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Barbara Stark

*Maurice A. Deane School of Law at Hofstra University*

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# DOMESTIC VIOLENCE AND INTERNATIONAL LAW: GOOD-BYE EARL (HANS, PEDRO, GEN, CHOU, ETC.)

*Barbara Stark\**

## I. INTRODUCTION

In *Good-Bye Earl*, the Dixie Chicks (“Chicks”) tell an old, all-too-familiar story. After high school graduation, a young woman looks for opportunities in her small town and “all she could see was Earl.” A short, miserable marriage later, she files for divorce. But Earl “walked right through that restraining order and put her in intensive care.” Before leaving the hospital, she telephones her old friend. They cook a special batch of black-eyed peas for Earl, which soon makes him “a missing person who nobody missed at all.”<sup>1</sup>

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\* Professor of Law, University of Tennessee College of Law. LL.M. Columbia, J.D. NYU, B.A. Cornell. I am deeply grateful to Professor Isabel Medina, who organized the Loyola Symposium on Integrating Responses to Domestic Violence, to Mary Kay Cosmetics and the ABA Commission on Domestic Violence, who sponsored it, to Verena Meiser for first-rate research assistance, and to Wendy Vermillion for her painstaking preparation of the manuscript.

Hearing *Good-Bye Earl* on the radio on the way to the law school encouraged me to teach domestic violence in my International Law course. I had always taught it in Family Law, of course, but it raises sensitive issues and I was not sure how my International Law students would respond. I was inspired by the Dixie Chicks’ willingness to raise the issue before a mainstream pop audience. If that audience was ready for it, surely my students were. DIXIE CHICKS, *Good-Bye Earl*, on FLY (Sony Music Entertainment, Inc. 1999)

1. DIXIE CHICKS, *Good-Bye Earl*, on FLY (Sony Music Entertainment, Inc. 1999).

This is not a song about vigilante justice; it is a song about women creatively and effectively confronting domestic violence.<sup>2</sup> It does not have to be a shameful secret, a merely “personal” tragedy, the Chicks insist. Domestic violence is a crime against women, and calls for effective methods to combat it<sup>3</sup> have become part of popular culture. The word is out.<sup>4</sup>

And the word is out in many languages, in many countries, on many continents. Domestic violence is a global problem<sup>5</sup> and international lawyers deal with it in three specific contexts. My purpose here is simply to introduce those contexts to the non-international lawyer or law student and, as a corollary, to introduce the relevant domestic violence law to international lawyers.<sup>6</sup>

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2. For an insightful and scholarly account of the women's movement's efforts to creatively and effectively confront domestic violence, see ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAW MAKING* (2000).

3. Debate continues as to what such methods might be. Elizabeth M. Misiaveg, *Important Steps and Instructive Models in the Fight to Eliminate Violence Against Women*, 52 WASH. & LEE L. REV. 1109, 1110–13 (1995).

4. In addition to the constant stream of articles in the popular press, the Google search engine shows 622,000 references. See, e.g., National Coalition Against Domestic Violence, at <http://www.ncadv.org> (last visited Nov. 26, 2000).

5. See, e.g., UNITED NATIONS, *WOMEN: CHALLENGES TO THE YEAR 2000* (1991). For an excellent, early exploration, see FAMILY VIOLENCE: AN INTERNATIONAL AND INTERDISCIPLINARY STUDY (John M. Eckelaar & Sanford N. Katz eds., 1978). Domestic violence takes different forms in different cultures. See, e.g., Yasmeen Hassan, *Stove Burning, Acid Throwing and Honor Killings*, in 2 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 587 (Kelly D. Askin & Dorean M. Koenig eds., 2000).

6. In-depth analyses of these laws, or guidance for practitioners, is beyond the scope of this short article. While a survey of the extensive literature is similarly beyond the scope of this footnote, a few outstanding examples for those interested in analyses include: NANCY K.D. LEMON, *DOMESTIC VIOLENCE LAW* (2001) (providing materials for a “domestic violence think tank”); Symposium, *New Perspectives on Women and Violence*, 2 TEX. J. WOMEN & L. 75 (1993); Symposium, *Women, Children and Domestic Violence: Current Tensions and Emerging Issues*, 27 FORDHAM URB. L.J. 567 (2000). For those approaching the subject from a practitioner's perspective, among the excellent resources available are: DEBORAH GOELMAN ET AL., *INTERSTATE FAMILY PRACTICE GUIDE: A PRIMER FOR JUDGES* (1997); *THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE: A LAWYER'S HANDBOOK* (Deborah M. Goelman et al. eds., 1996); Roberta L. Valente, *Addressing Domestic Violence: The Role of the Family Law Practitioner*, 29 FAM. L.Q. 187 (1995). See generally JANE F. CONNORS, UNITED NATIONS, *VIOLENCE AGAINST WOMEN IN THE FAMILY* (1989) (discussing violence against women in the family as a global issue); UNITED NATIONS, *STRATEGIES FOR CONFRONTING DOMESTIC VIOLENCE: A RESOURCE MANUAL* (1999) (describing national and international cooperation in developing strategies for responding to victims and working with perpetrators).

First, several "private" international treaties<sup>7</sup> have been ratified and come into force, such as the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention on Abduction").<sup>8</sup> These treaties resolve conflicts of law issues by coordinating the national laws of states parties.<sup>9</sup> While these treaties do not explicitly refer to domestic violence, it is often a relevant issue in the underlying domestic law, which must be taken into account under the treaty. Second, as part of public international law,<sup>10</sup> domestic violence has recently been recognized as a violation of women's human rights.<sup>11</sup> Finally, domestic violence has been the subject of several important initiatives, as well as sustained efforts at education and intervention, by a number of international organizations ("IO"s) and nongovernmental organizations ("NGO"s). Thus, domestic violence is a recurring theme in the study of international law, vividly illustrating the many ways in which international law interacts with and shapes domestic norms.

## II. PRIVATE INTERNATIONAL LAW CONVENTIONS

### A. The Hague Convention on Abduction

The Hague Convention on Abduction creates a previously unavailable civil remedy for the return of abducted children.<sup>12</sup> As

7. Historically, "[p]rivate international law dealt with the activities of individuals, corporations, and other private entities when they crossed national borders." BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 2 (3d ed. 1999).

8. Hague Conference on Private International Law, 19 I.L.M. 1501 (1980) (entered into force 1988) [hereinafter *Hague Convention on Abduction*].

9. Under Brazilian law, for example, the father is the automatic guardian of the children. See UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, REPORT ON THE MISSION OF THE SPECIAL RAPPORTEUR TO BRAZIL ON THE ISSUE OF DOMESTIC VIOLENCE ¶ 9, U.N. Doc. E/CN.4/1997/47/Add.2 (1996) [hereinafter *MISSION TO BRAZIL*].

10. Historically, "[p]ublic international law primarily governed the activities of governments in relation to other governments." CARTER & TRIMBLE, *supra* note 7, at 2. Although the distinction between "public" and "private" international law is increasingly contested, it provides a useful framework for present purposes.

11. This is due in large part to the work of the United Nations Special Rapporteur on Violence Against Women, Radhika Coomaraswamy. See *infra* Part III.A *Background—As a Violation of Women's Human Rights*.

12. See, e.g., Dept. of State, *Hague International Child Abduction Convention Text and Legal Analysis*, 51 Fed. Reg. 10,494 (1986) (providing a general introduction to the Conven-

Judge Jon O. Newman explains in *United States v. Amer*,<sup>13</sup> under the Convention, the "left-behind parent can request the designated 'Central authority' of the state in which the abducted child is retained to locate the child, institute proceedings to effect its return, assist in administrative technicalities, and generally aid in the amicable resolution of the kidnapping situation."<sup>14</sup> The only purpose of the Hague Convention is to restore the actual situation that existed prior to a child's removal or retention.<sup>15</sup> The United States became a party to the Convention on July 1, 1988.<sup>16</sup> Congress subsequently enacted the International Child Abduction Remedies Act<sup>17</sup> ("ICARA") to implement it.

Article 13b of the Hague Convention is triggered in domestic violence cases. It provides:

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.<sup>18</sup>

Under the Act, there are only three affirmative defenses available to defeat a demand that the child be returned under the Convention. These are set out at 18 U.S.C. § 1204(c):

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tion); PAUL BEAUMONT & PETER MCELEAVY, *THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION* (1999) (discussing the Convention).

13. 110 F.3d 873 (2d Cir. 1997).

14. *Id.* at 881. In the United States, the Department of State is the designated central authority. 53 Fed. Reg. 30,637 (Aug. 15, 1988).

15. Hague Convention on Abduction, *supra* note 8, art. 1.

16. Exec. Order No. 12,648, 53 Fed. Reg. 30,637 (Aug. 15, 1988).

17. 42 U.S.C. §§ 11601-11610 (1994).

18. Hague Convention on Abduction, *supra* note 8, art. 13b. *Cf.* UNIF. CHILD-CUSTODY JURISDICTION & ENFORCEMENT ACT § 207(b) (1997) ("UCCJEA") (providing that in deciding whether to decline jurisdiction, a court may consider whether domestic violence has occurred and is likely to continue).

- (1) [There exists a] court order granting the defendant legal custody or visitation rights and that order was obtained pursuant to the Uniform Child Custody Jurisdiction Act and was in effect at the time of the offense;
- (2) The defendant was fleeing an incidence or pattern of domestic violence;
- (3) The defendant had physical custody of the child pursuant to a court order granting legal custody or visitation rights and failed to return the child as a result of circumstances beyond the defendant's control, and the defendant notified [the other parent].<sup>19</sup>

While the Supreme Court of Canada has held that "the physical or psychological harm contemplated by the first clause of Article 13 is harm to a degree that also amounts to an intolerable situation,"<sup>20</sup> the United States Court of Appeals for the First Circuit has rejected such a narrow reading. Rather, in *Walsh v. Walsh*,<sup>21</sup> the court held that the district court erroneously required a showing of an "immediate, serious threat" to the children under Article 13b. The court found that respondent mother had proven by clear and convincing evidence that the children faced a grave risk of exposure to physical or psychological harm should they be returned to Ireland. In reaching this conclusion, the court relied on testimony establishing the father's

generalized pattern of violence, including violence directed at his own children . . . and [his] chronic disobedience of court orders. . . . There is ample evidence that John has been and can be extremely violent and that he cannot control his temper. There's a clear and long his-

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19. 18 U.S.C. § 1204(c)(1)-(3) (1994). Under ICARA, a state court must assess costs and fees to be paid to the parent who shows that jurisdiction was based on unjustifiable conduct, including domestic violence. 42 U.S.C. § 11607(b)(3) (1994). Cf. Joan Zorza, *The UCCJEA: What Is It and How Does It Affect Battered Women in Child Custody Disputes*, 27 *FORDHAM URB. L.J.* 909, 919 (2000) (noting that although the emergency jurisdiction provisions of the new UCCJEA are better than the comparable sections in both the UCCJA and the PKPA, they still fail to protect a victim who acts to protect someone who is not her and the abuser's child or if the abuser initiates litigation before the victim has been gone for six months).

20. *Thomson v. Thomson* [1994] 3 S.C.R. 551, 596 (Can.).

21. 221 F.3d 204 (1st Cir. 2000).

tory of spousal abuse, and of fights with and threats against persons other than his wife. These include John's threat to kill his neighbor in Malden, for which he was criminally charged, and his fight with his son Michael.<sup>22</sup>

The court of appeals held that the district court's failure to take John's attacks against others into account was reversible error:

John has demonstrated an uncontrollably violent temper, and his assaults have been bloody and severe. His temper and assaults are not in the least lessened by the presence of his two youngest children, who have witnessed his assaults—indeed [his 8-year-old daughter] was forced by him to witness the aftermath of his assault on Michael. Second, John has demonstrated that his violence knows not the bonds between parent and child or husband and wife, which should restrain such behavior.<sup>23</sup>

The court explicitly noted "credible social science literature" showing that serial spousal abusers are also likely to be child abusers.<sup>24</sup> The court further noted that "both state and federal law have recognized that children are at increased risk of physical and psychological injury themselves when they are in contact with a spousal abuser."<sup>25</sup> Thus, the court concluded that the requisite

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22. *Walsh*, 221 F.3d at 220.

23. *Id.*

24. *Id.* (citing Jeffrey L. Edleson, *The Overlap Between Child Maltreatment and Woman Battering*, in 5 *VIOLENCE AGAINST WOMEN* 134 (1999); Anne E. Appel & George W. Holden, *The Co-Occurrence of Spouse and Physical Child Abuse: A Review and Appraisal*, 12 *J. FAM. PSYCHOL.* 578 (1998)). See also *infra* Part III.C.2.c (describing children's rights in the context of domestic violence).

25. *Walsh*, 221 F.3d at 220. The court further noted that a Congressional resolution, passed in 1990, specifically found that: "whereas the effects of physical abuse of a spouse on children include . . . the potential for future harm where contact with the batterer continues . . . [w]hereas children often become targets of physical abuse themselves or are injured when they attempt to intervene on behalf of a parent." *Id.* (citing H.R. Con. Res. 172, 101st Cong., 104 Stat. 5182, 5182 (1990)).

“threshold showing of grave risk of exposure to physical or psychological harm”<sup>26</sup> had been made.

In *In re Marriage of Condon*,<sup>27</sup> even though the mother had secretly taken the children to Australia and kept them there without allowing the father any access until the Australian courts ordered their return under the Convention, the California court allowed the mother to move to Australia with her two children on the condition that California courts retained jurisdiction.<sup>28</sup> The court took into account “such factors as [the ex-husband’s] physical violence, their mutual verbal violence, her drug-taking and the amount of time the children spent with their father.”<sup>29</sup> In *United States v. Amer*,<sup>30</sup> the court made it clear that ICARA, which explicitly requires that “defendant was fleeing an incidence or pattern of domestic violence,”<sup>31</sup> was not triggered absent allegations of domestic violence.<sup>32</sup> Thus, allegations of a mother’s “neglectful behavior” were not sufficient.<sup>33</sup>

## B. The Hague Convention on Adoption

The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption (“Hague Convention on Adoption”) entered into force on May 29, 1993.<sup>34</sup> The Convention seeks to end abuses of intercountry adoption, which vary from state to state.<sup>35</sup> The United States is not a party. Domestic

26. *Walsh*, 221 F.3d at 220. The court noted that an English court had reached a similar decision in a case involving abuse. *In re F.*, [1995] 3 W.L.R. 339 (Eng. C.A.).

27. 73 Cal. Rptr. 2d 33 (Cal. Ct. App. 1998).

28. *Condon*, 73 Cal. Rptr. 2d at 35.

29. *Id.* at 45 n.15.

30. 110 F.3d 873 (2d Cir. 1997).

31. 18 U.S.C. § 1204(c)(2) (1994). *See also Zorza, supra* note 19, at 928 (explaining how the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”) which is the revised version of the Uniform Child Custody Jurisdiction Act (“UCCJA”) “has made many changes so that it can be better enforced to ensure return of the abducted child [pursuant to ICARA]”).

32. *Amer*, 110 F.3d at 880.

33. *Id.* at 881.

34. 32 I.L.M. 1134 (2000).

35. Judith Masson, *The 1999 Reform of Intercountry Adoption in the United Kingdom: New Solutions and Old Problems*, 34 FAM. L.Q. 221, 227 (2000). Intercountry adoption is shaped by national history. The United Kingdom, for example, was a “sending country” until 1968, before which, “with the best of intentions, [it] dispatched thousands of children over-



violence is an issue under the Hague Convention on Adoption in at least two distinct contexts. First, the Convention requires that the birth parents voluntarily relinquish the child.<sup>36</sup> Thus, it must be asked whether the mother's relinquishment is effectively coerced by domestic violence or the threat of domestic violence.<sup>37</sup> Second, the Convention requires a determination as to the suitability of the adoptive parents.<sup>38</sup> Thus, it must be asked whether the adoptive parents have been screened for domestic violence. As the death of Lisa Steinberg made so brutally clear, a child being adopted into an abusive relationship is at risk not only of witnessing abuse but of being abused herself.<sup>39</sup>

### III. AS A VIOLATION OF WOMEN'S HUMAN RIGHTS

#### A. Background

Historically, domestic violence was not viewed as a violation of women's human rights because it is not perpetuated by the state.<sup>40</sup> Rather, it was considered "private," "natural," or "cul-

seas to care which in many cases was neglectful of abusive." Masson, *supra*, at 221. As a result, "existing adoption agencies have sought to avoid involvement in intercountry adoption." *Id.*

36. Hague Convention on Abduction, *supra* note 8, art. 4(c).

37. See generally Elena Urso, *Intercountry Adoption Reform in Italy: From 'Adoptive Nationalism' to Global Harmonization?*, in THE INTERNATIONAL SURVEY OF FAMILY LAW 209, 213 (2000) (noting the importance of assuring that the necessary consents—including the child's consent—have been freely expressed in the required legal form).

38. Hague Convention on Adoption, *supra* note 30, art. 17d.

39. Ruth Jones, *Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser*, 88 GEO. L.J. 605, 607 (2000) (citing *State v. Steinberg*, 573 N.Y.S.2d 965, 970 (N.Y. App. Div. 1991), *aff'd*, 595 N.E.2d 845 (N.Y. 1992); Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 552 n.135 (1985) (describing the *Steinberg* case).

40. For a useful introduction, see Dorothy Q. Thomas & Michele E. Beasley, *Domestic Violence as a Human Rights Issue*, 58 ALB. L. REV. 1119 (1995) ("At best . . . manifestations of violence against women are considered unfortunate cultural practices outside of the state's or the international systems' responsibilities."). Mary K. Meyer, *Negotiating International Norms: The Inter-American Commission of Women and the Convention on Violence Against Women*, in GENDER POLITICS IN GLOBAL GOVERNANCE 58, 60 (Mary K. Meyer & Elizabeth Perügl eds., 1999). In addition, the marginalization of economic rights, and the corresponding focus on civil and political rights, has led to the neglect of "women's experience of gender specific violence . . . and [to] exclude such experiences from the very definition of 'human' rights and state responsibility." *Id.* at 61.

Jutta Joachim has described the ways in which the Cold War blocs (West/North, East, and South) impeded efforts to recognize violence against women. Jutta Joachim, *Shaping the*

tural.<sup>41</sup> International consciousness has been raised in the last decade, however. The three World Conferences on Women that the UN organized in connection with the UN Decade for Women between 1975 and 1985 (Mexico City 1975, Copenhagen 1980, Nairobi 1985) provided an opportunity to bring the issue of violence against women to international attention.<sup>42</sup>

This raised consciousness is grounded in the work of women's groups on several fronts.<sup>43</sup> Some groups lobbied for recognition of rape as a war crime before the *ad hoc* criminal tribunals in Rwanda and the former Yugoslavia.<sup>44</sup> Others urged the interna-

*Human Rights Agenda: The Case of Violence Against Women*, in GENDER POLITICS IN GLOBAL GOVERNANCE, *supra*, at 144. The West, for example, introduced resolutions on the subject of domestic violence in 1980. These received no support from the other blocs. *Id.*

41. See, e.g., MISSION TO BRAZIL, *supra* note 9, ¶ 25 (noting that University of Brasilia researchers describe "machismo" in Brazil as "imbued with the notion that violence is a natural part of a relationship between a man and a woman, as an indication of passion").

42. Joachim, *supra* note 40, at 143. After the Nairobi Conference, gender violence was placed on the agenda by the Commission on the Status of Women, a subsidiary body of the U.N. Economic and Social Council. *Id.* at 148. See also Joan Fitzpatrick, *The Use of International Rights Norms to Combat Violence Against Women*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 532, 536 (Rebecca J. Cook ed., 1994) (discussing the World Conference of the U.N. Decade for Women in 1980, which concluded that women "must be protected from domestic violence," consideration of domestic violence within the Commission on the Status of Women and the Economic and Social Council, as well as various criminal law initiatives, and the 1986 Expert Group Meeting on Violence in the Family with special emphasis on its effect on women). See also Donna Sullivan, *Women's Human Rights and the 1993 World Conference on Human Rights*, 88 AM. J. INT'L L. 152, 156-57 (1994) (describing consideration of gender specific violence at the conference). Women were relatively late arrivals in the human rights community. LOUIS HENKIN ET AL., HUMAN RIGHTS 383 (2000). The Women's Rights Project of Human Rights Watch and the Women's Rights Advocacy Program of the International Human Rights Law Group were not established until 1990 and 1992, respectively. *Id.*

43. Fitzpatrick, *supra* note 42, at 532 ("cataloging the myriad international norms that relate to gender-based violence against women"). See, e.g., Meyer, *supra* note 40, at 66 (noting that there were 379 separate women's organizations working on gender violence issues in Latin America in the early 1990s); Katherine M. Culliton, *Finding a Mechanism to Enforce Women's Right to State Protection from Domestic Violence in the Americas*, 34 HARV. INT'L L.J. 507, 509 (1993) (describing steps in developing consensus).

44. HENKIN, *supra* note 42, at 380. "Media attention to atrocities in Bosnia, Rwanda, and other war-torn areas where rape was used as a strategy of warfare has also helped to raise the question of violence against women at the international level." Meyer, *supra* note 40, at 65. See also KELLY D. ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS (1997); Kelly D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 AM. J. INT'L L. 97, 97-123 (1999) (discussing gender-based violence in Yugoslavia and Rwanda).

tional community to mobilize against female genital surgeries.<sup>45</sup> Still others explicitly focused on domestic violence.<sup>46</sup> On virtually every issue, women's groups worked on the regional<sup>47</sup> and national<sup>48</sup> as well as the international level.

Their work culminated in the 1993 Declaration on the Elimination of Violence Against Women,<sup>49</sup> which recognizes that violence against women "both violates and impairs or nullifies the enjoyment by women of human rights and fundamental free-

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45. See, e.g., *THIRD WORLD—SECOND SEX: WOMEN'S STRUGGLES AND NATIONAL LIBERATION* 217 (Miranda Davis ed., 1983), reprinted in HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 418–19 (2d. ed. 2000); CEDAW, General Recommendation No. 14, 9th Session, 1990, U.N. Doc. A/45/38/1 Int. Hum. Rts Re. 21 (No. 1 1994) (reprinted in STEINER & PHILIP ALSTON, *supra*, at 416).

46. See Kenneth Roth, *Domestic Violence as an International Human Rights Issue*, in HUMAN RIGHTS OF WOMEN 326 (discussing some of the methodological problems that the Human Rights Watch Women Rights Project has encountered in addressing domestic violence against women).

47. For a comprehensive report on women in the America, see OAS, REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS ON THE STATUS OF WOMEN IN THE AMERICAS, OEA/Ser.L/V/11.100, Doc. 17, Oct. 13, 1999. For an account of the work of the Inter-American Commission on Women ("CIM") in identifying the problem, calling for national reports on existing and model legislation, national measures to eliminate violence against women and statistical information on its incidence, making recommendations and, finally, calling for an international convention, see Meyer, *supra* note 40, at 66–67. Chapter 3 of the Inter-American Convention for example, creates "the path-breaking international human rights norm of state responsibility in the prevention, punishment, and elimination of violence against women." *Id.* at 69.

48. For a description of women's efforts to organize around the issue of violence on the national level, see Joachim, *supra* note 40, at 146 (describing "women only" police stations established in Brazil, programs to encourage whistle-blowing against batterers in Peru, campaigns against dowry death and police rape in India, the establishment of rape crisis centers and transition houses from Trinidad to Toronto, and opposition to sex tourism in the Philippines). National legal systems are often unable or unwilling to effectively address the problem. In Brazil, for example, only two percent of those convicted of domestic violence actually serve sentences. See MISSION TO BRAZIL, *supra* note 9, at 20 (citing "a reputed scholar"). China has recently revised its criminal code to deal with domestic violence in a more rigorous manner. Michael Palmer, *Caring for Young and Old: Developments in the Family Law of the People's Republic of China, 1996–98*, in THE INTERNATIONAL SURVEY OF FAMILY LAW, *supra* note 37, at 95. See also Satoshi Minamikata & Teiko Tamaki, *Developments in Japanese Family Law During 1998—Domestic Violence Reforms*, in THE INTERNATIONAL SURVEY OF FAMILY LAW, *supra* note 37, at 231 (describing the recent emergence of law addressing domestic violence in Japan).

49. G.A. Res. 48/104, U.N. GAOR, U.N. Doc. A/RES/48/104 (1993) [hereinafter Declaration of Elimination].

doms.”<sup>50</sup> It also resulted in the appointment of the Special Rapporteur on Violence Against Women, Radhika Coomaraswamy.<sup>51</sup>

The Special Rapporteur, through a series of fact-finding missions and over two dozen reports prepared by her office on the topic of violence against women, brought international consciousness to a new level. Now, a state’s acquiescence, or failure to take effective measures to combat domestic violence, is recognized as a violation of women’s human rights.<sup>52</sup> While the Declaration was aspirational, its prohibition of violence against women can now be characterized as emerging customary international law.

## B. Emergence of the Norm

### 1. As Customary International Law

There are two major sources of international law.<sup>53</sup> First, and most familiarly, international law can be made by treaty; that is, a binding agreement entered into by two or more states.<sup>54</sup> In addition, international law may be found in customary international law (“CIL”).<sup>55</sup> As defined in international law, CIL has two elements: (1) state practice and (2) *opinio juris*; that is, the idea that such state practice is legally mandated.<sup>56</sup> Torture, for example, is a violation of customary international law. No state claims

50. Declaration of Elimination, *supra* note 49, art. 5. Cf. Meyer, *supra* note 40, at 60 (describing the “marginalization of women-specific abuses from the international human rights regime”).

51. Commission on Human Rights resolution appointing a Special Rapporteur on violence against women, Commission on Human Rights resolution 1994/45 ESCOR, 1994 Supp. No. 4, at 140, 11 Mar. 1994, reprinted in THE UNITED NATIONS AND THE ADVANCEMENT OF WOMEN 1945–96, at 492 (1996) [hereinafter THE ADVANCEMENT OF WOMEN].

52. See generally Thomas & Beasley, *supra* note 40.

53. As set out in the Statute of the International Court of Justice, there is a third source of international law; i.e., “general principles of law.” Declaration of Elimination, *supra* note 49, art. 38.1c. This refers to practices common among domestic systems, such as *res judicata* and estoppel, and is not important for present purposes.

54. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 301 cmt. a (1986). Cf. Vienna Convention on the Law of Treaties, art. 2(1)(a) (defining “treaty” as an international agreement between States in written form and governed by international law).

55. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(1) (1986).

56. *Id.* § 102(2).

that it may legally engage in torture. All states, on the contrary, have official policies against torture, reflecting their common understanding that it is prohibited in the international community.<sup>57</sup> This does not mean, of course, that no state actually engages in torture. It simply means that it does so secretly, or contends that a particular practice is not in fact "torture."

Customary international law may be shown through state practice over time, in the form of state adherence to international treaties, declarations, or General Assembly resolutions; through the enactment of domestic legislation,<sup>58</sup> through executive action, and through a state's own judicial decisions. The accretion of such practice, accompanied by evidence that the state believed that such practice was legally mandated, constitutes CIL. Where consensus among states is great, and no state objects, less practice may be needed.<sup>59</sup>

#### a. State Responsibility

With the unanimous adoption of the Declaration on the Elimination of Violence Against Women in 1993,<sup>60</sup> 180 states recognized domestic violence as a violation of women's international human rights.<sup>61</sup> The issue of state responsibility is explicitly addressed in Article 4: "States should condemn violence against women and . . . pursue by all appropriate means and without delay a policy of eliminating violence against women."<sup>62</sup> Such measures should include: ratifying the Women's Convention (or with-

57. *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980) (noting that torture has been "universally renounced").

58. In Brazil, Chile and Mexico for example, "the emergence of women's groups and the democratic openings have combined to create government agencies devoted to addressing domestic violence through specialized police forces . . . public information and education programs to prevent family violence . . . and the compilation of some official statistics on the problem." Meyer, *supra* note 40, at 65-66.

59. In fact, where there is unanimous agreement, some have argued that "instant custom" should be recognized. *But see* Oscar Schachter, *International Law in Theory and Practice*, in 178 RECUEIL DES COURS 1982-V 111-21 (1985) (arguing that resolutions of the General Assembly should be considered *evidence* of law).

60. *See supra* note 49. CEDAW recognized this a year earlier, in CEDAW, General Recommendation No. 19, Violence Against Women, U.N. Doc. CEDAW/c/1992/2.1/Add.1/s (1992). *See also* Joachim, *supra* note 40, at 142.

61. *See* Declaration of Elimination, *supra* note 49.

62. *Id.* art. 4.

drawing reservations), preventing, investigating and punishing violence against women, whether on the part of the state or private persons,<sup>63</sup> and modifying social and cultural conduct based on stereotyped roles. Finally, the state should document its efforts in self-monitoring reports submitted to existing treaty bodies.<sup>64</sup>

Although the Declaration was aspirational, its unanimous adoption in conjunction with the proliferation of domestic legislation, executive action, and national judicial decisions which followed, along with the repeated references to state responsibility for domestic violence in reports of the Human Rights Commission, the Special Rapporteur on Domestic Violence,<sup>65</sup> and other international instruments as well as regional human rights instruments, supports the proposition that states may indeed be held responsible for domestic violence.<sup>66</sup>

## **b. Substance**

Once state responsibility is established, the substance of international norms against domestic violence may be understood as a clarification and elaboration of existing human rights norms. The Declaration explicitly recognizes that violence against women

63. Declaration of Elimination, *supra* note 49, art. 4(c).

64. *Id.* art. 4(m).

65. The Special Rapporteur repeatedly and consistently refers to the state's obligation to prevent violence against women to protect human rights. UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, INTEGRATION OF THE HUMAN RIGHTS OF WOMEN AND THE GENDER PERSPECTIVE: VIOLENCE AGAINST WOMEN ¶ 82, U.N. Doc. E/CN.4/1999/68/Add.4 (1999). For further recognition of the prohibition against violence against women as customary international law, see UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, REPORT OF THE SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN at 27 B.1, U.N. No. E/CN.4/1998/54 (1998) [hereinafter VIOLENCE AGAINST REFUGEE WOMEN].

66. See generally Subrata Paul, *Combating Domestic Violence Through Positive International Action in the International Community and in the United Kingdom, India, and Africa*, 7 CARDOZO J. INT'L & COMP. L. 205, 227 (1999). But see Roth, *supra* note 46, at 332–33 (criticizing the imposition of state responsibility for non-state action because 1) “it fails to distinguish domestic violence from a range of other forms of violence that also systematically subordinate a class of people” and 2) such arguments “breach[] the universality that underlies international human rights law”).

violates their "human rights and fundamental freedoms."<sup>67</sup> "Violence against women" has been defined by the Committee on Human Rights as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats, domestic violence, crimes committed in the name of honor . . . ."<sup>68</sup> Paragraph 15(d) reiterates state obligations, including the state's obligations to pass domestic legislation prohibiting violence against women.

As the Special Rapporteur explains in her Report of 21 January 1999, the "fundamental human rights to be free from torture, gender discrimination and the inherent right to life are directly applicable to . . . violence against women."<sup>69</sup> These rights, i.e., to be free from torture, gender discrimination<sup>70</sup> and the right to life, are well established in CIL. Indeed, their lineage is cited in the Declaration itself. Thus, in a general sense, the rights set out in the Declaration are *already* CIL. The Declaration, accordingly, represents the codification and clarification of general rights already recognized in CIL in the specific context of domestic violence. The concrete substance of the right, of course, is a function of the concrete context in which it is recognized.<sup>71</sup>

67. Declaration of Elimination, *supra* note 49, art. 5.

68. Committee on Human Rights, 2000/45 para. 4. The Inter-American Convention on Violence Against Women, similarly, defines violence against women to include "any act of conduct, based on gender, which causes death or physical, sexual, or psychological harm or suffering to women, whether in the public or private sphere." *Id.* art. 1. *Cf.* Declaration of Elimination, *supra* note 49, art. 2(a) (providing that violence includes "violence occurring in the family, including battering, sexual abuse of female children . . . marital rape . . . non-spousal violence").

69. VIOLENCE AGAINST REFUGEE WOMEN, *supra* note 65, ¶ 8.

70. The relationship between domestic violence and gender discrimination has been amply demonstrated:

In the end analysis, it is perhaps best to conclude that violence against wives is a function of the belief, fostered in all cultures, that men are superior and that the women that they live with are their possessions or chattels that they can treat as they wish and as they consider appropriate.

Rhonda Copelon, *Intimate Terror: Understanding Domestic Violence as Torture*, in HUMAN RIGHTS OF WOMEN, *supra* note 42, at 116, 120 [hereinafter Copelon, *Intimate Terror*] (citing U.N. Report, *Violence Against Women in the Family*). For an insightful discussion of the "usefulness as well as the limitations of the equality paradigm" in this context, see Fitzpatrick, *supra* note 42, at 538-39.

71. See MISSION TO BRAZIL, *supra* note 9, ¶ 6 (noting that Brazil was selected by the Special Rapporteur because of both the "high prevalence of [domestic] violence in the coun-

## 2. As Treaty Law<sup>72</sup>

### a. The Convention on the Elimination of All Forms of Discrimination Against Women (the "Women's Convention")<sup>73</sup>

The Women's Convention does not explicitly prohibit violence against women. As Joan Fitzpatrick notes, however, the Committee on the Elimination of Discrimination Against Women ("CEDAW") has attempted to retroactively fill in the gaps through "creative interpretation" of the Women's Convention.<sup>74</sup> In General Recommendation No. 19, for example, CEDAW explained that "gender-based violence is a *form of discrimination*" and thus included in the Women's Convention's bar against gender discrimination in general.<sup>75</sup> In addition, the Women's Convention requires all parties to "take all appropriate measures to eliminate discrimination against women by *any person, organization or enterprise.*"<sup>76</sup> CEDAW read this as making states responsible for private acts "if they fail to 'act with due diligence to prevent violations of rights, or to investigate and punish acts of violence, and to provide compensation.'"<sup>77</sup>

The United States is not a party to the Women's Convention, but it is a signatory.<sup>78</sup> Thus, the United States has the obligation

try, but also because of many of the existing programs and activities both governmental and non-governmental to combat and prevent such violence").

72. This section is limited to treaty law of particular importance to victims of domestic violence to which the United States is, or may become, a party. A discussion of regional human rights instruments (other than those in the Americas) is beyond the scope of this article, as is a discussion of the Optional Protocol to the Women's Convention, which will not be open to the United States until it becomes a party to the Women's Convention itself. For an excellent overview, see generally Alice M. Miller & Meghan Faux, *Reconceiving Responses to Private Violence and State Accountability: Using an International Human Rights Framework in the United States*, 1 GEO. J. GENDER & L. 67 (1999). See also Culliton, *supra* note 43 (discussing mechanisms for enforcing rights to state protection in the Americas).

73. GA Res. 34/180, U.N. GAOR, Supp. No. 46, at 193, U.N. Doc. A/RES34/180 (1980).

74. Fitzpatrick, *supra* note 42, at 534.

75. General Recommendation No. 19, *supra* note 60, art. 1 (emphasis added). See Culliton, *supra* note 43, at 513, 527.

76. Women's Convention, *supra* note 68, art. 2(e) (emphasis added).

77. Fitzpatrick, *supra* note 42, at 535.

78. President Carter submitted it to the Senate in 1980. In 1978, he had submitted the International Convention on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 271, 6 I.L.M. 171; the International Convention on Economic, Social, and Cultural Rights



at the very least to refrain from any action that would contravene the Convention.<sup>79</sup>

### b. The Convention Against Torture ("CAT")<sup>80</sup>

The CAT has been ratified by the United States<sup>81</sup> and the necessary implementing legislation, the Foreign Affairs Reform and Restructuring Act of 1998, has been enacted.<sup>82</sup> "Torture" is defined in Article 1 as the "intentional infliction of severe pain and of suffering" with a view to achieving a wide range of purposes, by, or with the acquiescence of, a person acting in an official capacity.<sup>83</sup> As Rhonda Copelon and others have argued,<sup>84</sup> and as the Special Rapporteur has confirmed, domestic violence may be torture.<sup>85</sup> As such, it is subject to the penalties set out in the United States implementing legislation.<sup>86</sup>

In addition, Article 3 of the CAT expressly provides for the withholding of removal of any individual seeking asylum in the

("ICESCR"), Jan. 1, 1976, 993 U.N.T.S. 3. Jan. 3, 1976, 993 U.N.T.S. 3.; the Convention for the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, Jan. 4, 1969; and the American Convention on Human Rights, O.A.S. Treaty Series No. 36 at 1, *entered into force* July 18, 1978, to the Senate.

79. See Vienna Convention on the Law of Treaties, art. 22 (requiring signatories to refrain from actions that would thwart the "object and purpose" of the treaty).

80. 1465 U.N.T.S. 113 (1988).

81. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 113.

82. Pub. L. No. 105-277, 112 Stat. 2681 (1998).

83. Article 1, CAT. For a description of other forms of gender-specific torture, see Report of the Special Rapporteur, Mr. Nigal S. Rodley, submitted pursuant to Commission on Human Rights Resolution 1992/32, U.N. Doc. E/CN.4 1995/34 (1995).

84. Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291 (1994); Copelon, *Intimate Terror*, *supra* note 70. See also authorities cited *supra* note 70 and *infra* note 85.

85. Domestic violence is torture if the following elements of torture, distilled by Professor Copelon from the binding legal instruments, are met: 1) severe physical and/or mental pain and suffering; 2) intentionally inflicted; 3) for specified purposes; 4) with "active or passive" official involvement. Copelon, *Intimate Terror*, *supra* note 70, at 122. Cf. Barbara C. Alexander, *Convention Against Torture: A Viable Alternative Legal Remedy for Domestic Violence Victims*, 15 AM. U. INT'L L. REV. 895, 925-32 (2000) (identifying only three elements of torture relevant to immigrant domestic violence victims—omitting requirement that it be "for specific purposes").

86. As Professor Copelon notes, however, "[t]he dilemma of mainstreaming also is illustrated by the inadequacy of the torture convention's remedies when applied to domestic and other forms of gender-based violence." Copelon, *Intimate Terror*, *supra* note 70, at 143.

United States who would “more likely than not” face a risk of torture should she be returned to her native country.<sup>87</sup> Thus, the CAT offers what one commentator characterizes as a “viable alternative legal remedy” for immigrant women fleeing domestic violence.<sup>88</sup>

### c. Inter-American Convention on Violence Against Women

The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (“Convention of Belém Do Pará”) was open for ratification in 1995.<sup>89</sup> This Convention explicitly bars violence against women, but the United States is not yet a party. Article 10 defines violence against women as “any act of conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or private sphere.”<sup>90</sup> Article 6 affirms a woman’s right to be free from all forms of discrimination, including “stereotyped patterns of behavior and social practices based on concepts of inferiority or subordination.”<sup>91</sup>

Article 8 requires the state to support educational and training programs, to change attitudes that contribute to violence against women, to provide specialized services for women who are the victims of violence, to develop guidelines for the media to promote more positive images of women, to support research on the causes, consequences, and frequency of violence against women, and to foster “international cooperation for the exchange of ideas and experiences and the execution of programs aimed at protecting women.”<sup>92</sup> Article 11 authorizes the Inter-American

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87. Alexander, *supra* note 85, at 907.

88. *Id.* at 900.

89. Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (Convention of Belém Do Pará), *entered into force* Mar. 5, 1995, *reprinted in* REPORT OF THE INTER-AMERICAN COMMISSION, *supra* note 47, at 57 [hereinafter Convention of Belém Do Pará].

90. *Id.* art. 10.

91. *Id.* art. 6. As Professor Meyer has pointed out, the Inter-American Convention challenges the public/private distinction that “both legally and culturally, has allowed states to tolerate violence against women.” Meyer, *supra* note 40, at 68. *See also* REPORT OF THE INTER-AMERICAN COMMISSION, *supra* note 47, at 25–26.

92. Convention of Belém Do Pará art. 8.

Court of Human Rights to give advisory opinions on its interpretation at the request of the state signatories and the CIM, and Article 12 permits individuals as well as NGOs to file petitions with the Inter-American Commission on Human Rights regarding violations of Article 7, which requires the state to "pursue policies to prevent, punish, and eradicate . . . violence."<sup>93</sup> Chapter IV of the Inter-American Convention sets out additional enforcement mechanisms, including self-monitoring.<sup>94</sup>

### C. Consequences

International law, CIL, as well as conventional law to which the state is a party, is binding on states. In the United States, as Justice Gray opined in *The Paquete Habana*, "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."<sup>95</sup> While enforcing international law in United States courts may be problematic in some cases,<sup>96</sup> especially cases involving violations of human rights, international law remains an important source of rights.<sup>97</sup> It is widely recognized, however, that the most effective means of implementing or enforcing human rights law is through its incorporation in domestic law.<sup>98</sup>

#### 1. Alien Tort Statute of 1789<sup>99</sup>

It is well established that United States courts can assume jurisdiction over alien tortfeasors under the 1789 Alien Tort Stat-

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93. Convention of Belém Do Pará arts. 7, 10, 11.

94. *Id.* art. 10.

95. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

96. See generally JORDAN PAUST ET AL., INTERNATIONAL LAW IN THE UNITED STATES (2000).

97. See, e.g., Elizabeth Dietz, *Violence Against Women in the United States: An International Solution*, 13 ARIZ. J. INT'L & COMP. L. 551, 566-67 (1996).

98. Richard Bilder, *An Overview of International Human Rights Law*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICES 3-17 (Hurst Hannum ed., 1983), reprinted in CARTER & TRIMBLE, *supra* note 7, at 850). For a proposal for exporting the United States approach, see Herbert Bowman, *Getting the Message Abroad: The International Training Program as a Vehicle for Change*, 47 LOY. L. REV. 479 (2001).

99. 28 U.S.C. § 1350 (1994).

ute. In *Filartiga v. Pena-Irala*,<sup>100</sup> for example, the Second Circuit Court of Appeals assumed jurisdiction over defendant Pena-Irala, who had allegedly tortured plaintiff's brother to death in Paraguay.<sup>101</sup> Although the United States had not yet ratified the CAT, the Second Circuit nevertheless found that torture was within the court's jurisdiction because it was a violation of CIL.<sup>102</sup> Thus, where domestic violence qualifies as torture, United States courts can arguably assume jurisdiction over the batterer even if the torture occurred in another country.

## 2. Links to Other Human Rights

As noted above, the Special Rapporteur as well as the Human Rights Commission have repeatedly and explicitly noted that domestic violence impedes women's enjoyment of fundamental human rights.<sup>103</sup> In addition to those rights set forth in the International Bill of Rights, and generally recognized as part of CIL,<sup>104</sup> domestic violence often interferes with, or precludes, women's enjoyment of other human rights and, as a corollary, denial of other human rights may promote or exacerbate domestic violence.<sup>105</sup> The right to shelter and the right to work are two prominent examples. In addition, domestic violence may violate the rights of children in the home.<sup>106</sup>

### a. Right to Shelter

The connection between the right to shelter, as set out in Article 11 of the ICESCR,<sup>107</sup> and domestic violence has been well

100. 630 F.2d 876 (2d Cir. 1980).

101. *Id.* at 880.

102. *Filartiga*, 630 F.2d at 880.

103. INTEGRATION OF THE HUMAN RIGHTS OF WOMEN AND THE GENDER PERSPECTIVE, *supra* note 65.

104. See *supra* Part III.B.1.b (explaining how domestic violence violates CIL since it necessarily violates some if not all of these rights).

105. See generally Kelsey S. Barnes, *The Economics of Violence: Why Freedom from Domestic Violence Must Be Treated as a Developmental Right in International Law*, 6 U. MIAMI Y.B. INT'L L. 97, 118-27 (1997-98).

106. The rights of children may be in tension with the rights of their mothers in the context of domestic violence. See generally Symposium, *Women, Children, and Domestic Violence*, *supra* note 6.

107. ICESCR, *supra* note 78, art. 11.

documented. Women often remain in abusive relationships because they have nowhere else to go.<sup>108</sup> As a corollary, women fleeing abusive relationships may well become homeless.<sup>109</sup>

### b. Right to Work

The right to work is broken down under the ICESCR into three major guarantees. First, under Article 6, the State “recognize[s] . . . the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts.”<sup>110</sup> Article 7 goes on to assure “just and favorable conditions of work,” explicitly including:

[F]air wages and equal remuneration for work of equal value without distinction of any kind, *in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work*; a decent living for themselves and for their families . . . rest, leisure and reasonable limitation of working hours.<sup>111</sup>

Article 8 focuses on the right to form and join trade unions. As the commentary to the Guidelines notes, “[t]he right to work is of

108. See generally Joan Zorza, *Women Battering: A Major Cause of Homelessness*, 25 CLEARINGHOUSE REV. 421 (1991).

109. UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, ECONOMIC AND SOCIAL POLICY AND ITS IMPACT ON VIOLENCE AGAINST WOMEN ¶¶ 69–71, U.N. Doc. E/CN.4/2000/68/Add.5 (2000). Half of all homeless women in the United States are fleeing abusive relationships. Zorza, *supra* note 108, cited in LEMON, *supra* note 6, at 331.

110. ICESCR, *supra* note 78, art. 6. As a commentator has pointed out, Article 6 “is not so much concerned with what is provided by work (in terms of remuneration), or the conditions of work, but rather with the value of employment itself.” It “thus gives recognition to the idea that work is an element integral to the maintenance of the dignity and self-respect of the individual.” MATTHEW C.R. CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 194 (1998). The socialist states argued for the inclusion of Article 6 in 1950. U.N. Docs. A/C.3/SR.289–91, 297–9, 5 U.N. GAOR, C.3, 289th–91st and 297th–99th mtgs. (1950).

111. ICESCR, *supra* note 78, art. 7 (emphasis added). As a commentator has observed, however: “International human rights law formulates some second generation rights in a discriminatory fashion. Article 7 . . . for example, is confined to work in the public sphere. Since most women’s economic activity is treated as falling within the private realm, Article 7’s guarantees offer no protection to most women.” PAUL HUNT, *RECLAIMING SOCIAL RIGHTS: INTERNATIONAL AND COMPARATIVE PERSPECTIVES* 105 (1996).

fundamental importance, not only for its own sake but because it can be the key to the enjoyment of many other rights.”<sup>112</sup>

Domestic violence interferes with these rights by causing victims to miss work, by bringing violence to the workplace, and by causing employers to fire obviously battered employees.<sup>113</sup> Women who are already vulnerable because of the kind of work they do, such as migrant workers, are likely to be at an increased risk of domestic violence.<sup>114</sup>

### c. Children's Rights

Children's rights, set out in the Convention on the Rights of the Child,<sup>115</sup> are similarly implicated.<sup>116</sup> A child's right to health is undermined when she does not believe that home is a safe place. Her psychological health is at risk because of the trauma suffered when she witnesses abuse, as well as the difficulty of dealing with the memory of such abuse and her anxiety that it may happen

112. U.N. CENTER FOR HUMAN RIGHTS, MANUAL ON HUMAN RIGHTS REPORTING UNDER SIX MAJOR INTERNATIONAL HUMAN RIGHTS INSTRUMENTS, U.N. Doc. HR/PUB/91/1 at 117 (1991).

113. See, e.g., MISSION TO BRAZIL, *supra* note 9, ¶ 10 (providing the Special Rapporteur's description of a twenty-seven year old domestic worker who "lost her job after her employer noticed that she was black and blue all over her body and asked her to stop coming to work"). In addition, the Union of Household Employees in Rio De Janeiro "was very emphatic that domestic violence should also include violence against household workers." *Id.* ¶ 32. See generally Lea B. Vaughn, *Victimized Twice—The Intersection of Domestic Violence and the Workplace: Legal Reform Through Curriculum Development*, 47 LOY. L. REV. 231 (2001) (describing domestic violence in the workplace in the United States, and more specifically in Washington state); Robin R. Runge & Marcellene E. Hearn, *Employment Rights Advocacy for Domestic Violence Victims*, in LEMON, *supra* note 6, at 821–28.

114. REPORT OF THE SECRETARY GENERAL TO THE GENERAL ASSEMBLY ON VIOLENCE AGAINST WOMEN MIGRANT WORKERS, U.N. Doc. A/49/354 (1994), reprinted in THE ADVANCEMENT OF WOMEN, *supra* note 51, at 506, 513 (noting "considerable evidence that violence against women in the family . . . is widespread, universal and possibly growing . . . [but that under many circumstances] reporting is unlikely").

115. U.N. Doc. A/RES/44/25 (1989). For a useful overview, see Jonathan Todres, *Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its Early Case Law*, 30 COLUM. HUM. RTS. L. REV. 159 (1998).

116. See generally Amy Haddix, Comment, *Unseen Victims: Acknowledging the Effects of Domestic Violence on Children Through Statutory Termination of Parental Rights*, 84 CAL. L. REV. 757 (1996) (arguing that domestic violence in the presence of children shows the violent parent's unfitness).

again.<sup>117</sup> Physically, it is well-established that the child is at increased risk of being abused herself.<sup>118</sup> In fact, a significant portion of child homicides are children killed by a batterer as yet another way to punish his victim.<sup>119</sup>

### 3. Refugee Law<sup>120</sup> and Asylum Cases

Domestic violence often plays a significant role in the lives of refugee and immigrant women. First, domestic violence may drive them from their native countries, causing them to seek asylum elsewhere.<sup>121</sup> Second, their problematic legal status in a new country may discourage them from reporting domestic violence.<sup>122</sup> Third, domestic violence is a problem in refugee camps.<sup>123</sup>

117. See, e.g., Stephen E. Doyne et al., *Custody Disputes and Domestic Violence: Making Children's Needs a Priority*, in LEMON, *supra* note 6, at 340-41 (explaining why exposure to abuse of others constitutes emotional abuse of a child).

118. Joan Zorza, *Protecting the Children in Custody Disputes When One Parent Abuses the Other*, in LEMON, *supra* note 6, at 331 (noting that more than half of men who beat their female partners beat their children). For a thoughtful and probing discussion of the legal construction of the battered mother, see G. Kristian Miccio, *A Reasonable Battered Mother? Redefining, Reconstructing, and Recreating the Battered Mother in Child Protective Proceedings*, 22 HARV. WOMEN'S L.J. 89 (1999). For an insightful analysis of child abuse from a feminist perspective, see Marie Ashe & Naomi R. Cahn, *Child Abuse: A Problem for Feminist Theory*, 2 TEX. J. WOMEN & L. 75 (1993). See also authorities cited *supra* note 24.

119. According to Joan Zorza, in about half of domestic child homicides, "the man often killed the children to spite the child's mother, whom he thought had betrayed him in some way." Zorza, *supra* note 19, at 930 n.130 (citing NEIL WEBSDALE, UNDERSTANDING DOMESTIC HOMICIDE 179-80 (1999)).

120. For a comprehensive discussion of one, the persecution that women "fear or have suffered which has caused them to lose their home, and, two, the risk of ensuing violence which they face in becoming refugees," see VIOLENCE AGAINST REFUGEE WOMEN, *supra* note 65, at 26.

121. See generally Deborah Anker et al., *Women Whose Governments Are Unable or Unwilling to Provide Reasonable Protection from Domestic Violence May Qualify as Refugees Under United States Asylum Law*, 11 GEO. IMMIGR. L.J. 709, 739 (1997).

122. *Id.*

123. Patricia A. Seith, Note, *Escaping Domestic Violence: Asylum as a Means of Protection for Battered Women*, 97 COLUM. L. REV. 1804, 1805 (1997). The United States Department of Justice has adopted "gender guidelines" in the wake of gender guidelines issued by the UNHCR in 1991. See Alexander, *supra* note 85, at 897 n.8. The author describes four categories of legal remedies available to immigrant domestic violence victims: (1) asylum; (2) withholding of removal under Immigration and Nationality Act regulations; (3) withholding of removal under Article 3 of CAT; and (4) deferral of removal under CAT. *Id.* at 907. As she concludes: "Asylum is always the preferred form of relief . . . because [withholding of removal] only prevents the United States from extraditing, expelling, or returning" a vic-

Under international refugee law, as set forth in the 1951 Convention Relating to the Status of Refugees,<sup>124</sup> persecution is a basis for asylum if petitioner is a member of a particular social group with common beliefs and practices. As the Special Rapporteur notes,

Gender-based violence is violation of international law, in particular the fundamental right to the security of person, including the right to not be subjected to torture or inhumane or degrading punishment . . . . Increasingly, states and international organizations are recognizing the argument that persecution based on gender is a legitimate ground for granting refugee status.<sup>125</sup>

While some in the refugee community think that all women should be considered members of a persecuted social group,<sup>126</sup> others argue that such characterization is overbroad and cannot withstand scrutiny under the Refugee Act.<sup>127</sup> Rather, they say that only women who are members of a group persecuted for common beliefs and practices are eligible for asylum under the Convention.<sup>128</sup>

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tim of domestic violence to a country where she would face torture. Alexander, *supra* note 85, at 911–12.

124. U.N. Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 629, 189 U.N.T.S. 137 (1954).

125. VIOLENCE AGAINST REFUGEE WOMEN, *supra* note 65, at 27. For a description of the INS procedures implemented pursuant to CAT, see Alexander, *supra* note 85, at 906 & n.55.

126. Through its *Gender Guidelines for Asylum Adjudications*, originally issued in March 1993 and reissued in 1996, “Canada became the first government to recognize formally that a woman fleeing persecution on gender-specific grounds can claim to ‘fear persecution on account of her membership in a particular social group.’” VIOLENCE AGAINST REFUGEE WOMEN, *supra* note 65, at 29. The United States *Guidelines on Gender Issues in Asylum Cases* explicitly recognizes domestic violence as a form of gender-related persecution. *Id.* at 30.

127. See, e.g., VIOLENCE AGAINST REFUGEE WOMEN, *supra* note 65, at 32:

One . . . argues that gender should be included as a persecution ground in the Convention’s definition of refugee, and that the term persecution should be reformulated to take the experience of women into account, while the other maintains that issues of gender can and should be dealt with within the existing structure.

*Id.*

128. See, for example, *R. v. The Immigrant Appeal Tribunal & the Secretary of State for the Home Department, ex parte Syede Kahatoon Shah*, in which the United Kingdom denied a claim for asylum by a Pakistani woman who claimed that she had suffered domestic vio-



United States law tracks the Refugee Convention, but its record on women fleeing domestic violence is mixed.<sup>129</sup> Even before *United States v. Morrison*,<sup>130</sup> which overturned the civil remedy section of the Violence Against Women Act,<sup>131</sup> commentators had noted the backlash in American refugee law in the form of the imposition of an "extreme hardship" requirement for women seeking asylum.<sup>132</sup>

For women in refugee camps, domestic violence remains a fact of life. In 1990, however, the UN High Commissioner for Refugees recognized that women refugees had specific needs, including needs for safety, that were not being addressed. A new policy was adopted, accordingly, to explicitly address those needs.<sup>133</sup>

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lence and faced the death penalty for alleged adultery under Sharia law. VIOLENCE AGAINST REFUGEE WOMEN, *supra* note 65. The special adjudicator held that:

There is no accepted definition of social group and it is no more possible for a woman who has suffered domestic violence to be herself within the meaning of social group . . . than it is for anyone who has been divorced to say that she or he is a member of a social group with the purposes of (the) convention

*Id.* at 29–30. In *In re MK*, a woman from Sierra Leone requested asylum in the United States on the grounds of persecution based on domestic violence. *Id.* at 30. The court found that there was in fact persecution here, relying on evidence showing that "violence against women, especially wife beating, is common . . . [since] disobedience on the part of the wife is considered a justification for punitive measures. . . by the husband, police are unlikely to intervene except in cases of severe injury or death, and few cases of violence go to court." *Id.*

129. For a description of the body of case law involving domestic violence as developed by the Board of Immigration Appeals in the United States, see Alexander, *supra* note 85, at 909.

130. 529 U.S. 598 (2000).

131. *Id.* at 627 (citing 18 U.S.C. §§ 2265–2269 (1994)).

132. Recent legislation added new Immigration and Nationality Act section 101(a)(15)(U) which creates a non-immigrant visa for immigrant crime victims who have suffered substantial physical or emotional injury as a result of being subjected to specific crimes in the United States, including domestic violence. NOW Summary on Final House/Senate VAWA Immigration Provisions, para. 30.

133. UNHCR Policy on Refugee Women, U.N. Doc. A/AC.96/754 (1990), cited in LOUIS HENKIN ET AL., INTERNATIONAL LAW 48 (3d ed. 1993). U.N. High Commissioners for Refugees ("UNHCR") and the Executive Committee of the High Commissioners Programme has promulgated Guidelines on the Protection of Refugee Women and Gendered Based Violence as a Form of Persecution in a 1985 policy statement of the executive committee as well as in new guidelines with respect to female asylum seekers. See generally Fitzpatrick, *supra* note 42, at 549.

#### 4. *Missouri v. Holland*<sup>134</sup>

In *Missouri v. Holland*, the United States Supreme Court upheld a federal law protecting migratory birds, although a similar law had already been struck down as violative of the sovereign authority of the States by a federal district court.<sup>135</sup> Yet this law, enacted pursuant to a treaty between the United States and Canada, was upheld. As Justice Holmes [QY: “the author of the opinion” instead of “Justice Holmes”] explained, “[i]t is obvious that there may be matters of the sharpest exigency for the national well being that an Act of Congress could not deal with but that a treaty followed by such an act could . . . .”<sup>136</sup>

Here, analogously, *Morrison* overturned that portion of the VAWA setting out a civil remedy<sup>137</sup> on the grounds that it exceeded Congress’s power under the Commerce Clause to do so. The reenactment of VAWA under the treaty power, like the reenactment of the statute protecting migratory birds, could be sustained under *Holland*.<sup>138</sup>

The several extant treaties noted above could serve this purpose. The Women’s Convention already signed, could provide the necessary “exigency.”<sup>139</sup> The Inter-American Convention is even more detailed and specific and explicitly defines violence against women as a violation of women’s human rights.<sup>140</sup> Unlike the

134. 252 U.S. 416 (1920).

135. *Id.* at 432 (citing *United States v. Shauver*, 214 F.154, 161 (D.C. Ark. 1914); *United States v. McCullagh*, 221 F. 288, 295–96 (D.C. Kan. 1915)).

136. *Holland*, 252 U.S. at 433.

137. As Professor Goldfarb has noted: “If the Violence Against Women Act’s civil rights remedy is ultimately found unconstitutional, the result will be to obscure the public significance of gender-motivated violence and deny an effective legal remedy to its victims.” Sally S. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1, 87 (2000). VAWA’s civil rights remedy has, of course, been found unconstitutional. *United States v. Morrison*, 529 U.S. 598, 627 (2000). However, *Missouri v. Holland* offers a possibility for its revival.

138. See Jordan J. Paust, *Human Rights Purposes of the Violence Against Women Act and International Law’s Enhancement of Congressional Power*, 22 HOUS. J. INT’L L. 209 (2000). For a compelling argument that a federal civil rights remedy for gender motivated violence is a necessary component of legal protection guaranteeing sex equality, see Goldfarb, *supra* note 137.

139. See *Holland*, 252 U.S. at 433.

140. See generally Meyer, *supra* note 40.

treaty in *Missouri v. Holland*, of course, these are human rights treaties. The distinction between these kinds of treaties and bilateral treaties such as that in *Holland* has been elaborated upon by the International Court of Justice in its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>141</sup> As the Court there noted, human rights treaties are likely to permit greater latitude among the parties in the interest of achieving universality.<sup>142</sup> Whether this additional latitude would distinguish VAWA from the migratory birds treaty is an open question.

#### IV. SOME EXAMPLES OF IO AND NGO EFFORTS

NGOs and IOs have played important roles in advocacy as well as in public education. The Special Rapporteur, among others, considers them crucial allies.<sup>143</sup> UNIFEM's Internet Working Group to End Violence Against Women is an example of an IO exploiting technology to develop effective working relationships among a broad range of women's groups. OXFAM is an example of a major international NGO with a broad development-focused mandate which has recognized the impact of domestic violence on its project.

##### A. UNIFEM's Internet Working Group to End Violence Against Women

UNIFEM's Internet Working Group to End Violence Against Women has considered strategies involving education, training, mobilization, changing male behavior, roles of NGO's and gov-

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141. 1951 I.C.J. 15 (May 28, 1951).

142. *Id.*

143. According to the Special Rapporteur:

Very little effort has been undertaken at the international level to provide for a "clearinghouse" on domestic violence . . . it is, therefore, proposed that a clearinghouse for information, perhaps located within UNIFEM or the Division for the Advancement of Women at headquarters, be established to ensure that information on ways and means of combating domestic violence at the national level is shared and accessible to all countries.

MISSION TO BRAZIL, *supra* note 9, ¶ 100.

ernments.<sup>144</sup> In addition, the Working Group has considered strategies relating to the role of the media.<sup>145</sup> The Working Group has also analyzed the factors contributing to the success of anti-violence strategies.<sup>146</sup>

## B. NGO Projects

The NGOs have been equally productive.<sup>147</sup> OXFAM, for example, seeks to address domestic violence within the development context. OXFAM recently sponsored a conference focusing on the factors contributing to the success of various anti-violence strategies.<sup>148</sup> These included sustained work by the women's movement, increased political participation of women, and alliances among local common national and international NGOs.<sup>149</sup> The Conference also noted the obstacles to those strategies, including splits in the women's movement, social and political backlash, and threats against service providers and survivors.<sup>150</sup>

An NGO focused on women in the developed world, the European Women's Lobby, has recently published an extensive report, *Unveiling the Hidden Data on Domestic Violence in the European Union*.<sup>151</sup> This report notes that violence crosses class and cultural boundaries;<sup>152</sup> that violence is the norm rather than

144. UNIFEM's Internet Working Group to End Violence Against Women, at <http://www.unifem.undp.org/campaign/violence/sum2505.htm> (summary of discussion Jan. 25–Feb. 5, 1999) [hereinafter Summary of Discussion].

145. See Summary of Discussion 18 Mar.–14 Apr. 1999, *supra* note 144.

146. See Summary of Discussion 15 Apr.–5 May 1999, *supra* note 144.

147. For an account of the women's organizations which brought the issue of violence against women "out of the private and into the public realm, and specifically, onto the U.N.'s agenda" see Joachim, *supra* note 40, at 142. See also LEMON, *supra* note 6, at 876 (noting the importance of NGOs in combating domestic violence). See generally Alice M. Miller, *Realizing Women's Human Rights: Nongovernmental Organization and the UN Treaty Bodies*, in GENDER POLITICS IN GLOBAL GOVERNANCE *supra* note 40, at 142, 161.

148. See Miller, *supra* note 147.

149. *Id.*

150. *Id.*

151. EUROPEAN WOMEN'S LOBBY, UNVEILING THE HIDDEN DATA ON DOMESTIC VIOLENCE IN THE EUROPEAN UNION (2000) [hereinafter UNVEILING THE HIDDEN DATA], available at <http://www.womenlobby.org/en/theme/violence/dossier.html> (last visited Mar. 20, 2001).

152. "The Report of the Parliamentary Inquiry Commission . . . indicated that patterns of violence against women vary by region and social group. It was felt, for example, that eco-

the exception; and that violence is independent of poverty, education, alcohol or drug use. In addition, *Unveiling the Hidden Data* notes that women are particularly vulnerable when they are pregnant and during the post-natal period, during periods of separation and when their children are very young.<sup>153</sup>

## V. CONCLUSION

Domestic violence is increasingly recognized as a serious problem by the international community. From a pedagogical perspective, domestic violence is a dramatic heuristic device for demonstrating the relevance of international law in individual cases, through the various Hague Conventions, as well as the incorporation of international human rights norms into domestic law. It is also an excellent example of the emergence of "soft law"; that is, the process through which emerging norms develop into binding international law. The promulgation of such law, and its incorporation in national legal systems, reflects and reinforces global efforts to combat domestic violence.

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nomically disadvantaged, black and indigenous women in rural areas did not have equal access to relief by appeal to the state." MISSION TO BRAZIL, *supra* note 9, at 26.

153. MISSION TO BRAZIL, *supra* note 9, at 26. See also UNVEILING THE HIDDEN DATA, *supra* note 151.