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The Right to No: The Crime of Marital Rape, Women's Human Rights, and International Law

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THE RIGHT TO NO: THE CRIME OF MARITAL RAPE, WOMEN'S HUMAN RIGHTS, AND INTERNATIONAL LAW¹

Melanie Randall & Vasanthi Venkatesh[‡]*

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1. "The Right to No" references an article by Sally Armstrong, *Marital Rape in Africa: The Right to Say No*, GLOBE AND MAIL (TORONTO), June 11, 2010, <http://www.theglobeandmail.com/news/world/marital-rape-in-africa-the-right-to-say-no/article4328673/?page=all>.

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INTRODUCTION

More than half of the world's countries do not explicitly criminalize sexual assault in marriage,² including OECD countries like the Czech Republic and Japan. Certain U.S. states either retain exemptions for sexual assault committed by spouses or give it lesser penalties than other rapes.³ In some countries, such as Tunisia, Cameroon, and Bulgaria, perpetrators of rape are exempt from criminal charges if they marry the victim. Sexual assaults committed against a spouse remain entirely legal in thirty-five countries, including Sri Lanka, India, Bulgaria, Kenya, and Malawi.⁴ When passing legislation to address domestic violence in 2014, Lebanon not only declined to criminalize marital rape, but legally entrenched a "marital right of intercourse."⁵ Clearly this is not a problem confined to one area of the world, but is instead one affecting women globally.

2. *Protecting Women from Violence*, WORLD BANK GROUP, <http://wbl.worldbank.org/data/exploretopics/protecting-women-from-violence> (last visited Nov 2, 2015).

3. Jessica Klarfeld, *Striking Disconnect: Marital Rape Law's Failure to Keep up with Domestic Violence Law*, A, 48 AM. CRIM. REV. 1819, 1833–66 (2011).

4. *Id.*

5. Lebanon: Domestic Violence Law Good, but Incomplete, HUM. RTS. WATCH (Apr. 3, 2014), <https://www.hrw.org/news/2014/04/03/lebanon-domestic-violence-law-good-incomplete>; see also *Why Does Lebanese Bill on Domestic Violence Fail to Tackle Marital Rape?*, GUARDIAN (Apr. 9, 2014),

The human rights violations inherent in acts of violence against women are now well recognized. Yet marital rape is a particular form of gendered violence that has escaped both criminal law sanctions and human rights approbation in almost one third of the world's nations. This silence in the law creates legal impunity for men who sexually assault or rape women who are their wives or intimate partners, thereby legitimizing this particular form of violence against women. This is a human rights problem that cries out for redress, both legally and socially.

An examination of international law and human rights norms demonstrates that state failures to criminalize sexual assault in marriage breach the due diligence standard and fail to comply with international human rights norms. The fact that there remain significant gaps in laws around the world ensuring legal impunity for men who sexually violate their intimate partners, indicates the global scale of the human rights law reform still to be done in this area.

Research has shown that the majority of violence against women is perpetrated by men known to the victims, who can be husbands or common law partners. While domestic violence is acknowledged as a human rights issue warranting legal intervention, the extent of the specifically sexual component of violence against women in intimate relationships, including rape in marriage,⁶ is drastically underrecognized. Sexual violence in intimate relationships has received relatively less attention in research literature, in law reform efforts, and in human rights advocacy. It remains a human rights problem without sufficient legal remedies.

State failures to criminalize marital rape represent a violation of women's fundamental human rights, including an undermining of women's right to equal benefit of the law. Moreover, these state failures to criminalize marital rape also represent a dereliction of a state's duties to comply with international obligations to enforce women's legally protected human rights to equality, liberty, and security of the person. These human rights are guar-

<http://www.theguardian.com/global-development/2014/apr/09/lebanese-bill-domestic-violence-marital-rape>.

6. The term marriage in this article refers to a range of intimate relationships, whether legally constituted or not, in which gendered violence can take place. This article also uses a range of terms to describe sexual violence in intimate relationships, such as spousal sexual assault, and sexual assault in marriage.

anteed, most importantly, by the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Failure to criminalize marital rape further represents a breach of the due diligence standard with regard to violence against women.

From a rights-based approach, it is evident that international human rights law and norms provide crucial forms of legal support for the kind of law reform and social change needed to end marital rape. Chief among these reforms must be the criminalization of sexual assault in marriage (and other intimate relationships), as the foundation for a meaningful strategy to end this form of sexual violence in women's lives. The criminality of sex without consent cannot depend on the relational context.

Criminalization of sexual assault and rape in intimate relationships, therefore, must be undertaken as part of the broader project of ending gendered violence, of developing effective legal remedies for this gendered harm, and of living up to a state's international human rights obligations. This article's specific focus is on the extent to which international law, human rights norms, and other instruments can assist states in undertaking the necessary efforts to end legal impunities for the sexual violation of women in intimate relationships.

Part I begins with an analysis and overview of the nature of the problem of sexual violence in intimate relationships and delineates some of its harms. In Part II, marital rape as an affront to women's fundamental human rights is explained, and the international legal instruments that impose duties on the state to protect women from gendered violence are identified. Part III identifies the fundamental human rights violations that the problem of marital rape presents and analyzes key legal and jurisprudential developments in each area. Finally, Part IV further elaborates these arguments and explains that criminalization of sexual assault within marriage and marriage-like relationships is a necessary, though not sufficient, strategy to end this human rights violation affecting too many women throughout the world.

I. MARITAL RAPE AND THE HARMS OF SEXUAL VIOLENCE IN INTIMATE RELATIONSHIPS

In a great many countries there have been significant and progressive law reforms regarding sexual assault, accompanied by an increasing public awareness of the problem. Yet, despite the success of law reforms pertaining to sexual assault generally, the particular issue of sexual assaults perpetrated against women by their own husbands remains a relatively taboo and misunderstood topic. This remains the case in spite of the advances made in recognizing domestic violence as a human rights issue. Sexual violence in intimate relationships is still among the more privatized and least remedied forms of gendered violence and an insufficiently recognized human rights problem.⁷

The next sections point to the ways in which the important work to end domestic violence has not always paid sufficient attention to the specifically sexual forms of violence against women in intimate relationships.

A. Marital Rape is Less Recognized than Other Sexual Assaults, and Not Identified as Domestic Violence

Much of the research and law reform on domestic violence in intimate relationships tends to overlook the fact that many assaulted women are forced into unwanted sex by their physically abusive partners. Kersti Yllö, a prominent researcher in the field of gendered violence, observed some years ago that at “the community level, as well as in the culture at large, efforts to challenge the taken-for-granted ‘right’ of husbands to coerce their wives sexually lag at least two decades behind our work on physical violence.”⁸ Despite progress in some countries, this is largely still the case in the vast majority of countries around the world.

The focus on physical assaults, threats, and even emotional abuse in domestic violence research, advocacy, public education,

7. See generally, DIANA E.H. RUSSELL, *RAPE IN MARRIAGE* (1982); DAVID FINKELHOR & KERSTI YLLÖ, *LICENSE TO RAPE: SEXUAL ABUSE OF WIVES* (1987); T.K. Logan, Robert Walker & Jennifer Cole, *Silenced Suffering The Need for a Better Understanding of Partner Sexual Violence*, 16 *TRAUMA, VIOLENCE & ABUSE* 111 (2015).

8. Kersti Yllö, *The Silence Surrounding Sexual Violence: The Issue of Marital Rape and the Challenges It Poses for the Duluth Model*, in *COORDINATING COMMUNITY RESPONSES TO DOMESTIC VIOLENCE: LESSONS FROM DULUTH AND BEYOND* 223, 225 (Melanie F. Shepard & Ellen Pence eds., 1999).

and law reform tends to obscure the fact that in too many cases, sexual violence⁹ is also a component of the violence in intimate relationships between men and women. Sexual assault in marriage can often involve significant harms and injuries, both psychological and physical.¹⁰ Forced or coerced sex in intimate relationships, however, does not necessarily require physical aggression or violence to be accomplished. Indeed, some assaulted women report acquiescing to unwanted and coerced sex with their abusive male intimate partners, precisely to avoid episodes of physical violence.¹¹

Early research and advocacy on sexual assault and rape focused largely on "stranger" or "acquaintance" rape, leaving the issue of sexual assault in the context of intimate relationships relatively unexplored and certainly under acknowledged.¹² Yet research has repeatedly demonstrated that, contrary to the dominant myth of the stranger assailant, the vast majority of sexual assaults take place in the context of some kind of relationship, and often some kind of ongoing and/or intimate relationship. More specifically, "sexual assault committed in familiar settings by assailants known to the victim, including spouses, occur at a greater frequency than those committed in high risk situations by unknown assailants."¹³

Notions of "privacy" continue to surround the problem of sexual assault in intimate relationships, and even when domestic violence is acknowledged as a social problem, marital rape tends

9. WORLD HEALTH ORG., WORLD REPORT ON VIOLENCE AND HEALTH 149 (Etienne G. Krug et al. eds., 2002) [hereinafter WHO REPORT]. The World Health Organization (WHO) defines sexual violence as "any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work." *Id.*

10. See Patricia Easteal, *Marital Rape: Conflicting Constructions of Reality*, WOMEN AGAINST VIOLENCE, Nov. 1997, at 23.

11. See Melanie Randall, Agency and (in)subordination Victimization, Resistance and Sexual Violence in Women's Lives 42, ch. 5 (1996) (unpublished Ph.D. dissertation, York University) (on file with author).

12. The term "intimate relationships" includes but is not limited only to (legal and common law) spousal relationships. It also includes dating relationships and ongoing intimate relationships that do not involve cohabitation.

13. Lana Stermac, Gianetta Del Bove & Mary Addison, *Violence, Injury, and Presentation Patterns in Spousal Sexual Assaults*, 7 VIOLENCE AGAINST WOMEN 1218, 1218 (2001).

not to be identified as part of it. For example, a survey of community attitudes undertaken in Australia demonstrated that very few of those surveyed “spontaneously identified sexual assault or rape as an element of domestic violence.”¹⁴ Even when the more well recognized forms of domestic violence were nominated, such as physical violence or battering, “sexual violence was only identified by 12 percent of respondents when further pressed about what “other forms” of domestic violence there might be.”¹⁵ Ultimately, the researchers note that “people surveyed were more inclined to describe domestic violence as verbal abuse, mental abuse, and violence against children before they turned their minds to the possibility of sexual assault.”¹⁶

Research in the field has also repeatedly documented that people’s perceptions of the prevalence, seriousness, and consequences of sexual violence are clearly linked to the relational context in which it takes place. The closer the relationship between perpetrator and victim, the more diminished the clarity about its wrongfulness.¹⁷ Other research documenting popular perceptions about rape (depending on the relationship between the perpetrator and the victim) demonstrates a definite tendency to underplay the harm of sexual assault in the context of intimate relationships because of the tendency to fixate on “stranger rapes” as the more serious problem.¹⁸ One study specifically found that “participants rated a rape between more

14. Melanie Heenan, Austrl. Ctr. for the Study of Sexual Assault, *Just “Keeping the Peace”: A Reluctance to Respond to Male Partner Sexual Violence*, ISSUES 1, Mar. 2004, at 2, <http://www.aifs.gov.au/acssa/pubs/issue/i1.html> (referencing the report of Australia’s Office of the Status of Women’s report entitled “Community Attitudes to Violence Against Women”).

15. *Id.*

16. *Id.*

17. See, e.g., Jennifer A. Bennice & Patricia A. Resick, *Marital Rape History, Research, and Practice*, 4 TRAUMA, VIOLENCE & ABUSE 228, 246 (2003).

18. This trend is evident in a recent study that assessed popular opinions about rape in the context of marriage. Research participants were presented with a variety of scenarios depicting sexual contact and then asked whether they defined each of these situations as constituting a rape. In each scenario, the perpetrator was a husband and the victim was his wife. When asked whether having vaginal intercourse with one’s wife without her consent was rape, 74 percent of those surveyed answered in the affirmative. However, when the same scenario was modified to include the husband’s use of physical force, an overwhelming 93 percent of respondents replied that the scenario constituted rape. Without the presence of physical violence, more people had difficulty recognizing sexual assault in a spousal relationship than they did when

closely acquainted people as less serious than stranger rape.”¹⁹ Moreover, the same study concluded that “[marital rape] is minimized somewhat in terms of seriousness in contrast to other types of rape.”²⁰

Stranger perpetrated sexual violence, therefore, tends to be seen as more “serious,” more harmful, and definitely more criminal, than sexual violence perpetrated in intimate relationships. One set of researchers, in reviewing previous research and by conducting their own study, observed that “knowing that the perpetrator and victim are spouses was shown to alter beliefs about both parties involved in conflictual interactions.”²¹ They continue to suggest that “these findings imply that judges, jurors, and other individuals who hear reports of violence may also make different attributions about violence on the basis of the victim-perpetrator relationship.”²²

This underlines the point that popular misconceptions about what sexual assault involves, what it looks like, and where it is most likely to happen, tend to distort the subtleties and intricacies that characterize the crime of spousal sexual assault. Furthermore, these popular misconceptions also contribute to the context in which disclosures are often inhibited and adequate remedies are often not provided. In countries where the criminal exemption for marital rape has long been repudiated, even judges struggle to correctly apply the criminal law of sexual assault and consent to cases involving spouses.²³ This struggle demonstrates that amending laws is only one step forward in a

the sex was accompanied by physical assault. Mary Kay Kirkwood & Dawn K. Cecil, *Marital Rape: A Student Assessment of Rape Laws and the Marital Exemption*, 7 VIOLENCE AGAINST WOMEN 1234, 1245–48 (2001).

19. Kelly Simonson & Linda Mezydlo Subich, *Rape Perceptions as a Function of Gender-Role Traditionality and Victim-Perpetrator Association*, 40 SEX ROLES 617, 629 (1999).

20. *Id.* at 630.

21. Jennifer Langhinrichsen-Rohling et al., *Attributions About Perpetrators and Victims of Interpersonal Abuse Results From an Analogue Study*, 19 J. INTERPERSONAL VIOLENCE 484, 493 (2004).

22. *Id.* at 496; see Melanie Randall, *Sexual Assault in Spousal Relationships, Continuous Consent, and the Law: Honest but Mistaken Judicial Beliefs*, 32 MAN. L.J. 144 (2006) (discussing the conceptual difficulties and legally flawed analyses in Canadian cases on sexual assaults perpetrated in intimate relationships where judges wrongly presumed that the relational context is relevant in determining sexual assault and that the test for consent differs in an ongoing intimate relationship).

23. *Id.*

longer and more complicated process of social change to protect human rights.

B. Sexual Assault in Intimate Relationships as a Form of Domestic Violence

*"There is not a single incident, it was almost a normal pattern. I never had the option of saying no"*²⁴

*"So what is marital rape like? Anyone can imagine it who has seen a film in which a woman is attacked, beaten and raped in a park, in her own apartment or anywhere else. The thing is: it is exactly the same as any other rape. Someone grabs your hair, slaps your face or hits it with a clenched fist, kicks you in the stomach, or simply holds a knife to your throat . . . The difference between rape in films and marital rape is that we cannot scream, as our child might wake up in the other room. Or that our child is right there, next to us, her or his face distorted with terror. And another difference is that the person who does this to us is someone we used to love, someone we once trusted more than anyone else. And there's another difference, too: that others say that we invented the whole thing. That we tell lies. Or if this can really happen, it is not such a big deal."*²⁵

A body of research now documents just how extensive the problem of spousal sexual assault actually is.²⁶ In 2006, the United Nations established the U.N. Task Force on Violence Against Women, and the U.N. Secretary-General released an "in-depth

24. Randall, *supra* note 11.

25. Amnesty Int'l, *Hungary: Cries Unheard: The Failure to Protect Women from Rape and Sexual Violence in the Home*, AI Index EUR 27/002/2007, at 4–5 (May 10, 2007) [hereinafter *Cries Unheard*] (citing Krisztina Morvai, *A családon belüli erőszakos bűncselekmények kontextuális megközelítésének jelentősége a büntető jogalkotásban és jogalkalmazásban* [The Significance of a Contextual Approach to Cases of Domestic Violence in Legislature and the Application of Criminal Law] (unpublished Ph.D. dissertation, Eötvös Loránd University of Budapest, 2001).

26. See Jill Duncan & Deborah Western, AUSTL. DOMESTIC & FAM. VIOLENCE CLEARINGHOUSE, *Addressing 'The Ultimate Insult': Responding to Women Experiencing Intimate Partner Sexual Violence*, Feb. 2011, http://www.austdvclearinghouse.unsw.edu.au/documents/Stakeholder_Paper_10.pdf; Lene Symes et al., *Physical and Sexual Intimate Partner Violence, Women's Health and Children's Behavioural Functioning: Entry Analysis of a Seven-Year Prospective Study*, 23 J. CLINICAL NURSING 2909 (2014).

study on all forms of violence against women.”²⁷ The study points out that “[t]he most common form of violence experienced by women globally is intimate partner violence” that includes “a range of *sexually*, psychologically and physically coercive acts.”²⁸

The World Health Organization (WHO) reports that available data indicates that in some countries, nearly one in four women may experience sexual violence by an intimate partner.²⁹ The most recent and extensive WHO report on the prevalence and health effects of gendered violence indicates that 42 percent of women who have been subjected to physical or sexual violence at the hands of an intimate partner experienced injuries as a result. Furthermore, women subjected to sexual violence by their male intimates are 1.5 times more likely to acquire sexually transmitted diseases such as syphilis infection, chlamydia, or gonorrhoea. And in some regions women sexually violated by male intimates are 1.5 times more likely to acquire HIV.³⁰ Other research suggests that approximately 40 percent of all assaulted women are forced into sex at one time or another by their male partners.³¹

Research in the United States revealed that 68 percent of physically abused women also reported sexual assault perpetrated by their male intimate partners. Of those women, and contrary to the mistaken belief that this problem is more pronounced amongst racialized groups, 79 percent of sexually assaulted women reported repeated episodes of forced sex, with the frequency of sexual assault highest for Caucasian women.³²

27. U.N. SECRETARY-GENERAL, ENDING VIOLENCE AGAINST WOMEN: FROM WORDS TO ACTION, at ix, U.N. Sales No. E.06.IV.8 (2006) [hereinafter VAW STUDY].

28. *Id.* at 43 (emphasis added).

29. WHO REPORT, *supra* note 9; see also Jacquelyn C. Campbell & Karen L. Soeken, *Forced Sex and Intimate Partner Violence: Effects on Women's Risk and Women's Health*, 5 VIOLENCE AGAINST WOMEN 1017 (1999).

30. WHO et al., Global and Regional Estimates of Violence Against Women: Prevalence and Health Effects of Intimate Partner Violence and Non-partner Sexual Violence 31 (2013), <http://www.who.int/reproductivehealth/publications/violence/9789241564625/en>.

31. Jacquelyn C. Campbell & Peggy Alford, *The Dark Consequences of Marital Rape*, 89 AM. J. NURSING 946, 946 (1989).

32. Judith M. McFarlane & Ann Malecha, Sexual Assault among Intimates: Frequency, Consequences & Treatments 3 (2005), <https://www.ncjrs.gov/pdffiles1/nij/grants/211678.pdf>.

In the largest Canadian random survey conducted on the subject of violence against women, 39 percent of women interviewed reported being sexually assaulted at some point in their lives since the age of sixteen, 45 percent reported physical and sexual violence by a marital or dating partner, and 25 percent of women who were physically assaulted by a spouse were also sexually assaulted.³³ The large majority of sexual assaults (approximately three quarters of police reported sexual assaults) perpetrated against women in a 2008 Canadian survey were perpetrated by men known to them (only 24 percent of perpetrators were strangers).³⁴ The 2011 crime victimization survey by Statistics Canada reports that, in the five years prior to 2009, 6 percent of women (six hundred thousand women) were victims of marital violence and 460,000 women are sexually assaulted by men other than marital partners each year.³⁵

Furthermore, research has documented how many men openly admit that they have forced their female partners to have sex. In a recent study with a large sample size (N=1737) of men in South Africa, Jewkes et al. report that 14.3 percent (241/1681) of men disclosed that they had raped their wife, ex-wife, or girlfriend.³⁶ Findings from another large research study on rape perpetration indicate that in Bangladesh 10 percent of urban men and 15 percent of rural men reported that they had forced their

33. U.N., Econ. & Soc. Council, Economic Commission for Europe Conference of European Statisticians, Geneva, Switz., Sept. 11-16, 2006, *Assessing the Prevalence of Violence Against Women in Canada*, paras. 22–24, U.N. Doc. ECE/CES/GE.30/2006/8 (June 30, 2006). See also CAN. RES. INST. FOR THE ADVANCEMENT OF WOMEN, FACTSHEET: VIOLENCE AGAINST WOMEN IN CANADA (2013), <http://www.cwhn.ca/sites/default/files/CRIAW%20FACTSHEET%20Violence%20against%20women%20-%20long%20version.pdf>; HOLLY JOHNSON, DANGEROUS DOMAINS: VIOLENCE AGAINST WOMEN IN CANADA (1996).

34. Roxan Vaillancourt, *Gender Differences in Police-reported Violent Crime in Canada*, STATISTICS CANADA, May 2010, at 10, <http://www.statcan.gc.ca/pub/85f0033m/85f0033m2010024-eng.pdf>.

35. CAN. RES. INST. FOR THE ADVANCEMENT OF WOMEN, *supra* note 33, at 2 (citing STATISTICS CANADA, FAMILY VIOLENCE IN CANADA: A STATISTICAL PROFILE (2011), <http://www.statcan.gc.ca/pub/85-224-x/85-224-x2010000-eng.pdf>).

36. Rachel Jewkes et al., *Gender Inequitable Masculinity and Sexual Entitlement in Rape Perpetration South Africa: Findings of a Cross-Sectional Study*, PLOS ONE, Dec. 2011, at 5, <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0029590>.

partners into sex.³⁷ Similarly, in India, almost all sexual violence occurred within marriage.³⁸

Sexual assault of women in marriage and other marriage-like intimate relationships is a form of domestic violence, which is a problem the world over. As such, it requires social, educational, and legal responses and remedies. These responses and remedies must include the criminalization of sexual assault as a fundamental starting point, regardless of relational context. Legal immunity for men who sexually violate their wives is patently incompatible with criminalization of other sexual and physical assaults.

II. MARITAL RAPE AS AN AFFRONT TO WOMEN'S FUNDAMENTAL HUMAN RIGHTS: INTERNATIONAL LAW AND TREATIES

It is well recognized that violence against women represents a breach of women's fundamental human rights.³⁹ As early as 1993, violence against women including marital rape was recognized as representing a breach of women's fundamental human rights under international law in the U.N. Declaration on the Elimination of Violence Against Women (DEVAW).⁴⁰ The Fourth World Conference on Women in Beijing in 1995 and the resulting Beijing Declaration and Platform for Action reiterated that violence against women under international law includes "physical, sexual and psychological violence occurring *in the family*,

37. RUCHIRA TABASSUM NAVED ET AL., MEN'S ATTITUDES AND PRACTICES REGARDING GENDER AND VIOLENCE AGAINST WOMEN IN BANGLADESH (2011), http://www.partners4prevention.org/sites/default/files/documents/final_report_0.pdf.

38. RACHEL JEWKES, SEXUAL VIOLENCE RESEARCH INITIATIVE, RAPE PERPETRATION: A REVIEW 6 (2012) <http://www.svri.org/RapePerpetration.pdf>.

39. Human Rights Council Res. 23/25, U.N. Doc. A/HRC/RES/23/25 (June 25, 2013).

40. U.N. Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, art. 1 (Dec. 20, 1993) [hereinafter DEVAW]. DEVAW provides the first internationally agreed definition of violence against women: "Violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life." *Id.* Article 2 specifies marital rape as being encompassed in the definition. *Id.* art. 2.

including battering . . . , *marital rape*, . . . and violence related to exploitation” and gender violence condoned by the state.⁴¹

The recognition that violence against women represents a grave human rights violation has been developed and confirmed over the past three decades. It is based not only on the fact that gendered violence directly breaches several fundamental rights requiring legal protection but also on the recognition that it interferes with or entirely undermines the enjoyment of all other rights. These rights include (and are not limited to) the rights to life, freedom from torture, liberty and security of person, equal protection under the law, equality within the family, health, and just and favorable conditions of work.⁴² Marital rape, therefore, by definition also constitutes a breach of all of these fundamental rights.

The following sections assess the ways in which human rights norms in international law require that states take action to prevent sexual violence against women in intimate relationships, a project that necessarily includes the criminalization of rape and sexual assault in marital and marital-type relationships. This section begins with an overview of the due diligence standard as it applies to violence against women and reviews the various international and regional fora in which marital rape has been identified as a critical human rights concern. The following sections elaborate on the ways in which international human rights law demands criminalization of marital rape in order to respect, fulfill, and protect women’s fundamental, and universal human rights.

A. The Due Diligence Standard Requires the Criminalization of Gendered Violence Under International Law

Where rights are legally guaranteed, the state must exercise “due diligence” to ensure their fulfillment and protection. As early as 1988, the Inter-American Court of Human Rights observed in *Velásquez-Rodríguez v. Honduras* that:

41. World Conference on Women, *Rep. of the Fourth World Conference on Women*, para. 112, 113, 117, 118, U.N. Doc. A/CONF.177/20/Rev.1 (Sept. 15, 1996) (emphasis added).

42. Comm. on the Elimination of Discrimination Against Women, General Recommendation 19 of the 11th Session, para. 7, U.N. Doc. A/47/38 (1992) [hereinafter General Recommendation 19].

[i]f the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.⁴³

In this case the Court found that an illegal act "which violates human rights and which is initially not directly imputable to a State" can nevertheless create "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 [American Convention on Human Rights]."⁴⁴ The due diligence standard is perhaps the most important resource in international law for marshaling state power through law to combat violence against women and provide effective remedies for it. Under international law, the due diligence standard establishes that a state is obliged to prevent, investigate, punish, and provide remedies for violations of human rights, regardless of whether the acts are committed by state or non-state actors.⁴⁵

In 1993, the due diligence standard was extended to apply to gender violence. The 1993 DEVAW adopted by the General Assembly specifies that all U.N.-member states have a duty to "pursue by all appropriate means and without delay a policy of eliminating violence against women."⁴⁶ This includes "due diligence to prevent, investigate and, in accordance with national legislation, *punish acts of violence against women*, whether those acts are perpetuated by the State or by private persons."⁴⁷ DEVAW affirms that violence against women constitutes a "violation of the rights and fundamental freedoms of women and impairs or nullifies their enjoyment of those rights and freedoms."⁴⁸

While DEVAW does not impose binding obligations on states, the norms set forth in the Declaration have high persuasive

43. Velasquez Rodriguez v. Honduras, Compensation, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 176 (July 29, 1988).

44. *Id.* ¶¶ 172–176 (emphasis added).

45. *Id.* ¶ 166.

46. DEVAW, *supra* note 40, art. 4 (Dec. 20, 1993).

47. *Id.* art. 4(c) (emphasis added).

48. *Id.* pmb1.

value because the Declaration shows consensus that gender violence is a fundamental human rights violation that states must take specific measures to combat. Furthermore, given that DEVAW identifies violence against women as a violation of fundamental freedoms, a state's obligations to punish acts of gender violence derive from the state's obligation to prevent violations of these fundamental freedoms.

The due diligence standard was reiterated in the Beijing Declaration and Platform for Action, which was adopted by 189 U.N. member states.⁴⁹ The Beijing Declaration further recognized that violence against women, including marital rape, "is a manifestation of the historically unequal power relations between men and women" and demanded that states enact or reinforce sanctions that punish perpetrators and provide women with access to justice.⁵⁰

In 1994, the U.N. Economic and Social Council adopted Resolution 1994/45 of the U.N. Commission on Human Rights and established the mandate of the Special Rapporteur on Violence against Women to recommend measures to eliminate violence against women and its causes, and to remedy its consequences.⁵¹ The Resolution emphasized that it is,

the duty of Governments to refrain from engaging in violence against women and to *exercise due diligence* to prevent, investigate and, in accordance with national legislation, to *punish acts of violence against women* and to take appropriate and effective action concerning acts of violence against women, whether those acts are perpetrated by the State or by private persons, and to provide access to *just and effective remedies* and specialized assistance to victims.⁵²

In a key report on the due diligence standard, the Special Rapporteur on Violence against Women outlined the way in which the due diligence standard obligates states to prevent, investigate, punish, and provide remedies for acts of violence against women, precisely because these acts are grave human rights violations.⁵³

49. World Conference on Women, *supra* note 41, para. 124(b).

50. *Id.* para. 118, 124(c) & (h).

51. Commission on Human Rights Res. 1995/86, U.N. Doc. E/CN.4/1995/176, at 253 (Mar. 8, 1995).

52. *Id.* para. 2 (emphasis added).

53. *See generally* Yakin Ertürk (Special Rapporteur on Violence Against Women, Its Causes and Consequences), U.N. Econ. & Soc. Council, Comm'n on

Throughout the first decade of the twenty-first century, a number of important human rights cases were litigated by women whose governments had failed to protect them from egregious violence perpetrated by male intimates. These important decisions of the European Court of Human Rights in *Bevacqua and S. v. Bulgaria* and *Opuz v. Turkey*, the CEDAW Committee in *AT v. Hungary*, and the decisions of the Inter-American Commission on Human Rights (IACHR) in *Maria da Penha v. Brazil* and *Lenahan (Gonzales) v. United States* began to give shape to and articulate the content of a state's duties to combat domestic violence.⁵⁴ While some commentators have argued that the due diligence standard with respect to domestic violence is still being shaped and is only *emerging* as customary international law through "a *growing* consensus,"⁵⁵ a more persuasive view is that the due diligence standard has now become an accepted norm.

The fact that the due diligence standard is now the accepted norm is evident from recent cases and legislation in regional and domestic fora that take for granted a due diligence responsibility on the part of the state to effectively combat domestic violence. As the IACHR recently observed in *Lenahan v. United States*:

There is a broad international consensus over the use of the due diligence principle to interpret the content of State legal obligations towards the problem of violence against women; a consensus that extends to the problem of domestic violence.

Human Rights, Rep. on Violence Against Women, *The Due Diligence Standard as a Tool for the Elimination of Violence Against Women*, U.N. Doc. E/CN.4/2006/61 (Jan. 20, 2006).

54. *Bevacqua and S. V. Bulgaria*, App. No. 71127/01, Eur. Ct. H.R. (2008), <http://www1.umn.edu/humanrts/research/bulgaria/BEVACQUA.pdf>; *Opuz v. Turkey*, App. No. 33401/02, Eur. Ct. H.R. (2009), <http://www.coe.int/t/dghl/standardsetting/minjust/mju29/CASE%20OF%20OPUZ%20v%5B1%5D.%20TURKEY.pdf>; *Maria Da Penha v. Brazil*, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser.L/V/II.111, doc. 20 rev. at 704 (2001); *Lenahan v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, OEA/Ser.L/V/II.142, doc. 11 ¶¶ 170, 177, 199 (2011); Comm. on the Elimination of Discrimination Against Women, Comm. No. 2/2003, Ms. A. T. v. Hungary, ¶¶ 9.3–.4, CEDAW/C/36/D/2/2003 (Jan. 26, 2005).

55. Lee Hasselbacher, *State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, And International Legal Minimums of Protection*, 8 NW. J. INT'L HUM. RTS. 190, 198 (2010) (emphasis added).

This consensus is a reflection of the international community's growing recognition of violence against women as a human rights problem requiring State action.⁵⁶

States that are parties to the CEDAW Convention are obligated to adopt the principles of the CEDAW Committee's General Recommendation 19 on Violence against Women. They thereby have directly undertaken obligations of "due diligence" to combat violence against women.⁵⁷

The obligation of due diligence under the CEDAW Convention, therefore, requires that states *prevent* violations of the rights of women, obligates them to investigate and *punish* acts of violence, and obligates them to provide compensation for gendered violence.⁵⁸ Importantly, for this analysis of marital rape, the standard requires that state parties implement "effective legal measures, *including penal sanctions*, civil remedies and compensatory provisions to protect women against all kinds of violence, including, *inter alia*, violence and abuse in the family, sexual assault . . ."⁵⁹ Thus, the due diligence standard has both protective and proactive elements. That is, it obligates states both to respond appropriately to crimes of violence against women already committed and to take positive steps to stop the perpetration of these crimes.

General Recommendation 19 also calls on state parties to make sure that the laws "give adequate protection to all women."⁶⁰ What constitutes "adequate protection," however, is not defined. Nor is the Recommendation clear about whether criminal sanctions, and specifically, criminalization of marital rape, is a necessary component of adequate protection. With respect to domestic violence, the Recommendation only calls for "criminal penalties where necessary," so long as the state parties are taking efforts to make sure that women are receiving "effective protection" from the state against gender-based violence.⁶¹ Criminalizing marital rape, however, must be a fundamental requirement of the state's due diligence obligation to remedy and prevent this form of gendered violence.

56. *Lenahan v. United States*, OEA/Ser.L/V/II.142, doc. 11 ¶ 123.

57. General Recommendation 19, *supra* note 42, art. 9.

58. *Id.* art. 24(r)–(t).

59. *Id.* art. 24(r)(i), (t)(i) (emphasis added).

60. *Id.* art. 24(b).

61. *Id.* art. 24(r)(i).

Even from the instrumentalist perspective that is imposed by General Recommendation 19, penal sanctions are necessary for "adequate protection" from gendered violence. When Amnesty International researchers asked women in Afghanistan about solutions to the problem of domestic violence, the women recognized the necessity of making these acts illegal and subject to punishment, both to signal the social wrong and to deter this kind of gendered violence.⁶² Through criminalization, one woman said, "[m]en would learn it is wrong and would stop beating us."⁶³ Criminalization both codifies rights and creates a potential source of power for victims to get access to legal remedies when those rights are violated. In this way, the law's power is both symbolic and practical. Criminalization of sexual assault in marriage can and should operate on both levels.

Lastly, in criminalizing marital rape, the due diligence standard also requires that pursuing civil remedies through domestic violence legislation does not exclude or preclude the need for criminal remedies. With regard to the domestic violence legislation in Peru, for example, although the rape laws in the criminal legislation do not exclude marital rape, the Law for Protection from Family Violence ("Family Violence Law") excludes marital rape.⁶⁴ As a result, victims in Peru are forced to choose between two options. They can either file a psychological abuse complaint under the Family Violence Law or they can file a standard criminal rape complaint, which does not provide access to the immediate protection order and other benefits available in the Family Violence law.⁶⁵ Thus merely removing the marital-rape exemption from the criminal code on rape, without taking into account other barriers to obtaining effective criminal sanctions, will not satisfy the due diligence standard to protect women from domestic sexual violence.

62. Amnesty Int'l, *Afghanistan: "No-One Listens to Us and No-One Treats Us as Human Beings," Justice Denied to Women*, AI Index ASA 11/023/2003 (Oct. 5, 2003).

63. *Id.* at 12.

64. *Peru: Law of Protection from Family Violence*, HUM. RTS. WATCH (Mar. 31, 2000), <http://www.hrw.org/news/2000/03/31/peru-law-protection-family-violence> [hereinafter *Law of Protection*]; see also Michelle A. McKinley, *Emancipatory Politics and Rebellious Practices: Incorporation Global Human Rights in Family Violence Laws in Peru*, 39 N.Y.U. J. INT'L L. & POL. 75, 121 n.190 (2006).

65. *Law of Protection*, *supra* note 64.

B. The International Instruments and Agreements Requiring the Criminalization of Marital Rape

There are multiple reports, conventions, resolutions, and directives requiring that states criminalize marital rape. The U.N. Secretary General's 2006 report, *Ending violence against women: From words to action*, reiterates the Beijing Platform's exhortation "to treat all forms of violence against women and girls as *criminal offences*."⁶⁶

Violence against women, including spousal rape, has similarly been given high priority for immediate legislative action by regional human rights systems. On June 9, 1994, the Organization of American States (OAS) adopted the Inter-American Convention to Prevent, Punish and Eradicate Violence against Women (also called Convention of Belém do Pará).⁶⁷ The Convention recognizes all gender-based violence as an abuse of human rights and has been ratified by thirty-two states.⁶⁸ In this Convention, violence against women is defined as including "physical, sexual and psychological violence," which occurs "within the family or domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman."⁶⁹ This Convention additionally provides an individual right of petition and a right for nongovernmental organizations (NGOs) to lodge complaints with the IACHR.⁷⁰

66. VAW STUDY, *supra* note 27, at 12 (emphasis added). The U.N. Secretary General also noted,

State inaction with regard to the proper functioning of the *criminal justice system* has particularly corrosive effects as impunity for acts of violence against women encourages further violence and reinforces women's subordination. Such inaction by the State *to address the causes of violence against women constitutes lack of compliance with human rights obligations*.

Id. at 37 (emphasis added).

67. Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June, 9 1994, 33 I.L.M. 1534 [hereinafter Convention of Belém do Pará].

68. *Id.* pmbl.; *see also* List of Countries that Signed, Ratified and Acceded to the Convention of Belém do Pará, ORG. AM. STATES, <http://www.oas.org/juridico/english/sigs/a-61.html> (last visited Nov. 20, 2015).

69. Convention of Belém do Pará, *supra* note 67, art. 2

70. *Id.* art. 12.

The IACHR has consistently demanded that states adopt “*criminal*, civil and administrative laws to prevent, punish and eradicate violence against women” and, importantly, to make no distinctions based on marital status of victim or perpetrator.⁷¹ A recent report also points out that historically while “honor” and other patriarchal cultural values used to be the core interests at stake in sexual violence crimes, it is no longer condoned in many states.⁷² Criminal laws in the Meso-American countries, for example, now take other legal rights and interests into account such as personal security/integrity (Nicaragua) and sexual self-determination (El Salvador, Guatemala, and Honduras) providing further evidence that criminalizing marital rape is increasingly an accepted international norm.⁷³ The IACHR report also asserts that under all circumstances rape is a crime against society and has to be prosecuted by the state as a crime even when the victim “forgives” the perpetrator.⁷⁴

Nevertheless, the marital-rape exemption has still not been eliminated in many OAS states. It is ironic that many of the postcolonial countries in the Caribbean (and elsewhere such as South Asia) resort to the British common law marital-rape exemption articulated by Lord Hale when the U.K. House of Lords has since then explicitly ruled on the exemption’s inapplicability in “modern times.”⁷⁵ The Caribbean Committee (“CARICOM”) model legislation for sexual offences insufficiently demands a criminalization of marital rape only under specific conditions of

71. INTER-AM. COMM’N ON HUMAN RIGHTS, ACCESS TO JUSTICE FOR WOMEN VICTIMS OF SEXUAL VIOLENCE IN MESOAMERICA, at xi, para. 4 (2011) (emphasis added) [*hereinafter* Inter-Am. Comm’n on Human Rights, Mesoamerica Report].

72. *Id.* at 15 para. 48.

73. *Id.*

74. *See id.* at 35–40.

75. R v R, [1992] 1 AC 599 (HL) (appeal taken from Eng.). The court stated:

[M]arriage is in modern times regarded as a partnership of equals and no longer one in which the wife must be the subservient chattel of the husband. Hale’s proposition involves that by marriage a wife gives her irrevocable consent to sexual intercourse with her husband under all circumstances and irrespective of the state of her health or how she happens to be feeling at the time. In modern times any reasonable person must regard *that conception as quite unacceptable*.

Id. at 616 (emphasis added).

divorce, separation, or direct order.⁷⁶ Countries like Trinidad and Tobago and Guyana have nonetheless removed the marital rape exemption from their laws.⁷⁷

The recent Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (“Istanbul Convention” or “CAHVIO”), in effect as of August 2014, is one of the most comprehensive instruments against gender violence. The Istanbul Convention explicitly obligates its Parties to *criminalize* sexual violence, inter alia, when committed against former or current spouses or partners, whether living or not living in the same residence.⁷⁸ The Council of Europe includes forty-seven countries extending all the way to the Russian Federation.⁷⁹

76. 8 CARICOM MODEL LEGISLATION ON SEXUAL OFFENCES ¶ 4(4) (1997).

77. Sexual Offences Act, ACT 27 OF 1986, Chapter 11:28 (2000) (as amended by Act 20 of 1994 and Act 31 of 2000) (Trin. and Tobago), http://rgd.legalaffairs.gov.tt/Laws2/Alphabetical_List/lawspdfs/11.28.pdf; Sexual Offences Act, ACT No. 7 OF 2010, Official Gazette [Legal Supp.] 33 (2010) (Guy.) <http://scm.oas.org/pdfs/2010/CIM02920T-2.pdf>.

78. Convention on Preventing and Combating Violence Against Women and Domestic Violence, art. 36, May 11, 2011, C.E.T.S. No. 201 [hereinafter Istanbul Convention (CAHVIO)]. Article 36 of the Convention, on “[s]exual violence, including rape,” states:

1. Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are *criminalised*:

a) engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object;

b) engaging in other non-consensual acts of a sexual nature with a person;

c) causing another person to engage in non-consensual acts of a sexual nature with a third person.

2. Consent must be given voluntarily as the result of the person’s free will assessed in the context of the surrounding circumstances.

3. Parties shall take the necessary legislative or other measures to ensure that the provisions of paragraph 1 *also apply to acts committed against former or current spouses* or partners as recognised by internal law.

Id. (emphasis added).

79. *Our Member States*, COUNCIL OF EUR., <http://www.coe.int/en/web/about-us/our-member-states> (last visited Oct. 25, 2015).

The EU expressly called for the criminalization of marital rape in the *European Parliament's Resolution on Violence Against Women of 1986*.⁸⁰ In 2009, the *European Parliament's Resolution on the Elimination of Violence Against Women* pointed out that "men's violence against women represents a violation of human rights, and in particular: the right to life, the right to safety, the right to dignity, the right to physical and mental integrity, and the right to sexual and reproductive choice and health."⁸¹ The Resolution further noted that gendered violence "is an obstacle to the participation of women in social activities, in political and public life and in the labor market, and can lead to marginalization and poverty for women."⁸² The Parliament urged that Member States must

recognize sexual violence and rape against women, including within marriage and intimate informal relationships and/or where committed by male relatives, as a *crime* in cases where the victim did not give consent, and to ensure that such offences result in *automatic prosecution* and reject any reference to cultural, traditional or religious practices or traditions as a mitigating factor in cases of violence against women.⁸³

Resolutions by the European Parliament, unlike the Istanbul Convention, are not legally binding. But the Parliament's call for the criminalization of sexual violence in the domestic sphere (amongst other types of gender violence) in several resolutions

80. Resolution on Violence Against Women, EUR. PARL. DOC. A2-44/86 (1986) [hereinafter 1986 Resolution]. The European Parliament in Article 10, "calls for the legal recognition, in those countries where such is not yet the case, of rape within the marriage, and further calls for the same treatment by the law of forced sexual acts, within and without marriage," *id.* art. 10, while Article 11, calls for

sexual violence, whether individual or group violence, to be considered a crime for which proceedings may be brought in all cases, not only by the injured party, but also by the public authorities; and further calls for women's associations and movements to be allowed to bring civil actions for damages in proceedings for sexual violence, if the injured party so requests.

Id. art. 11.

81. See Resolution on the Elimination of Violence Against Women, EUR. PARL. DOC. P7_TA(2009)0098, pmbl. para. E (2009) [hereinafter 2009 Resolution].

82. *Id.* pmbl. para. F.

83. *Id.* para. 24 (emphasis added).

(as well as by several EU actors) illustrates the widespread recognition of the fundamental rights implicated by state failures to criminalize sexual violence in the private sphere.⁸⁴ In addition, the EU has enacted Directive 2012/29/EU establishing minimum standards and safeguards that must be enforced to protect direct victims of crime and which automatically *assumes* that intimate partner sexual violence is criminalized in EU-member states.⁸⁵

Unlike resolutions of the European Parliament, directives are legal acts of the EU imposing obligations on member states to achieve a specific result through the implementation of domestic legislative procedures.⁸⁶ Directive 2012/29/EU, calling for effective imposition of criminal sanctions in cases of intimate partner sexual violence, *inter alia*, has to be implemented by member states within two years of its enactment, and requires that within three years Member states must show the Commission data showing how victims have accessed the rights set out in the directive.⁸⁷ The directive explicitly defines gender violence as including intimate partner sexual violence and emphasizes the harmful consequences of gender violence and spousal sexual violence on the rights and well-being of the victim. It specifies that

Violence that is directed against a person because of that person's gender, gender identity or gender expression or that affects persons of a particular gender disproportionately, is understood as gender-based violence. It may result in physical, sexual, emotional or psychological harm, or economic loss, to the victim. *Gender-based violence is understood to be a form of*

84. Resolution with Recommendations to the Commission on Combating Violence Against Women, Preamble, EUR. PARL. DOC. P7_TA-PROV(2014)0126, pmbl. (2014) (listing European Parliamentary resolutions and actions addressing violence against women, including intimate partner sexual violence).

85. Council Directive 2012/29, 2012 O.J. (L 315) 57.

86. EUROPEAN UNION LAW AFTER MAASTRICHT: A PRACTICAL GUIDE FOR LAWYERS OUTSIDE THE COMMON MARKET 5 (Ralph Haughwout Folsom, Ralph B. Lake & Ved P. Nanda eds., 1996).

87. Directorate General Justice, European Commission, *Guidance Document related to the Transposition and Implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*, at 3 and at 50, Doc. ARES(2013)3763804 (Dec. 2013), http://ec.europa.eu/justice/criminal/files/victims/guidance_victims_rights_directive_en.pdf.

*discrimination and a violation of the fundamental freedoms of the victim and includes violence in close relationships, sexual violence (including rape, sexual assault and harassment) . . . Women victims of gender-based violence and their children often require special support and protection because of the high risk of secondary and repeat victimization, of intimidation and of retaliation connected with such violence.*⁸⁸

The directive furthermore explicitly recognizes the particular dynamics of violence in intimate relationships and the need for states to adopt special protection measures. It states that:

*Where violence is committed in a close relationship, it is committed by a person who is a current or former spouse, or partner or other family member of the victim, whether or not the offender shares or has shared the same household with the victim. Such violence could cover physical, sexual, psychological, or economic violence and could result in physical, mental or emotional harm or economic loss. Violence in close relationships is a serious and often hidden social problem, which could cause systematic psychological and physical trauma with severe consequences because the offender is a person whom the victim should be able to trust. Victims of violence in close relationships may therefore be in need of special protection measures. Women are affected disproportionately by this type of violence and the situation can be worse if the woman is dependent on the offender economically, socially or as regards her right to residence.*⁸⁹

In 2003, the African Union adopted the Protocol on the Rights of Women in Africa to the African Charter on Human Rights that defines violence against women as including “all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts . . . in *private* or public life.”⁹⁰ Asia does not have an effective regional human rights system, however several

88. Council Directive 2012/29, *supra* note 85, para. 17 (emphasis added).

89. *Id.* para. 18 (emphasis added).

90. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art. 1(j), July 11, 2003 [hereinafter Maputo Protocol] (emphasis added).

countries have tabled bills, some successfully, that call for criminalization of marital rape in their legislatures.⁹¹ Progress on the criminalization of marital rape in jurisdictions around the world, therefore, has been steady, but also slow and uneven.

III. INTERNATIONAL HUMAN RIGHTS LAW AND THE RIGHTS VIOLATED BY MARITAL RAPE

The key and specific fundamental rights violated by the crime of spousal rape are identified in the following sections. Marital rape violates *jus cogens* norms such as the prohibition against torture, as well as fundamental human rights such as the right to life, liberty, and security of person, equal protection under the law, and nondiscrimination. It further violates rights critical to the autonomy and well-being of an individual such as the right to health and to equality within the family.⁹² Moreover, marital rape impinges on the myriad other rights that have been recognized by regional human rights instruments, domestic laws, and transitional and domestic courts. These include the rights to sexual self-determination, human dignity, humane treatment, pri-

91. At least eleven Asian countries explicitly criminalize marital rape, including Nepal, Thailand, Indonesia, and China. Tay Suan Chian & Shuli Suderuddin, *Singapore: Proposed Marital Rape Law Welcomed*, IF ONLY SINGAPOREANS STOPPED TO THINK BLOG (Feb. 19, 2012), <http://ifonlysingaporeans.blogspot.com/2012/02/proposed-marital-rape-law-welcomed.html>; Vishal Arora, *Maldives President Vetoes Marital Rape Bill as "un-Islamic,"* WASH. POST (Jan. 16, 2014), http://www.washingtonpost.com/national/religion/maldives-president-vetoes-marital-rape-bill-as-un-islamic/2014/01/16/d8f50b8a-7ed3-11e3-97d3-b9925ce2c57b_story.html; Yuen Melkeng, *Malaysia Urged to Make Marital Rape a Crime*, ASIA NEWS NETWORK (Feb. 6, 2013), <http://www.asianewsnet.net/Malaysia-urged-to-make-marital-rape-a-crime-42395.html>; *Thailand Outlaws Marital Rape*, CHINA POST (June 22, 2007), <http://www.chinapost.com.tw/2007/06/22/113083/Thailand-outlaws.htm>; *Marital Rape: Parliamentary Panel and Government Decide Against Terming It a Criminal Offence*, ECON. TIMES (Mar. 2, 2013), http://articles.economictimes.indiatimes.com/2013-03-02/news/37390035_1_criminal-offence-parliamentary-panel-panel-chairman; *Malaysian Man Convicted of Marital Rape Under New Law*, JAKARTA GLOBE (Aug. 6, 2009), <http://www.thejakartaglobe.com/archive/malaysian-man-convicted-of-marital-rape-under-new-law/>; *Marital Rape Outlawed by Nepal's Supreme Court*, PANOS LONDON (Oct. 1, 2002), <http://panos.org.uk/features/marital-rape-outlawed-by-nepals-supreme-court/>.

92. General Recommendation 19, *supra* note 42, art. 7.

vacy, effective judicial recourse, safety, physical and mental integrity, integrity of the person, sexual and reproductive choice, and health.⁹³

The U.N. has consistently declared that violence against women impairs or nullifies women's human rights and their exercise of "fundamental freedoms" whether this violence occurs in public or in *private* life.⁹⁴ The CEDAW Committee has specifically identified these rights as being impaired or entirely nullified by gender violence.⁹⁵ These rights are protected in the core human rights treaties that have been ratified by most countries. The core international treaties protecting human rights include the ICCPR, ICESCR, the Convention Against Torture (or "Torture Convention"), and the CEDAW.⁹⁶ Human rights treaties impose obligations on the state to regulate the actions of private

93. American Convention on Human Rights, arts. 1, 2, 5, 11 & 25, Nov. 22, 1969, 1144 U.N.T.S. 123; Convention of Belém do Pará, *supra* note 67, art. 7; Maputo Protocol, *supra* note 90, arts. 3, 4; 2009 Resolution, *supra* note 81; Charter of Fundamental Rights of the European Union, arts. 1, 3, 4, 6, 20, 21 & 23, 2000 O.J. (C 364) 1 (Dec. 18, 2000); *see also* Maria Da Penha v. Brazil, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser.L/V/II.111, doc. 20 rev. at 704 (2001).

94. DEVAW, *supra* note 40, pmbl., arts. 1, 4(c) (emphasis added).

95. In its General Recommendation 19, the Committee on the Elimination of All Forms of Discrimination Against Women identified gender-based violence, including rape and sexual violence within the family, as a form of discrimination, stating that:

Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention. These rights and freedoms include: (a) The right to life; (b) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment; (c) The right to equal protection according to humanitarian norms in time of international or internal armed conflict; (d) The right to liberty and security of person; (e) The right to equal protection under the law; (f) The right to equality in the family; (g) The right to the highest standard attainable of physical and mental health; (h) The right to just and favourable conditions of work.

General Recommendation 19, *supra* note 42, art. 7.

96. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention

actors. As with all other specific human rights violations, marital rape is not explicitly mentioned in the instruments. As shown in the earlier section, treaty bodies like the CEDAW Committee have interpreted these rights to include the prohibition of marital rape. By ratifying these conventions, states accept the jurisdiction of the treaty bodies to monitor state compliance and to provide the substantive content for the rights and the nature of obligations through general comments and recommendations.

The analysis turns next to the specific and most fundamental human rights which are breached by marital rape.

A. The Right Not to be Subject to Torture or to Cruel, Inhuman, or Degrading Treatment or Punishment

The right to be free from torture or cruel, inhuman or degrading treatment includes the right to be free from domestic violence and rape.⁹⁷ The Committee against Torture has emphasized that gender violence or rape by non-state actors constitutes a violation of the Torture Convention.⁹⁸ Marital rape satisfies all the elements of an act of torture as defined in Article 1 of the Convention Against Torture since it is an act of (1) infliction of severe pain and suffering; (2) for a prohibited purpose that includes coercion, intimidation, or discrimination, and (3) is acquiesced to or condoned by a state actor.⁹⁹ Although the Convention Against Torture does not require both physical and mental suffering for an act to qualify as an act of torture, marital rape is “intentionally inflicted” and is an act which can impose “severe pain and suffering,” both physical and mental.¹⁰⁰

Against Torture]; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

97. See generally Barbara C. Alexander, *Convention Against Torture: A Viable Alternative Legal Remedy for Domestic Violence Victims*, 15 AM. U. INT'L L. REV. 895 (1999); Rhonda Copelon, *Gender Violence as Torture: The Contribution of Cat General Comment No. 2*, 11 N.Y.C. L. REV. 229 (2007); Katharine Fortin, *Rape as Torture: An Evaluation of the Committee Against Torture's Attitude to Sexual Violence*, 4 UTRECHT L. REV. 145 (2008).

98. Comm. Against Torture, General Comment No. 2 to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on the Implementation of Article 2 by States Parties, U.N. Doc. CAT/C/GC/2/CRP.1/Rev.4, paras. 18, 22 (Nov. 23, 2007) [hereinafter CAT General Comment 2].

99. See Convention Against Torture, *supra* note 96, art. 1.

100. *Id.*

In international criminal law, rape has also been identified as constituting torture and cruel and inhuman treatment, even when conducted by private actors, if it is condoned or tolerated by the state.¹⁰¹ International criminal law is concerned with individual responsibility, whereas international human rights law is concerned with state responsibility, and the two define rape and torture somewhat differently.¹⁰² Yet the absolute condemnation of rape as an act of torture in both fields, along with the requirement that rape perpetrated by private actors must be criminalized, demonstrates the universality and convergence in international law in matters of sexual violence against women.¹⁰³

The due diligence standard is not met if the state fails to stop, sanction, and provide remedies to victims of gender violence, or if the state “facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity.”¹⁰⁴

The General Comment further states that the state bears responsibility and its *officials should be considered as authors*, for consenting to or acquiescing in such impermissible acts.¹⁰⁵ The state’s indifference or inaction on these crimes are deemed to

101. CAT General Comment 2, *supra* note 98, ¶18. See *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, ¶¶144, 153–89 (ICTY, Dec. 10, 1998); *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 597 (ICTR, Sept. 2, 1998) (“Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person.”).

102. REDRESS, REDRESS FOR RAPE: USING INTERNATIONAL JURISPRUDENCE ON RAPE AS A FORM OF TORTURE OR OTHER ILL TREATMENT (2013), [http://www.redress.org/downloads/publications/FINAL%20Rape%20as%20Torture%20\(1\).pdf](http://www.redress.org/downloads/publications/FINAL%20Rape%20as%20Torture%20(1).pdf).

103. For example, the International Criminal Tribunal of Yugoslavia has confirmed that the prohibition against torture in both times of peace and during an armed conflict by a public or private actor (where consent or acquiescence is implied if no actions are taken to protect) constitutes a norm of *jus cogens*, which is therefore nonderogable and that rape is a form of torture. In *Prosecutor v. Furundžija*, the Tribunal extensively analyzed the criminal sanction against rape, asserting that rape is an outrage upon personal dignity and physical integrity, which is a *fundamental right* and a part of customary international law; furthermore, the tribunal stated “the principle of respect for human dignity is the basic underpinning and indeed the very *raison d’être* of international humanitarian law and human rights law general.” Case No. IT-95-17/1-T, Judgment, ¶¶ 144, 183, 163–89.

104. CAT General Comment No. 2, *supra* note 98, para. 18.

105. *Id.*

“provide a form of encouragement and/or de-facto permission.”¹⁰⁶ State failures to criminalize marital rape, therefore, represent such an encouragement or de facto permission for this crime.

The Committee Against Torture has identified women as a social group specifically at risk of torture by private actors in their homes. In the Committee’s own words, “[t]he contexts in which [women] are at risk include deprivation of liberty, medical treatment, particularly involving reproductive decisions, and violence by private actors in communities and homes.”¹⁰⁷ As women constitute a social group at risk for violence in intimate relationships, the Torture Convention particularly obliges the state Parties to ensure the protection of women facing risk of domestic violence and/or rape “by fully prosecuting and punishing all acts of violence and abuse against these individuals and ensuring implementation of other positive measures of prevention and protection.”¹⁰⁸

The Committee Against Torture is categorical about the range of measures that states are obliged to implement. These measures include “making the offence of torture *punishable as an offence under its criminal law*,” in accordance, at a minimum, with the elements of torture as defined in Article 1 of the Convention Against Torture, and the requirements of Article 4.¹⁰⁹ It includes making sure that there are no loopholes in the law that can result in perpetrators escaping criminal sanctions.¹¹⁰ As such, since marital rape is an act of torture, the Convention mandates that the state must enact criminal sanctions.

In particular, the Committee Against Torture emphasizes, “elements of intent and purpose . . . *do not involve a subjective inquiry into the motivations of the perpetrators*, but rather must be objective determinations under the circumstances.”¹¹¹ This important insight is of direct relevance to overcoming well-documented evidentiary barriers in prosecuting marital rape. Furthermore, it is a violation of the Convention to prosecute conduct solely as “ill-treatment” where the elements of torture are also

106. *Id.*

107. *Id.* para. 22.

108. *Id.* para. 21.

109. *Id.* para. 8 (emphasis added).

110. *Id.* para. 9.

111. *Id.* (emphasis added).

present.¹¹² Thus, it is a violation of international law against torture if the state minimizes sanctions against marital rape by incorporating them indirectly in legislation and civil remedies aimed at “ill-treatment” or abuse by intimate partners.

The prohibition against torture is absolute and non-derogable; it is a *jus cogens* norm that states are obligated to respect regardless of their treaty obligations. Due diligence under this norm requires a mandatory criminalization of any act qualifying as torture, in this case, marital rape.

The Committee Against Torture also explains why *criminalization* is a just and necessary remedy:

Naming and defining [torture as a distinct crime] will promote the Convention’s aim, inter alia, by alerting everyone, including perpetrators, victims, and the public, to the special gravity of the crime of torture. Codifying this crime will also emphasize the need for a) appropriate punishment that takes into account the gravity of the offence, b) strengthening the deterrent effect of the prohibition itself and c) enhancing the ability of responsible officials to track the specific crime of torture and d) enabling and empowering the public to monitor and, when required, to challenge state action as well as state inaction that violates the Convention.¹¹³

The Committee Against Torture also states that criminalization alone is not sufficient as a remedy, especially when dealing with at-risk groups such as women. Additional obligatory measures include sensitization trainings, education, monitoring inter alia, which are required for *preventing* such acts.¹¹⁴ Nevertheless, criminalization is the first and essential step in the condemnation of the act and protection of the victim.¹¹⁵

That marital rape can qualify as an act of torture or cruel, degrading, and inhuman treatment is further evident from the definition derived by other human rights bodies and courts.¹¹⁶ The

112. *Id.* para. 10.

113. *Id.* para. 11.

114. *Id.* paras. 24, 25.

115. *Id.* paras. 8–10.

116. See, e.g., *Aydin v. Turkey* (No. 50), 1996–VII 75 Eur.Ct.H.R. 1866 at ¶86 (1997) (noting that the “especially cruel act of rape . . . amounted to torture”); *Opuz v. Turkey*, Eur.Ct.H.R. App. No. 33401/02 (2009) (ruling that state failure to protect against physical and psychological violence in domestic relationships amounted to a violation of Article 3 of the European Convention of Human Rights).

European Court of Human Rights as well as other highest national courts have found that premeditated punishment or behavior causing intense physical and mental suffering is equivalent to inhuman treatment.¹¹⁷ Degrading treatment has been described as arousing in its victims feelings of fear, anguish, and inferiority capable of humiliating and debasing them and possibly breaking their physical and moral resistance. By this definition, marital rape is clearly a form of inhuman, degrading treatment.

The prohibition of torture relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim. Psychological trauma from marital rape can lead to anxiety, shock, intense fear, depression, suicidal ideation, and long-lasting post-traumatic stress.¹¹⁸ In *Meija v. Peru*, the IACHR recognized that:

Rape causes physical and mental suffering in the victim. In addition to the violence suffered at the time it is committed, the victims are commonly hurt or, in some cases, are even made pregnant. The fact of being made the subject of abuse of this nature also causes a psychological trauma that results, on the one hand, from having been humiliated and victimized, and on the other, from suffering the condemnation of the members of their community if they report what has been done to them.¹¹⁹

This aspect of marital rape as an act of extraordinary humiliation and victimization suggests that marital rape can be categorized as an act of torture, even in cases where there is no non-sexual or other physical violence inflicted by the perpetrator. The content of the due diligence standard requires that states address violations of this fundamental *jus cogens* norm; this must include the criminalization of marital rape.

117. See, e.g., *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 439, 478 (1989); *United States v. Burns*, [2001] S.C.R. 283 (Can.).

118. Saurabh Mishra & Sarvesh Singh, *Marital Rape—Myth, Reality, and Need for Criminalization*, PRAC. LAW. WEB J., no. 12, 2003, <http://www.ebc-india.com/lawyer/articles/645.htm>; Rachel Kennedy Bergen, *Marital Rape: New Research and Directions* VAWNET APPLIED RES. F., Feb. 2006, at 5, https://www.nycourts.gov/ip/women-inthecourts/pdfs/MARITAL%20RAPE_1_d_1.pdf.

119. *Raquel Martí De Mejía v. Perú*, Case 10.970, Inter-Am. Comm'n H.R., Report No. 5/96, OEA/Ser.L/V/II.91, doc. 7 at 157 (1996).

B. The Right to Life

Violence against women in the family, particularly intimate partner violence, has been recognized as a leading cause of death and suffering around the world.¹²⁰ Honor killings are an extreme example where women are killed with deliberate intent for perceived transgressions of family, community, or religious norms. In many communities, one such norm is a man's right to have sex with his wife, whether she consents or not.¹²¹

Marital rape can have distinct health consequences harboring right to life implications such as miscarriages, fistulas, bladder infections, and potential contraction of sexually transmitted diseases including HIV that can have *fatal* outcomes.¹²² Even in regions where there may be no outright community pressure on women to sexually "please" their men, the fear of domestic violence and physical harm can force women to accede to unwanted sex.¹²³ In extreme cases, marital rape has also been connected to "marital murder" as men kill their wives, often with impunity under various defenses, such as "defense of honor" or "crime of passion" as when a battered wife tries to escape her daily violence.¹²⁴ Therefore, marital rape violates the right to life, both on its own terms, and as an expression of domestic violence.

The right to life is a fundamental right guaranteed by all human rights treaties and is a part of customary international law. The inherent right to life protected by law is a non-derogable right recognized in the ICCPR in Article 6.¹²⁵ The Human Rights Committee identifies violence against women as a threat to the

120. VAW STUDY, *supra* note 27, at iii, 43–45.

121. Rhonda Copelon, *Intimate Terror: Understanding Domestic Violence as Torture*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 116, 128 (Rebecca J. Cook ed., 1994); *see also* Melissa Spatz, *A Lesser Crime: A Comparative Study of Legal Defenses for Men Who Kill Their Wives*, 24 COLUM. J.L. & SOC. PROBS. 597 (1991).

122. World Health Organization [WHO], *Understanding and Addressing Violence Against Women: Sexual Violence*, WHO/RHR/12.37, at 6 (2012), http://apps.who.int/iris/bitstream/10665/77434/1/WHO_RHR_12.37_eng.pdf; Bergen, *supra* note 118.

123. World Health Organization, *supra* note 122, at 3.

124. Sue Lees, *Marital Rape and Marital Murder*, in HOME TRUTHS ABOUT DOMESTIC VIOLENCE: FEMINIST INFLUENCES ON POLICY AND PRACTICE 57 (Jalna Hanmer & Catherine Itzin eds., 2000).

125. ICCPR, *supra* note 96, art. 6.

right to life.¹²⁶ The Human Rights Committee's General Comment 28 on the equality of rights between men and women mandates that states report on the specific measures taken to protect women from practices that violate their right to life.¹²⁷ Any action by a non-state actor which is condoned by the state and results in the violation of the right to life must be subject to the strictest sanctions, in other words, criminal sanctions. Rape has been legally recognized as a violation of the right to life¹²⁸ and rape in a spousal relationship, by extension, violates that right. Criminalization of marital rape, therefore, is an essential element of the state's obligation to protect women from practices that violate their right to life.

The recognition that rape violates a victim's right to life is found not only in international law but also in some domestic jurisprudence as well. The Indian Supreme Court has found

126. U.N. Human Rights Comm., Concluding Observations on Colombia, UN Doc A/52/40, para. 287 (1997); U.N. Human Rights Comm., Concluding Observations on Peru, UN Doc A/52/40, para. 167 (1997). In several concluding observations, the Human Rights Committee has specifically demanded that the member states criminalize marital rape. See U.N. Human Rights Comm., Concluding Observations on Sri Lanka, U.N. Doc. CCPR/CO/79/LKA, para. 20 (2003). The U.N. Human Rights Committee is drafting a General Comment 36 on Article 6 that is expected to explicitly identify domestic and sexual violence as violations of women's right to life. See *Human Rights Committee Developing New Right to Life General Comment*, INT'L JUST. RESOURCE CTR. (July 28, 2015), <http://www.ijrcenter.org/2015/07/28/human-rights-committee-developing-new-right-to-life-general-comment/>.

127. U.N. Human Rights Comm., General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women), para. 10, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000) [hereinafter General Comment No. 28].

128. For example, in *Prosecutor v. Akayesu*, the ICTR, while finding rape to be a crime against humanity, stated that "[s]exual violence was a step in the process of destruction [of the Tutsi group]—destruction of the spirit, of the will to live, and of life itself." Case No. ICTR-96-4-T, Judgment, ¶ 731 (Int'l Crim. Trib. for Rwanda, Sept. 2, 1998). Acts of sexual violence are also accompanied by explicit threats of death violating the right to life. Domestic violence in general has been found to implicate the right to life in cases where the state has not fulfilled its positive obligations to respond to domestic violence complaints and adopt preventive operational measures to protect the individuals whose life is put at risk by the violence. See *Opuz v. Turkey*, App. No. 33401/02, Eur. Ct. H.R. (2009), <http://www.coe.int/t/dghl/standardsetting/minjust/mju29/CASE%20OF%20OPUZ%20v%5B1%5D.%20TURKEY.pdf>; *Lenahan v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, OEA/Ser.L/V/II.142, doc. 11 (2011).

rape to be a crime against basic human rights that violates the victim's "most cherished fundamental right, namely, the right to life."¹²⁹ Regional adjudicating bodies have found dereliction by the state to effectively protect against domestic violence a violation of the right to life, since ignoring domestic violence in any form can lead to death.¹³⁰ As a fundamental human rights norm, the legal protection of the right to life demands a criminal remedy for effective deterrence and prosecution of marital rape.

C. *The Right to Liberty and Security of Person*

Marital rape is a violation of the physical and psychological security of the person and bears implications on the full and equal enjoyment of the right to liberty of women within their homes. The right to liberty and security is ensured under Article 9 of the ICCPR.¹³¹ The right to "security" is often expressed together with a right to "liberty" and has been protected since the French Declaration of the Rights of Man and of the Citizen of 1789.¹³² This right is provided for by Articles 3 and 9 of the UDHR as well as in several regional instruments and has been used in various fora as encompassing criminal prohibition of spousal rape.¹³³

129. *Bodhisattwa Gautam v. Subhra Chakraborty*, (1996) 1 SCC 490 (India). Yet, in India, marital rape is not criminalized. See Malavika Vyawahare, *India: Court Rules that Marital Sex, Even When Forced is not Rape*, N.Y. TIMES, May 13, 2014, at A7; Bharti Jain, *House Panel Backs Move Not to Treat Marital Rape as Sexual Offence*, TIMES OF INDIA (Mar. 2, 2013, 5:27 AM), <http://timesofindia.indiatimes.com/india/House-panel-backs-move-not-to-treat-marital-rape-as-sexual-offence/articleshow/18759230.cms>. The Parliamentary committee that was to review the government's decision to not criminalize marital rape, *inter alia*, supported the action stating that "if marital rape is brought under the law, the entire family system will be under great stress and the committee may perhaps be doing more injustice." *Id.* The Supreme Court has not yet ruled on marital rape.

130. *Opuz*, App. No. 33401/02, Eur. Ct. H.R.; *Lenahan*, OEA/Ser.L/V/II.142, doc. 11 ¶125; *Maria Da Penha v. Brazil*, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser.L/V/II.111, doc. 20 rev. (2001).

131. ICCPR, *supra* note 96, art. 9; Convention Against Torture, *supra* note 96.

132. James Spigelman AC, C.J. N.S.W., *The Forgotten Freedom: Freedom from Fear*, 59 INT'L & COMP. L.Q. 543, 549 (2010).

133. Comm. on the Elimination of Discrimination Against Women, Comm. No. 2/2003, Ms. A. T. v. Hungary, ¶ 9.3, CEDAW/C/36/D/2/2003 (Jan. 26, 2005) (stating that the state's inadequate response to domestic violence constituted

However, the ICCPR Article 9 right has had only limited use since it was interpreted in 1982 by the Human Rights Committee as being limited only to state action and primarily in the area of criminal detention.¹³⁴ Since its four paragraphs provide little guidance on the other issues raised by Article 9, the Committee, in 2012, began a process of drafting a new General Comment.¹³⁵ General Comment 35 on Article 9 was finally formalized on December 16, 2014.¹³⁶ It states that the right to security of a person mandates that state parties must “respond appropriately” to patterns of violence against women, including domestic violence.¹³⁷

Sexual violence and the possibility of further sexual assaults in an ongoing relationship leave the victim under the continuous

a “violation of the author’s human rights and fundamental freedoms, *particularly her right to security of person*” (emphasis added); Rep. of the Comm. on the Elimination of Discrimination Against Women on its Exceptional Session, transmitted by Letter Dated 15 September 2002 from the Chairperson of the Comm. on the Elimination of Discrimination Against Women to the General Assembly, at 195 paras. 333–334, U.N. Doc. No. A/57/38 (2002) [hereinafter CEDAW Report] (“The Committee remains concerned that the Hungarian Penal Code currently treats sexual crimes as crimes against decency *rather than violations of women’s rights to bodily security*. It is particularly concerned that the definition of rape, including that within marriage, is based on the use of force *rather than the lack of consent* The Committee recommends that the State party reform its law *to define sexual crimes as crimes involving violations of women’s rights to bodily security* and that the State party define the crime of rape as sexual intercourse without consent.”) (emphasis added); *S v. Baloyi* 2000 (2) SA 425 (CC) at para. 11 (S. Afr.) (“[S]erious threats to security of the person arise from private sources. [The section of the Constitution protecting the right to security] has to be understood as obliging the state directly to protect the right of everyone to be free from private or domestic violence.”); INTER-AM. COMM’N ON HUMAN RIGHTS, MESOAMERICA REPORT, *supra* note 71, paras. 48, 124 (“[T]he right being protected [by laws criminalizing sexual violence under all conditions] is sexual self-determination and *sexual security*.”) (emphasis added).

134. U.N. Human Rights Comm., General Comment No. 8: Article 9 (Right to Liberty and Security of Persons), at 8, U.N. Doc. HRI/GEN/1/Rev.1 (June 30, 1982).

135. Int’l Just. Resource Ctr., *UN Human Rights Committee Invites Feedback On Draft General Comment No. 35 On The Rights To Liberty And Security Of Person* (Apr. 14, 2014), <http://www.ijrcenter.org/2014/04/14/un-human-rights-committee-invites-feedback-on-draft-general-comment-no-35-on-the-rights-to-liberty-and-security-of-person/>.

136. U.N. Human Rights Comm., General Comment No. 35: Article 9 (Liberty and Security of Persons), U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014).

137. *Id.* para. 9.

threat of a repeat attack, as the perpetrator is someone most likely to be living under the same roof with her, who may be the father of her children, and who may be the sole economic provider in the household. In countries where marital rape is not criminalized, the perpetrator may also be the man sanctioned by society and law to have sex with the victim whenever he feels like it. This creates a legal space where a woman's right to liberty and to security of the person can be invaded with impunity.

Sexual assault laws, which are underinclusive and exempt rape in marriage, legitimize the idea that women cannot refuse consent to sex in marriage and therefore put women in situations where they continuously live with a sense of vulnerability and loss of rights to both bodily and sexual integrity. In this context, a woman sexually assaulted in marriage is left without any remedy, and should she elect to leave her abuser, she may be stigmatized, face poverty, lose custody of her children, and face the possibility of continued threats of violence from her husband.¹³⁸

Not only is such a victim in a profoundly powerless situation where her right to liberty and security is threatened in her everyday life, but she is also more prone to disbelief by many around her, especially the legal and police systems, should she disclose rape perpetrated by her husband or other male intimate. She may even be held responsible for the attacks she has endured.¹³⁹ Victims of marital rape face an increased vulnerability to all the same stereotypes that rape victims face in general, such as social prejudices about the perpetrators which minimize the harms of sexual violence in relationships (i.e. he is a good husband so long as he brings in the money and does not beat too much) or about women as less credible (i.e. that they frequently make false allegations of rape).¹⁴⁰ Without criminalization of marital rape, the law leaves a woman's right to bodily security and liberty sacrificed to other interests, such as gendered notions of "family

138. See *Cries Unheard*, *supra* note 25.

139. *Id.* at 4.

140. *Id.* at 5–6, 13. See generally Jill E. Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373 (2000); Jo Fidgen, *Zambia's Celebrity Couple Reveal Wife-Beating Past*, BBC NEWS, <http://news.bbc.co.uk/2/hi/africa/8375291.stm> (last updated Nov. 30, 2009, 7:45 AM).

unity” and “family peace” and unmitigated support for the husband as the “bread-winner.”¹⁴¹ Safeguarding women’s rights to liberty and security of the person, therefore, necessarily imposes specific obligations on states to criminalize marital rape.

D. The Right to be Free from Discrimination

The right to be free from discrimination is also established in all the major human rights treaties. Indeed, freedom from discrimination is a *raison d’être* of the legal protection of human rights. It is also defined in Article 1 of CEDAW, and it is a *jus cogens* principle of customary international law.¹⁴² Noncriminalization of marital rape implies discriminatory treatment in two ways: it discriminates between violence experienced by women and other types of violence *and* it discriminates between violence experienced in the private sphere and the public sphere (by discriminating between nonmarital rape and intimate partner rape).

The link between violence against women and gender discrimination is well established and accepted. In 1992, through its General Recommendation 19, the CEDAW Committee established that gender-based violence is “violence that is directed against a woman because she is a woman or that affects women disproportionately.”¹⁴³ It further recognized that it “is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men.”¹⁴⁴ General Recommendation 19 states that gender-based violence is a form of *discrimination* on the basis that violence directed against a woman purely because she is a woman and gender-based violence affects women disproportionately. The obligation of state

141. Heenan, *supra* note 14; see also Rashida Manjoo (Special Rapporteur on Violence Against Women, Its Causes and Consequences), *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, para. 50, U.N. Doc. A/HRC/23/49 (May 14, 2013); Jain, *supra* note 129. See generally Melisa J. Anderson, *Lawful Wife, Unlawful Sex—Examining the Effect of the Criminalization of Marital Rape in England and the Republic of Ireland*, 27 GA. J. INT’L & COMP. L. 139 (1998).

142. CEDAW, *supra* note 96, art. 1; Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶¶ 97–101 (Sept. 17, 2003).

143. General Recommendation 19, *supra* note 42, art. 6.

144. *Id.* arts. 1, 6.

parties to address violence against women includes violence perpetrated by "any person, organization or enterprise."¹⁴⁵

To give effect to their obligations, state parties to CEDAW must undertake comprehensive measures to end discrimination against women through laws, policies, and commitments by state institutions.¹⁴⁶ State parties to CEDAW are bound to ensure the equal protection of women by the law. Article 2(c) requires states "*to establish legal protection of the rights of women on an equal basis with men* and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination."¹⁴⁷

The U.N. Human Rights Committee has recognized that the gender-specific nature of domestic violence requires that it be classified as a violation of the human right to equality.¹⁴⁸ Since intimate partner sexual assault and violence against women in general impair or nullify the enjoyment of economic, social, and cultural rights, these forms of discrimination implicate the rights under ICESCR as well.¹⁴⁹

A U.N. Special Rapporteur report asserts that as per the due diligence obligation to eliminate gender discrimination, "States are required *to use the same level of commitment* in relation to prevention, investigation, punishment and provision of remedies for violence against women as they do with regards to the other forms of violence."¹⁵⁰ Further, "the State, by failing to respond to intimate/domestic violence, can be held responsible for not fulfilling its obligation to protect and punish in a non-discriminatory way and can be charged as an accomplice to private violation."¹⁵¹ Criminalizing sexual and physical violence in all its forms has long been recognized by the CEDAW Committee, U.N. Special Rapporteurs on violence against women, and several

145. *Id.* art 9.

146. CEDAW, *supra* note 96, art. 2(a)–(g).

147. *Id.* art. 2(c) (emphasis added).

148. General Comment No. 28, *supra* note 127, para. 10.

149. U.N. Comm. on Econ. & Soc. Council, Comm. On Econ., Soc. & Cultural Rights, General Comment No. 16, para. 27, U.N. Doc. E/C.12/2005/4 (Aug. 11, 2005).

150. Ertürk, *supra* note 53, para. 35.

151. The failure furthermore maintains "a separate regime of responsibility for private as opposed to public acts." *Id.* para. 61.

U.N. bodies as essential remedies for combatting gender discrimination and providing women with equal protection under the law.

The current U.N. Special Rapporteur on violence against women, Rashida Manjoo, points to the discriminatory treatment of spousal violence in many member states.¹⁵² Even in countries where spousal violence is a criminal offence, it is often tried as a misdemeanor, categorized as a minor offence, and the police typically do not take reports of spousal violence seriously.¹⁵³ However, the due diligence standard requires that states impose “severe” and effective sanctions against spousal violence to prevent future conduct “because of the ongoing nature of the relationship between victim and perpetrator.”¹⁵⁴ The previous Special Rapporteur confirmed that the criminalization of domestic and intimate partner violence is a specific requirement under the Beijing Platform and was a “minimum standard.”¹⁵⁵

In *Maria da Penha v. Brazil*, the IACHR found that by allowing perpetrators of domestic violence to enjoy impunity with no threat of prosecution or punishment, not only was Brazil complicit in the crime, but Brazil’s failure to respond to domestic violence was evidence of gender discrimination.¹⁵⁶ The Council of Europe and the EU have consistently reiterated that violence against women, including intimate partner sexual assault, is a form of discrimination that requires adequate criminal remedies.¹⁵⁷ A state’s failure to criminalize or adequately criminalize marital rape, therefore, is necessarily a form of discrimination against women.

152. Manjoo, *supra* note 141.

153. *Id.* para. 50.

154. *Id.* para. 74.

155. Yakin Ertürk (Special Rapporteur on Violence Against Women, Its Causes and Consequences), U.N. Econ. & Soc. Council, Comm’n on Human Rights, Rep. on Violence Against Women, Indicators on Violence against women and State response, UN Doc A/HRC/7/6, paras 71, 78, 81 (Jan. 29, 2008).

156. *Maria Da Penha v. Brazil*, Case 12.051, Inter-Am. Comm’n H.R., Report No. 54/01, OEA/Ser.L/V/II.111, doc. 20 rev. ¶ 55–56 (2001).

157. Istanbul Convention (CAHVIO), *supra* note 78, pmbl., art. 3(a); Council of Europe Comm. of Ministers, *Recommendation Rec (2002)5 of the Committee of Ministers to Member States on the Protection of Women Against Violence*, app. para. 34 (Apr. 30, 2002), <https://wcd.coe.int/ViewDoc.jsp?id=280915> [hereinafter *Rec (2002)5*]; 2009 Resolution, *supra* note 81, pmbl., art. 1; Council Directive 2012/29, *supra* note 85, art. 17.

E. The Right to Equality in the Family

In a society or culture that negates a woman's right to give or refuse consent for sex in marriage there can be no real gender equality. Assuming that for a woman marriage necessarily implies her ongoing consent to sex with her spouse, is tantamount to treating her as a form of sexual property of the husband. In countries where marital rape is condoned or not legally prohibited, therefore, women's rights to equality within the family are violated in multiple ways.

In some contexts, the social and legal acceptance of marital rape is so strong that if a perpetrator marries the woman he raped, the marital rape exemption applies retroactively, and the assault is nullified. Penal codes in Venezuela, Indonesia, Cameroon, Chad, Denmark, and Russia state that if a woman is raped, and the perpetrator marries the victim, he will be pardoned or his sentence will be reduced.¹⁵⁸ Not only is this based on the misogynistic belief that a woman is "damaged goods" if she is raped outside of marriage but it also simultaneously supports the belief that sexual violence within a marriage is not rape.

Laws that entrench gender inequality by making the husband the head of the household, as is the case in Iran, Chile, Rwanda, Honduras, Gabon, Indonesia, United Arab Emirates, Peru, and the Philippines among others,¹⁵⁹ necessarily increase the vulnerability of women to sexual assault within their homes. If a woman in this situation is derelict in her "wifely duties," the societal norms and even the laws, provide the husband with the right to inflict emotional and physical violence on her. Faced with the threat of such emotional and physical violence, the wife has no choice but to obey the sexual demands of her husband.

158. AMNESTY INT'L, THE STATE OF THE WORLD'S HUMAN RIGHTS 82 (2013); Morgan McDaniel, *From Morocco to Denmark: Rape Survivors Around the World Are Forced to Marry Attackers*, WOMEN UNDER SIEGE PROJECT (May 2, 2013), <http://www.womenundersiegeproject.org/blog/entry/from-morocco-to-denmark-rape-survivors-around-the-world-are-forced-to-marry>; Radhika Coomaraswamy (Special Rapporteur on Violence Against Women, Its Causes and Consequences), *Cultural Practices in the Family that Are Violent Towards Women*, para. 58, U.N. Doc E/CN.4/2002/83 (Jan. 31, 2002).

159. THE WORLD BANK AND IFC, WOMEN, BUSINESS AND THE LAW: REMOVING RESTRICTIONS TO ENHANCE GENDER EQUALITY 16 tbl.2.2 (2013), <http://wbl.worldbank.org/~media/FPDKM/WBL/Documents/Reports/2014/Women-Business-and-the-Law-2014-Key-Findings.pdf>.

U.N. Special Rapporteur Coomaraswamy notes in her report that multiple “forms of threat or violence are used to ensure that women stay obedient within a marriage, for example the threat of the husband taking another wife or of divorce”¹⁶⁰

Marital rape also implicates the equality rights and protection of girls. When culturally permitted and mandated, marital rape has a pernicious impact on the health of women and girls. In a July 2009 report on violence against women in Afghanistan, the U.N. noted that “[e]arly and forced marriages are . . . particularly conducive to marital rape, including of very young girls.”¹⁶¹ There are other examples where the culture condones or supports marital intercourse even where there is no explicit consent.¹⁶²

Inequality in a marital relationship and gender inequality in a society in general are the most important factors contributing to marital rape, which in turn exacerbates inequality.¹⁶³ State parties are required by CEDAW to

modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.¹⁶⁴

The criminalization of marital rape at least partially disrupts this perpetuation of gender inequality by challenging the idea that women are the sexual property of men in a marriage and by sending a strong signal that marriage is based on equality between spouses. Furthermore, criminalizing marital rape legally protects a woman’s right to give or withhold consent to sex

160. Coomaraswamy, *supra* note 158, para. 63.

161. U.N. Assistance Mission in Afghanistan & Office of the U.N. High Comm’r for Human Rights, *Silence is Violence: End the Abuse of Women in Afghanistan* 22 (July 8, 2009), http://www.ohchr.org/Documents/Press/VAW_Report_7July09.pdf.

162. McDaniel, *supra* note 158 (providing examples from Morocco, Denmark, Latin America, and the Arab World where women were forced to marry their rapists to legitimize the rape through marriage); Jain, *supra* note 129 (noting the Indian Parliamentary Committee ruled that in India, “the [f]amily is able to resolve the problems . . . and if the marital rape is brought under the law, the entire family system will be under great stress and the Committee may perhaps be doing more injustice”).

163. See generally Manjoo, *supra* note 141; Coomaraswamy, *supra* note 158; Ertürk, *supra* note 53.

164. CEDAW, *supra* note 96, art. 5.

within a marriage. Therefore, criminalizing marital rape is essential for states to carry out their obligations to uphold equality in the family.

F. The Right to Health and Well Being

Marital rape represents a violation of the right to the highest standard attainable of physical and mental health as protected by the UDHR and the ICESR. In addition to the psychological trauma that can lead to anxiety, shock, intense fear, depression, suicidal ideation, and post-traumatic stress, marital rape can have specific health consequences such as miscarriages, stillbirths, bladder infections, infertility, and the potential contraction of sexually transmitted diseases including HIV.¹⁶⁵

Women's groups in South Africa have campaigned for the criminalization of marital rape on the platform that condoning marital rape seriously undermines efforts to combat the horrifying HIV-AIDS pandemic particularly affecting African women.¹⁶⁶ Victims of marital rape and domestic violence not only have an increased risk in contracting the disease but are also undermined in their ability to access healthcare and treatment for this disease.

Gendered violence has long been recognized to be associated with very heavy costs, not only to the women victimized, but also to society as a whole. These include costs associated with damage to women's physical and mental health, loss of employment, and diminished productivity. This has been recognized by the WHO, the U.N., and various national governments, research bodies, individual scholars, and NGOs the world over.¹⁶⁷

165. WHO REPORT, *supra* note 9.

166. Nada Ali, *The Costs of Marital Rape in Southern Africa*, HUM. RTS. WATCH (Aug. 19, 2008), <http://www.hrw.org/news/2008/08/18/costs-marital-rape-southern-africa>.

167. See, e.g., NAT'L CTR. FOR INJURY PREVENTION & CONTROL, COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES (2003), <http://www.cdc.gov/violenceprevention/pdf/ipvbook-a.pdf>; Council of Europe, Gender Equal. & Violence Against Women Div., *Overview of Studies on the Costs of Violence Against Women and Domestic Violence* 1, 7 (Oct. 26, 2012); World Health Organization [WHO], *Economic Dimensions of Interpersonal Violence* (Hugh Waters et al., 2004) <http://whqlibdoc.who.int/publications/2004/9241591609.pdf>; Karuna S. Chibber & Suneeta Krishnan, *Confronting Intimate Partner Violence, A Global Healthcare Priority*, 78 MT. SINAI J. MED. 449 (2011).

General Comment 14 to Article 12 of the ICESCR on the right to the highest attainable standard of health by the Committee on Economic, Social and Cultural Rights (CESCR) asserts that a major goal of states should be reducing women's health risks by protecting women from domestic violence, which includes sexual violence. The failure to protect women against violence, and to criminalize and to prosecute perpetrators of marital rape, therefore, is a violation of a state's obligation to protect women's right to health.¹⁶⁸

IV. WHY CRIMINALIZING SEXUAL ASSAULT IN INTIMATE RELATIONSHIPS IS NECESSARY TO PROTECT WOMEN'S HUMAN RIGHTS

Existing international law now unambiguously *requires* that states criminalize marital rape. This is because, as is clear from a review of human rights law and norms, marital rape violates a range of fundamental human rights that are protected by international law. Criminalization is a crucial way in which the law's power must be drawn upon to prohibit and prevent these rights violations.

The U.N. Special Rapporteur on violence against women acknowledges the debate in the human rights community that an emphasis on education and health strategies may be more productive than legal sanctions.¹⁶⁹ Nevertheless, the Special Rapporteur is emphatic about the particular efficacy of penal sanctions, especially in the role of securing a reduction in violence within "a generation."¹⁷⁰ Specifically, the Special Rapporteur states,

It is often argued that the human rights approach, with its emphasis on law and punishment, may not be very productive in fighting violence against women on the ground. Many activists feel that the emphasis should be placed on education and health strategies that combat attitudes over the long term. However, history does have examples of how strong and effective laws have eliminated certain practices within a matter of years The existence of a criminal sanction ensures that

168. U.N. Comm. on Econ. & Soc. Council, Comm. On Econ., Soc. & Cultural Rights, General Comment No. 14, U.N. Comm. on Econ. & Soc. Council, Comm. On Econ., Soc. & Cultural Rights, General Comment No. 16, para. 27, U.N. Doc. E/C.12/2005/4 (Aug. 11, 2005).

169. Coomaraswamy, *supra* note 158, para. 113.

170. *Id.* para. 112.

parents have an excuse to spare their child such a practice. The law allows parents a way to avoid giving in to social pressure and custom. Without such a law, it is difficult to eradicate a practice in a generation.¹⁷¹

More recently, the Special Rapporteur has also called for a legally binding global treaty for the elimination of violence against women, as a measure necessary to promote and protect gender equality.¹⁷² As the Rapporteur emphasizes,

Transformative change requires that the words and actions of States' reflects the acknowledgement that violence against women is a human rights violation, in and of itself; and more importantly it requires a commitment by States' to be bound by specific legal obligations in the quest for elimination of this pervasive and widespread human rights violation.¹⁷³

A. What Does Criminalization Require? Legal Repudiation of the Idea of Implied or Continuous Consent

Criminalization of rape in spousal and other intimate relationships requires more than simply the removal of the marital-rape exemption. It also requires that there be no presumption of consent in the definition of rape in a marital (or marital type) context and that lack of consent be an essential element of the criminalization. According the CEDAW Committee, definitions of rape, including rape within marriage, that are based merely on use of force rather than lack of consent fail to satisfy state's obligations to ensure that women's rights to bodily security remain protected.¹⁷⁴

The international law governing the elements of sexual violence crimes is particularly important to the project of criminalizing rape in marriage. Rule 70 of the International Criminal Court (ICC) Rules of Procedure and Evidence states the following with respect to sexual violence:

171. *Id.*

172. *UN Expert Calls for a Legally Binding Global Treaty for the Elimination of Violence Against Women*, OFF. OF THE HIGH COMMISSIONER FOR HUM. RTS. (Oct. 27, 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15211&LangID=E>.

173. *Id.*

174. CEDAW Report, *supra* note 133.

- (a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;
- (b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
- (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence.¹⁷⁵

In other words, these rules indicate that where a victim is incapable of giving genuine consent, as in a context where the community and the state condones marital rape, consent simply cannot be inferred by the relational context.

A presumption of the ongoing existence of consent in a marital relationship is also a violation of a woman's right to sexual autonomy and security. In fact, given the inequality of power in many marital relationships, especially where a wife is often faced with the ongoing threat of violence, dishonor or stigma, removal of economic support and shelter, polygamy, and other societal pressures, having a requirement of affirmative consent is arguably the only way that her universal right to security and liberty is protected.

Not only must statutory change in criminal laws be enacted to remove exemptions of sexual assaults perpetrated in marital-type relationships, but also a vigorous campaign of judicial and public education must be undertaken to raise awareness about the criminal wrongfulness of sexual violence and coercion within marriages. These sociolegal educational initiatives must also include the norms of gender equality and women's rights to say no to unwanted sex, which is, of course, a precondition for a genuine capacity to give consent.

The manner in which marital rape is criminalized also matters. Criminalization requires that marital rape be recognized as a crime against the liberty and security of the *individual*. Instead, many countries have deficient protections because they

175. Assembly of States Parties to the Rome Statute of the Int'l Criminal Court, 1st Sess., 1st mtg. at 44 r. 70, Doc. No. ICC-ASP/1/3 (Sept. 10, 2002), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/603/35/PDF/N0260335.pdf?OpenElement>.

categorize rape under crimes against morality or honor.¹⁷⁶ The Hungarian Penal Code, for example, defines rape and other crimes of sexual violence as “crimes against marriage, the family, youth and sexual *morality*.”¹⁷⁷ Incest laws in Mexico, even where the victim is underage, fall under the rubric of crimes against the family and not against the *physical integrity* of the victim.¹⁷⁸ These types of legal prohibitions are inadequate and fail to achieve the full criminalization of sexual assault in general and sexual assault in marriage specifically.

Such morality-based categorizations not only have implications for making the law meaningful and effective but also have implications in ensuring that the specific right that marital rape violates (i.e. right to liberty and security) is protected. If marital rape is deemed to violate the physical integrity of the victim, it is a violation of the victim’s right to personal security. Therefore it is simply not sufficient to categorize the prohibition against sexual assault as a morality-based sanction.

From an instrumentalist perspective, such a categorization renders the criminalization meaningless. As Amnesty International has pointed out, it increases the pressure on a victim to remain silent for fear that her complaint against her husband can disrupt the morality norms of her community and bring “shame” to her extended family.¹⁷⁹

The Council of Europe has therefore recommended that member states must “ensure that criminal law provides that any act of violence against a person, in particular physical or sexual violence, constitutes a violation of that person’s physical, psychological and/or sexual freedom and integrity, and not solely a violation of *morality, honor or decency*.”¹⁸⁰ The CEDAW Committee

176. See, e.g., Amnesty Int’l, “*I Can’t Afford Justice*”: Violence against Women in Uganda Unchecked and Unpunished, AI Index AFR 59/001/2010 (Apr. 7, 2010); *Cries Unheard*, *supra* note 25, at 7; *Afghanistan: Surge in Women Jailed for ‘Moral Crimes’*, HUM. RTS. WATCH (May 21, 2013), <https://www.hrw.org/news/2013/05/21/afghanistan-surge-women-jailed-moral-crimes>.

177. *Cries Unheard*, *supra* note 25, at 7 (emphasis added).

178. Marianne Mollmann, *Ending Impunity for Rape*, WASH. POST (Dec. 27, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/12/26/AR2008122601493.html>; see also INTER-AM. COMM’N ON HUMAN RIGHTS, MESOAMERICA REPORT, *supra* note 71.

179. *Cries Unheard*, *supra* note 25, at 3–4, 22.

180. *Rec (2002)5*, *supra* note 157, app. para. 34.

has similarly asserted that sexual crimes, particularly in intimate relationships, be treated as violations of women's rights to bodily security instead of as crimes defending moral violations.¹⁸¹ Treating sexual crimes in intimate relationships the same way as other sexual crimes without any allusions to cultural values and morality, as is demanded by international human rights law, requires the unconditional criminalization of marital rape.

CONCLUSION

In spite of decades of advocacy, scholarship, community organizing, and law reform across jurisdictions, violence against women remains a major social problem. It is both a significant impediment to women's equality and a major breach of women's human rights. Sexual assaults perpetrated against women by male intimates are among the more intransigent and privatized expressions of this violence that remain largely beyond the reach of the law in too many nation states.

Too many criminal justice systems across the world either grant legal impunity for marital rape by upholding an exemption for sexual assault in marriage or by treating marital rape cases that do get processed criminally, as if they are somehow fundamentally different from, and less serious than, other sexual assaults.¹⁸² In either case, women who are sexually violated by men who are their husbands or intimate partners are left unprotected by the law.

Though unevenly progressing, there is a developing international trend towards extending criminal law's reach to cover sexual assaults in marriage and marital type relationships. However, even in countries that have criminalized marital rape, there remain formidable social, cultural, and legal barriers to achieving criminal justice for women who have experienced this form of assault in an intimate relationship.¹⁸³ Furthermore, far

181. Comm. on the Elimination of Discrimination Against Women, *Concluding Comments of the Comm. on the Elimination of Discrimination against Women: Hungary*, 39th Sess, U.N. Doc. CEDAW/C/HUN/CO/6, paras. 20–21 (Aug. 10, 2007).

182. See *supra* Part I.A.

183. For an example of one such country where marital rape is criminalized but formidable barriers to achieving criminal justice for women remain, see Jennifer Koshan, *The Legal Treatment of Marital Rape and Women's Equality: An Analysis of the Canadian Experience*, EQUALITY EFFECT, Sept. 2010,

too many countries fail to even recognize rape in marriage as a crime, let alone as a human rights violation. For example, on April 1, 2014, Lebanon's parliament passed legislation entitled "Law on Protection of Women and Family Members from Domestic Violence."¹⁸⁴ The law, many years in the making, is intended to provide some legal remedies to women harmed in their spousal relationships, yet it specifically and deliberately fails to criminalize marital rape. Instead, the law rather astonishingly endorses what is described as a "marital right of intercourse."¹⁸⁵ This legal legitimization of marital rape continues to be the subject of vigorous debate and protest by women's and other human rights organizations.¹⁸⁶

In countries where marital rape is not criminalized, the laws effectively facilitate and condone sexual assault in marriage. They do so by removing women's rights to choose to either consent or not consent to sexual contact, they remove legal remedies for sexual violence perpetrated in intimate relationships, and they immunize perpetrators from legal sanctions for sexual violence perpetrated in these relationships. Simply put, when rape in marriage is not criminalized, the rape laws of that country do not apply to married women. As a result, women who are married are stripped of fundamental legal protections and basic human rights afforded to other women. Married women in countries that fail to criminalize marital rape are denied equal benefit and protection of the law, equal citizenship rights, and denied full and equal participation in social, economic, and domestic life.¹⁸⁷

Criminalizing rape within marriage or marital-like relationships is not the only remedy for this form of violence against women, nor should it be the sole focus of efforts to end this form

<http://theequalityeffect.org/pdfs/maritalrapecanadexperience.pdf> (discussing the situation in Canada). See also Randall, *supra* note 22.

184. *Lebanon: Domestic Violence Law Good, but Incomplete*, HUM. RTS. WATCH (Apr. 3, 2014), <https://www.hrw.org/news/2014/04/03/lebanon-domestic-violence-law-good-incomplete>.

185. *Id.*; see also Ellie Violet Bramley, *Why does Lebanese Bill on Domestic Violence Fail to Tackle Marital Rape?*, GUARDIAN (Apr. 9, 2014), <http://www.theguardian.com/global-development/2014/apr/09/lebanese-bill-domestic-violence-marital-rape>.

186. Dana Halawi, *Activists Urge Lebanon to Make Marital Rape Illegal*, REUTERS (Mar. 23, 2015), <http://www.reuters.com/article/2015/03/23/us-lebanon-women-abuse-idUSKBN0MJ0GY20150323>.

187. See discussion *supra* Part III.

of gendered violence. Nor is it an adequate response on the part of the state or of society more broadly. However, it is an essential remedy and a crucially important legal response.

Criminalization strategies in relation to violence against women have been vigorously pursued, while simultaneously being the occasional subject of debate, especially within feminist academic circles. The merits and perils of criminalization have been most strenuously argued in relation to domestic violence, particularly with regard to some of the unintended consequences associated with a criminalization strategy for this form of relational violence.¹⁸⁸

While the criminal justice system remains a deeply imperfect system, and criminalization can sometimes be associated with certain perils and unintended consequences, criminal law sanctions prohibiting sexual violence against women in intimate relationships are nevertheless of paramount importance and must be implemented. Their absence signals that women in marriage and other marriage-like relationships have no legal protection against violence of a sexual nature perpetrated against them. The use of criminal law is a necessary, if incomplete, part of the strategy to end this form of gendered violence and human rights violation, as it is necessary to ending violence against women more generally.

Criminalization specifically, and law reform in general, can only form a part of the solution of addressing the complex problem of marital rape. Public education and awareness efforts, shifts in attitudes, professional training and education about appropriate system responses, adequate victim services, and sexual violence prevention efforts are also needed to combat marital rape. Additionally, any and all other legal and social supports for gender inequality in marriage must be removed.

On this front, perhaps most fundamentally crucial in addressing the problem of marital rape is a challenge to the ideology of masculine dominance in marriage and in society, and the rejection of any notion that men are “head” of the family or household and are thus entitled to authority over women by virtue of their status as men. This speaks to the way in which the criminaliza-

188. See, e.g., Kristin Bumiller, *Feminist Collaboration with the State in Response to Sexual Violence*, in *GENDER, VIOLENCE, AND HUMAN SECURITY: CRITICAL FEMINIST PERSPECTIVES* 191 (Aili Mari Tripp et al. eds., 2013).

tion of marital rape must be part of a broader challenge to gender inequality in general, and, in particular, to its embeddedness in familial and intimate relationships. In those societies, religions, and cultures where the superiority of men and the subordination of women is assumed and legitimized, this challenge will be fundamental and profound. But that is not a reason to shy away from it. Indeed, it makes the challenge all the more imperative if we are to eliminate the violation of women's human rights and work to achieve substantive equality.

Nevertheless, given that the criminalization of sexual violence against women within intimate relationships is an important component of broader efforts to ensure women's rights to safety, bodily integrity, autonomy, and equality, international legal instruments and covenants can and must play an important role in developing effective criminal law responses to rape in marriage. The protection of women's fundamental human rights requires it. As part of this project, states are therefore legally obligated to prosecute the sexual violation of women by their male intimate partners, by engaging the power of criminal law to stop this form of gendered violence and human rights violation.