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## International and Regional Standards for Protecting Victims of Domestic Violence

Andreea Vesa

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# INTERNATIONAL AND REGIONAL STANDARDS FOR PROTECTING VICTIMS OF DOMESTIC VIOLENCE

ANDREEA VESA\*

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## INTRODUCTION

Domestic violence is a deeply rooted problem that exists in every country in the world.<sup>1</sup> For the most part, however, the international community has yet to create effective legal standards that *exclusively* address domestic violence. Despite this unfortunate void, the rights of battered women may be asserted under international and regional human rights conventions that are legally binding upon ratifying states. The International Bill of Human Rights, comprised of the Universal Declaration of Human Rights (“UDHR”),<sup>2</sup> the International Covenant on Civil and Political Rights (“ICCPR”),<sup>3</sup> and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”),<sup>4</sup> sets forth general human rights standards that victims of

1. In a 2000 report, Amnesty International indicated that:

Violence in the home is a truly global phenomenon. The figures may vary in different countries but the suffering and its causes are similar around the world . . . According to World Bank figures, at least 20 per cent of women around the world have been physically abused or sexually assaulted. Official reports in the USA say that a woman is battered every 15 seconds and 700,000 are raped every year. In India, studies have found that more than 40 per cent of married women reported being kicked, slapped or sexually abused for reasons such as their husbands’ dissatisfaction with their cooking or cleaning, jealousy, and a variety of other motives. At least 60 women were killed in domestic violence in Kenya in 1998-99, and 35 per cent of women in Egypt reported being beaten by their husbands. For millions of women the home is not a haven but a place of terror.

AMNESTY INTERNATIONAL, *BROKEN BODIES, SHATTERED MINDS: TORTURE AND ILL-TREATMENT OF WOMEN 10-11* (2000) [hereinafter AI 2000 REPORT], available at <http://web.amnesty.org/library/index/engact400012001> (last visited May 18, 2004). See generally DOMESTIC VIOLENCE: A GLOBAL VIEW (Randal W. Summers & Allan M. Hoffman eds., 2002); see generally TOO CLOSE TO HOME: DOMESTIC VIOLENCE IN THE AMERICAS (Andrew R. Morrison & Maria Loreto Biehl eds., 1999).

2. *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., at 71, U.N. Doc. A/810 (1948) [hereinafter UDHR], available at <https://www1.umn.edu/humanrts/instree/bludhr.htm> (last visited May 18, 2004).

3. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR], available at <http://www1.umn.edu/humanrts/instree/b3ccpr.htm> (last visited May 18, 2004).

4. International Covenant on Economic, Social and Cultural Rights, Dec. 16,

domestic violence may invoke against their state of citizenship. That is, battered women who have exhausted all domestic remedies and who still find that the state has failed to adequately address their grievances, may hold the state liable if that state is a party to the above instruments. The same can be done under the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”)<sup>5</sup> together with its Optional Protocol,<sup>6</sup> and under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (“CAT”).<sup>7</sup> Likewise, regional instruments may offer protection for battered women. The European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”),<sup>8</sup> the American Convention on Human Rights (“ACHR”),<sup>9</sup> together with the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (“Inter-American Convention on Violence Against Women”),<sup>10</sup> and the African Charter on Human and Peoples’ Rights (“African Charter”)<sup>11</sup> are the major regional human rights documents that may be invoked by victims of domestic violence. The following is a summary of applicable provisions from the aforementioned documents as well as a brief explanation of how the various human rights bodies operate. The most critical failing of the institutions

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1966, 993 U.N.T.S. 3 [hereinafter ICESCR], *available at* <http://www1.umn.edu/humanrts/instreetree/b2esc.htm> (last visited May 18, 2004).

5. Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW], *available at* <http://www1.umn.edu/humanrts/instreetree/e1cedaw.htm> (last visited May 18, 2004).

6. *See generally* Optional Protocol to the Convention on the Elimination of Discrimination Against Women, Oct. 6, 1999, 2131 U.N.T.S. 83 [hereinafter CEDAW Optional Protocol], *available at* <http://www1.umn.edu/humanrts/instreetree/cedawopprot-2000.html> (last visited May 18, 2004).

7. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT], *available at* <http://www1.umn.edu/humanrts/instreetree/h2catoc.htm> (last visited May 18, 2004).

8. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR], *available at* <http://www.echr.coe.int/Convention/webConvenENG.pdf> (last visited May 20, 2004).

9. American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR], *available at* <http://heiwww.unige.ch/humanrts/oasinstr/zoas3con.htm> (last visited May 20, 2004).

10. Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June 9, 1994, 33 I.L.M. 1534, [hereinafter Inter-American Convention on Violence Against Women], *available at* <http://www1.umn.edu/humanrts/instreetree/brazil1994.html> (last visited May 20, 2004).

11. African Charter on Human and Peoples’ Rights, June 27, 1981, 21 I.L.M. 58, [hereinafter African Charter], *available at* <http://www.hrcr.org/docs/Banjul/afhr.html> (last visited May 20, 2004).

discussed below is the lack of adequate enforcement. That is, while some of the international and regional courts are capable of rendering binding decisions, the ultimate responsibility lays with the States' Parties to the various conventions to implement these decisions.

### I. DOMESTIC VIOLENCE DEFINED

Domestic violence is one of the numerous forms of violence against women that have been identified worldwide.<sup>12</sup> The United Nations defined the term "violence against women" in a 1993 declaration 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 private life."<sup>13</sup> The declaration further notes that violence against women can occur within the *family* or within the general community and that it may be condoned or perpetrated by government officials.<sup>14</sup> Having included domestic violence as a form of violence against women, the United Nations further explained that:

The term 'domestic violence' is used to describe actions and omissions that occur in varying relationships. The term is used narrowly to cover incidents of physical attack, when it may take the form of physical and sexual violations. . . . The result of such physical violence can range from bruising to killing; what may often start out as apparently minor attacks can escalate both in intensity and frequency. . . . '[D]omestic violence' . . . [also] include[s] psychological or mental violence, which can consist of repeated verbal abuse, harassment, confinement and deprivation of physical, financial and personal resources . . . .<sup>15</sup>

12. See Johanna Bond & Robin Phillips, *Violence Against Women as a Human Rights Violation: International Institutional Responses*, in SOURCEBOOK ON VIOLENCE AGAINST WOMEN 481, 482 (Claire M. Renzetti et al. eds., 2001) [hereinafter SOURCEBOOK ON VIOLENCE AGAINST WOMEN] (citing other forms of violence against women including "rape, sexual assault, forced prostitution, female genital mutilation, female infanticide, and sexual harassment. Other lesser known forms of violence against women include honor killing . . . dowry violence . . . [and] sex trafficking in women . . .").

13. *Declaration on the Elimination of Violence Against Women*, G.A. Res. 48/104, U.N. GAOR, 48th Sess., art. 1, Supp. No. 49, at 217, U.N. Doc. A/48/49 (1993) [hereinafter *1993 Declaration on Violence Against Women*], available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.RES.48.104.En?Opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.RES.48.104.En?Opendocument) (last visited May 20, 2004).

14. See *id.* at art. 2 (stating violence in the family may include battery, sexual abuse, and marital rape while violence in the general community may include rape, sexual harassment at work, and trafficking in women).

15. UNITED NATIONS OFFICE AT VIENNA, CENTRE FOR SOCIAL DEVELOPMENT AND HUMANITARIAN AFFAIRS, STRATEGIES FOR CONFRONTING DOMESTIC VIOLENCE: A

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Scholars have confirmed that “[g]ender-based violence, such as . . . domestic violence, involves some form of physical assault or intrusion. As a result, these forms of violence inherently violate the rights of bodily integrity and security of the person.”<sup>16</sup> However, others point out that “extensive and continually expanding research literature supports the assertion that domestic violence is associated with a wide range of traumatic psychological reactions . . . .”<sup>17</sup> It is important to note that, for the purposes of this article, I will solely focus on legal avenues available to women since the overwhelming majority of domestic violence victims are adult females.<sup>18</sup> There are situations, though, where targeted victims could be young boys and girls as well as elderly persons (male and female).<sup>19</sup>

## II. THE UNITED NATIONS AND INTERNATIONAL TREATIES PERTAINING TO DOMESTIC VIOLENCE

### A. *The United Nations Campaign for Women’s Rights*

As previously mentioned, the United Nations addressed the issue of violence against women as part of its general ban on gender-based discrimination.<sup>20</sup> Shortly thereafter, the 1993 World Human Rights

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RESOURCE MANUAL 6 (1993) [hereinafter U.N. DOMESTIC VIOLENCE MANUAL].

16. SOURCEBOOK ON VIOLENCE AGAINST WOMEN, *supra* note 12, at 485.

17. Ela Grdinic, *Application of the Elements of Torture and Other Forms of Ill-Treatment, as Defined by the European Court and Commission of Human Rights, to the Incidents of Domestic Violence*, 23 HASTINGS INT’L & COMP. L. REV. 217, 232 (2000).

18. See WOMEN, LAW & DEVELOPMENT INTERNATIONAL, STATE RESPONSES TO DOMESTIC VIOLENCE: CURRENT STATUS AND NEEDED IMPROVEMENTS 1 (Rebecca P. Sewall et al. eds., 1996); see also HANDBOOK OF DOMESTIC VIOLENCE INTERVENTION STRATEGIES: POLICIES, PROGRAMS, AND LEGAL REMEDIES 102 (Albert R. Roberts ed., 2002) (explaining from a U.S. perspective that “[d]emographic analyses of domestic violence offenses reported to the police confirm the observation that domestic violence is most frequently perpetrated by males against their female partners and that males constitute only a small fraction of the total number of victims in domestic violence cases”); see also Callie Marie Rennison, *Intimate Partner Violence, 1993-2001*, BUREAU OF JUSTICE STATISTICS: CRIME DATA BRIEF, Feb. 2003, at 1 (reporting U.S. Department of Justice statistics that, in 2001 alone, 85 percent of the victims of intimate partner violence were women (588,490 crimes)), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf> (last visited May 20, 2004).

19. See WOMEN, LAW & DEVELOPMENT INTERNATIONAL, *supra* note 18, at 1 (“Violence within the domestic arena takes many forms. Young boys may be victims of sexual and physical abuse. Elderly family members and the infirm are equally vulnerable and, in some cases, husbands are attacked by their wives.”). See generally PHILIP W. COOK, ABUSED MEN: THE HIDDEN SIDE OF DOMESTIC VIOLENCE (1997) (examining the neglected social issue of violence against men).

20. See EUROPEAN UNION, BREAKING THE SILENCE: EUROPEAN CAMPAIGN AGAINST DOMESTIC VIOLENCE 3 (2000) (aiming to advance victim protection, ensure preventive measures, and improve available information and statistics on violence against women); see also U.N. CHARTER, art. 55(c). See generally CEDAW, *supra* note 5

Conference confirmed that women's rights are human rights,<sup>21</sup> and states could then be held accountable for condoning and/or failing to prevent domestic violence and, thus, failing to protect their female citizens in general.<sup>22</sup> A Platform for Action was established in 1995 at the UN Fourth World Conference on Women in Beijing, China.<sup>23</sup> The Beijing Declaration, which accompanied the 1995 Platform for Action, solidified the world community's resolve to, *inter alia*, "ensure the full enjoyment by women and the girl child of all human rights and fundamental freedoms, . . . take effective action against violations of these rights and freedoms"<sup>24</sup> and "[p]revent and eliminate all forms of violence against women and girls."<sup>25</sup> The Platform for Action identified violence against women as one of its critical areas of concern,<sup>26</sup> delineated the scope of its definition, which includes

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(defining discrimination against women and taking measures to end such discrimination including abolishing discriminatory laws, establishing tribunals to ensure protection against discrimination, and ensuring equal access to political and public life).

21. See *Vienna Declaration and Programme of Action, World Conference on Human Rights*, ch. II, Pt. B. sec. 3, U.N. Doc. A/CONF.157/24 (1993), available at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument) (last visited May 20, 2004) ("The World Conference on Human Rights urges the full and equal enjoyment by women of all human rights and that this be a priority for Governments and for the United Nations."); see also *id.* ("The equal status of women and the human rights of women should be integrated into the mainstream of United Nations system-wide activity. These issues should be regularly and systematically addressed throughout relevant United Nations bodies and mechanisms.").

22. See Barbara Stark, *Domestic Violence and International Law: Good-Bye Earl* (*Hans, Pedro, Gen, Chou, etc.*), 47 *LOY L. REV.* 255, 262-65 (2001) [hereinafter Stark 1].

Historically, domestic violence was not viewed as a violation of women's human rights because it was not perpetuated by the state. Rather, it was considered 'private,' 'natural,' or 'cultural.' International consciousness has been raised in the last decade, however . . . Now, a state's acquiescence, or failure to take effective measures to combat domestic violence, is recognized as a violation of women's human rights.

*Id.*

23. See *Beijing Platform for Action, Fourth World Conference on Women*, U.N. Doc. A/CONF.177/20, ch. 1 (1995), [hereinafter *Platform for Action*], available at <http://www1.umn.edu/humanrts/instree/e5dplw.htm> (last visited May 20, 2004) (explaining that the Platform for Action "requires immediate and concerted action by all to create a peaceful, just, humane and equitable world based on human rights and fundamental freedoms, including the principle of equality for all people of all ages and from all walks of life" and that it "will require a strong commitment on the part of Governments, international organizations and institutions at all levels").

24. *Id.* at para. 23.

25. *Id.* at para. 29.

26. See *id.* at ch. 3, para. 46 (including additional critical areas of concern, such as women in poverty, unequal access to education and healthcare, and discrimination against the girl child).

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domestic violence,<sup>27</sup> and made some of the following recommendations to governments:

- (b) Refrain from engaging in violence against women and exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons;
- (c) Enact and/or reinforce penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs done to women and girls who are subjected to any form of violence, whether in the home, the workplace, the community or society;
- (d) Adopt and/or implement and periodically review and analyse legislation to ensure its effectiveness in eliminating violence against women, emphasizing the prevention of violence and the prosecution of offenders; take measures to ensure the protection of women subjected to violence, access to just and effective remedies, including compensation and indemnification and healing of victims, and rehabilitation of perpetrators;
- (e) Work actively to ratify and/or implement international human rights norms and instruments as they relate to violence against women, including those contained in the Universal Declaration of Human Rights . . . the International Covenant on Civil and Political Rights . . . the International Covenant on Economic, Social and Cultural Rights . . . and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- (f) Implement the Convention on the Elimination of All Forms of Discrimination against Women . . . .
- (h) Provide women who are subjected to violence with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm they have suffered and inform women of their rights in seeking redress through such mechanisms . . . .<sup>28</sup>

The 1995 Beijing Declaration and Platform for Action were the first steps towards showing a strong commitment, at the international level, to combating violence against women (domestic violence included).

In order to ensure that such commitment was maintained, the UN General Assembly decided to convene a special session entitled “Women 2000: Gender Equality, Development and Peace for the Twenty-First Century,” better known as Beijing + 5.<sup>29</sup> At this session,

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27. See *id.* at ch. 4, para. 114(a) (encompassing violence that occurs in the family, such as battery, sexual abuse, and marital rape).

28. *Id.* at ch. 4, para. 125.

29. See *Beijing+5 Process and Beyond*, U.N. GAOR, 23rd Sess. (2000) (reviewing

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member states adopted a Political Declaration<sup>30</sup> and an Outcome Document entitled “Further Actions and Initiatives to Implement the Beijing Declaration and Platform for Action.”<sup>31</sup> The Political Declaration reaffirmed the goals of the 1995 Beijing Declaration and Platform for Action, including the eradication of violence against women (as well as domestic violence)<sup>32</sup> and

pledg[ed] to undertake further action to ensure their full and accelerated implementation, *inter alia*, through the promotion and protection of all human rights and fundamental freedoms, mainstreaming a gender perspective into all policies and programmes and promoting full participation and empowerment of women and enhanced international cooperation for the full implementation of the Beijing Platform for Action.<sup>33</sup>

The Outcome Document indicated that, while some progress had been made since the 1995 Beijing conference, “barriers remain[ed] and . . . the goals set and commitments made in Beijing need[ed] to [be] implemented further.”<sup>34</sup> With respect to violence against women, the Outcome Document noted the following achievements on the part of states:

There is increased awareness of and commitment to preventing and combating violence against women and girls, including domestic

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the progress of implementation of the Beijing Declaration and Platform for Action), available at <http://www.un.org/womenwatch/daw/followup/bfbeyond.htm> (last visited May 20, 2004). The special General Assembly session was held on June 5-9, 2000. *Id.*

30. See *Political Declaration*, G.A. Res. S-32/2, U.N. GAOR, 23rd Special Sess., U.N. Doc. A/RES/S-23/2 (2000) [hereinafter *Political Declaration*] (reaffirming commitment to goal and objectives of the Beijing Declaration and Platform for Action as well as the implementation of the Platform for Action’s critical areas of concern), available at <http://www.un.org/womenwatch/daw/followup/ress232e.pdf> (last visited May 20, 2004).

31. See *Further Actions and Initiatives to Implement the Beijing Declaration and Platform of Action*, G.A. Res. S-23/2, U.N. GAOR, 23rd Special Sess., U.N. Doc. A/RES/S-23/3 (2000) [hereinafter *Outcome Document*] (detailing achievements and obstacles in critical areas of concern, including women and poverty, education of women, health, and violence against women), available at <http://www.un.org/womenwatch/daw/followup/ress233e.pdf> (last visited May 20, 2004).

32. See *Political Declaration*, *supra* note 30, paras. 1-2.

33. *Id.* at para. 8; see also *Report of the Secretary-General: Implementation of the Outcome of the Fourth World Conference on Women and of the Special Session of the General Assembly entitled “Women 2000: Gender Equality, Development and Peace for the Twenty-first Century”*, U.N. GAOR, 55th Sess., U.N. Doc. A/55/341 (2000) [hereinafter *Report of the Secretary General*], available at <http://www.un.org/womenwatch/daw/followup/ungass.pdf> (last visited May 20, 2004) for a subsequent report issued by the UN Secretary General providing more in-depth analysis of the Political Declaration, its implementation and follow-up.

34. *Outcome Document*, *supra* note 31, at 2-3. See generally *Report of the Secretary General*, *supra* note 33.

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violence, which violates and impairs or nullifies the enjoyment of their human rights and fundamental freedoms, through, *inter alia*, improved legislation, policies and programmes. Governments have initiated policy reforms and mechanisms, such as interdepartmental committees, guidelines and protocols, national, multidisciplinary and coordinated programmes to address violence. Some Governments have also introduced or reformed laws to protect women and girls from all forms of violence and laws to prosecute the perpetrators . . . . Some progress has been made in the provision of services for abused women and children, including legal services, shelters, special health services and counselling, hotlines and police units with special training. Education for law enforcement personnel, members of the judiciary, health-care providers and welfare workers is being promoted. Educational materials for women and public awareness campaigns have been developed as well as research on the root causes of violence . . . . Successful cooperation has been achieved between governmental and non-governmental organizations in the field of preventing violence against women.<sup>35</sup>

Having delineated some of the accomplishments in the campaign to eradicate violence against women, the Outcome Document stressed that women were still victims of various forms of abuse and domestic violence, in particular, that had not been effectively addressed:

Inadequate understanding of the root causes of all forms of violence against women and girls hinders efforts to eliminate violence against women and girls. There is a lack of comprehensive programmes dealing with the perpetrators, including programmes, where appropriate, which would enable them to solve problems without violence. Inadequate data on violence further impedes informed policy-making and analysis. Socio-cultural attitudes which are discriminatory and economic inequalities reinforce women's subordinate place in society. This makes women and girls vulnerable to many forms of violence, such as physical, sexual and psychological violence occurring in the family, including battering. . . . Domestic violence, including sexual violence in marriage, is still treated as a private matter in some countries. Insufficient awareness of the consequences of domestic violence, how to prevent it and the rights of victims still exists. Although improving, the legal and legislative measures, especially in the criminal justice area, to eliminate different forms of violence against women and children, including domestic violence . . . are

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35. *Outcome Document*, *supra* note 31, at 6.

weak in many countries. Prevention strategies also remain fragmented and reactive and there is a lack of programmes on these issues.<sup>36</sup>

These limitations, described during the Beijing + 5 conference in June 2000, are still prevalent today and, while declarations and international conferences are pertinent venues for pointing out such issues of wide concern and for suggesting solutions,<sup>37</sup> they do not create binding obligations that require states to enforce these solutions. The 1995 Beijing Declaration and the Platform for Action as well as the 2000 Political Declaration and Outcome Document carry political weight but they are not, on their own, legally binding instruments,<sup>38</sup> unless they are seen as embodying notions of customary human rights law, which has a legally binding effect upon states.<sup>39</sup>

### *B. The International Bill of Human Rights*

There are, however, other international documents, which delineate broader human rights categories and which have more force than declarations as far as their legally binding nature is concerned. The United Nations has recognized that the International Bill of Human Rights, comprised of the Universal Declaration of Human Rights (“UDHR”),<sup>40</sup> the International Covenant on Civil and Political Rights (“ICCPR”),<sup>41</sup> and the International Covenant on Economic, Social and Cultural Rights

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36. *Id.* at 7.

37. *See id.* at 17-42 (suggesting various actions to be undertaken at the national and international level in order to address women’s issues, including violence against women and domestic violence). Such measures include enacting effective legislation to protect women and girls from all forms of violence, prosecuting perpetrators of violence against women, and treating all violence against women as criminal offenses. *Id.*

38. *See* INTERNATIONAL LAW 847 (Barry E. Carter & Phillip R. Trimble eds., 3rd ed. 1999).

[T]here are a great number of international declarations . . . relevant to international human rights that have been adopted by the UN or by other international organizations or conferences. While these instruments are not directly binding in a legal sense, they establish broadly recognized standards and are frequently invoked in connection with human rights issues.

*Id.*

39. *See* LOUIS HENKIN ET AL., HUMAN RIGHTS 319 (1999) (stating that customary human rights law is slightly different from customary international law); *see also infra* Part II.E (discussing the incorporation of domestic violence norms within customary international law).

40. *See generally* UDHR, *supra* note 2.

41. *See generally* ICCPR, *supra* note 3.

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(“ICESCR”),<sup>42</sup> provides for fundamental human rights, which, in turn, are “general rights for victims of domestic violence.”<sup>43</sup> The following is a closer analysis of each of the aforementioned international human rights documents with a focus on particular provisions that could be invoked in connection with domestic violence situations. It should be noted that not all of the analyzed provisions would be applicable in all instances since there is always the possibility that a State Party has signed/ratified legally binding international documents, such as the ICCPR and the ICESCR, with reservations to certain provisions.<sup>44</sup>

1. *Universal Declaration of Human Rights (“UDHR”)*

Former United Nations Special Rapporteur on Violence Against Women Radhika Coomaraswamy indicated that the “fundamental human rights to be free from torture, gender discrimination and the inherent right to life are directly applicable to . . . violence against women” (domestic violence included).<sup>45</sup> These rights, in addition to being well established within customary international law, are specifically delineated within the UDHR. The UDHR sets the tone for gender equality and the fundamental right to be free from gender-based discrimination, which, in turn, is the broad basis for domestic violence standards worldwide. UDHR signatories pledge to recognize that “[a]ll human beings are born free and equal in dignity and rights.”<sup>46</sup> Furthermore “[e]veryone is entitled to all the rights and freedoms set forth in [the UDHR], without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property or other status.”<sup>47</sup> The UDHR also acknowledges that “[e]veryone has the right to recognition everywhere as a person before the law”<sup>48</sup> and that “all are

42. See generally ICESCR, *supra* note 4.

43. See U.N. DOMESTIC VIOLENCE MANUAL, *supra* note 15, at 1 (noting that basic human rights encompass the right to a safe domestic environment).

44. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 19, 1155 U.N.T.S. 331, 336-37 (permitting states to sign treaties with reservations, except when the treaty prohibits reservations or when the reservation contradicts the purpose of the treaty). Theoretically, the law on reservations is the same whether the instrument in question is a traditional international treaty or a human rights treaty. However, some have questioned the effectiveness of reservations within the human rights context where documents express generally accepted principles. See HENKIN, *supra* note 39, at 308-10.

45. *Violence Against Women, Report of the Special Rapporteur*, U.N. Economic and Social Council, para. 8, U.N. Doc. E/CN.4/1998/54 (1998).

46. UDHR, *supra* note 2, at art. 1.

47. *Id.* at art. 2.

48. *Id.* at art. 6.

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equal before the law and are entitled without any discrimination to equal protection of the law . . . .”<sup>49</sup> In addition, the UDHR sets the premise for the right to be free from torture or cruel, inhuman or degrading treatment, which is key for domestic violence victims.<sup>50</sup> The UDHR also designates the inherent “right to life, liberty and the security of person” to every individual;<sup>51</sup> another crucial right for women who have been subjected to domestic violence. Lastly, the UDHR ensures that both men and women have the equal right to physical and mental health.<sup>52</sup> However, as noted above, declarations like the UDHR, are not legally binding unless they are seen as part of customary international law.<sup>53</sup> Some scholars argue further that, the UDHR, in particular, has a legally binding effect on all United Nations members since it is “an authoritative interpretation of the general human rights commitments contained in the [United Nations] Charter.”<sup>54</sup>

## 2. *International Covenant on Civil and Political Rights (“ICCPR”)*

Fundamental human rights, such as the right to life, the right to be free from torture and the right to be free from gender discrimination that can refer directly to violence against women, are also delineated in the ICCPR, which entered into force on March 23, 1976.<sup>55</sup> Article 7 of the ICCPR states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>56</sup> The right to life, belonging to both men and women, is inscribed in the first paragraph of Article 6: “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be

49. *Id.* at art. 7 (emphasis added).

50. *Id.* at art. 5.

51. *Id.* at art. 3.

52. *See id.* at art. 25, para. 1.

53. *See* INTERNATIONAL LAW, *supra* note 38, at 262 (noting scholars’ recognition of the UDHR as “binding, customary international law”); *see also id.* at 848 (“One oft-stated argument is that at least some standards set by the Universal Declaration of Human Rights, although initially only recommendatory and nonbinding, have now become legally binding as customary law through their wide acceptance by nations as having normative effect.”).

54. *Id.* at 848.

55. *See* ICCPR, *supra* note 3, at art. 49, para. 1 (“The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.”); *see also* Status of Ratifications of the Principal International Human Rights Treaties (listing the States which have signed and/or ratified various U.N. treaties including the ICCPR), at <http://www.unhchr.ch/pdf/report.pdf> (last visited May 20, 2004).

56. ICCPR, *supra* note 3, at art. 7.

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arbitrarily deprived of his life.”<sup>57</sup> Gender equality and the right to be free from gender-based discrimination appear within several provisions of the ICCPR depending upon the scope of its application:

Article 2(1): Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion or other opinion, national or social origin, property, birth or other status . . . .

Article 14(1): All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a compact, independent and impartial tribunal established by law . . . .

Article 16: Everyone shall have the right to recognition everywhere as a person before the law.

Article 23(4): States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution . . . .

Article 26: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>58</sup>

Furthermore, the ICCPR guarantees, to all persons, the right to effective legal protections and remedies.<sup>59</sup> Some scholars have concluded that certain States Parties have violated this right by impeding upon the ability of domestic violence victims to access the court system.<sup>60</sup> High standards of proof, strict evidentiary requirements and unresponsiveness on the part of police are all obstacles that battered women continuously encounter.<sup>61</sup> If a State

57. *Id.* at art. 6, para. 1.

58. *See id.* at art. 2, para. 1; art. 14, para. 1; art. 16; art. 23, para. 4; art. 26.

59. *See id.* at art. 26 (“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”).

60. *See SOURCEBOOK ON VIOLENCE AGAINST WOMEN, supra* note 12, at 487.

61. *See id.* Scholars have found that:

In many countries around the world, women victims of domestic violence may not be able to document their injuries adequately due to onerous rules of evidence in court . . . . For example, in Macedonia, women seeking to prosecute their batterers must obtain medical documentation of their injuries, which can cost as much as a month’s salary. . . . These rules deny

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Party allows for such obstacles, it violates its ICCPR obligations.<sup>62</sup>

The ICCPR is a legally binding document upon the states that have signed it and/or ratified it by passing domestic legislation.<sup>63</sup> Article 2, paragraph 1 imposes affirmative obligations upon states not only to respect the rights delineated within the ICCPR, but also to ensure that those rights are protected through national law.<sup>64</sup> Article 2, paragraphs 2 and 3 confirm that these affirmative obligations require States Parties to frame their legal system in such a manner as to ensure the protection of human rights and to provide for an effective remedy in cases where those rights have been impeded upon.<sup>65</sup> If a State Party fails to fulfill its affirmative obligations, individual citizens are entitled, under the 1966 Optional Protocol to the ICCPR,<sup>66</sup> to file

women an effective remedy by preventing the prosecution of crimes of violence against women. In some countries, rules of evidence discount the testimony of women. In Pakistan, for example, Article 17 of the *Qanun-e-Shahadat* Order of 1984 (Law of Evidence Order) diminishes the weight of women's testimony in some circumstances to that of half of a man's testimony. . . . The *Qanun-e-Shahadat* Order also allows for the admission of evidence to show that the victim was 'immoral.' . . . In many countries, police refuse to respond to calls relating to domestic violence or to investigate assault claims when they discover the victim and the perpetrator of the assault are related. Even if the police investigate and file a report, prosecutors often do not pursue the cases. In some instances, when a woman successfully maneuvers through the criminal justice system to have her case heard before a judge, the judge dismisses the case or imposes only a nominal fine. For example, in Albania, a woman who attempts to prosecute a domestic assault meets with extreme resistance at each step of the criminal justice system. The police, prosecutors, and judges view their role as facilitating reconciliation, and they pressure women to 'pardon' their husbands. . . .

*Id.*

62. See ICCPR, *supra* note 3, at art. 26.

63. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 cmt. h (2002). Depending upon the manner in which international treaties become binding in each country. In the case of the United States, for example, it is up to the state "to decide how it will carry out its international obligations. Accordingly, the intention of the United States determines whether an agreement is to be self-executing in the United States or should await implementation by legislation or appropriate executive or administrative action." *Id.*

64. See ICCPR, *supra* note 3, at art. 2, para. 1; see also HENKIN, *supra* note 39, at 489 (construing the Covenant's language to mandate affirmative action by States Parties to protect the relevant rights).

65. See ICCPR, *supra* note 3, at art. 2, paras. 2 & 3.

66. See Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, art. I, 999 U.N.T.S. 302, available at <http://www1.umn.edu/humanrts/instreet/b4ccprp1.htm> (last visited May 18, 2004).

A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by the State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.

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complaints with the Human Rights Committee (“HRC”), the monitoring body of the ICCPR,<sup>67</sup> who, in turn, will issue an advisory opinion, or a “view,” to the violating State Party. The State Party, then, has the “option” to follow the recommendations of the HRC by employing its domestic enforcement mechanisms in order to protect the rights asserted by the complainants.<sup>68</sup> The State Party’s progress is monitored by a Special Rapporteur, whose main function is to follow-up with the implementation of the HRC’s views.<sup>69</sup> Thus, a domestic violence victim, who has exhausted all of her domestic remedies, can file a complaint with the HRC asserting her right to be free from torture, her right to be free from gender discrimination, her inherent right to life and her right to an effective legal remedy (depending upon her situation) and the HRC will, in turn, issue an opinion, or view, recommending that her state of citizenship employ effective means of protecting and ensuring the asserted rights.<sup>70</sup> Then, it is the responsibility of her state of citizenship to implement the HRC’s recommendations under the watchful eye of the Special Rapporteur.

### 3. *International Covenant on Economic, Social and Cultural Rights (“ICESCR”)*

The ICESCR can also provide protection for victims of domestic

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*Id.*

67. See ICCPR, *supra* note 3, at art. 28 (establishing the Human Rights Committee (“HRC”).

68. See HENKIN, *supra* note 39, at 491-92. The Human Rights Committee may be described as the guardian of the [ICCPR], with responsibility for monitoring its implementation. Its two main functions . . . are to consider *reports* from, and *complaints* against, the State Parties. The former is obligatory for all State Parties, while the latter is optional and exists in two forms: interstate ‘communications’ under the Covenant, as well as individual ‘communications’ under the Optional Protocol. The basic obligation of States Parties is to implement the rights provided for in Parts I and III of the [ICCPR].

*Id.*

69. See, e.g., *Annual Report of the Human Rights Committee: Volume I*, U.N. Human Rights Committee, 70th-72nd Sess., at 131, U.N. Doc. A/56/40 (2001) (articulating the responsibilities of the Special Rapporteur, while conceding that financial difficulties prevented the initiation of follow up visits), *available at* [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/a91dea9af2c00fa7c1256ace0055cab5?Op=endocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/a91dea9af2c00fa7c1256ace0055cab5?Op=endocument) (last visited May 18, 2004).

70. Unfortunately, thus far, there are no HRC advisory opinions interpreting the relevant ICCPR articles in connection with specific domestic violence situations. See United Nations Documents By Treaty (revealing the dearth of the HRC advisory opinions interpreting the relevant ICCPR articles in connection with specific domestic violence situations), *at* <http://www.unhchr.ch/tbs/doc.nsf> (last visited May 18, 2004).

violence.<sup>71</sup> However, it should be noted that the ICESCR is more often used to uphold women's economic, social and cultural rights.<sup>72</sup> While not as widely invoked in situations involving violence against women, one could still argue that certain ICESCR provisions are applicable to specific instances of violence within the home, depending upon the circumstances. For example, Article 12, paragraph 1 indicates that "States Parties to the [ICESCR] recognize the right of *everyone* to the enjoyment of the highest attainable standard of physical and mental health."<sup>73</sup> If we follow our initial definition of domestic violence from above<sup>74</sup> coupled with the ICESCR's guarantee against gender-based discrimination,<sup>75</sup> Article 12 could be read to impose an obligation upon States Parties to protect women's physical and mental health and provide for domestic remedies when their health is in peril (i.e. when their partners are batterers). Since the ICESCR seeks to provide rights for both sexes equally, battered women are entitled to protection under Article 12.

The ICESCR can also be read in conjunction with the ICCPR in order to ensure that victims of domestic violence have proper access to legal redress. Amnesty International points out that:

Women may not be able to obtain redress for abuses . . . because [they] are deprived of their economic, social and cultural rights. Economic dependence and inadequate welfare provision in many parts of the world force women to bear continued abuse. Abused women often have nowhere to go, no money to sustain themselves

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71. The ICESCR entered into force on January 3, 1976. See ICESCR, *supra* note 4, at art. 27, para. 1 ("The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession."); see also United Nations Documents By Treaty, available at <http://www.unhchr.ch/pdf/report.pdf> (last visited May 18, 2004).

72. See generally Barbara Stark, *The International Covenant on Economic, Social and Cultural Rights as a Resource for Women*, in 2 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 209-243 (Kelly D. Askin & Dorean M. Koenig eds., 2000) [hereinafter Stark 2] (reviewing the creation of the ICESCR, its valuation of "nurturing work" often performed by women, its protection of families, its provision of educational rights, and its incorporation of women into the international legal arena).

73. ICESCR, *supra* note 4, at art. 12, para. 1 (emphasis added).

74. See *supra* Part I. (defining domestic violence as acts or threats of gender-based violence that causes or will likely cause physical, sexual or psychological trauma within the home).

75. See ICESCR, *supra* note 4, at art. 2, para. 2 ("The States Parties to the present Covenant undertake to guarantee that the right enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."); see also *id.* at art. 3 ("the States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural changes set forth in the present Covenant.").

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or their children, and no funds to seek legal counsel in order to pursue redress. Legal aid is often not available to abused women. Social and economic deprivation go hand in hand with ignorance of legal rights and the criminal justice process, so women are often unaware of their alternatives.<sup>76</sup>

The guarantee to provide both men and women with equal “enjoyment of all economic, social and cultural rights set forth” in the ICESCR,<sup>77</sup> including the right to work<sup>78</sup> and the right to earn “a decent living for themselves and their families,”<sup>79</sup> together with the ICCPR’s obligation to provide effective legal protections and remedies to *all*,<sup>80</sup> address the economic and social dilemmas that battered women face as well as their inability to access the legal system. Thus, an argument can be made that a victim of domestic violence should be able to hold a State Party, to both the ICESCR and the ICCPR, responsible for not sustaining her economic and social viability, thus, in turn, preventing her from reaching the legal system in order to obtain redress and protection from her violent partner.

The ICESCR is monitored by the Committee on Economic, Social and Cultural Rights (“CESCR”) and has a legally binding effect upon states that have signed and/or ratified it.<sup>81</sup> However the affirmative obligations of States Parties to the ICESCR are phrased differently than those of States Parties to the ICCPR. Under the ICESCR:

[e]ach State Party . . . undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.<sup>82</sup>

Many scholars are skeptical about the language allowing states to “take steps . . . to the maximum of [their] available sources . . . with a view to achieve progressively . . .” because such language is vague and undermines the states’ affirmative obligation under the ICESCR.<sup>83</sup>

76. AI 2000 REPORT, *supra* note 1, at 37.

77. ICESCR, *supra* note 4, at art. 3. *See also id.* at art. 2, para. 2 (setting forth the principle of non-discrimination).

78. *See id.* at art. 6, para. 1 (acknowledging the rights to independently select an occupation).

79. *Id.* at art. 7(a) (ii).

80. *See* ICCPR, *supra* note 3, at art. 26.

81. Depending upon the manner in which international treaties become binding within each country. *See, e.g., supra* note 63.

82. ICESCR, *supra* note 4, at art. 2, para. 1.

83. *See* HENKIN, *supra* note 39, at 518 (questioning the extent of States Parties’ responsibilities regarding the ICESCR).

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The CESCR issued a general comment in 1990 in order to specifically address the nature of States Parties' obligations under Article 2, paragraph 1 of the Covenant;<sup>84</sup> however, enforceability remains a problem with the ICESCR.<sup>85</sup> Thus, a domestic violence victim would benefit more from invoking the ICCPR and other international treaties focused specifically on women's rights, such as CEDAW, than raising an argument solely under the ICESCR.

*C. Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), Its Optional Protocol and the 1993 Declaration on the Elimination of Violence Against Women*

The 1967 Declaration on the Elimination of Discrimination Against Women acknowledged the lack of international protection of women's rights in particular<sup>86</sup> and was a precursor to CEDAW, which entered into force on September 3, 1981.<sup>87</sup> CEDAW does not explicitly prohibit violence against women, which encompasses domestic violence. However, the Committee on the Elimination of Discrimination Against Women ("CEDAW Committee") has incorporated gender-based violence within CEDAW's general ban on gender-based discrimination.<sup>88</sup> In its General Recommendation No.

84. See Office of the High Commissioner for Human Rights, *Reporting by States Parties: CESCR General Comment 3* (1989) (explaining that States Parties must take "deliberate, concrete, and targeted" action to achieve covenant goals, including legislative, judicial, administrative, economic, educational, and cultural action), available at <http://www.unhchr.ch/tbs/doc.nsf> (last visited May 18, 2004).

85. See HENKIN, *supra* note 39, at 518-19 (observing that the vague language used to describe States Parties' responsibilities to the ICESCR may permit States Parties to evade their obligations).

86. See *Declaration on the Elimination of Discrimination Against Women*, G.A. Res. 2263(XXII), U.N. GAOR, 22nd Sess., (1967), available at <http://www.unhchr.ch/html/menu3/b/21.htm> (last visited May 20, 2004).

Concerned that, despite the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenants on Human Rights and other instruments of the United Nations and the specialized agencies and despite the progress made in the matter of equality of rights, there continues to exist considerable discrimination against women . . . .

*Id.*

87. See CEDAW, *supra* note 5, at art. 27, para. 1 ("[t]he present Convention shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession."); see also Division for the Advancement of Women, States Parties to CEDAW, at <http://www.un.org/womenwatch/daw/cedaw/states.htm> (last visited May 20, 2004); see also Status of Ratification of the Principal International Human Rights Treaties (Dec. 9, 2000) at <http://www.unhchr.ch/pdf/report.pdf> (last visited May 20, 2004).

88. See CEDAW, *supra* note 5, at art. 2 (describing CEDAW signatories' resolve to "condemn discrimination against women in all its forms"); see also Office of the High Commissioner for Human Rights, Violence Against Women: CEDAW General Recommendation No. 19, para. 1, U.N. Doc. A/47/38 (1992) [hereinafter CEDAW

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19, the CEDAW Committee explains the following:

The Convention in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.<sup>89</sup>

Thus, when analyzing CEDAW in order to find protections for a victim of domestic violence, which is a form of violence against women, one can use and interpret various articles even though such articles do not explicitly address violence.

Article 2(e) of CEDAW requires its signatories and/or ratifiers<sup>90</sup> “[t]o take all appropriate measures to eliminate discrimination against women by *any* person, organization or enterprise,”<sup>91</sup> which the CEDAW Committee interpreted as the basis for holding states responsible for failing to prevent, investigate and punish acts of violence perpetrated by private citizens against women.<sup>92</sup>

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Gen. Rec. 19] (“Gender-based violence is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men.”), *available at* [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/300395546e0dec52c12563ee0063dc9d?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/300395546e0dec52c12563ee0063dc9d?OpenDocument) (last visited May 20, 2004).

89. See CEDAW Gen. Rec. 19, *supra* note 88, at para. 6; see also CEDAW, *supra* note 5, at art. 1.

For the purposes of the present Convention, the term ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

*Id.*

90. Depending upon the manner in which international treaties become binding within each country. See, e.g., *supra* note 63.

91. See CEDAW, *supra* note 5, at art. 2(e) (emphasis added).

92. See Stark 1, *supra* note 22, at 269-70 (explaining that states may be held responsible for private acts if they fail to take reasonable steps to prevent the discriminatory acts or fail to investigate and punish acts of violence). According to the CEDAW Committee,

discrimination under the Convention is not restricted to action by or on behalf of Governments . . . . For example, under article 2(e) the Convention calls on State parties to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.

Furthermore, CEDAW's Article 3 specifies that:

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.<sup>93</sup>

Lastly, Article 12, paragraph 1 of CEDAW ensures that *both* men and women have an equal right to physical and mental health and indicates that women should have equal access to health care services.<sup>94</sup> Thus, one could argue that a woman who is a victim of domestic violence, whose health is in danger and who cannot receive adequate medical attention, can seek protection under CEDAW by holding her state of citizenship responsible for not implementing legislation or other measures that would have prevented her partner from physically abusing her, for failing to investigate and punish her partner who has committed domestic violence and for not providing the appropriate avenues to access health care.

Other CEDAW provisions pave the way for further arguments that can be made on behalf of domestic violence victims. The CEDAW Committee points out that traditional views regarding women as being subordinate to men fuel violence against women (domestic violence included). "Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them of the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms."<sup>95</sup> Article 2(f) of CEDAW requires States Parties "[t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."<sup>96</sup> Article 5(a) compels states:

[t]o modify the social and cultural patterns of conduct of men and women, with a view of achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women.<sup>97</sup>

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CEDAW Gen. Rec. 19, *supra* note 88, at para. 9.

93. See CEDAW, *supra* note 5, at art. 3.

94. See *id.* at art. 12, para. 1 (explaining that women should have access to medical services including those related to family planning).

95. See CEDAW Gen. Rec. 19, *supra* note 88, at para. 11.

96. See CEDAW, *supra* note 5, at art. 2(f).

97. See *id.* at art. 5(a).

Article 10(c) indicates that States Parties are to ensure that such gender stereotypes are eliminated from the education system.<sup>98</sup> Article 14 of CEDAW focuses on empowering women in rural areas and ensuring their equal access to various social services including adequate health care.<sup>99</sup> The CEDAW Committee explains that “[r]ural women are at risk of gender-based violence because traditional attitudes regarding the subordinate role of women . . . persist in many rural communities . . . .”<sup>100</sup> Lastly, Article 5(a), described above, can be read in conjunction with Article 16, which aims at eliminating discrimination against women in all family and marriage related matters,<sup>101</sup> as a prohibition of domestic violence. The CEDAW Committee indicates that:

Family violence is one of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes. Lack of economic independence forces many women to stay in violent relationships. The abrogation of their family responsibilities by men can be a form of violence, and coercion. These forms of violence put women’s health at risk and impair their ability to participate in family life and public life on a basis of equality.<sup>102</sup>

Thus, a victim of domestic violence can hold her state of citizenship responsible for failing to uphold its obligations under the aforementioned CEDAW articles if she can prove that the state has not implemented adequate means to eradicate traditional views and customs regarding the subordination of women to men from its legislation, social structure or education system. She can argue that the state has allowed such prejudices to thrive, thus, fueling violence against women in general as well as violence within the home. When analyzing the applicability of certain CEDAW provisions to individual domestic violence situations, though, one must take into

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98. See *id.* at art. 10(c) (recommending co-education and the modification of textbook and school programs).

99. See *id.* at art. 14.

100. See CEDAW Gen. Rec. 19, *supra* note 88, at para. 21.

101. See CEDAW, *supra* note 5, at art. 5(a) (stating that states should try to “modify the social and cultural patterns of conduct of men and women” in order to eliminate common prejudices and the stereotyped roles of men and women); see *id.* at art. 16 (stating that States should take steps to ensure that women have equal rights to men within the institution of marriage).

102. See CEDAW Gen. Rec. 19, *supra* note 88, at para. 23.

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consideration any reservations that a particular State Party might have entered when it signed/ratified this treaty.<sup>103</sup>

Following CEDAW's entry into force,<sup>104</sup> the United Nations General Assembly adopted the Declaration on the Elimination of Violence Against Women on December 20, 1993.<sup>105</sup> In this declaration, the term "violence against women" was defined more precisely since CEDAW itself focuses on the broader notion of "discrimination against women." The declaration clarifies that "the term 'violence against women' means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."<sup>106</sup> Furthermore Article 2 of the declaration indicates that the following types of abuse constitute violence against women:

*Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;*

*Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;*

*Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.*<sup>107</sup>

Article 3 of the declaration reiterates the rights of battered women, which have been articulated in various other international human rights instruments:

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103. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 19, 1155 U.N.T.S. 331 (stating that parties may make a reservation to the treaty, as long as that reservation is not prohibited by the treaty or violates the purpose of the treaty), available at <http://www1.umn.edu/humanrts/instr/viennaconvention.html> (last visited May 20, 2004); see also CEDAW, *supra* note 5, at art. 28, paras. 1-2 ("(1) The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession. (2) A reservation incompatible with the object and purpose of the present Convention shall not be permitted.")

104. See CEDAW, *supra* note 5, at art. 23, para. 1 (stating that CEDAW would enter into force "on the thirtieth day after the date of deposit with the Secretary General of the United Nations of the twentieth instrument of ratification or accession"). CEDAW entered into force on September 3, 1981.

105. See generally 1993 Declaration on Violence Against Women, *supra* note 13.

106. *Id.* at art. 1.

107. *Id.* at art. 2 (emphasis added).

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Women are entitled to the equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. These rights include, *inter alia*:

The right to life;

The right to equality;

The right to liberty and security of person;

The right to equal protection under the law;

The right to be free from all forms of discrimination;

The right to the highest standard attainable of physical and mental health;

The right to just and favourable conditions of work;

The right not to be subjected to torture, or other cruel, inhuman or degrading treatment or punishment.<sup>108</sup>

Lastly, Article 4(c) imposes a duty upon states to “[e]xercise *due diligence* to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by *private* persons.”<sup>109</sup> This “due diligence” standard is a critical element for dealing with situations of domestic violence because it clarifies the misconception that a state can dodge its responsibilities simply because the perpetrator of the violence was a private actor, thus, outside the scope of the state’s authority, or that such violence is justified by existing social or cultural traditions.<sup>110</sup> While the declaration encourages signatory states to abide by the obligations delineated in CEDAW, to condemn violence against women and to refrain from “invok[ing] any custom, tradition or religious consideration to avoid their obligations with respect to its elimination,”<sup>111</sup> it is not a legally binding document on its own. Perhaps if taken in conjunction with CEDAW or if seen as part of

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108. *Id.* at art. 3.

109. *Id.* at art. 4(c) (emphasis added).

110. Amnesty International, *Respect, Protect, Fulfill- Women’s Human Rights: State Responsibility for Abuses by ‘Non-State Actors,’* 5 (2000) (“[t]he concept of *due diligence* is a way to describe the threshold of action and effort which a state must demonstrate to fulfill its responsibility to protect individuals from abuses of their rights”), at <http://web.amnesty.org/library/print/ENGIOR500012000> (last visited May 18, 2004). “A state cannot, for example, avoid responsibility for the mistreatment of domestic workers by arguing that the abuse took place in the privacy of the employer’s home, or that it is justified by social or cultural practices.” *Id.*

111. *1993 Declaration on Violence Against Women*, *supra* note 13, at art. 4.

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customary law,<sup>112</sup> one could argue that the aspirations and definitions delineated in the declaration have a binding effect upon states.

Until recently, enforcement of CEDAW was weak.<sup>113</sup> On December 22, 2000, an Optional Protocol entered into force,<sup>114</sup> which strengthened CEDAW's means of enforcement and which can be used as an important tool to ensure that states protect individual victims by undertaking measures to prevent domestic violence. The protocol provides for two new mechanisms to hold States Parties accountable for their CEDAW obligations:

- 1) the communications procedure, which provides individuals and groups the right to lodge complaints with the Committee on the Elimination of Discrimination Against Women . . . regarding violations of the terms of the Convention by State Parties and 2) the inquiry procedure, which enables CEDAW to conduct inquiries into serious and systematic abuses of women's human rights within State Parties.<sup>115</sup>

Consequently, a domestic violence victim, after exhausting her domestic remedies, can file a communication with the CEDAW Committee, thus, lodging a grievance against her state of citizenship for failing to protect her right against gender-based abuse, as well as any other applicable right expressed in CEDAW, and for failing to undertake measures to prevent domestic violence.<sup>116</sup> In turn, the

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112. See INTERNATIONAL LAW, *supra* note 38, at 848 (explaining that there are many non-binding international human rights declarations that "establish broadly recognized standards and are frequently invoked in connection with human rights issues"). See *generally infra* Part II.E (discussing the incorporation of domestic violence standards into customary international law).

113. See Laboni Amena Hoq, Note, *The Women's Convention and Its Optional Protocol: Empowering Women to Claim Their Internationally Protected Rights*, 32 COLUM. HUM. RTS. L. REV. 677, 684 (2001) (observing that before the adoption of the Optional Protocol, the Convention included only two enforcement mechanisms: the interstate procedure and the reporting procedure); see also Dame Silvia Cartwright, *The Committee on the Elimination of Discrimination Against Women*, in 2 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 165, 179 (Kelly D. Askin & Dorean M. Koenig eds., 2000) (explaining that CEDAW lacked a mechanism for individual complaint procedures prior to the adoption of the Optional Protocol).

114. See CEDAW Optional Protocol, *supra* note 6, at art. 16, para. 1 ("The present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or accession."); see also UNITED NATIONS, SIGNATURES TO AND RATIFICATIONS OF THE OPTIONAL PROTOCOL (Apr. 16, 2003), at <http://www.un.org/womenwatch/daw/cedaw/sigop.htm> (last visited May 18, 2004).

115. Hoq, *supra* note 113, at 678.

116. See CEDAW Optional Protocol, *supra* note 6, at art. 2 ("Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the rights set forth in the Convention by that State Party."); see also *id.* at pmb1. ("Reaffirming [the] determination [of States Parties] to ensure the full and equal enjoyment by women of all human rights and fundamental freedoms and to take effective action to

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CEDAW Committee issues recommendations, or “views,” sharing them with all parties involved, including the state in question.<sup>117</sup> Furthermore, the CEDAW Committee can now investigate situations in which a particular state has consistently violated CEDAW protected rights and has frequently failed to curtail domestic violence within its territory.<sup>118</sup>

*D. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (“CAT”)*

The CAT, which entered into force on June 26, 1987, establishes a complete ban on any form of torture or other inhuman or degrading treatment.<sup>119</sup> The CAT defines torture as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>120</sup>

The former UN Special Rapporteur on Violence Against Women, Radhika Coomaraswamy,<sup>121</sup> various scholars,<sup>122</sup> non-governmental organizations, such as members of the World Organisation Against Torture (“WOAT”)<sup>123</sup> and Amnesty International,<sup>124</sup> have all

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prevent violations of these rights and freedoms.”).

117. *Id.* at art. 7, para. 3.

118. *See id.* at art. 8 (stating that the Committee may conduct an inquiry into a state’s actions, which may include a visit to that state). The Committee will then submit its findings to the state, which has six months to respond. *Id.*

119. *See* CAT, *supra* note 7, at art. 27, para. 1 (“This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.”); *see also* Status of Ratifications of the Principal International Human Rights Treaties, at <http://www.unhchr.ch/pdf/report.pdf> (last visited May 18, 2004).

120. *See* CAT, *supra* note 7, at art. 1, para. 1.

121. *See* Stark 1, *supra* note 22, at 270.

122. *See id.*; *see also* Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 296 (1994) (“[W]hen stripped of privatization, sexism and sentimentality, private gender-based violence is no less grave than other forms of inhumane and subordinating official violence that have been prohibited by treaty and customary law and recognized by the international community as jus cogens, or preemptory norms.”); *see also* Grdinic, *supra* note 17, at 259 (asserting that domestic violence could represent torture under the European Convention on Human Rights).

123. *See generally* The World Organisation Against Torture (providing information about the “largest international coalition of NGOs fighting against

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concluded that, in certain circumstances, domestic violence could qualify as torture. The WOAT associates private forms of torture, like domestic violence, with public forms of torture. “[J]ust as torture by a state official typically takes place when the victim is in incommunicado detention, at the unsupervised mercy of his interrogators or captors and without access to the outside world, battered women, because of their domestic situation, live isolated from family and friends and others.”<sup>125</sup>

Amnesty International indicates that “[t]he severity of harm inflicted upon women by private individuals can be just as damaging as that inflicted on women who are tortured by agents of the state,” and that, in both cases, abuses are intentionally inflicted.<sup>126</sup> Furthermore, “[t]orture in custody is often used not only to extract confessions but also to instill profound dread into victims, to break their will, to punish them and to demonstrate the power of the perpetrators. Similar purposes characterize acts of torture in the family or the community.”<sup>127</sup> Amnesty International interprets CAT to impose responsibility upon states to not comply, consent or acquiesce in<sup>128</sup> such private forms of torture as well as “to exercise due diligence and to provide equal protection in preventing and punishing such abuses by private individuals.”<sup>129</sup>

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torture, summary executions, forced disappearances and all other forms of cruel, inhuman and degrading treatment”), at <http://www.omct.org> (last visited May 18, 2004).

124. See AMNESTY INTERNATIONAL, STOP VIOLENCE AGAINST WOMEN (“When states fail to take the basic steps needed to protect women from domestic violence or allow these crimes to be committed with impunity, states are failing in their obligation to protect women from torture.”), available at <http://www.amnestyusa.org/stopviolence/factsheets/violence.html> (last visited May 18, 2004).

125. CARIN BENNINGER-BUDEL & ANNE-LAURENCE LACROIX, VIOLENCE AGAINST WOMEN: A REPORT 43 (1999). While WOAT parallels violence within the home with torture at the hand of public officials, others disagree:

Conceived by its promoters and drafters primarily as a response to the use of state violence against citizens . . . the [Torture] Convention accordingly focus[es] on the actions of public officials and the state’s responsibility for them. . . . There is no doubt that the Convention, in its adherence to fairly traditional international law paradigms of state responsibility, does exclude from its coverage many types of violations of the rights to physical and mental integrity of women, and that violence in the family is largely (if not completely) untouched by its provisions.

Andrew Byrnes, *The Convention Against Torture*, in 2 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 183 (Kelly D. Askin & Dorean M. Koenig eds., Transnational Publishers, Inc. 2000).

126. AI 2000 REPORT, *supra* note 1, at 5.

127. *Id.*

128. See CAT, *supra* note 7, at art. 1, para. 1.

129. AI 2000 REPORT, *supra* note 1, at 6.

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Professor Rhonda Copelon found striking similarities between the elements of torture listed in Article 1 of CAT and aspects of domestic violence: physical and psychological pain are present in both instances,<sup>130</sup> the general intent required in torture cases is also often present in episodes of domestic violence when abusers plan their attacks upon women,<sup>131</sup> and pain is inflicted with a specific purpose in mind in both situations.<sup>132</sup> Professor Copelon explains that while in cases of torture state involvement must be established, such a requirement is not the *sine qua non* of the definition of torture as a human rights violation.<sup>133</sup> That is, violence inflicted by anyone, a public official or a private citizen, could amount to torture.<sup>134</sup> Consequently, under CAT, States' Parties are not only obligated to protect citizens who are subjected to torture at the hand of public officials, but could also be obligated to protect victims of domestic violence who are subjected to certain grave abuses by their partners.<sup>135</sup> According to CAT, states are responsible to investigate, prosecute and extradite individuals suspected of torture.<sup>136</sup> The same obligations can be imposed in cases where domestic violence amounts to torture. CAT dictates that states should avert the possibility of situations where torture might arise by ensuring that law enforcement personnel are properly trained and reviewed.<sup>137</sup> The same training and review can prove to be helpful in instances of domestic violence. Furthermore, States' Parties to CAT are required to investigate complaints as well as provide legal remedies and compensation when

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130. See Copelon, *supra* note 122, at 311-19 (describing various methods of abuse, including beating, burning, raping, starving, depriving of sleep, and threatening the victim or the victim's family or friends).

131. See *id.* at 327 (observing that male batterers plan their abuse).

132. See *id.* at 329-41 (detailing purposes such as eliciting information, punishment, intimidation, discrimination, destruction of personality, and reduction of capacities).

133. See *id.* at 341-52.

134. See *id.*

135. See AI 2000 REPORT, *supra* note 1, at 3 ("States have a duty under international law to take positive measures to prohibit and prevent torture and to respond to instances of torture, regardless of whether the torture takes place and whether the perpetrator is an agent of the state or a private individual."); see also Amnesty International, *End Domestic Violence. End Torture. A Fact Sheet on Domestic Violence as Torture*, at 1 ("Acts of violence against women [including domestic violence] constitute torture when they are of the nature and severity envisaged by the concept of torture and the state has failed to provide effective protection.") [on file with the author].

136. CAT, *supra* note 7, at arts. 4-9.

137. See *id.* at arts. 10-11 (requiring training and periodic review of police, doctors, public officials, and others who exercise control over, question, or treat detainees and arrested individuals).

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allegations of torture have been proven.<sup>138</sup> The same requirements can apply in situations where domestic violence is deemed to be torture under CAT.

States that fail to address domestic violence can be held responsible under CAT for having “consented” to or “acquiesced” in such behavior.<sup>139</sup> Professor Copelon explains:

The concepts of consent or acquiescence [in CAT] are broad enough to embrace the failure of government to redress domestic violence, even if the drafters did not have domestic violence in mind. If the purpose of the “consent or acquiescence” language was to cover situations where the state machinery does not work, then gender-based violence is a case in point. Indeed, laws and customs that exempt domestic aggressors from sanction, such as marital rape exceptions or the defense of honor, reflect active encouragement and consent of the state as well as formal gender discrimination. The same is true of state law enforcement practices which implicitly condone or minimize the seriousness of gender-based violence. Where domestic violence is a matter of common knowledge and law enforcement and affirmative prevention measures are inadequate, or where complaints are made and not properly responded to, the state should be held to have “acquiesced” in the continued infliction of violence.<sup>140</sup>

Lastly, Professor Copelon argues that CAT could even apply directly against private individuals who have perpetrated acts of domestic violence, thus bypassing the state as the primarily responsible party: “[W]hile the CAT is limited to examining complaints against states parties, the provisions for universal criminal jurisdiction and for compensation should apply against any private person who commits torture or domestic violence ‘at the instigation of’ or ‘with the consent or acquiescence of’ an official.”<sup>141</sup>

When analyzing the applicability of particular CAT provisions to individual domestic violence situations, as Professor Copelon and others have done, one must note any reservations that a particular State Party might have entered when it signed/ratified this treaty.<sup>142</sup>

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138. See *id.* at arts. 12-14 (mandating a “prompt and impartial investigation” of complaints and “fair and adequate compensation” for victims).

139. See *id.* at art. 1, para. 1.

140. Copelon, *supra* note 122, at 355-56.

141. *Id.* at 356.

142. See Vienna Convention on the Law of Treaties, *supra* note 44, at art. 19 (delineating requirements for making reservations); see also CAT, *supra* note 7, at arts. 28, 30 (permitting reservations and withdrawal of reservations related to recognizing the ability of the Committee against Torture to conduct inquiries and dispute settlement procedures among signatories).

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Generally, the Committee Against Torture<sup>143</sup> enforces CAT by initiating investigations when it receives reliable information that torture is being practiced within the territory of a State Party,<sup>144</sup> by reviewing communications submitted by a State Party alleging that another State Party is not fulfilling its CAT obligations,<sup>145</sup> and by considering communications from individuals who claim that their rights have been violated by a State Party to CAT.<sup>146</sup> Thus, as Professor Copelon and others have argued above, a victim of domestic violence can file a communication with the Committee Against Torture against her state of citizenship, alleging that the state has failed to prosecute, investigate, implement preventive measures, provide legal remedies, and/or grant compensation, or has consented to or acquiesced in the violent behavior of her spouse by simply turning a blind eye to her situation.<sup>147</sup>

More specifically, CAT can also be enforced within the context of asylum, namely persons fleeing from persecution (including the threat of torture) from their country of origin. If the country to which they flee has signed and/or ratified CAT<sup>148</sup> and denies them asylum, individuals are entitled to file communications with the

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143. See CAT, *supra* note 7, at art. 17 (creating a Committee Against Torture and establishing selection procedures). See generally OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, COMMITTEE AGAINST TORTURE, FACT SHEET NO. 17 (providing committee materials, including sessions, notes, complaints, and press releases), at <http://www.unhchr.ch/html/menu6/2/fs17.htm> (last visited May 20, 2004).

144. See CAT, *supra* note 7, at art. 20 (outlining investigatory procedures comprised of confidential inquiries, reports, and visits).

145. See *id.* at art. 21 (delineating the requirements for State Party complaints regarding another State Party's failure to abide by CAT provisions).

146. See *id.* at art. 22 (explaining the individual complaint process); see also OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, COMMITTEE AGAINST TORTURE: OVERVIEW AND PROCEDURE, at <http://www.unhchr.ch/html/menu2/8/overcat.htm> (last visited May 20, 2004). See generally Documents by Treaty; CAT-Committee Against Torture; Jurisprudence, at <http://www.unhchr.ch/tbs/doc.nsf/newhydocsbytreaty?OpenView&Start=1&Count=750&Expand=2.5#2.5> (last visited May 20, 2004).

147. See Copelon, *supra* note 122, at 356.

148. Implementation of CAT in each country depends upon the manner in which each legal system incorporates international treaties and conventions within its legal system. See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §111, cmt. h (2002) (indicating that in the United States, it is up to the state "to decide how it will carry out its international obligations. Accordingly, the intention of the United States determines whether an agreement is to be self-executing in the United States or should await implementation by legislation or appropriate executive or administrative action"). For example, the United States has signed and ratified CAT by enacting domestic legislation entitled the Foreign Affairs Reform and Restructuring Act of 1998, and a victim of torture seeking asylum in the United States may invoke this particular act. See Stark 1, *supra* note 22, at 270; see also Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-761 (1998) (codified in 22 U.S.C. § 6501).

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Committee Against Torture.<sup>149</sup> The committee, in turn, takes the individual communications into consideration, deliberates upon their admissibility and forms a view as to whether the provisions of CAT asserted in the communications were violated.<sup>150</sup> The most often asserted CAT provision is Article 3, which forbids a state to return or extradite persons in danger of being tortured back to their country of origin.<sup>151</sup> Following its deliberations, the committee then advises the violating state in question to redress its practice (that is, not return or extradite individuals in danger of being tortured and grant him/her asylum in accordance with its obligations under CAT).<sup>152</sup> Thus, technically, if a domestic violence victim is suffering abuse that could be equated to torture and is denied asylum, she may invoke Article 3 of CAT and file a communication against the state that is denying her asylum before the Committee Against Torture.

#### *E. Customary International Law*

Some scholars maintain that domestic violence standards have become part of customary international law, which is binding in nature:

Customary international law may be shown through state practice over time, in the form of state adherence to international treaties, declarations, or General Assembly resolutions; through the enactment of domestic legislation, through executive action, and through a state's own judicial decisions. The accretion of such practice, accompanied by evidence that the state believed that such practice was legally mandated, constitutes [customary international law]. Where consensus among states is great, and no state objects, less practice may be needed.<sup>153</sup>

States can be held responsible for tolerating and/or failing to prevent domestic violence through the application of customary international law. Professor Barbara Stark makes the case that by signing the 1993 Declaration on the Elimination of Violence Against

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149. See CAT, *supra* note 7, at art. 22; see also OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, COMMITTEE AGAINST TORTURE, *supra* note 146. See generally Documents by Treaty, CAT-Committee Against Torture; Jurisprudence, *supra* note 146.

150. See CAT, *supra* note 7, at art. 22.

151. See *id.* at art. 3.

152. See, e.g., Communication 149/1999: Sweden, CAT/C/25/D/149/1999, paras. 8.2, 9 (2001) (advising Sweden that, under Article 3 of CAT, it was prohibited from forcibly returning an Iranian citizen back to her country of origin because there were "substantial grounds for believing that . . . she would be in danger of being subjected to torture"), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/3c43aa8300384387c1256ab1002fea71?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3c43aa8300384387c1256ab1002fea71?Opendocument) (last visited May 20, 2004).

153. See Stark 1, *supra* note 22, at 266.

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Women, 180 states have symbolically confirmed the importance of combating domestic violence and can be held liable for failing to do so through the declaration

in conjunction with the proliferation of domestic legislation, executive action, and national judicial decisions which followed, along with the repeated references to state responsibility for domestic violence in reports of the Human Rights Commission, the Special Rapporteur on Domestic Violence, and other international instruments as well as regional human rights instruments . . . .<sup>154</sup>

Professor Stark further explains that once the responsibility of states vis-à-vis domestic violence is established in customary international law, the substance of domestic violence standards could be “understood as a clarification and elaboration of existing [general international] human rights norms.”<sup>155</sup>

### III. REGIONAL HUMAN RIGHTS INSTRUMENTS AND DOMESTIC VIOLENCE

In order to better understand the development of domestic violence standards at the international level, one must also consult various regional human rights instruments. The European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”),<sup>156</sup> the American Convention on Human Rights (“ACHR”) <sup>157</sup> and the African Charter on Human and Peoples’ Rights (“African Charter”) <sup>158</sup> provide broad bases from which battered women can assert their individual rights against their state of citizenship. Once again, it should be emphasized that not all of the provisions that are about to be analyzed are applicable in all domestic violence situations, since a state can choose to sign/ratify the aforementioned documents with reservations to certain provisions.<sup>159</sup>

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154. *See id.* at 267.

155. *See id.*

156. *See generally* ECHR, *supra* note 8.

157. *See generally* ACHR, *supra* note 9.

158. *See generally* African Charter, *supra* note 11.

159. *See* Vienna Convention on the Law of Treaties, *supra* note 44, at art. 19 (delineating requirements for making reservations); *see also* ECHR, *supra* note 8, at art. 57, para. 1.

Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.

*Id.*

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Furthermore, these particular instruments have precise regional limitations.<sup>160</sup>

*A. European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR")*

Domestic violence norms can be read into the ECHR<sup>161</sup> in the same manner as they were read into the International Bill of Human Rights and other international human rights instruments. That is, the ECHR acknowledges the right to life in Article 2<sup>162</sup> and the right to be free from torture and from inhuman or degrading treatment or punishment in Article 3.<sup>163</sup> Since Article 1 requires all States Parties to secure the rights and freedoms delineated within the ECHR "to everyone within their jurisdiction"<sup>164</sup> and since Article 14 discusses the ECHR's ban on gender-based discrimination, women and men are equally entitled to the aforementioned rights.<sup>165</sup> Thus, battered women can seek help through the domestic legal system and if (after exhausting all domestic remedies) their situation does not improve, they can hold their state of citizenship liable for failing to provide them with an effective remedy.<sup>166</sup> It is worth noting that the scope of Article 13, which delineates the right to an effective remedy, is not limited to violations of human rights by public officials; this article applies "notwithstanding that the violation has been committed by persons acting in an official capacity."<sup>167</sup>

Consequently, the European Court of Human Rights ("ECtHR") has found in favor of domestic violence victims, whose rights were violated by private persons (i.e. their partners), and against their state of citizenship because the state failed, *inter alia*, to provide them with proper access to the courtroom and with effective legal remedies. In *Airey v. Ireland*, a woman sought a court-ordered separation from her

160. See ECHR, *supra* note 8, at pmb.; see ACHR, *supra* note 9, at pmb.; see African Charter, *supra* note 11, at pmb.

161. See ECHR, *supra* note 8, at art. 59, para. 2 ("The present Convention shall come into force after the deposit of ten instruments of ratification."). The ECHR entered into force on September 3, 1953.

162. See *id.* at art. 2.

163. See *id.* at art. 3.

164. See *id.* at art. 1 (emphasis added).

165. See *id.* at art. 14. It should be noted that Article 14 of the ECHR cannot be invoked on its own. The European Court of Human Rights ("ECtHR") indicates that "Article 14 . . . has no independent existence; it constitutes one particular element (non-discrimination) of each of the rights safeguarded by the Convention . . ." See *Airey v. Ireland*, 2 Eur. Ct. H.R. 305, 318 (1979).

166. See ECHR, *supra* note 8, at art. 13.

167. See *id.*

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violent husband, but the Irish government did not provide her with legal aid in order to pursue her claim.<sup>168</sup> Starting in June 1972, Mrs. Johanna Airey of Cork, Ireland sought a decree of judicial separation alleging that her husband physically and mentally abused her and her children.<sup>169</sup> Her husband had been previously convicted for assaulting her and fined.<sup>170</sup> Given her low income, Mrs. Airey could not retain a solicitor to represent her in the separation proceedings and, at that time, the state of Ireland did not offer legal aid for civil matters.<sup>171</sup> As a result, Mrs. Airey filed a petition with the then existing European Commission of Human Rights (“European Commission”),<sup>172</sup> which forwarded it to the ECtHR.<sup>173</sup> Her complaint stated the following:

[T]he State [of Ireland] had failed to protect her against physical and mental cruelty from her allegedly violent and alcoholic husband:

- by not detaining him for treatment as an alcoholic;
- by not ensuring that he paid maintenance to her regularly;
- in that, because of the prohibitive cost of proceedings, she could not obtain a judicial separation.<sup>174</sup>

In order to sustain her last allegation, Mrs. Airey invoked the following ECHR provisions:

- Article 6 [para. 1] of the Convention, by reason of the fact that her right of access to a court was effectively denied;
- Article 8 . . . by reason of the failure of the State to ensure that there is an accessible legal procedure to determine rights and obligations which have been created by legislation regulating family matters;
- Article 13 . . . in that she was deprived of an effective remedy before a national authority for the violations complained of;

168. See *Airey*, 2 Eur. Ct. H.R. at 310 (explaining that in Ireland, legal aid was not provided for a person seeking a judicial separation of a marriage).

169. See *id.* at 311 (claiming that the State failed to protect Mrs. Airey and her children from the alcoholic and violent Mr. Airey).

170. See *id.* (explaining how the District Court of Cork City convicted and fined Mr. Airey for assault in January 1972).

171. See *id.* at 307-10.

172. See THE EUROPEAN COURT OF HUMAN RIGHTS, HISTORICAL BACKGROUND, ORGANIZATION AND PROCEDURE (2003) [hereinafter ECTHR BACKGROUND] (explaining how the European Commission of Human Rights (“European Commission”) and the original European Court of Human Rights were replaced by a full-time court on Nov. 1, 1998), at <http://www.echr.coe.int/Eng/Edocs/ HistoricalBackground.htm> (last visited May 18, 2004).

173. See *Airey*, 2 Eur. Ct. H.R. at 310-11.

174. *Id.*

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-Article 14 in conjunction with Article 6. [para. 1] in that judicial separation is more easily available to those who can afford to pay than to those without financial resources.<sup>175</sup>

The ECtHR found that because Mrs. Airey's financial situation prevented her from hiring an attorney and she would not be able to effectively represent herself in her judicial separation proceedings and since legal aid was not made available in such civil suits, Ireland breached Article 6, paragraph 1 of the ECHR that guarantees the right to access the judicial system.<sup>176</sup> Setting aside Mrs. Airey's allegations under Article 14<sup>177</sup> and Article 13<sup>178</sup> for procedural reasons, the ECtHR also found that the state of Ireland was in violation of Article 8 of the ECHR, which the Court read as establishing the right to respect for private and family life.<sup>179</sup> The ECtHR reasoned that:

[A]lthough the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private and family life.<sup>180</sup>

According to the Court, Ireland violated this particular right by not facilitating the judicial separation of the Aireys. The ECtHR explained in the following manner:

In Ireland, many aspects of private or family life are regulated by law. As regards marriage, husband and wife are in principle under a duty to cohabit but are entitled, in certain cases, to petition for a decree of judicial separation; this amounts to recognition of the fact that the protection of their private or family life may sometimes necessitate their being relieved from the duty to live together. Effective respect for private or family life obliges Ireland to make

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175. *Id.*

176. See ECHR, *supra* note 8, at art. 6, para. 1; see also *Airey*, 2 Eur. Ct. H.R. at 318 ("Having regard to all the circumstances of the case, the Court finds that Mrs. Airey did not enjoy an effective right of access to the High Court for the purpose of petitioning for a decree of judicial separation.").

177. See *Airey*, 2 Eur. Ct. H.R. at 318 (explaining that Article 14 of the ECHR (prohibiting discrimination) has "no independent existence"). Article 14 is solely used to qualify other rights delineated in the ECHR, therefore, it was not analyzed separately for the purposes of the *Airey* case. *Id.*

178. *Id.* at 319 (indicating that Article 13, which guarantees the right to an effective remedy, overlaps with Article 6, paragraph 1, thus it would not be analyzed).

179. See ECHR, *supra* note 8, at art. 8; see also *Airey*, 2 Eur. Ct. H.R. at 319.

180. *Airey*, 2 Eur. Ct. H.R. at 319.

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this means of protection effectively accessible, when appropriate, to anyone who may wish to have recourse thereto.<sup>181</sup>

In Mrs. Airey's case, the ECtHR concluded that the state of Ireland did not effectively provide for such protection since the petitioner was not able to reach the proper judicial forum and "she was unable to seek recognition in law of her de facto separation from her husband."<sup>182</sup> Consequently, Ireland violated Article 8 of the ECHR.<sup>183</sup> Such is the manner in which the ECtHR interpreted and applied various ECHR provisions in favor of a victim of domestic violence.

The ECtHR continued its trend of protecting battered women with the case of *S.W. v. United Kingdom*.<sup>184</sup> In that case, the petitioner was charged with rape under England's Sexual Offences Act, as well as threatening to kill and assault occasioning actual bodily harm, under England's Offences Against the Person Act.<sup>185</sup> The victim of these alleged crimes was his wife.<sup>186</sup> A jury found the petitioner guilty of all three offenses<sup>187</sup> and he appealed in domestic court, arguing that a husband could not be found guilty of raping his wife because, according to traditional British law, a woman gives her implied consent to sexual intercourse at the time of marriage.<sup>188</sup> The petitioner recognized that British law had evolved, carving out certain exceptions to this absolute notion of implied consent,<sup>189</sup> however, he argued that these changes in the law were not confirmed until later and, thus, were incorrectly, retroactively applied to his case.<sup>190</sup> After all of his domestic appeals were unsuccessful, the petitioner filed an application with the European Commission (later referred to the

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181. *Id.*

182. *Id.*

183. *See id.* at 321 (holding four votes to three that Article 8 had been breached).

184. *See S.W. v. United Kingdom*, 21 Eur. Ct. H.R. 363 (1995).

185. *See id.* at 365 (reciting the charges against a male British citizen accused of raping his wife).

186. *See id.* (retelling the story of the turbulent marriage of the accused and his wife).

187. *See id.* at 369 (stating the accused was found guilty and sentenced to over five years in prison).

188. *See id.* at 365-68 (relying on a British common law principle established in 1736).

189. *See id.* at 366 (describing the 1976 British case of *R v. Steele* where the implied consent to sexual intercourse of a wife could be revoked 1) by a court order or equivalent 2) by agreement or 3) by "withdrawal of either party from cohabitation, accompanied by a clear indication that consent to sexual intercourse has been terminated"). *See generally* *R. v. Steele*, 65 Crim. App. R. 22 (1976).

190. *See S.W.*, 21 Eur. Ct. H.R. at 368-70.

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ECtHR) under Article 7 of the ECHR,<sup>191</sup> which dictates that “[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.”<sup>192</sup> The petitioner maintained that “he was convicted in respect of conduct, namely the rape upon his wife, which at the relevant time did not . . . constitute a criminal offence.”<sup>193</sup>

The ECtHR responded by primarily acknowledging the importance of Article 7 of the ECHR as safeguarding against arbitrary prosecution, conviction and punishment by prohibiting retroactive application of the law and by stressing that offences must be clearly defined in the law.<sup>194</sup> The Court emphasized, however, that Article 7, cannot be read as outlawing clarification of rules of criminal liability through judicial interpretation from case to case, provided that the result is consistent with the essence of the offence and could reasonably be foreseen.<sup>195</sup> Thus, in the case at hand, the gradual modification of the common law principle that a husband cannot be found guilty of raping his wife,<sup>196</sup> which included the development of exceptions to this absolute rule,<sup>197</sup> was not barred by Article 7 of the ECHR because such changes were consistent with the essence of the general offense of rape in British law.<sup>198</sup> Furthermore, the petitioner himself did not dispute the fact that, had the victim not been his wife, the conduct for which he was convicted could have constituted rape.<sup>199</sup> Accordingly, the ECtHR coupled the gradual transformation of British law regarding marital rape with the petitioner’s acclamation and agreed with the Court of Appeal in the United Kingdom that “a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim.”<sup>200</sup> The ECtHR’s overall conclusion was that, at the time of the alleged conduct on the part of the petitioner, a husband could be found guilty of raping his wife under British

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191. *See id.* at 373.

192. *See* ECHR, *supra* note 8, at art. 7, para. 1.

193. *See S.W.*, 21 Eur. Ct. H.R. at 373.

194. *See id.* at 374.

195. *See id.* at 375.

196. *See id.*

197. *See id.* at para. 43.

198. *See id.* (“[T]here was an evident evolution, which was consistent with the very essence of the offence, of the criminal law through judicial interpretation towards treating such conduct generally as within the scope of the offence of rape.”).

199. *See id.*

200. *Id.*

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criminal law.<sup>201</sup> Thus, one could argue that by barring the petitioner's Article 7 claim in such a manner, the ECtHR reaffirmed a vital protection and legal remedy for domestic violence victims: the criminal prosecution of their husbands for physical and sexual violence that rises to the level of marital rape.<sup>202</sup>

Another protection made available to domestic violence victims by the ECtHR, is the Court's affirmation of the prohibition of torture and ill-treatment delineated in Article 3 of the ECHR.<sup>203</sup> In *A. v. United Kingdom*, the ECtHR found that the United Kingdom violated Article 3 by not providing adequate protection to a nine-year old boy who was repeatedly beaten with a cane by his stepfather.<sup>204</sup> In February 1993, school authorities notified the Social Services Department that the petitioner, nine years old at the time, was often beaten by his stepfather.<sup>205</sup> A medical consultation revealed that "the bruising [on A.'s body] was consistent with the use of a garden cane applied with considerable force on more than one occasion."<sup>206</sup> British authorities arrested A.'s stepfather and charged him with assault occasioning actual bodily harm.<sup>207</sup> At trial, the stepfather raised the defense that "parents and other persons *in loco parentis* are protected by the law if they administer punishment which is moderate and reasonable in the circumstances."<sup>208</sup> The jury entered a verdict of "not guilty" against the stepfather.<sup>209</sup> Subsequently, A. filed an application with the European Commission, which was later forwarded to the ECtHR, alleging that the United Kingdom

had failed to protect him from ill-treatment by his step-father, in violation of Articles 3 and/or 8 of the Convention; that he had been denied a remedy for these complaints in violation of Article 13; and that the domestic law on assault discriminated against

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201. See *id.* at 377 (stating that "by September 1990 there was significant doubt as to the validity of the alleged marital immunity for rape").

202. See *supra* Part I (incorporating physical and sexual violence into the overall definition of domestic violence).

203. See ECHR, *supra* note 8, at art. 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment.").

204. See *A. v. the United Kingdom*, 27 Eur. Ct. H.R. 611 (1999).

205. See *id.* at 613-14 (stating that petitioner's brother notified the head teacher about the physical abuse).

206. See *id.* at 614.

207. See *id.*

208. See *id.*

209. See *id.* (finding that the prosecution had not proven the stepfather was guilty of assault occasioning actual bodily harm).

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children, in violation of Article 14 in conjunction with Articles 3 and 8.<sup>210</sup>

Setting aside the allegations made under Articles 8, 13, and 14 of the ECHR for procedural reasons,<sup>211</sup> the ECtHR analyzed two issues: whether the ill-treatment of A. attained the minimum level of severity such that it qualified as conduct prohibited by Article 3<sup>212</sup> and whether the United Kingdom was to be held responsible under Article 3.<sup>213</sup> As to the first issue, the ECtHR used the test for minimum severity, which is dependent upon “all [the] circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim,”<sup>214</sup> and found that the repeated beatings applied with considerable force upon A.’s person amounted to ill-treatment under Article 3 of the ECHR.<sup>215</sup> As to the second issue, the ECtHR noted that Article 1 together with Article 3 of the ECHR impose a duty upon states to implement measures ensuring that their citizens are not subjected to ill-treatment or torture, including situations when such treatment is administered by private individuals.<sup>216</sup> Furthermore, the ECtHR stressed that “[c]hildren and *other vulnerable individuals*, in particular, are entitled to State protection, in the form of effective deterrence of the criminal law, against such serious breaches of personal integrity.”<sup>217</sup> In sum, the Court found that the United Kingdom was responsible under Article 3 since it did not adequately protect the applicant (through its laws) against ill-treatment by his stepfather.<sup>218</sup>

It seems that victims of domestic violence would benefit significantly from the ECtHR’s interpretation of Article 3 in this case. Battered women, who are subjected to abuse rising to the level of torture or ill-treatment under Article 3, could certainly qualify as vulnerable individuals who are especially deserving of state

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210. *See id.* at 615.

211. *See id.* at 626-27 (holding that if a finding was made under Article 3, the ECtHR would not deliberate upon Article 8, Article 14 or Article 13).

212. *See id.* at 616-17 (debating whether a stepfather hitting his stepson constituted “torture or inhumane, degrading treatment”).

213. *See id.*

214. *See id.* at 618.

215. *See id.* at 619-20 (citing the significant physical injury, pain and humiliation as reasons to qualify the treatment under Article 3).

216. *See id.* at 621.

217. *Id.* at 622 (emphasis added).

218. *See id.* at 623.

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protection.<sup>219</sup> If their state of citizenship fails to protect them from a repeated pattern of severe abuse, either because of inadequate laws or laws that are inappropriately applied, then that state has violated Article 3 of the ECHR.<sup>220</sup>

The ECHR is currently enforced by a newly mandated court, ECtHR, whose jurisdiction was reaffirmed in 1998 through Protocol No. 11 to the Convention.<sup>221</sup> Previously, the two bodies that monitored ECHR implementation were a commission and a court.<sup>222</sup> The commission issued recommendations while the court (past and present) issues binding decisions. Neither the past nor the present court, however, have police powers to compel States Parties to the ECHR to comply with their judgments.<sup>223</sup> Thus a domestic violence victim can file her grievances with the ECtHR after she has exhausted all of her domestic remedies and her state of citizenship has failed to rectify her situation. An ECtHR decision in favor of such a victim, though, could face enforceability challenges at the state level.

*B. American Convention on Human Rights (“ACHR”) and Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (“Inter-American Convention on Violence Against Women”)*

The ACHR<sup>224</sup> and the Inter-American Convention on Violence Against Women<sup>225</sup> may also be used to protect the rights of battered women. The ACHR recognizes the right to life in Article 4<sup>226</sup> and the right to humane treatment in Article 5.<sup>227</sup> Women, together with men, are equally entitled to these rights. The ACHR imposes upon its State Parties the obligation to respect and ensure the rights and freedoms included in the convention, for “*all* persons subject to their jurisdiction . . . without any discrimination for reasons of race, color,

219. *See id.* at 622 (observing that Article 3 applies to the “protection of vulnerable individuals”).

220. *See id.* at 623-24.

221. *See* ECtHR BACKGROUND, *supra* note 172, at para. 6 (describing the creation of the new European Court of Human Rights).

222. *See id.*

223. *See* HENKIN, *supra* note 39, at 552.

224. The ACHR entered into force on July 18, 1978. *See* ACHR, *supra* note 9, at art. 74, para. 2 (“As soon as eleven states have deposited their instruments of ratification or adherence, the Convention shall enter into force.”).

225. *See generally* Inter-American Convention on Violence Against Women, *supra* note 10.

226. *See* ACHR, *supra* note 9, at art. 4.

227. *See id.* at art. 5.

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sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”<sup>228</sup> Furthermore, the ACHR guarantees that “[a]ll persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.”<sup>229</sup> Given this clear ban on gender discrimination, the ACHR could prove to be helpful for battered women. Thus, victims who find themselves subjected to domestic violence may make use of the legal remedies available to them through their domestic court system. If these domestic remedies fail,<sup>230</sup> broadly delineated human rights within the ACHR provide protection and hold their state of citizenship responsible at the regional level.<sup>231</sup>

The Inter-American Convention on Violence Against Women, also known as the Convention of Belém do Pará, entered into force on March 5, 1995 and is geared entirely towards women’s rights, particularly women who have been subjected to some form of violence.<sup>232</sup> Article 1 defines violence against women as “any act of conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or *private* sphere.”<sup>233</sup> Thus, Article 1 covers victims who suffer physical or mental abuse within the home (i.e. domestic violence). Article 3

228. *Id.* at art. 1, para. 1 (emphasis added).

229. *Id.* at art. 24.

230. See ACHR, *supra* note 9, at art. 46(1)(a) (requiring that before an individual petition is reviewed “remedies under domestic law [must] have been pursued and exhausted in accordance with generally recognized principles of international law”); see also *Fairén Garbí & Solís Corrales*, Inter-Am. Ct. H.R., ser. C, no. 6, at 17, para. 79 (1989) (addressing the primary issue of exhaustion of domestic remedies), available at [http://www1.umn.edu/humanrts/iachr/b\\_11\\_13d.htm](http://www1.umn.edu/humanrts/iachr/b_11_13d.htm) (last visited May 18, 2004); see also *Velásquez Rodríguez*, Inter-Am. Ct. H.R., ser. C, no. 4, at 12, para. 61 (1988) (explaining that the exhaustion of domestic remedies requirement “allows the State to resolve the problem under its internal law before being confronted with an international proceeding” and that the State has a legal duty to provide such remedies), available at <http://www1.umn.edu/humanrts/iachr/C/4-ing.html> (last visited May 20, 2004); see also *Godínez Cruz*, Inter-Am. Ct. H.R., ser. C, no. 5, at 12, para. 70 (1989) (addressing the same requirement of exhaustion of domestic remedies), available at [http://www1.umn.edu/humanrts/iachr/b\\_11\\_14d.htm](http://www1.umn.edu/humanrts/iachr/b_11_14d.htm) (last visited May 18, 2004).

231. See *Garbí & Corrales*, *supra* note 230, at para. 136 (“The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from acts of the States responsible.”); see also *Velásquez Rodríguez*, *supra* note 230, at 30-31 (explaining the various components of state responsibility under the ACHR); see also *Godínez Cruz*, *supra* note 230, at 23, paras. 140-42 (addressing the notion of state responsibility).

232. See Inter-American Convention on Violence Against Women, *supra* note 10, at art. 21 (“This Convention shall enter into force on the thirtieth day after the date of deposit of the second State that ratifies or accedes to the Convention. . .”).

233. *Id.* at art. 1 (emphasis added).

reaffirms that “[e]very woman has the right to be free from violence in both the public and private spheres.”<sup>234</sup> Article 6 affirms every woman’s right to be free from violence which includes: “a) [t]he right of women to be free from all forms of discrimination; and b) [t]he right of women to be valued and educated free of stereotyped patterns of behavior and social practices based on concepts of inferiority or subordination.”<sup>235</sup> In Article 7, States Parties to the convention pledge to undertake “policies to prevent, punish and eradicate” violence against women including passing domestic legislation in this vein, adopting legal measures requiring perpetrators “to refrain from harassing, intimidating and employing any method that harms or endangers” the lives, integrity or property of women, taking appropriate measures to stop customary practices that promote violence against women, and ensuring the existence of fair and effective legal procedures and remedies for victims of such violence.<sup>236</sup> Thus, the Inter-American Convention on Violence Against Women seems to be the most pertinent regional instrument that domestic violence victims can invoke against their state of citizenship.

In fact, a domestic violence case was brought before the Inter-American human rights system in April 2001 invoking provisions of the Inter-American Convention on Violence Against Women in addition to applicable ACHR provisions. Maria da Penha Maia Fernandes filed a petition with the Inter-American Commission on Human Rights (“IACHR”)<sup>237</sup> alleging that Brazil had failed to effectively prevent and punish brutal acts of domestic violence perpetrated against her by her husband over a period of more than fifteen years.<sup>238</sup> On May 29, 1983, Mrs. Fernandes was shot by her husband while she was asleep. This event was the culmination of a pattern of abuse against her and her children throughout the marriage.<sup>239</sup> As a result of the shooting, Mrs. Fernandes sustained numerous injuries and suffered irreversible paraplegia as well as other

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234. *Id.* at art. 3.

235. *Id.* at art. 6.

236. *See id.* at art. 7.

237. *See generally* Inter-American Commission on Human Rights (“IACHR”), available at <http://www.umn.edu/humanrts/cases/commissn.htm> (last visited May 20, 2004).

238. *See generally* *Maria da Penha Maia Fernandes*, Case 12.051, Inter-Am. C. H.R., doc. 54/01 (2001) (retelling the story of repeated physical abuse by her husband and her claim for relief), available at <http://www.cidh.org/annualrep/2000eng/chapteriii/merits/brazil12.051.htm> (last visited May 18, 2004).

239. *See id.* at para. 2.

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physical and psychological trauma.<sup>240</sup> The violence continued upon her return from the hospital as her husband attempted to kill her again, this time by electrocution.<sup>241</sup> She argued that the attacks were premeditated since her husband had previously asked her to sign a life insurance policy and attempted to force her to sign a sales contract on her car, which did not indicate the name of the purchaser.<sup>242</sup> Subsequently, Mrs. Fernandes also learned that her husband had a criminal record, practiced bigamy, and fathered a child in Colombia.<sup>243</sup> Her husband was eventually prosecuted for the 1983 shooting in domestic court.<sup>244</sup> Despite the clearly stated charges and the preponderance of evidence, the proceedings were prolonged for eight years with a jury finally convicting and sentencing him to fifteen years in prison for assault and attempted murder on May 4, 1991.<sup>245</sup> An appeals court overturned the verdict accepting the defense's argument that the questions to the jury were flawed.<sup>246</sup> On March 15, 1996, a second trial by jury took place in domestic court sentencing Mrs. Fernandes' husband to ten years and six months in prison.<sup>247</sup> A second appeal followed and the decision was still pending when Mrs. Fernandes filed her petition with the IACHR on August 20, 1998.<sup>248</sup> The state of Brazil did not respond to the IACHR's requests in connection with her claim.<sup>249</sup>

Given these facts, Mrs. Fernandes alleged in her petition that the local judicial system and the state of Brazil were "ineffective, as seen in their failure to conduct proceedings in a prompt and efficient manner, thereby creating a great risk of impunity, since punishment in this case will be barred by the statute of limitations twenty years after the occurrence of these events. . . ."<sup>250</sup> The state of Brazil should have ensured that Mrs. Fernandes received compensation for her suffering "by guaranteeing her a fair trial within a reasonable time

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240. *See id.* at para. 8.

241. *See id.* at para. 9 (retelling the events of the second murder attempt).

242. *See id.* at para. 10.

243. *See id.*

244. *See id.* at paras. 12-13.

245. *See id.* at para. 13.

246. *See id.* at para. 15.

247. *See id.* at paras. 16-17.

248. *See id.* at para. 4.

249. *See id.* at para. 25 ("The Brazilian State has not provided the Commission with a response regarding the admissibility or the merits of the petition, despite the requests of the Commission to the State on October 19, 1998, August 4, 1999, and August 7, 2000.").

250. *See id.* at para. 19.

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period.”<sup>251</sup> Furthermore, the delayed response to the abuse perpetrated against Mrs. Fernandes was not an isolated incident: “it is an example of a pattern of impunity in cases of domestic violence against women in Brazil, since the majority of complaints filed do not lead to criminal prosecution and in the few cases where they do, the perpetrators are convicted in only a small number of cases.”<sup>252</sup> Citing statistics, Mrs. Fernandes argued that Brazil had failed to prevent domestic violence, in general, and had failed to investigate, prosecute and punish domestic abusers despite its international obligations.<sup>253</sup> Lastly, Mrs. Fernandes indicated that the delay on the part of Brazilian judicial authorities to render a decision against her husband not only raised statute of limitations issues but would also create difficulties if she attempted to seek civil reparations.<sup>254</sup> Mrs. Fernandes asserted the above claims as violations of the following rights inscribed in the ACHR: Article 1, paragraph 1 (obligation to respect),<sup>255</sup> Article 8 (right to fair trial),<sup>256</sup> Article 24 (right to equal protection),<sup>257</sup> and Article 25 (right to judicial protection).<sup>258</sup> All ACHR rights were related to Articles II<sup>259</sup> and XVIII<sup>260</sup> of the American Declaration of the Rights and Duties of Man (“American Declaration”). Mrs. Fernandes also invoked Articles 3,<sup>261</sup> 4(a)-(g),<sup>262</sup>

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251. *Id.*

252. *See id.* at para. 20.

253. *See id.* at para. 21.

254. *See id.* at para. 23.

255. *See* ACHR, *supra* note 9, at art. 1, para. 1 (stating that the Convention must ensure that all persons are free to exercise the rights and freedoms recognized by the Convention without discrimination).

256. *See id.* at art. 8.

257. *See id.* at art. 24.

258. *See id.* at art. 25.

259. *See American Declaration of the Rights and Duties of Man*, OAS Res. XXX (1948), art. II [hereinafter *American Declaration*] (“All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.”), available at <http://www1.umn.edu/humanrts/oasinstr/zoas2dec.htm> (last visited May 20, 2004).

260. *See id.* at art. XVIII (“Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.”).

261. *See* Inter-American Convention on Violence Against Women, *supra* note 10, at art. 3 (“Every woman has the right to be free from violence in both the public and private spheres.”).

262. *See id.* at art. 4(a)-(g) (ensuring certain rights for women such as the right to life, right to physical, mental and moral integrity, right to personal liberty and security, right to be free from torture, right to privacy within personal and family life, right to equal protection and right to legal recourse).

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5<sup>263</sup> and 7<sup>264</sup> of the Inter-American Convention on Violence Against Women.

The IACHR responded by analyzing Mrs. Fernandes' case on the merits and by drawing certain preliminary conclusions before referring the case to the IACtHR.<sup>265</sup> Concerning Brazil's obligation to respect and ensure<sup>266</sup> the right to justice inscribed in Article XVIII of the American Declaration,<sup>267</sup> ACHR Article 8, guaranteeing the right to fair trial,<sup>268</sup> and ACHR Article 25, ensuring judicial protection,<sup>269</sup> the IACHR found a violation.<sup>270</sup> The IACHR indicated that "the judicial delay and long wait for decisions on appeals reveal conduct on the part of the judicial authorities that violates the right to the prompt and effective remedies provided for in the Declaration and the Convention."<sup>271</sup> Furthermore the commission found that:

the domestic judicial decisions in this case reveal inefficiency, negligence, and failure to act on the part of the Brazilian judicial authorities and unjustified delay in the prosecution of the accused. These decisions are standing in the way of punishment of the accused and are raising the specter of impunity and failure to compensate the victim as a result of barring of the offense by the statute of limitations. They demonstrate that the State has not been capable of organizing its entities in a manner that guarantees those rights.<sup>272</sup>

As to Article 24 of the ACHR, ensuring equal protection before the law,<sup>273</sup> together with Articles II<sup>274</sup> and XVIII<sup>275</sup> of the American Declaration, the IACHR also found a violation.<sup>276</sup> The commission

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263. See *id.* at art. 5 (describing the full entitlement of women to freely and fully exercise their rights, which are inscribed in regional and international instruments, and acknowledging that violence against women is an impediment in this regard).

264. See *id.* at art. 7 (outlining the duties of States to "prevent, punish and eradicate" violence against women).

265. See *Maria da Penha Maia Fernandes*, *supra* note 238, at para. 3 (concluding that the state violated Mrs. Fernandes' rights to a fair trial and judicial protection, and that the violation forms a pattern in Brazil of condoning domestic violence against women).

266. See ACHR, *supra* note 9, at art. 1, para. 1.

267. See *American Declaration*, *supra* note 259, at art. XVIII.

268. See ACHR, *supra* note 9, at art. 8.

269. See *id.* at art. 25.

270. See *Maria da Penha Maia Fernandes*, *supra* note 238, at para. 141.

271. See *id.*

272. See *id.* at para. 44.

273. See ACHR, *supra* note 9, at art. 24.

274. See *American Declaration*, *supra* note 259, at art. II.

275. See *id.* at art. XVIII.

276. See *Maria da Penha Maia Fernandes*, *supra* note 238, at para. 3.

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made reference to various reports, including a domestic violence study conducted in Brazil as well as one of its special reports on the human rights situation in Brazil, and found that Brazilian authorities are not responding properly to the needs of battered women.<sup>277</sup> While improvements have been made, such as the establishment of special police stations to address reports of violence against women, the creation of shelters, and a Supreme Court decision to strike down the notion of the “honor defense” as a justification for wife-killing in Brazil, the IACHR declared that “these initiatives have not had any effect whatsoever.”<sup>278</sup> Lastly, the IACHR found a violation of Article 7 of the Inter-American Convention on Violence Against Women, which outlines various duties that States owe their citizens in preventing, punishing and eradicating violence against women (domestic violence included)<sup>279</sup> as well as a violation of Articles 3<sup>280</sup> and 4(a)-(g)<sup>281</sup> of the same instrument.<sup>282</sup> The IACHR reasoned that

[t]he failure to prosecute and convict the perpetrator under these circumstances is an indication that the State condones the violence suffered by Maria da Penha, and this failure by the Brazilian courts to take action is exacerbating the direct consequences of the aggression by her ex-husband. Furthermore . . . that tolerance by the State organs is not limited to this case; rather, it is a pattern . . . . Given the fact that the violence suffered by Maria da Penha is part of a general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors, it is the view of the Commission that this case involves not only failure to fulfill the obligation with respect to prosecut[ion] and convict[ion], but also the obligation to prevent these degrading practices. That general and discriminatory judicial ineffectiveness also creates a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts.<sup>283</sup>

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277. See *id.* at para. 47 (finding that clear discrimination exists against battered women arising from an inadequate justice system and uneven application of national and international laws in Brazil).

278. *Id.* at para. 50.

279. See Inter-American Convention on Violence Against Women, *supra* note 10, at art. 7 (condemning all forms of violence against women).

280. See *id.* at art. 3 (delineating that all women have the right to be free from violence).

281. See *id.* at art. 4(a)-(g) (outlining the right to life, right to physical, mental and moral integrity, right to personal liberty and security, right to be free from torture, right to privacy within personal and family life, right to equal protection and right to legal recourse).

282. See *Maria da Penha Maia Fernandes*, *supra* note 238, at para. 3.

283. See *id.* at paras. 55-56.

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Consequently, the IACHR indicated that Brazil had violated the aforementioned provisions of the Inter-American Convention on Violence Against Women.<sup>284</sup>

Mrs. Fernandes' petition marked a milestone for women's rights because it is one of the first cases to apply the Inter-American Convention on Violence Against Women and because it has brought attention to the issue of domestic violence in the Inter-American human rights system. In 2002, the IACHR continued this trend by issuing a report that addressed the problem of violence against women (domestic violence included) occurring in Ciudad Juárez, Mexico.<sup>285</sup> Responding to the requests of numerous nongovernmental organizations, the IACHR examined and reported on a disturbing pattern of killings in Ciudad Juárez: since 1993, over 200 women had been killed and left in impunity as the state failed to investigate, prosecute, punish and prevent such crimes.<sup>286</sup> The IACHR found that "many of these killings are manifestations of violence based on gender, particularly sexual violence and domestic or intra-familial violence."<sup>287</sup> Furthermore, the Commission pointed out that

While public and official attention [in Mexico] have focused on the brutality of and fear associated with the so-called "serial" killings, insufficient attention has been devoted to the need to address the discrimination that underlines crimes of sexual and domestic violence, and that underlies the lack of effective clarification and prosecution.<sup>288</sup>

Reiterating Mexico's obligations under various international and regional human rights instruments, including the ACHR and the Inter-American Convention on Violence Against Women,<sup>289</sup> the IACHR concluded its report with several recommendations geared to improve the application of due diligence "to investigate, prosecute and punish violence against women . . . and overcome impunity" as well as "to prevent violence against women . . . and increase their security" in Ciudad Juárez.<sup>290</sup> Since the issuance of this report, the

284. See *id.* at para. 58.

285. See generally INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, THE SITUATION OF THE RIGHTS OF WOMEN IN CIUDAD JUAREZ, MEXICO: THE RIGHT TO BE FREE FROM VIOLENCE AND DISCRIMINATION (2002) [hereinafter CIUDAD JUAREZ REPORT], available at <http://www.cidh.org/annualrep/2002eng/chap.vi.juarez.htm> (last visited May 20, 2004).

286. See *id.* at paras. 3, 7, 41-68.

287. See *id.* at paras. 11, 57-64.

288. See *id.* at paras. 11, 69-87.

289. See *id.* at paras. 99-108.

290. See *id.* at paras. 161-end (concluding with general recommendations to

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IACHR has received, and is currently processing, several individual petitions concerning the death of women and girls in Ciudad Juárez.<sup>291</sup>

Both the ACHR and the Inter-American Convention on Violence Against Women are interpreted and enforced by the Inter-American Commission on Human Rights (“IACHR”)<sup>292</sup> and the Inter-American Court of Human Rights (“IACtHR”)<sup>293</sup> with respect to members of the Organization of American States<sup>294</sup> who are States Parties to the two instruments. The IACHR can receive and analyze communications alleging violations of the ACHR from States Parties to the convention against other States Parties.<sup>295</sup> More specifically, the IACHR can receive petitions from individuals (and NGO’s) containing allegations that a particular State Party violated the ACHR<sup>296</sup> and/or the Inter-American Convention on Violence Against Women.<sup>297</sup> The IACHR then issues nonbinding recommendations and/or refers the petitions to the IACtHR.<sup>298</sup>

With respect solely to the Inter-American Convention on Violence

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improve the domestic violence situation in Ciudad Juárez).

291. See CIUDAD JUAREZ REPORT, *supra* note 285, at para. 26 (processing four petitions, 104/02, 281/02, 282/02, and 283/02, at this time and evaluating other petitions as they are filed).

292. See *generally* Inter-American Commission on Human Rights (“IACHR”), at <http://www.oas.org/> (last visited May 20, 2004).

293. See *generally* Inter-American Court of Human Rights (“IACtHR”), at <http://www.oas.org/> (last visited May 20, 2004).

294. See ACHR, *supra* note 9, at pmb1.

295. See HENKIN, *supra* note 39, at 524; see also ACHR, *supra* note 9, at arts. 45-46 (describing communications that can be initiated by States Parties to the ACHR against other States Parties and delineating the filing requirements for state petitions).

296. See HENKIN, *supra* note 39, at 524; see also ACHR, *supra* note 9, at art. 44 (allowing individuals or groups that are legally recognized members of the organization of American States to file petitions with the IACHR against States Parties). Also delineating the filing requirements for individual petitions. *Id.* at art. 46.

297. See Inter-American Convention on Violence Against Women, *supra* note 10, at art. 12 (indicating that individuals and groups can lodge petitions with the IACHR alleging violations of the Inter-American Convention on Violence Against Women). The IACHR has, in fact, been poised to interpret the Inter-American Convention on Violence Against Women in at least two cases: the case of Maria da Penha Maia Fernandes mentioned above and the case of Indravani Pamela Ramjattan. See *generally* *Maria da Penha Maia Fernandes*, *supra* note 238; see also *Indravani Pamela Ramjattan*, Case 11.837, Inter-Am. Comm. H.R., no. 92/98, at 2 (1998), available at <http://www.cidh.org/annualrep/98eng/admissibility/t&t%2011837.htm> (last visited May 20, 2004). The Inter-American Convention on Violence Against Women does not, however, make express reference to the competence of the IACtHR. See E-mail from Elizabeth Abi-Mershed, Inter-American Commission on Human Rights (“IACHR”), to Andreea Vesa, Fellow, ABA/CEELI (Apr. 09, 2003, 12:37 EST) (on file with author).

298. See HENKIN, *supra* note 39, at 524-25.

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Against Women, the Inter-American Commission on Women<sup>299</sup> can also play an advisory role as petitions are forwarded.<sup>300</sup> The IACtHR can issue binding decisions with respect to individual petitions referred by the IACHR (or by States Parties directly).<sup>301</sup> The IACtHR may also issue advisory opinions regarding the interpretation of the ACHR and the Inter-American Convention on Violence Against Women at the request of the IACHR or States Parties.<sup>302</sup> The IACtHR's decisions are final and not subject to appeal.<sup>303</sup> Thus, domestic violence victims can utilize both regional mechanisms (the commission and the court) in order to assert their rights and hold signatories of the ACHR and the Inter-American Convention on Violence Against Women legally responsible for failing to protect them from their abusive partners. Just like in the European system of human rights, though, enforceability of IACtHR decisions could become a problem at the state level.

*C. African Charter on Human and Peoples' Rights ("African Charter") and Its Draft Protocol*

Another regional instrument that may be used by victims of domestic violence is the African Charter, which entered into force on October 21, 1986.<sup>304</sup> The Charter imposes a general duty upon its States Parties to "recognize the rights, duties and freedoms enshrined in [the] Charter and . . . to adopt legislative or other measures to give effect to them."<sup>305</sup> The right to life and integrity of the person are

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299. See Inter-American Convention on Violence Against Women, *supra* note 10, at art. 10.

300. One expert explains that the IACHR primarily interprets the Inter-American Convention on Violence Against Women and its juridical application. However, the Inter-American Commission on Women also has a role in receiving reports as to the implementation of the Inter-American Convention on Violence Against Women and, in turn, reports on that information. The main difference between the IACHR and the Inter-American Commission of Women is that the former is composed of independent autonomous experts, while the latter is composed of state appointed delegates representing each of the States Parties to the Inter-American Convention on Violence Against Women. See E-mail from Elizabeth Abi-Mershed, *supra* note 297.

301. See HENKIN, *supra* note 39, at 524-25; see also ACHR, *supra* note 9, at art. 61, para. 1 ("Only the States Parties and the Commission shall have the right to submit a case to the Court.").

302. See HENKIN, *supra* note 39, at 524; see also ACHR, *supra* note 9, at art. 64; see also Inter-American Convention on Violence Against Women, *supra* note 10, at art. 11.

303. See ACHR, *supra* note 9, at art. 67.

304. See African Charter, *supra* note 11; see also List of Countries Who Have Signed, Ratified/Adhered to the African Charter on Human and Peoples' Rights, at <http://www1.umn.edu/humanrts/instree/ratzlafchr.htm> (last visited May 20, 2004).

305. African Charter, *supra* note 11, at art. 1.

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inscribed in Article 4 of the Charter.<sup>306</sup> Article 5 guarantees the right to be free from torture and cruel, inhuman or degrading treatment.<sup>307</sup> Article 16, paragraph 1 of the African Charter emphasizes that “[e]very individual shall have the right to enjoy the best attainable state of physical and mental health.”<sup>308</sup> Gender equality is a constant theme throughout the African Charter. Article 2 affirms that “[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter,”<sup>309</sup> while Article 3 declares that “[e]very individual shall be equal before the law”<sup>310</sup> and “[e]very individual shall be entitled to equal protection of the law.”<sup>311</sup> Article 18, paragraph 3 discusses women’s rights in particular and indicates that “[t]he State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.”<sup>312</sup> One commentator makes the point that while the Charter touches upon gender equality, the aforementioned articles still fail to fully address women’s issues because they do not dedicate separate provisions solely to women.<sup>313</sup> However, by placing certain limitations on

306. *See id.* at art. 4.

307. *See id.* at art. 5 (prohibiting all forms of exploitation and degradation of man, “particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment”).

308. *Id.* at art. 16, para. 1 (emphasis added).

309. *Id.* at art. 2 (emphasis added).

310. *Id.* at art. 3, para. 1 (emphasis added).

311. *See African Charter, supra* note 11, at art. 3, para. 2 (emphasis added).

312. *Id.* at art. 18, para. 3.

313. Julia Harrington makes the following observations:

Article 2 might be criticized, however, on grounds that it fails to give sufficient weight to women’s rights because sexual discrimination is placed in the middle of a long list of other grounds on which distinctions are not permitted. Given the extremely serious discrimination that women suffer in Africa, it might be thought that a separate article specifically on women would have been more appropriate to give the rights of women the weight that they need and deserve. Articles 3-14 of the Charter present civil and political rights; none mentions women specifically . . . .

On the other hand, the plain language of Article 18.3 requires states to eliminate every form of discrimination against women, and the article’s reference to ‘international declarations and conventions’ has wide significance in that it incorporates international standards, including those in nonbinding declarations. The African Charter’s provisions, including those on economic rights, have more detailed counterparts in the Convention on the Elimination of All Forms of Discrimination Against Women. By reference to Article 18.3, the provisions of the Women’s Convention are essentially incorporated into the African Charter. This is of particular significance because relatively few African states have ratified the Women’s Convention, and many have done so with substantial reservations.

Julia Harrington, *The African Commission on Human and Peoples’ Rights*, in 2

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others, the Charter inadvertently provides additional protections from which women can benefit.<sup>314</sup> For example, Article 28 imposes a duty on every individual “to respect and consider his fellow beings without discrimination.”<sup>315</sup> One could argue that by imposing such a duty upon men, women are automatically protected.<sup>316</sup> Thus, victims of domestic violence are entitled to invoke the above provisions of the African Charter in order to require their state of citizenship to uphold their right to life, right against torture and ill-treatment, right to good mental and physical health as well as their right to be protected from gender-based discrimination and to provide them with the requisite safeguards and legal remedies against their abusers.

A more relevant document for domestic violence victims within the African system is the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (“Protocol to African Charter”).<sup>317</sup> This document was initiated by a working group in January 1998.<sup>318</sup> A Special Rapporteur on the Rights of Women in Africa was also appointed in order to oversee the continued development of the protocol.<sup>319</sup> Among other things, the instrument requires States Parties to the African Charter to undertake appropriate measures in order to eliminate discrimination against women<sup>320</sup> as well as violence against women (including domestic violence).<sup>321</sup> However, as of March 2004, the protocol remains in

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WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 455-70, 457, 459 (Kelly D. Askin & Dorean M. Koenig eds., 2000).

314. See *id.* at 460.

315. African Charter, *supra* note 11, at art. 28.

316. See Harrington, *supra* note 313, at 460 (stating, “Given that men discriminate against women at least as much as women discriminate against men, this article can only be an advantage to women.”).

317. See generally Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, O.A.U. Doc. CAB/LEG/66.6 (1999) [hereinafter Draft Protocol to African Charter], available at [http://www.achpr.org/english/\\_info/women\\_en.html](http://www.achpr.org/english/_info/women_en.html) (last visited May 20, 2004).

318. See *Eleventh Annual Activity Report of the African Commission on Human and Peoples’ Rights*, 22nd-23rd Sess., at para. 33 (1997-1998), available at <http://www1.umn.edu/humanrts/afrika/11thannualrpt.html> (last visited May 20, 2004).

319. See *id.* at para. 33 (appointing Mme. Julienne Ondzeil-Gnelenga as the Special Rapporteur on the Rights of Women).

320. See Draft Protocol to African Charter, *supra* note 317, at art. 2.

321. See *id.* at art. 4(2)(a) (calling for the prohibition of “all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public . . .”).

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draft form,<sup>322</sup> thus, it cannot currently be enforced along with the African Charter.

The African Commission on Human and People's Rights ("African Commission") was established in order to protect the rights delineated in the African Charter (as well as in other pertinent documents).<sup>323</sup> According to Article 45, the commission has three central functions: to promote and protect human rights and to interpret the provisions of the African Charter.<sup>324</sup> This body is also tasked with overseeing inter-state complaints<sup>325</sup> and "other communications," which include individual petitions.<sup>326</sup> One author observes:

The Commission's mandate, articulated in Article 45 of the Charter, is very broad, but in practice its activities have been concentrated in three main areas: hosting conferences and seminars to inform various constituencies of their rights and obligations under the Charter; receiving periodic reports from states parties; and examining communications (individual cases) brought against governments for alleged violations of the rights in the Charter. The Commission's work on women's rights takes place within these areas of activity.<sup>327</sup>

While the African Commission "may resort to any appropriate method of investigation,"<sup>328</sup> its decisions take the form of recommendations and it has been reluctant to challenge States Parties for not complying with the African Charter.<sup>329</sup> In June 1998, a protocol to the African Charter was drafted in order to create an African Court on Human and Peoples' Rights that would issue binding decisions.<sup>330</sup> The protocol recently received the requisite

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322. See Gina Bekker, *Africa*, 22 NETHERLANDS Q. HUM. RTS. 137, 138 (2004) (explaining that the proposed Protocol to the African Charter does not yet have the requisite number of ratifications to come into force).

323. See African Charter, *supra* note 11, at art. 30.

324. See *id.* at art. 45.

325. See HENKIN, *supra* note 39, at 601; see also African Charter, *supra* note 11, at arts. 47-54.

326. See HENKIN, *supra* note 39, at 601; see also African Charter, *supra* note 11, at arts. 55-58.

327. See Harrington, *supra* note 313, at 456.

328. African Charter, *supra* note 11, at art. 46.

329. See HENKIN, *supra* note 39, at 601.

330. See *id.* at 600; see also Association for the Prevention of Torture, *The African Court of Human and Peoples' Rights; Presentation, Analysis and Commentary: The Protocol to the African Charter on Human and Peoples' Rights, Establishing the Court*, at 3, Jan. 2000, available at <http://www.apt.ch/africa/African%20Court.pdf> (last visited May 20, 2004).

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number of ratifications and came into force on January 25, 2004.<sup>331</sup> Since the court is still in the developing stages, it has not received any individual petitions yet; however it promises to be a much more adequate forum for victims of domestic violence than the African Commission.

#### CONCLUSION

This article is an attempt to assess the availability of mechanisms, both at the international and regional level, through which domestic violence victims can assert their rights against their state of citizenship after exhausting all viable domestic remedies. The International Bill of Human Rights, comprised of the UDHR, ICCPR and ICESCR, other international human rights conventions such as CEDAW and CAT, and regional human rights treaties such as the ECHR, ACHR and the African Charter, offer general (as well as some specific) protections for battered women. While I identified several provisions within each instrument that could possibly apply in situations involving domestic violence, these are not exhaustive lists. International and regional human rights instruments are flexible and can be invoked in various ways depending upon the situation of each victim. Furthermore, the application of human rights instruments varies depending upon possible reservations entered by each State Party. When invoking such instruments, though, one should remain aware of an overarching issue that straddles all human rights systems: enforceability is still a lingering weakness.

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331. Press Release, African Union, The Protocol on the African Court on Human Rights and Peoples' Rights to Come Into Force Soon (Dec. 30, 2003), at <http://www.pict-pcti.org/pdf/APHRC%20coming%20into%20force.pdf> (last visited May 20, 2004).