

HUMAN RIGHTS PURPOSES OF THE VIOLENCE AGAINST WOMEN ACT AND INTERNATIONAL LAW'S ENHANCEMENT OF CONGRESSIONAL POWER

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An important issue pending before the U.S. Supreme Court¹ is whether Congress has constitutionally based power to enact the Violence Against Women Act (VAWA).² Although some have focused on congressional power under the Commerce Clause,³ treaty-based and customary international law concerning fundamental human rights of women, coupled with other provisions of the Constitution, also provide an enhancement of congressional power to enact the VAWA.⁴ This essay identifies a purpose of the VAWA as partly to protect human rights of women to freedom from gender-based violence. The essay also identifies constitutionally-based enhancement of congressional power to implement international law.

I. VAWA'S PURPOSE: PARTLY TO PROTECT HUMAN RIGHTS

A. *International Legal and Domestic Media Backgrounds*

In 1994, prior to enactment of the VAWA, the Declaration on the Elimination of Violence Against Women⁵ recognized gender-based violence as a matter of serious concern to the international community. Also in 1994, and prior to enactment of the VAWA, the U.N. Commission on Human Rights appointed a Special Rapporteur on Violence Against Women to assure more adequate implementation of the human rights of women to freedom from violence.⁶ Previously,

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1. *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 169 F.3d 820 (4th Cir. 1999) *cert. granted sub nom. United States v. Morrison*, 120 S. Ct. 11 (Sep. 28, 1999) (Nos. 99-5, 99-29).

2. 42 U.S.C. § 13,981 (1994). The VAWA was enacted on September 13, 1994.

3. U.S. CONST. art. I, § 8, cl. 3.

4. See generally *Amici Curiae* Brief of International Law Scholars and Human Rights Experts, *Morrison*, 120 S. Ct. at 11, available in 1999 WL 1037253 [hereinafter *Amici Curiae* Brief].

5. G.A. Res. 48/104, U.N. GAOR 3d Comm., 48th Sess., 85th plen. mtg., U.N. Doc. A/48/629 (1994), reprinted in 33 I.L.M. 1050 (1994).

6. See C.H.R. Res. 1994/45, U.N. ESCOR, 50th Sess., U.N. Doc. E/1994/24, E/CN.4/1994/132 (1994); see also LOUIS HENKIN ET AL., HUMAN RIGHTS 358 (1999); HENRY J.

there had also been global attention to domestic violence as a matter of significant international concern and as a serious human rights infraction.⁷ In 1993 and 1994, domestic media in the United States also brought attention to the fact that domestic violence against women involves human rights violations, and several articles expressly noted that drafts of the VAWA would aid in protecting women's human rights to freedom from gender-based violence.⁸ Congress, and especially the Executive branch as a key participant in the international legal process, could not have been unaware of such attention, the human rights dimension of domestic violence against women, or the purpose of the draft legislation in part to protect human rights of women. Indeed, there are several recognitions of the interface between human rights and domestic violence against women in statements of congresspersons in 1993 as well as the human rights-protecting nature of the proposed VAWA, as noted below.

B. Congressional and Executive Recognitions

Part of the Violence Against Women Act contains provisions enabling battered immigrant women to obtain

STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 446 (1996); John R. Crook, *The Fiftieth Session of the U.N. Commission on Human Rights*, 88 AM. J. INT'L L. 806, 809 (1994).

7. See, e.g., G. Kristian Miccio, *With All Due Deliberate Care: Using International Law and the Federal Violence Against Women Act to Locate the Contours of State Responsibility for Violence Against Mothers in the Age of Deshaney*, 29 COLUM. HUM. RTS. L. REV. 641, 645 & n.19, 646, 655-56 (1998); Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 292-94 (1994); *Report of the Committee on the Elimination of Discrimination Against Women*, U.N. GAOR, Comm. on the Elimination of Discrimination Against Women, 11th Sess., paras. 1, 2, 7, U.N. Doc. A/47/38 (1992). Relevant literature prior to enactment of the VAWA included Hilary Charlesworth, *The Declaration on the Elimination of All Forms of Violence Against Women*, AM. SOC'Y. INT'L L. (June 1994); Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63 (1993); Rhonda Copelon, *Intimate Terror: Understanding Domestic Violence as Torture*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 116 (Rebecca Cook ed., 1993); Katherine M. Culliton, *Finding a Mechanism to Enforce Women's Right to State Protection from Domestic Violence in the Americas*, 34 HARV. INT'L L.J. 507, 508 (1993); Celina Romany, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Law*, in HUMAN RIGHTS OF WOMEN, *supra*, at 85; Dorothy Q. Thomas & Michele E. Beasley, *Domestic Violence as a Human Rights Issue*, 58 ALB. L. REV. 1119, 1120 (1995).

8. See, e.g., Francis T. Murphy, *Struggling Against Domestic Violence*, N.Y. L.J. S1 (May 2, 1994); Nancie L. Katz, *Opening Asylum Doors for Women*, WASH. POST, May 22, 1994, at A11; Pam Maples, *Domestic Violence: Old Problem, New Attitudes Attacks on Women Are a Form of Hate Crime, Many Feminists Argue*, ST. LOUIS POST-DISPATCH, June 13, 1993, at 4B; Elizabeth Levitan Spaid, *Young Activist Defends Abused Women*, CHRISTIAN SCI. MONITOR, Feb. 22, 1993, at 12 (also noting that Senators Biden and Kennedy were sponsors of the 1993 draft VAWA).

protections,⁹ thus evidencing a congressional purpose in part to address problems of domestic violence involving transnational processes or contexts in which immigrants in this country have a need for special domestic legal protections. These and other parts of the Act applying more broadly to women tend to serve human rights of the victims of domestic violence, as recognized by the Executive Branch. Importantly, during the first U.S. Report to the Human Rights Committee of the International Covenant on Civil and Political Rights¹⁰ on U.S. compliance with obligations under the treaty to ensure respect for relevant human rights¹¹ and to enact appropriate legislation,¹² the Executive assured the

9. See 8 U.S.C. § 1154(a)(1)(A)(iii)–(iv) (1994); Elizabeth M. Iglesias, *Identity, Democracy, Communicative Power, Inter/National Labor Rights and the Evolution of LatCrit Theory and Community*, 53 U. MIAMI L. REV. 575, 606 (1999); Jennifer M. Mason, Note, *Buying Time for Survivors of Domestic Violence: A Proposal for Implementing an Exception to Welfare Time Limits*, 73 N.Y.U. L. REV. 621, 659 (1998).

10. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

11. See, e.g., *id.* preamble & arts. 2(1) & (3), 3, 6–7, 14(1), 16, 23(4), 26, at 172–79; U.N. CHARTER, preamble & arts. 55(c), 56.

12. See, e.g., ICCPR, *supra* note 10, art. 2(2), 999 U.N.T.S. at 173–74. On the customary and treaty-based human rights of access to courts and to an effective remedy, see *id.* art. 14(1), 99 U.N.T.S. at 176 (“All persons shall be equal before the courts and tribunals. In the determination of . . . his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal”); see also General Comment No. 13, adopted by the Human Rights Committee, U.N. GAOR, 21st Sess., Supp. No. 40, at 143, U.N. Doc. A/39/40 (1987), *reprinted in* International Human Rights Instruments, U.N. Doc. HRI/GEN/1 (4 Sept. 1992) (on file with the *Houston Journal of International Law*):

1. . . . All of [Article 14’s] provisions are aimed at ensuring the proper administration of justice, and to this end to uphold a series of individual rights such as equality before the courts and tribunals and the right to a fair and public hearing by a competent, independent and impartial tribunal

2. . . . [A]rticle 14 applies . . . also to procedures to determine their rights and obligations in a suit at law. . . .

Id.; see also Universal Declaration of Human Rights, G.A. Res. 217(III)A, 3d Sess., pt. 1, at 73 art. 3, U.N. Doc. A/810 (1948) (“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”); American Declaration of the Rights and Duties of Man, Res. XXX, O.A.S. Int’l Conf. of Am. States, 9th Conf., OEA/Ser. L/V/I.4 (1948). (“Every person may resort to the courts to ensure respect for his legal rights.”); JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 7, 75 n.97, 198–210, *passim* (1996) [hereinafter PAUST, INTERNATIONAL LAW]; *Dubai Petroleum Co. v. Kazi*, 43 Tex. Sup. Ct. J. 246 (Jan. 6, 2000) (“The Covenant not only guarantees . . . equal treatment in the signatorie’s courts, but also guarantees them equal access to these courts.”); *Velasquez Rodriguez Case*, Inter-Am. Ct. H.R. (Ser. C) No.4, para. 174 (Judgment of July 29, 1988) (deciding that the American Convention on Human Rights creates a “legal duty to . . . ensure the victim adequate compensation”); Case No. 10.843, Inter-Am. C.H.R. paras. 68, 105, 112, 36/96 (1996) (ruling that Chile’s 1978 Amnesty Decree Law violated Article 25 of the American Convention on Human Rights because “the [human rights] victims and their families were deprived of their right to effective recourse against the violations of their rights”); *Mentes v. Turkey*, Eur. Ct. H.R., para. 89, *reprinted in* 37 I.L.M. 858, 882 (1998) (ruling that Turkey violated the rights of its citizens who were prevented from bringing a claim

international body that the Violence Against Women Act was a measure undertaken in part to comply with and execute such treaty obligations.¹³ Prominent mention of the VAWA in the first U.S. report to the Human Rights Committee serves not merely to evidence our continuing national commitment to human rights,¹⁴ but also to underscore congressional and Executive resolve to avoid friction with the international community with respect to U.S. compliance with human rights treaty obligations.

Bonnie J. Campbell, Director of the Violence Against Women Office of the U.S. Department of Justice, also confirmed that domestic violence is "now . . . recognized as [a] violation of our human rights . . ." and that the VAWA is an example of U.S. legislation designed to address human

for the deliberate destruction of their houses and possessions, and noting that "[t]he notion of an 'effective remedy' entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigative procedure"); PAUST, *INTERNATIONAL LAW*, *supra*, at 199, 259 n.481 (quoting *Golder v. United Kingdom*, 18 Eur. Ct. H.R. (Ser. A) at 34–35 (1975)); JORDAN J. PAUST, JOAN M. FITZPATRICK & JON M. VAN DYKE, *INTERNATIONAL LAW AND LITIGATION IN THE UNITED STATES* (forthcoming 2000) (manuscript at ch. 2, § 2D, on file with the author) [hereinafter PAUST ET AL., *INTERNATIONAL LAW AND LITIGATION*]. "[A]mnesties for gross violations of human rights . . . are incompatible with the obligations of the State party' under the International Covenant on Civil and Political Rights and that each country has a 'responsibility to provide effective remedies to the victims of those abuses . . .'" *Id.* (quoting *Rodriguez v. Uruguay*, U.N. Doc. CCPR/C/51/D/322/1988, Annex (Hum. Rts. Comm. (1994)); *see also id.* (citing *Chanfeau Orayce and Others v. Chile*, Cases 11.505, Inter-Am. C.H.R. 512, OEA/Ser.L/V/II.98, doc. 7 rev. (1997) ("stating that Chile's amnesty law violated Articles 1(1), 2, and 25 of the American Convention on Human Rights, that countries have a duty to 'investigate the violations committed within its jurisdiction, identify those responsible and impose the pertinent sanctions on them, as well as ensure the adequate reparation of the consequences suffered by the victim'").

13. *See* U.N. GAOR, Hum. Rts. Comm., 53rd Sess., 1401st mtg. para. 29, U.N. Doc. CCPR/C/SR.1401 (1995). Concerning Executive recognition of the human right of women to freedom from domestic violence, *see* Alexander F. Watson, Ass't Sec'y of State for Inter-American Affairs, remarks to Inter-American Dialogue and International Center for Research on Women, Washington, D.C. (Oct. 6, 1994), in *SUMMIT OF THE AMERICAS: THE IMPACT ON WOMEN*, 5 DEP'T OF STATE DISPATCH NO. 42 (Oct. 17, 1994) (stressing the human right of women "to live free from all forms of violence and discrimination in both public and private spheres"). U.S. executive reports on human rights practices in other countries include sections on domestic and other private violence against women. *See, e.g.*, U.S. Dep't of State, *Peru Country Report on Human Rights Practices for 1997* (visited Feb. 6, 2000) <www.state.gov/www/global/human_rights/1997_hrp_report/pu.html>; U.S. Dep't of State, *Pakistan Country Report on Human Rights Practices for 1997* (visited Feb. 6, 2000) <http://www.state.gov/www/global/human_rights/1997_hrp_report/pakistan.html>; U.S. Dep't of State, *Indonesia Report on Human Rights Practices for 1997* (visited Feb. 6, 2000) <http://www.state.gov/www/global/human_rights/1997_hrp_report/indonesia.html>; U.S. Dep't of State, *Republic of Korea Report on Human Rights Practices for 1997* (visited Feb. 6, 2000) <http://www.state.gov/www/global/human_rights/1997_hrp_report/southkor.html>.

14. Concerning such a commitment and use of human rights precepts since the time of the Framers, *see, for example*, PAUST, *INTERNATIONAL LAW*, *supra* note 12, at 167–292.

rights violations against women.¹⁵ Indeed, one express purpose of the Civil Rights for Women Act, which is part of the VAWA, is “to protect the civil rights of victims of gender motivated violence . . . by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender,”¹⁶ and there is express recognition that “[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender.”¹⁷

In 1994, the Senate Foreign Relations Committee recommended that the Senate give advice and consent to ratification of the Convention on the Elimination of All Forms of Discrimination Against Women,¹⁸ while noting that the treaty “requires broad regulation of private conduct, in particular under Articles 2, 3 and 5,” and stating that the U.S. will not take “action with respect to private conduct except as mandated by the Constitution and laws of the United States.”¹⁹ Thus, the Senate Committee’s report to the Senate contemplated U.S. legislation to implement certain treaty-based human rights protections against private conduct involving violence against women, and the VAWA had been enacted just three weeks earlier.

The year prior to the enactment of the Violence Against Women Act was marked by significant recognition by various congresspersons of the human rights aspects of domestic violence against women. In their preview of the 103rd Congress, Senators Dole and Lott referred to “provisions regarding violence against women” in their “crime bill” and to “The Sexual Assault Prevention Act of 1993, which would also be introduced in the House by Congresswoman Susan Molinari, [and which] is a comprehensive response to violence against women, both on the streets, and in the home,”²⁰ while also decrying similar and additional human rights violations by Slobodan Milosevic in Bosnia.²¹ Representative Christopher Smith affirmed the relationship between violent abuses of human rights and “violence against women

15. *Amici Curaie* Brief, *supra* note 4, 1999 WL 1037253, at *27; *see also* Miccio, *supra* note 7, at 676 & n.163 (citing an On the Record Briefing by Director Bonnie J. Campbell, Sept. 12, 1995).

16. 42 U.S.C. § 13,981 (a) (1994).

17. *Id.* § 13,981(b).

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

19. 140 CONG. REC. S13,927-04 (1994) (statement of Sen. Pell); *see also* S. REP. NO. 103-38 (1994).

20. 139 CONG. REC. S85-88 (1994) (statements of Sens. Dole and Lott).

21. *See id.* at S88.

(including rape and wife beating)” in Nicaragua.²² Senator DeConcini also spoke of the need for “appointment of a special U.N. rapporteur on gender discrimination and violence against women and the strengthening of implementation procedures under the Convention for the Elimination of All Forms of Discrimination Against Women” as part of a “human rights agenda into the next century.”²³ Senator Pell spoke of serious human rights violations in East Timor involving “discrimination and violence against women.”²⁴ Senator Boxer spoke of human rights atrocities in Bosnia-Herzegovina “with a specific focus on acts of violence against women,” adding: “As you know well, Madam President . . . we are working together to stop the violence against women in this country and around the world”²⁵

Later that year, Senator Pressler spoke of human rights violations in Africa, including “[v]iolence against women . . . [i]n particular, wife beating . . . ;”²⁶ Representative Snowe introduced bills addressing “women’s human rights,” including “violence against women,” and “special needs of refugee women and children;”²⁷ and Senator Pell stressed the need for the Human Rights Commission to “appoint a special rapporteur on violence against women . . . [who] should investigate human rights violations including battering in the family, rape, female infanticide, ‘honor killings,’ ‘dowry murder,’ and other violence related to traditional and customary practices.”²⁸ While addressing violent crime control, H.R. 4092 (which was termed the “Violent Crime Control and Law Enforcement Act of 1994”), and “The Sexual Assault Prevention Act,” each addressing violence against women, certain congresspersons noted relevant hearings by the Congressional Human Rights Caucus,²⁹ presumably indicating some interface with human rights concerns.

22. 139 CONG. REC. E301 (1993) (statement of Rep. Christopher H. Smith).

23. 139 CONG. REC. S2003 (1993) (statement of Sen. DeConcini).

24. 139 CONG. REC. S1991 (1993) (statement of Sen. Pell, quoting the 1992 Dep’t of State Annual Human Rights Report on Indonesia).

25. 139 CONG. REC. S2987 (1993) (statement of Sen. Boxer).

26. 139 CONG. REC. S5079 (1993) (statement of Sen. Pressler).

27. 139 CONG. REC. E1317 (1993) (statement of Rep. Snow).

28. 139 CONG. REC. S6931 (1993) (statement of Sen. Pell). The Special Rapporteur was appointed in 1994. *See* C.H.R. Res. 1994/45, U.N. ESCOR, 50th Sess., U.N. Doc. E/1994/24, E/CN4/1994/132 (1994).

29. *See* Violent Crime Control and Law Enforcement Act of 1994, 140 CONG. REC. H2415, H2427, H2434 (1994); Providing for Further Consideration of H.R. 4092, Violent Crime Control and Law Enforcement Act of 1994, 140 CONG. REC. H2233, H2234, H2241, H2246 (Apr. 13, 1994).

In July of 1993, during the Senate Judiciary Committee's confirmation hearing concerning Ruth Bader Ginsburg as Supreme Court Justice, Judge Ginsburg spoke of human rights of women to equality before the law and, in response, Senator Biden addressed "the Violence Against Women Legislation which he had drafted and been fighting to get passed for three years now . . . [and stated that he wanted] to make it clear the purpose of that . . . is to break down the barriers that continue to exist in the unequal application of the law,"³⁰ thus recognizing a broad human rights purpose of what would become the Violence Against Women Act. More specifically, in June, Senator Biden had proclaimed that "[v]iolence that primarily targets women" would be addressed in the proposed VAWA, which treats gender-based violence as a hate crime, and openly recognized "violence against women as a human rights issue" that would be met in part by the new legislation.³¹

C. *Judicial Recognition*

At least one federal court, while finding that a plaintiff's claim under the Violence Against Women Act was valid, has recognized that "a woman's basic human right to be free from rape, including in the workplace, was ["obviously"] not [first] created by the VAWA," and the court "therefore" would not entertain argument that there were "no constitutional rights at issue here, . . . only a statutory one."³²

II. INTERNATIONAL LAW'S ENHANCEMENT OF CONGRESSIONAL POWER

The constitutionally-based power of Congress to enact legislation implementing either treaties or customary international law, even with respect to matters otherwise closely connected to interests of states within the United States, is well-known.³³ Article I, Section 8, Clause 10 (the

30. *Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Judiciary Comm.*, 103rd Cong. 194 (1993) (statement of Sen. Biden).

31. Pam Maples, *Bringing Fear Home: U.S. Women Face Pervasive Threat of Violence, Often at the Hands of Husbands, Boyfriends*, DALLAS MORNING NEWS, June 6, 1993, at 1A.

32. *Avila-Franco v. Worrell*, 1998 U.S. Dist. LEXIS 12,129 (D.D.C. 1998) (discussing claims of sexual harassment, assault, and rape by the victim's supervisor, a sergeant of the U.S. Park Police) (citation omitted).

33. See, e.g., LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 69-70, 190-91, 360-61 nn.27-28 (2d ed. 1996); JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 211-12 (4th ed. 1991); PAUST, *INTERNATIONAL LAW*, *supra* note 12, at 6, 8-9, 33 n.35, 39-40 nn.42-44, 97-98, 130, 207, 215 n.11, 256 n.468, 282 nn.563-70, 371-72,

Offenses Clause) of the Constitution expressly confirms congressional power to enact legislation defining and punishing offenses under the law of nations,³⁴ and Clause 18 (the Necessary and Proper Clause) expressly confirms congressional power to enact any laws necessary and proper to carry into execution such a power as well as all other powers vested by the Constitution in the Government of the United States or any department or officer thereof.³⁵ The treaty power is one such power.³⁶

Among the many cases recognizing congressional power to implement treaty-based rights or obligations is *Missouri v. Holland*.³⁷ In that case, the Court recognized the power of Congress to enact legislation to protect ducks “as a necessary and proper means to execute the powers of the Government” in connection with the treaty power.³⁸ The Court also expressly noted that “the great body of private relations usually fall within the control of the State, but a treaty may override its power;” “most of the laws of the United States are carried out within the States . . .;” and, especially in view of the express mandate of the Supremacy Clause that “all Treaties . . . shall be supreme Law of the Land,”³⁹ the Tenth Amendment is no barrier to congressional implementation of treaties.⁴⁰ Certainly if congressional power is enhanced by a

385 nn.85–88, 394 n.2, 418; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 & cmt. j, reporter’s note 8 (1987) [hereinafter RESTATEMENT THIRD]; Jordan J. Paust, *Customary International Law and Human Rights Treaties Are Law of the United States*, 20 MICH J. INT’L L. 301, 328–29 & n.132 (1999) [hereinafter Paust, *Customary International Law*].

34. See U.S. CONST. art. I, § 8, cl. 10.

35. See *id.* cl. 18.

36. See *id.* art. II, § 2, cl. 2, art. III, § 2, cl. 1, & art. VI, cl. 2.

37. 252 U.S. 416 (1920).

38. *Id.* at 432.

39. U.S. CONST. art. VI, cl.2 (“ . . . and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding”). Moreover, the Supreme Court has emphasized that “state law must yield when it is inconsistent with, or impairs the policy or provisions, of a treaty . . . [and] must give way before the superior Federal policy evidenced by a treaty” *United States v. Pink*, 315 U.S. 203, 230–31 (1942). Ever since *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 209 (1796), the constitutionally based supremacy of treaties over state law and power has been complete. See, e.g., PAUST, *INTERNATIONAL LAW*, *supra* note 12, at 52, 55, 63, 68 n.42, 92, 133–34 n.83; RESTATEMENT THIRD, *supra* note 33, § 115, cmt. e; Paust, *Customary International Law*, *supra* note 33, at 324–25 & n.113. Such a constitutional supremacy also transfers to congressional legislation implementing the treaty in whole or in part. See, e.g., *Missouri v. Holland*, 252 U.S. 416, 432 (1920) (“If the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government.”).

40. See *Missouri*, 252 U.S. at 434. The Court also noted that whether or not Congress had power to protect the ducks when its legislation was “not in pursuance of a treaty,” Congress did have the power to do so by an enactment implementing the treaty. *Id.* at 432. Of course, a

treaty and the treaty power in order to protect ducks it can also be enhanced to protect women.

Another interesting case recognizing enhancement of congressional power to regulate private conduct occurring within states by reason of relevant treaties is the earlier case of *United States v. Haun*.⁴¹ In *Haun*, Justice Campbell, sitting on circuit, ruled that congressional legislation to suppress the slave trade was supported by several treaties⁴² and was a valid exercise of power under Article I, Section 8, Clauses 3, 10, and 18, even though importation of slaves had already occurred and punishable acts took place within the limits of the states.⁴³ While addressing international legal precepts, Justice Campbell also declared that President Jefferson unquestionably “supposed that something beyond a regulation of commerce was concerned” when it was recognized that Congress “might interpose their authority constitutionally to withdraw the citizens of the United States from all further violations of human rights which have been so long continued on the unoffending inhabitants of Africa.”⁴⁴ Importantly, it was also a recognition by a President and Supreme Court Justice that private individuals can violate human rights of other individuals.⁴⁵

treaty can itself reach where Congress, at the time, might not have been able to reach under the Commerce Clause. *Compare*. *Hauenstein v. Lynham*, 100 U.S. 483 (1879) (ruling that a treaty protecting alien rights prevailed over local law concerning descent and inheritance of real property), *with* NOWAK & ROTUNDA, *supra* note 33, at 138–43 (examining the reach of the commerce power up to the late 1880s).

41. 26 F. Cas. 227 (C.C.S.D. Ala. 1860) (No. 15,329).

42. *See id.* at 231.

43. *See id.* at 230–31.

44. *Id.* at 231. President Jefferson made such remarks in his Sixth Annual Message to Congress in 1806. *See* PAUST, *INTERNATIONAL LAW*, *supra* note 12, at 176.

45. Concerning private human rights duties, see Jordan J. Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 HARV. HUM. RTS. J. 51 (1992) (also addressing both express and implied recognition of private duties in human rights instruments); *see also* Rebeca Rios-Kohn, *The Convention on the Rights of the Child: Progress and Challenges*, 5 GEO. J. FIGHTING POVERTY 139, 140 (1998) (discussing the Declaration of the Rights of the Child adopted by the League of Nations in 1924, which placed duties on men and women); *Burger-Fisher v. Degussa AG. & Degussa Corp.*, 65 F. Supp. 2d 248, 272–73 (D.N.J. 1999); *Jama v. United States Immig. & Natur. Serv.*, 22 F. Supp. 2d 353, 362–63 (D.N.J. 1998) (cruel, inhuman, or degrading treatment); *John Doe I v. UNOCAL Corp.*, 963 F. Supp. 880, 891–92 (C.D. Cal. 1997) (human rights and other claims); Memorandum for the United States as *Amicus Curiae* in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), *reprinted in* 19 I.L.M. 585, 602–03 (1980) (Executive affirming that human rights under international law “directly create rights and duties of private individuals,” quoting the “highly respected” Constitutional Court of Germany); ELEANOR C. MCDOWELL, *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW* 168, 171 (1976) (private perpetrator of “offense against human rights of passengers and crew”). For further examples of executive and congressional recognitions of such violations see *supra* notes 9, 13, 15, 18–31, 44. Concerning private violators of international law more generally, see, *for example*, PAUST, *INTERNATIONAL LAW*, *supra* note

Addressing the power of Congress to implement customary international law and enact legislation reaching private conduct, the Supreme Court noted in *United States v. Arjona*⁴⁶ that “[t]he law of nations requires every national government to use ‘due diligence’ to . . . punish those who within its own jurisdiction counterfeit the money of another nation” and that others have a reciprocal right to demand compliance.⁴⁷ The Court recognized that states within the United States are not prevented from punishing the same violations of customary international law, but also noted:

A right secured by the law of nations to a nation, or its people, is one the United States as the representative of this nation are bound to protect. Consequently, a law which is necessary and proper to afford this protection is one that Congress may enact, because it is one that is needed to carry into execution a power conferred by the Constitution on the Government of the United States . . . and [“as a means of performing a duty”] which the law of nations has imposed on them as part of their international obligations.⁴⁸

Congress, in enacting the statute in question, had not mentioned its power or purpose to implement international law, but the Court declared that it was not necessary that the offense

“be declared in the statute itself to be ‘an offence against the law of nations’ . . . if the thing made punishable is one which the United States are required by their international obligations to use due diligence to prevent . . . [and, s]uch being the case,

12, at 8, 49, 51–54, 199–201, 204–05, 264–70, 393, *passim*. See also Paust, *Customary International Law*, *supra* note 33, at 301; *Kadic v. Karadzic*, 70 F.3d 232, 233–43 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); *Linder v. Portocarrero*, 963 F.2d 332, 336–37 (11th Cir. 1992); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 443–45 (D.N.J. 1999); *Bao Ge v. Li Peng*, No. 90-1986, 1999 U.S. Dist. Lexis 10834, at *6–7 (D.D.C. June 9, 1999); *Jane Doe I v. Islamic Salvation Front*, 993 F. Supp. 3, 8 (D.D.C. 1998); *Mushikiwabo v. Barayagwiza*, No. 94-3627, 1996 U.S. Dist. Lexis 4409, at *3 (S.D.N.Y. 1996); *United States v. Yunis*, 681 F. Supp. 896, 899–903 (D.D.C. 1988); 26 Op. Att’y Gen. 250, 252–53 (1907); 1 Op. Att’y Gen. 57, 58 (1795).

46. 120 U.S. 479 (1886).

47. *Id.* at 484.

48. *Id.* at 487–88. The Court also addressed the treaty power and Article I, § 8, cl. 10. See *id.* at 483; see also *Miller v. United States*, 78 U.S. (11 Wall.) 268, 316 (1870) (Field, J., dissenting) (“Whatever any independent civilized nation may do in the prosecution of war, according to the law of nations, Congress, under the Constitution, may authorize to be done”); *Brown v. United States*, 12 U.S. (8 Cranch) 110, 122–29 (1814) (deciding that Congress has power derived from the law of war to confiscate enemy property during war).

there is no more need of declaring in the statute that it is such an offence than there would be in any other criminal statute to declare that it was enacted to carry into execution any other particular power . . .

»⁴⁹
 . . .

The Court also noted that no such purpose had been expressed in the statutes punishing violations of neutrality, but it had never been supposed that they were thus invalid.⁵⁰ More generally, the Supreme Court has affirmed that federal courts can “discern some legislative purpose or factual predicate that supports the exercise of . . . power” to enact federal legislation whether or not any power or a different power is mentioned.⁵¹ In any event, with respect to the VAWA, a human rights purpose is clearly discernable.

Another case recognizing the role of customary international legal obligations in enhancing congressional power to regulate conduct of private individuals is *Finzer v. Barry*.⁵² In *Finzer*, customary and treaty-based obligations to protect foreign embassies and personnel were stressed as supporting congressional power to enact legislation under the Offences Clause, and it was recognized that “since the founding of our nation adherence to the law of nations . . . has been regarded as a fundamental and compelling national interest,” adding: “[i]t is also clear that the founders . . . explicitly gave Congress the power to enforce adherence to the standards of the law of nations”⁵³

It is also certain that human rights were of fundamental importance to the Founders and were partly what our nation and much of the Bill of Rights, including the Ninth Amendment,⁵⁴ were founded upon.⁵⁵ As Chief Justice

49. *United States v. Arjona*, 120 U.S. 479, 488 (1887).

50. *See id.* at 488.

51. *E.E.O.C. v. Wyoming*, 460 U.S. 226, 243–44 n.18 (1982); *see also* *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1947); *Coger v. Board of Regents*, 154 F.3d 296, 303 (6th Cir. 1998) (“As long as Congress possesses the authority, whether it also has the specific intent to legislate pursuant to that authority is irrelevant.”); *Crawford v. Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997); *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 698 (1st Cir. 1983).

52. 798 F.2d 1450, 1454 (D.C. Cir. 1986), *rev’d in part and aff’d in part sub nom.*, *Boos v. Barry*, 485 U.S. 312 (1988).

53. *Id.* at 1458; *see also* *Boos*, 485 U.S. at 323 (Offenses Clause supports legislation); *Frend v. United States*, 100 F.2d 691, 692–93 (D.C. Cir. 1938), *cert. denied*, 306 U.S. 640 (1939).

54. Certainly Congress, under the Offenses Clause and the Necessary and Proper Clause, also has power to further effectuate human rights protected by the Ninth Amendment. *See, e.g.*, PAUST, INTERNATIONAL LAW, *supra* note 12, at 323–59.

Marshall affirmed, our federal courts “are established to decide on human rights.”⁵⁶

In view of the above, it is clear that Congress has power under the Constitution to enact the Violence Against Women Act partly to better effectuate the human rights of women to freedom from domestic violence. It is also evident that this was partly the purpose of the legislation. Choice and power of our national political branches to effectuate international law, especially in view of the Supremacy Clause, provide an overriding constitutional propriety of the VAWA regardless of the reach of the commerce power.

55. See generally PAUST, *INTERNATIONAL LAW*, *supra* note 12, at 5, 8, 44, 95, 142, 169–75, 192–94, 198–203, 209–10, 216–23, 248, 256–70, 288–91, 323–25, 329–33, 339–40, 356–57. See also Paust, *Customary International Law*, *supra* note 33, at 307–08.

56. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 133 (1810).