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Gaby Oré-Aguilar

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# SEXUAL HARASSMENT AND HUMAN RIGHTS IN LATIN AMERICA

Gaby Oré-Aguilar\*

## INTRODUCTION

SEXUAL harassment is one of the most tolerated human rights violations against women in Latin American societies. Because it is often a hidden crime, Latin American governments have not specifically penalized sexual harassment in their domestic legislation.<sup>1</sup> In fact, laws on sexual harassment in the region are primarily incorporated into general labor or penal code provisions. These laws rarely apply to educational establishments or other spheres of women's lives.<sup>2</sup> Furthermore, no Latin American government has passed a national law defining sexual harassment as a human rights violation.

This article will analyze existing regional laws and international human rights treaties aimed at eradicating sexual harassment. Part I describes the current state of regional sexual harassment legislation in Latin American countries. Part I concludes that, because most relevant legislation is contained primarily within broader labor legislation or penal codes, it is often inadequate in addressing the problem of sexual harassment. Part II introduces the international human rights perspective by reviewing varying definitions and conceptual models relevant to the issue of sexual harassment. In so doing, part II analyzes international treaties and other international human rights instruments as they contain aspects of the conceptual models. Part III then advocates for treating the issue of sexual harassment as a gender-based act of violence. This article concludes that such treatment is necessary for the recognition of sexual harassment as a human rights violation.

## I. NATIONAL LAWS ON SEXUAL HARASSMENT

Sexual harassment is a form of discrimination against women on the basis of their gender. In Latin America, sexual harassment is a particular problem because certain groups of Latin American women are more vulnerable to sexual harassment due to their social and eco-

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\* Gaby Oré-Aguilar is a staff attorney responsible for the Latin American projects of the International Program of the Center for Reproductive Law & Policy ("CRLP"). LL.M., Columbia University Law School; J.D., National University of San Marcos ("UNMSM") (Lima, Peru); B.A. in Law and Political Science, UNMSM; Diploma in Gender Studies, Catholic University of Peru (Lima).

1. See *infra* Part I.

2. But see notes 21-23 and accompanying text (describing a Costa Rican law that specifically prohibits sexual harassment in the workplace and in educational establishments).

conomic conditions.<sup>3</sup> Furthermore, because such women have limited access to redressive mechanisms, the need for regional or international protections is increased.

In Latin America, there are few specific laws or other legislation penalizing sexual harassment. Most countries only prohibit sexual harassment in the workplace in the context of broader labor legislation.<sup>4</sup> Uruguay, El Salvador, and Mexico, however, regulate sexual harassment in their broader penal codes,<sup>5</sup> while Costa Rica has a special law that protects against sexual harassment in the workplace and educational establishments.<sup>6</sup> This part examines various aspects of these laws and the degree to which they vary within the region.

In 1993, Argentina enacted a narrowly tailored law prohibiting sexual harassment. The Argentine legislature defines sexual harassment as a situation where "a public official, [in] the performance of his or her functions, takes advantage of a hierarchical relationship by inducing another person to accede to his or her sexual demands, whether or not a carnal act."<sup>7</sup> Although the definition may seem broad in theory, it is fairly limited in practice. First, it only prohibits sexual harassment at the workplace between civil servants in the executive branch and its decentralized entities.<sup>8</sup> Second, the law contains exemptions for many public officials including ministers and secretaries of the executive branch, secretaries of the presidency, subsecretaries, and persons of equivalent level.<sup>9</sup> The law also excludes diplomatic personnel, active members of the security and police forces, official clerics, teachers, and upper-level managers of decentralized entities.<sup>10</sup> Because of these extensive exemptions, it would be interesting to know who, if anyone, the Argentine legislators had in mind when they promulgated this law.

Peru offers even less protection because sexual harassment is not considered an act of discrimination on the basis of sex. Instead, the Employment Promotion Law has established sexual harassment as an act of hostility on the part of the employer against an employee, defin-

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3. See *infra* notes 70-71 and accompanying text.

4. For example, Argentina and Peru regulate sexual harassment in their respective labor legislation. See *infra* notes 7-20 and accompanying text.

5. Uruguay's Penal Code defines sexual harassment as a crime of "offensive gallantry." See Organización Internacional del Trabajo, *Regulación del Trabajo de la Mujer en América Latina* [Regulation of Work of Women in Latin America] 40 (1993) [hereinafter *Regulation of Work*]. El Salvador and Mexico have treated sexual discrimination as a sex crime. See *infra* notes 24-30 and accompanying text.

6. See *infra* notes 21-23 and accompanying text.

7. Decreto 2385/93 del 18.11.93 [Decree 2385/93 of Nov. 18, 1993] (visited Sept. 3, 1997) <<http://infoleg.mecon.ar/perl/norma.pl?19028> (citing Decreto 2385/93, B.O. del 23.11.1993)>.

8. *Id.*

9. Ley 22140 del 14.01.80 [Law 22140 of Jan. 14, 1980] (visited Sept. 3, 1997) <<http://infoleg.mecon.ar/txnorma/16169.HTM>> (citing Ley 22140, B.O. del 25.01.80).

10. *Id.*

ing it as a “dishonest act” that affects the dignity and the moral values of the workers.<sup>11</sup> Thus, sexual harassment differs from “acts of discrimination on the basis of sex,” despite a different clause of the same law which defines discrimination as an act of hostility as well.<sup>12</sup> Logistically, a claim of sexual harassment offers the employee two mutually exclusive paths of action within thirty days of the alleged act. She or he may: a) solicit the labor court to order the employer to cease the sexual harassment, or; b) decide to terminate his or her work contract and demand compensation for unjustified dismissal.<sup>13</sup> In both cases, the plaintiffs must endure proceedings that are difficult, costly, and time-consuming.<sup>14</sup> Moreover, if the plaintiff reaches the damages stages, his or her damages may be limited. Because the law distinguishes between acts of harassment and acts of discrimination, the employee is precluded from using the compensation mechanisms established for discriminatory acts which, while limited, are more favorable to workers.<sup>15</sup> Such obstacles create real disincentives: To date, no employee has filed a claim of sexual harassment—or at least presented a claim as such—in the Peruvian labor court system. To address this problem, the Peruvian Congress has recently proposed a specific bill to prevent and penalize sexual harassment in the workplace.<sup>16</sup> While this bill is an improvement over existing law,<sup>17</sup> it has some questionable aspects both in the definition of the crime and the procedural aspects. For example, the bill states that the complaint must be dismissed if the defendant proves during the proceedings that he or she was “encouraged through insinuations, poses, attitudes, and expressions of a sexual nature” or if “the victim of harassment ac-

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11. Texto Unico Ordenado de la Ley Fomento del Empleo [Unified Text of the Employment Promotion Law] art. 63.

12. *Id.* art. 63(f).

13. *Id.* art. 68.

14. In Peruvian labor proceedings, the burden of proof falls on the party who alleges that an illegal act has occurred. *Id.* art. 70. The act of sexual harassment is difficult to prove because an employer may use various justifications to fire a worker who refuses his sexual demands. The law does not provide for the inversion of the burden of proof in such cases, nor does it protect witnesses in subordinate positions from dismissal.

15. *Id.* art. 62. “Any dismissal is null and void when its motive is: . . . d) discrimination on the basis of sex, race, religion, opinion or language.” *Id.* Thus, in effect, the worker has the right to be re-hired. *Id.* art. 67.

16. The bill was presented to the Congressional Labor Committee by the Women’s Committee of the Congress of the Republic on July 10, 1997. *See* *Se Propone Ley para Prevenir y Sancionar el Hostigamiento Sexual en el Empleo* [Law for the Prevention and Punishment of Sexual Harassment in the Workplace], *Con Copia No. 2842/96-CR* (1997).

17. The bill includes several new positive aspects. For example, it considers sexual harassment as a violation of the principle of equality and the right to security, health, and physical and moral integrity. *Id.* *Exposición de Motivos* [Statement of Motives]. It also includes workers in all sectors and levels of employment and regulates sexual harassment between individuals of the same sex. *Id.*

cepted expensive gifts or invitations to recreation activities.”<sup>18</sup> It also allows the defendant to bring charges and even to terminate the work contract if the judge determines that the claim is without merit.<sup>19</sup> Inexplicably, the bill also exempts those who have been elected into public office.<sup>20</sup>

In contrast, Costa Rica has fashioned a comprehensive law that extends beyond the workplace. More specifically, the Costa Rican legislature has enacted a specific law that penalizes sexual harassment both in the workplace and educational establishments.<sup>21</sup> This law broadly defines sexual harassment as “all sexual conduct that is unwanted by the person to whom it is directed, that is recurring, and that provokes harmful effects in: a) the material conditions of the workplace or the educational establishment; b) the victim’s working or educational performance, or; c) the general state of personal well-being.”<sup>22</sup> It provides for legal recourse while enabling employers to establish internal procedures to independently investigate and resolve sexual harassment disputes.<sup>23</sup>

In addition to these various civil approaches, certain Latin American countries discourage sexual harassment with criminal penalties. In El Salvador, the recently approved Penal Code broadly defines sexual harassment as all sexual behavior that is unwanted by the person to whom it is directed.<sup>24</sup> The penalty ranges from six months to two years of imprisonment.<sup>25</sup> Furthermore, if the perpetrator uses his or her position of authority or superiority to harass the victim, he or she may be subject to an additional fine of thirty to fifty days’ wages.<sup>26</sup>

The Mexican Penal Code has also criminalized sexual harassment, categorizing it as a “Crime against Liberty and Normal Psychosexual Development.”<sup>27</sup> Although it does not provide for imprisonment, it does demand a fine of 40 days’ wages from “any person who, with lustful intentions, repeatedly harasses a person of any sex, and who takes advantage of their hierarchical position deriving from relationships in the workplace, educational establishments, or in the domestic

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18. *Id.* art. 23(a)-(b).

19. *Id.* art. 24.

20. *Id.* ch. V.2.

21. 1995-CRI 1. *Hostigamiento Sexual* [Sexual Harassment] (visited Sept. 6, 1997) <<http://www.oit.or.cr/Hp-oit/natlex/S95CRI01.HTM>> (citing Ley Núm 7476, de 3 de febrero de 1995, La Gaceta, 3 de Marzo de 1995, núm 45, pags. 1-2).

22. *Id.*

23. *Id.*

24. Código Penal [C.P.] [Penal Code] art 165.

25. *Id.*

26. *Id.*

27. See Código Penal para el Distrito Federal [C.P.D.F.] [Penal Code for the Federal District] art. 259-62 (Porrora ed., 1995). In addition to sexual harassment, this title includes sexual abuse, rape of a minor, and rape. *Id.* tit. 15 (Delitos Contra La Libertad y el Normal Desarrollo Psicosexual) [Crimes against Liberty and Normal Psychosexual Development].

arena, or from any other relationship that implies subordination."<sup>28</sup> Under this law, sexual harassment is subject to such penalty only when the victim requests the prosecution and when the act of harassment causes harm to the victim.<sup>29</sup> The most notable aspect of the Mexican legislation is that it specifically provides protection against sexual harassment for domestic workers.<sup>30</sup> While other generic laws may include this category of women workers in their provisions, the specific Mexican criminal law underscores the vulnerability of domestic workers.

No matter what the type, these legislative proposals aimed at discouraging sexual harassment have become increasingly popular among the legislatures of several Latin American countries. Although these bills are needed to address the high rates of sexual harassment in the region,<sup>31</sup> they only receive popular support and widespread media coverage in cases of sexual harassment involving high-ranking officials. For instance, in June 1997, a Panamanian public official was dismissed for sexually harassing a secretary of the Central American Parliament based in Guatemala.<sup>32</sup> This case sparked debate over a 1996 bill that addressed the problem of sexual harassment in the workplace and educational establishments in Guatemala. If the bill passes, Guatemala would join Peru and Argentina as the only Latin American countries with specific laws on sexual harassment. Guatemala's law, however, unlike Peru's and Argentina's, would extend beyond the workplace.<sup>33</sup>

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28. *Id.* art. 259. For public servants, the penalty for such conduct is dismissal from their post. *Id.*

29. *Id.* Although the law does not specify the type of harm that makes sexual harassment a criminal act, analogous guidelines in other laws suggest that it encompasses harm against the victim's physical integrity.

30. *Id.*

31. See generally Red Entre Mujeres, Las Mujeres y los Derechos Humanos en America Latina (1994) [Women and Human Rights in Latin America] (describing acts of violence against women in Latin America in preparation for the Beijing Conference of 1995).

32. Silvio Hernández, *Panama-Women: Immunity No Longer the Norm for Sexual Harassment*, Inter Press Serv., June 2, 1997, available in WL 7075711:

Parlacen Deputy Emiliano Aguilar was the second high-level government official to be ousted by President Ernesto Pérez Balladares . . . . The measure against Aguilar was taken after a Parlacen secretary denounced him before the governing body of the Guatemala-based regional integration forum for repeated sexual harassment. The former deputy also reportedly abused a woman in Guatemala . . . .

*Id.*

33. The bill on sexual harassment is applicable in the workplace and in educational establishments. This bill was approved by Congress, and must be approved in a plenary session of the Guatemalan Congress. See Satisface a Diputadas Dictamen Favorable del Proyecto Sobre Acoso Sexual [Congress Women Are Satisfied with the Proposal Against Sexual Harassment] (visited July 16, 1997) <<http://www.lahora.com.gt/08101996/paginas/nacill1.htm>>.

Thus, Latin American countries have developed different approaches to sexual harassment. The most traditional approach is to include sexual harassment legislation within labor-based legislation. Another common approach is to criminalize sexual harassment. Both of these institutional approaches, however, fail to specifically address the problem; rather, they categorize sexual harassment as a subset within broader laws. This response is inadequate—these countries instead should enact specific regional laws outlawing sexual harassment within and beyond the workplace. The next part will discuss how international instruments can complement such specific laws to provide comprehensive protections against sexual harassment.

## II. THE REGULATION OF SEXUAL HARASSMENT IN INTERNATIONAL TREATIES AND DOCUMENTS

### A. *Conceptions and Definitions*

Before analyzing the international instruments developed to combat sexual harassment in Latin America, this section will review various definitional and conceptual models. These models, as they correspond to the appropriate spheres of action or the governing jurisdiction, represent an international effort to develop a unified approach to sexual harassment. This section introduces the theory behind the international approaches.

Both regional and international bodies have proffered definitions of sexual harassment. For example, the European Economic Community defines sexual harassment in a somewhat broad manner. Accordingly, sexual harassment includes all verbal or physical conduct of a sexual nature that the actor knows or should know is offensive to the employee.<sup>34</sup> Such conduct is considered illegal when: a) the rejection or acceptance of such conduct is used or invoked as a threat regarding a decision that affects the employee's employment or work conditions, or; b) such conduct prejudices the victim's work environment.<sup>35</sup> In March 1997, the Council of the European Union initiated the second phase of a consultation process with social interlocutors to establish a preventative common system regulating such incidents in the workplace.<sup>36</sup> Some of the issues submitted to consultation include the definition of sexual harassment, measures to be adopted to prevent sexual harassment, and the responsibility of employers to implement such measures.<sup>37</sup>

In the United States, the Equal Employment Opportunity Commission ("EEOC") guidelines establish that unwanted sexual advances,

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34. Resolution of 29 May 1990, 1990 O.J. (C 157) (regarding the protection of the dignity of women and men in the workplace).

35. *Id.*

36. 1997-3 E.C. Bull., no. 1.3.157, at 58.

37. *Id.*

demands for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment.<sup>38</sup> Within its definition, though, the EEOC has created two subcategories. First, *quid pro quo* sexual harassment is when submission to sexual conduct becomes a condition of employment, or when submission to or rejection of such conduct affects decisions at the workplace.<sup>39</sup> Second, *hostile work environment* sexual harassment may apply if such conduct has the objective or the effect of interfering unreasonably with the employee's work performance or creating an intimidating, hostile, or offensive work environment.<sup>40</sup>

International human rights organizations have also tried to formulate a definition of sexual harassment. For example, in the 1988 Meeting of Experts, the International Labour Organization ("ILO") established that the action must assume certain characteristics to constitute sexual harassment.<sup>41</sup> First, the employee must perceive the action as a condition of continued or secured employment.<sup>42</sup> In addition, the incident must influence decisions affecting the employee, undermine the employee's professional performance, or humiliate, insult, or intimidate the employee.<sup>43</sup>

The United Nation's Commission on Human Rights, in its Preliminary Special Report on Violence against Women, states that to fight sexual harassment, a proper definition of what constitutes sexual harassment must be established.<sup>44</sup> The Report emphasizes that actions that fall within this category are very diverse, ranging from actions that may be considered "normal" within a particular social context, to actions that are legally categorized as sexual crimes.<sup>45</sup> As a result, the Report states cultural factors are critical in determining a definition of sexual harassment.<sup>46</sup>

The issue of sexual harassment is complicated not only by different definitions but by varying conceptual models. These models are contained in both the regional laws and international treaties and em-

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38. Equal Employment Opportunity Commission, 29 C.F.R. § 1604.11 (1996).

39. *Id.*

40. *Id.*

41. *Equality in Employment and Occupation: General Survey of the Reports on the Discrimination (Employment and Occupation) Convention (No. 111) and Recommendation (No. 111), 1958*, International Labour Conference, Committee of Experts on the Application of Conventions and Recommendations, 75th Sess., rep. III, pt. 4B, para. 45 (1988).

42. *Id.*

43. *Id.*

44. *Preliminary Report Submitted by the Special Rapporteur on Violence Against Women, its Cause and Consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights Resolution 1994/45*, U.N. ESCOR, Comm'n on H.R., 50th Sess., Agenda Item 11(a), para. 190, U.N. Doc. E/CN.4/1995/42 (1994) [hereinafter *Preliminary Report on Violence Against Women*].

45. *Id.*

46. *Id.*



body different perspectives on sexual harassment. The first model, the *cultural values model*, treats sexual harassment as an attack against social and cultural values such as decency, modesty, and good morals.<sup>47</sup> This model is evidenced in antiquated regional laws which define harassment as "offensive gallantry," a "malicious" or "dishonest" act that attacks the dignity and integrity of the employee.<sup>48</sup> Such an approach reflects the underlying humanistic and paternalistic vision that characterizes the labor legislation of the early nineteenth century. Although this model is reflected in the domestic laws of some countries, it is not reflected in international standards.

In contrast, the other two models are represented in both international and regional capacities. First, the *anti-discrimination model* calls for laws that penalize sexual harassment as an attack against the principles of equality and nondiscrimination.<sup>49</sup> The second model, the *gender-based violence model*, considers sexual harassment one of several forms of violence against women. This model, although less represented, promises to be a useful tool in eradicating sexual harassment. In reviewing the regional laws and international instruments, the following section will further illustrate the impact of these conceptual models.

### B. *International Efforts*

International treaties and documents have attempted to provide a complementary safeguard to regional laws that are oftentimes inadequate. This section briefly analyzes regulatory models based on treaties adopted by the universal and regional systems of human rights protection, including the treaties adopted by the ILO. The international approaches, for the most part, embody either the anti-discrimination model or the gender-based violence model.

The ILO Discrimination (Employment and Occupation) Convention<sup>50</sup> ("Discrimination Convention") has created a conceptual framework based on equal, non-discriminatory treatment in the workplace

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47. The Penal Code of Uruguay, for example, considers "offensive gallantry" as a crime and penalizes it with a fine and/or a prison sentence. See Regulation of Work, *supra* note 5, at 39. In India, the Penal Code penalizes the act of insulting a woman's modesty through words, gestures, or actions. Similarly, the Metropolitan Council of Delhi penalizes "malicious annoyance," defined as written or spoken words, signs or visible representations or gestures, the act of reciting or singing indecent words in a public place, or acts or poetry or songs, carried out by a man in order to upset or offend a woman. See *Preliminary Report on Violence Against Women*, *supra* note 44, para. 193.

48. See, e.g., *supra* note 11 and accompanying text (Peru's civil law).

49. See, e.g., *supra* notes 38-40 and accompanying text (describing the EEOC guidelines which provide the classic example of anti-discrimination law).

50. *Discrimination (Employment and Occupation) Convention*, adopted June 15, 1960, ILO, 42d Sess., 4th Agenda Item (1958), II ILO, International Labour Conventions and Recommendations 1952-1976, at 176 (1996).

without specifically addressing the issue of sex discrimination.<sup>51</sup> In 1979, the Convention for the Elimination of All Forms of Discrimination Against Women ("CEDAW")<sup>52</sup> likewise contributed to the effort, offering a broad understanding of the problem of sex discrimination by addressing discrimination in all facets of women's lives. CEDAW explicitly defined sexual harassment as a violation of the principle of equality in the workplace, noting: "discrimination against women . . . constitutes an obstacle to the full realization of the potentialities of women."<sup>53</sup> Thus, in effect, the resolution demands equality-promoting policies, including measures specifically aimed at eradicating sexual harassment.

Although many Latin American governments have created a standard of protection in the workplace by adopting the terms of the Discrimination Convention, CEDAW provisions are proving to be more effective. First, the local rules of domestic procedure often preclude seeking redress under both the regional employment laws and the Discrimination Convention provisions. Second, the Discrimination Convention provisions only apply to the workplace while the CEDAW provisions afford protection to women against discriminatory acts within and outside the workplace.<sup>54</sup> CEDAW provisions also have the power to expand protection in countries like Argentina, whose law only governs public sector employees. To illustrate, an employee in the private sector could invoke the Law of Employment Contracts which protects the physical and psychological integrity of employees<sup>55</sup> via the provisions of CEDAW,<sup>56</sup> which have constitutional status in Argentina.<sup>57</sup> This could serve as a strategic alternative to Argentina's lack of specific legislation dealing with sexual harassment in the private sector.

Thus, while the CEDAW has contributed much to the development of the anti-discrimination model, it also has been involved in the development of the *gender-based violence model*. This model became the center of international attention when the international women's movement demanded that women's human rights, including the right to be free from gender-based violence, be considered an integral and indivisible part of those fundamental human rights recognized by the universal system. In 1993, the World Conference on Human Rights<sup>58</sup>

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51. *Id.*

52. G.A. Res. 34/180, U.N. GAOR, 34th Sess., Agenda Item 75, U.N. Doc. A/RES/34/180 (1979).

53. *Id.* para. 5.

54. *Id.* art. 1.

55. Ley de Contrato de Trabajo [Law of Employment Contracts] (Astrea ed., 1981).

56. G.A. Res. 34/180, *supra* note 52, art. 81, 172.

57. Const. Arg. art. 75(22).

58. *Report of the World Conference on Human Rights*, U.N. GAOR, U.N. Doc. A/Conf. 157/24 (1993).

("Vienna Conference") declared for the first time that "[g]ender-based violence and all forms of sexual harassment and exploitation" constitute attacks against the dignity of the individual and must be eliminated.<sup>59</sup> Only a few months thereafter, the General Assembly of the United Nations echoed the international consensus manifested at the Vienna Conference by adopting the *Declaration on the Elimination of Violence Against Women*<sup>60</sup> ("Declaration"), articulating existing standards for combating gender-based violence in the form of sexual harassment in the workplace and the educational system.<sup>61</sup> The Declaration supports a broad conception of violence which "implies the right to inquire against all forms of action which disempower women because of the fear of violence, whether the fear is instilled by the State, actors in the community, or members of the family."<sup>62</sup>

Amidst this movement, CEDAW became particularly instrumental in advancing the gender-based violence model. In 1992, the Committee on the Elimination of Discrimination Against Women<sup>63</sup> ("Committee") established that gender-based violence—violence resulting in physical, mental, or sexual harm, the threat to commit such acts, and other coercive acts that deprive women of their freedom—is discrimination as described in article 1 of CEDAW.<sup>64</sup> On this basis, the Committee recommended that national governments report on the status of sexual harassment under the norms of CEDAW, and revise their laws and policies accordingly.<sup>65</sup> This initiative by the Committee created the possibility of developing legislation and other mechanisms to penalize sexual harassment in the spheres within CEDAW's reach. In doing so, the Committee successfully created an instrument that regulates gender-based violence as an act of discrimination.

In addition to the efforts of the United Nations, the Inter-American Convention to Prevent, Penalize, and Eradicate Violence Against Women ("Convention of Belem do Para"), which was adopted by the Organization of American States ("OAS") in 1994, has made significant

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59. *Id.* pt. III.18.

60. G.A. Res. 48/104, U.N. GAOR, 48th Sess., Agenda Item 111, U.N. Doc. A/RES/48/104 (1994).

61. *Id.*

62. See *Preliminary Report on Violence Against Women*, *supra* note 44, para. 98 (reviewing the progress of the Declaration on the Elimination of Violence Against Women).

63. The Committee on the Elimination of Discrimination Against Women was created pursuant to article 17 of CEDAW. See G.A. Res. 34/180, *supra* note 52, art. 17. Its purpose is to "consider[ ] the progress made in the implementation of the present Convention." *Id.*

64. See *General Recommendation No. 19 (11th Session, 1992): Violence Against Women*, U.N. CEDAW, 11th Sess., Agenda Item 7, para. 8, U.N. Doc. CEDAW/C/1992/L.1/Add.15 (1992) ("Gender-based violence which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under specific human rights conventions is discrimination within the meaning of article 1 of the Convention.").

65. *Id.* pt. II.

strides against sexual harassment as a gender-based act of violence.<sup>66</sup> The Convention of Belem do Para requires member-states to adopt effective measures to prevent, penalize, and eliminate violence against women. More specifically, it includes examples of "sexual harassment in the workplace, as well as in educational establishments, health facilities, or any other place . . . that is perpetrated or condoned by the State and its agents regardless of where it occurs."<sup>67</sup>

In addition to the substantive provisions on sexual harassment, the Convention of Belem Do Para provides procedural mechanisms to carry out its provisions. Primarily, it provides that any person, group, or nongovernmental organization associated with any member-state of the OAS may lodge petitions against a member-state that fails to fulfill its duties under the established norms.<sup>68</sup> Thus, the Convention of Belem Do Para is the most advanced regional tool in preventing violence against women because it is the only international human rights treaty that specifically requires the States to eliminate sexual harassment in the public and private sphere.<sup>69</sup>

### C. *International Efforts Specific to Poor Latin American Women*

International efforts have also focused on addressing sexual harassment in terms of its disproportionate impact on poor indigenous women in Latin America. Gender-based violence, while it affects all women because of their gender, is more likely to occur to these groups of women due to their socio-economic status, their educational levels, their age, or their ethnic background.<sup>70</sup> Sexual harassment against domestic workers, for example, is a widespread phenomenon in Latin American societies, affecting mostly working women who are indigenous and poor.<sup>71</sup>

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66. *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women: Convention of Belem do Para*, adopted June 9, 1994, G.A. OAS, Inter-American Comm'n of Women, 24th Sess. [hereinafter *Convention of Belem do Para*].

67. *Id.* art. 2(b)-(c).

68. As stated:

Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Inter-American Commission on Human Rights containing denunciations or complaints of violations of Article 7 of this Convention by a State Party, and the Commission shall consider such claims in accordance with the norms and procedures established by the American Convention on Human Rights and the Statutes and Regulations of the Inter-American Commission on Human Rights for lodging and considering petitions.

*Id.* art. 12.

69. *Id.* art. 2, 7, 12.

70. Glenn Welker, *Indigenous Women* (last modified Sept. 6, 1996) <<http://www.indians.org/welker/indwomen.htm>>.

71. See, e.g., *supra* note 30 and accompanying text (describing Mexican law that specifically prohibits sexual harassment against domestic workers).

In 1989, the ILO adopted the Indigenous and Tribal Peoples Convention,<sup>72</sup> which includes a provision specifically designed to protect indigenous working women against sexual harassment in the workplace.<sup>73</sup> This Convention establishes that governments must create mechanisms to protect indigenous workers against sexual harassment with the aim of ensuring equal treatment.<sup>74</sup> Given that 59% of the 40 million indigenous people of Latin America are women,<sup>75</sup> these provisions against sexual harassment are of great importance for the protection of indigenous women and rural workers, at least in the workplace.

In addition, Article 9 of the Convention of Belem do Para likewise recognizes the necessity of creating special protections for certain groups of women. In doing so, it notes "the vulnerability of women to violence by reason of, among others, their race or ethnic background or their status as migrants, refugees, or displaced persons."<sup>76</sup> The Convention of Belem do Para urges governments to be especially aware of the specific situation of minority women and women in disadvantaged socio-economic conditions.<sup>77</sup>

### III. FUTURE STRATEGIES

Sexual harassment acts as a permanent warning to women that their gender, and oftentimes their socio-economic background, makes them vulnerable to harassment and other forms of sexual violence. In all of its forms, sexual harassment is a demonstration of power on the part of the aggressor aimed at subordinating the victim, thereby violating her human rights. Sexual harassment is also linked to social understandings of sexuality based on gender-based sexual stereotypes in which women are seen as engaging in behavior that "provokes" harassment or violence, while men who respond to such provocation by harassing women are excused because they must "fulfill their sexual role" or face scrutiny about their virility.<sup>78</sup>

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72. Convention Concerning Indigenous and Tribal Peoples in Independent Countries, adopted June 27, 1989, ILO, 76th Sess., III ILO, International Labour Conventions and Recommendations: 1977-1995, at 324 (1996).

73. *Id.* art. 20.3 ("The measures taken [by governments] shall include measures to ensure: . . . (d) that workers belonging to these peoples enjoy equal opportunities and equal treatment in employment for [both] men and women, and protection from sexual harassment.").

74. *Id.* art. 20.

75. Welker, *supra* note 70.

76. *Convention of Belem do Para*, *supra* note 66, art. 9.

77. *Id.*

78. Interviews of Peruvian men convicted of rape reveal that the offenders do not consider as crimes non-violent sexual aggression, such as "abuse or illicit pressure by an individual in a position of authority or superiority." On the contrary, the rapists constructed "discourses of exoneration" that denigrated their victims as human beings and sought to explain the crime based on the actions of the victims. See Abraham Siles Vallejos, *Apuntes Sobre lo Hallado* [Notes on the Findings], in *Yo Actuaba*

In light of these findings, how should the law address the issue of sexual harassment? Should it be considered an act of gender discrimination or as a mode of sexual and gender-based violence? As already discussed, as countries and international human rights organizations adopt one or the other approach, different procedures, outcomes, and remedies result with varying degrees of success.

Because sexual harassment often constitutes a kind of "preliminary phase" of sexual assault,<sup>79</sup> the gender-based violence model holds the most promise. It provides a useful framework because it successfully portrays sexual harassment as a violation of women's human rights. This approach encourages the development of effective strategies in two ways. First, it legitimizes the incorporation of measures against sexual harassment into the domestic human rights legislation of each country. Second, it allows victims of sexual harassment to seek compensation for damages using domestic and international mechanisms of protection.

Latin American countries and international organizations must adopt effective and comprehensive measures to counteract the harm that results from sexual harassment.<sup>80</sup> Evidence shows that in countries that penalize sexual harassment by specific laws or human rights legislation, complaints are more frequent<sup>81</sup> and damages include compensatory damages.<sup>82</sup> In some cases, compensation for sexual harassment under such specific statutes does not exclude other means of compensating for damages provided by domestic law.<sup>83</sup> Thus, both

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Como Varon Solamente . . . [I was Just Acting Like a Man] 170, 172-73 (Rafael León & Marga Stahr eds., 1995).

79. A Federal Bureau of Investigation study of repeat offenders revealed that crimes of sexual harassment, such as voyeurism, obscene phone calls, or exhibitionism, are often precursors to more violent crimes. See Mary Becker et al., *Cases and Materials on Feminist Jurisprudence: Taking Women Seriously* 203 n.6 (1994) (citing *The Serial Rapist: His Characteristics and Victims*, FBI L. Enforcement Bull., Feb. 1989, at 18, 21).

80. *Preliminary Report on Violence Against Women*, *supra* note 44, para. 190 (revealing that sexual harassment in the workplace and beyond is a growing problem with serious and alarming consequences for women).

81. For example, in Canada:

the system of specific human rights statutes which is also seen at the state level in the U.S., avoids the difficulties inherent in the British system because the violation of a right labeled a "human right" emphasizes the egregious nature of harassing conduct. While the level of compensation seems relatively modest, the Canadian response seems to have been to increase the seriousness of the tort, allowing the victim to attain psychological vindication by being able to show that the harasser has infringed her or his human rights. This may explain why sexual harassment litigation seems more frequent in Canada than in Britain, even though the damages awarded in such litigation are broadly comparable.

Joseph Kelly & Bob Watt, *Damages in Sex Harassment Cases: A Comparative Study of American, Canadian and British Law*, 16 N.Y.L. Sch. J. Int'l & Comp. L. 79, 133 (1996) (footnote omitted).

82. *Id.* at 89 n.70.

83. *Id.* at 89.

regional laws and international instruments can work in concert to provide a comprehensive system of protection. In this respect, the gender-based violence model offers an effective solution because it protects against sexual harassment in the spheres of public and private life outside the workplace without affecting the validity of anti-discriminatory laws in the workplace.

Within the Inter-American system of human rights and in Latin America in general, the Convention of Belem do Para is the only tool that specifically addresses the problem of sexual harassment in terms of gender-based violence. These norms must be respected in those countries that ratify it. As of the date of publication of this article, twenty-five member-states of the OAS have signed the Convention,<sup>84</sup> and almost all of them have ratified it.<sup>85</sup>

Progress may also come in the form of model legislation that has been proposed for countries belonging to the Caribbean Community and Common Market ("CARICOM"). The proposed legislation regulating sexual harassment in the workplace and educational establishments would include provisions for monetary compensation,<sup>86</sup> including compensation for emotional distress.<sup>87</sup> It also proposes the creation of a special tribunal to settle cases of sexual harassment.<sup>88</sup>

#### CONCLUSION

Sexual harassment is a violation of human rights based on the gender of the victims. The impact of sexual harassment on women's lives<sup>89</sup> makes it a form of sexual and gender-based violence regardless of where it takes place. Consequently, the most effective approach for reform in Latin America is to pass laws that define sexual harassment as a form of gender-based violence that infringes upon the fundamental human rights of women. These laws have the potential to penalize sexual harassment in spheres of public and private life outside the workplace without affecting the anti-discriminatory model of protection. The framework of the gender-based violence model can open access to more effective procedural mechanisms than those established by Latin America's labor laws. Such mechanisms provide a

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84. OAS, Inter-American Commission on Human Rights, *Documentos Basicos en Materia de Derechos Humanos en el Sistema Interamericano* [Basic Documents Pertaining to Human Rights in the Inter-American System] 160 (1997).

85. *Id.*

86. Protection Against Sexual Harassment Act para. 16.-(1) (Model legislation proposed by CARICOM secretariat).

87. *Id.* para. 16.-(2).

88. *Id.* para. 6.-(1) (providing two options—either the establishment or the appointment of a tribunal).

89. See ILO, *Unwelcome, Unwanted, and Increasingly Illegal*, World of Work, March 1997, at 7, 8 ("The studies are striking. Millions of women are suffering sexual harassment, as we speak. The problem is how to point them out . . .").

more effective and comprehensive way of compensating victims of sexual harassment.

The Latin American countries that have ratified the Convention de Belem do Para have the obligation to incorporate the norms of this convention into their domestic legislation and to seek out solutions and preventive strategies to the problem of sexual harassment. Latin American countries must respond to the crucial need to develop educational strategies to eradicate social and cultural patterns that subordinate women and their rights to equality and freedom.



*Notes & Observations*