

RETHINKING PROPERTY RIGHTS AS HUMAN RIGHTS: ACQUIRING EQUAL PROPERTY RIGHTS FOR WOMEN USING INTERNATIONAL HUMAN RIGHTS TREATIES

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I. INTRODUCTION

This Comment discusses opportunities for women to acquire equal property rights by using mechanisms available under human rights treaties. The discussion focuses on women in North, Central, and South America, living in countries that are part of the Inter-American System¹ for the protection of human rights.

The principles and theories this Comment discusses for acquiring property rights are broadly applicable and relevant to women who live in countries that are parties to other human rights treaties.² These principles and theories are most relevant to women in the European System, which, like the Inter-American System, has both a commission and a court to implement human rights conventions.³ This Comment is less directly applicable, but still relevant, to the African System in which the African Commission on Human and Peoples' Rights implements human rights conventions.⁴

A. Organization

Part II.A of this Comment will discuss the current status of women in the world and the relationship between that status and property

1. For a complete discussion of the Inter-American System see *infra* Part II.C. This Comment refers specifically to countries which are parties to the American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention]: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Surinam, Trinidad and Tobago, Uruguay, and Venezuela.

2. See Richard J. Wilson, *Researching the Jurisprudence of the Inter-American Commission on Human Rights: A Litigator's Perspective*, 10 AM. U. J. INT'L L. & POL'Y 1, 5 (1994) (observing that the regional systems of Europe and Africa both operate human rights commissions roughly analogous to those used in the Inter-American System). For a description of rights within the European System see The European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention]; in the African System see African Charter on Human and Peoples' Rights, *adopted* June 27, 1981, 21 I.L.M. 59 [hereinafter African Charter].

3. See THOMAS BUERGENTHAL & HAROLD G. MAIER, PUBLIC INTERNATIONAL LAW IN A NUTSHELL 128-30 (2d ed. 1990).

4. See *id.* at 140-41.

rights. Part II.B will then explore the current status of the property rights of women in Latin America. Finally, Part II.C will give an overview of the Inter-American system. Part III will explore how deprivation of property rights violates human rights treaties and how the Inter-American Court and the Commission on Human Rights have treated similar rights. Part III will then attempt to evaluate the usefulness of human rights treaties and their organs to women trying to obtain equal property rights. Part IV will discuss the potential avenues available for women to acquire equal property rights. Finally, this Comment recommends that women in Organization of American States⁵ ("OAS") countries utilize OAS organs to fight for equal property rights.

II. HISTORICAL PERSPECTIVE

A. *The Relationship between Women's Human Rights and Property Rights*

1. Status

Globally, women remain in an inferior economic position relative to men and continue to suffer odious human rights abuses.⁶ Deprivation of property rights is itself a human rights abuse.⁷ This particular human rights⁸ abuse facilitates other abuses such as domestic violence and female genital mutilation.⁹

5. The OAS is a regional organization of states in North and South America. For a more extensive discussion of the OAS see *infra* Part II.C.

6. See U.S. DEP'T OF STATE, 103D CONG., 2D SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1993 xvi-xvii (Comm. Print 1994) [hereinafter HUMAN RIGHTS PRACTICES] (giving an overview of human rights abuses around the world including: physical and sexual abuse, dowry deaths, and legally unrecognized marital rape). The report also found:

In 1993, women throughout the world were subjected to onerous and discriminatory restrictions of such fundamental freedoms as voting, marriage, travel, testifying in court, inheriting and owning property, and obtaining custody of children. All too often, women and girls find their access to education, employment, health care, and even food is limited because of their gender.

Id.; see also Nina J. Crimm, *Introductory Remarks: Women's Rights as International Human Rights*, 69 ST. JOHN'S L. REV. 1, 3-4 (1995) (summarizing and commenting on the State Department's findings regarding the status of women).

7. See Jay M. Vogelson, *Women's Human Rights*, 30 INT'L LAW. 209, 210 (1996) ("Generally, the right of an individual to own some property and not be deprived of it arbitrarily is recognized as a human right.").

8. See Celina Romany, *Claiming a Global Identity: Latino/a Critical Scholarship and International Human Rights*, 28 U. MIAMI INTER-AM. L. REV. 215, 217 (1997) (describing the generation framework for human rights). First generation rights are civil and political rights. *Id.* Second generation rights are social, economic, and cultural rights. *Id.* Third generation rights are those which transcend the individual, such as the right to development and self determination. *Id.*

9. See Gregory A. Kelson, *Granting Political Asylum to Potential Victims of Female Circumcision*,

For decades, feminists have fought to improve the human rights conditions for women under international law using a gender-based¹⁰ approach.¹¹ In recent years, feminist legal scholars have expressed dissatisfaction with the progress made under the gender-based model.¹² In reaction to the perceived deficiencies in the gender-based approach, one school of feminist thought advocates pursuing women's human rights under non-gender specific or general human rights instruments, therefore bringing women's human rights into the mainstream.¹³ Proponents of the mainstreaming movement reason that, because women are human beings, they should defend their rights using general human rights treaties rather than separate gender-based initiatives.¹⁴ Using this mainstreaming theory, women who are unable to obtain a satisfactory remedy within their own legal systems for human rights abuses can bring their cases to general international human rights bodies.¹⁵

3 MICH. J. GENDER & L. 257, 297 (1995) ("Internal flight [within Nigeria] to escape female circumcision is often impossible because most tribal laws and customs do not allow women to own property in their own right or hold a job. Therefore a woman's independence would be very difficult to achieve and maintain, and many women who flee would ultimately be forced to return to their families."); see also Marsha A. Freeman, *The Human Rights of Women Under CEDAW Convention: Complexities and Opportunities of Compliance*, 91 AM. SOC'Y INT'L L. PROC. 378, 380 (1997) (stating that "equal access to and distribution of property" is fundamental to the enjoyment of other rights).

10. In this Comment, the term "gender-based" refers to initiatives created specifically to address the rights of women.

11. See Christine Ainetter Brautigam, *Mainstreaming a Gender Perspective in the Work of the United Nations Human Rights Treaty Bodies*, 91 AM. SOC'Y INT'L L. PROC. 389 (1997) (stating that women have pursued equality and advancement through the United Nations on both mainstream and gender-specific tracks).

12. See Julie A. Minor, *An Analysis of Structural Weaknesses in the Convention on the Elimination of All Forms of Discrimination Against Women*, 24 GA. J. INT'L & COMP. L. 137, 143 (criticizing the Convention on the Elimination of Discrimination Against Women, a gender-based initiative, for failing to bring about its mandate); see also *infra* Part II.B.2 for a discussion of gender-based initiatives. See generally Hilary Charlesworth, Christine Chinkin, & Shelly Wright, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991) (critiquing institutions, agreements, and procedures in international law for their ineffectiveness in addressing issues affecting women).

13. See Donna J. Sullivan, *Women's Human Rights and the 1993 World Conference on Human Rights*, 88 AM. J. INT'L L. 152, 154 (1994) (observing that, in anticipation of the World Conference, the Commission on Human Rights passed a resolution integrating women's human rights into the "mainstream" program).

14. Advocates of mainstreaming argue that it is a mistake to separate women's rights from human rights. See Cecilia Medina, *Toward a More Effective Guarantee of the Enjoyment of Human Rights by Women in the American System*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 257, 257-58 (Rebecca J. Cook ed., 1994) (summarizing her general approach to women's rights in international law: that women are human and therefore entitled to human rights); see also Brautigam, *supra* note 11, at 390. Brautigam describes the mainstreaming of gender rights as the expansion of the traditional boundaries of human rights. *Id.* Under this more expansive definition of human rights, the law recognizes the inequalities women suffer as a result of gender bias. *Id.*

15. See Medina, *supra* note 14, at 271.

Acquiring property rights is a particularly important human rights issue because without property rights women are unable to effectively exercise other human rights.¹⁶ Inequality in property rights is a major hindrance to correcting internationally recognized problems women face such as generally inferior economic status,¹⁷ domestic violence,¹⁸ and female genital mutilation.¹⁹ Without property rights, it is difficult for women to be individual economic actors.²⁰ In order to survive, people who are not economic actors must attach themselves to people who are. In that situation, it is difficult, if not impossible, for a woman to exercise any right in a way that risks estranging her from

16. See discussion *supra* note 9 and accompanying text (discussing the importance of property rights to the enjoyment of other human rights).

17. See Kenneth G. Dau-Schmidt, *Dividing the Surplus: Will Globalization Give Women a Larger or Smaller Share of the Benefits of Cooperative Production?*, 4 IND. J. GLOBAL LEGAL STUD. 51, 53 (1996) ("In 1980, the United Nations estimated that although women did two-thirds of the world's work, they earned only one-tenth of the world's income and owned only one-hundredth of the world's property."); Emily MacFarquhar, Jennifer Seter, Susan V. Lawrence, Robin Knight & Joannie M. Schrof, *The War Against Women in Much of the World, Political and Economic 'Progress' Has Been Dragging Them Backward*, U.S. NEWS & WORLD REP., Mar. 28, 1994, at 42 (discussing the global pattern of women working more than men while receiving less remuneration).

18. See Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June 9, 1994, 33 I.L.M. 1534, 1535 (affirming that "violence against women pervades every sector of society regardless of class, race, or ethnic group, income, culture, level of education, age or religion and strikes at its very foundations").

19. The case of female genital mutilation ("FGM") is a particularly compelling example of why equal property rights are essential to the exercise of other rights. FGM is the removal of part or all of the clitoris and labia. See AMNESTY INTERNATIONAL, HUMAN RIGHTS ARE WOMEN'S RIGHTS 132 (1995); see also Kirsten M. Backstrom, *The International Human Rights of the Child: Do they Protect the Female Child?*, 30 GEO. WASH. J. INT'L L. & ECON. 541, 545 (1997) (stating that FGM is practiced in central Africa, parts of the Arabian Peninsula, India, Pakistan, and various countries in South America). Consider the situation of the mother of a female child in a community where FGM is the norm and women cannot effectively control property. See Kelson, *supra* note 9, at 297. If a mother knows that her daughter cannot inherit property, retain control of property she earns, or exercise control over marital property, the future well-being of that child is dependent on her marrying. *Id.* If women who have not undergone FGM are not considered appropriate brides and are ostracized within that community, a mother who does not subject her daughter to FGM sentences her daughter to a life as a destitute outcast. *Id.*

20. As an example, lack of property rights has been an obstacle to women claiming development rights. Land reform laws and resettlement programs exclude women from the bases of rural productivity by denying women land ownership, by stipulating 'exceptions' for women in cases where full land ownership is granted, and by masculinizing the concept of the head of household. See Berta Esperanza Hernandez-Truyol, *Women's Rights as Human Rights—Rules, Realities, and the Role of Culture: A Formula for Reform*, 21 BROOK. J. INT'L L. 605, 639 (1996) [hereinafter *Rules and Realities*] (citing Nadia H. Youssef, *Women's Access to Productive Resources: The Need for Legal Instruments to Protect Women's Development Rights*, in WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 279, 281 (Julie Peters & Andrea Wolper eds., 1995)). Women constitute only "one third of the economically active population" in Latin American states. See Medina, *supra* note 14, at 261; see also HUMAN RIGHTS PRACTICES, *supra* note 6, at 455 (reporting that in Guatemala, women comprise only 24% of the economically active population).

that economic actor.²¹ This reality keeps women in an inferior position within marriages, families, and society.²²

In many countries within the OAS, women do not have equal property rights in law and/or in practice.²³ The denial of equal property rights is a violation of the Inter-American Convention on Human Rights.²⁴ In order to improve the human rights conditions for women in Latin America, non-governmental organizations ("NGOs") and individuals should utilize the Inter-American Commission on Human Rights and the Inter-American Court to pressure member states to (1) bring their domestic legislation into compliance with the convention,²⁵ and (2) defend women's rights in specific instances where a woman cannot get a remedy in her own justice system.²⁶

2. Property Laws in Latin America

Latin American countries derived their modern property laws from the Napoleonic Code brought by the Europeans to the Americas.²⁷ Over time the concept of property shifted from the ideal of absolute property rights to relative property rights and the idea of property ownership as a social function²⁸ and privilege.²⁹ In keeping with this

21. See Medina, *supra* note 14, at 260-62 (describing the economic and social manifestations of discrimination against Latin American women and how these manifestations subordinate Latin American women); see also Kelson, *supra* note 9, at 297 (describing how their lack of property rights prevents women from fleeing FGM).

22. See Linda Robinson & Jack Epstein, *Battered by the Myth of Machismo Violence Against Women is Endemic in Brazil*, U.S. NEWS & WORLD REP., Apr. 4, 1994, at 40 (explaining the prevailing attitudes toward women in Brazilian society, anthropologist Richard Parker said "[i]n Brazil . . . [a] good woman is one controlled, first by her father, who guards her virginity and then by her husband, whose property she becomes").

23. See Steven E. Hendrix, *Property Law Innovation in Latin America with Recommendations*, 18 B.C. INT'L & COMP. L. REV. 1, 13 (1995) (stating that under the agrarian reforms in many Latin American states, women are unable to inherit land unless the male "head of household" has deserted the family). The article also notes that although women ostensibly have equal property rights in civil law jurisdictions, "[l]ocal groups that decide disputes, however, often give all real property to the sons, irrespective of the law." *Id.* at 13-14; see also discussion *infra* Part II.A.2.

24. American Convention, *supra* note 1, arts. 1-2, 21, 24, 25; see also discussion *infra* Part III.B.1.

25. See discussion *infra* Part III.

26. See Claudio Grossman, *The Inter-American System: Opportunities for Women's Rights*, 44 AM. U. L. REV. 1305, 1306 (1995) (stating that litigants can bring unsuccessful domestic claims before international supervisory organs).

27. See Hendrix, *supra* note 23, at 5 (stating that although the Napoleonic Code provides absolute property rights, Latin American legal doctrine establishes relative property rights).

28. See Hendrix, *supra* note 23, at 8 (defining social function as a "catchall term which refers to the notion that land should be used to promote social and economic development, rather than simply viewed as a market commodity").

conception of property, some countries began implementing agrarian reforms.³⁰ These reforms broke up large estates into small producer-owned plots.³¹ The goals of these reforms were equality in land ownership and the elimination of peasant worker exploitation.³²

There are any number of ways in which societies deprive women of equal property rights. One way is simply not to allow women to hold property.³³ Another way is either to limit or prohibit women from inheriting property,³⁴ or to have default rules that favor men.³⁵ Yet another way to discriminate against women is in the implementation of agrarian reform and development schemes.³⁶ It is also possible to deny women equal property rights through the definition of the marital relationship or through divorce laws.³⁷

29. See Hendrix, *supra* note 23, at 8-9 (noting that land grants are subject to restrictions and are therefore seen as a privilege rather than a right).

30. See Hendrix, *supra* note 23, at 8-9 & nn.46-48 (indicating that a number of Latin American countries implemented agrarian reform including Venezuela, Honduras, Ecuador, and Peru).

31. See Hendrix, *supra* note 23, at 7.

32. For a discussion of the specific types of grants and titles provided by reform programs see Hendrix, *supra* note 23, at 8-13.

33. See Berta Esperanza Hernandez-Truyol, *Sex, Culture, and Rights: a Re/Conceptualization of Violence for the Twenty-First Century*, 60 ALB. L. REV. 607, 617 (1997) [hereinafter *Re/Conceptualization of Violence*] ("[W]omen suffer direct economic oppression by virtue of systems that prohibit them from inheriting and owning property."); Crimm, *supra* note 6, at 4-5 & n.23 (stating that South Africa has only recently reformed its laws to allow married women to own property and enter into contracts without their husbands' consent) (citing Jerelyn Eddings, *Fighting the Next Battle: Neglected in the Anti-Apartheid Struggle, Women Push for Equal Rights*; *South Africa*, U.S. NEWS & WORLD REP., Mar. 28, 1994, at 53).

34. See *Rules and Realities*, *supra* note 20, at 639-40; see also HUMAN RIGHTS PRACTICES, *supra* note 6, at 222. In Nigeria, a woman cannot inherit her husband's property "unless she can prove that she contributed to the acquisition of that property." *Id.* Under customary tenure systems, only men own land. *Id.* Women may gain access to land through marriage, although some customary practices even prevent women from inheriting their husband's land. *Id.* See also Florence Butegwa, *Using the African Charter on Human and People's Rights to Secure Women's Access to Land in Africa*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 495, 498 (Rebecca J. Cook ed., 1994) (citing a Tanzanian High Court Decision holding that daughters cannot inherit their fathers' land).

35. See HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT 1997, 343-44 (stating that, under Rwandan law, women face economic difficulties as second-class citizens). In Uganda, for example, women cannot inherit property unless they are specifically designated as beneficiaries. See Butegwa, *supra* note 34, at 497 (reporting that the Ugandan Succession Act and Succession Decree 1972 allow a surviving wife to inherit property from her husband if she is specifically named in his will). Very few Ugandans have wills because it is considered to be a bad omen. *Id.*

36. See *Re/Conceptualization of Violence*, *supra* note 33, at 617 (stating that some development schemes deny women access to economic benefits and women only receive a small share of credit).

37. See Vogelsson, *supra* note 7, at 210; see also Freeman, *supra* note 9, at 380 n.7 ("Under customary law, applicable to over 90% of the marriages in Zimbabwe, women have no rights to marital property upon divorce."); see also Butegwa, *supra* note 34, at 496 (stating that in Uganda, the law does not consider women's domestic work to be a contribution toward her husband's accumulation of property. Therefore, a wife will not receive a share of the marital property

Due to the seemingly endless variations of ways in which countries deprive women of their property rights, it is impossible to detail them all here. The sections below will instead examine three examples of discriminatory practices and provisions that women in OAS countries could challenge under international law.

a. Head of Household Designation

Agrarian reform laws normally grant land to the father figure in a family.³⁸ By granting land to the father figure these laws fail to legally recognize any woman as a possible "head of the household."³⁹ In order for a woman to receive the benefits of agrarian reform laws, she must show that the father has abandoned the family.⁴⁰ Once she has made this showing, "the woman can receive benefits as if she were the head of the household."⁴¹

b. Laws Making a Husband Guardian of His Wife

In some countries, such as Chile, the law considers women to be under the guardianship of their husbands, therefore lacking the authority to exercise control over marital property.⁴² In practical terms, this lack of control leaves married women without access to real assets.⁴³ Unless a woman has separate assets outside of the marriage, she must depend on the good will of her husband or friends and family for survival.⁴⁴

upon distribution unless she can show that she made some monetary contribution towards its purchase); *see also* HUMAN RIGHTS PRACTICES, *supra* note 6, at 390 (reporting that Chilean law does not allow divorce, although Chilean courts often dissolve marriages by annulment). As an annulled marriage never legally existed, former wives and children are not entitled to financial support. *Id.*

38. *See* Hendrix, *supra* note 23, at 13 (citing CONSTITUCION DE LA REPUBLICA DE VENEZUELA arts. 73, 93).

39. Hendrix, *supra* note 23, at 13 (citing CONSTITUCION DE LA REPUBLICA DE VENEZUELA arts. 73, 93).

40. *See* Hendrix, *supra* note 23, at 13 (citing CONSTITUCION DE LA REPUBLICA DE VENEZUELA arts. 73, 93).

41. Hendrix, *supra* note 23, at 13.

42. *See Re/Conceptualization of Violence*, *supra* note 33, at 623 (noting that under this concept of guardianship, married women in Botswana, Chile, Lesotho, Namibia, and Swaziland do not retain the right to manage their own property).

43. *See* Kelson, *supra* note 9, at 297 (discussing how tribal laws that prohibit property ownership for Nigerian women hinder those women in achieving and maintaining independence); *see also* HUMAN RIGHTS PRACTICES, *supra* note 6, at 517 (commenting on the lack of economic opportunities for Panamanian women, which may be due in part to Panamanian law's non recognition of property in common).

44. *Cf.* HUMAN RIGHTS PRACTICES, *supra* note 6, at 517 ("Panamanian law does not recognize property in common, and divorced or deserted women are often left destitute.").

c. Equal Rights on Paper Ignored in Favor of Customary Practices

Even in civil code jurisdictions, where women normally have equal inheritance rights to men, those rights are not always afforded to them.⁴⁵ Under customary tenure systems, it is often automatic that sons receive real assets upon marriage.⁴⁶ Women traditionally receive only personal property, which they can take with them to their husband's land.⁴⁷ In accordance with this tradition, those deciding the distribution of property are apt to disregard applicable law and give real property to the sons.⁴⁸ For instance, in developing countries "resettlement schemes . . . are carried out at local levels by administrative officers who may be ignorant of, or may deliberately ignore, legal provisions for joint title or ownership of property by women in their own name."⁴⁹

B. *Movements to Improve Global Conditions for Women through International Law*

First, a word on why international law is so crucial to the improvement of the condition of women globally. In the United States, we tend to think of domestic legislation and our federal and state constitutions as the most important instruments for the protection of our human and civil rights.⁵⁰ Many women around the world live in countries whose laws and judiciaries do not afford women basic rights.⁵¹ In this context, where domestic instruments are not available or not effective, international law is a very important tool for women to obtain and defend their rights.⁵²

45. See Hendrix, *supra* note 23, at 13-14.

46. See Hendrix, *supra* note 23, at 14.

47. See Hendrix, *supra* note 23, at 14.

48. See Hendrix, *supra* note 23, at 13-14 (stating that discrimination within Latin American legal systems is itself a serious problem); Robinson & Epstein, *supra* note 22, at 41 (observing that "Brazil's legal system is colored by centuries of discrimination against women"); see also MARIA DAKOLIAS, *THE JUDICIAL SECTOR IN LATIN AMERICA AND THE CARIBBEAN: ELEMENTS OF REFORM* 50 (World Bank Technical Paper No. 319, 1996) (reporting that women in Latin America face disproportionately high barriers to accessing justice because they are more likely to be poor and suffer higher rates of illiteracy resulting in less knowledge of legal rights and the judicial system).

49. Freeman, *supra* note 9, at 380.

50. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 4 (1997) (stating that the protection of individual liberties is popularly regarded as the American Constitution's most significant goal).

51. See HUMAN RIGHTS PRACTICES, *supra* note 6, at xvi-xvii (reporting that states around the world continue to restrict or deny women's basic social and political rights).

52. See Rebecca J. Cook, *Women, in THE UNITED NATIONS AND INTERNATIONAL LAW* 181, 181 (Christopher C. Joyner ed., 1997) [hereinafter *Women*] (arguing that women should not view

Perhaps even more important, international law influences domestic legislation.⁵⁵ Women can challenge discriminatory laws in their own countries on the theory that the law fails to comply with the country's obligations under treaties to which it is a party.⁵⁴

1. Under-representation of Women in International Law

Women's interests are not well represented in international legal bodies.⁵⁵ Initially, the problem was that women were excluded from the formal institutions creating international law.⁵⁶ Women were and are under-represented among lawmakers.⁵⁷ As a result, lawmakers have not incorporated a feminine perspective, or "woman's voice" in the formulation of human rights instruments.⁵⁸ International bodies formulated early human rights instruments without women's input.⁵⁹ As a consequence, though equality provisions are present in human rights instruments, the structure of international law made it very difficult for women to defend their rights.⁶⁰

the system of international human rights law as guaranteeing their rights, rather, they should view international human rights bodies as presenting opportunities to expose violations of women's human rights and to pursue prospects of redress).

53. See *infra* notes 156-64 and accompanying text (discussing Provision 140 of the Peruvian Constitution and the Court's application of human rights instruments to domestic laws).

54. See Medina, *supra* note 14, at 275 (noting that the Inter-American Court of Human Rights can make advisory opinions on the country's compliance with human rights instruments); see also discussion *infra* Part III.B.1.

55. See Rebecca J. Cook, *State Responsibility for Violations of Women's Human Rights*, 7 HARV. HUM. RTS. J. 125, 130 (1994) [hereinafter *State Responsibility*] (arguing that the historical origins of international law in commerce and military conflict "have resulted in masculine-gendered doctrines, institutions, and imagery").

56. See *Rules and Realities*, *supra* note 20, at 617 (asserting that initially women had to achieve visibility outside of the formal international system "because women were excluded from all aspects and levels of official international structures and policy-making").

57. Cf. *Rules and Realities*, *supra* note 20, at 633 n.105 (noting that the United Nations described women as "the largest excluded group in the world" and also labeled women a "non-participating majority" because women comprise the majority of the world's population but receive "only a small share of developmental opportunities").

58. Cf. Rebecca J. Cook, *Implementation and Effectiveness of United States Sponsored World Conferences: Advancing International Law Regarding Women*, 91 AM. SOC'Y INT'L L. PROC. 310, 312 (1997) [hereinafter *Advancing International Law*] ("A source of friction between prevailing international law and feminist criticism of its failure to realize its promise is that women's interests are not made relevant to the planning, achievement or enforcement of human rights conventions, because such steps are conditioned by male environments that exclude women's voices.").

59. See *Rules and Realities*, *supra* note 20, at 630 (arguing that, until recently, women's concerns and perspectives were absent from international human rights discourse and the "rules were not made by women for women").

60. See *Rules and Realities*, *supra* note 20, at 630-31 (arguing that, as a result of the exclusion of women from international human rights discourse, the structure of international human rights law is not conducive to addressing women's issues). For a more general critique of United Nations law making and proposals for reform see Theodor Meron, *Reforming United Nations Human Rights Law Making*, 80 AM. SOC'Y INT'L L. PROC. 175 (1986).

A prime example of a structural obstacle to women's human rights is the public/private distinction.⁶¹ Classically, international law can only address the public sphere because international law only governs the conduct of states.⁶² Many violations of women's human rights are considered private wrongs because individuals commit them against other individuals.⁶³ As a result of this distinction, international legal bodies could not effectively address many of the issues critical to women's human rights such as bride burning, female genital mutilation, and domestic violence.⁶⁴ This frustrating reality led women to take an alternative route towards obtaining recognition of their needs by the international legal community, by holding forums to specifically address violations of women's human rights.⁶⁵

2. Gender-Based Movements

The movement for women's human rights developed on a "parallel track" with the growth of formal human rights bodies.⁶⁶ Non-governmental organizations ("NGOs") formed a bridge between grassroots women's organizations and international human rights bodies.⁶⁷ The United Nations Convention on Women brought

61. See Sullivan, *supra* note 13, at 156-58 (highlighting the changes in the Vienna Declaration & Programme of Action that recognize the important public concern for issues previously considered private).

62. See Elizabeth F. Dedeis, *Women's Human Rights: The Twenty-First Century*, 18 FORDHAM INT'L L.J. 1748, 1748-49 (1995) (describing the traditional western distinction between the public sphere, which encompasses work, politics, and macro-economics, and the private sphere of home and family). Traditionally, governments have tried not to interfere in the private sphere of their constituents. *Id.* Until recently, international law makers continued this distinction by maintaining that international law only governs relations between states. *Id.* at 1749. As a result, international law did not reach the private sphere, in which many violations of women's human rights continued unchecked. *Id.*

63. See *id.* at 1749-50 (noting that sexual harassment and domestic violence are examples of violations of women's human rights by private actors).

64. See *Rules and Realities*, *supra* note 20, at 608-09 ("[T]he flawed public/private dichotomy historically interfered with the recognition of wrongs inflicted on women because of their sex such as domestic violence This false public/private dichotomy, in the name of the 'rule of law,' has ghettoized women's interests and conspired to deny equal status to women.").

65. See *Rules and Realities*, *supra* note 20, at 617 (arguing that the exclusion of women from the formal system of international law forced women to go outside that formal system in order to gain recognition of women's issues).

66. See *Rules and Realities*, *supra* note 20, at 617 ("This parallel track was necessary because women were excluded from all aspects and levels of official international structures and policy-making."); see also Cook, *Advancing International Law*, *supra* note 58, at 312 (describing the phenomenon of international conferences increasingly attracting "parallel NGO forums"). At these parallel forums, women testify to the failures of existing human rights protections and the persistent gap between the rights promised under international law and the continuing reality of inequality. *Id.*

67. See *Rules and Realities*, *supra* note 20, at 617 (explaining that grassroots movements by women have been able to bridge the gap to the "formalistic/traditional international framework").

women's rights to the forefront in 1948.⁶⁸ Since then there have been a number of other international conventions and treaties that address the human rights of women.⁶⁹ The strongest and most ambitious of these instruments is the Convention on the Elimination of Discrimination Against Women ("CEDAW").⁷⁰ CEDAW requires states to reach beyond the goal of non-discrimination and to specifically address the disadvantaged position of women.⁷¹

These initial separate women's conferences were very successful in bringing women's rights issues to the attention of international legal bodies and obtaining legal instruments recognizing women's rights.⁷² However, the conferences had limited success in actually improving the human rights conditions of women.⁷³ One reason for this failure is that the separate institutions developed to implement these instruments are comparatively weak.⁷⁴ They simply lack the authority

68. See *Rules and Realities*, *supra* note 20, at 618 (noting that, as a result of the work of NGOs bringing women's rights to the attention of the international community, sex was included in the non-discrimination clauses of the United Nations Charter, the Universal Declaration of Human Rights, G.A. Res. 217A (III) (Dec. 10, 1948), the International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR], and the International Covenant on Economic, Social and Cultural Rights, adopted Dec. 16, 1966, 993 U.N.T.S. 3).

69. See, e.g., The Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, Dec. 18, 1979, 1249 U.N.T.S. 14 [hereinafter CEDAW]; The International Convention on the Elimination of All Forms of Race Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter CERD]; American Convention, *supra* note 1; African Charter, *supra* note 2; European Convention, *supra* note 2; Report of the International Conference on Development on Population and Development, U.N. Doc. A/CONF. 171/13 (1994); Report of the World Summit for Social Development, Principles and Goals, U.N. Doc. A/CONF.166/9 (1995); United Nations Fourth World Conference on Women, Beijing Declaration and Draft Platform for Action, U.N. Doc. A/CONF.177/20 (1995); see also *Rules and Realities*, *supra* note 20, at 623.

70. CEDAW, *supra* note 69; see also discussion *infra* note 74.

71. See *Women*, *supra* note 52, at 188 (arguing that CEDAW is particularly innovative because, rather than framing women's rights in relation to those of men by guaranteeing equality, CEDAW just prohibits discrimination against women).

72. See *Rules and Realities*, *supra* note 20, at 617 (arguing that, as a result of women's efforts on the "parallel track," recent conferences in Rio, Vienna, Cairo, and Beijing began integrating women's concerns into the international human rights framework).

73. See *Rules and Realities*, *supra* note 20, at 629 ("[D]espite the rules that the lofty aspirational goals of equality [gender-specific treaties set, the results of the recognition of women's rights in human rights treaties] have fallen short of expectations and obligations creating a large schism . . . between women's 'paper' rights and the realities of their everyday lives.").

74. CEDAW is an excellent example of the difficulty with separate gender-based instruments. See *Minor*, *supra* note 12, at 137. The UN Commission on the Status of Women drafted CEDAW. *Id.* at 138. Although other treaties have addressed women's rights, CEDAW is the most comprehensive. *Id.* at 138-39. CEDAW, however, has failed to bring about the changes in its mandate. *Id.* at 141. One problem with CEDAW is that the drafters allowed countries to make numerous reservations in order to ensure greater participation. *Id.* at 144. The Women's Committee, which is to implement the treaty, lacks the power to do so. See *Minor*, *supra* note 12, at 148. The Committee has not established reporting standards and states will often not include controversial areas in their reports. *Id.* at 149. The Committee also

and resources to implement the agreements and ensure compliance.⁷⁵ A second problem is the structure of the instruments themselves, which tends to place affirmative duties on member states.⁷⁶ A third problem is that the public/private distinction remains an obstacle to women getting cases concerning violations of their human rights before international human rights bodies.⁷⁷

3. Mainstreaming Movement

The mainstreaming movement⁷⁸ developed in response to the remaining weaknesses in the parallel track system.⁷⁹ By bringing their complaints to general human rights bodies rather than the separate bodies created to address women's issues, those in the mainstreaming

suffers from its geographic location. *Id.* at 148-49. The Women's Committee is located in Vienna while the other six major UN treaty bodies are in Geneva, separating it from experts, advice, and resources. *Id.*; see also Meron, *supra* note 60, at 175. Compared to other UN treaties, the implementation provisions of CEDAW are very weak. *Id.* at 175. CEDAW also lacks an optional procedure to allow the committee to hear individual complaints. *Id.* at 216. See generally Jo Lynn Southard, *Protection of Women's Human Rights Under the Convention on the Elimination of All Forms of Discrimination Against Women*, 8 PACE INT'L L. REV. 1, 2-83 (1996) (giving a thorough analysis of CEDAW and evaluating the viability of protecting women's rights through a "universalist" approach). Southard notes that in 1992, CEDAW bound 117 nations, yet numerous practices that violate its provisions such as female genital mutilation, veiling, dowry, and battery continued. *Id.* at 6; see also Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 AM. J. INT'L L. 281, 288 (1991) (analyzing the meaning and impact of reservations to CEDAW).

75. See Meron, *supra* note 60, at 176 (noting that the Committee meets for a maximum of two weeks per year and discussing weaknesses in the structures which implement CEDAW).

76. See Brautigam, *supra* note 11, at 390 (noting that the human rights-based approach has the advantage of focusing on women's entitlements under international law, and comparing this approach to the less desirable welfare and protection approach taken in some gender-based initiatives that imposes duties on states rather than providing women with remedies).

77. See Berta Esperanza Hernandez-Truyol, *Concluding Remarks, Making Women Visible: Setting an Agenda for the Twenty-First Century*, 69 ST. JOHN'S L. REV. 231, 232 (1994) (arguing that the abolition of the public/private dichotomy in international law is an essential step in reformulating international law so that it can effectively address women's human rights).

78. See generally *Advancing International Law*, *supra* note 58, at 310 (analyzing and hypothesizing about the evolution of international law regarding women). Cook argues that international law regarding women is evolving in four overlapping stages: (1) focusing on specific legal rights of women; (2) treaties for the enforcement of the prohibition of discrimination against women; (3) reaction to and elimination of structural violations of women's rights; and (4) the integration of women's concerns into more general treaties. *Id.*

79. See Andrew Byrnes, *Slow and Steady Wins the Race: The Development of an Optional Protocol to the Women's Convention*, 91 AM. SOC'Y INT'L L. PROC. 383, 383 (1997) (stating that, in response to feminist and activist calls to strengthen human rights machinery, two movements have developed: one to strengthen gender-specific human rights instruments, and a second to mainstream gender concerns through the existing human rights machinery); see also Brautigam, *supra* note 11, at 389-90 (arguing that while there is still a need for a gender-specific approach, mainstreaming is particularly important in the area of human rights because general human rights institutions: (1) interact with states to assess compliance with treaty obligations; (2) interpret rights through comments and recommendations that create a jurisprudence which has the potential to transform state behavior; and (3) create a rights-based framework, as opposed to the welfare-protection framework, which portrays women as victims and dependants).

movement believe they can get more effective remedies⁸⁰ for violations of women's human rights.⁸¹ The institutions that implement general human rights treaties tend to be older and better established.⁸² These institutions already have effective procedures in place.⁸³ General human rights treaties tend to have the resources to review and investigate more reports.⁸⁴ Finally, they tend to have optional protocols in place to hear individual cases.⁸⁵

C. *The Inter-American System*

The Inter-American System serves the members of the Organization of American States ("OAS").⁸⁶ The OAS has thirty-five members and is the world's oldest regional organization.⁸⁷ The

80. See Brautigam, *supra* note 11, at 391 (arguing that one of the reasons that general human rights treaties have not brought about recognition of women's human rights is that states have only a limited understanding of the content of these treaties as they apply to women). Brautigam calls for the pursuit of women's human rights within the treaty bodies on two levels. *Id.* On one level, she recommends a conceptualization of the rights guaranteed by the treaties and the corresponding state obligations. *Id.* On another level, she recommends including gender perspectives and gender issues in the dialogue with state parties and in the bodies' comments and recommendations. *Id.*

81. The doctrine of state responsibility is central to the defense of women's rights under either gender-specific instruments or general human rights instruments.

The doctrine of state responsibility holds a state accountable for breaches of international obligations committed by or attributable to the state. Breaches may arise from violations of customary international law or binding treaties. Recent developments in the international law of state responsibility for violations of human rights widen the scope of international obligations and enhance the potential for enforcement of these obligations. States must now protect and individual's exercise and enjoyment of human rights, investigate alleged violations, punish proven violators, and provide effective remedies, including compensation of victims. Nonetheless, states are seldom held responsible for ignoring their international obligations with respect to women's human rights.

State Responsibility, *supra* note 55, at 127-28 (citations omitted).

82. State parties ratified CEDAW in 1979, ICCPR in 1966, the African Charter in 1982, the European Charter in 1950, and the American Declaration of the Rights and Duties of Man, adopted May 2, 1948, Basic Doc. Hum. Rts. Inter-Am. Sys. 17, OEA/ser. L.V/II.92 doc. 31 rev. 3 [hereinafter American Declaration], in 1948. Note that the international community created most of these treaties and institutions several years before the states ratified CEDAW.

83. For instance, the other six major treaties and their associated institutions are located in Geneva and have the Centre for Human Rights at their disposal. Minor, *supra* note 12, at 149. These bodies have also benefited from innovations in UN procedure, such as the appointment of special rapporteurs in specific issues. Meron, *supra* note 60, at 176.

84. See discussion *supra* note 74 and accompanying text.

85. Optional protocols exist to the American Convention, *supra* note 1, art. 44; ICCPR, *supra* note 68; CERD, *supra* note 69; and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51 at 197, UN Doc. A/39/51 (1985).

86. Medina, *supra* note 14, at 263.

87. *The OAS and the Inter-American System* (visited Oct. 18, 1998) <<http://www.oas.org/en/pinfo/oas/oas.htm>> [hereinafter *The OAS and the Inter-American System*]. The First International Conference of American States took place from October 1889 to April 1890 in Washington, D.C. *Id.* Member states signed the OAS Charter in Bogotá in

system's two primary human rights instruments are the American Declaration of the Rights and Duties of Man⁸⁸ (the "Declaration") and the American Convention on Human Rights (the "Convention").⁸⁹ The Convention is a general human rights treaty ratified by twenty-five member states and the Declaration provides a basic catalogue of human rights, including equality and non-discrimination.⁹⁰ The Inter-American System has two organs that implement the Convention: the Inter-American Commission on Human Rights and the Inter-American Court.⁹¹

1. Inter-American Commission on Human Rights

The Inter-American Commission on Human Rights (the "Commission") is a permanent body that meets several times per year and for special sessions as needed.⁹² Although its headquarters are in Washington, D.C., the Commission has held sessions in several member countries.⁹³ The Commission is comprised of seven members elected by the OAS general assembly.⁹⁴ The Commission monitors the compliance of member states to the Convention and the Declaration.⁹⁵ The Commission carries out its purpose through several functions: developing an awareness of human rights within the Americas;⁹⁶ providing advisory services on human rights;⁹⁷ making

1948. *Id.* The original goals of the OAS were primarily to resolve and prevent disputes between member countries, and promote economic, social, and cultural development. *Id.* Today the goals of the OAS have expanded to include: promoting and protecting human rights, combating corruption, eliminating the threat of national and international terrorism, building mutual confidence, and strengthening the role of women in society among others. *Id.*

88. See American Declaration, *supra* note 82.

89. See *The OAS and the Inter-American System*, *supra* note 87 (stating that the American Convention on Human Rights is the human rights treaty for the Inter-American System). Members signed the Convention in 1969. However, it did not enter into force until 1978. *Id.* The Convention also created the Inter-American Court. See discussion *infra* Part II.C.2.

90. American Convention, *supra* note 1, art. 1(1); American Declaration, *supra* note 82, art. II; see *The OAS and the Inter-American System*, *supra* note 87 (describing the roles of human rights instruments in the OAS system).

91. See American Convention, *supra* note 1, arts. 34-64 (describing the organizations and procedures for the Commission and Court); Medina, *supra* note 14, at 265.

92. See *Inter-American Commission on Human Rights* (visited Jan. 29, 2000) <<http://www.cidh.oas.org/what's%20the%20IACHR.htm>> [hereinafter *Inter-American Commission*].

93. See *Inter-American Commission*, *supra* note 92.

94. *Id.*; American Convention, *supra* note 1, arts. 34-36; see also Medina, *supra* note 14, at 265 (describing the Commission and its activities).

95. See American Convention, *supra* note 1, art. 41 (stating the main functions the Commission uses to promote and defend human rights); see also Medina, *supra* note 14, at 265 (noting that member states are subject to the supervision of the Commission).

96. American Convention, *supra* note 1, art. 41(a).

97. American Convention, *supra* note 1, art. 41(e).

recommendations to states to adopt progressive measures to improve human rights;⁹⁸ and investigating and issuing opinions on complaints of human rights abuses.⁹⁹

There are three major ways the Commission can aid women in improving their domestic human rights situations. First, the Commission can issue reports documenting violations of women's human rights.¹⁰⁰ Second, the Commission can issue advisory opinions on domestic legislation that violates women's human rights.¹⁰¹ Third, the Commission can hear individual cases.¹⁰²

The Commission has the capacity to process cases brought by individuals from member states under its optional protocol.¹⁰³ In order for the Commission to process an individual case, the individual must first show that a member state perpetrated the alleged human rights violation.¹⁰⁴ A state can commit a human rights violation by the actions of its agents,¹⁰⁵ by failing to prevent a violation by a non-state actor,¹⁰⁶ or by failing to pursue and prosecute a

98. American Convention, *supra* note 1, art. 41(b).

99. American Convention, *supra* note 1, art. 41(f); Medina, *supra* note 14, at 265.

100. American Convention, *supra* note 1, art. 41(c).

101. American Convention, *supra* note 1, art. 41(e); *see also* Medina, *supra* note 14, at 270. In order for this remedy to be effective, women must use internal political pressure to persuade their states to seek advisory opinions. *Id.* The Commission will only comment on the compatibility of domestic legislation to the Convention or Declaration if a state seeks an advisory opinion, or if an individual brings a case alleging a law is violating her human rights. *Id.* at 265. In the latter case, the Commission can only recommend that the state suspend implementation of the law in violation of that individual's rights. *Id.* The Commission cannot hold that a law contravenes the Convention or Declaration when hearing individual cases. *Id.*

102. American Convention, *supra* note 1, art. 44.

103. *See* American Convention, *supra* note 1, art. 44 (allowing any person, group, or NGO legally recognized by one or more member states to lodge petitions with the Commission).

104. American Convention, *supra* note 1, art. 44.

105. *See* discussion *infra* Part III.B.2 (discussing decisions interpreting the states' duty to ensure human rights under Article 1 of the Convention); *see also* Kristine M. Culliton, *Finding a Mechanism to Enforce Women's Right to State Protection from Domestic Violence in the Americas*, 34 HARV. INT'L L.J. 507, 522 (1993) ("Under international law, state responsibility is imputed to the state if the actions of police, municipal judges, or other low-level state agents constitute an official practice that is 'carried out by the government or at least tolerated by it.'"). The standard of proof to show state tolerance of human rights abuses is more lax under international law than in domestic courts. *Id.* at 522-23. International courts, however, may be less lenient in their interpretation of state action for property rights violations, than they are in domestic violence cases. In domestic violence cases, without state intervention, the violence continues and escalates, causing further injury. *Id.* at 522. In the case of property rights, without state intervention, further injury will continue, but the primary violation is one of economic rights. The Court may find that international law requires states to be more vigilant in protecting physical rights than in protecting economic rights. However, paradoxically, without economic rights it is very difficult for women to escape violations of their physical rights. *See* discussion *supra* notes 17-23 and accompanying text.

106. *See* discussion *infra* Part III.B.3 (describing a decision in which the Court held that a state fails to fulfill its duty to ensure human rights when the state fails to prevent non-

violation by a non-state actor.¹⁰⁷ An individual bringing a complaint must also show that she exhausted all available domestic remedies.¹⁰⁸ The Commission makes exceptions to this requirement in cases where the claimant can show that she was unable to exhaust those remedies because the remedies available do not provide adequate due process,¹⁰⁹ the state denied her access to remedies,¹¹⁰ or the state has unduly delayed a decision on the remedies.¹¹¹ The burden falls on the accused state to show that domestic remedies are available and effective.¹¹² A complainant must file his or her case with the Commission within six months of the date that the complainant's domestic court notified her of its final judgment.¹¹³ In cases where the complainant has not exhausted her remedies, she must bring her case within a reasonable time after the events complained of occurred.¹¹⁴

Once an individual fulfills the procedural requirements, the Commission processes the petition or communication.¹¹⁵ The Commission applies the Convention if the state accused is a party to it.¹¹⁶ Otherwise, the Commission applies the Declaration.¹¹⁷ When reviewing a case, the Commission solicits relevant information from the accused state, then requests input from other parties on that

governmental actors from violating human rights); Culliton, *supra* note 105, at 522-23 (reporting that under general international law, as well as human rights covenants, states may be responsible for human rights violations committed by individuals if the states fail to exercise due diligence in preventing and responding to human rights violations).

107. See discussion *infra* Part III.B.2; see also Culliton, *supra* note 105, at 523 ("[S]tates have a duty to 'prevent, investigate, and punish any violation of the rights recognized by the [American] Convention.'").

108. American Convention, *supra* note 1, art. 46(1)(a); *The OAS and the Inter-American System*, *supra* note 87 (describing the requirement that complainants first seek remedies for human rights violations within their domestic judicial systems).

109. American Convention, *supra* note 1, art. 46(2)(a); Culliton, *supra* note 105, at 524 (arguing that the due process exception should apply where the complainant can show that gender bias exists within a state's legal system).

110. American Convention, *supra* note 1, art. 46(2)(b); Culliton, *supra* note 105, at 524 (arguing that this condition would be fulfilled if the complainant could show that her domestic law prevented her from obtaining a remedy or that conditions within her country prevented her from obtaining the remedies available under domestic law).

111. American Convention, *supra* note 1, art. 46(2)(c).

112. See Culliton, *supra* note 105, at 524 (asserting that "[t]he Inter-American System is the most flexible and generous" in applying the exhaustion requirement).

113. American Convention, *supra* note 1, art. 46(1)(b).

114. *The OAS and the Inter-American System*, *supra* note 87.

115. American Convention, *supra* note 1, art. 48(1).

116. American Convention, *supra* note 1, art. 44; *The OAS and the Inter-American System*, *supra* note 87.

117. American Convention, *supra* note 1, art. 44; *The OAS and the Inter-American System*, *supra* note 87.

state's response.¹¹⁸ The Commission may also investigate by making on-site visits and requesting further information from the parties.¹¹⁹

The Commission then prepares an unpublished report, which it distributes to all states concerned, making recommendations on how to resolve the situation.¹²⁰ If the accused state does not implement the Commission's suggestions within a given period of time, the Commission can either prepare a second published report or forward the case to the Inter-American Court.¹²¹

2. Inter-American Court

Although the Inter-American Court (the "Court") is located in San Jose, Costa Rica, the Court may convene in any member state by majority vote of the Court.¹²² The Court has both contentious¹²³ and advisory jurisdiction.¹²⁴ The OAS General Assembly elects the seven judges who make up the court.¹²⁵ Before any party may bring a case to the Court against a state, that state must recognize the Court's jurisdiction.¹²⁶

Only member states or the Commission can bring issues to the Court under its advisory jurisdiction.¹²⁷ In its advisory capacity, the Court may interpret the Convention or any other human rights treaty that applies in the Americas.¹²⁸ At a state's request, the Court can also

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

119. American Convention, *supra* note 1, arts. 48(1)(d), 48(1)(e).

120. American Convention, *supra* note 1, art. 50.

121. See American Convention, *supra* note 1, arts. 51(1), 51(3) (stating that a finding that the accused state failed to take adequate corrective measures requires the vote of an absolute majority of the Commission); *The OAS and the Inter-American System*, *supra* note 87 (stating that the second report is normally similar to the first unpublished report).

122. *Statute of the Inter-American Court of Human Rights 1996*, Basic Documents Pertaining to Human Rights in the Inter-American System, 163, OEA/ser. L.V/II.91-92. doc. 31 rev.3 art. 3 [hereinafter *Inter-American Court of Human Rights*]; American Convention, *supra* note 1, art. 58 (stating that the Court's members may change the Court's seat by a two-thirds vote).

123. For the purposes of this Comment, the contentious jurisdiction of the Court deals with its ability to hear actual cases or controversies.

124. American Convention, *supra* note 1, art. 64; Medina, *supra* note 14, at 267.

125. American Convention, *supra* note 1, arts. 52(1), 53(1).

126. American Convention, *supra* note 1, arts. 62(1), 62(3) (explaining that a state recognizes the Court's jurisdiction by executing a declaration in which it accepts the jurisdiction of the Court, either for a specified period of time or for a specified case); *Inter-American Court of Human Rights*, *supra* note 122, art. 2(1).

127. See American Convention, *supra* note 1, art. 64 (describing the right of states to consult the Court for interpretations of international human rights treaties); *Inter-American Court of Human Rights*, *supra* note 122, art. 2(2).

128. American Convention, *supra* note 1, art. 64(1).

issue an opinion on the compatibility of that state's laws with the Convention.¹²⁹

The Court can also rule on cases through its contentious jurisdiction.¹³⁰ Either the Commission or a member state can submit cases to the Court.¹³¹ Individuals bringing cases must first take their case to the Commission, which then determines whether to forward the case to the Court.¹³² The Court can issue a decision finding whether there was a violation of the complainant's rights, order that the state allow the individual the enjoyment of her rights, and award compensation.¹³³ In its contentious jurisdiction, the Court cannot rule on the consistency of a law with the Convention or other human rights treaties.¹³⁴ The Court can only rule on whether a state violated the individual's rights and freedoms in the enforcement of the law.¹³⁵ For this reason, the Commission cannot ask the Court to exercise its advisory jurisdiction over non self-executing laws.¹³⁶ Arguably, the

129. American Convention, *supra* note 1, art. 64(2).

130. American Convention, *supra* note 1, art. 62(3); Medina, *supra* note 14, at 268.

131. American Convention, *supra* note 1, art. 61(1).

132. American Convention, *supra* note 1, arts. 44, 50(3), 61 (stating that the Commission can hear petitions from individuals, that the Commission can vote to forward cases to the Court, and that the Court can hear cases forwarded by the Commission); Medina, *supra* note 14, at 268.

133. American Convention, *supra* note 1, art. 63(1).

134. See International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights), Advisory Opinion OC-14/94 of Dec. 9, 1994, Inter-Am. Ct. H.R. (Ser. A) No. 14 at 7-8 (Dec. 9) [hereinafter Advisory Opinion 14], 1994 Inter-Am. Y.B. on H.R. 1516 (Ct. H.R.) (articulating the authority of the Court to judge the consistency of domestic legislation with international human rights treaties). The Court further states that the Commission cannot take a domestic law involved in a case it is considering under its contentious jurisdiction and forward that law to the Court for the Court's advisory opinion. *Id.* at 9. The law can only be considered as an expression of the state's intent. *Id.* The Commission justifies this distinction by asserting that advisory jurisdiction, by its nature, does not allow a state the same opportunities to defend itself as contentious jurisdiction. *Id.*

135. Advisory Opinion 14, *supra* note 134, at 7; 1994 Inter-Am. Y.B. on H.R. at 1516.

If the case were to come to the Court after the completion of the proceedings described in the relevant articles, the Court would have to weigh and decide whether the action attributed to the State constitutes a violation of the rights and freedoms protected under the Convention, regardless of whether or not such action is consistent with the State's domestic law. If the Court were to find the existence of such a violation, it would have to hold that the injured party be guaranteed the enjoyment of the rights or freedoms that have been violated and, if appropriate, that the consequences of such violation be redressed and compensation be paid The contentious jurisdiction of the Court is intended to protect the rights and freedoms of specific individuals, not to resolve abstract questions.

Advisory Opinion 14, *supra* note 134, at 11, 1994 Inter-Am. Y.B. on H.R. at 1536.

136. Advisory Opinion 14, *supra* note 134, at 11, 1994 Inter-Am. Y.B. on H.R. at 1534 (defining non self-executing laws as those which "empower the authorities to adopt measures pursuant to them").

Court could consider self-executing laws under its advisory jurisdiction as the violation occurs upon promulgation.¹³⁷

III. INSTRUMENTS AVAILABLE TO WOMEN IN THE INTER-AMERICAN SYSTEM AND THEIR APPLICATION BY THE COURT AND COMMISSION

A. *Rights Guaranteed by Human Rights Instruments*

The Declaration and the Convention guarantee a wide range of rights, including the right to property.¹³⁸ Both instruments prohibit discrimination on the basis of sex.¹³⁹ The Convention includes a right to equal protection before the law and a right to judicial protection.¹⁴⁰ The Convention enumerates several other rights that are effectively impracticable without property rights,¹⁴¹ including the right to personal liberty,¹⁴² the right to freedom of movement and residence,¹⁴³ and the right not to enter into a marriage without the full consent of both parties.¹⁴⁴

The Convention describes the duties of the states to make these rights a reality.¹⁴⁵ First, the Convention requires individual states to ensure that all persons subject to its jurisdiction can fully exercise the rights the Convention guarantees.¹⁴⁶ The duty to "ensure" human rights requires the states to stop human rights violations by both public and private actors.¹⁴⁷ Second, the Convention asserts that the

137. Advisory Opinion 14, *supra* note 134, at 11, 1994 Inter-Am. Y.B. on H.R. at 1534 ("In the case of self-executing laws, . . . the violation of human rights, whether individual or collective, occurs upon their promulgation. Hence, a norm that deprives a portion of the population of some of its rights—for example, because of race—automatically injures all the members of that race.").

138. See American Convention, *supra* note 1, art. 21 (guaranteeing the right to use and enjoy one's property and freedom from deprivation of property without compensation); American Declaration, *supra* note 82, art. XXIII (asserting the right of every person "to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home").

139. American Convention, *supra* note 1, art. 1(1); American Declaration, *supra* note 82, art. II.

140. American Convention, *supra* note 1, arts. 24-25.

141. See discussion *supra* Part II.A.1 (arguing that a woman who cannot effectively control property cannot function independently).

142. American Convention, *supra* note 1, art. 7.

143. American Convention, *supra* note 1, art. 22.

144. American Convention, *supra* note 1, art. 17(3).

145. American Convention, *supra* note 1, arts. 1(1), 2.

146. American Convention, *supra* note 1, art. 1(1); see Grossman, *supra* note 26, at 1306-07 (commenting that international human rights law has changed the norm of classic international law by the inclusion of provisions such as Article 1(1)).

147. Classic international law could rarely hold states responsible for the conduct of private

states have a duty to adopt domestic legislation or invoke measures necessary to give effect to the rights in the Convention.¹⁴⁸

Together these rights and duties provide a basis for women in OAS countries to pursue equal property rights on several levels.¹⁴⁹ First, women can challenge domestic legislation that denies women the same property rights as men.¹⁵⁰ Second, women can pressure states to enact legislation ensuring them equal property rights.¹⁵¹ Third, women who are deprived of property rights by private actors (such as their husbands or brothers) can use these instruments to force the state to protect their rights against those private actors.¹⁵² Fourth, women can challenge discriminatory treatment by courts that refuse to uphold their rights under either the treaties or domestic legislation.¹⁵³ Finally, under the Declaration and the Convention, women can challenge discriminatory acts by their governments.¹⁵⁴ An example of such an act would be refusals by local land boards to distribute property to women to which they are legally entitled.¹⁵⁵

B. Similar Rights Considered by the Court and Commission

1. Bringing Domestic Legislation into Compliance

The Court addressed the problem of domestic legislation that contravenes the Convention in examining Provision 140 of the new Peruvian Constitution.¹⁵⁶ The Inter-American Commission on

individuals. See Grossman, *supra* note 26, at 1306-07 (discussing the duties which arise for states from the obligation to ensure, including the duties to prevent, investigate, and punish human rights violations); see also discussion *infra* Part III.B (discussing the Court's interpretation of the extent of the duty to ensure).

148. American Convention, *supra* note 1, art. 2.

149. See Grossman, *supra* note 26, at 1307 (arguing that the structure and flexibility of the Inter-American and European Systems for the protection of human rights provides excellent opportunities for women to contest violations of their human rights).

150. See *infra* notes 155-63 and accompanying text.

151. See *infra* notes 177-87 and accompanying text.

152. See *infra* notes 193-200 and accompanying text.

153. See *infra* notes 209-15 and accompanying text. It is important to note that the role of the Commission and Court is strictly to determine violations of the Declaration and Convention. See Case 11.227, Inter-Am. C.H.R. 93, 98, OEA/ser. L./VII.95, doc. 7 rev. (1997) (stating that neither body will revise the decision of a national court for a mistake of fact or law).

154. See American Declaration, *supra* note 82, art. II (guaranteeing equality before the law without distinction on the basis of sex); American Convention, *supra* note 1, art. 1(1) (describing the states' duty to ensure human rights to all its subjects without discrimination on the basis of sex).

155. See *Rules and Realities*, *supra* note 20 and accompanying text (discussing how the lack of equal property rights has been a hindrance to women attempting to claim development rights).

156. See Advisory Opinion 14, *supra* note 134, at 4-9, 1994 Inter-Am. Y.B. on H.R. at 1512

Human Rights sought an advisory opinion from the Court to determine the rights and responsibilities of officials who promulgate laws that constitute a violation of the Convention.¹⁵⁷ Provision 140, a proposed provision to the new Peruvian Constitution, would have expanded the application of the death penalty.¹⁵⁸ The Convention, however, guarantees the right to life.¹⁵⁹ Part of that guarantee is an obligation for states that have not abolished the death penalty not to extend it to any new crimes.¹⁶⁰

In the Peruvian case, the Court asserted that it had full authority to interpret binding human rights instruments and to determine whether domestic legislation was compatible with them.¹⁶¹ The Court found that the obligation under the Convention to adopt legislation to give effect to human rights includes an obligation not to adopt legislation that would violate those rights.¹⁶² The Court restated the general principle of international law that states must comply with

(noting that death penalty language in the Peruvian Constitution is subject to approval and subsequent adoption by the Inter-American Commission on Human Rights) .

157. Advisory Opinion 14, *supra* note 134, at 5, 1994 Inter-Am. Y.B. on H.R. at 1510.

158. Advisory Opinion 14, *supra* note 134, at 2, 1994 Inter-Am. Y.B. on H.R. at 1512.

159. American Convention, *supra* note 1, art. 4 (providing that no person "shall be arbitrarily deprived of his life.")

160. American Convention, *supra* note 1, art. 4(2).

161. Advisory Opinion 14, *supra* note 134, at 7, 1994 Inter-Am. Y.B. on H.R. at 1532. *But see* Advisory Opinion 7, Enforceability of the Right to Reply or Correction (Arts. 14(1), 1(1), and 2 of the American Convention on Human Rights), 1986 Inter-Am. Ct. H.R. (Ser. A) No. 7, at 13 (Aug. 29) [hereinafter Advisory Opinion 7], 1986 Inter-Am. Y.B. on H.R. 364, 390, 392 (Inter-Am. Ct. H.R.). Two dissenting judges argued that the interpretation of domestic legislation is outside the jurisdiction of the Court except in very specific circumstances. *Id.* The dissenting opinion asserted that the function of the Court was to interpret international law. *Id.* The Court lacked the jurisdiction to interpret domestic legislation unless: (1) it was necessary in a case brought under its contentious jurisdiction to determine if a state was in violation of its obligations under the Convention; or (2) a state sought the help of the Court under its advisory jurisdiction to help the state bring its domestic legislation into compliance with the Convention. *Id.* In both cases, the Court's purpose is still predominantly to interpret international law. *Id.* For a discussion of the facts in Advisory Opinion 7 see *infra* Part III.B.2.

162. Advisory Opinion 14, *supra* note 134, at 9, 12 1994 Inter-Am. Y.B. on H.R. at 1532. The Court has since reaffirmed this principle in even stronger terms. *See* Advisory Opinion No. 13, Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41-42, 44, 46-47, 50-51 of the American Convention on Human Rights), 1993 Inter-Am. Ct. H.R. (Ser. A) No. 13, at 6 (July 16), 1993 Inter-Am. Y.B. on H.R. 1990, 2002 (Ct. H.R.).

A state may violate an international treaty and, specifically, the Convention in many ways. It may do so in the latter case, for example, by failing to establish the norms required by Article 2. Likewise, it may adopt provisions which do not conform to its obligations under the Convention In these circumstances, there should be no doubt that the Commission has in that regard the same powers it would have if confronted with any other type of violation and could express itself in the same way as in other cases The powers of the Commission in this sense are not restricted in any way by the means by which the Convention is violated.

Id.

treaty obligations in good faith.¹⁶³ Domestic laws contrary to the Convention would not provide a defense to non-fulfillment of treaty obligations.¹⁶⁴

Using the principles that the Court articulated in the Peruvian case, women in OAS countries could challenge domestic laws that discriminate against women.¹⁶⁵ Such a law would violate the anti-discrimination clauses of the Declaration¹⁶⁶ and the Convention¹⁶⁷ and the equal protection clause of the Convention.¹⁶⁸

In order to maintain the integrity of the Convention, the Court would likely rule similarly on any law that contradicts it.¹⁶⁹ There is no reason to think the Court's position would change if the law in question addressed women's property rights.¹⁷⁰ However, this precedent provides limited guidance to women because the Court analyzed Provision 140 in its advisory jurisdiction.¹⁷¹ In order for women to get a domestic law before the Court in advisory jurisdiction, they must get their states to request such an opinion from the Court.¹⁷² Convincing the state to request such an advisory opinion could require a great deal of political pressure.¹⁷³ The fact that discriminatory laws are in place reflects the fact that women have limited political power.¹⁷⁴

Women could independently challenge the discriminatory laws in the Court's contentious jurisdiction if the state's application of the

163. Advisory Opinion 14, *supra* note 134, at 9, 1994 Inter-Am. Y.B. on H.R. at 1530.

164. Advisory Opinion 14, *supra* note 134, at 9, 1994 Inter-Am. Y.B. on H.R. at 1530.

165. See *supra* notes 116-28 and accompanying text.

166. American Declaration, *supra* note 82, art. II.

167. American Convention, *supra* note 1, art. 1(1).

168. American Convention, *supra* note 1, art. 24.

169. See *supra* notes 160-63 and accompanying text.

170. Cf. Advisory Opinion 14, *supra* note 134, 1994 Inter-Am. Y.B. on H.R. at 1530-32 (describing the obligation of states to adopt measures as necessary to give effect to the rights guaranteed in the Convention). The Court speaks of this obligation in general terms. *Id.* There is no language suggesting that the obligation to adopt measures applies to some rights and not to others. *Id.*

171. Advisory Opinion 14, *supra* note 134, at 7, 1994 Inter-Am. Y.B. on H.R. at 1510-12.

172. See discussion *supra* Part II.C.2.

173. Cf. Medina, *supra* note 14, at 271, 279 (recommending that women lobby their governments to bring domestic legislation into compliance with international human rights treaties and to request advisory opinions from the Court when the compatibility of legislation is in question).

174. See MacFarquhar, Seter, Lawrence, Knight & Schrof, *supra* note 17, at 47 ("More women are getting elected, but they still compose only 10 percent of all legislators [worldwide]."); Medina, *supra* note 14, at 260-61 (stating that as of 1994, in Chile only 7 of 120 representatives and 3 of 47 senators were women); Robinson & Epstein, *supra* note 22, at 41 (reporting that as of 1994, women comprised only 38 members of the 305-member Brazilian congress).

law violates women's human rights.¹⁷⁵ However, a ruling that the state had violated the complaining women's human rights would only allow the Court to order that the state not apply the law in a manner that violates those women's rights.¹⁷⁶ Such a ruling would not allow the Court to consider the general compatibility of the law with the state's obligations under international law.¹⁷⁷

2. Obligation to Adopt Legislation and Other Measures Necessary

Article 2¹⁷⁸ of the Convention obligates states to adopt such legislative or other measures as may be necessary to give effect to the rights the Convention guarantees.¹⁷⁹ The Court has rejected the argument that this clause merely empowers states to enact such measures if they so choose.¹⁸⁰ In its advisory opinion to Costa Rica¹⁸¹ regarding the right to reply,¹⁸² the Court stated that such an

175. See discussion *supra* Part II.C.2.

176. See discussion *supra* Part II.C.2.

177. See discussion *supra* Part II.C.2.

178. The legislative history of Article 2 emphasizes its purpose. See Advisory Opinion 7, *supra* note 161, 1986 Inter-Am. Y.B. on H.R. at 388 (stating that the drafters of the Convention added Article 2 during the last stage of drafting). The drafters of the Convention excluded Article 2 from earlier drafts because they believed that the obligation to ensure the rights guaranteed was the natural consequence of an international treaty. *Id.* However, Chile proposed the inclusion of Article 2 as a complement to Article 1 to make the rights announced by the Convention more certain and to overtly impose the obligation of making those rights effective. *Id.*

179. American Convention, *supra* note 1, art. 2; see also Advisory Opinion 7, *supra* note 161, 1986 Inter-Am. Y.B. on H.R. at 388.

It is evident that this article of the Convention imposes a duty on the States Parties to adopt the measures necessary to make the rights and freedoms recognized by the Convention effective. These rights are not conditioned on the existence of pertinent norms in the domestic law of the States Parties. Rather, the States Parties are obligated to adopt legislative or other means, if they do not already exist, to make these rights and freedoms effective.

Advisory Opinion 7, *supra* note 161, 1986 Inter-Am. Y.B. on H.R. at 388.

180. Advisory Opinion 7, *supra* note 161, 1986 Inter-Am. Y.B. on H.R. at 374.

181. Advisory Opinion 7, *supra* note 161, 1986 Inter-Am. Y.B. on H.R. at 374. Costa Rica requested an advisory opinion from the Court on three issues related to the relationship between Article 14(1) (the Right to Reply) and Articles 1(1) and 2 of the Convention. *Id.* at 366. The first issue was whether the right to the full exercise could be sufficiently guaranteed by Costa Rica's commitment to the Convention. *Id.* at 370. The second was, assuming the treaty obligations were not sufficient, whether Costa Rica had an international obligation to enact further measures giving effect to the right to reply. *Id.* at 372-74. The third was whether the word "law" at the end of Article 14 is meant in its broadest sense to include regulatory provisions and executive decrees. *Id.* at 376-78. The Court held that Article 14(1) is an internationally enforceable right. Advisory Opinion 7, *supra* note 161, 1986 Inter-Am. Y.B. on H.R. at 380. The Court further held that if the right to reply is not enforceable under domestic law, the state must enact measures to give effect to the right. *Id.* at 380. Measures that give effect to the right may include all domestic measures necessary (including regulatory provisions, executive agreements, etc.). *Id.* If a state adopts measures placing restrictions on a right, the state must enact those restrictions as laws. *Id.*

182. See American Convention, *supra* note 1, art. 14 (defining the right to reply as the right

interpretation of Article 2 would be inconsistent with the standards of treaty interpretation found in the Vienna Convention on the Law of Treaties ("Vienna Convention").¹⁸³ This interpretation violates the Vienna Convention because it is inconsistent with the ordinary meaning of the terms and context of the American Convention.¹⁸⁴

According to the advisory opinion requested by Costa Rica, the states' obligation to ensure human rights goes well beyond the enactment of legislation regarding enforcement.¹⁸⁵ The Court asserted that situations of human rights violations within states gave rise to both domestic and international jurisdiction.¹⁸⁶ The Court indicated that domestic law no longer trumps international law.¹⁸⁷ Finally, the Court announced that if *anyone* within the jurisdiction of a member state could not exercise her right to reply *for any reason*, the state would be in violation of the Convention.¹⁸⁸ This interpretation of the Convention places an extremely heavy burden on member states, but proves very useful to women seeking equal property rights.¹⁸⁹

In the Costa Rican case, the Court made strong statements about the states' obligations,¹⁹⁰ and there is nothing to indicate that the

of a person injured by inaccurate or offensive statements made to the public to correct those statements using the same means of communication).

183. Vienna Convention on the Law of Treaties, May 23, 1969, T.S. No. 58, 1155 U.N.T.S. 331. For a complete definition of the standards for treaty interpretation see *id.* art. 31(1).

184. See Advisory Opinion 7, *supra* note 161, 1986 Inter-Am. Y.B. on H.R. at 372-74 (stating that "the purpose of the Convention is to recognize individual rights and freedoms and not simply to empower the states to do so").

185. Advisory Opinion 7, *supra* note 161, 1986 Inter-Am. Y.B. on H.R. at 376.

186. See Advisory Opinion 7, *supra* note 161, 1986 Inter-Am. Y.B. on H.R. at 412 (separate opinion of Judge Piza) (arguing that because international human rights law now regulates practices within states, situations within a state's territory can give rise to issues of both domestic and international law).

187. See Advisory Opinion 7, *supra* note 161, 1986 Inter-Am. Y.B. on H.R. at 412 (arguing that there is no longer a clear distinction between international law and domestic law). As a result, it is necessary to analyze domestic issues in terms of both domestic and international law. *Id.* This reality challenges the classical principle that domestic law must take precedence over international law. *Id.*

188. See Advisory Opinion 7, *supra* note 161, 1986 Inter-Am. Y.B. on H.R. at 376 (stating that the fact that states are responsible for fixing the manner in which the right to reply is guaranteed does not lessen the enforceability of the states' obligation under Article 1(1) to make the right effective) (emphasis added).

189. Advisory Opinion 7 states that it is the responsibility of the state to make sure that all people within its jurisdiction enjoy the rights guaranteed in the Convention. Advisory Opinion 7, *supra* note 161, 1986 Inter-Am. Y.B. on H.R. at 376. Using this logic, women who are denied equal property rights could hold their states responsible for failing to take measures that would ensure women enjoyment of equal property rights. *Id.*

190. See Advisory Opinion 7, *supra* note 161, 1986 Inter-Am. Y.B. on H.R. at 376 (referring to language in Article 1(1) and Article 2 of the Convention for support).

Court will not maintain this position.¹⁹¹ However, it is unclear how this precedent might apply in cases brought to the Court under its contentious jurisdiction.¹⁹² Theoretically, women could bring cases to the Court claiming that their states were delinquent in their international obligations for failing to take measures such as: defining the legal term "head of household" as being applicable to either a man or a woman, declaring non-discriminatory guidelines for the administration of development programs, and creating legal provisions for the division of property upon divorce.¹⁹³

3. Obligation to Prevent, Investigate and Punish Violations of Human Rights

Litigants have successfully used the contentious jurisdiction of the Court to remedy a state failure to ensure their human rights in the context of disappearances.¹⁹⁴ In the *Velasquez Rodriguez* case,¹⁹⁵ the Court found that the state failed to fulfill its duty to ensure human rights by perpetrating and acquiescing to forced disappearances.¹⁹⁶ In *Velasquez Rodriguez*, the Court took a somewhat less inclusive view of states' duty to ensure¹⁹⁷ than it had in the context of the adoption of legislation.¹⁹⁸ The Court stated that the duty required states to organize their governmental apparatus and the structures through which the states exercise power "so that they are capable of juridically ensuring the full and free enjoyment of human rights."¹⁹⁹ In *Velasquez*

191. See *supra* notes 178-84 and accompanying text.

192. See *supra* notes 102, 129-36 & 180 and accompanying text.

193. See discussion *supra* Parts II.A.2 and III.B.1.

194. See *Velasquez Rodriguez*, Inter-Am. Ct.H.R., OAS/Ser.L/V/III.19 doc. 13 (1988), 1988 Inter-Am. Y.B. on H.R. (Inter-Am. Ct. H.R.) 914, 966 [hereinafter 1988 I.A.Y.B.] (holding that "Honduras has violated...its obligations to respect and ensure the right to humane treatment... [and] right to life" of Angel Manfredo Velasquez Rodriguez).

195. See *id.* Velasquez was a university student in Tegucigalpa. *Id.* at 916. In September 1981, several heavily armed men kidnapped Velasquez from a parking lot. *Id.* at 972. Velasquez's whereabouts remained unknown, and he was presumed dead. *Id.* The Court found that Honduran officials practiced or tolerated disappearances from 1981-1984. 1988 I.A.Y.B., *supra* note 194, at 974. Further, the Court found that "Velasquez disappeared at the hands of or with the acquiescence" of Honduran officials. *Id.* The Court eventually concluded that agents of the state kidnapped Velasquez. *Id.* at 988. However, the Court clearly stated that even if it had not found that government agents committed the human rights violations, Honduras would still have been guilty of violating its obligation to ensure Velasquez the exercise of his human rights under Article 1(1). *Id.* at 998-90.

196. *Velasquez Rodriguez*, *supra* note 194, 1988 I.A.Y.B. at 988-90.

197. *Velasquez Rodriguez*, *supra* note 194, 1988 I.A.Y.B. at 984.

198. See Advisory Opinion 7, *supra* note 161, 1986 I.A.Y.B. at 376 (discussing a state's legal obligation to enact legislative measures to comply with treaties).

199. See *Velasquez Rodriguez*, *supra* note 194, 1988 I.A.Y.B. at 984 (holding that the duty to ensure the full and free exercise of human rights implies a duty to organize government structures in a way that makes it possible for the state to administer human rights).

Rodriguez, the Court held that even in cases of human rights violations that the state did not perpetrate, a lack of due diligence by the state in failing to adequately prevent, investigate, and punish such a violation imputes responsibility to the state.²⁰⁰ The decisive factors in determining state responsibility are: (1) whether the state supported or acquiesced to the violation of the right; and (2) whether the state took steps to prevent or punish the perpetrators of the violation.²⁰¹

If the Court continues to rule in accord with this definition of state responsibility, *Velasquez Rodriguez* may be the most valuable precedent of those discussed here for women attempting to obtain equal property rights.²⁰² Women denied equal property rights by development schemes, local property boards, courts dividing the assets from a marriage or inheritance, or other means could bring their cases to the Court.²⁰³ These women would charge that their states had either violated their human rights or failed to defend those rights against violation.²⁰⁴ Further, the duty to prevent and investigate encourages judicial recognition of women's rights and the promulgation of standards for equal treatment.²⁰⁵

However, *Velasquez Rodriguez* may not be indicative of the stance that the Court will take in future cases under its contentious jurisdiction. *Velasquez Rodriguez* dealt with a forced disappearance,²⁰⁶ an egregious human rights violation. It is unclear if the Court would interpret the state's duties in ensuring women equal property rights as assertively in future cases.²⁰⁷ Also, in *Velasquez Rodriguez*, there was considerable evidence of state acquiescence and lack of

200. See *Velasquez Rodriguez*, *supra* note 194, 1988 I.A.Y.B. at 984.

An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the convention.

Id.

201. *Velasquez Rodriguez*, *supra* note 194, 1988 I.A.Y.B. at 986.

202. See discussion *supra* Part II.B.1.

203. See discussion *supra* Parts II.A.2 & III.B.3.

204. See discussion *supra* Part III.B.3.

205. Cf. *supra* notes 193-96 and accompanying text.

206. *Velasquez Rodriguez*, *supra* note 194, 1988 I.A.Y.B. at 972.

207. See Grossman, *supra* note 26, at 1305 (noting that, until recently, the Court dealt primarily with human rights violations related to political, ideological, and military conflicts). In such cases the Court's rulings were a reaction to the loss of an individual's life or freedom. *Velasquez Rodriguez*, *supra* note 194, 1988 I.A.Y.B. at 916, 972-74. A state's failing to ensure enjoyment of equal property rights may not evoke the same response for the Court. *Id.* at 916, 972-74. The Court may find that the burden on the state should not be as heavy when there are economic rights at stake rather than the loss of life or freedom. *Id.*

punishment.²⁰⁸ It is unclear what standard women would have to meet in order to prove that the state had acquiesced to, and failed to punish, violations by denial of equal property rights.²⁰⁹

4. Right to Sufficient Judicial Recourse

The Commission recently held that the failure to provide sufficient judicial recourse is also a violation of the Convention.²¹⁰ In a case brought under contentious jurisdiction against the state of Argentina,²¹¹ the Commission found that the state violated the complainants' human rights in the application of its national amnesty laws.²¹² In its report, the Commission emphasized that each individual has the right to obtain a judicial investigation by a criminal court, a trial to determine those responsible, punishment of those responsible and just compensation.²¹³ Although the Commission recognized that Argentina had taken substantial measures to investigate, adjudicate, punish and compensate on a national scale,²¹⁴ those measures could not be used to off-set the state's duty to ensure the rights of these specific individuals.²¹⁵ Therefore, the termination

208. See Velasquez Rodriguez, *supra* note 194, 1988 I.A.Y.B. at 972, 988 (noting, in particular, the failure of the judicial branch to appropriately respond to writs of habeas corpus and the executive branch to properly investigate the disappearance).

209. But see Grossman, *supra* note 26, at 1307 (describing efforts by the Court to articulate standards of proof which shift the burden in favor of victims).

210. Cases 10,147, 10,181, 10,240, 10,262, 10,309 and 10,311, Inter-Am. C.H.R. 41, OEA/ser.L/V/II.83, doc. 14 (1992).

211. Complainants had sought criminal proceedings, alleging that the Argentine armed forces had perpetrated disappearances, summary executions, torture, and kidnappings during Argentina's "Dirty War." *Id.* at 42-43. The term "Dirty War" refers to the period from 1976 to 1983 when a military government ruled the country. *Id.* at 44. In 1986, Argentina passed a series of amnesty laws which terminated all criminal proceedings for crimes committed during the "Dirty War," and created an irrefutable presumption for future cases that military personnel who committed crimes during that period were acting in the line of duty and were therefore immune to criminal liability. *Id.* at 42. As a result of these laws, the state terminated the criminal proceedings sought by all six petitioners. *Id.* at 43. The petitioners argued the enforcement of these amnesty laws violated their rights to judicial protection and to fair trials under Articles 8 and 25 of the Convention. Cases 10,147, 10,181, 10,240, 10,262, 10,309 and 10,311, Inter-Am. C.H.R. 41, 41, OEA/ser. L./V./II.83, doc. 14 (1992).

212. Cases 10,147, 10,181, 10,240, 10,262, 10,309 and 10,311, Inter-Am. C.H.R. 41, 51, OEA/ser. L./V./II.83, doc. 14 (1992).

213. *Id.*

214. See *id.* at 50. The present Argentine government established a commission to investigate disappearances, put several high ranking officials on trial, and established a pension system for families of the disappeared. *Id.*

215. Cases 10,147, 10,181, 10,240, 10,262, 10,309 and 10,311, Inter-Am. C.H.R. 41, 51 OEA/ser. L./V./II.83, doc. 14 (1992) (opining that although measures taken by the Argentine government provided for economic compensation to the victims, the measures had adverse legal consequences).

of the petitioners' cases constituted a violation of their rights to a fair trial and to judicial protection.²¹⁶

Women can use this precedent and their rights under Articles 8 and 25 of the Convention²¹⁷ to pressure the courts in their respective states to adequately honor their property rights.²¹⁸ If a woman can make a showing to the Commission or Court that her domestic legal system has failed to defend her rights, the Commission or Court can issue a report declaring that her state is in violation of the Convention.²¹⁹ This precedent is particularly helpful to women who live in civil law jurisdictions in which women usually have equal inheritance rights to men, but in which those rights are not always honored.²²⁰ The Court further enhanced the effectiveness of this mechanism by recognizing that the rights in Articles 8 and 25 apply to civil as well as criminal trials.²²¹

As in the cases discussed in previous sections,²²² this precedent should be treated cautiously in determining the future stance of the Commission and Court because it involved such egregious human rights violations.²²³ Although the Argentine case specifically dealt with the right of victims and their families to litigate,²²⁴ the Court sustained the rights of individuals to seek prosecutions for forced disappearances, kidnapping and torture.²²⁵ It is unclear whether the Commission would take such an activist role in upholding equal property rights for women.²²⁶

216. *Id.*

217. *See* American Convention, *supra* note 1, arts. 8, 25 (guaranteeing the rights to a fair trial and judicial protection).

218. *Cf.* Culliton, *supra* note 105, at 552 (arguing that women can force their domestic courts to effectively prosecute perpetrators of domestic violence by bringing cases to the Commission and Court alleging violations of their rights to a fair trial and judicial protection).

219. *See* Culliton, *supra* note 105, at 552 (noting that failure to provide effective judicial recourse is a violation of the American Convention and arguing that states can be held responsible by the Commission and Court for failing to enforce women's human rights).

220. *See* Hendrix, *supra* note 23, at 13-14 (describing how women in civil code jurisdictions are often deprived of the equal inheritance rights which the codes guarantee). By failing to enforce women's equal inheritance rights, local land boards fail to provide judicial protection in violation of the Convention. American Convention, *supra* note 1, arts. 8, 25.

221. *See* Culliton, *supra* note 105, at 552 (citing Report No. 29/92, Inter-Am. C.H.R., OEA/ser. L./V./II.82, doc. 25 (1992) (finding that Uruguay's amnesty law violated Article 25)).

222. *See supra* notes 195, 207 & 210 and accompanying text.

223. *See* Cases 10,147, 10,181, 10,240, 10,262, 10,309 and 10,311, Inter-Am. C.H.R. 41, 43, OEA/ser. L./V./II.83, doc. 14 (1992).

224. *Id.*

225. *Id.*

226. *See supra* notes 205, 207 & 210 and accompanying text.

C. *Problems with the Approach*

One shortcoming of asserting equal property rights through the Inter-American System, and of international human rights law in general, is its inability to change local cultural practices.²²⁷ As observed with CEDAW, the fact that rights exist in international law does not make them a reality for individuals.²²⁸ There are no international police who may enforce treaties and Court or Commission decisions.²²⁹ Individuals on local land boards and the women whose rights they may violate are, for the most part, unaware of decisions made in the Inter-American Court concerning their rights and behavior.²³⁰

However, despite these shortcomings, the Inter-American system has successfully addressed human rights violations.²³¹ Though the system has not eliminated human rights violations, as seen in the cases discussed, the Court has influenced domestic legislation,²³² defended individual's human rights,²³³ and ordered reparations.²³⁴ The Court and Commission reports and decisions bring human rights violations to the attention of the international legal community

227. See Medina, *supra* note 14, at 260 (noting that, although legal discrimination against Latin American women has decreased, men continue to treat women as subordinate beings in most spheres of everyday life).

228. See Southard, *supra* note 74, at 1 (describing numerous cultural practices, which violate women's human rights, that continue in countries which have adopted CEDAW); see also *supra* notes 71 & 74 and accompanying text (discussing CEDAW).

229. Cf. Medina, *supra* note 14, at 259 ("[I]t is my understanding that the ultimate aim of international human rights law is to strengthen the national laws as much as possible, international law itself remaining a subsidiary instrument to recognize and protect human rights and a main instrument to support and give legitimacy to the changes needed at a national level.").

230. See Medina, *supra* note 14, at 278 (arguing that education about human rights and the way that discriminatory cultural practices violate them is needed in order to improve the conditions of women in Latin America).

231. See Velasquez Rodriguez, *supra* note 194, 1988 I.A.Y.B. at 914 (finding Honduras violated the American Convention by failing to prevent violation of Velasquez's human rights); see also Cases 10,147, 10,181, 10,240, 10,262, 10,309 and 10,311, Inter-Am. C.H.R. 41, OEA/ser. L./V./II.83, doc. 14 (1992) (finding that Argentina violated its obligations under the American Convention by adopting amnesty laws which prevented families from prosecuting officials whom the families believed violated their family members' human rights).

232. See Advisory Opinion 14, *supra* note 134, 1994 Inter-Am. Y.B. on H.R. at 1530 (finding that a proposed provision to the new Peruvian Constitution would violate Peru's treaty obligations by expanding the use of the death penalty in violation of Article 4 of the American Convention guaranteeing the right to life).

233. See Cases 10,147, 10,181, 10,240, 10,262, 10,309 and 10,311, Inter-Am. C.H.R. 41, 51 OEA/ser. L./V./II.83, doc. 14 (1992) (affirming the right of individuals to receive judicial remedy for human rights violations).

234. See *id.* (finding that, in order to fulfill its treaty obligations, Argentina must allow the families lawsuits to go forward); see also Velasquez Rodriguez, *supra* note 194, 1988 I.A.Y.B. at 914 (finding that Honduras owed reparations to the Velasquez Rodriguez family).

by articulating how specific practices violate international law.²³⁵ It is unclear, however, what impact the increased consciousness of these issues will have on the actions of states and the policies that they adopt.

IV. RECOMMENDATIONS

The first step for women in OAS countries who do not have equal property rights is recognition by those women that it is part of their states' treaty obligations to make sure that their human rights are afforded to them.²³⁶ NGOs and women's activists should take a fresh look at laws and practices for ways in which states may be depriving women of property rights.²³⁷

Women should then challenge the actions of both their states and private actors that deprive women of equal property rights.²³⁸ Women should force their states and judiciaries into a position where they must clearly choose between ensuring women's human rights,²³⁹ overtly denying them, or clearly acquiescing to the deprivation of these rights.²⁴⁰ While exhausting their domestic remedies,²⁴¹ women can thus strengthen their potential cases for the Commission and Court that their states are not fulfilling their duty to ensure.²⁴²

If their domestic courts will not honor their rights, women should file petitions to the Commission.²⁴³ The more such cases the Commission receives, the more likely it will hear one. A decision from the Court or Commission stating that failure by a state to ensure that women receive equal property rights is a violation of international human rights obligations would be another weapon for

235. See Medina, *supra* note 14, at 258 (arguing that international law is a statement of the community's collective values and that the body of law is evolutionary, growing to reflect the recognition that different groups of people, not formerly afforded the status of human beings, are human beings and therefore entitled to human rights).

236. See Medina, *supra* note 14, at 278 (calling for the education of men and women regarding human rights and arguing that "a number of people would be willing to change if they could realize the implications of their actions and statements").

237. See discussion *supra* Part II.B.2.

238. See discussion *supra* Parts II.B.2 & III.B.

239. See discussion *supra* Parts III.A & III.B.2.

240. See *supra* notes 200-01 and accompanying text.

241. See *supra* notes 108-14 and accompanying text.

242. See discussion *supra* Parts III.A & III.B.2.

243. See discussion *supra* Part III.B.4; see also Medina, *supra* note 14, at 271 (arguing that by bringing their cases before international legal bodies, women can convince those who apply domestic law to "shed their prejudices" and apply the law non-discriminatorily regardless of past practices).

women to use in their domestic courts.²⁴⁴ Such a decision could also shift the judicial mindset toward recognition of women as human beings entitled to human rights.²⁴⁵

Women should also attack discriminatory domestic legislation and other measures, new and old, as being in violation of the Declaration and the Convention.²⁴⁶ While women may not be able to convince their states to request advisory opinions regarding the compatibility of discriminatory legislation to the Convention from the Court, they can still challenge laws domestically by pointing out that they are in violation of the states' international obligations.²⁴⁷ This approach may be most useful in applying political pressure during the drafting of new legislation and reforms.²⁴⁸

This is not to say that women should ignore the gender specific instruments available to them such as CEDAW and the Inter-American Commission on Women.²⁴⁹ This Comment advocates women concentrating their efforts on the international bodies that have the resources and recognition to be of the most help.²⁵⁰ The fact that violations of the Declaration and the Convention, which women will be challenging, are also violations of CEDAW, will only strengthen their cases. In addition, decisions from the Court or Commission holding that states' actions are in violation of CEDAW may have the effect of adding authority to CEDAW.

V. CONCLUSION

Human rights conditions for many women in the world remain dire.²⁵¹ In order to most effectively address violations of women's human rights, women's rights activists should concentrate their

244. See discussion *supra* Parts III.A-B.2.

245. See discussion *supra* Part II.B.

246. See discussion *supra* Part III.B.1-2; see also Medina, *supra* note 14, at 275, 277 (arguing that women should lobby their governments to seek advisory opinions regarding the compatibility of domestic legislation to international obligations and that it would be difficult for legislatures not to amend legislation in accordance with advisory opinions).

247. See discussion *supra* Part III.B.1-2.

248. See Advisory Opinion 14, *supra* note 134, 1994 Inter-Am. Y.B. on H.R. at 1512 (finding that Peru could not adopt a proposed provision to its new constitution and remain in compliance with its international obligations); see also Medina, *supra* note 14, at 275 (arguing that women should lobby for more advisory opinions on the compatibility of domestic legislation with other guarantees in the Convention such as equality in marriage (art. 17(4)) and equal protection in law (art. 24)).

249. See *supra* notes 68-69 and accompanying text.

250. See discussion *supra* Part II.B.3.

251. See HUMAN RIGHTS PRACTICES, *supra* note 6, at xvi (summarizing findings that women in many parts of the world continue to suffer physical abuse and denial of political, civil, and legal rights).

efforts on acquiring rights, such as property rights, that will allow women to better exercise other human rights.²⁵² Where it is necessary to resort to international law, women's rights activists should focus their efforts on the international bodies that have the most resources and influence to help them.²⁵³ Women living in OAS countries whose judicial systems do not honor their human rights have few legal options.²⁵⁴ Using the Court and Commission to pursue equal property rights is an important opportunity to improve the human rights conditions for women in Latin America.²⁵⁵

252. See discussion *supra* Part II.A.1.

253. See discussion *supra* Part II.B.

254. See discussion *supra* Part II.A.1.

255. Cf. Grossman, *supra* note 26, at 1306 (arguing that the Commission and Court can play a valuable role in the promotion of women's rights); Medina, *supra* note 14, at 270 (advocating that women make international legal organs their own by utilizing them in the defense of women's human rights).

