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## Judging Women Who Kill Their Batterers in the United States: A Violation of Their Right to Equality Before the Law Under the ICCPR

Paulina Lucio Maymon

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# JUDGING WOMEN WHO KILL THEIR BATTERERS IN THE UNITED STATES: A VIOLATION OF THEIR RIGHT TO EQUALITY BEFORE THE LAW UNDER THE ICCPR

PAULINA LUCIO MAYMON\*

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## I. INTRODUCTION

When women<sup>1</sup> commit an offense against another's life, they often do so in the context of domestic violence.<sup>2</sup> Between seventy and eighty percent of incarcerated women in the United States (U.S.) report experiencing intimate partner violence as adults, and between sixty and seventy percent report experiencing physical or sexual violence in childhood.<sup>3</sup> Approximately ninety percent of the women in prison for killing men have previously been battered by those men.<sup>4</sup>

The Battered Spouse Syndrome or Battered Woman Syndrome (BSS or BWS) has been used to explain why women stay in abusive relationships even when they feel their lives are at imminent risk.<sup>5</sup> BWS is a type of post-traumatic stress disorder caused by repeated

1. This Comment narrowly focuses on defendants categorized as women or female defendants within the criminal justice system. The term "female defendant" is used in this article as a synonym of a woman facing criminal charges. Because people with different gender identities might experience different forms of violence and institutional discrimination, a more thorough, perhaps separate, analysis is required.

2. *Women who kill in response to domestic violence: How do criminal justice systems respond?*, LINKLATERS LLP & PENAL REFORM INT'L 4 (2016), [https://cdn.penalreform.org/wp-content/uploads/2016/04/Women\\_who\\_kill\\_in\\_response\\_to\\_domestic\\_violence\\_Full\\_report.pdf](https://cdn.penalreform.org/wp-content/uploads/2016/04/Women_who_kill_in_response_to_domestic_violence_Full_report.pdf) [hereinafter PENAL REFORM INTERNATIONAL]; See Malika Saada Saar et al., *The Sexual Abuse to Prison Pipeline: The Girls' Story*, HUM. RTS. PROJECT FOR GIRLS, GEO. CTR. ON POVERTY & INEQ., MS. FOUND. FOR WOMEN 7 (2016), <https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2019/02/The-Sexual-Abuse-To-Prison-Pipeline-The-Girls%E2%80%99-Story.pdf> (discussing research showing connection between survivors of sexual violence and incarcerated girls).

3. Melissa E. Dichter, *Women's Experiences of Abuse as a Risk Factor for Incarceration: A Research Update*, NAT'L ONLINE RES. CTR. ON VIOLENCE AGAINST WOMEN 10 (2015), [https://vawnet.org/sites/default/files/materials/files/2016-09/AR\\_IncarcerationUpdate.pdf](https://vawnet.org/sites/default/files/materials/files/2016-09/AR_IncarcerationUpdate.pdf).

4. *Women in Prison: An Overview*, AM. C.L. UNION, [https://www.aclu.org/other/words-prison-did-you-know#\\_ednref43](https://www.aclu.org/other/words-prison-did-you-know#_ednref43) (last visited June 20, 2021) [hereinafter *Women in Prison: An Overview*].

5. See PENAL REFORM INTERNATIONAL, *supra* note 2, at 4 (referencing the two typical reasons victims of abuse stay in an abusive relationship); Katie Fair, *Battered Spouse Syndrome: A Comparative Regional Look at Domestic Abuse and Self-Defense in Criminal Courts*, 5 LINCOLN MEM'L U. L. REV. 1, 2 (2018) (explaining Battered Spouse Syndrome ("BSS") and its historical background).

and long-term abuse that leads a battered woman to believe that her only options are to continue enduring the abuse or to die.<sup>6</sup> More recent theories, which focus on battering and its effects, aim to explain a woman's survival strategies based on her acute understanding of her partner's violence rather than emphasizing her pathology or mental failings.<sup>7</sup> Although courts have become increasingly aware of the legal and psychological issues applicable in cases where women kill in response to domestic violence, gender biases and stereotypes continue to taint courts' treatment of female defendants.<sup>8</sup>

In the legal realm, BWS has been used to support the elements of self-defense and duress as evidence of a woman's reasonable fear of serious injury or death.<sup>9</sup> Under self-defense laws, using force against another person is justifiable when the actor believes that such force is immediately necessary to protect herself against another person's unlawful and imminent force.<sup>10</sup> Under a strict definition of imminence, a woman cannot justifiably use lethal force against her abuser until he beats her harshly enough for her to have an objective fear for her life.<sup>11</sup> Thus, when a woman kills her batterer while he is unarmed, asleep, or drunk, most courts refuse to instruct juries on self-defense because her use of force is deemed unnecessary and

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6. See Carol Jacobsen et al., *Battered Women, Homicide Convictions, and Sentencing: The Case for Clemency*, 18 HASTINGS WOMEN'S L.J. 31, 38 (2007) (discussing the stages of the cycle that causes BSS to develop). But see Cindene Pezzell, *The Use of Expert Testimony on Battering and Its Effects in Criminal Cases: Examining Case Law from 1994–2016*, NAT'L CLEARINGHOUSE FOR THE DEF. OF BATTERED WOMEN, 7 n.6 (2018), <https://www.ncdbw.org/examining-case-law-from-1994-2016> (explaining that many experts critique the BWS as misleading and stigmatizing because it does not accurately reflect the effects of domestic violence).

7. Pezzell, *supra* note 6, at 7 (recognizing the shift in language and the motivation for recognizing battering and its effects over BSS).

8. See *id.* at 7–8 (describing how lay people have difficulties understanding the complex experiences of victims of battering).

9. See *Battered Women Who Kill Their Abusers*, 106 HARV. L. REV. 1574, 1579–80 (1993) (highlighting the legal considerations given to BSS); Fair, *supra* note 5, at 8 (discussing how BSS allows juries to better understand the reasonableness of a person's subjective fear).

10. See, e.g., MODEL PENAL CODE § 3.04 (AM. L. INST. 2020).

11. See Jacobsen, *supra* note 6, at 33 (discussing the limitations of self-defense law, which disproportionately impacts women who have been abused).

unjustified.<sup>12</sup> There is still disagreement as to whether there is a personal right to self-defense under international law.<sup>13</sup> Instead, the right to equality before the law is a more viable path for female defendants to find redress under international law when courts fail to recognize their abuse histories as crucial aspects of their defenses for killing their abusers.<sup>14</sup>

This Comment argues that the United States violated the right to equality before the law, under article 26 of the International Covenant on Civil and Political Rights (hereinafter “ICCPR” or “Covenant”), when its courts discriminated against female defendants accused of killing their abusers on the basis of sex by failing to appropriately consider their domestic abuse histories and trauma at their criminal trials. Part II of this Comment presents statistical studies on women who kill in the United States and the cases of five women tried for killing their batterers, explores the legal elements of ICCPR article 26, and presents relevant cases from United Nations (U.N.) Treaty Bodies.<sup>15</sup> Part III analyzes the five

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12. See *id.* (paraphrasing an argument that certain areas of self-defense law unfairly result in the conviction of battered women who kill their abusers, including the rule of imminence, which requires a woman to refrain from fighting back with a weapon until her attacker is beating her severely enough to pose a risk of imminent death).

13. See David B. Kopel et al., *The Human Right of Self-Defense*, 22 BYU J. PUB. L. 43, 44 (2007) (arguing that personal self-defense is a well-established human right under international law); Don B. Kates, *Genocide, Murder and the Fundamental Human Right to Defend One's Life*, 2 J.L. ECON. & POL'Y 309, 311 (2006) (claiming that States have a right to self-defense because the human beings who compose them have that right). But see John Cerone, *Is There a Human Right of Self-Defense*, 2 J.L. ECON. & POL'Y 319, 329 (2006) (asserting that, at most, there is a norm of international law recognizing self-defense as a basis for excluding criminal responsibility); Barbara Frey (Special Rapporteur in accordance with Sub-Commission on the Promotion and Protection of Human Rights resolution 2002/25), *Prevention of human rights violations committed with small arms and light weapons*, ¶¶ 20–21, U.N. Doc. A/HRC/Sub.1/58/27\* (July 27, 2006) (explaining that self-defense is more properly characterized as a means of protecting the right to life).

14. See Arthur Ripstein, *Self-Defense and Equal Protection*, 57 U. PITT. L. REV. 685, 686, 723 (1996) (claiming that pervasive inequalities cannot be ignored if the law is to claim that it is fair and that the unusual dangers women face must be considered if the law of self-defense is to afford women the same protection as men).

15. See discussion *infra* Part II.

cases in light of U.N. Treaty Bodies' jurisprudence to find the United States violated article 26 and rebuts possible defenses.<sup>16</sup> Part IV provides recommendations to prevent future violations and to provide redress.<sup>17</sup> The recommended preventive measures include enacting justifiable domestic homicide statutes, adopting sentencing guidelines that account for domestic abuse, and introducing evidence rules with a gender perspective.<sup>18</sup> The suggested measures to provide redress are signing the Optional Protocol to the ICCPR, enacting implementing legislation, and granting post-conviction remedies.<sup>19</sup>

## II. BACKGROUND

This section describes how U.S. courts apply criminal laws to women accused of killing their abusers.<sup>20</sup> It presents national and local studies, spanning four decades, on battered women facing homicide charges, and the cases of five women sentenced for killing their batterers in California, New York, and Michigan.<sup>21</sup> Further, the legal elements of ICCPR article 26 and the relevant opinions of U.N. Treaty Bodies are summarized.<sup>22</sup> The section concludes by outlining the United States' Understanding concerning article 26.<sup>23</sup>

### A. HOW U.S. COURTS JUDGE DEFENDANTS WHO SURVIVE DOMESTIC ABUSE

Federal laws in the United States do not explicitly mention a history of abuse as a defense to criminal liability or a mitigating factor.<sup>24</sup> Nevertheless, federal courts disagree on whether a history of abuse may support certain defenses.<sup>25</sup> Although the Federal

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16. See discussion *infra* Part III.

17. See discussion *infra* Part IV.

18. See discussion *infra* Part IV (A).

19. See discussion *infra* Part IV (B).

20. See discussion *infra* Part II (A).

21. See discussion *infra* Part II (A)(1)–(2).

22. See discussion *infra* Part II (B)(1)–(3).

23. See discussion *infra* Part II (B)(4).

24. Penal Reform International, *supra* note 2, at 76.

25. *Id.* at 75–76 (certain courts will permit abuse histories for consideration of self-defense or other defenses); see *United States v. Nwoye*, 60 F. Supp. 3d 225, 238 (D.D.C. 2014) (stating that expert evidence on BWS may be admitted in support of a defense of duress); *Dando v. Yukins*, 461 F.3d 791, 801 (6th Cir.

Sentencing Guidelines do not explicitly prescribe courts to consider a defendant's domestic abuse history,<sup>26</sup> the Supreme Court has ruled that judges have broad discretion to determine appropriate sentences.<sup>27</sup>

In the United States, each state has different criminal laws.<sup>28</sup> In California, for instance, evidence of "intimate partner battering" is relevant in the context of self-defense and voluntary manslaughter.<sup>29</sup> Florida courts have allowed defendants to rely on a BWS defense to show they had a reasonable fear of life.<sup>30</sup> New York's Penal Code allows courts to impose an alternative sentence to some victims of domestic violence.<sup>31</sup> Under Texan law, courts must permit a defendant charged with murdering her abuser to offer evidence of the domestic violence she suffered.<sup>32</sup>

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2006) (explaining that BWS evidence can bolster an argument that a defendant's actions were reasonable). *But see* United States v. Willis, 38 F.3d 170, 175 (5th Cir. 1994) (affirming conviction because BWS evidence is inherently subjective); United States v. Dixon, 413 F.3d 520, 524 (5th Cir. 2005) (affirming the exclusion of expert testimony on BWS because of its subjectiveness).

26. *See* 18 U.S.C. § 3553 (listing the factors to be considered in imposing a sentence, which do not include a history of domestic violence).

27. *See, e.g.,* Pepper v. United States, 562 U.S. 476, 488 (2011) ("courts in this country . . . practiced a policy under which a sentencing judge could exercise a wide discretion . . ."); *see also* 18 U.S.C.A. § 3661 (West 2020) (explaining that no limitation shall be placed on the information concerning the background and conduct of a convicted person for purposes of sentencing).

28. *Criminal Law*, CORNELL L. SCH. LEGAL INFO. INST., [https://www.law.cornell.edu/wex/criminal\\_law#:~:text=Each%20state%20decides%20what%20conduct,states%20and%20the%20federal%20government](https://www.law.cornell.edu/wex/criminal_law#:~:text=Each%20state%20decides%20what%20conduct,states%20and%20the%20federal%20government) (last visited June 20, 2021).

29. *See, e.g.,* People v. Humphrey, 921 P.2d 1, 2 (1996) (stating that BWS evidence may help the jury understand the reasonableness of the defendant's belief); People v. Jaspar, 119 Cal. Rptr. 2d 470, 475–76 (2002) (explaining that BWS evidence is relevant to assess the defendant's credibility, to evaluate whether the defendant believed that she was in imminent danger, and to determine whether that belief was reasonable); *see also* Cal. Evid. Code § 1107 (West 2021) (stating that expert testimony on intimate partner battering is admissible in criminal trial).

30. *See* Fla. R. Crim. P. 3.201(a) (allowing, with notice, for defendants to present battered spouse syndrome for self-defense considerations); *see also* WILLIAM M. HICKS, TRIAL HANDBOOK FOR FLORIDA LAWYERS § 39:9. Battered spouse syndrome (2020), Westlaw FLTRHB (explaining that BWS evidence may be used to show a reasonable fear of life).

31. N.Y. Penal Law § 60.12(1)(a) (McKinney 2019).

32. Tex. Code Crim. Proc. Ann. art. 38.36 (West 2019).

### 1. *A Systemic and Historical Look*

In the United States, one in four women—compared to one in ten men—experiences sexual and physical violence at an intimate partner’s hands.<sup>33</sup> One in two female murder victims—compared to one in thirteen male murder victims—is killed by an intimate partner.<sup>34</sup>

National statistics from the 1990s showed that women received harsher punishments for killing their male partners than men for killing their female partners.<sup>35</sup> On average, women who killed their partners were sentenced to fifteen years in prison, whereas men who killed their female partners were sentenced to two to six years.<sup>36</sup>

In 2018, the National Clearinghouse for the Defense of Battered Women (NCDBW) analyzed 366 federal and state criminal cases from 1994 to 2016 that involved expert testimony regarding battering and its effects.<sup>37</sup> Most female defendants (eighty-five percent or 146 women) tried to introduce expert testimony on battering and its effects, compared to a minority of male defendants (nineteen percent or thirty-five men).<sup>38</sup> Further, trial courts denied more women (thirty-seven percent) than men (twenty-six percent) from introducing this type of testimony.<sup>39</sup>

From 1986 to 1988, the Michigan Battered Women’s Clemency Project conducted a study of eighty-two homicide cases in Oakland County, Michigan, to determine whether courts’ gender biases affected battered women’s trials.<sup>40</sup> The results showed that courts convicted seventy-one percent of women and sixty-two percent of men.<sup>41</sup> Further, because the conviction rate was higher for domestic

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33. *Domestic Violence*, NAT’L COAL. AGAINST DOMESTIC VIOLENCE 1 (2020), [https://assets.speakcdn.com/assets/2497/domestic\\_violence-2020080709350855.pdf?1596828650457](https://assets.speakcdn.com/assets/2497/domestic_violence-2020080709350855.pdf?1596828650457) [hereinafter NATIONAL COALITION AGAINST DOMESTIC VIOLENCE].

34. *Id.* at 2.

35. *Women in Prison: An Overview*, *supra* note 4.

36. *Id.*

37. Pezzell, *supra* note 6, at 4.

38. *Id.* at 15–16.

39. *Id.*

40. Jacobsen, *supra* note 6, at 42, 44.

41. *Id.* at 45.

violence victims (all of whom were women),<sup>42</sup> the average sentences were longer for them than for batterers and men with criminal histories.<sup>43</sup> In sum, studies spanning four decades suggest that courts treat battered women accused of homicide differently compared to other defendants in the United States.<sup>44</sup>

## 2. *A Closer Look: The Cases of Angelique, Kelly, Nancy, Sally, and Nicole*

The five cases presented in this section span almost three decades and took place in California, Michigan, and New York.<sup>45</sup> The most recent judgment was handed down in 2020.<sup>46</sup> Most of these cases have reached federal courts in their appellate stages, including the United States Supreme Court.<sup>47</sup> Therefore, the cases illustrate a long-lasting pattern that permeates both state and federal courts and extends from the West to the East Coast.<sup>48</sup>

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42. *See id.* (stating that seventy-eight percent of the defendants who were victims of domestic violence were convicted compared to sixty-three percent otherwise. Further, where the defendant killed her batterer, the conviction rate was seventy-one percent compared to sixty-four percent in other cases).

43. *See id.* at 46 n.113 (explaining that, in multivariate tests, predicted sentences for white female defendants with no prior convictions found guilty of killing a white person increased from ten to thirty years to life in prison if the defendant was a victim of domestic violence).

44. *See* discussion *supra* Part II (A)(1) (discussing relevant historical context and explaining the systemic inequities faced by women who have been abused opposed to different defendants).

45. *See* discussion *infra* Part II (A)(2) (referencing the detailed discussion of cases that reflect the systemic nature of the prejudice faced by women who have been abused in the criminal legal system).

46. *See* *People v. Addimando*, 120 N.Y.S.3d 596, 614 (N.Y. Co. Ct. 2020) (decided on February 5, 2020, petition was denied citing lack of evidence and the sentence was not unduly harsh).

47. *See* *Middleton v. McNeil*, 541 U.S. 433, 433 (2004) (granted certiorari and reversed and remanded); *DePetris v. Kuykendall*, 239 F.3d 1057, 1057 (9th Cir. 2001) (holding the exclusion of evidence of abuse violated the defendant's due process rights and exclusion of imperfect self-defense is harmful); *Seaman v. Washington*, 506 F. App'x 349, 351 (6th Cir. 2012) (failure of counsel to fully develop BSS argument did not entitle her to relief, reversed, and remanded for dismissal).

48. *See* discussion *infra* Part II (A)(2) (discussing cases across the nation as examples of the harm caused by broad and inconsistent discretion for admission of BSS evidence).

*a. Angelique: Sentenced to Forty Years to Life*

In 2017, Angelique Spurlock was convicted of second-degree murder and sentenced to forty years to life for killing her abusive ex-partner, James McQuater.<sup>49</sup> Angelique shot James after a physical fight.<sup>50</sup> At trial, Angelique and several witnesses testified that James abused Angelique, and the parties stipulated that James had a prior 2014 domestic violence conviction against Angelique.<sup>51</sup> Before the killing, James had broken into her home and choked her.<sup>52</sup>

The defense called an expert on Intimate Partner Battering, who explained that Angelique had suffered “pretty severe domestic violence.”<sup>53</sup> The trial court admitted two phone calls where Angelique said to James, “I love you too.”<sup>54</sup> The trial court, however, rejected the defense’s request to admit more calls that supported that Angelique was in an abusive relationship.<sup>55</sup> The court admitted Angelique’s interviews with the sheriff’s department but excluded her emotional reaction when she learned about James’s death.<sup>56</sup> Furthermore, the trial court permitted the prosecution to present a video of Angelique and James playing “happily with their daughters” to show she was not afraid of him.<sup>57</sup> Finally, the court allowed a neighbor to testify seeing Angelique chasing James with a machete three months before the killing.<sup>58</sup> The court instructed the jury that they could conclude that Angelique was inclined to commit domestic violence and murder if they decided she committed the *uncharged* domestic violence.<sup>59</sup> The appellate court affirmed her conviction.<sup>60</sup>

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49. *People v. Spurlock*, No. B282499, 2019 WL 698106, at \*1, \*18 (Cal. Ct. App. Feb. 20, 2019).

50. *See id.* at \*1–2 (explaining that a valid protective order was in place at the time).

51. *Id.* at \*1.

52. *See id.* at \*2 (describing how Angelique called James’s probation officer to report the incident).

53. *Id.* at \*4.

54. *Id.* at \*4, \*11.

55. *People v. Spurlock*, No. B282499, 2019 WL 698106, at \*4 (Cal. Ct. App. Feb. 20, 2019) (reasoning that the calls included highly prejudicial features, including Angelique crying about her children).

56. *Id.* at \*5, \*15.

57. *Id.* at \*5, \*17.

58. *Id.* at \*7.

59. *Id.* at \*4, \*10 (emphasis added).



*b. Kelly: Sentenced to Twenty-Nine Years to Life*

In 1995, Kelly DePetrìs shot and killed her abusive husband, Dana DePetrìs, while he slept in bed after he threatened at gunpoint to kill her earlier that day.<sup>61</sup> At trial, Kelly testified that Dana constantly abused her.<sup>62</sup> When she tried to leave him, Dana took their baby at gunpoint.<sup>63</sup> Several witnesses testified about the injuries Dana caused Kelly through beatings.<sup>64</sup> An expert on BWS testified that Kelly's test results, history, and conduct were consistent with other battered women's information.<sup>65</sup> To prove that she acted under an actual fear that her husband would kill her, Kelly tried to offer Dana's handwritten journal into evidence, where Dana described beating his first wife and stepdaughter and raping another woman.<sup>66</sup> Kelly tried to testify that reading the journal contributed to her belief that she and her baby were in imminent danger.<sup>67</sup> The trial court excluded the journal and any reference to it as irrelevant.<sup>68</sup> The jury convicted her of first-degree murder.<sup>69</sup> Years later, the Ninth Circuit reversed Kelly's conviction after finding that the journal's exclusion violated Kelly's constitutional right to present a defense.<sup>70</sup>

*c. Nancy: Sentenced to Life Imprisonment*

In 2005, Nancy Seaman was convicted of first-degree murder and sentenced to life imprisonment for killing her abusive husband,

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60. See *id.* at \*5 (remanding the case only to permit the trial court to exercise its discretion to strike the personal discharge of a firearm enhancement).

61. *DePetrìs v. Kuykendall*, 239 F.3d 1057, 1058, 1060 (9th Cir. 2001) (explaining that Dana awakened Kelly at night, pointed the gun at her head, and said: "[t]ic-toc, tic-toc. You better come out with the money for rent or you are clocking out.").

62. *Id.* at 1059.

63. *Id.*

64. *Id.* at 1060.

65. *Id.*

66. *Id.*

67. *DePetrìs v. Kuykendall*, 239 F.3d 1057, 1059 (9th Cir. 2001).

68. *Id.*

69. *Id.* at 1060.

70. *Id.* at 1059 ("None of the other evidence adduced at trial could in any way make up for Kelly DePetrìs's own testimony about her state of mind, or for Dana DePetrìs's handwritten corroboration of it.").

Robert Seaman.<sup>71</sup> Nancy testified that he threw her against the refrigerator, threatened to kill her, and cut her hand with a knife.<sup>72</sup> She ran to the garage, where she found a hatchet that she swung blindly at her husband.<sup>73</sup> She continued to hit him because she was terrified he would kill her for fighting back.<sup>74</sup> Robert was struck with a hatchet sixteen times and stabbed twenty-one times.<sup>75</sup>

At trial, Nancy testified that she killed her husband in self-defense after suffering abuse for decades.<sup>76</sup> Her colleagues' testimony confirmed that Nancy displayed injuries at her job.<sup>77</sup> Two expert witnesses testified about BWS but could not testify whether Nancy suffered from the syndrome.<sup>78</sup> Further, the trial court failed to include one of the elements of first-degree murder in its jury instructions: "that the killing was not justified, excused, or done under circumstances that reduce it to a lesser crime."<sup>79</sup> The jury convicted Nancy.<sup>80</sup> After a district court granted Nancy a conditional writ of habeas corpus,<sup>81</sup> the Sixth Circuit vacated the writ.<sup>82</sup>

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71. *Seaman v. Washington*, No. 08-CV-14038, 2010 WL 4386930, at \*3 (E.D. Mich. Oct. 29, 2010), *rev'd*, 506 F. App'x 349 (6th Cir. 2012).

72. *Id.* at \*1; *Seaman v. Washington*, 506 F. App'x 349, 351 (6th Cir. 2012).

73. *Seaman*, 506 F. App'x at 351.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Seaman*, 2010 WL 4386930, at \*3.

78. *Seaman*, 506 F. App'x at 355.

79. *Seaman*, 2010 WL 4386930, at \*16.

80. *See id.* at \*3–4 (explaining that the trial court reduced Nancy's conviction to second-degree murder because her first-degree murder conviction was not supported by the evidence, but the Michigan Court of Appeals reinstated Nancy's first-degree murder conviction).

81. *See id.* at \*15 (concluding that she suffered ineffective assistance of counsel when her attorney failed to fully develop her BWS claim). A writ of habeas corpus is a civil action against the State agent holding a person in custody. It is used to bring the case before a court to determine if the person's imprisonment is lawful. See generally *Habeas Corpus*, CORNELL L. SCH. LEGAL INFO. INST., [https://www.law.cornell.edu/wex/habeas\\_corpus](https://www.law.cornell.edu/wex/habeas_corpus) (last visited June 10, 2021) (defining a writ of habeas corpus as being used to bring a prisoner or other detainee before the court to determine if the person's imprisonment or detention is lawful).

82. *See Seaman*, 506 F. App'x at 351 (remanding the case with instructions to dismiss it).

*d. Sally: Sentenced to Fifteen Years to Life*

In 1996, Sally Marie McNeil was convicted of second-degree murder for killing her abusive husband, Ray McNeil.<sup>83</sup> After Ray started choking her, she ran into the bedroom, loaded her shotgun, and shot him.<sup>84</sup> He continued his advance towards her, so she shot him a second time.<sup>85</sup> At trial, Sally testified that she acted in self-defense, fearing that her life was in imminent danger.<sup>86</sup> An expert witness testified that Sally suffered from the effects of BWS.<sup>87</sup> The trial court instructed the jury that it could not consider BWS evidence in determining the reasonableness of Sally's belief and that "imminent peril is a peril that is apparent to a reasonable person."<sup>88</sup> The prosecution conceded that both instructions were erroneous, but she was still convicted based on those instructions.<sup>89</sup>

*e. Nicole: Sentenced to Nineteen Years to Life*

Nicole Addimando was convicted of second-degree murder and sentenced to nineteen years to life in prison for killing her abusive partner, Christopher Grover.<sup>90</sup> Nicole shot Christopher while he was

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83. *McNeil v. Middleton*, 344 F.3d 988, 990 (9th Cir. 2003), *cert. granted*, *rev'd*, 541 U.S. 433 (2004).

84. *Id.* at 992.

85. *Id.*

86. *Id.* at 990.

87. *Id.*

88. *McNeil v. Middleton*, 344 F.3d 988, 990 (9th Cir. 2003), *cert. granted*, *rev'd*, 541 U.S. 433 (2004).

89. *See id.* at 990, 995, 1002 (granting Sally's petition for writ of habeas corpus and reversing her conviction because the erroneous instruction prevented the jury from considering her imperfect self-defense and violated her due process right to present a defense). *But see Middleton v. McNeil*, 541 U.S. 433, 436, 438–39 (2004) (reinstating Sally's conviction because the state court did not unreasonably apply federal law when it found that the faulty instruction had no reasonable likelihood of misleading the jury).

90. *See* Geoffrey Wilson, *Addimando Sentenced to 19 Years to Life in Murder of Boyfriend Grover in Poughkeepsie*, *POUGHKEEPSIE J.* (Feb. 11, 2020), <https://www.poughkeepsiejournal.com/story/news/crime/2020/02/11/nicole-addimando-sentenced-murder-christopher-grover-poughkeepsie/4694452002> (discussing the conviction of Nicole Addimando following the shooting death of her boyfriend, Christopher Grover).

lying on the couch.<sup>91</sup> At trial, Nicole narrated a lifelong history of abuse before and during her relationship with Christopher.<sup>92</sup> Multiple witnesses testified about observing several wounds on Nicole's body over time.<sup>93</sup> The defense's psychiatrist expert testified that Nicole acted in accordance with BWS.<sup>94</sup> The prosecution argued that there was insufficient proof of domestic abuse and challenged the abuser's identity.<sup>95</sup> According to the prosecution, Christopher did not fit the profile of an abuser.<sup>96</sup> The jury unanimously rejected Nicole's BWS justification defense.<sup>97</sup>

Before sentencing, Nicole petitioned the court to conduct a hearing according to NY Penal Law § 60.12.<sup>98</sup> At the sentencing hearing, the court concluded that, although Nicole had presented "horrific allegations," sentencing her within the standard sentencing range would not be "unduly harsh."<sup>99</sup> The court reasoned she "had a myriad of non-lethal options at her disposal," had the opportunity to "safely leave her *alleged* abuser, and inconsistently recounted her abuse."<sup>100</sup>

## B. WOMEN'S RIGHT TO EQUALITY BEFORE THE LAW UNDER THE ICCPR

### 1. *The United States' International Responsibility Under the ICCPR*

The International Covenant on Civil and Political Rights (hereinafter "ICCPR" or "Covenant")—an international human rights

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91. *People v. Addimando*, 120 N.Y.S.3d 596, 614, 616 (N.Y. Co. Ct. 2020).

92. *See id.* at 602–04 (describing how Nicole was abused by several men as a child).

93. *Id.* at 604.

94. *Id.* at 605.

95. *See id.* at 598, 605, 607–08 (explaining how the prosecution argued that the identity of the defendant's abuser was not corroborated by any witness or pictures but came solely from the defendant).

96. *Id.* at 613.

97. *People v. Addimando*, 120 N.Y.S.3d 596, 598 (N.Y. Co. Ct. 2020).

98. *See id.* at 598–99 (explaining that this NY statute authorizes courts to impose an alternative sentence if the defendant proves by a preponderance of the evidence that domestic abuse by a family member was a significant contributing factor to her criminal behavior).

99. *Id.* at 618, 620.

100. *Id.* at 620–21 (emphasis added).

treaty that the U.N. General Assembly adopted in 1966—obligates State parties to respect and protect civil and political rights, such as the rights to life, equality before the law, and a fair trial.<sup>101</sup> Upon ratification on June 8, 1992,<sup>102</sup> the Covenant became the “supreme law of the land” under the Supremacy Clause of the U.S. Constitution.<sup>103</sup> The United States must comply with the ICCPR subject to the Reservations, Understandings, and Declarations (RUDs) it entered.<sup>104</sup> Among other RUDs, the United States submitted an Understanding that clarifies that the federal, state, and local governments shall implement the ICCPR.<sup>105</sup> It also presented a Declaration stating that the ICCPR provisions are not self-executing,<sup>106</sup> which means the provisions are not directly enforceable in domestic courts unless Congress enacts implementing legislation.<sup>107</sup> Nonetheless, the United States retains the international obligation to comply with the ICCPR.<sup>108</sup>

The U.N. Human Rights Committee (HRC) is the body of independent experts that monitors State parties’ implementation of the ICCPR<sup>109</sup> and interprets its provisions through its General

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101. International Covenant on Civil and Political Rights art. 26, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

102. *Status of Treaties, International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION 3, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf> [hereinafter *Status of Treaties, ICCPR*].

103. U.S. CONST. art. VI, cl. 2.

104. 138 CONG. REC. S4781-01 (Apr. 2, 1992).

105. *See id.* (understanding that the federal government will implement the treaty to the extent that it is able and remove any impediments to states to fulfill their obligations under the ICCPR).

106. *See id.* (stating that “even though the covenant is non-self-executing, these will now become binding international obligations of the United States.”).

107. *See* *Medellin v. Texas*, 552 U.S. 491, 505, 525–26 (2008) (explaining that only self-executing treaties immediately become federal law); *see also* Brian L. Porto, *Construction and Application of International Covenant on Civil and Political Rights*, 11 A.L.R. Fed. 2d 751 (2021) (showing that, as of February 2021, the U.S. has not enacted implementing legislation creating a federal cause of action for violations of the ICCPR).

108. *See Medellin*, 552 U.S. at 504 (explaining that a decision that flows from the treaties ratified by the United States constitutes an international law obligation).

109. *Human Rights Committee*, OFF. OF THE UNITED NATIONS HIGH COMM’R FOR HUM. RTS.,

Comments and jurisprudence.<sup>110</sup> U.N. Treaty Bodies, like the HRC, interpret human rights treaties by looking at the jurisprudence of other human rights bodies as a persuasive source of law.<sup>111</sup> Therefore, the ICCPR's right to equality before the law will be analyzed in light of the Human Rights Committee's and the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee)'s jurisprudence.<sup>112</sup> The CEDAW Committee is the body of independent experts that monitors State parties' implementation of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), a treaty that establishes an international bill of rights for women and an agenda to guarantee the enjoyment of those rights.<sup>113</sup>

## 2. Article 26 of the ICCPR

The Human Rights Committee has explained that article 26 entitles all persons to equality before the law and to equal protection of the law, prohibits any legal discrimination, and guarantees effective protection to all persons.<sup>114</sup> The Committee further clarifies that article 26 prohibits discrimination *in law or in fact* in any field

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<https://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx> (last visited June 23, 2021).

110. *See id.* (explaining that a General Comment is a treaty body's interpretation of human rights treaty provisions).

111. *See, e.g.*, U.N. Human Rights Committee, General Comment No. 18: Non-discrimination, ¶ 6 (Nov. 10, 1989) [hereinafter HRC, General Comment No. 18: Non-discrimination] (quoting the definitions of discrimination provided in the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women); U.N. Human Rights Committee, *Müller v. Namibia*, ¶¶ 3.2, 5.5, Communication No. 919/2000, U.N. Doc. CCPR/C/74/D/919/2000 (Mar. 26, 2002) (citing the European Court of Human Rights decision in *Burghartz v. Switzerland*, where the court found no legal justification for a law to require married women to take their husbands' surnames).

112. *See Committee on the Elimination of All Forms of Discrimination against Women*, OFF. OF THE UNITED NATIONS HIGH COMM'R FOR HUM. RTS., <https://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx> (last visited June 26, 2021).

113. Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

114. HRC, General Comment No. 18: Non-discrimination, *supra* note 111, ¶ 1.

regulated and protected by public authorities.<sup>115</sup> Article 26 of ICCPR states:

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>116</sup>

3. *A State Party Violates ICCPR Article 26 When It Discriminates against Women on the Basis of Sex in a Field Regulated and Protected by Public Authorities*

Two elements must be proven to show that a State party has violated a woman's right to equality before the law under ICCPR article 26. First, a State party must discriminate on the basis of sex by providing differential treatment to women that was unreasonable, not objective, or had an illegitimate aim under the Covenant.<sup>117</sup> Second, public authorities must regulate and protect the field where the discrimination took place.<sup>118</sup> Thus, a State party to the ICCPR violates women's right to equality before the law under article 26 when it discriminates against them on the basis of sex in a field regulated and protected by public authorities.<sup>119</sup>

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115. *Id.* ¶ 12 (emphasis added) (explaining that when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content or application should not be discriminatory).

116. ICCPR, *supra* note 101, art. 26 (emphasis added).

117. *See* U.N. Human Rights Committee, *G. v. Australia*, ¶ 7.12, Communication No. 2172/2012, U.N. Doc. CCPR/C/119/D/2172/2012 (Mar. 17, 2017) (explaining that the test is whether the differential treatment met the criteria of reasonableness, objectivity, and legitimacy of aim); *see also* F. H. Zwaan-de Vries v. The Netherlands, ¶ 13, Communication No. 182/1984, U.N. Doc. CCPR/C/OP/2 (Apr. 9, 1987) (explaining that a differentiation based on reasonable and objective criteria does not amount to prohibited discrimination).

118. *See* HRC, General Comment No. 18: Non-discrimination, *supra* note 111, ¶ 12 (explaining that article 26 prohibits discrimination in law or in fact in any field regulated and protected by public authorities); *cf.*

*Trabajadores de la Hacienda Brasil Verde v. Brazil*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser C) No. 31, ¶ 334 (Oct. 20, 2016) (asserting that if the discrimination refers to unequal protection or application of domestic law, the fact must be analyzed in light of the right to equal protection).

119. *See* HRC, General Comment No. 18: Non-discrimination, *supra* note 111, ¶

*a. Differential Treatment that Constitutes Discrimination on the Basis of Sex*

Differential treatment constitutes discrimination when it is unreasonable, not objective, or has an illegitimate aim.<sup>120</sup> The HRC and the CEDAW Committee have found differential treatment of women to be discriminatory on the basis of sex when: (i) it has a disproportionately negative effect on women;<sup>121</sup> (ii) it is based on stereotypical and preconceived notions of domestic violence and the roles of men and women;<sup>122</sup> or (iii) it has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise of women's human rights.<sup>123</sup> The Human Rights Committee has clarified that differential treatment is not discriminatory if the criteria for the differentiation are reasonable and objective and if the aim is legitimate under the ICCPR.<sup>124</sup> Nevertheless, the State party has the "heavy burden" of explaining the reason for the differentiation.<sup>125</sup>

*i. Differential Treatment That Has a Disproportionately Negative Effect on Women*

A State might discriminate against women when its laws have a

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12 (asserting that ICCPR article 26 is "concerned with the obligations imposed on States parties in regard to their legislation and the application thereof.").

120. *See id.* ¶ 13 (clarifying that "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.").

121. *See* U.N. Human Rights Committee, *Maya v. Nepal*, ¶ 12.5, Communication No. 2245/2013, U.N. Doc. CCPR/C/119/D/2245/2013 (Mar. 17, 2017) (arguing that an unreasonably short statutory period for bringing complaints of rape had a disproportionately negative effect on women).

122. U.N. Committee on the Elimination of Discrimination against Women, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, ¶ 26(c), U.N. Doc. CEDAW/C/GC/35 (July 26, 2017) [hereinafter CEDAW Committee, General Recommendation No. 35]; U.N. Committee on the Elimination of Discrimination against Women, General Recommendation No. 33 on women's access to justice, ¶¶ 26–27, U.N. Doc. CEDAW/C/GC/33 (Aug. 3, 2015) [hereinafter CEDAW Committee, General Recommendation No. 33].

123. HRC, General Comment No. 18: Non-discrimination, *supra* note 111, ¶ 6.

124. *Id.* ¶ 13.

125. U.N. Human Rights Committee, *Müller v. Namibia*, ¶ 6.7, Communication No. 919/2000, U.N. Doc. CCPR/C/74/D/919/2000 (Mar. 26, 2002).



disproportionately negative effect on women.<sup>126</sup> In *Maya v. Nepal*, Purna Maya was tortured and raped by multiple soldiers.<sup>127</sup> Nepal failed to investigate her allegations and provide her with redress.<sup>128</sup> The HRC found that the thirty-five-day statute of limitations applicable to the crime of rape was “flagrantly inconsistent with the gravity and nature of the crime” and had “a disproportionately negative effect on women, who are predominantly the victims of rape.”<sup>129</sup> The HRC concluded such statute of limitations prevented Purna Maya from accessing justice under Nepalese law, which constituted a violation of ICCPR article 2(3) (right to an effective remedy), read in conjunction with article 26 (right to equality before the law).<sup>130</sup>

Similarly, the CEDAW Committee found in *V.K. v. Bulgaria* that a law that placed an undue legal burden on women to access protective orders against their abusers was discriminatory.<sup>131</sup> The author of the complaint was a victim of long-term domestic violence by her husband.<sup>132</sup> After the author left her husband, a domestic court granted her an immediate protection order against him.<sup>133</sup> Nonetheless, the court rejected the author’s application for a permanent protection order because no domestic violence had been perpetrated against her in the month prior to her application as required by law.<sup>134</sup> The author argued that the law had a

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126. See *Maya v. Nepal*, ¶ 12.5 (ruling that a short statute of limitations for rape discriminated against women); see also CEDAW Committee, General Recommendation No. 35, *supra* note 122, ¶ 1 (defining gender-based violence as “violence which is directed against a woman because she is a woman or that affects women disproportionately.”)

127. *Maya v. Nepal*, ¶ 12.2.

128. *Id.* ¶ 2.11.

129. *Id.* ¶ 12.5.

130. *Id.*

131. U.N. Committee on the Elimination of Discrimination against Women, *V.K. v. Bulgaria*, ¶ 9.12, Communication No. 20/2008, U.N. Doc. CEDAW/C/49/D/20/2008 (July 25, 2011) (concluding that the courts’ refusal to issue a permanent protection order against the author’s husband “was based on stereotyped, preconceived and thus discriminatory notions of what constitutes domestic violence.”).

132. *Id.* ¶¶ 2.2, 2.5–2.6 (explaining that the author’s husband beat the author severely, tied her up, and committed economic violence against her).

133. *Id.* ¶¶ 2.11, 2.16.

134. *Id.* ¶ 2.18.

disproportionate impact on women, who are typically the victims of domestic violence.<sup>135</sup> The CEDAW Committee found that Bulgaria committed an act of discrimination against women in violation of CEDAW articles 2 (prohibition of discrimination) and 15 (right to equality before the law).<sup>136</sup>

The HRC explained in *Müller v. Namibia* that a long-standing tradition is not a justification for differential treatment of men and women.<sup>137</sup> Mr. Müller wanted to adopt his wife's surname.<sup>138</sup> Under domestic law, however, it was an offense to take the surname of another without governmental authorization, except when women assumed their husbands' surnames.<sup>139</sup> Namibia argued that the law only reflected a generally accepted situation in Namibian society.<sup>140</sup> The Committee ruled that the law made an unreasonable distinction between men and women, and thus Namibia had violated Mr. Müller's right to equality before the law under ICCPR article 26.<sup>141</sup>

*ii. Differential Treatment Based on Stereotypical and Preconceived Notions of Domestic Violence*

The HRC and the CEDAW Committee have explained that preconceived and stereotypical notions of violence against women, what women's responses to such violence should be, and the standard of proof required to prove its occurrence can affect women's rights to equality before the law.<sup>142</sup> Stereotyping affects women's credibility in court and results in decisions based on "myths

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135. *Id.* ¶ 3.8.

136. *Id.* ¶ 9.15.

137. U.N. Human Rights Committee, *Müller v. Namibia*, ¶ 6.8., Communication No. 919/2000, U.N. Doc. CCPR/C/74/D/919/2000 (Mar. 26, 2002).

138. *Id.* ¶ 2.1.

139. *Id.* ¶ 2.2 (explaining that a husband would have to request the government's authorization to adopt his wife's surname).

140. *Id.* ¶ 6.8.

141. *Id.*

142. CEDAW Committee, General Recommendation No. 35, *supra* note 122, ¶ 26(c); see U.N. Human Rights Committee, *L.N.P. v. Argentina*, ¶ 13.3, Communication No. 1610/2007, U.N. Doc. CCPR/C/102/D/1610/2007 (July 18, 2011) (finding a violation of article 26 of the ICCPR because casting doubt on a rape victim's morality based on her loss of virginity constituted gender-based discrimination).

rather than relevant facts.”<sup>143</sup> Such stereotyping, the CEDAW Committee argues, may lead “judges to misinterpret or misapply laws . . . which can, in turn, lead to miscarriages of justice.”<sup>144</sup>

As explained above, in *V.K. v. Bulgaria*, domestic courts rejected the author’s application for a permanent protection order because she suffered no violence in the previous month.<sup>145</sup> The CEDAW Committee found that the law’s rationale—providing urgent court interventions rather than policing cohabitation—lacked gender sensitivity because it reflected the preconceived notion that domestic violence is a private matter.<sup>146</sup> Further, the Committee reasoned that the domestic court’s exclusive focus on an immediate threat to the victim’s life reflected a stereotyped understanding of domestic abuse.<sup>147</sup>

The CEDAW Committee has also indicated that judges often apply rigid standards based on what they consider to be women’s appropriate behavior and penalize those who do not conform.<sup>148</sup> In *X v. Timor-Leste*, the author of the complaint was convicted of aggravated murder for killing her abusive partner and sentenced to fifteen years in prison.<sup>149</sup> Although the author reported the abuse to the authorities, no one protected her.<sup>150</sup> On the day of the incident, the author was asleep when her husband started kicking her until she lost consciousness.<sup>151</sup> As she regained consciousness and saw him approaching her again, she grabbed a kitchen knife and stabbed him in the chest, killing him.<sup>152</sup> Although she was granted a retrial

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143. CEDAW Committee, General Recommendation No. 33, *supra* note 122, ¶ 26.

144. *Id.* ¶¶ 26–27.

145. U.N. Committee on the Elimination of Discrimination against Women, *V.K. v. Bulgaria*, ¶ 2.18, Communication No. 20/2008, U.N. Doc. CEDAW/C/49/D/20/2008 (July 25, 2011).

146. *Id.* ¶ 9.12.

147. *Id.*

148. CEDAW Committee, General Recommendation No. 33, *supra* note 122, ¶ 26.

149. U.N. Committee on the Elimination of Discrimination against Women, *X v. Timor-Leste*, ¶ 1.2, Communication No. 88/2015, U.N. Doc. CEDAW/C/69/D/88/2015 (Feb. 26, 2018).

150. *Id.* ¶ 2.4.

151. *Id.* ¶ 2.7.

152. *Id.*

because her self-defense claim had not been considered in the first trial,<sup>153</sup> the CEDAW Committee found that the first trial's defects—including the court telling the author that “as a wife, you must protect your husband”—were not remedied in the retrial.<sup>154</sup> The CEDAW Committee concluded that Timor-Leste infringed the author's rights under articles 2 (prohibition of discrimination against women) and 15 (right to equality before the law) for failing to address the issue of ongoing domestic violence, for the treatment of her testimony, and for the sentencing decision.<sup>155</sup>

Similarly, in *J.I. v. Finland*, the complaint's author suffered prolonged abuse by her husband, J.A.<sup>156</sup> One day, after J.A. hit the author on the head with a drill, J.A. was detained, and the welfare authorities took custody of the couple's eight-month-old child.<sup>157</sup> After the couple separated, a Finnish court granted J.A. custody of the son, reasoning that the mother's behavior indicated instability.<sup>158</sup> Months later, J.A. was convicted of violent assault against his wife.<sup>159</sup> Despite the conviction, the appellate court upheld the lower court's decision granting sole custody of the child to J.A.<sup>160</sup> The CEDAW Committee found that the courts applied stereotyped and discriminatory notions of domestic violence by treating J.A.'s violence towards the author as a disagreement between parents, dismissing the importance of J.A.'s criminal conviction, and granting

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153. *Id.* ¶¶ 2.15–2.16.

154. *Id.* ¶ 6.5.

155. U.N. Committee on the Elimination of Discrimination against Women, *X v. Timor-Leste*, ¶¶ 6.5, 6.7, 6.9–7, Communication No. 88/2015, U.N. Doc. CEDAW/C/69/D/88/2015 (Feb. 26, 2018) (describing that the State party failed to take appropriate measures to prevent gender-based violence, gave the author's voice less credence than that of a third-party who had not been present at all relevant times, and sentenced the author to fifteen years in prison despite evidence that she acted in self-defense).

156. U.N. Committee on the Elimination of Discrimination against Women, *J.I. v. Finland*, ¶ 2.1, Communication No. 103/2016, U.N. Doc. CEDAW/C/69/D/103/2016 (Mar. 5, 2018).

157. *Id.* ¶ 2.6.

158. *Id.* ¶¶ 2.8–2.10 (explaining that the domestic court focused on the author's “hostile attitude” towards her husband and on how that might affect their child in the future).

159. *Id.* ¶ 2.12.

160. *Id.* ¶ 2.13.

custody to a violent man.<sup>161</sup> The CEDAW Committee found that Finland violated the author's right to equality before the law, under CEDAW article 15, among other rights.<sup>162</sup>

In *S.T. v. Russia*, Mr. Timagov repeatedly mistreated his wife (the complaint's author) and their children.<sup>163</sup> After Mr. Timagov beat his wife with a shovel, she filed for divorce.<sup>164</sup> Mr. Timagov was later arrested and indicted for attempted murder for hitting the author in the head with an axe.<sup>165</sup> At trial, Mr. Timagov argued that the author had systematically insulted him and that he had been temporarily insane.<sup>166</sup> The court permitted the prosecution to reduce the charges to infliction of serious bodily harm in state of temporary insanity.<sup>167</sup> Because of the time served since his arrest, Mr. Timagov was released.<sup>168</sup> The CEDAW Committee found that the Russian authorities engaged in an act of discrimination against women by not giving equal weight to Mr. Timagov's domestic abuse record, violating CEDAW article 2 (prohibition of discrimination against women).<sup>169</sup>

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161. *Id.* ¶¶ 8.5, 8.9.

162. U.N. Committee on the Elimination of Discrimination against Women, *J.I. v. Finland*, ¶ 8.9, Communication No. 103/2016, U.N. Doc. CEDAW/C/69/D/103/2016 (Mar. 5, 2018).

163. U.N. Committee on the Elimination of Discrimination against Women, *S.T. v. Russia*, ¶ 2.1, Communication No. 65/2014, U.N. Doc. CEDAW/C/72/D/65/2014 (Feb. 25, 2019).

164. *Id.* ¶¶ 2.2, 2.5.

165. *Id.* ¶¶ 2.9–2.10, 2.12.

166. *Id.* ¶¶ 2.11, 2.14–2.15.

167. *Id.* ¶¶ 2.17–2.18.

168. *Id.* ¶ 2.18.

169. U.N. Committee on the Elimination of Discrimination against Women, *S.T. v. Russia*, ¶¶ 9.6, 9.12, Communication No. 65/2014, U.N. Doc. CEDAW/C/72/D/65/2014 (Feb. 25, 2019) (explaining that the victim was exposed to renewed trauma when the authorities failed to prevent the violence and adequately punish the perpetrator).

*iii. Differential Treatment That Impairs or Nullifies Women's Human Rights*

The Human Rights Committee has noted that the ICCPR:

neither defines the term 'discrimination' nor indicates what constitutes discrimination. However, . . . article 1 of the [CEDAW Convention] provides that '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 . . . of human rights and fundamental freedoms.<sup>170</sup>

The Human Rights Committee interprets an act of discrimination against women, through article 1 of the CEDAW Convention, as any restriction based on the basis of sex that impairs the exercise of a woman's human rights.<sup>171</sup> In *Broeks v. The Netherlands*, Mrs. Broeks claimed that domestic law made an unacceptable distinction in unemployment benefits on the basis of sex and status.<sup>172</sup> If she were a man, married or unmarried, the law would not deprive her of unemployment benefits.<sup>173</sup> Nevertheless, because she was a married woman, the law excluded her from continued unemployment benefits.<sup>174</sup> The HRC concluded that the Netherlands violated ICCPR article 26 "because [Mrs. Broeks] was denied a social security benefit on an equal footing with men."<sup>175</sup>

*b. Discrimination in a Field Regulated and Protected by Public Authorities*

Finally, acts by law enforcement authorities,<sup>176</sup> the legislature,<sup>177</sup>

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170. HRC, General Comment No. 18: Non-discrimination, *supra* note 111, ¶ 6.

171. *Id.*

172. U.N. Human Rights Committee, *Broeks v. The Netherlands*, ¶ 2.3, Communication No. 172/1984, U.N. Doc. CCPR/C/OP/2 (Apr. 9, 1987).

173. *Id.*

174. *Id.*

175. *Id.* ¶ 14–15.

176. *See* U.N. Human Rights Committee, *Maya v. Nepal*, ¶ 12.2, Communication No. 2245/2013, U.N. Doc. CCPR/C/119/D/2245/2013 (Mar. 17, 2017).

177. *See* *Broeks v. The Netherlands*, ¶ 2.3; U.N. Human Rights Committee, *Müller v. Namibia*, ¶ 2.2, Communication No. 919/2000, U.N. Doc. CCPR/C/74/D/919/2000 (Mar. 26, 2002).

and judicial courts<sup>178</sup> qualify as fields regulated and protected by public authorities. Thus, the discrimination on the basis of sex described in the abovementioned cases occurred in fields that public authorities regulate and protect.

*4. Possible Defense: The United States' Understanding Concerning Article 26*

The Vienna Convention on the Law of Treaties (VCLT) allows States to formulate a Reservation to a treaty except when the Reservation is prohibited or incompatible with the treaty's object and purpose.<sup>179</sup> A Reservation is a statement that purports to modify the treaty's legal effects.<sup>180</sup> In contrast, an Understanding is an interpretive statement that clarifies or elaborates a treaty provision without changing the State party's obligations.<sup>181</sup> The mere characterization of a condition as an Understanding rather than a Reservation is not conclusive.<sup>182</sup> Instead, the HRC looks at the State party's intention.<sup>183</sup> The United States could assert one potential defense to avoid international responsibility under ICCPR article 26 based on the following Understanding:<sup>184</sup>

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178. See *Müller v. Namibia*, ¶¶ 2.4–2.6; U.N. Committee on the Elimination of Discrimination against Women, *X v. Timor-Leste*, ¶ 6.5, Communication No. 88/2015, U.N. Doc. CEDAW/C/69/D/88/2015 (Feb. 26, 2018); U.N. Committee on the Elimination of Discrimination against Women, *J.I. v. Finland*, ¶ 8.9, Communication No. 103/2016, U.N. Doc. CEDAW/C/69/D/103/2016 (Mar. 5, 2018); U.N. Committee on the Elimination of Discrimination against Women, *S.T. v. Russia*, ¶ 9.6, Communication No. 65/2014, U.N. Doc. CEDAW/C/72/D/65/2014 (Feb. 25, 2019); U.N. Committee on the Elimination of Discrimination against Women, *V.K. v. Bulgaria*, ¶ 2.18, Communication No. 20/2008, U.N. Doc. CEDAW/C/49/D/20/2008 (July 25, 2011).

179. Vienna Convention on the Law of Treaties arts. 2(d), 19, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]; see also CONG. RSCH. SERV., S. PRT. 106–71, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE U.S. SENATE 125 n.21 (Jan. 2001) [hereinafter CONG. RSCH. SERV. STUDY] (explaining that although the United States has not ratified the VCLT, this treaty codifies customary international law).

180. VCLT, *supra* note 179, art. 2(d).

181. CONG. RSCH. SERV. STUDY, *supra* note 179, at 125.

182. *Id.* at 126.

183. U.N. Human Rights Committee, General Comment No. 24, ¶ 3, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 11, 1994) [hereinafter HRC, General Comment No. 24].

184. Article 4 of the ICCPR permits State parties to derogate their obligations

The United States understands distinctions based upon race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status—as those terms are used in Article 2, paragraph 1 and Article 26—to be permitted when such distinctions are, *at minimum, rationally* related to a *legitimate* governmental objective.<sup>185</sup>

As will be analyzed later, however, it is unlikely that the United States could escape liability under the ICCPR pursuant to this Understanding.<sup>186</sup>

### III. ANALYSIS

Statistical studies at the national and local levels suggest that women who kill their batterers in the United States have received differential treatment during their criminal proceedings for several decades.<sup>187</sup> The cases of five women convicted and sentenced for killing their abusers in California, Michigan, and New York also reveal the existence of a continuing and widespread pattern of discrimination.<sup>188</sup> The analysis in this section will prove that the United States violated female defendants' right to equality before the law under article 26 of the ICCPR.<sup>189</sup> It will also establish that the United States cannot assert a valid defense to avoid international responsibility.<sup>190</sup>

#### A. THE UNITED STATES VIOLATED ICCPR ARTICLE 26 BY DISCRIMINATING AGAINST FEMALE DEFENDANTS ON THE BASIS OF SEX IN A FIELD PROTECTED BY PUBLIC AUTHORITIES

As previously explained, to prove that a State party has violated a woman's right to equality before the law under article 26, two elements must be met: (1) the State must provide differential treatment that is unreasonable, not objective, or has an illegitimate aim (i.e., discriminate against that person) and (2) such treatment

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under the Covenant *only in time of public emergency* that threatens the life of the nation. See ICCPR, *supra* note 101, art. 4 (emphasis added).

185. 138 CONG. REC. S4781-01 (Apr. 2, 1992) (emphasis added).

186. See discussion *infra* Part III (B).

187. See discussion *supra* Part II (A)(1).

188. See discussion *supra* Part II (A)(2).

189. See discussion *infra* Part III (A).

190. See discussion *infra* Part III (B).



must occur in a field regulated by public authorities.<sup>191</sup> Thus, this section will first demonstrate that the United States discriminated on the basis of sex against female defendants accused of killing their abusers when it provided them with differential treatment that was unreasonable, not objective, or that had an illegitimate aim under the ICCPR.<sup>192</sup> Second, it will show that U.S. public authorities are responsible for trying criminal defendants.<sup>193</sup>

*1. The United States Discriminated on the Basis of Sex against Female Defendants Accused of Killing Their Abusers*

All the types of differential treatment presented in this section are not reasonable, objective, or legitimate under the ICCPR and thus constitute discrimination.<sup>194</sup> First, the statistics and cases will show that U.S. courts failed to recognize domestic violence victims' right to defend themselves from domestic abuse, which has had a disproportionately negative effect on women.<sup>195</sup> Second, courts have judged female defendants accused of killing their abusers based on stereotypical and biased notions of domestic violence.<sup>196</sup> Third, courts have ruled in ways that impair or nullify female defendants' human rights.<sup>197</sup> Therefore, the United States has discriminated on the basis of sex against female defendants judged for killing their abusers.<sup>198</sup>

*a. U.S. Courts' Failure to Recognize Victims of Domestic Violence Legal Right to Defend Themselves Has Had a Disproportionately Negative Effect on Women*

The HRC explained that laws that have a disproportionately negative effect on women might constitute sex-based discrimination.<sup>199</sup> The few available studies about women who kill

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191. See discussion *supra* Part II (B)(2)–(3).

192. See discussion *infra* Part III (A)(1).

193. See discussion *infra* Part III (A)(2).

194. See discussion *infra* Part III (A)(1).

195. See discussion *infra* Part III (A)(1)(a).

196. See discussion *infra* Part III (A)(1)(b).

197. See discussion *infra* Part III (A)(1)(c).

198. See discussion *infra* Part III (A)(2).

199. See U.N. Human Rights Committee, *Maya v. Nepal*, ¶ 12.5, Communication No. 2245/2013, U.N. Doc. CCPR/C/119/D/2245/2013 (Mar. 17,

their batterers suggest that U.S. authorities have left thousands of women without protection from domestic violence, and they nonetheless try and sentence these women harshly for their reactions to such violence.<sup>200</sup> The Federal Sentencing Guidelines do not explicitly prescribe courts to consider a defendant's domestic abuse history.<sup>201</sup> National statistics from the 1990s show that women who killed their male partners received higher sentences than men who killed their female partners.<sup>202</sup> The results from the Michigan Battered Women's Clemency Project, if not reflective of the United States as a whole, are consistent with national data, showing a higher conviction rate and longer average sentences for domestic violence victims (all of whom were women) in Oakland County, Michigan.<sup>203</sup>

The United States' lack of sentencing guidelines—at the federal level and in most states—for domestic violence victims who kill in response to such abuse has disproportionate, adverse effects on women because most domestic violence victims are women.<sup>204</sup>

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2017) (ruling that a short statute of limitations for rape discriminated against women); *see also* CEDAW Committee, General Recommendation No. 35, *supra* note 122, ¶ 1 (defining gender-based violence as “violence which is directed against a woman because she is a woman or that affects women disproportionately.”).

200. *See* National Coalition Against Domestic Violence, *supra* note 33, at 2 (explaining that one in two female murder victims is killed by an intimate partner); *Women in Prison: An Overview*, *supra* note 4 (describing how the vast majority of women in prison have been victims of domestic violence prior to their incarceration).

201. *See* 18 U.S.C. § 3553 (listing the factors courts should consider in imposing a sentence, which do not include a history of domestic violence).

202. *Women in Prison: An Overview*, *supra* note 4 (showing that women who killed their partners were sentenced to fifteen years in prison on average, while the average prison sentence for men who killed their female partners was two to six years).

203. Jacobsen, *supra* note 6, at 45, 46 n.113 (describing how if the defendant was a victim of domestic violence, seventy-seven percent were convicted, compared to sixty-two percent otherwise).

204. *See* 18 U.S.C. § 3553 (listing the factors courts should consider in imposing a sentence, which do not include a history of domestic violence); PENAL REFORM INTERNATIONAL, *supra* note 2, at 15, 17 (explaining that a history of abuse was not provided for in sentencing guidelines in most U.S. states surveyed); *see also* NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, *supra* note 33, at 1–2 (stating that one in four women—compared to one in ten men—experiences sexual and physical violence at the hands of an intimate partner); CEDAW Committee,

Furthermore, the NCDBW study shows that the vast majority of female defendants (eighty-five percent or 146 women) tried to introduce expert testimony on battering and its effects compared to a minority of men (nineteen percent or thirty-five men).<sup>205</sup> Like the inflexible statute of limitations for rape in *Maya v. Nepal*, which had a disproportionate effect on women,<sup>206</sup> some laws regulating the introduction at trial of expert testimony on battering also have a disproportionate impact on women, the predominant victims of domestic violence.<sup>207</sup> In *Seaman v. Washington*, for instance, Nancy's two expert witnesses could not testify on whether she suffered from BWS because her counsel and the court agreed that Michigan law did not allow it.<sup>208</sup> When laws that regulate the admissibility of expert testimony on BWS are restrictive and inflexible, their effect is disproportionately negative on women, who lose the ability to defend themselves in court, which constitutes sex-based discrimination.<sup>209</sup>

The NCDBW study not only showed that more female defendants than male defendants tried to introduce expert testimony on battering and its effects, but it also showed that courts obstructed a larger percentage of women (thirty-seven percent) than men (twenty-six percent) from introducing such expert testimony.<sup>210</sup> Analogous to Namibia's domestic laws in *Müller v. Namibia*, which made choosing a wife's surname more cumbersome than choosing a husband's surname,<sup>211</sup> some U.S. courts have made it more

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General Recommendation No. 33, *supra* note 122, ¶ 51(m) (recommending State parties to monitor sentencing procedures and eliminate discrimination against women in the penalties for certain crimes).

205. Pezzell, *supra* note 6, at 15–16 (adding that seventy-four percent of the cases involving a female defendant were homicide cases and approximately half of those cases involved a self-defense claim).

206. U.N. Human Rights Committee, *Maya v. Nepal*, ¶ 12.5, Communication No. 2245/2013, U.N. Doc. CCPR/C/119/D/2245/2013 (Mar. 17, 2017).

207. Pezzell, *supra* note 6, at 15–16.

208. *Seaman v. Washington*, 506 F. App'x 349, 358 (6th Cir. 2012) (explaining that the Michigan Supreme Court had not settled this area of the law).

209. *See Maya v. Nepal*, ¶ 12.5 (concluding that the thirty-five-day statute of limitations for rape violated article 26 of the ICCPR).

210. Pezzell, *supra* note 6, at 15–16.

211. *See* U.N. Human Rights Committee, *Müller v. Namibia*, ¶ 6.8, Communication No. 919/2000, U.N. Doc. CCPR/C/74/D/919/2000 (Mar. 26,

cumbersome for female defendants to introduce expert testimony on battering and its effects than for male defendants to do the same.<sup>212</sup> Thus, like the State in *Müller v. Namibia*,<sup>213</sup> the United States has discriminated against female defendants on the basis of sex by making it harder for them than for male defendants to introduce expert testimony on battering.<sup>214</sup>

*b. U.S. Courts Are Providing Differential Treatment to Female Defendants Accused of Killing Their Abusers Based on Stereotypical and Preconceived Notions of Domestic Violence*

The courts that tried Angelique, Kelly, Sally, Nancy, and Nicole infected their criminal proceedings with gender biases and stereotypical notions of domestic violence.<sup>215</sup> The CEDAW Committee explained that judges tend to apply rigid standards based on what they consider to be women's appropriate behavior and penalize those who do not conform.<sup>216</sup> In *People v. Spurlock*, the court admitted two phone calls where Angelique said, "I love you too," to James, her abusive husband, and a video of Angelique and James playing with their children.<sup>217</sup> According to the court, the calls were probative of Angelique's feelings towards James, and the video

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2002) (concluding that to subject the possibility of choosing the wife's surname as family name to more cumbersome conditions than the alternative is unreasonable).

212. See Pezzell, *supra* note 6, at 15–16.

213. See *Müller v. Namibia*, ¶ 6.8 (explaining that a long-standing tradition cannot justify differential treatment and ruling Namibia violated ICCPR article 26).

214. See Pezzell, *supra* note 6, at 15–16; see also CEDAW Committee, General Recommendation No. 35, *supra* note 122, ¶ 29(c)(ii) (urging States to repeal discriminatory evidentiary rules and judicial practices that disregard a history of gender-based violence to female defendants' detriment); CEDAW Committee, General Recommendation No. 33, *supra* note 122, ¶ 51(h) (recommending States to ensure that evidentiary requirements are not overly restrictive, inflexible, or influenced by gender stereotypes).

215. See CEDAW Committee, General Recommendation No. 33, *supra* note 122, ¶ 8 (explaining that discrimination against women based on gender stereotypes has an adverse impact on women's ability to access justice on an equal basis with men).

216. *Id.* ¶ 26.

217. *People v. Spurlock*, No. B282499, 2019 WL 698106, at \*11, \*17 (Cal. Ct. App. Feb. 20, 2019) (According to the prosecution, the video rebutted that she had PTSD because she seemed "happy-go-lucky, not under unusual stress.").

rebutted that she was afraid of him.<sup>218</sup> Such rationale reveals the court's stereotypical understanding that women should react to domestic violence in specific ways.<sup>219</sup> The domestic court in *X v. Timor-Leste* allowed gender stereotypes to infect the proceedings by giving more credibility to a third party (who was not present at all relevant times) than to the author.<sup>220</sup> Similarly, the court in Angelique's case showed bias by admitting into evidence the calls and video offered by the prosecution while rejecting the defense's request to admit more phone calls that supported Angelique's claim to being in an abusive relationship.<sup>221</sup> The court further excluded her emotional reaction when she learned about James's death because the risk of undue prejudice of the jury hearing Angelique's "hysterical crying" substantially outweighed its probative value.<sup>222</sup> Like the domestic courts in *X v. Timor-Leste*, which applied exacting standards based on preconceived notions of what constitutes domestic violence,<sup>223</sup> the trial court in Angelique's case made evidentiary decisions based on preconceived notions of how an abused woman should respond to such abuse.<sup>224</sup>

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218. *Id.* at \*12, \*17.

219. *See id.* (suggesting that if a domestic violence victim says "I love you" to her abuser, she consequently does not fear him).

220. *See* U.N. Committee on the Elimination of Discrimination against Women, *X v. Timor-Leste*, ¶¶ 6.5–6.6, Communication No. 88/2015, U.N. Doc. CEDAW/C/69/D/88/2015 (Feb. 26, 2018) ("[T]he Defence Force took the author's partner's word on trust, and believed that he would no longer beat the author.").

221. *See Spurlock*, 2019 WL 698106, at \*4, \*5, \*11, \*17 (reasoning that the calls included highly prejudicial features, including Angelique crying about her children); *c.f.* U.N. Committee on the Elimination of Discrimination against Women, *S.T. v. Russia*, ¶ 9.7, Communication No. 65/2014, U.N. Doc. CEDAW/C/72/D/65/2014 (Feb. 25, 2019) (finding that domestic courts discriminated against the victim of domestic violence on the basis of sex by giving more weight to opposing party's witnesses, who alleged that the victim insulted her abusive ex-husband, than to those witnesses who corroborated the victim's abuse history).

222. *Spurlock*, 2019 WL 698106, at \*5, \*15–16 (explaining that the defense argued that excluding Angelique's reaction would give the jury the false impression that she did not care she fired a fatal shot).

223. *X v. Timor-Leste*, ¶ 6.5; *See* CEDAW Committee, General Recommendation No. 35, *supra* note 122, ¶ 26(c) (explaining that stereotyping affects women's credibility).

224. *Spurlock*, 2019 WL 698106, at \*4, \*5, \*11, \*17; *See* CEDAW Committee, General Recommendation No. 33, *supra* note 122, ¶ 26 (stating that stereotyping

Stereotyping often leads judges to misapply laws.<sup>225</sup> Under a state law created to protect domestic violence victims,<sup>226</sup> the trial court admitted testimony on Angelique's involvement in a prior machete attack against James.<sup>227</sup> Further, it instructed the jury that if the jurors decided she committed the *uncharged* domestic violence, they could conclude that Angelique was inclined to commit domestic violence and "was likely to commit and did commit Murder."<sup>228</sup> Similar to the court in *J.I. v. Finland*, which focused on the "hostile attitude" of the author towards her abusive husband and granted custody of their child to him,<sup>229</sup> the trial court in Angelique's case admitted character evidence for the jury to infer that she was a violent murderer.<sup>230</sup> The courts in *J.I. v. Finland* applied stereotyped notions of domestic violence by treating the husband's repetitive pattern of unilateral violence towards the author as a disagreement between parents.<sup>231</sup> The trial court in Angelique's case equally distorted irrefutable evidence that Angelique was the victim of abuse by allowing the jury to infer that *she* was the abuser based on one incident (in which she could have acted in self-defense).<sup>232</sup> Consequently, like the States in *J.I. v. Finland*<sup>233</sup> and in *X v. Timor-Leste*,<sup>234</sup> the United States

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distorts perceptions and results in decisions based on myths rather than relevant facts).

225. CEDAW Committee, General Recommendation No. 33, *supra* note 122, ¶ 26.

226. *Spurlock*, 2019 WL 698106, at \*8 (explaining that § 1109 of the Evidence Code carves out exceptions to the general ban on character evidence in cases involving domestic violence).

227. *Id.* at \*7–8.

228. *Id.* at \*4, \*10 (reasoning that evidence that Angelique chased down and wounded James months before the shooting is highly probative of her state of mind when she shot James and not unduly prejudicial).

229. U.N. Committee on the Elimination of Discrimination against Women, *J.I. v. Finland*, ¶¶ 2.9–2.10, Communication No. 103/2016, U.N. Doc. CEDAW/C/69/D/103/2016 (Mar. 5, 2018).

230. *Spurlock*, 2019 WL 698106, at \*4, \*10.

231. *J.I. v. Finland*, ¶ 8.9.

232. See *Spurlock*, 2019 WL 698106, at \*1–2 (explaining that Angelique had a restraining order against James, the parties stipulated that James had a prior 2014 domestic violence conviction against Angelique, and Angelique called James's probation officer days before the incident because James broke into her house and choked her).

233. See *J.I. v. Finland*, ¶ 8.9 (holding that the authorities applied stereotyped and thus discriminatory notions of domestic violence).

discriminated against Angelique on the basis of sex through the court's unreasonable differential treatment towards her.<sup>235</sup>

The CEDAW Committee has explained further that stereotyping affects the credibility given to women's testimony.<sup>236</sup> In *DePetrís v. Kuykendall*, the trial court excluded the abusive husband's handwritten journal, where he described his beatings and sexual abuse of several women, and Kelly's state-of-mind testimony about reading the journal.<sup>237</sup> In *J.I. v. Finland*, the domestic court's gender bias led it to dismiss the importance of the abusive husband's criminal conviction and child welfare reports against him and to grant custody of the couple's child to a violent man.<sup>238</sup> Similarly, the trial court's gender bias in Kelly's case led it to exclude a critical piece of evidence that corroborated her testimony and reinforced her belief that she was in imminent danger.<sup>239</sup> Analogous to the court in *J.I. v. Finland*, which discredited the author's testimony,<sup>240</sup> the trial court in Kelly's case denied her the possibility of corroborating her testimony and explaining her state of mind to prove her defense of manslaughter.<sup>241</sup> Hence, like Finland discriminated against the author

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234. See U.N. Committee on the Elimination of Discrimination against Women, *X v. Timor-Leste*, ¶¶ 6.5–6.6, Communication No. 88/2015, U.N. Doc. CEDAW/C/69/D/88/2015 (Feb. 26, 2018) (ruling that domestic judges allowed gender stereotypes and bias to affect the weighing of evidence); see also U.N. Committee on the Elimination of Discrimination against Women, *S.T. v. Russia*, ¶¶ 9.6, 9.12, Communication No. 65/2014, U.N. Doc. CEDAW/C/72/D/65/2014 (Feb. 25, 2019) (finding the State discriminated against the author based on sex because the court gave precedence to the abusive ex-husband's version of events, while not giving equal consideration to the ex-husband's documented record of domestic violence).

235. See generally *Spurlock*, 2019 WL 698106, at \*1–2, \*4–5.

236. CEDAW Committee, General Recommendation No. 33, *supra* note 122, ¶ 26.

237. *DePetrís v. Kuykendall*, 239 F.3d 1057, 1059–61 (9th Cir. 2001).

238. *J.I. v. Finland*, ¶ 8.9.

239. See *DePetrís*, 239 F.3d at 1060–61 (explaining that the husband's journal described his physical abuse of a former partner, his beatings of his stepdaughter, his rape of a friend's girlfriend, and his recurrent beating of his first wife).

240. *J.I. v. Finland*, ¶¶ 6.16, 8.5–8.6.

241. See *DePetrís*, 239 F.3d at 1059, 1063, 1065 (reversing Kelly's conviction and explaining that none of the other evidence adduced at trial could make up for Kelly's testimony about her state of mind or for her abusive husband's handwritten corroboration of it).

on the basis of sex in *J.I. v. Finland*,<sup>242</sup> the United States discriminated against Kelly on the same basis through unreasonable differential treatment in court.<sup>243</sup>

Stereotyping also affects women's right to impartial judicial processes and impedes women's access to justice.<sup>244</sup> In *Seaman v. Washington*, the court failed to include in its jury instructions the element of first-degree murder that explains that such killing must not be "justified, excused, or done under circumstances that reduce it to a lesser crime."<sup>245</sup> Similarly, in *McNeil v. Middleton*, the court erroneously instructed the jury that it could not consider BWS evidence in determining the reasonableness of Sally's belief of imminent harm and that imminent peril must be apparent to a *reasonable* person.<sup>246</sup> Like the domestic courts in *X. v. Timor-Leste*, which did not properly address the issue of self-defense,<sup>247</sup> the courts in Nancy's and Sally's cases gave faulty jury instructions concerning first-degree murder and self-defense and voluntary manslaughter, respectively.<sup>248</sup> Analogous to the courts in *X. v. Timor-Leste*, which showed a pattern of bias by not adequately addressing the issue of self-defense,<sup>249</sup> the courts in Nancy's and Sally's case showed bias by erroneously modifying the jury instructions, which eliminated

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242. See *J.I. v. Finland*, ¶ 8.9 (finding that the authorities discriminated against the author for applying stereotyped notions of domestic violence).

243. See *DePetrìs*, 239 F.3d at 1062–63 (analogizing DePetrìs's case to past cases in which exclusion of critical corroborative evidence was found to be unconstitutional); see also CEDAW Committee, General Recommendation No. 33, *supra* note 122, ¶¶ 26–27 (asserting that stereotyping compromises the impartiality of the justice system and can shape a trial's final judgment).

244. U.N. Committee on the Elimination of Discrimination against Women, *X v. Timor-Leste*, ¶ 6.8, Communication No. 88/2015, U.N. Doc. CEDAW/C/69/D/88/2015 (Feb. 26, 2018); CEDAW Committee, General Recommendation No. 33, *supra* note 122, ¶ 26.

245. *Seaman v. Washington*, No. 08-CV-14038, 2010 WL 4386930, at \*1, \*16 (E.D. Mich. Oct. 29, 2010), *rev'd*, 506 F. App'x 349 (6th Cir. 2012) (describing how the jury convicted Nancy of first-degree evidence).

246. *McNeil v. Middleton*, 344 F.3d 988, 990 (9th Cir. 2003), *cert. granted, rev'd*, 541 U.S. 433 (2004) (emphasis added) (explaining that the prosecution conceded that both instructions were erroneous).

247. *X. v. Timor-Leste*, ¶¶ 2.16, 6.5.

248. *Seaman*, 2010 WL 4386930, at \*16; *McNeil*, 344 F.3d at 990.

249. *X. v. Timor-Leste*, ¶ 6.5.



Nancy's and Sally's defense theories from jury consideration.<sup>250</sup> Therefore, like the courts in *X v. Timor-Leste*,<sup>251</sup> the U.S. courts provided unreasonable differential treatment to Nancy and Sally that constitutes sex-based discrimination.<sup>252</sup>

Judges are not the only actors in the justice system who apply and perpetuate stereotypes.<sup>253</sup> When prosecutors allow stereotypes to influence trials, undermining domestic violence survivors' claims, they also discriminate against women.<sup>254</sup> The prosecution in *People v. Addimando* argued that there was insufficient proof of abuse and that Christopher did not fit the profile of a *typical* domestic violence abuser, despite overwhelming evidence that he horrifically abused Nicole.<sup>255</sup> Comparably, the prosecution in *S.T. v. Russia* injected gender stereotypes into the case proceedings by giving precedence to the abuser's version of events while undermining the author's testimony.<sup>256</sup> The prosecution in Nicole's case infected her trial with

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250. See *Seaman*, 2010 WL 4386930, at \*16–17 (explaining that because Nancy presented a defense of self-defense, the trial court was obliged to instruct the jury on the omitted language but concluding that the error was harmless because the court “much later in the instructions” included an instruction on self-defense); *McNeil*, 344 F.3d at 998, 1001–02 (asserting that Sally's only defense was that she killed her husband in an honest belief that her life was in imminent peril, and thus the erroneous definition of imminent peril likely prevented the jury from considering how the BWS could have affected Sally's perception of imminent harm).

251. See *X v. Timor-Leste*, ¶¶ 6.5–6.6 (holding that the first trial's defects, when the court dismissed the author's self-defense claim, showed a pattern of bias that continued into the retrial and was enormously detrimental to the author).

252. See *Seaman*, 2010 WL 4386930, at \*16–17; *McNeil*, 344 F.3d at 990, 995, 1001–02.

253. CEDAW Committee, General Recommendation No. 33, *supra* note 122, ¶ 27.

254. *Id.* ¶¶ 26–27.

255. *People v. Addimando*, 120 N.Y.S.3d 596, 598, 602–03, 605, 612–13 (N.Y. Co. Ct. 2020) (emphasis added) (explaining that Christopher raped her with a bottle, burned her vagina, left her tied up, photographed her in degrading situations, and verbally abused her).

256. See U.N. Committee on the Elimination of Discrimination against Women, *S.T. v. Russia*, ¶¶ 9.5–9.6, Communication No. 65/2014, U.N. Doc. CEDAW/C/72/D/65/2014 (Feb. 25, 2019) (explaining that the prosecution reduced the criminal charges—from attempted murder to inflicting serious bodily harm in a state of temporary insanity—against Mr. Timagov for striking the author with an axe after he argued that he had a nervous breakdown resulting from the author's insults against him).

bias by portraying her abusive husband as not fitting the “typical” profile of an abuser and undermining irrefutable evidence of abuse.<sup>257</sup> Hence, the authorities in Nicole’s case exhibited unreasonable differential treatment towards Nicole that constitutes discrimination on the basis of sex,<sup>258</sup> like the judicial authorities in *S.T. v. Russia* did to the complaint’s author.<sup>259</sup>

Finally, stereotypical notions of the standard of proof required to substantiate the occurrence of domestic violence can affect women’s rights to equality before the law.<sup>260</sup> At Nicole’s sentencing hearing, the court concluded that, despite Nicole’s horrific sexual abuse allegations, she did not sustain her burden of proof by a preponderance of the evidence that she was entitled to a lenient sentence under Penal Law § 60.12.<sup>261</sup> Equally, the courts in *V.K. v. Bulgaria* rejected the author’s application for a permanent protection order based on their preconceived notion that domestic violence is a private matter and their overly narrow focus on an immediate threat to life.<sup>262</sup> Likewise, the court denied Nicole a mitigated sentence based on the stereotyped notion that domestic violence is relevant only if it poses an immediate threat to the victim’s life.<sup>263</sup> Analogous

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257. See *Addimando*, 120 N.Y.S.3d at 613 (noting the prosecution used expert testimony to support their assertion that Nicole’s husband did not fit the profile).

258. See *id.*; see also CEDAW Committee, General Recommendation No. 33, *supra* note 122, ¶¶ 26–27 (adding that prosecutors often allow stereotypes to influence trials).

259. See *S.T. v. Russia*, ¶¶ 9.5–9.6, 9.9, 9.12 (ruling that the authorities discriminated against the author for failing to address her case in a gender-sensitive manner).

260. CEDAW Committee, General Recommendation No. 35, *supra* note 122, ¶ 26(c).

261. *Addimando*, 120 N.Y.S.3d at 599–600, 619–20 (explaining that this NY statute authorizes courts to impose an alternative sentence if the defendant proves by a preponderance of the evidence that a family member’s abuse was a significant contributing factor to her criminal behavior).

262. U.N. Committee on the Elimination of Discrimination against Women, *V.K. v. Bulgaria*, ¶¶ 2.18, 9.12, Communication No. 20/2008, U.N. Doc. CEDAW/C/49/D/20/2008 (July 25, 2011) (describing the law required victims of domestic violence to request a protection order within one month of the violent event and explaining that, according to the State, the law’s rationale is to provide for urgent court interventions rather than to police cohabitation).

263. See *Addimando*, 120 N.Y.S.3d at 618–20 (reasoning that Nicole’s choice and how the murder occurred outweigh her *undetermined* abusive history and adding that her *inconsistent* recounting of which individuals were abusing her

to the court in *J.I. v. Finland*, which questioned the author's mental state but failed to examine the abusive husband's mental stability,<sup>264</sup> the court in Nicole's case challenged Nicole's testimony and emphasized "inconsistencies" in her story despite ample evidence of the abuse she suffered.<sup>265</sup> Like the courts in *V.K. v. Bulgaria*<sup>266</sup> and in *J.I. v. Finland*,<sup>267</sup> the court in Nicole's case applied the law based on stereotyped domestic violence notions, which constitutes sex-based discrimination.<sup>268</sup>

*c. U.S. Courts Are Providing Differential Treatment to Female Defendants Accused of Killing Their Abusers That Impairs or Nullifies Their Rights*

U.S. courts' faulty jury instructions and evidentiary decisions have impaired the human rights of several female defendants tried for

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undermined her claim for a lenient sentence).

264. U.N. Committee on the Elimination of Discrimination against Women, *J.I. v. Finland*, ¶¶ 8.5, 8.9, Communication No. 103/2016, U.N. Doc. CEDAW/C/69/D/103/2016 (Mar. 5, 2018).

265. *See Addimando*, 120 N.Y.S.3d at 618–20 (noting that there remained "weighty" unanswered questions about Nicole's husband's profile as an abuser); *c.f.* *J. v. Peru*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 275, ¶¶ 325, 329 (Nov. 27, 2013) (reasoning that the victim's mentioning of the alleged ill-treatment only in some of her statements and the absence of physical signs do not mean that the ill-treatment has not occurred).

266. *See V.K. v. Bulgaria*, ¶ 9.12 (holding that domestic courts' exclusive focus on physical violence and an immediate threat of life reflects a stereotyped concept of domestic violence).

267. *See J.I. v. Finland*, ¶ 8.9 (ruling that the authorities applied stereotyped notions of domestic violence by treating a pattern of unilateral violence as a disagreement between parents).

268. *See Addimando*, 120 N.Y.S.3d at 618–20; *see also* U.N. Committee on the Elimination of Discrimination against Women, *X v. Timor-Leste*, ¶ 6.5, Communication No. 88/2015, U.N. Doc. CEDAW/C/69/D/88/2015 (Feb. 26, 2018) (finding that domestic courts' prioritization of a third party's testimony over the author's voice showed a pattern of bias); U.N. Committee on the Elimination of Discrimination against Women, *S.T. v. Russia*, ¶¶ 3.9 n.10, 9.6, 9.9, Communication No. 65/2014, U.N. Doc. CEDAW/C/72/D/65/2014 (Feb. 25, 2019) (ruling that stereotypes influenced the court's deference to the abuser's witnesses over the victim's testimony); *see generally* CEDAW Committee, General Recommendation No. 33, *supra* note 122, ¶¶ 26–27 (explaining that stereotyping leads judges to misinterpret or misapply laws, which causes miscarriages of justice).

killing their abusers.<sup>269</sup> The HRC noted that discrimination against women means any restriction made on the basis of sex that has the effect of impairing women's human rights.<sup>270</sup> The domestic law in *Broeks v. The Netherlands* restricted women's access to unemployment benefits based on sex.<sup>271</sup> Comparably, the courts in Nancy's and Sally's cases restricted their right to present a defense on the basis of sex because they erroneously modified the jury instructions based on stereotyped notions of how women should respond to domestic violence.<sup>272</sup> In *Seaman v. Washington* and *McNeil v. Middleton*, the courts' defective jury instructions not only showed the courts' gender biases<sup>273</sup> but also impaired Nancy's and Sally's right to present a defense by preventing the jury from considering key facts that supported their self-defense and voluntary manslaughter defenses.<sup>274</sup>

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269. See HRC, General Comment No. 18: Non-discrimination, *supra* note 111, ¶ 6 (explaining that "discrimination against women" means any sex-based distinction or restriction that has the effect or purpose of nullifying the exercise of women's rights).

270. *Id.*

271. U.N. Human Rights Committee, *Broeks v. The Netherlands*, ¶ 15, Communication No. 172/1984, U.N. Doc. CCPR/C/OP/2 (Apr. 9, 1987).

272. See *Seaman*, 2010 WL 4386930, at \*15–16 (conditionally granting a habeas corpus petition because Nancy suffered ineffective assistance of counsel when her trial attorney failed to fully develop her BWS claim); *McNeil*, 344 F.3d at 990, 995, 1001–02 (granting Sally's petition for writ of habeas corpus and reversing her conviction because the erroneous instruction prevented the jury from considering her imperfect self-defense and violated her due process right to present a defense). *But see* *Seaman v. Washington*, 506 F. App'x 349, 351 (6th Cir. 2012) (vacating Nancy's writ of habeas corpus and remanding the case with instructions to dismiss it); *Middleton v. McNeil*, 541 U.S. 433, 436, 438 (2004) (reinstating Sally's conviction because the state court did not unreasonably apply federal law when it found that the faulty instruction had no reasonable likelihood of misleading the jury).

273. See discussion *supra* Part III (A)(2).

274. See *Seaman v. Washington*, No. 08-CV-14038, 2010 WL 4386930, at \*1, \*15–16 (E.D. Mich. Oct. 29, 2010), *rev'd*, 506 F. App'x 349 (6th Cir. 2012) (explaining that the trial court failed to include in its jury instructions the element of first-degree murder that underscores that such killing must not be "justified, excused, or done under circumstances that reduce it to a lesser crime"); *McNeil v. Middleton*, 344 F.3d 988, 990 (9th Cir. 2003), *cert. granted, rev'd*, 541 U.S. 433 (2004) (stating the trial court erroneously instructed the jury that it could not consider BWS evidence in determining the reasonableness of Sally's belief of imminent harm and that imminent peril must be apparent to a *reasonable* person).

Similarly, in *DePetrís v. Kuykendall*, the trial court's exclusion of the abusive husband's handwritten journal and any reference to it not only unveiled the court's bias toward Kelly,<sup>275</sup> but it also prevented Kelly from fully testifying about her state of mind.<sup>276</sup> Like the law in *Broeks v. The Netherlands*, which restricted the author's access to unemployment benefits based on sex,<sup>277</sup> the trial court's sex-based bias nullified Kelly's right to present a defense.<sup>278</sup> Therefore, like the Netherlands in *Broeks v. The Netherlands*,<sup>279</sup> the United States discriminated against Nancy, Sally, and Kelly because the courts' biases and stereotypical notions of domestic violence had the effect of invalidating their rights to present defenses.<sup>280</sup>

In conclusion, the cases and systemic data have shown that, first, U.S. courts are not protecting domestic violence victims nor recognizing their legal right to defend themselves from such abuse, which has had a disproportionately negative effect on women.<sup>281</sup> Second, U.S. courts have provided differential treatment to female defendants accused of killing their abusers based on stereotypical and preconceived notions of domestic violence.<sup>282</sup> Third, the differential treatment provided to female defendants has nullified the

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275. See discussion *supra* Part III (A)(2).

276. *DePetrís v. Kuykendall*, 239 F.3d 1057, 1062–63 (9th Cir. 2001) (“The trial court not only excluded the journal, which would have corroborated petitioner’s testimony, but worse still, it prevented petitioner from testifying fully in her own behalf about why she did what she did—this in a case where proof of the defendant’s state of mind was an essential element of the defense.”).

277. U.N. Human Rights Committee, *Broeks v. The Netherlands*, ¶¶ 14–15, Communication No. 172/1984, U.N. Doc. CCPR/C/OP/2 (Apr. 9, 1987).

278. See *DePetrís*, 239 F.3d at 1059, 1065 (reversing Kelly’s conviction after finding that the journal’s exclusion and any reference to it violated her due process rights to present a valid defense).

279. See *Broeks v. The Netherlands*, ¶¶ 14–15 (ruling that the State discriminated against the author by denying her a social security benefit on an equal footing with men).

280. See *Seaman v. Washington*, No. 08-CV-14038, 2010 WL 4386930, at \*1, \*15–16 (E.D. Mich. Oct. 29, 2010), *rev’d*, 506 F. App’x 349 (6th Cir. 2012); *McNeil v. Middleton*, 344 F.3d 988, 990, 995, 1001–02 (9th Cir. 2003), *cert. granted, rev’d*, 541 U.S. 433 (2004); *DePetrís*, 239 F.3d at 1059, 1065; see also CEDAW Committee, General Recommendation No. 33, *supra* note 122, ¶ 26 (explaining that stereotyping and gender bias in the justice system have far-reaching consequences for women’s enjoyment of human rights).

281. See discussion *supra* Part III (A)(1)(a).

282. See discussion *supra* Part III (A)(1)(b).

exercise of their human rights.<sup>283</sup> All three types of differential treatment constitute discrimination on the basis of sex because they are unreasonable, not objective, or have an illegitimate aim under the ICCPR.<sup>284</sup>

*2. Because U.S. Public Authorities Are Responsible for Criminal Trials and They Discriminated on the Basis of Sex, the United States Violated ICCPR Article 26*

A State party violates a woman's right to equality before the law under ICCPR article 26 when (1) it discriminates against her on the basis of sex (2) in any field regulated and protected by public authorities.<sup>285</sup> As shown in the previous section, the first element is met because U.S. courts discriminated on the basis of sex against several female defendants accused of killing their abusers when it provided them with differential treatment that was unreasonable, not objective, or that had an illegitimate aim under the ICCPR.<sup>286</sup>

The second element is easily established because all case studies entail U.S. courts' application of domestic laws.<sup>287</sup> Therefore, because U.S. courts—which are public authorities responsible for applying criminal laws and trying criminal defendants<sup>288</sup>—discriminated against female defendants based on sex, the United States has violated these women's right to equality before the law under ICCPR article 26.<sup>289</sup>

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283. See discussion *supra* Part III (A)(1)(c).

284. See discussion *supra* Part III (A)(1).

285. See discussion *supra* Part II (B)(3).

286. See discussion *supra* Part III (A)(1).

287. See discussion *supra* Part III (A)(2).

288. See U.S. CONST. art. III, § 2, cl. 1 (“The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority . . .”).

289. See HRC, General Comment No. 18: Non-discrimination, *supra* note 111, ¶ 1 (explaining that ICCPR article 26 not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground, such as sex).

B. THE UNITED STATES CANNOT ASSERT A DEFENSE TO AVOID  
RESPONSIBILITY

It is unlikely that the United States could use its Understanding concerning ICCPR article 26 as a valid defense.<sup>290</sup> The United States must comply with the ICCPR subject to its Reservations, Understandings, and Declarations.<sup>291</sup> The United States' Understanding applicable to article 26 clarifies that the United States "understands distinctions based upon . . . sex . . . as [the term is] used in . . . Article 26 . . . to be permitted when such distinctions are, *at minimum, rationally related to a legitimate governmental objective*."<sup>292</sup> The mere characterization of a condition as an Understanding rather than a Reservation is not conclusive.<sup>293</sup> What the U.S. Senate might view as an interpretation of a treaty, and therefore an Understanding, might appear to other State parties as a modification, and consequently a Reservation.<sup>294</sup> Finland, for instance, considered the United States' Understanding to article 26 "to constitute in substance a reservation" directed at some of its most essential provisions concerning the prohibition of discrimination.<sup>295</sup>

Consequently, the present analysis has two possible outcomes. If the Understanding of article 26 is only an interpretative statement, as the United States claims, it does not modify the United States' obligations under article 26 and cannot be invoked as a defense.<sup>296</sup>

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290. Although article 4 of the ICCPR permits State parties to derogate their obligations under the Covenant in time of public emergency that threatens the life of the nation, the U.S. cannot assert this defense because none of the cases analyzed in this comment occurred in time of public emergency. *See* ICCPR, *supra* note 101, art. 4.

291. 138 CONG. REC. S4781-01 (Apr. 2, 1992).

292. *Id.* (emphasis added).

293. CONG. RSCH. SERV. STUDY, *supra* note 179, at 126; *see also* HRC, General Comment No. 24, *supra* note 183, ¶ 3 (explaining that regard will be had to the State party's intention, irrespective of the instrument's name, and adding that if the instrument purports to modify the treaty's legal effect, it constitutes a Reservation).

294. CONG. RSCH. SERV. STUDY, *supra* note 179, at 126.

295. *Status of Treaties, ICCPR*, *supra* note 102, at 19, 34 (showing that Sweden also submitted that some of the U.S. Understandings in substance constitute Reservations).

296. CONG. RSCH. SERV. STUDY, *supra* note 179, at 125–26 (explaining that understandings are interpretative statements and the characterization of a condition as an understanding does not necessarily make it one).

Alternatively, if the Understanding is *in substance* a Reservation, as Finland argues, it modifies the United States' obligations under article 26.<sup>297</sup>

Under the latter scenario, to avoid international liability under article 26, the United States would have to show that the differential treatment provided to female defendants accused of killing their abusers was “*at minimum*, rationally related to a legitimate governmental objective.”<sup>298</sup> The words “at minimum” are critical because the United States itself has explained to the HRC that certain classifications, like race, national origin, and gender, have been subjected to more exacting scrutiny pursuant to the U.S. Constitution.<sup>299</sup> The U.S. Supreme Court has ruled that gender classifications must be *substantially related* to an *important government purpose*, which the government can demonstrate if it offers an *exceedingly persuasive justification* for the classification.<sup>300</sup> Consequently, in this scenario, the United States must prove that its differential treatment of female defendants accused of killing their spouses is substantially related to an important government purpose (not rationally related to a legitimate governmental objective)—otherwise, it violates its own Constitution.<sup>301</sup> It is important to mention, however, that even under the heightened scrutiny, equal-protection challenges under the U.S. Constitution in cases of battered defendants have not been successful in domestic courts.<sup>302</sup>

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297. *Status of Treaties, ICCPR*, supra note 102, at 19; CONG. RSCH. SERV. STUDY, supra note 179, at 125–26.

298. 138 CONG. REC. S4781-01 (Apr. 2, 1992) (emphasis added).

299. Human Rights Committee, Initial reports of States parties due in 1993: United States of America, ¶¶ 81–82, U.N. Doc. CCPR/C/81/Add.4. (July 29, 1994).

300. See *Craig v. Boren*, 429 U.S. 190, 197, 210 (1976) (striking down a state statute setting a higher drinking age for men than women); *United States v. Virginia*, 518 U.S. 515, 524, 556–58 (1996) (declaring unconstitutional women's categorical exclusion from the Virginia Military Institute).

301. See *Craig v. Boren*, 429 U.S. at 197 (holding that differentiating by gender in a statute constitutes a denial of equal protection); *United States v. Virginia*, 518 U.S. at 524, 556–58 (holding that there must be an “exceedingly persuasive justification” for gender-based exclusion).

302. See, e.g., *Lumpkin v. Ray*, 977 F.2d 508, 510 (10th Cir. 1992) (explaining that the defendant's argument that she was part of a discrete class of individuals, who as a group was disadvantaged by the Oklahoma self-defense statute's imminence requirement, failed because she offered no evidence of the existence of



In any case, if the United States tries to avoid international liability pursuant to its Understanding concerning article 26,<sup>303</sup> this Understanding could be deemed contrary to the ICCPR's object and purpose and thus invalid,<sup>304</sup> as argued by Finland.<sup>305</sup> The ICCPR's object and purpose is "to create legally binding standards for human rights" for States parties.<sup>306</sup> Additionally, the HRC elucidated that a Reservation to the obligation to respect and ensure the rights on a non-discriminatory basis would not be acceptable.<sup>307</sup> In sum, if the United States attempts to use its Understanding as a Reservation, such Reservation would go against the treaty's object and purpose because it would allow the United States to avoid a legally binding human rights standard and get away with sex-based discriminatory treatment, which the ICCPR and customary law forbid.<sup>308</sup>

If the Understanding is, in fact, an Understanding, it does not modify the United States' obligations under the treaty and does not constitute a defense.<sup>309</sup> Therefore, because the United States would

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a discrete group of women suffering from BWS. Further, her arguments were inconsistent as to whether the basis of the equal protection claim was that the Oklahoma self-defense statute discriminated against her because she was a woman or a battered woman).

303. 138 CONG. REC. S4781-01 (Apr. 2, 1992) (indicating the United States' understanding of article 26 to mean that distinctions based on characterizations in Article 2, paragraph 2 of the Constitution need to be "rationally related to a legitimate governmental objective").

304. See VCLT, *supra* note 179, art. 19 (providing that a State may not formulate a Reservation to a treaty that is incompatible with its object and purpose); HRC, General Comment No. 24, *supra* note 183, ¶ 6 (explaining that the object and purpose test governs the interpretation and acceptability of reservations under the ICCPR); see also CONG. RSCH. SERV. STUDY, *supra* note 179, at 125 n.21 (explaining that although the United States has not ratified the VCLT, this treaty is viewed as codifying customary international law).

305. See *Status of Treaties, ICCPR*, *supra* note 102, at 19 (arguing that the United States' Reservation to article 26 of the ICCPR constitutes in substance a Reservation directed at some of the treaty's most essential provisions and is thus contrary to the ICCPR's object and purpose).

306. HRC, General Comment No. 24, *supra* note 183, ¶ 7.

307. *Id.* ¶ 9.

308. See *V.R.P., V.P.C., and Others v. Nicaragua*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 350, ¶ 289 (Mar. 8, 2018) (recalling that the fundamental principle of equality and non-discrimination has entered the domain of *jus cogens*).

309. CONG. RSCH. SERV. STUDY, *supra* note 179, at 125–26.

likely not be able to assert a valid defense with its Understanding, the United States incurred international responsibility for violating several female defendants' rights to equality before the law in their trials for killing their batterers.<sup>310</sup>

#### IV. RECOMMENDATIONS

Women in the United States continue to bear the heaviest burden of domestic violence at the hands of their intimate partners.<sup>311</sup> Nevertheless, U.S. authorities have not adequately adapted criminal laws and sentencing guidelines to deal with situations where a criminal defendant acted in response to prolonged domestic violence.<sup>312</sup> This section sets out recommendations to ensure that domestic violence victims who resist their aggressors are treated equally before the law and receive a fair trial.

##### A. MEASURES TO PREVENT AN UNEQUAL APPLICATION OF THE LAW

###### 1. Legislatures Should Adopt Justifiable Domestic Homicide Statutes

A State cannot prevent every violent act as part of its obligation to exercise due diligence to protect human rights.<sup>313</sup> Thus, the State must provide individuals with the legal right to defend themselves when it cannot provide protection.<sup>314</sup> The United States is failing to

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310. See discussion *supra* Part III.

311. See National Coalition Against Domestic Violence, *supra* note 33, at 1 (explaining that intimate partner violence in the United States is most common against women between the ages eighteen to twenty-four); see also United Nations Office on Drugs and Crime, *Global Study on Homicide. Gender-related killing of women and girls* 11 (2019), [https://www.unodc.org/documents/data-and-analysis/gsh/Booklet\\_5.pdf](https://www.unodc.org/documents/data-and-analysis/gsh/Booklet_5.pdf) (explaining that women and girls worldwide bear the greatest burden of intimate partner homicide).

312. See Penal Reform International, *supra* note 2, at 15, 17 (explaining that U.S. federal laws do not explicitly mention a history of abuse as a mitigating factor or a defense to criminal liability and that in most U.S. states surveyed, sentencing guidelines do not explicitly provide for a history of abuse).

313. Jan Arno Hessbruegge, *Human Rights Standards for Self-Defense between Private Persons*, in HUMAN RIGHTS AND PERSONAL SELF-DEFENSE IN INTERNATIONAL LAW 238–39 (Oxford University Press, 2017).

314. *Id.* at 239.

protect millions of girls and women from domestic violence.<sup>315</sup> When women react to such violence, they often cannot rely on self-defense laws because these laws only apply in situations of present or immediate threats to life.<sup>316</sup> Women's experience with violence usually entails a delayed response to prolonged abuse by an intimate partner.<sup>317</sup>

Consequently, legislatures should adopt justifiable domestic homicide statutes that allow courts and juries to consider the reasonableness of a defendant's acts in the context of domestic abuse and the resulting trauma.<sup>318</sup> Just as legislatures across the United States have criminalized domestic assault through specific statutes, legislatures should adopt justifiable domestic homicide statutes, recognizing the context of abuse as critical to the legal inquiry and the defendant's culpability.<sup>319</sup>

## 2. Sentencing Guidelines Must Account for a History of Abuse

Women who kill their batterers often receive harsher sentences than any other criminal defendant because of the courts' preconceived and stereotypical notions of how women should

315. See NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, *supra* note 33, at 1 (explaining that twenty-five percent of women in the United States experience severe intimate partner violence).

316. Hessbruegge, *supra* note 313, at 247.

317. See *id.* at 248 (explicating that victims of prolonged and recurrent abuse can usually anticipate the abuser's next attack).

318. See Cara Cookson, *Confronting Our Fear: Legislating Beyond Battered Woman Syndrome and the Law of Self-Defense in Vermont*, 34 VT. L. REV. 415, 418 (2009) (explaining that domestic homicide statutes would separate domestic self-defense from traditional self-defense cases based on typical patterns of violence between men).

319. *Id.*; cf. Shana Wallace, *Beyond Imminence: Evolving International Law and Battered Women's Right to Self-Defense*, 71 U. CHI. L. REV. 1749, 1770 (2004) (arguing that the additional factors beyond the imminence requirement—probability, alternative recourses, and magnitude of harm—offered by self-defense law in the international arena to regulate the doctrine of *preemptive* self-defense can be successfully imported to domestic self-defense laws); Jane Campbell Moriarty, “While Dangers Gather”: *The Bush Preemption Doctrine, Battered Women, Imminence, and Anticipatory Self-Defense*, 30 N.Y.U. REV. L. & SOC. CHANGE 1, 32 (2005) (suggesting that the limited form of *anticipatory* self-defense permitted in the international arena to respond to terrorist threats should inform domestic self-defense laws).

respond to domestic violence.<sup>320</sup> The United States is not only failing to protect women from domestic violence, but it is also punishing them with disproportionately long and harsh sentences when they respond to such abuse.<sup>321</sup> Hence, the U.S. Sentencing Commission and its state-level counterparts should adopt specific sentencing guidelines for criminal defendants convicted of killing their abusers, prompting judges to consider the defendant's history of domestic violence and trauma to determine a proper sentence.<sup>322</sup> Sentencing guidelines should also include a history of domestic abuse as a specific ground for a downward departure<sup>323</sup> from the applicable guideline range.<sup>324</sup> Similarly, judges should consider granting variances below the recommended guideline range on domestic

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320. See *Women in Prison: An Overview*, *supra* note 4; see also Jacobsen, *supra* note 6, at 45, 46 n.113 (explaining that predicted sentences for white female defendants with no prior convictions found guilty of killing a white person increased from ten to thirty years to life in prison if the defendant was a victim of domestic violence).

321. See *Facts About the Over-Incarceration of Women in the United States*, AM. C.L. UNION, <https://www.aclu.org/other/facts-about-over-incarceration-women-united-states> (last visited June 30, 2021) (explaining that women are the fastest-growing segment of the incarcerated population in the United States, increasing at nearly double the rate of men since 1985, and that many of these women have experienced physical or sexual trauma at men's hands).

322. See G.A. Res. 65/229, United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders ("the Bangkok Rules"), Rule 61 (Dec. 21, 2010) [hereinafter Bangkok Rules] ("When sentencing women offenders, courts shall have the power to consider mitigating factors . . ."); see also United Nations Office on Drugs and Crime, *Commentary to the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules)* 45 (2009), [https://www.unodc.org/documents/justice-and-prison-reform/BKKrules/UNODC\\_Bangkok\\_Rules\\_ENG\\_web.pdf](https://www.unodc.org/documents/justice-and-prison-reform/BKKrules/UNODC_Bangkok_Rules_ENG_web.pdf) (explaining that a significant proportion of women who commit violent offenses commit them against their partners in response to systematic abuse and calling for provisions to allow judges to account for the circumstances of the offense).

323. See U.S. SENT'G GUIDELINES MANUAL § 1B1.1 Commentary 1(F) (U.S. SENT'G COMM'N 2018) (defining a downward departure as a departure that effects a sentence less than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise less than the guideline sentence).

324. See *id.* at Part K – Departures (providing grounds for departure from the applicable guideline range, which do not include domestic violence). The guideline policy statement for a downward departure for domestic violence could state: "If the criminal defendant suffered physical, sexual, or psychological abuse by the victim, the court may reduce the sentence below the authorized guideline range."

abuse grounds.<sup>325</sup> Finally, departures and variances from sentencing guidelines for victims of domestic violence convicted of killing their abusers should include rehabilitation programs and non-custodial measures.<sup>326</sup>

### 3. *Courts Should Evaluate Evidence With a Gender Perspective*

When dealing with criminal defendants accused of killing their batterer, courts and juries must evaluate the evidence with a gender perspective within the context of domestic violence.<sup>327</sup> First, courts and juries cannot expect domestic violence victims to demonstrate all of the abuse they suffered.<sup>328</sup> Second, courts and juries should recognize that domestic abuse is traumatic and, as a result, the victim's recollection of events might be imprecise.<sup>329</sup> Third, courts and juries should consider the victim's testimony as an essential piece of evidence and cannot always expect graphic or documentary proof to corroborate the victim's story.<sup>330</sup> Fourth, courts should admit

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325. *See id.* § 1B1. Background (defining variance as a sentence outside the framework of the guidelines).

326. Bangkok Rules, *supra* note 322, Rule 60 (setting forth that States should devise suitable alternatives for women offenders to combine non-custodial measures with interventions to address the most common problems leading to women's contact with the criminal justice systems, including counseling for victims of domestic violence and sexual abuse).

327. *See* Follow-up Mechanism to the Belém do Pará Convention (MESECVI), *General Recommendation of the Committee of Experts of the MESECVI (No.1) Self-Defense and Gender-Based Violence* 8–9, U.N. Doc. OEA/Ser.L/II.7.10 (Dec. 5, 2018), <https://www.oas.org/en/mesecvi/docs/MESECVI-CEVI-doc.249-EN.pdf> [hereinafter MESECVI] (explaining that gender stereotyping and the lack of a gender perspective in trying these cases can lead to an inaccurate evaluation of women's behavior when considering whether they acted in self-defense).

328. *Id.* at 10; *see also* Espinoza Gonzalez v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 289, ¶ 149 (Nov. 20, 2014) (ruling that the lack of medical evidence of sexual abuse does not diminish the victim's veracity).

329. MESECVI, *supra* note 327, at 10–11; *see also* Cabrera Garcia and Montiel Flores v. Mexico, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220, ¶ 113 (Nov. 26, 2010) (asserting that courts cannot consider the differences between the victim's statements as contradictions that denote untruthfulness or falsehood).

330. MESECVI, *supra* note 327, at 11; *see also* J. v. Peru, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 275, ¶¶ 325, 329 (Nov. 27, 2013) (reasoning that the victim's mentioning of

expert testimony on battering and its effects every time a criminal defendant offers it.<sup>331</sup> Finally, evidence rules should provide for a rebuttable presumption of fear when the defendant demonstrates a history of abuse at the victim's hands.<sup>332</sup> Such a presumption would allow the fact-finder to infer that the victim of domestic abuse had a reasonable fear that her *known* abuser intended to harm her, unless the prosecution rebuts the presumption.<sup>333</sup>

#### 4. *U.N. Treaty Bodies Must Publish Guidance on How to Judge Women Who Kill Their Batterers*

There is a dearth of guidance available from international human rights bodies on how to judge women who kill their long-time abusers.<sup>334</sup> U.N. Treaty Bodies provided States with ample guidance on how to protect women from domestic violence, but once a woman takes responsibility for that abuse, international human rights law is quiet.<sup>335</sup> Therefore, U.N. Treaty Bodies should publish a general

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the alleged ill-treatment only in some of her statements and the absence of physical signs do not mean that the ill-treatment has not occurred).

331. See Pezzell, *supra* note 6, at 3 (explaining that expert testimony on battering and its effects not only educates fact-finders on the dynamics of domestic violence but also helps them develop a more nuanced understanding of the victim's behavior. This critical information allows judges and juries to assess the facts without biases and misconceptions about battering and its effects).

332. See Brandi L. Jackson, *No Ground on Which to Stand: Revise Stand Your Ground Laws So Survivors of Domestic Violence Are No Longer Incarcerated for Defending Their Lives*, 30 BERKELEY J. GENDER L. & JUST. 154, 178–9 (2015) (arguing that if the statutory presumption of Stand Your Ground laws that a resident would fear a stranger who entered the resident's home is accepted as rational, then the presumption that an abused woman has a reasonable fear that her *known abuser* intends to harm or kill her should also be accepted as rational).

333. See *id.* at 178 (maintaining that to accept the presumption of fear for a stranger who enters a resident's home but not for the known abuser is nonsensical).

334. See Hessbruegge, *supra* note 313, at 250–52 (explaining that international human rights law and tribunals have provided States with little guidance on how to judge women who kill in response to domestic abuse).

335. See, e.g., CEDAW Committee, General Recommendation No. 35, *supra* note 122 (making no mention of women who respond to domestic violence); CEDAW Committee, General Recommendation No. 33, *supra* note 122 (excluding guidance on how to judge women offenders); U.N. Human Rights Committee, General Comment No. 32 on Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007) (leaving out guidance on how to guarantee women offenders' right to a fair trial).

recommendation or comment on how to guarantee female offenders' right to equality before the law and to a fair trial, especially when the defendant's behavior occurred in the context of a violent relationship.

## B. MEASURES TO PROVIDE REDRESS TO FEMALE DEFENDANTS

### 1. *The United States Should Sign the Optional Protocol to the ICCPR and Enact Implementing Legislation*

The First Optional Protocol to the ICCPR gives the Human Rights Committee competence to examine individual complaints concerning alleged violations of the ICCPR.<sup>336</sup> Because the United States has not ratified this Protocol, individuals whose rights have been infringed by the United States under the ICCPR cannot submit complaints to the HRC to get redress.<sup>337</sup> The only mechanism available to submit allegations of U.S. human rights violations under the ICCPR is the periodic review mechanism—under which the United States must submit regular reports to the HRC, and civil society may submit alternative reports.<sup>338</sup> The HRC then issues recommendations to the United States in the form of concluding observations<sup>339</sup> that are not legally binding.<sup>340</sup>

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336. Optional Protocol to the International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 171 U.N.T.S. 999 [hereinafter Optional Protocol to ICCPR].

337. See Status of Ratifications of the Optional Protocol to ICCPR, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-5&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&clang=_en) (last accessed June 30, 2021).

338. See U.N. Human Rights Committee Working Methods, OFF. OF THE UNITED NATIONS HIGH COMM'R FOR HUM. RTS., <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/WorkingMethods.aspx> (last accessed June 30, 2021) (explaining the procedure for State parties and civil society to submit reports to the HRC).

339. See, e.g., U.N. Human Rights Committee, Concluding observations on the fourth periodic report of the United States of America, ¶ 4(c), U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014) [hereinafter HRC's Concluding Observations to the U.S. fourth periodic report] (recommending that the United States accede to the Optional Protocol to the ICCPR).

340. See *Human Rights Treaty Bodies - Glossary of technical terms related to the treaty bodies*, OFF. OF THE UNITED NATIONS HIGH COMM'R FOR HUM. RTS., <https://www.ohchr.org/en/hrbodies/pages/tbglossary.aspx> (last visited June 30,

Therefore, to permit female defendants and other individuals to submit complaints about violations of their rights under the ICCPR and to get redress after exhausting local remedies, the United States should ratify the Optional Protocol to the ICCPR.<sup>341</sup> Finally, the United States should enact implementing legislation to ensure that individuals can seek a remedy in U.S. courts for ICCPR violations, including those that do not constitute violations of U.S. domestic law.<sup>342</sup>

2. *U.S. Authorities Should Grant Post-Conviction Remedies to Angelique, Kelly, Nancy, Sally, and Nicole*

The United States violated the right to equality before the law under article 26 of the ICCPR of Angelique, Kelly, Nancy, Sally, and Nicole by providing them with unreasonable differential treatment in their criminal trials for killing their abuser.<sup>343</sup> Consequently, under the ICCPR, these women have a right to an effective remedy determined by competent judicial, administrative, or legislative authorities.<sup>344</sup> The relevant authorities should provide these women with post-conviction remedies such as resentencing hearings, parole, clemency, commutations, pardons, and reprieves.<sup>345</sup> Furthermore, the competent authorities should provide these women with appropriate reparation, including free and immediate psychological and medical treatment<sup>346</sup> and compensation commensurate with the infringement

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2021) (explaining that Concluding observations refer both to the positive aspects and areas of concern of a State's implementation of the treaty).

341. See Optional Protocol to ICCPR, *supra* note 336, art 1 (establishing the Human Rights Committee to which individuals can file complaints against their State).

342. HRC's Concluding Observations to the U.S. fourth periodic report, *supra* note 339, ¶ 4(c).

343. See discussion *supra* Part III (A).

344. ICCPR, *supra* note 101, art. 2(3).

345. Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN'S L.J. 217, 317–18 (2003) (arguing that, when deciding which post-conviction remedies to pursue, counsel must strategize based on the facts, current political climate, time served, access to the parole board, and connections with the governor's office).

346. See *Fernandez Ortega and others v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 215, ¶ 251 (Aug. 30, 2010) (ordering to provide free and immediate medical and psychological treatment to the victims of sexual violence).



of their rights.<sup>347</sup>

## V. CONCLUSION

As a party to the ICCPR, the United States violated the right to equality before the law, under article 26 of the Covenant, of several female defendants accused of killing their abusers.<sup>348</sup> The United States, through its courts, discriminated against these female defendants on the basis of sex by failing to appropriately consider their domestic abuse histories at their criminal trials.<sup>349</sup> The United States infringed the right to equality before the law because (1) its domestic courts inflicted differential treatment to these female defendants, which was unreasonable, not objective, or had an illegitimate aim under the ICCPR, (2) in a field regulated and protected by public authorities.<sup>350</sup> The differential treatment constitutes discrimination on the basis of sex because it (1) had a disproportionately negative effect on women,<sup>351</sup> (2) was based on stereotypical notions of domestic violence,<sup>352</sup> and (3) impaired the exercise of women's human rights.<sup>353</sup> Finally, the United States cannot derogate from its responsibility under the ICCPR by relying on its Understanding concerning article 26.<sup>354</sup>

At least four recommendations must be followed to prevent future violations of the rights of female defendants accused of killing their abusers: legislatures should enact justifiable homicide statutes; sentencing commissions should adopt specific sentencing guidelines; courts should evaluate evidence with a gender perspective; and U.N. treaty bodies should publish guidance on how to judge such women defendants. To provide adequate redress to the women whose human rights were impaired, the United States should sign the Optional

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347. See U.N. Committee on the Elimination of Discrimination against Women, *X v. Timor-Leste*, ¶ 8(a), Communication No. 88/2015, U.N. Doc. CEDAW/C/69/D/88/2015 (Feb. 26, 2018) (granting the author who killed her husband in self-defense a full pardon and compensation).

348. See discussion *supra* Part III.

349. See discussion *supra* Part III.

350. See discussion *supra* Part III (A).

351. See discussion *supra* Part III (A)(1)(a).

352. See discussion *supra* Part III (A)(1)(b).

353. See discussion *supra* Part III (A)(1)(c).

354. See discussion *supra* Part III (B).

Protocol to the ICCPR and enact implementing legislation to permit individuals to access remedies under the Covenant. The United States should also provide post-conviction relief to the affected women. At the very least, female defendants should be able to rely on a justice system free of myths and stereotypes.<sup>355</sup>

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355. CEDAW Committee, General Recommendation No. 33, *supra* note 122, ¶ 28.