages, but if the timeline included all of the incidents within the one week in printed format, the timeline would have been approximately 1,500 pages long. From the data collected from across the Nation, the Committee found that: In 1991, 21,000 domestic crimes were reported to the police *each week*; almost one-fifth of all aggravated assaults (20%) reported to the police are aggravated assaults in the home. These figures reveal a total of at least 1.1 million assaults, aggravated assaults, murders, and rapes against women reported to the police in 1991; unreported crimes may be more than three times this total. *Id.* at 4.

2. SENATE COMM. ON THE JUDICIARY, THE VIOLENCE AGAINST WOMEN ACT OF 1993, S. REP. NO. 138, 103d Cong., 1st Sess., 38 (1993) [hereinafter S. REP. NO. 138] (citing Surgeon General Antonio Novello, *U.S. Public Health Services*, 267 JAMA 3132 (1992)).

their lifetime, and four million women fall victim to domestic violence yearly.³ Perceived in terms of time, every fifteen seconds a woman is battered, and every six minutes a woman is raped in the United States.⁴ By comparison, "a woman is ten times more likely to be raped than she is to die in a car crash; . . . eight times more likely to be victimized by a violent crime than to die of heart disease, and fifteen times more likely to be a crime victim than to die of cancer."⁵

The staggering number of women victimized by violence at the hands of men desecrates the moral vision encapsulated in the internationally ascribed concepts of human rights: "the inherent dignity and worth of all members of the human family, the inalienable right to freedom from fear and want, and the equal rights of men and women."⁶ However, until recently, states have failed or refused to recognize the violations of human rights that individuals suffer because they are

3. *Id.* at 38 (citing U.S. DEP'T OF JUSTICE, REPORTS TO THE NATION ON CRIME AND JUSTICE 29 (1988)). A recent survey of teenagers showed high levels of approval of violence. Almost 10% of the students surveyed said that they approved of a husband hitting a wife "if she would not listen to reason," and more than 12% approved of a wife hitting a husband in a similar situation. Aside from the effects of violence on children's perspectives, violence costs society in other ways. One million women yearly seek medical attention for injuries caused by violence at the hands of a male partner. Children in violent homes suffer abuse and neglect 15 times more often than do other children, and society pays five to ten billion dollars yearly as a result of domestic violence on health care, criminal justice, and other social costs. *Id.* at 38-41.

4. SENATE COMM. ON THE JUDICIARY, THE VIOLENCE AGAINST WOMEN ACT OF 1991, S. REP. NO. 197, 102d Cong., 1st Sess. 36 (1991) [hereinafter S. REP. NO. 197]. No official yearly estimates of the number of victims beaten in their homes or the number of victims of acquaintance rape exist. Instead, estimates come from special victimization studies, and almost all experts agree that the National Crime Survey estimates on rapes are substantially low and inaccurate. The Justice Department estimates the number of crime victims by asking, "Did someone try to attack you in some other way?" and never directly asks the woman if she has been raped. *Id.* at 37 n.20. Fortunately, this system is under revision. *Id.* at 37.

5. *Id.* at 36 (citing U.S. DEP'T OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE 24 (1988)). Even with these statistics, problems of lesser scope and danger, such as heart disease and breast cancer, receive far more public concern and attention. *Id.*

6. Dorothy Q. Thomas & Michele E. Beasley, *Domestic Violence as a Human Rights Issue*, 58 ALB. L. REV. 1119, 1120 (1995). Although nations across the globe accede to the general ideas of human rights, problems arise when the international community applies the ideas behind international human rights law to specific factual situations that inculcate a particular cultural or religious practice as a violation of human rights law. *See infra* note 24. Many states refuse to recognize that certain cultural norms transgress or disregard the human rights of certain of its members. This dilemma often occurs in regard to violations of women's rights because women typically have lived within the private sphere of the home and family, and states either decline to interfere in this arena or vigorously protect this domain as sacred to their cultures. *Id.*; *see also infra* note 8.

women.⁷ Traditionally, theoretically gender-neutral international law precepts focused on violations of rights in the public sphere of male existence, such as in the civil and political arenas.⁸ For example, from the beginning human rights law protected the right of citizens to vote and to participate in the political arena, or guaranteed the rights of individuals to a fair trial or to legal recourse.⁹ Historically, however, most states precluded women from the political and legal processes and confined them, whether by law or by custom, to the private domestic and social spheres.¹⁰ Thus, human rights law left unchallenged violations of women that typically occurred in the home and in social life as beyond the state's purview of responsibility.¹¹ As a consequence of this inherent

7. Rebecca J. Cook, *State Responsibility for Violations of Women's Human Rights*, 7 HARV. HUM. RTS. J. 125, 126-27 (1994).

8. Thomas & Beasley, *supra* note 6, at 1122; see Elizabeth F. Defeis, *The Role of International Law in the Twenty-First Century: Women's Human Rights: The Twenty First Century*, 18 FORDHAM INT'L L.J. 1748, (1995). "It has been argued that the existing international human rights norms and practices are the result of a male-centric approach to human rights norms and international law that addresses only the concerns of white males, leaving women and children of all nations, as well as developing nations, to challenge those established norms for legal recognition of their human rights in the public and private sphere. The western liberal tradition draws a distinction between public life encompassing work, politics, and macro-economics and the private sphere including home, children, and domestic concerns often gravely affecting the responsibilities of the women. Traditionally, the law has functioned in the public sphere and avoided entanglement in the lives of those it governs. . . . Consequently, human rights violations specific to women are largely unregulated and have, until recently, continued ' [sic] without international legal sanctions.'" *Id.*

9. See *supra* note 8.

10. See *supra* note 8.

11. See *supra* note 8; Cook, *supra* note 7, at 127-28; see also 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, 510 n.17 (1993) (construing SONIA PICADO SOTELA, *LA MUJER Y LOS DERECHOS HUMANOS*, 1-45 (1986)). According to Culliton, prior to the 1970s, international accords spoke of women's rights only in general terms of political rights. For example, Article 2 of the Universal Declaration of Human Rights, adopted in 1948, entitled "all people to the rights set forth in the Declaration without any distinction on the basis of sex (or other factors). This provision was included at the insistence of Eleanor Roosevelt and Latin American women, and was clearly intended to 'address the problem of women's subordination.'" *Id.* (citing Charlotte Bunch, *Women's Rights as Human Rights*, 12 HUM. RTS. Q. 486, 487 (1990)). Nevertheless, violations of women's rights never came close to reaching the prominence of violations of fundamental human rights "that are seen as primarily effecting men." *Id.* at 126 n.17; see also Lori L. Heise, *Violence Against Women: Translating International Advocacy Into Concrete Change*, 44 AM. U. L. REV. 1207, 1208 (1995). "[W]omen have pointed out repeatedly, the human rights community has proven willing to stretch the boundaries of 'State responsibility' to accommodate the concerns of men. . . . But when it comes to the

gender bias, States justify violations of women's human rights "as an essential element of culture or religion, or as an aspect of human nature."¹²

Due in part to the women's movement and to the growing literature that documents violations against women in the international community, a recent trend to identify such violence as a violation of human rights has generated worldwide support. As a result, several international documents have been written to combat violence against women, including conventions, declarations, and programs of action.¹³ Examples of these documents exist in both the United

systematic violation of women's bodies and minds, suddenly the hands of the international community are tied." *Id.*

12. Cook, *supra* note 7, at 126. "States in all regions of the world contest allegations of legal responsibility for violations of women's human rights. Some deny that criticized practices occur or that they violate international human rights norms. They deny that international obligations are binding, that proven outrages are attributable to them, that particular tribunals have jurisdiction over them, and that particular claimants have standing to launch legal proceedings. Denial that a proven practice is a human rights violation may be particularly strong when the practice has a long history in the cultural or national tradition and is considered to reflect and protect the society's fundamental values." *Id.*

13. See Ruth Rosen, *Women's Rights are the Same as Human Rights Abuse: We Must Stop Trivializing Sexual Crimes by Calling Them Customs*, L.A. TIMES, Apr. 8, 1991, at B5. "Are genital mutilation, forced prostitution, marital rape, murder of raped daughters, deaths resulting from dowry disputes merely customs, or do they constitute violations of human rights? Spurred by the spread of global feminism, some activists are seeking to redefine the hidden injuries of sex as violations of women's human rights." *Id.*

Rosen's article points out that, by using the language of human rights, what seemed to be customs begin to look like human rights abuses. Defining women's rights as human rights sets up a measuring stick to measure diverse cultural treatment of individuals and groups and creates immediate political consequences when violations are recognized. Leaders of the women's movement in the United States, such as Charlotte Bunch, emphasize that the civil and political rights given in domestic law remain rigid in the context of creating broader definitions of human rights. Women's rights activists see international human rights documents as the answer to defining women's rights as human rights. *Id.*; see Kathleen Hendrix, *World's Women Speak as One Against Abuse Strategy: From Fiji to Israel, Uganda to the U.S., activists raise a new battle cry - treat violence against women as a violation of basic human rights*, L.A. TIMES, May 27, 1991, at E1. In Stanford, at a 10-day international workshop to end violence against women, the sponsor of the workshop and the forum chairwoman and president of the Global Fund for Women stated that "[n]o matter where you go among women around the world, there are two unifying themes - reproductive rights and violence against women. Women talk the same language on those issues." *Id.* (quoting statement of Anne Firth Murray). Like the Rosen article, see *supra*, the Hendrix article notes that "it is in the international arena that these women, many of whom are victims of violence themselves, want to press a new strategy of identifying women's rights as human rights . . ." *Id.* The director of the Southern California Women's Law Center in Los Angeles states that "[v]ery basic human rights include the right not to be killed or tortured . . . [b]ut this has been

Nations and in the Inter-American system. In 1992, the United Nations Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) issued a declaration that gender-based violence violates women's fundamental human rights.¹⁴ In 1994, State Parties to the Inter-American system of the Organization of American States (OAS) approved the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women.¹⁵ Furthermore, in 1985, the Second U.N. Conference to Review the Decade for Women in Nairobi, Kenya established the Forward-Looking Strategy, the "first international human rights instrument recognizing and attempting to remedy the serious and widespread problem of violence against women."¹⁶ The Vienna Declaration and Programme of Action adopted in 1993 by the Fifth World

confined to a political sphere. No one sees it applied to women. It's more nation against nation, tribe against tribe. But as long as we have got this (violence against women), we have got women as political prisoners." *Id.* (quoting statement of Sheila James Kuehl); Heise, *supra* note 11, at 1208-09.

14. General Recommendation No. 19, Committee on the Elimination of Discrimination Against Women (CEDAW), 11th Sess., Agenda Item 7, para. 8, at 2, U.N. Doc. CEDAW/C/1992/L.1/Add.15 (1992) (standing for the norm that gender-based violence is a violation of women's fundamental human rights) [hereinafter General Recommendation No. 19]; *see also*, Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979) [hereinafter Women's Convention].

15. Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, Inter-American Commission on Women, June 9, 1994, 33 I.L.M. 1534. A regional organization in the Americas, the Inter-American system "operates for all member states of the Organization of American States (OAS). Twenty-five of them are evaluated against the catalogue of human rights set forth in the American Convention on Human Rights, being monitored by the Inter-American Commission on Human Rights . . . acting as an organ of the Convention, and if certain conditions are met, also by the Inter-American Court of Human Rights The remaining OAS states are evaluated against the standards set in the American Declaration on the Rights and Duties of Man, and monitored by the Inter-American Commission on Human Rights, this time acting as an organ of the OAS charter." *Id.*; Cecilia Medina, *Toward a More Effective Guarantee of the Enjoyment of Human Rights by Women in the Inter-American System*, in HUMAN RIGHTS OF WOMEN 257, 263 (Rebecca J. Cook ed., 1994). The United States signed the American Declaration; therefore, the Inter-American Commission on Human Rights acting as an organ of the OAS charter monitors the United States' obligations under the American Declaration. *Id.*

16. Culliton, *supra* note 11, at 510 n.18; *see Report of the World Conference to Review and Appraise Achievements of the United Nations Decade for Women: Equality, Development and Peace*, ch. 1, Sec.B para. 258, U.N. Doc. A/conf.116/28/Rev:1 (1986); *see also Implementation of the Nairobi Forward-Looking Strategies for the Advancement of Women*, G.A. Res. 161, U.N. GAOR, 49th Sess., Agenda Item 97, U.N. Doc. A/Res/49/161 (1995) (reaffirming the commitments made under the Nairobi Forward-Looking Strategies and calling upon governments to fulfill specific duties in order to meet the goals implemented by the Nairobi Forward-Looking Strategies).

Conference on Human Rights, also expressly proclaimed women's rights as part of universal human rights and made a number of recommendations relevant to women's human rights, including that the state have responsibility for violence against women.¹⁷

Finally, the campaign for women's rights culminated recently in the Fourth World Conference on Women in Beijing (FWCW), which included in paragraph 14 of the Beijing Declaration that "women's rights are human rights."¹⁸ Somewhat surprisingly, although the United States has often led the discussion on the rights of women, it never "formally acceded to any of the international enforcement mechanisms that allow for litigation of domestic violence complaints against the state"¹⁹ or to any other complaints of violence against women.

17. *The Extent to Which Gender Concerns have been Included in the Activities of the United Nations Human Rights Mechanisms: Report by the Secretary General*, U.N. Doc. A/Conf.177/9 Agenda Item 8(a), para. 3, at 3 (1995). Among the extensively discussed issues of women's human rights at the Fifth World Conference on Human Rights, "the chairpersons stressed that all human rights contained in the international instruments applied fully to women; that the equal enjoyment of those rights should be closely monitored by each treaty body within the competence of its mandate; and that a common strategy should be developed by the treaty bodies in that regard." *Id.*; see Vienna Declaration and Programme of Action, 1993 World Conference on Human Rights, U.N. Doc. A/Conf. 157/24 (1993), 32 I.L.M. 1661 (1993) [hereinafter Vienna Declaration].

18. Beijing Declaration and Programme of Action, *A Daily Report on the Fourth World Conference on Women*, 14 EARTH NEGOTIATIONS BULLETIN No. 21 (Peter Doran et al. eds.) available at <enb@ibc.apc.org>. During the Fourth World Conference on Women [hereinafter FWCW], the media coverage failed to give substantive information on the events that were taking place in Beijing and instead focused on trivial topics such as the weather and the details of the First Lady Hillary Clinton's arrival. Consequently, the Internet played a vital role in spreading information about the daily events that occurred, the topics that were covered, and the actual documents that were drafted. Throughout the FWCW, women and men from around the world received this news and communicated their viewpoints via the internet. *Id.*

19. Culliton, *supra* note 11, at 510. Often the United States includes reservations to human rights treaties that require the treaty to comport with domestic or constitutional law. See e.g. United States Reservations, Understandings, Declarations and Proviso to the Covenant on Civil and Political Rights, 138 CONG.REC. S. 4783-84 (1992); U.S. Reservations and Understandings to the Genocide Convention, 28 I.L.M. 782 (1988); see Michael J. Corbera, *The Women's Convention and the Equal Protection Clause*, 26 ST. MARY'S L.J. 755, 777-78 (1995). Some scholars explain the United States' failure to ratify treaties protecting women's rights specifically as a result of the provisions in the treaty that conflict with U.S. constitutional law. *Id.*; Cook, *supra* note 7. Many experts in women's human rights would explain that the United States' reluctance to ratify human rights treaties protecting women is a result of cultural bias or cultural relativism. Cultural relativists criticize the universality of international human rights and raise concerns about the difficulty of establishing universal norms in different cultural contexts. See also e.g.,

The author of this Note argues that by not adopting constitutional law to comport with international standards of human rights, the United States promotes the notion that the domestic law provides sufficient protection against human rights violations by both the state and the individual. Thus, human rights violations that do occur in the United States either as arbitrary acts of individuals or state sponsored violations are thought to receive adequate judicial redress. This Note argues that the perception of the effectiveness of domestic law in protecting human rights abuses in the United States shows this country's blindness to the gender discrimination within the legal system which fails to protect women against violence. In reality, serious human rights violations exist in this country because our domestic laws commonly fail to protect women against routine and numerous human rights violations by both individuals and the State.

This Note examines the possibility of enforcing complaints of human rights violations against the United States for tolerating and encouraging violence against women through its unresponsive legal system. Part II analyzes the doctrine of state responsibility in three areas: the international norms of human rights, the recognition of violations of women's rights under these norms, and the application of these norms to the violations of women's rights in the United States. Part II begins by explaining that violations of state responsibility include the systematic failure to prosecute state recognized abuses of rights, such as the right to life, and the practice of prosecuting individual abuses of rights along prohibited discriminatory lines, such as gender. Part II finds that traditional customary human rights violations, including the denial of the right to life, the right to be free from torture, and the right to equality before the law, encompass acts of violence against women. Part II supports that finding with examples of recent international instruments that declare violence against women to be a violation of customary human rights law. Finally, Part II concludes that the United States' responsibility for the violations of women's human rights makes the U.S. accountable for the government's systematic failure to prosecute violent crimes against women that violate recognized human rights, and the government's discriminatory practice of non-prosecution on prohibited gender lines.

Part III considers instruments that can be used as tools for filing complaints against the United States from both the United Nations and the Inter-American System of the Organization of American States (OAS). These documents include the following: 1) the Convention on the Elimination of All Forms of

Thomas & Beasley, *supra* note 6, at 1122. "[G]ender bias, if unchallenged, becomes so embedded in the social structure that it often assumes the form of a social or cultural norm seemingly beyond the purview of the state's responsibility." *Id.*; Heise, *supra* note 11; Defeis, *supra* note 8 at 1748 "[W]omen continue to have a subordinate social and economic status in all societies and are virtually invisible in leadership positions within national governments and international organizations." *Id.*; Sarah Y. Lai & Regan E. Ralph, *Female Sexual Autonomy and Human Rights*, 8 HARV. HUM. RTS. J. 201, 203 (1995). "Despite the wide-ranging protections against human rights abuse provided by these [human rights] treaties, human rights standards have been interpreted in light of gender-biased domestic laws and social structures." *Id.*

Discrimination Against Women (Women's Convention); 2) instruments of the Inter-American system; and 3) the United Nations Vienna Declaration and Programme of Action. Part III first reviews the Women's Convention because this document represents the revolutionary origins of women's human rights and retains the support of most of the international community. After showing how possible and actual interpretations of the Women's Convention define broad principles that hold states to high standards of responsibility for not protecting women against violence, Part III examines why the United States has not ratified the Women's Convention. In conclusion, this Note suggests that the United States could and should ratify the Women's Convention because of the large international support it has generated.

Due to the unique remedial possibilities of the Inter-American system, Part III also analyzes three instruments of the Inter-American system: the American Convention on Human Rights (American Convention), the American Declaration on the Rights and Duties of Man (American Declaration), and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women. Part III indicates that unlike the Women's Convention's lack of remedial provisions, the American Convention guarantees simple and prompt recourse for violations of the rights enumerated in the American Convention and outlines procedures for seeking recourse for complaints. Because the United States has not ratified the American Convention, the United States maintains membership in the Inter-American system through the adoption of the American Declaration. Part III outlines how the American Declaration protects the right to life, the right to equality under the law, and arguably the right to be free from torture. By interpreting these rights in light of the American Convention as well as the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, this Note concludes that the United States' responsibility within the Inter-American system for violations of human rights against women implicates its lack of protection for women. This means that the remedial measures available in the American Convention and applicable against all member states of the Inter-American system also bind the United States.

Finally, Part III examines the Vienna Declaration and Programme of Action (Vienna Declaration). This instrument recognizes women's rights, such as the right to reproductive freedom and the right to have property, as part of universal human rights; thus, it moves women's rights into the mainstream of the human rights movement. Part III highlights the Vienna Declaration's following achievements: it recognizes violence against women as a human rights violation; it urges the universal adoption of the Women's Convention; and it leads to the Declaration on the Elimination of Violence Against Women and to the appointment of a Special Rapporteur on Violence. Significantly, Part III finds that the Vienna Declaration aids in the formation of legally binding customary international law by bringing the historically minimal role of women's rights into the mainstream U.N. human rights system. Part III concludes that customary human rights law recognizes that violence against women is a violation of human rights. This customary law provides a strong basis for

holding the United States responsible for violations due to governmental support, encouragement, and condonation of violence against women.

The last section of this Note briefly presents the Beijing Declaration and Platform of Action promulgated at the FWCW and speculates on the possibility of its legal significance. As the most recent worldwide conference on women's rights, the FWCW represents the consolidation and reaffirmation of commitments made at other U.N. conferences. The Beijing Declaration stands for many new principles advancing women's rights, and the Platform of Action's call for state commitments gives an exciting and revolutionary political push for states to implement the goals of the FWCW. However, because of specific reservations to the Beijing Declaration and Platform of Action by the United States, the instruments of the FWCW provide the best method for holding the United States liable for women's human rights violations by promoting the recognition of customary international norms that define violence against women as a human rights violation.

II. THE DOCTRINE OF STATE RESPONSIBILITY AND HUMAN RIGHTS VIOLATIONS

A. The Concept of State Responsibility

Under international law,²⁰ state responsibility holds a state accountable for breaches of international obligations committed by or attributed to the state. Thus, with regards to human rights law, state responsibility "defines the limits of a government's accountability for human rights abuses under international law."²¹ State breaches of international human rights law include violations of both customary international law and binding treaties.²² Traditionally, "states [were]

20. See RESTATEMENT (THIRD) FOREIGN RELATIONS §101 (1986); see also *Zenith Radio Corps. v. Matsushita in Elec. Indus. Co. Ltd.*, 494 F. Supp. 1161, 1178 (D.C.Pa. 1980).

21. Thomas & Beasley, *supra* note 6, at 1124; see Cook, *supra* note 7, at 127. "The doctrine of state responsibility . . . enhance[s] the potential for enforcement of [international] obligations." *Id.* A leader in the fight for women's human rights, Cook presents a very thorough analysis of state responsibility and its relation to women's human rights.

22. Cook, *supra* note 7, at 127; see Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 417 (1989). "Customary International law is the general practice of states which, over a period of time, becomes binding law through repetition and adoption. Customary law is judicially enforceable in United States courts, and is found by studying the 'customs and usages of civilized nations; and as evidence of these, the works of jurists and commentators.'" Besides customary international law, treaties, or

held accountable for what they [did] directly or through an agent, rendering acts of purely private individuals—such as domestic violence crimes, outside the scope of state responsibility.”²³ However, due to growing opposition to cultural relativism²⁴ and to other recent developments in international law, such as the growing voice of feminists, the concept of state responsibility expanded to encompass human rights previously not acknowledged by the international community.²⁵ Consequently, state responsibility now includes greater international obligations and enhanced potential for enforcement of these obligations.²⁶

For example, today state responsibility involves not only actions that states directly commit but also duties that states have to “protect an individual’s exercise and enjoyment of human rights, investigate alleged violations, punish proven violators, and provide effective remedies, including the compensation of victims.”²⁷ Therefore, “although the state does not actually commit the primary abuse, its failure to prosecute the abuse amounts to complicity in it.”²⁸

formal agreements between two or more nations, legally bind states and may be enforced in the courts. *Id.*

23. Thomas & Beasley, *supra* note 6, at 1124.

24. See Lai & Ralph, *supra* note 19, at 206. “Cultural relativists challenge the universalists view of international human rights. They argue that human rights norms are reflective of one set of principles, embodying primarily Western values. Many of the norms are thus inconsistent with the religious or cultural tenets, beliefs and practices of many societies. The cultural relativist critique of universality raises important concerns about the difficulty of establishing the legitimacy of universal norms across wide-varying cultural contexts. These concerns are particularly relevant to attempts to define women’s rights under international human rights law, as many gender-specific human rights violations are grounded in, or strongly identified with, cultural and religious practices. Governments frequently take exception to international norms that promote women’s rights on the grounds that they contradict cultural conditions.” *Id.*; Cook, *supra* note 7, at 132 n.35 and accompanying text. (discussing how the feminist movement raised awareness of the effects of cultural rules or customs on women by documenting violations and accumulating data that targeted areas of women’s subordination). In raising awareness, feminists promoted the technique of “asking the woman’s question” which means examining how the law fails to take into account the experiences and values that seem more typical of women than of men, for whatever reason, or how existing legal standards and concepts might disadvantage women. The question assumes that some features of the law may be not only nonneutral in a general sense, but also “male” in a specific sense. The purpose of the woman question is to expose those features and how they operate, and to suggest how they might be corrected.” (quoting Katherine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837 (1990)).

25. Cook, *supra* note 7, at 127.

26. *Id.*

27. *Id.*; see Culliton, *supra* note 11, at 523. “In the Inter-American system states have a duty to ‘prevent, investigate, and punish any violation of the rights recognized by the [American] Convention.’” (citing Velasquez Rodriguez, Case 4 Inter-Am. C.H.R. OEA/ser.C./No.4 (1988)).

28. Thomas & Beasley, *supra* note 6, at 1124-25.

Consequently, a state violates its responsibility when it does not protect against private abusive actions.²⁹

Tests for determining state responsibility for its acts differ from those determining state responsibility for acts of private individuals.³⁰ Actions of state actors create state liability when either: the state explicitly authorized the act (i.e., a senior official committed or authorized it); or the state systematically failed to prosecute abuses committed by its agent, whether or not these acts were ordered by senior officials. In the latter case, one must usually show a pattern of nonprosecution of acts that violate human rights, and that the state has agreed to enforce those human rights.³¹

For example, nonprosecution of a customary international norm recognized by the United States, such as the rights to life or to be free from torture, or of a norm established by any international treaty ratified by the United States, such as the Declaration of Human Rights,³² creates the possibility of holding the United States accountable for a human rights violation.

The test for state responsibility for private actors differs from that for state actors and requires more than systematic nonenforcement of laws.³³ When private actors violate individual rights, a human rights issue arises only when "the reason for the state's failure to prosecute can be shown to be rooted in discrimination along prohibited lines . . ." ³⁴ For example, because Article 2 of the Universal Declaration of Human Rights proclaims the right to equality before the law without any distinction on the basis of sex,³⁵ a valid complaint exists against the

29. *Id.* "For instance, in three significant cases, Velasquez, Godinez and Fairen, and Solis, decided by the Inter-American Court on Human Rights in 1988-1989, the tribunal found that the government of Honduras was responsible for a series of forced disappearances carried out between 1981 and 1984 by members of [sic] Honduran military who were acting as private individuals." *Id.*; see Velasquez Rodriguez, Case 4 Inter-Am. C.H.R. OEA/ser.C./No.4 (1988).

30. Thomas & Beasley, *supra* note 6, at 1125.

31. *Id.*

32. Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948).

33. Thomas & Beasley, *supra* note 6, at 1125. Systematic nonenforcement of the laws refers to nonprosecution of crimes. Systematic nonenforcement of the laws occurs because of the fault of one or more legal actors, such as: the failure of the police to respond to calls and to arrest perpetrators, the failure of prosecutors to prosecute gender-based crimes, the inadequacy of juries to find guilt due to their own cultural biases, and the inefficiency of judges to act without a prejudicial attitude about crimes against women. *Id.*

34. *Id.* at 1125-26

35. Universal Declaration of Human Rights, *supra* note 32, art. 2. Article 2 states, "[e]veryone is entitled to all the rights and freedoms set forth in this declaration, without discrimination of any kind, such as . . . sex . . ." *Id.*; see International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. at 360, art. 2(2) (entered into force Jan. 3, 1976); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M.

United States whenever the government fails to prosecute violence against women for a reason rooted in discrimination on the basis of sex. As discussed subsequently, one advantage of using international human rights law to hold the United States responsible is that domestic law allowing suits for the government's failure to act have been limited by the Supreme Court decision of *DeShaney v. Winnebago County Dept. of Social Services*.³⁶

Because state responsibility is found under international law "when a state codifies, encourages, or condones human rights violations"³⁷ through nonprosecution, if violence against women constitutes a human rights violation, the United States may be held legally accountable for nonprosecution of violent crimes against women. Recently, the norms of human rights law indicate that violence against women does violate basic human rights principles.³⁸ This Note argues that the United States fails in its responsibility towards complaints of violence against women because the violence in the United States violates the norms of women's rights recently recognized as part of universal human rights law.³⁹

368, art. 2(1) (entered into force Mar. 23, 1967); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, *amended by* Protocol No. 3, Europ. T.S. 45, Protocol No. 5, Europ.T.S. 55, & Protocol 8, Europ. T.S. 118, art. 14 (amended versions entered into force Sept. 21, 1970); American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36 OEA/ser.S/V/II.23 art. 1(1) (1979) [hereinafter American Convention]. Most major human rights treaties also prohibit discrimination on the basis of gender or sex.

36. See *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989). Presently, the Supreme Court acknowledges a constitutionally required affirmative duty to protect only when the state limits an individual's freedom by incarceration or institutionalization. *Id.*

37. Culliton, *supra* note 11, at 516.

38. See Heise, *supra* note 11, at 1209. "The final declaration out of [the 1993 Second World Conference on Human Rights at Vienna] recognized violence against women in the private sphere as an abuse of human rights and affirmed that women's rights are an 'inalienable, integral and indivisible part of universal human rights.'" *Id.*; Vienna Declaration, *supra* note 17, art. 18; see also Women's Convention, *supra* note 14; Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, *supra* note 15; *Implementation of the Nairobi Forward-Looking Strategies for the Advancement of Women*, *supra* note 16; General Recommendation No. 19, *supra* note 14. All of these documents recognize women's rights and support the concept of women's rights as human rights. Moreover, these documents represent the success of the women's movement in generating favor in the international arena.

39. See Vienna Declaration, *supra* note 17.

B. Human Rights Norms and Women's Right To Be Free From Violence

1. Jus Cogens Norms and Women's Right to Be Free From Violence

International human rights norms⁴⁰ “developed largely from Western political theory of the rights of the individual to autonomy and freedom.”⁴¹ Since the promulgation of the Universal Declaration of Human Rights,⁴² human rights law intended to protect individuals from state encroachment.⁴³ Many of the substantive human rights concerns, such as “genocide, violations of the right to life and the plight of refugees—are governed by jus cogens.”⁴⁴ Although not easily defined, “[j]us cogens norms are the highest rules of international law, and function essentially as ‘very strong rules of customary international law.’”⁴⁵ The significance of an international norm that becomes jus cogens is that “it is absolutely binding on all states, whether they have persistently objected or not.”⁴⁶

This Note argues that violence against women violates three human rights recognized as jus cogens norms: 1) the right to life, 2) the right to be free from torture, and 3) the right to equality before the law. The systematic nonenforcement of punishment for crimes of violence against women⁴⁷ breaches the fundamental human right to physical integrity, which implicates the right to life and the right to be free from torture.⁴⁸ The failure of the state to respond to and prosecute complaints of gender-based violence also denies the right to equality under the law “not only because gender discrimination adds another human rights violation, but also because the victim’s suffering becomes part of a systematic failure on the part of the state to protect women’s rights with respect to a

40. This paper uses international human rights norms and international human rights laws interchangeably.

41. Thomas & Beasley, *supra* note 6, at 1121; *see also supra* note 24 (considering the current disagreement with the universal notion of international law by cultural relativists who argue for norms recognizing different cultural practices that divert from Western notions of human rights).

42. Universal Declaration of Human Rights, *supra* note 32.

43. *See supra* note 11.

44. Parker & Neylon, *supra* note 22, at 413-14.

45. *Id.* at 417 (quoting A. D’AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 132 n.73 (1971)).

46. *Id.* at 418.

47. *See supra* note 33.

48. Culliton, *supra* note 11, at 514. Culliton states that “the right to physical integrity . . . may implicate the right to life.” *Id.* This Note adds that the right to physical integrity encompasses the right to be free from torture because the right to be free from torture also falls within the area of protection of women’s physical bodies and minds.

particular class of human rights."⁴⁹ In other words, due to nonprosecution of gender-based violence, states deny protection to that class of human rights which predominantly affects women; for example, rape was recognized for the first time as a war crime at the FWCW.⁵⁰

The current trend in international treaties recognizes violations of women's rights as violations of human rights norms.⁵¹ However, the United States has not signed any of the recent human rights documents recognizing the norms of women's rights as part of human rights law.⁵² Nevertheless, if the right of women to be free from gender-based violence becomes a *jus cogens* norm or implies other *jus cogens* norms, those norms will bind the United States whether or not the United States continues to oppose recognition of violence against women as a human rights norm.⁵³ Furthermore, even if the right to be free from gender-based violence only becomes significant as part of customary international law, as opposed to *jus cogens* law, a viable possibility remains for finding the United States accountable for norms requiring state responsibility for complaints of violence against women.⁵⁴

2. Customary Law and Women's Right to Be Free From Violence

The Inter-American Commission on Human Rights outlined the following elements for a norm of customary international law: a concordant practice by a number of states with reference to a type of situation falling within the domain of international relations; a continuation or repetition of the practice over a considerable period of time; a conception that the practice is required by or

49. Culliton, *supra* note 11, at 514; *see also supra* note 35 (giving a list of international treaties that recognize the right to equality under the law on the basis of gender).

50. *See A Daily Report on the Fourth World Conference on Women, supra* note 18.

51. *See supra* notes 13-17 and accompanying text.

52. *See Culliton, supra* note 11, at 510. "To date, the United States has not formally acceded to any of the international enforcement mechanisms that allow for litigation of domestic violence complaints against the state." *Id.* The United States still abstains from ratifying the Women's Convention, the first major treaty on women's rights. Furthermore, the United States has not adopted as binding the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, *supra* note 15 and text accompanying note 186, nor the Beijing Declaration and Programme of Action, *supra* note 18 and *infra* text accompanying note 247.

53. *See Parker & Neylon, supra* note 22, at 418; *see also* text accompanying note 22.

54. *See Culliton, supra* note 11, at 536-37; *see also Parker & Neylon, supra* note 22, at 417.

consistent with prevailing international law; and a general acquiescence in the practice by other states.⁵⁵

No established rule exists for the number of countries necessary for a practice to become custom, nor does the law require that a state must conform with the custom at all times before being held responsible for the rule as customary international law.⁵⁶ However, by consistently objecting to a customary norm as it emerges, the state may, "by becoming a persistent objector, prevent the rule from becoming binding upon it, although other states would still be bound."⁵⁷

The present recognition in international documents of violence against women as a violation of human rights, and the great number of states that have signed those documents, supports a finding that these documents embody customary norms of international law.⁵⁸ The instruments discussed below specifically guarantee women's rights in the international arena.

The Convention on the Elimination of All Forms of Discrimination Against Women (the Women's Convention), adopted by the United Nations General Assembly on December 18, 1979, has been ratified by 135 countries since it was opened for signatures on March 1, 1980.⁵⁹ In 1985, at the Final Conference of the Decade for Women in Nairobi, Kenya the participants concluded:

55. Parker & Neylon, *supra* note 22 (quoting Case 9647, Inter-Am. C.H.R. 147, 166, OEA/ser. L/V/II.71, doc. 9 rev.1 (1987)).

56. *Id.* at 417-18.

57. *Id.* at 418.

58. See Culliton, *supra* note 11, at 536. "The provisions of the Women's Convention 'may be binding on the United States to the extent they embody customary norms of international law.'" *Id.*; see also Thomas & Beasley, *supra* note 6, at 1132-33. "Developments in the concept of state responsibility, new information about the gender-specific nature of domestic violence, its pervasiveness and frequent non- or discriminatory prosecution by governments, and a new emphasis on equal protection of the law as a central human rights concern have made it possible to conceptualize domestic violence as a human rights issue and to hold governments accountable for the pervasive abuse of women worldwide . . . Although not all states have acknowledged that they have an underlying obligation to provide substantive protection to women from domestic violence, there is support in international human rights jurisprudence for the idea that states have an affirmative obligation to criminalize domestic violence." *Id.*

Beasley & Thomas argue that state responsibility in recent human rights jurisprudence requires prosecution of domestic violence claims not only to protect the right to equality under the law but also to protect fundamental human rights, such as the right to bodily and mental integrity, against abuse by private individuals. In other words, although most states, including the United States, recognize the customary norm of the right to equality before the law and perceive how that may apply to gender-based violence, the new jurisprudence demands state responsibility for protection against private abuses of substantive customary human rights, such as physical integrity. *Id.*

59. Corbera, *supra* note 19, at 757; see also General Recommendation No. 19, *supra* note 14 and accompanying text.

Violence against women exists in various forms in everyday life in all societies. Women are beaten, mutilated, burned, sexually abused and raped. Such violence is a major obstacle to the achievement of peace and other objectives of the Decade and should be given special attention. Women victims of violence should be given particular attention and comprehensive assistance. To this end, legal measures should be formulated to prevent violence and to assist women victims. National machinery should be established in order to deal with the question of violence against women within the family and society. Preventive policies should be elaborated, and institutionalized forms of assistance to women victims provided.⁶⁰

Subsequently, the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) adopted General Recommendation 19, which recognizes that "gender based violence 'impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under specific human rights conventions' including the right to life, the right not to be subject to torture, the right to liberty and security of the person, and the right to equality before the law."⁶¹ Furthermore, the Vienna Declaration prepared by the 1993 World Conference on Human Rights, "identified numerous gender-specific abuses including those resulting from cultural prejudices, such as violence, sexual harassment, and sexual exploitation, as human rights violations incompatible with the dignity and worth of the human person."⁶² Finally, the FWCW produced the Beijing Declaration and Platform for Action, which requires that governments be determined to "prevent and eliminate violence against women and girls."⁶³ Within the Inter-American system, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women defines violence against women as "any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or private sphere."⁶⁴ This Inter-American Convention gives abused women recourse to the Latin American Court of Justice.⁶⁵

60. *Report of the World Conference To Review and Appraise Achievements of the United Nations Decade for Women: Equality, Development and Peace*, *supra* note 16, para. 258; see Thomas & Beasley, *supra* note 6, at 1127-28.

61. Culliton, *supra* note 11, at 527 (quoting General Recommendation No 19, *supra* note 14, para. 8).

62. Defeis, *supra* note 8, at 1748-49. The Declaration called for the elimination of the abuses against women and stressed "that equal status of women and the human rights of women should be integrated into the mainstream of the U.N. system-wide activity." *Id.*; see Vienna Declaration, *supra* note 17, pt. 1, para. 18.

63. *A Daily Report on the Fourth World Conference on Women*, *supra* note 18.

64. Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, *supra* note 15, art. 1. The Inter-American Commission

As a growing number of documents establish violence against women as a violation of fundamental human rights, the probability of finding a prohibition against gender-based violence a norm in customary international law increases.⁶⁶ According to the elements set out by the Inter-American court,⁶⁷ the recognition of women's rights violations as human rights violations becomes a customary norm, when: "a concordant practice by a number of states" adopts the prohibition against gender-based violence as a norm for regulating human rights abuses; the practice continues or repeats "over a considerable period of time"; the "conception that the practice is required by or consistent with prevailing international law" arises; and there is "a general acquiescence in the practice by other states."⁶⁸ When the world-wide community adopts a customary human rights norm, such as the right to be free from gender-based violence, the accountability of the United States remains open.⁶⁹

Unlike treaties, which "are the supreme law of the land, equivalent to acts of Congress and binding on the states,"⁷⁰ the United States Constitution contains no provision dealing with customary international law.⁷¹ The United States Supreme Court has held that "customary international law is part of domestic law 'where there is no treaty and no controlling executive or legislative act or judicial decision.'"⁷² However, the scope of the United States' obligations under

for Women (CIM), a body of government delegates acting under a mandate of support from the O.A.S. General Assembly, formulated this Inter-American Convention.

65. Heise, *supra* note 11, at 1209; *see also* Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, *supra* note 15, art. 4(g).

66. *See* Parker & Neylon, *supra* note 22, at 417.

67. *See* text accompanying note 55.

68. Parker & Neylon, *supra* note 22, at 417.

69. Culliton, *supra* note 11, at 536.

70. *Id.* at 536; *see* U.S. CONST. art. VI ("[A]ll treaties made, or which shall be made under the Authority of the United States, shall be the Supreme Law of the Land.") *Id.*

71. Culliton, *supra* note 11, at 536.

72. *Id.* at 536-37 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)); *see* Corbera, *supra* note 19, at 776-77. If customary international law has the same status as domestic law, then a judicial interpretation of the Supreme Court on the constitutionality of a domestic law policy stands as precedent for interpreting customary international law. Thus, Supreme Court decisions interpreting the scope of equal rights protection under the Fifth Amendment Due Process Clause and the Fourteenth Amendment Equal Protection Clause govern the extent to which the U.S. courts will recognize an international human rights complaint of equal protection. Similarly, if customary international law retains the same status as domestic law, the domestic law on due process violations under the Fifth and Fourteenth Amendments sets the precedents for international complaints of human rights violations of life and physical integrity. *See supra* note 19. The problem with the U.S. legal system occurs because international human rights law often offers greater protection than the U.S. courts allow under domestic law; thus, the two systems conflict. The conflict in turn causes the United States not to sign human rights treaties or to give the treaties their

customary rule remains very controversial.⁷³ Thus, the “status of customary international human rights norms, such as the CEDAW’s Declaration that domestic violence is a violation of women’s fundamental human rights, is very much an open question in United States’ law.”⁷⁴

Typically, U.S. courts adjudicate cases on customary international law more often when they involve general human rights issues.⁷⁵ The United States’ willingness to accept these cases makes sense because *jus cogens* norms govern many human rights concerns and generally represent ideas compatible with those in the Declaration of Independence and in the Constitution.⁷⁶ Moreover, *jus cogens* norms bind the court regardless of whether or not the United States complies with the norm.⁷⁷ Therefore, a norm defined as *jus cogen* presents a good incentive for agreeing with the norm. For example, the “[o]ne violation of fundamental rights that the United States has consistently acknowledged as a violation of customary international law is torture, including state-tolerated violence, state-tolerated murder, and other inhuman or degrading treatment.”⁷⁸

full effect. According to some customary law, for example the international law of *jus cogens*, the customary rules require that U.S. legal standards comport with those of international law. See *supra* text accompanying note 46.

73. Culliton, *supra* note 11, at 536.

74. *Id.* at 537. Culliton gives as an example of a customary human rights norm CEDAW’s declaration that violence against women violates fundamental human rights. The author of this Note questions whether Culliton means that violence against women *alone* is a violation of a customary human rights norm or that violence against women violates other rights that are customary human rights norms, such as the right to life and the right to be free from torture. The difference seems slight, but the subtlety appears to characterize the distinction between how traditional human rights law interpreted human rights violations and how modern day feminists view human rights violations.

See *supra* note 8. The author of this Note believes that violence against women as a violation of fundamental human rights, such as the right to life and the right to be free from torture, states the obvious and gives women the rights that should have been recognized at the inception of human rights law, except that the male-centric human rights view ignored crimes like rape and spousal abuse. *Id.*; Inter-American Convention on the Prevention, Punishment & Eradication of Violence Against Women, *supra* note 15, art. 3. In contrast, violence against women as an independent human rights violation seems to describe a brand-new human right, the right to be free from gender-based violence, which encompasses other human rights. “Every woman has the right to be free from [gender-based] violence in both the public and private spheres.” *Id.* In reading the literature on women’s rights, these two distinct views are intertwined in the discussion on women’s human rights.

75. Culliton, *supra* note 11, at 537.

76. See Parker & Neylon, *supra* note 22, at 424; see also *supra* text accompanying note 40.

77. Parker & Neylon, *supra* note 22; see *supra* text accompanying note 45.

78. Culliton, *supra* note 11, at 537.

Torture is a recognized *jus cogens* norm,⁷⁹ the punishment of which comports easily with the principles of the United States Constitution.⁸⁰

Several of the human rights documents that protect women's rights do so by encompassing customary norms recognized by the United States, such as the right to life, the right to human dignity and worth, the right to physical integrity, the right to judicial redress, and the right to equality before the law.⁸¹ Because the above international documents declare violence against women to be a violation of human rights, and because the United States recognizes such norms, a valid human rights complaint exists against the United States for violence against women.

Allowing litigation of complaints of human rights violations in U.S. courts provides many advantages for victims of violence. One expert on women's rights provides the following summation of the advantages of litigating domestic violence as a human rights complaint: human rights litigation would create more immediate results; it would focus public attention on the problem as a human rights issue; it would recognize the suffering of individual victims; it would dispel the myths that trivialize domestic violence; it would take away the force of cultural relativism that limits legal enforcement of the rights of women; and it would provide a means of compensating and redressing victims of violence.⁸² These advantages apply equally to litigation of any gender based violence complaint as a human rights violation.

C. United States' Responsibility for Women's Right to Be Free From Violence

The United States' responsibility for the violation of women's human rights arises because: violence against women threatens women's right to life and physical integrity; human rights norms protecting people from violence prohibit a legal system's tolerance of and failure to prosecute violence;⁸³ and human rights norms guarantee gender equality before the law and prohibit the systematic gender bias that has worked against women victims of violence.⁸⁴

79. Parker & Neylon, *supra* note 22, at 437.

80. The prohibition against torture reflects the ideas in the Eighth Amendment prohibiting cruel and unusual punishment. Torture also implicates the Due Process Clause of the Fifth and Fourteenth Amendments as well as the right to a fair trial available in the Sixth Amendment. *See* U.S. CONST. amends. V, VI, VIII & XIX.

81. *See supra* notes 14, 17, 18, 60, & 61 and accompanying text on human rights documents.

82. Culliton, *supra* note 11, at 514-15.

83. *Id.* at 514.

84. Culliton, *supra* note 11, at 513; *see supra* note 35 (citing some of the international instruments guaranteeing the right to equality before the law on the basis of sex).

Without a doubt, violence against women threatens their right to life and physical integrity, and in the United States the statistics alone confirm that this violence is an epidemic.⁸⁵ In 1992, Surgeon General Antonio Novello found that "violence is the leading cause of injuries to women ages fifteen to forty-four."⁸⁶ The scope of the violations often includes the most serious crimes, such as murder, rape, and aggravated assaults.⁸⁷ Moreover, besides the physical abuse that women endure, the extent of the violence in the United States creates great fear among women that may terrorize and control their lives.⁸⁸ Since the violence against women created by individual perpetrators violates women's rights to life, physical integrity, and freedom from torture, the United States violates its responsibility under customary international law if its legal system fails to prosecute these crimes and if the failure to prosecute discriminates against women in receiving legal redress.

Evidence of the systematic failure of actors in the legal process to respond to reports of violence against women abound. Crimes against women are often treated differently and less seriously than other crimes, from the initial report to the police through prosecution, trial, and sentencing.⁸⁹ Often the policy of the

85. See S. REP. NO. 197, *supra* note 4; S. Rep. No. 138, *supra* note 2; see also *supra* notes 1, 3 & 4.

86. See S. REP. NO. 138, *supra* note 2, at 38 (citing Surgeon General Antonio Novello, *U.S. Public Health Services*, 267 JAMA 3132 (1992)).

87. *Id.* at 41; see S. Rep. No. 197, *supra* note 4, at 38. "It is common to conceive of 'domestic violence' as a trivial squabble, a push or a shove. In fact, one-third of all such incidents, if reported, would be classified as felony rape, robbery, or aggravated assault; the remaining two-thirds involve bodily injury at least as serious as the injury inflicted in 90% of all robberies and aggravated assaults." (citing NATIONAL INSTITUTE OF JUSTICE, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 4 (1990)); see also Kim Wozencraft, *Women and Children Last, Next Time She'll Be Dead: Battering and How to Stop It*, L.A. TIMES, Jan. 16, 1994, (Book Review Desk) (reviewing ANN JONES, NEXT TIME SHE'LL BE DEAD: BATTERING AND HOW TO STOP IT. Jones states in her book that "[r]arely in the authoritative literature does a man hit a woman: in the gut, for instance, or the face, with his fist, hard—hard enough to split her lip, loosen her teeth, break her nose, lace her eyeball with a red web of ruptured veins—hard enough to make the blood run down the page. In real life it happens all the time."). *Id.*

88. S. REP. NO. 197, *supra* note 4, at 38-39. "Recent studies estimate . . . the 'fear of rape is central to the day-to-day concerns of about a third of women . . .'. One recent study showed that three-quarters of women never go to the movies alone after dark because of the fear of rape and nearly 50% do not use public transit alone after dark for the same reason. . . . Due in large part to the fear of rape, a woman is eight times more likely than a man to avoid walking in her own neighborhood after dark." *Id.*; see also "Women's Lives Controlled by Fear," *Congress Told in Look into Domestic Violence*, L.A. TIMES, Oct. 4, 1992 at A13.

89. S. Rep. No. 138, *supra* note 2, at 42. The report authored by Senator Joseph Biden found the following differences in treatment: police refuse to take reports; prosecutors encourage defendants to plead to minor offenses; judges rule against

police in domestic violence matters includes the following: "failure to respond to [victims'] calls, refusal to arrest batterers, failure to file reports on domestic disputes, and general harassment of victims of domestic violence."⁹⁰ A study in Texas showed that of 2096 battered women in Texas, police failed to respond to calls in one of three cases.⁹¹ In Cleveland, police filed only 700 reports out of 1500 domestic violence calls and made arrests in only 460 or one out of 32, calls.⁹² Another study conducted in Washington, D.C. found that in over 85% of family violence cases where a woman was found bleeding from wounds, police did not arrest her abuser.⁹³

Outside the arena of domestic abuse, crimes against women in the form of rape also go unreported and unprosecuted in the United States. A report prepared by the Majority Staff of the Senate Judiciary Committee found that: over 60% of reported rapes do not result in arrests; a rape case is more than two times as likely to be dismissed than a murder case and nearly 40% more likely to be dismissed than a robbery; less than one half of those arrested for rape are convicted of rape (many are found guilty of lesser charges); and over one half of all convicted rapists serve an average of one year, or less, in prison.⁹⁴

Besides the substantive human rights violations that result from unprosecuted gender-based violence, the failure of legal actors to respond to crimes of violence against women and the discriminatory manner in which legal actors handle these crimes violates women's right to equality before the law. Senator Joseph Biden, writing for the Senate Judiciary Committee, acknowledged that U.S. society has "inadvertently accepted [violence against women] as somehow 'normal' and, as a result, we have been too quick to accept a system that places greater burdens on some female crime victims than on male victims."⁹⁵ In support of Senator

victims on evidentiary matters; and juries often focus on the victim's behavior and lay blame on the victim and not the attacker. *Id.*

90. Susanne M. Browne, *Due Process and Equal Protection Challenges to the Inadequate Responses to the Police in Domestic Violence Situations*, 68 S. CAL. L. REV. 1295, 1297 (1995). According to Browne, domestic violence calls have been labeled the 'common cold' of police work because they constitute the single largest type of call received by the police yearly. *Id.*

91. *Id.* at 1298.

92. *Id.* (stating that only 12 states have mandatory arrest policies even though arresting batterers reduces the chance they will abuse again).

93. S. REP. NO. 138, *supra* note 2, at 41; *see also A Worthy Training Program*, L.A. TIMES, Sept. 18, 1989 (Metro), at 2 (stating that prior to recent training, a common response of a Los Angeles police officer to a domestic abuse victim would be to "[j]ust go in the bathroom, close the door and wait for him to cool off").

94. S. REP. NO. 138, *supra* note 2, at 42 (citing MAJORITY STAFF OF THE SENATE JUDICIARY COMMITTEE, *THE RESPONSE TO RAPE: DETOURS ON THE ROAD TO EQUAL JUSTICE* 30 (1993)).

95. S. REP. NO. 197, *supra* note 4, at 36. "[H]istorically, crimes against women have been perceived as anything but crime—as a 'family' problem, as a 'private' matter, as 'sexual' miscommunication. That tradition of ambivalence has led to oxymoronic labels such as 'date rape,' and 'domestic violence,' both of which suggest that the violence described is somewhat less violent or less harmful or less serious if it

Biden's view of society, Task Forces on Gender Bias in several states report that women face barriers of law, enforcement, and biased attitudes that male victims do not share in seeking justice.⁹⁶ Examples of legal actors' gender-biased attitudes given by the task force include the following:

In Georgia, a judge reported that one of his colleagues in a case of repeated domestic abuse, 'mocked,' 'humiliated,' and 'ridiculed' the victims and led the courtroom in laughter as the woman left. . . . Subsequently, the woman was killed by her estranged husband. In Vermont, a probation officer questioned whether a nine year-old girl was a 'real victim since he had heard she was a tramp.' In California, a judge commented at a hearing that a domestic violence victim 'probably should have been hit.' A Connecticut prosecutor badgered a fifteen year-old: 'Come on, you can tell me. You're probably just worried that your boyfriend got you pregnant, right? Isn't that why you're saying he raped you?' A Florida judge commented during sentencing that he felt sorry for a confessed rapist because his victim was such a 'pathetic' woman. A Georgia detective investigating a rape told the victim's mother that since the fourteen-year-old said 'no' only once, it might not be considered rape.⁹⁷

Besides this pervasive attitude of gender bias among legal actors, the laws in some states refuse to criminally recognize certain acts of violence against women such as spousal rape.⁹⁸ Other states prohibit prosecution of spousal rape without an additional degree of violence, such as kidnapping or being threatened with a weapon, or classify spousal rape as a lesser crime with lighter penalties.⁹⁹ Another example of the barriers that state laws raise is that until recently, courts in Maryland could not issue a civil protection order unless the couple had been married or had a child in common.¹⁰⁰

The great inequity in the legal process adds to the seriousness of the violence against women because women are aware of the unresponsiveness of the system

takes place in a social setting or at home." *Id.*; see S. REP. NO. 138, *supra* note 2, at 41. "Until the 20th century, our society effectively condoned family violence, following a common-law rule known as the 'rule of thumb,' which barred a husband from 'restraining a wife of her liberty by chastisement with a stick thicker than a man's thumb.' This rule, originally intended to protect women from excessive violence, in fact led to a reluctance on the part of government to interfere to protect women even where serious violence occurred." (quoting Joseph Biden, *Domestic Violence A Crime Not a Quarrel*, TRIAL 56 (1993)).

96. S. REP. NO. 197, *supra* note 4, at 33.

97. *Id.* at 34 (citing reports received from task forces in various states).

98. S. REP. NO. 138, *supra* note 2, at 42.

99. *Id.*; see also Eric Slater, *What's Worse: Killing Rabbit or Beating Girlfriend? Court: Alleged assault on woman could cost man \$1,000 fine, but strangling her bunny could bring a penalty of \$20,000*, L.A. TIMES, June 28, 1995 at B1.

100. Culliton, *supra* note 11, at 526 n.90.

and believe that no one will treat their abuse seriously.¹⁰¹ Moreover, the stereotypes legal actors employ enhance the general societal attitude by reinforcing suspicions about female victims of violence so that juries are less likely to convict.¹⁰² Finally, victims often consider when choosing not to report crimes of violence that the lack of response by the police and other legal actors may put them in greater jeopardy of harm when the perpetrator realizes nothing will be done to punish his behavior.¹⁰³

The systematic failure of the United States legal system to prosecute violence against women and the gender-biased response of the legal system to abuses against women may allow victims to bring complaints of human rights violations against the United States for failing in its responsibility to protect the norms of customary international law. Although domestic law does allow victims to bring suits against the government for constitutional violations of the Due Process and Equal Protection Clauses,¹⁰⁴ these remedies remain very limited and lack many of the advantages that an international human rights complaint permits.¹⁰⁵ Currently, victims of injuries due to nonprosecution sue for remedies under the Equal Protection or Due Process Clauses of the United States Constitution, or under § 1983 of the Federal Civil Rights Act.¹⁰⁶ However,

101. Browne, *supra* note 90, at 1296.

102. S. REP. NO. 138, *supra* note 2, at 42.

103. Browne, *supra* note 90, at 1299; *see* S. REP. NO. 197, *supra* note 4, at 39 (noting that at the Women and Violence Hearings before the Committee on the Judiciary, “[m]ore than one witness . . . explained to the committee that ‘the system’ often works against, not for, the victim”). *Id.*

104. *See supra* note 72 and accompanying text; *see also* Civil Rights Act of 1871, 42 U.S.C. §1983 (permitting all victims of arbitrary violence by a state actor to sue the state for due process violations) [hereinafter Section 1983]. In addition, victims of violence who have been legally discriminated against on the basis of gender may make out a claim of an equal protection violation under the Due Process or the Equal Protection Clauses. Nevertheless, these domestic law remedies prove insufficient because of the limits established by judicial decisions. *Id.*

105. *See infra* notes 110-18 and accompanying text.

106. Culliton, *supra* note 11, at 525; *see also* Violence Against Women Act of 1994, 42 U.S.C. § 13701 (1994). The Violence Against Women Act [hereinafter VAWA], adopted by Congress in 1994, provides both a criminal and civil remedy for victims of gender-biased violence. Due to the relative newness of the VAWA, the first civil complaint under the VAWA occurred in February 1995; *Civil Rape Case Challenges Culture of College Athletics*, *The Arizona Republic*, Feb. 11, 1996, at A3. Questions still remain about the standards of proof necessary for sustaining a VAWA complaint, especially with regards to the element of gender motivation. VAWA *supra*. Challenges to the VAWA’s constitutionality also seem viable because the Act was passed under Congress’ interstate commerce power, a power recently limited by the Supreme Court, and because the Act infringes upon areas of law traditionally controlled by the state, such as domestic law. *Id.* Until litigation occurs under VAWA, the legal effectiveness of the Act remains undetermined. Culliton, *supra* note 11, at 538 n.158. One feminist legal scholar notes that the “VAWA does not ‘take all legal measures

cases under the Due Process and Equal Protection Clauses as well as §1983 cases allow only a monetary remedy and provide no protection to the victims as required in some international documents, for example the Inter-American Convention and the Women's Convention.¹⁰⁷ Moreover, domestic law itself appears ineffective for bringing complaints of state responsibility for due process and equal protection violations,¹⁰⁸ and very few women in the United States have succeeded in their claims.¹⁰⁹

Under §1983 of the Civil Rights Act of 1871,¹¹⁰ battered women or women under protective orders typically bring substantive due process claims that the failure of the police to intervene resulted in a liberty deprivation.¹¹¹ However, the Supreme Court decision in *DeShaney v. Winnebago County Department of Social Services* limited the success of due process complaints under §1983 by holding that the Due Process Clause does not require an affirmative duty by the state to protect the right to life, liberty, or property unless the state's own act of "restraining the individual's freedom" creates an affirmative obligation to protect individuals.¹¹² Currently, the Supreme Court decisions recognize only two instances when the state's action requires an affirmative duty to protect individuals: when the state incarcerates a person and when the state institutionalizes a person.¹¹³ In contrast, "[u]nder international human rights instruments, the legal obligation of states is not only to refrain from committing human rights violations, but also to affirmatively protect individuals from human rights violations."¹¹⁴

Similarly, women who allege complaints under the Equal Protection Clause must meet difficult standards of proof and must show; that the law or policy discriminates against women on its face, or that the administration of a facially neutral law disproportionately discriminates against women and that the government had a purpose or intent to discriminate.¹¹⁵ These high and often

which are necessary to provide effective protection of women against gender based violence,' as the CEDAW recommends." *Id.*

107. Culliton *supra* note 11, at 525; *see* Section 1983, *supra* note 104.

108. Culliton, *supra* note 11, at 525-26. Culliton states that under the domestic law available for seeking civil remedies, "the plaintiff must show intentional sex discrimination or intentional discrimination against victims of domestic crimes on the part of the police in order to make out a successful complaint. The actual effectiveness of the remedy of civil protection orders is similarly questionable, and not available to, or only partially effective for, many classes of battered women in a number of U.S. jurisdictions." *Id.*

109. *Id.* at 525.

110. Section 1983, *supra* note 104.

111. Browne, *supra* note 90, at 1300.

112. *See* *DeShaney*, 489 U.S. at 189.

113. *Id.* at 200.

114. Culliton, *supra* note 11, at 513.

115. Browne, *supra* note 90, at 1315. Under domestic law, once a plaintiff proves that a law discriminates on gender grounds, the Supreme Court typically applies intermediate judicial review which requires the state to give an important

difficult standards of proof generally find no place in international human rights instruments.¹¹⁶ The Inter-American system allows a due process complaint to be established simply by "a showing of gender bias in the legal system and inequality before the law."¹¹⁷ The burden of a plaintiff bringing suit under the Inter-American system is also lighter because the state bears the burden of showing that domestic remedies are available and effective.¹¹⁸

III. INTERNATIONAL DOCUMENTS AS TOOLS FOR LITIGATION

Part II of this article considered the responsibility of the United States to the extent that violence against women is recognized as a violation of customary human rights norms as outlined in recent international documents. Part III surveys some of the documents that proclaim violence against women a violation of human rights norms and explains how violence against women in the United States may be litigated under these instruments if the United States adopts them. Part III analyzes both the documents' viability as an aid to women in litigating complaints and the limits and barriers to holding the United States liable under these instruments. The documents reviewed include: (a) the Women's Convention;¹¹⁹ (b) the documents of the Inter-American system;¹²⁰ and (c) the Vienna Declaration and Programme of Action.¹²¹

governmental interest and prove that the gender discriminatory policy substantially relates to that interest. *Id.*; see also *Rostker v. Goldberg*, 453 U.S. 57 (1981). This case supports the proposition that Supreme Court cases fail to use the intermediate level of review consistently, and some of the conservative justices argue that gender discriminatory policies only demand rational basis review. *Id.* Rational basis review generally allows any policy to pass Supreme Court review. See *infra* note 146.

116. See Culliton, *supra* note 11, at 522-23. "The standard of proof for showing a pattern of state tolerance of human rights violations in an international case is generally less formal than in a typical domestic case." *Id.*

117. *Id.* at 524.

118. *Id.*

119. Women's Convention, *supra* note 14.

120. See American Convention, *supra* note 35 at 13; American Declaration on the Rights and Duties of Man, reprinted in the Organization of American States, Handbook of Existing Rules Pertaining to Human Rights 17, OEA/ser.L/V/II.50, doc. 65, rev., corr. 2 (1970) [hereinafter American Declaration]; Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, *supra* note 15.

121. Vienna Declaration, *supra* note 17.

A. The Women's Convention

The Women's Convention represents a landmark in an affirmative effort to recognize the rights of women.¹²² The Preamble of the Women's Convention begins by explaining that the purpose of the Convention is to adopt the measures required for the elimination of discrimination, and serves "as a statement of 'governmental interests' beyond its creation."¹²³ Article 1 defines discrimination against women as:

[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."¹²⁴

The language of this Article, in particular the statement that "any distinction, exclusion or restriction made on the basis of sex which has the *effect* or *purpose* of impairing . . . [emphasis added]," indicates that the Women's Convention considers discrimination as either intentional or de facto.

Article 2 outlines the general requirements that States Parties to the Women's Convention must meet to fulfill their obligations under articles 5 through 16. Article 2 requires that "States Parties condemn discrimination against women in all its forms, [and] agree to pursue by all appropriate means and without delay, a policy of eliminating discrimination against women."¹²⁵ Within a policy of eliminating discrimination, the Article mandates the adoption of the principle of equality between men and women through legislation, competent tribunals, administrative conformity, and "measures to eliminate discrimination against women by any person, organization or enterprise."¹²⁶

The language of Article 2 leaves room for interpretation when compared with other human rights treaties. "Agree to pursue," does not hold states liable simply because an act of discrimination is observed but because states neglect to implement the means which the drafters consider reasonable.¹²⁷ What is reasonable depends on the breadth and immediacy of the nature of the right guaranteed.¹²⁸ For example, the general obligations in the International

122. Women's Convention, *supra* note 14; *see also supra* note 57 and accompanying text.

123. Corbera, *supra* note 19, at 758; *see Women's Convention, supra* note 14, pmb1.

124. Women's Convention, *supra* note 14, art. 1.

125. *Id.* art. 2.

126. *Id.* art. 2 (a)-(g).

127. Cook, *supra* note 7, at 159.

128. *Id.*

Covenant on Economic, Social, and Cultural Rights (Economic Covenant) imposes upon States Parties the responsibility "to take steps . . . with a view to achieving progressively . . . the rights recognized" within a reasonable time.¹²⁹ The purpose of the Women's Convention, to prevent critical causes of women's deaths, coincides with the purposes of the Economic Covenant.¹³⁰ Therefore, the obligation to pursue the policies of the Women's Convention reasonably requires states to take steps to assess their own deficiencies and to address the causes of the deficiencies within a reasonable time.¹³¹ The obligation to act "by all appropriate means" also permits interpretation by CEDAW in a way that "must be sensitive to national legal, political, and social environments." However, to be culturally sensitive does not mean that the criteria of appropriateness remains exclusively within the individual State's control.¹³² CEDAW might recommend that States Parties "justify the means they propose for the effective protection of a right under the Convention" by compiling data that is sex-specific.¹³³

In order to pursue "a policy of eliminating discrimination against women" as outlined in Article 2, CEDAW made a recommendation on the issue of violence against women. General Recommendation No. 19 states that "gender-based violence which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under specific human rights conventions is discrimination within the meaning of Article 1 of the Convention."¹³⁴ General Recommendation No. 19 also provides 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 to provide

129. *Id.* at 159-60. Cook gives several examples of possible interpretations of Article 2 of the Women's Convention. She states that "a state complies with the general duty 'to respect' a right by not interfering with its exercise, but the obligation 'to ensure' a right is substantially broader. Rights under the [International Covenant on Civil and Political Rights] are 'negative,' in that states must not obstruct individuals' exercise of them, but also 'positive,' in that states must take affirmative measures to prevent violations. . . . A General Recommendation by CEDAW on the Women's Convention undertaking provision might be similarly explicit." *Id.*; see International Covenant on Civil and Political Rights, *supra* note 35, at 173 art. 2(1); see also International Covenant on Economic, Social, and Cultural Rights, *supra* note 35, art. 2(1).

130. Cook, *supra* note 7, at 160-61.

131. *Id.* at 161.

132. *Id.*

133. *Id.* at 162. "Relevant data are essential to evaluate state compliance; the study of performance data may offer guidance in choosing among alternative strategies. International standards of compulsory state data gathering would constrain state suppression of adverse data. CEDAW has indicated that data offered in support of compliance strategies should be sex-specific." *Id.*

134. General Recommendation No. 19, *supra* note 14, para. 8.

compensation.”¹³⁵ Article 15(1) of the Women’s Convention plays an important role in the rights that General Recommendation No. 19 intends to protect. Article 15 (1) requires that “States Parties shall accord equality with men before the law.”¹³⁶ The failure of states to adhere to their duty of equality under Article 15(1) provides proof that the state failed to act with “due diligence to prevent violations of rights” as required by General Recommendation No. 19.¹³⁷

The greatest handicap to employing the Women’s Convention as a remedy for ensuring the human rights of women lies in its lack of enforcement power. A self-monitoring process in which CEDAW reviews reports on the status of women filed by states parties “represents the extent of the enforcement mechanisms available in the Women’s Convention.”¹³⁸ However, “[w]ith greater enforcement power, and/or willingness on the part of states to comply with its provisions, the Women’s Convention could be a powerful instrument because its mandate is broad and clear: states must take whatever measures are necessary in all public spheres to eliminate all forms of discrimination against women.”¹³⁹

The United States refuses to sign the Women’s Convention. Despite early enthusiasm in drafting and signing the document by the Carter administration, until recently, the Senate fell short in any effort to ratify it.¹⁴⁰ At the World Conference on Human Rights in Vienna in 1993, Secretary of State, Warren Christopher, announced that the Clinton Administration would seek ratification. On September 27, 1994, the Senate Committee on Foreign Relations held a public hearing on the status of the Convention.¹⁴¹ Two days later the Senate Committee met and voted to recommend ratification by the Senate subject to the reservations, understandings, and declarations proposed by the Clinton

135. *Id.* para. 10.

136. Women’s Convention, *supra* note 14, art. 15(1).

137. *See* General Recommendation No. 19, *supra* note 14.

138. Corbera, *supra* note 19, at 759; *see* Women’s Convention, *supra* note 14, art.

18. “States Parties undertake to submit to the Secretary-General . . . for consideration by the Committee [CEDAW], a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the Convention and on the progress made in this respect: (1) Within one year after the entry into force for the State concerned; (2) Thereafter at least every four years and further whenever the Committee so requires.” *Id.* Even with the minimal enforcement power of the Women’s Convention, the United States refuses to ratify it.

139. Culliton, *supra* note 11, at 540.

140. *See* Corbera, *supra* note 19, at 778. The United States often shows enthusiasm and plays a major role in drafting human rights treaties, even though it fails to ratify many of them. “The United States originally demonstrated great enthusiasm for the Women’s Convention by participating in the drafting of the Convention. . . .” *Id.* at 757; *see supra* note 19. One possible reason for the United States’ failure comes from a cultural belief that the U.S. Constitution provides adequate protection.

141. Corbera, *supra* note 19, at 778.

Administration.¹⁴² Interestingly, the U.S. reservations, which limit the applicability and enforceability of particular provisions of the Convention, may prove impermissible if CEDAW or the United Nations Human Rights Commission finds them not to comport with the "object and purpose" of the Women's Convention.¹⁴³ Nevertheless, CEDAW tolerated many of the reservations that other signatories submitted, even those CEDAW found incompatible with the object and purpose of the Women's Convention, in order to gain maximum adherence to the Convention.¹⁴⁴

One barrier that stands in the way of the ratification of the Women's Convention by the U.S. Senate comes from constitutional law on the Equal Protection Clause.¹⁴⁵ The Equal Protection Clause usually uses intermediate scrutiny to determine whether a gender-based classification complies with the Constitution.¹⁴⁶ The test requires that the gender distinction serves an important

142. *Id.* at 778-79. The Clinton Administration included four reservations, three understandings, and two declarations. The four reservations relate to the Women's Convention's reach regarding private conduct, combat assignments, comparable worth, and paid maternity leave. The three understandings refer to the Convention's effect on the balance between federal and state laws in the United States; the effect on freedom of speech, expression, and association; and the provision of free health care services. The two declarations proposed by the Administration designate that the Women's Convention be non-self-executing, and by election pursuant to Article 29(1), that the United States not be bound by the jurisdiction of the International Court of Justice. *Id.*

143. *Id.* at 780; see Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 19(c) 1155 U.N.T.S. 331, (entered into force Jan. 27, 1980). "[P]ursuant to the Vienna Convention on the Law of Treaties, reservations that are incompatible with the 'object and purpose' of a treaty are impermissible since they fundamentally contravene the treaty itself." *Id.*

144. Defeis, *supra* note 8, at 1751. The trend of toleration for reservations may halt. The Human Rights Committee recently indicated it will take a more active role in determining the appropriateness of reservations because "human rights treaties are of such a special character that compatibility of such reservations must be established objectively guided by legal principles." If the CEDAW Committee adapts a similar critical review of reservations and eliminates them it could greatly strengthen the effectiveness of CEDAW. *Id.*

145. See *supra* note 72; see also note 115 and accompanying text.

146. Corbera, *supra* note 19, at 780; see *Frontiero v. Richardson*, 411 U.S. 677 (1973) (finding sex based classifications "are inherently suspect, and must therefore be subjected to strict judicial scrutiny"); *Stanton v. Stanton*, 421 U.S. 7 (1975) (avoiding the decision of what level of scrutiny would apply in gender cases, the Court struck down a statute discriminating against girl children in the receipt of child support payments); *Craig v. Boren*, 429 U.S. 190, (1976) (applying an intermediate scrutiny test requiring that the classification serves an important governmental objective and substantially relates to that goal). *Cf. Rostker v. Goldberg*, 453 U.S. 57 (1981) (purporting to apply intermediate review, the Court upheld an act allowing only males to register for the draft even though the governmental objective of efficiency previously only passed a rational basis review, and even though the act

governmental objective, and that the classification bears a fair and substantial relationship to the state's objectives.¹⁴⁷

The Women's Convention probably meets the first prong of the test with ease because "[b]ased on U.S. case law, the stated goals of the Women's Convention most likely serve sufficiently important and specific governmental interests."¹⁴⁸ The problem for the Women's Convention comes in the second prong. The gender classifications in the Women's Convention bear a questionable relationship to the state's objectives as determined by U.S. case law for various reasons, including: 1) the Women's Convention may not be necessary since other human rights treaties already condemn gender discrimination;¹⁴⁹ 2) gender-based classifications within the Convention may not be necessary to the accomplishment of the state's objectives;¹⁵⁰ and 3) the differences between the genders highlighted in the treaty, with the exception of the maternity provisions, exist in a social status sense and not in an innate, physical, or immutable way.¹⁵¹

could easily be replaced by a gender neutral law); *Geduldig v. Aiello*, 417 U.S. 484 (1974) (holding that a public employer's employee-benefit discrimination on the basis of pregnancy is not "discrimination based upon gender as such" because not all women are or will become pregnant); *Personnel Administer of Massachusetts v. Feeney*, 442 U.S. 256, (1979) (upholding an act allowing veterans preference in hiring and promotion despite the great discriminatory impact on women because the motivation of the legislatures was not based on discriminatory purposes). These cases support the proposition that although gender-based classifications require intermediate review, the application of intermediate review by the Supreme Court appears very inconsistent.

147. Corbera, *supra* note 19, at 780; see *Craig v. Boren* 429 U.S. 190.

148. Corbera, *supra* note 19, at 780.

149. *Id.* (arguing that the domestic law under the Equal Protection Clause might not find a "fair and substantial" relationship where the Women's Convention protects "rights that are protected by other treaties currently in place").

150. See *Craig v. Boren*, 429 U.S. 190 (concluding that the statistics offered by the government lacked sufficient support for using a gender based distinction in allowing girls to purchase beer at an earlier age than boys); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) (finding that the policy of prohibiting admission to men in order to provide opportunities traditionally denied women failed the second prong of the test in a case where the school of nursing, an area of employment predominated by women, denied admission to a man). *Cf. Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981) (upholding a statutory rape law making men alone criminally liable because the gender classification substantially related to the government's goal of preventing teenage pregnancy, a real physical difference).

151. See Corbera, *supra* note 19, at 780-85; see also *Frontiero v. Richardson*, 411 U.S. 677 (giving the immutable characteristic of gender as a predominant reason why gender is a suspect class, the court stated "since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the member of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility. . . .'" (quoting *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972)).

Nevertheless, the Congress and U.S. courts may adapt or interpret the Women's Convention in ways that satisfy the requirements of the gender classification test of the Equal Protection Clause. Possible suggestions for making the ratification of the treaty more likely include first, curing the Convention of its gender bias by making its goal more overtly focused on women's rights and by changing its body to a more gender-neutral format and application process.¹⁵² Second, the already existing human rights treaties should be modified in text and application by using the Women's Convention.¹⁵³ Considering the wide acceptance of the treaty in the international arena, the United States should take all possible steps to ratify it.

B. Documents of the Inter-American System

The Organization of American States (OAS) established the Inter-American system¹⁵⁴ which governs states that are parties to the American Convention on Human Rights (American Convention),¹⁵⁵ the American Declaration on the Rights and Duties of Man (American Declaration),¹⁵⁶ and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women.¹⁵⁷ Under the Inter-American system, "States Parties to the American Convention have an affirmative duty to investigate, prosecute, and punish human rights violators, and . . . this duty must be implemented through the state's judicial tribunals."¹⁵⁸ For example, the Inter-American court decision in the *Velasquez Rodriguez* case¹⁵⁹ held Honduras responsible for violations of Articles 1 and 25 of the Convention, even though the forced disappearances at issue were not committed by state actors.¹⁶⁰

Article 1(1) of the American Convention obligates members to the Convention "to respect the rights and freedoms recognized herein and to ensure all persons subject to their jurisdiction the free and full exercise of those rights and

152. Corbera, *supra* note 19, at 789.

153. *Id.*

154. *See supra* note 15 (characterizing the Inter-American system).

155. American Convention, *supra* note 35, at 13.

156. American Declaration, *supra* note 120.

157. Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, *supra* note 15.

158. Culliton, *supra* note 11, at 549; *see Velasquez Rodriguez, supra* note 29, at para. 166. On the issue of forced disappearances tolerated by the Honduran government, the Inter-American Court stated that forced disappearances were "crimes against humanity," and that state tolerance of these disappearances was a grave violation of the victim's fundamental human rights. *Id.*

159. Culliton, *supra* note 11, at 549; *Velasquez Rodriguez, supra* note 29.

160. *Id.* at 550.

freedoms.”¹⁶¹ Article 25(1) states that “[e]veryone has the right to simple and prompt recourse.”¹⁶² Analyzed together, Articles 1(1) and 25(1) determine the basic characteristics of judicial guarantees within the Inter-American system.¹⁶³ The Inter-American Court stated that:

The starting point of the analysis must be the obligation of every State Party to ‘respect the rights and freedoms recognized and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms’ (Art. 1(1)). From that general obligation is derived the right of every person, set out in Article 25(1), ‘to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his [or her] fundamental rights recognized by the constitution or laws of the state concerned or by this Convention.’¹⁶⁴

Furthermore, according to the Court, the principle of effective recourse guaranteed in Article 25(1) means:

[I]t is not sufficient that [a remedy] be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective.¹⁶⁵

Measured by the standards of Article 25(1) adopted by the Inter-American Court, the recourse of suing the United States under the Due Process and Equal Protection Clauses or under §1983 appears ineffective.¹⁶⁶ As discussed above,¹⁶⁷ the barriers of high standards of proof, limited state responsibility, and singular monetary remedies characterizing due process and equal protection cases under domestic law prevents the domestic law from being “truly effective in

161. American Convention, *supra* note 35, art. 1(1).

162. *Id.* art. 25(1). “Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention.” *Id.*

163. Culliton, *supra* note 11, at 551.

164. *Id.* (citing Advisory Opinion of Oct. 6, 1987, OC-9/87, Inter-Am. C.H.R., OEA/ser.A, at 31-32, para. 22); American Convention, *supra* note 34. The American Convention also includes a non-derogation provision in Article 27 which does not authorize the suspension of several fundamental rights. *Id.*

165. *Id.* at 551-52.

166. *See* text accompanying notes 113-18.

167. *See* text accompanying notes 101-21.

establishing whether there has been a violation of human rights and in providing redress."¹⁶⁸

Within the Inter-American system, the Inter-American Human Rights Commission receives petitions from victims of human rights abuses living in any O.A.S. member state, even if the state denied ratification of the American Convention.¹⁶⁹ Since the United States has not signed the American Convention, this provision still allows victims within the United States to petition under the American Declaration.¹⁷⁰ After receiving a petition and finding it admissible, the Commission examines the matter in order to verify the facts of the petition.¹⁷¹ Investigation of the matter includes requesting information from the state¹⁷² and may involve asking the state to furnish necessary facilities for investigation as well as more pertinent information, including oral and written statements.¹⁷³ At the completion of its examination into the matter, the Commission attempts to aid the parties in reaching a friendly settlement on the basis of respect for the human rights recognized in the Convention.¹⁷⁴ At the conclusion of these negotiations, the Commission writes a report whether or not agreement has been reached.¹⁷⁵

When no agreement has been reached, the Commission's report sets forth the facts of the case and states the Commission's conclusions as well as any proposals and recommendations the Committee sees fit.¹⁷⁶ The Commission transmits these reports to the state, and if within three months "the matter has not either been settled or submitted by the Commission or by the state concerned to the Court and its jurisdiction accepted, the Commission may . . . set forth its opinion and conclusions concerning the question submitted for its consideration."¹⁷⁷ Besides making findings and pertinent recommendations, the Commission "[w]here appropriate . . . shall prescribe a period within which the state is to take the measures that are incumbent upon it to remedy the situation," and "[w]hen the prescribed period has expired, the Commission shall decide . . . whether the state has taken adequate measures and whether to publish its report."¹⁷⁸ If the Commission decides to publish its report, the report will appear in the annual report to the General Assembly and will create formidable pressure

168. See Culliton, *supra* note 11, at 551 (quoting Advisory Opinion of Oct. 6, 1987, OC-9/87, Inter-Am. C.H.R., OEA/ser.A, at 31-32, para. 22); see also *supra* text accompanying note 164.

169. American Convention, *supra* note 35, art. 44.

170. See Culliton, *supra* note 11, at 543-44; see also *supra* text accompanying note 15.

171. American Convention, *supra* note 35, art. 48(1)(a).

172. *Id.*

173. *Id.* art. 48(1)(e).

174. *Id.* art. 48(1)(f).

175. *Id.* arts. 49 & 50(1).

176. American Convention, *supra* note 35, arts. 50(1) & 50(3).

177. *Id.* arts. 50(2) & 51(1).

178. *Id.* art. 51(2) & (3).

on the state to redress the victim's injuries.¹⁷⁹ The subjection of the United States to international political pressure to redress violations of women's rights seems probable if the Commission's report finds the United States in violation of the American Declaration.

In addition to issuing a report when a case cannot be settled through friendly agreement, the Commission may decide to send the matter to the Inter-American Court of Human Rights.¹⁸⁰ The Court determines the existence of violations of the Convention guarantees, the measures necessary to ensure protection, and the payment of fair compensation in the cases over which the court has jurisdiction.¹⁸¹ Since the United States is not a State Party to the American Convention, the Court lacks jurisdiction over the United States.¹⁸² However, whether or not the state accepts jurisdiction under the American Convention, the Court may issue advisory opinions on the norms of the American Convention and "other treaties concerning the protection of human rights in the American States."¹⁸³ Thus, an alternative under the American Convention permits the Court to issue an advisory opinion, which may eventually become international human rights law, concerning the United States' responsibilities under the American Declaration.¹⁸⁴

The American Declaration protects the right to life, arguably the right to freedom from torture, and the right to equality before the law. Article 1(1) of the Declaration expressly guarantees the right to life.¹⁸⁵ Within the Inter-American system, the Court found that to "guarantee the full exercise and enjoyment of human rights,' such as the right to life, means that states must protect those persons within their jurisdiction[s] from violations of the right to life."¹⁸⁶ Therefore, the failure of the U.S. legal system to protect women victims of

179. Culliton, *supra* note 11, at 547.

180. American Convention, *supra* note 35, art. 61. The Inter-American Court represents the judicial branch of the Inter-American system. *Id.*

181. *Id.* art. 63(1).

182. Culliton, *supra* note 11, at 545. The Inter-American Court only has jurisdiction in a case when States Parties to the American Convention accept the Court's jurisdiction. Non-parties to the American Convention, such as the United States, cannot agree to jurisdiction in the Inter-American Court. *Id.*

183. American Convention *supra* note 35, art. 61; *see* Culliton, *supra* note 11, at 545.

184. Culliton, *supra* note 11, at 546. "Although Advisory Opinions are limited to interpretations of the relevant international human rights instruments and cannot provide any other remedy, an Advisory Opinion could be useful in ensuring that the fundamental right to state protection of domestic violence is understood and enforced. The Court has been very progressive in its Advisory Opinions, using its authority to gradually develop international human rights law." *Id.*

185. American Declaration, *supra* note 120, art. 1(1).

186. Culliton, *supra* note 11, at 553; *see* Velasquez Rodriquez, *supra* note 29; *see also supra* text accompanying notes 158-61.

violence from violations of the right to life conflicts with other obligations under the American Declaration.

The right to freedom from torture does not appear in the text of the American Declaration, but "such right may be inferred from the text itself and from its relation to similar international instruments."¹⁸⁷ For example, the right to the security of the person guaranteed in Article 1 corresponds to the American Convention's guarantee of freedom from torture.¹⁸⁸ Within the Inter-American system, the majority of governments recognize that violence against women constitutes a violation of women's fundamental right to physical integrity.¹⁸⁹ The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women condemns violence against women "whether in the public or private sphere" and protects the right of a woman "to have the inherent dignity of her person respected."¹⁹⁰ However, at the drafting of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, the United States protested the statement that "'the right to be free from violence includes the protection of other rights,' which would include the right to be free from torture, and instead suggested limiting the language to 'a general statement to the effect that the promotion and observance of human rights and fundamental freedoms is instrumental to freedom from violence against women.'"¹⁹¹ In other words, the United States agrees, to a large extent, that already existing human rights norms and human rights treaties forbid violence against women and asserts that their main objection is to the drafting of new and

187. Culliton, *supra* note 11, at 556. "The text of the Declaration itself shows that it was intended to protect people from torture, and from cruel or inhumane treatment. The first paragraph of the Declaration acknowledges the 'dignity of the individual,' and the fourth paragraph affirms the American states' commitment to protecting essential human rights 'together with the guarantees given by the internal regimes of the states.' Additionally, Article 1, which guarantees the right to the security of the person, is analogous to the American Convention's guarantees of freedom from torture." *Id.*

188. *Id.*

189. *Id.* at 556-57. "The majority of governments in the Inter-American system have made official statements that domestic violence constitutes a violation of women's fundamental right to physical integrity." Although Culliton limits her statement to domestic violence, the majority of governments extend the violation of women's fundamental right to physical integrity to all forms of pervasive gender violence. *Id.*; see Inter-American Convention on the Prevention, Punishment & Eradication of Violence Against Women, *supra* note 15.

190. Inter-American Convention on the Prevention, Punishment & Eradication of Violence Against Women, *supra* note 15, arts. 1 & 4(e); see also Lai & Ralph, *supra* note 19, at 208 n.33.

191. See Culliton, *supra* note 11, at 557 (quoting Reply of the Government of the United States of America, OEA/ser.L/II.2.26, CIM/doc.5/92 add.1, at 8 (Sept. 21, 1992)).

unnecessary agreements.¹⁹² Thus, whether or not the United States agrees with the Inter-American system's interpretation that violence against women violates the right to physical integrity, the American Declaration holds the United States responsible for complaints of human rights violations which could result from a claim of gender violence.¹⁹³

Article 2 of the American Declaration guarantees equality under the law and Article 23 allows that "every person may resort to the courts to ensure respect for his [or her] legal rights [and that] [t]here should likewise be available a simple, brief procedure whereby the courts will protect him [or her] from acts of authority that, to his [or her] prejudice, violate any fundamental constitutional rights."¹⁹⁴ By permitting gender bias in the courts, the United States violates its obligations under Article 2 of the American Declaration and becomes subject to judicial redress mandated under Article 23.¹⁹⁵ The Inter-American Court interprets the right to judicial redress to be the same under the American Declaration as it is under the American Convention, which "suggests that the right to judicial redress under Article 23 of the American Declaration would also apply to domestic violence cases, as it does under the American Convention."¹⁹⁶ Moreover, since the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women condemns violence against women in both the public and private spheres, the right to judicial redress should apply to all cases of violence against women whether or not committed in the home. Thus, the massive evidence of instances in which the U.S. legal system failed to provide a fair trial or judicial remedy for crimes against women implicates the United States in human rights violations.

C. The Vienna Declaration

At the United Nations World Conference on Human Rights held in Vienna in 1993, women's rights moved more fully into the mainstream human rights

192. *Id.* at 557 n.279. "The United States took this position . . . despite the fact that the United States government considers torture to be a violation of customary international human rights." *Id.*

193. *Id.* at 557.

194. American Declaration, *supra* note 120, arts. 1 & 23; *see also* Culliton, *supra* note 11, at 558 n.286. "The Inter-American system's anti-discrimination provisions are stronger than those of the U.N. Charter, which prohibits discrimination based on race, sex, language, or religion, but not any other status." *Id.*

195. *See* Culliton, *supra* note 11, at 559.

196. *Id.*; *see also* Lopez Aurelli Case, Inter-Am. C.H.R., OEA/ser.L/V/II.79, doc 12, rev. 1 (1991).

movement.¹⁹⁷ The Conference promulgated the Vienna Declaration and Programme of Action which “expressly recognized that the human rights of women are an inalienable, integral, and indivisible part of universal human rights.”¹⁹⁸ In mainstreaming women’s rights, the Vienna Declaration stressed the equal status of women’s rights.¹⁹⁹ The Vienna Declaration also declared that “gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking,²⁰⁰ are incompatible with the dignity and worth of the human person and must be eliminated.”²⁰¹

The Vienna Declaration promoted one of the most important concepts for women’s rights, the principal of universality of human rights.²⁰² States endorsed this principle “by affirming their duty, irrespective of their political, economic, and cultural systems, to promote and protect all human rights and fundamental freedoms.”²⁰³ The significance of this affirmation lies in the fact that, due to these systems, states often deny legal responsibility for obligations to respect women’s human rights.²⁰⁴ Nevertheless, “[a]lthough the core principle of universality was established, a qualification remained: ‘the significance of national and regional particularities and various historical, cultural, and religious backgrounds *must be borne in mind* (emphasis added).’”²⁰⁵

197. Elizabeth Evatt, Book Review, 7 HARV. HUM. RTS. J. 295, 299 (1994); *see also* Defeis, *supra* note 8, at 1751.

198. Vienna Declaration, *supra* note 17, at pt. 1, para. 18; Defeis, *supra* note 8, at 1749. By bringing women’s rights into the mainstream of human rights, the World Conference in Vienna added human rights concerns specific to women to the agenda of the mainstream human rights bodies, including the United Nations Commission on Human Rights. The move represents a big step because women’s rights historically received marginal attention by the main human rights bodies. Instead, the United Nations had pushed them aside as merely the concerns of smaller women’s committees, which lacked power to be heard. *Id.*

199. Vienna Declaration, *supra* note 17, at pt. 1, para. 18.

200. International trafficking refers to the selling and buying of women for various reasons including sexual slavery.

201. Vienna Declaration, *supra* note 17, at pt. 1, para. 18; *see also* Evatt, *supra* note 8, at 1749; *see also* Evatt, *supra* note 196, at 297.

202. *See supra* notes 19 & 24 and accompanying text; Vienna Declaration, *supra* note 17, at pt. 1, para. 5. The universality of rights refers to the existence of rights that encompass rights specific to gender and that reject cultural interpretation. *Id.*

203. Evatt, *supra* note 197, at 297; *see* Vienna Declaration, *supra* note 17, at pt. 1, para. 5.

204. *See* Cook, *supra* note 7, at 127-28; *see also* Defeis, *supra* note 8, at 1750-51. “The Vienna Declaration also urges States to withdraw the numerous reservations to CEDAW. . . . There have been more than 100 reservations submitted by over 40 states to CEDAW. Reserving states justify their reservations on grounds of religion, culture, tradition, and economics.” *Id.*

205. Evatt, *supra* note 197, at 297 (quoting Vienna Declaration, *supra* note 17, at pt. 1, para. 5).

Within the Programme of Action, the Vienna Declaration urged that treaty monitoring mechanisms be strengthened and, in particular, that the Convention on the Elimination of All Forms of Discrimination Against Women be universally adopted by the year 2000, that the large numbers of reservations to CEDAW be reviewed, and that an optional protocol to allow for individual petitions be adopted. Further, it called upon governments and all international organizations to facilitate women's access to policy level posts and greater participation in the decision-making process.²⁰⁶

The effects of the Vienna Declaration can already be seen in the adoption by the General Assembly, on December 20, 1993, of the Declaration on the Elimination of Violence Against Women and in the appointment of a Special Rapporteur on Violence in April 1994.²⁰⁷

The Preamble to the Declaration on the Elimination of Violence Against Women affirms that "violence against women constitutes a violation of the rights and fundamental freedoms of women and impairs or nullifies their enjoyment of those rights and freedoms."²⁰⁸ The Declaration defines violence against women as "any act of gender-based violence that results in, or is likely to result in, physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."²⁰⁹ This definition is highly effective and important because it reaches violence within the private sphere and within the family. The Declaration also rejects cultural relativism by prohibiting states from invoking "any custom, tradition or religious consideration to avoid their obligations"²¹⁰ in pursuing a policy of eliminating violence by all appropriate means and without delay.²¹¹ Under Article 4, an effective policy of eliminating violence requires that the state use due diligence to prevent, investigate, and punish acts of violence against women.²¹²

The Special Rapporteur on violence provides a valuable tool for monitoring states that have not ratified the Women's Convention, including the United States.²¹³ The Special Rapporteur focuses and reports on violence in the home,

206. Defeis, *supra* note 8, at 1749.

207. See Declaration on the Elimination of Violence against Women, G.A. Res. 104, U.N. GAOR, 48th Sess., Agenda Item 11, U.N. Doc. A/RES/48/104 (1994) [hereinafter Declaration]; Defeis, *supra* note 8, at 1750. The Special Rapporteur is a monitoring body that focuses on violence against women and reports its observations, concerns, and conclusions to the United Nations. *Id.*

208. Declaration, *supra* note 207, at pmbl.

209. *Id.* art. 1.

210. *Id.* art. 4 pmbl.

211. See Evatt, *supra* note 197, at 298.

212. *Id.*; see Declaration, *supra* note 207, art. 4(c).

213. See Defeis, *supra* note 8, at 1750.

the community (prostitution, rape, pornography), and the state (abuse in prisons and in armed conflict).²¹⁴

Although the Vienna Declaration does not legally bind States, the declaration does call for state action and may aid in the formation of customary international law with binding legal effects.²¹⁵ The awareness and sensitivity of the Vienna Declaration to violations of human rights suffered specifically or primarily by women reflects a change in the historical marginalization²¹⁶ of women's rights in the mainstream U.N. Human Rights System. If violence against women becomes a violation of customary international law, then U.S. accountability seems susceptible to the human rights norms recognized in women's rights treaties. One authority wonders "whether national activists will receive the kind of support from the U.N. Human Rights System that the Vienna Declaration seems to offer . . . [because the international human rights system] still lacks effective implementation and enforcement mechanisms."²¹⁷ However, she concludes that the Vienna Declaration calls for review and reform of the system and encourages women to continue their activism at national and grassroots levels.²¹⁸ The significance of women's activism proves quite powerful in obtaining acknowledgment of women's rights in the international system. Thus, the remedy to the lack of success in U.S. domestic law may reside in seeking world-wide support.

IV. THE FOURTH WORLD CONFERENCE ON WOMEN

The Fourth World Conference on Women at Beijing (FWCW) represented the consolidation and reaffirmation of commitments made at other U.N. conferences in a single document focused on the role of women. The Beijing Conference produced the Beijing Declaration and Platform for Action (Beijing Declaration), which stands as an integration of references to gender in previous U.N. agreements and calls for commitments by governments and the international community.²¹⁹ The Beijing Declaration consists of four sections: a preamble, reaffirmed commitment, principles, and actions that governments are determined to carry out.²²⁰ Chapter I of the Beijing Declaration in its Mission Statement, defines the Platform for Action as an agenda for women's empowerment that reaffirms the human rights of women and the girl-child, and calls for strong

214. *Id.*

215. *Id.*

216. *Id.* at 1748.

217. Evatt, *supra* note 197, at 299.

218. *Id.*

219. *A Daily Report on the Fourth World Conference on Women, supra* note 18.

220. *Id.*

commitments by government delegates.²²¹ With reference to human rights, delegates agreed, as in Vienna, that the human rights of women and the girl child are part of universal human rights.²²² Making women's rights part of universal human rights eliminates the distinction between universal human rights and women's rights.²²³

Chapter II, Global Framework, adopted in paragraph 4 the statement that "women's rights are human rights."²²⁴ Chapter II further refers in paragraph 23 to the full enjoyment of human rights and fundamental freedoms of women; however, the delegates removed the reference to sexual and reproductive rights originally in this Chapter.²²⁵ Finally, paragraph 9 of Chapter II contains a significant compromising footnote which requires the implementation of the objectives and actions in Chapter IV to conform to cultural and religious backgrounds, with the exception of Chapter IV, Section C on health.²²⁶

Chapter III covers areas of critical concern and reaffirms that the "advancement of women and the achievement of equality" involve a matter of human rights and a condition for social justice.²²⁷ Among the twelve interrelated areas of critical concern, the Beijing Declaration calls upon governments, the international community, civil society and the private sector to address: violence against women and the girl child; effects of conflict on women (including rape as a war crime); mechanisms to promote the advancement of women; human rights of women; and the persistent discrimination and violation of the rights of the girl child.²²⁸

Chapter IV of the Beijing Declaration and Platform for Action considers strategic objectives and actions for each of the twelve areas of concern. Section I on human rights states that human rights are the birthright of all human beings²²⁹ and that "[g]overnments must work actively to promote and protect these rights and the systematic and systemic nature of discrimination against women must be taken into account when international human rights instruments are applied."²³⁰ Section I also calls upon actors to implement human rights

221. *Id.*

222. *Id.*

223. *Id.*; see *supra* text accompanying notes 197 and 201.

224. *A Daily Report on the Fourth World Conference on Women*, *supra* note 18. Some delegations objected to the phrase that "women's rights are human rights because it could be interpreted as establishing human rights activities not already implemented in other international legal instruments." *Id.*; see *supra* note 74.

225. *A Daily Report on the Fourth World Conference on Women*, *supra* note 18.

226. *Id.*

227. *Id.*

228. *Id.* The other areas of concern that the Declaration enumerates include: poverty; unequal access to education and training; inequalities in health care; participation in the definition of economic structures and policies; power sharing; mechanisms to promote advancement of women; the media; and the environment. *Id.*

229. *Id.*

230. *A Daily Report on the Fourth World Conference on Women*, *supra* note 18.

instruments, to ensure non-discrimination under the law, and to achieve legal literacy.²³¹ Thus, the Beijing Declaration implies that states that have not ratified the Women's Convention must do so and that states that fail to prosecute violations of women's rights violate international human rights law.

Section D in this same Chapter concerns violence against women. Delegates concluded that "in 'all' societies, to a greater or lesser degree, women and girls are subjected to physical, sexual, and psychological abuse." This abuse involves "acts of violence in situations of armed conflict and forced sterilization, abortion, forced use of contraceptives, prenatal sex selection,²³² and female infanticide."²³³ Important to the issue of violence against women, the Beijing Declaration also recognizes in Section E (armed conflict) that rape is a war crime, and in Section C, which is not subject to respect for religious and cultural values, that the human rights of women means the right "to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination, and violence."²³⁴

Finally, Chapters V and VI call for reform at the national, international, and regional levels. Chapter V involves institutional arrangements and notes that, although states bear the primary responsibility for implementation, implementation of the Beijing Declaration and Platform of Action is "dependent on a wide range of institutions at all levels."²³⁵ This Chapter calls for change in the different levels of organizations and institutions.²³⁶ Chapter VI requests political commitment to make available financial resources at the national, regional, and international levels.²³⁷

The idea of reform, as promulgated in these Chapters, is supported by the adoption of paragraphs 293 and 327 of the Platform for Action.²³⁸ Paragraph 293, which makes the Fourth World Conference on Women a "Conference of Commitments," originated from a 1994 proposal by Australia.²³⁹ Australia proposed that state delegates make commitments during plenary speeches and that these commitments be published as a list in an annex to the report of the Conference.²⁴⁰ Although the idea of adding an annex of commitments to the FWCW report was dropped, national government organizations monitored the numerous plenary speeches in which governments pledged to dedicate activities and resources to the goals of the FWCW.²⁴¹ After articulation in front of the

231. *Id.*

232. Prenatal sex selection refers to the practice of terminating pregnancies when the sex of the child is a girl.

233. *A Daily Report on the Fourth World Conference on Women, supra* note 18.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *A Daily Report on the Fourth World Conference on Women, supra* note 18.

239. *Id.*

240. *Id.*

241. *Id.*

world, these commitments provide a push toward implementation and "an opportunity . . . to apply pressure by ensuring that delegations and observers alike would have no doubt about who was doing what, and who wasn't."²⁴² Similarly, paragraph 327 recommends using existing human and financial resources to develop post positions.²⁴³

The United States played a very visible role at the FWCW. The arrival of First Lady Hillary Rodham Clinton caused traffic to stop in Beijing.²⁴⁴ The world waited to see if she would give a speech or remain quiet in protest of the human rights abuses in China. When the First Lady did speak, the world listened as she held their attention with powerful words recognizing the rights of women everywhere.²⁴⁵ As a delegation, the United States made a statement stressing the commitment to women's empowerment, and noted that [the Nairobi Forward-Looking Strategy] "should be thought of as a compass and Beijing as a detailed map for achieving equality, development and peace."²⁴⁶ Nevertheless, the United States delegates said that they would not consider the Platform as legally binding, indicating that it consisted only of recommendations, and made several reservations to the document.²⁴⁷

Although the Beijing Declaration does not bind states, it does mark the transition to a universal agenda of women's rights by expressly recognizing women's rights as human rights.²⁴⁸ The Beijing Declaration clarifies the objectives of the international community with regards to women's rights and obtains commitments to the implementation of these objectives.²⁴⁹ Furthermore, the Beijing Declaration adds great weight to efforts to recognize women's rights as customary international law. The document will be presented at the 50th Session of the UN General Assembly, and it represents the latest stage in a process of global thinking on women's rights, the type of thinking necessary to establish customary international law and to bind states to norms recognizing women's human rights. The international norms of women's rights may prove viable for holding the United States accountable for the violence that women suffer in this country.

242. *Id.*

243. *A Daily Report on the Fourth World Conference on Women*, *supra* note 18.

244. The source for the details of the First Lady's trip came from speeches made by women from Tucson, Arizona who went to the FWCW as members of non-governmental organizations.

245. *A Daily Report on the Fourth World Conference on Women*, *supra* note 18.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

V. CONCLUSION

Nonprosecution of violence against women in the United States appears to violate international human rights law requiring the prosecution, prevention, and punishment of violence against women. International human rights treaties proclaim that violence against women violates fundamental human rights that characterize *jus cogens* norms, including the right to life, the right to be free from torture, and the right to equality before the law. If violence against women is found to violate *jus cogens* norms, the United States should be held accountable.

Whether or not violence against women violates *jus cogens* norms, the violation of women's right to be free from gender-based violence retains the support of several countries that have ratified human rights documents declaring violence against women to be a violation of women's human rights. Consequently, international law seems to adopt women's right to be free from gender-based violence as a customary human rights norm. The legal effect of the customary international norm in the United States remains open, but typically the United States follows customary human rights norms more readily than other customary international law.

Besides customary international law, international instruments bind the United States and provide a means for finding the United States accountable for nonprosecution of violence against women as a violation of a human rights norm. The Women's Convention finds that violence against women deprives women of the right to be free from gender-based discrimination as promulgated by the treaty. The likelihood of the United States signing the Women's Convention depends on how the standards in the treaty comport with domestic law. Presently, the Women's Convention appears adverse to U.S. law on due process and equal protection. Within the Inter-American system, the American Declaration binds the United States to recognition of the right to life, the right to be free from torture, and the right to equality before the law. The Inter-American system declares nonprosecution of violence against women as a violation of the rights stated in the American Declaration. It further outlines a system of recourse that, at a minimum, would apply political pressure on the United States through an advisory opinion asking the United States to adhere to the standards of the Inter-American system. Finally, the Vienna Declaration and Programme of Action and the Beijing Declaration and Platform for Action reinforce the status of women's rights to be free from gender-based violence as a customary international human rights norm by bringing women's rights into the mainstream human rights arena.

The legal effect on the United States of the international instruments establishing violence against women as a violation of customary international human rights norms is controversial. The United States will probably refuse any standard of international human rights law that conflicts with already established domestic law. The domestic laws on due process and equal protection fail to adopt the same high standards of protection as international law and instead demand greater burdens of proof than international law allows. Thus, unless the domestic law changes or the international law permits reinterpretation, the United

States probably will not recognize the customary international law establishing nonprosecution of violence against women as a violation of human rights. Nevertheless, the political pressure to apply the standards of the international human rights law appears to be increasing as the number of international instruments supporting women's right to be free from gender-based violence grows, and the voice of feminists world-wide gets louder. Presently, the international law on women's rights best aids in encouraging the United States to reevaluate its domestic law on gender-based violence from the perspective of women from around the world and from an international view that finds nonprosecution of gender-based violence, such as that which is so prevalent in the United States, an abomination of women's fundamental human rights.

