



Legal Tools for the Establishment of Gender Equality through International Law

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LIST OF ABBREVIATIONS

CAT	Convention Against Torture
CEDAW	Convention of the Elimination of all forms of Discrimination Against Women
CEDAW-OP	Convention of the Elimination of all forms of Discrimination Against Women- Optional Protocol
CEJIL	Center for Justice and International Law
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CIL	Customary International Law
CRC	Convention on the Rights of the Child
CSW	The Commission on the Status of Women
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
IDEA	Institute for Democracy and Electoral Assistance Law
ILC	International Law Commission
MSG	Millennium Development Goal
RUD	Reservations, Understandings or Declarations
SC	Security Council
UDHR	Universal Declaration of Human Rights
UNIFEM	United Nations Development Fund for Women

ABOUT THIS GUIDE

This manual starts with a general background on the role of international law and how it can be used in a domestic context. It then touches on the concept of Customary International Law and some international forums for enforcing women's rights when domestic efforts fail.

We then look at some of the tools women are using – the laws – starting with the women's rights treaty – the bill of rights for women – Convention on the Elimination of All Forms of Discrimination Against Women, followed by a brief discussion of other treaties with a bit of extra focus on the ICCPR. In addition to treaties, a number of other international legal tools have developed including, most recently, Security Council Resolution 1325 on women, peace, and security.

The manual then reviews two other forums for enforcing women's rights—regional bodies and tribunals. It then discusses the role of constitutions and quotas in advancing rights. Finally we try to provide other resources for understanding and researching international law.

Words in bold indicate those words defined in the back of the booklet.

We hope this guide will be the beginning of your use of international law to advance rights.

INTRODUCTION

International law can be a powerful tool for promoting gender equality everywhere in the world. It is not just for lawyers; everyone can, and should, learn how to use international law in their campaigns for gender equality.

This manual has two main goals: first, to introduce the non-lawyer to the international legal system, and second, to demonstrate some ways international law can be used by the gender equality advocate.

Different countries approach international law in different ways. But no matter how your country integrates international law into its domestic legal framework, every country which has signed a treaty, such as CEDAW, is bound, or required, to uphold its provisions.

Unfortunately, many countries do not uphold their treaty obligations. This is where activists can play an important role. Through education, outreach, and using the court system, activists can challenge their governments' lack of compliance. Since governments have an obligation to uphold their treaty obligations, activists should be aware of these legal requirements and use legal rhetoric in their activities to strengthen and fortify their claims for rights and equal treatment.

Activists can also use domestic and international courts to address women's rights issues. Our CEDAW Case Bank¹ is a great place for gender activists to study how women in their country and others have used international law in domestic courts as a means of bringing about meaningful change. For more resources, visit the "Researching International Law and Human Rights" section.

Citing international obligations, such as those set out in CEDAW² or Security Council Resolution 1325³ are key to making treaties a part of the international vocabulary with regards to women's equality rights. The more that domestic and international courts cite these international obligations, the more powerful they become as an advocacy tool for women in countries around the globe.

Because of the affirmative obligations on governments and progressive definitions, it is not just for lawyers; all activists can learn how to use international law in their campaigns. International law is almost universally better for advancing women's rights than domestic law.

¹ See <http://www.globaljusticecenter.net/tools/casebank/index.html>

² See <http://www.un.org/womenwatch/daw/cedaw/>

³ See <http://www.unfpa.org/women/1325.htm>

CHAPTER 1: USING INTERNATIONAL LAW FOR GENDER EQUALITY

I. INTERNATIONAL LAW IN THE DOMESTIC SYSTEM

Two domestic legal approaches to International Law:

Countries typically approach international law from two different standpoints.

The “Monist” approach places international agreements and international legal obligations as “above” all domestic law. In countries which subscribe to this view, a lawsuit can be brought in the country based solely on international legal obligations. Lawyers and judges can cite international law, such as a treaty or customary law, as binding precedent for their decisions. Also, treaties come into force in monist countries as soon as they are ratified.

The “Dualist” approach to international law requires that the country pass domestic legislation implementing international treaty obligations in order for those treaty obligations to have legal force (of course, if laws already exist which comport with international obligations, then no new legislation is required). Treaties and customary law can still be cited in judicial opinions, but they only serve as persuasive authority, rather than binding precedent. Also, in countries that comport with this view of international law, a lawsuit cannot be brought based solely on a treaty, but rather must be based on the domestic legislation implementing the international obligation. Of course, treaties or international law can be referred to and used in the claimant’s arguments, but they cannot be the sole basis for the lawsuit.

As a general rule, most common law based countries – those countries based on the English legal system – use a dualist approach. Most civil law countries – those based on the legal systems of the European continent – use a monist- based approach to international law.

Comparing the two views: Which is preferable for Gender Advocates?

The Global Justice Center advocates for a view of international law in which countries’ compliance with international obligations should be automatic and above all domestic obligations. This corresponds highly with a monist view. However, as shown in the case study below, activists in dualist countries can also use international law to enforce women’s rights.

If your country is in transition, and has yet to take a stand on this issue, advocating for a monist approach will better equip advocates, lawyers, and judges in advancing equality and human rights issues. However, as is demonstrated in the India case study below, progressive judges in any country can find ways to use international law to push for domestic change.

How do I determine whether my country’s approach is monist or dualist?

Looking at your country’s constitution may help determine your country’s approach to international law. Some constitutions set out rules governing when international law must be considered by the judiciary. However, just looking to your country’s constitution is frequently

not enough. You should also research how the courts in your country have interpreted these constitutional provisions, such as by reading recent cases or books on the issue.

If your government has not been following its international legal obligations, activists can advocate for change through a number of different domestic or international means. For example, if your country accepts lower sentences for perpetrators of honor killings, they are in violation of CEDAW.⁴ If a country has ratified CEDAW, these laws must be struck down as invalid because they are in violation of international law.

Judicial Activism – The Bangalore Principles

In 1998, a collection of chief justices from former commonwealth countries gathered in Bangalore, India to discuss the role of international human rights law in domestic courts. The result of this conference was the issuance of the *Bangalore Principles*⁵. These principles empower judges in dualist countries to employ international human rights obligations:

7. It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.

These principles have been followed by a number of judges in commonwealth countries and since 1988 have influenced judges throughout the world. The following case demonstrates how this Bangalore Principles have affected gender justice in India.

Case Study 1.1: Sexual Harassment in India. Using CEDAW in a Dualist Country.

Vishaka v. State of Rajasthan (3 BHRC 261)

Facts. Following a brutal gang rape of a publicly-employed social worker in a village in Rajasthan, a group of activists and NGO's filed a class action under Art. 32 of the Constitution, seeking the court's enforcement of the fundamental rights provisions relating to working women and India's international obligations under Arts. 11 and 24 of CEDAW.

Judicial Holding. The court ruled that any international convention consistent with the fundamental rights guaranteed in the Constitution and in harmony with its spirit *must* be used to construe the meaning and content of the constitutional guarantee and to promote its object, regardless of whether implementing legislation has been passed. This is now an accepted rule of judicial construction in India.

The case follows that Arts. 11 and 24 of CEDAW, General Recommendations No's. 22, 23 and 24 of the CEDAW Committee, relating to sexual harassment in the workplace, may be relied upon to construe the nature and ambit of the gender equality guarantee in India's

⁴ See <http://www.un.org/womenwatch/daw/cedaw/>

⁵ See http://www.chr.up.ac.za/hr_docs/african/docs/other/cwn1.doc

constitution. The court issued a series of guidelines to be observed at all workplaces or other institutions for the preservation and enforcement of the right to gender equality of working women.

Importance for Advocates. This is a perfect example of applying the Bangalore Principles, whereby progressive judges used International Law to influence domestic policy. The court side-stepped dualist problems by arguing that any international human rights treaty that is in harmony with the country's constitution can automatically be used to promote the values set out by the constitution. Advocates in dualist countries can use this case as an example of how to use international treaties, such as CEDAW, in domestic courts.

A. LOCAL CUSTOM AND INTERNATIONAL LEGAL NORMS

For many women's rights activists, culture is a barrier to promoting gender equality. There is a great deal of writing on the interplay between cultural relativism (each culture should comply only with its traditional values) and universalism (all cultures share a single bare-minimum set of values). Some women's rights advocates have settled on a test whereby cultural values should only be scrutinized if they affect the *autonomy* of the women. Autonomy is violated if a cultural norm or value affects the capacity of a woman to make decisions about her own life.

This level of scrutiny, which protects a minimum core of rights, has been embraced by a number of progressive judges throughout the world. These cases were successful because the lawyers did not challenge all cultural traditions relating to women, but only those which were discriminatory. Here are a few examples – more detail can be found in our casebank.⁶

Case Studies 1.2: Local Custom and International Norms

- *Mudaliar v. Thirukoil* (India 1996). The Supreme Court of India ruled that a reservation the Indian government made to CEDAW that protected local cultural practices was negated by other provisions and declarations of CEDAW and by the Indian Constitution itself.
- *Noel v. Toto* (Vanuatu 1994). The Supreme Court of Vanuatu considered laws which enforced patrilineal succession. The court weighed Article 5 of the Vanuatu Constitution, preventing discrimination on the grounds of sex, against Article 74, protecting custom as the basis of land ownership. The court concluded that it would be inconsistent with the Constitution and intent of Parliament to rule that some women have fewer rights than men.
- *Gurung v. Department of Central Immigration, Ministry of Home Affairs* (Nepal 1994). The Supreme Court of Nepal struck down a residency law based on cultural traditions which favored men's marriages rather than women's as a contravention

⁶ See <http://www.globaljusticecenter.net/tools/casebank/index.html>

of Nepal's Constitutional equality provision.

- *Romualdez-Marcos v. Commission on Elections and Cirolo Roy Montejo* (Philippines 1995). The Supreme Court of Philippines struck down a law based on traditional custom whereby a woman's domicile was defined by the residence of her husband (even after her husband's death). The court relied upon the newly enacted Family Code of the Philippines which was enacted to embody many of the principles set out in CEDAW

B. WHAT INTERNATIONAL LAW APPLIES IN YOUR COUNTRY?

1. TREATIES

Key sources of international law are treaties, customary law, and UN Security Council resolutions.

CEDAW has been cited by domestic courts in over 20 countries. Our CEDAW Case Bank⁷ is a compendium of these ground-breaking decisions from around the world. This section describes how human rights treaties have been used in domestic courts in order to provide an understanding of these decisions and the process through which they came about. Hopefully you will be able to use them in your own advocacy.

Ratification: How a Treaty Becomes Binding

The first step is to know which treaties to apply. There are two steps a country must take to ratify the treaty; first, it must sign the treaty, which usually involves a dignitary or Head of State, actually signing a printed copy of the treaty, and second, it must ratify the treaty. This usually involves the legislature or other law-making body voting the treaty into power. For example, in the United States, if the President signs a treaty, the Senate must approve the treaty by a 2/3 vote ("advice and consent" of the Senate) in order for the President to then ratify it. Once a state has signed and ratified a treaty, it is said to be a "party" to the treaty. The term "*states parties*" refers to the group of countries which are party to a treaty.

The easiest way to find out if your country has ratified a treaty is to visit the treaty's website. For a list of treaty websites and a further discussion of the role of treaties, see the "CEDAW" and "Other Treaties" (Chapters 2 &3).

Signature but No Ratification.

⁷ See <http://www.globaljusticecenter.net/tools/casebank/index.html>

If a state has signed but not ratified the treaty, it has not yet affirmatively obligated itself to enforce the treaty. However, according to the Vienna Convention on the Law of Treaties, Article 18, when a country has signed but not ratified a treaty, it is still obligated to “refrain from acts which would defeat the object and purpose of [the] treaty”⁸).

For example, if a state has signed but not ratified CEDAW, it would defeat the object and purpose of CEDAW for the country to implement domestic legislation which discriminates against women. In this regard, the state’s actions are questionable under the Vienna Convention, Article 18.

Treaty Enforcement.

As discussed above, once a treaty is ratified, depending on how the state approaches international law, the treaty will either automatically be part of domestic law (and thus enforceable in courts), or its provisions will only take effect once the legislature has implemented the treaty obligations through domestic law. Note that if a country’s existing laws abide by the obligations set out in the treaty, no new laws need to be passed to specifically comply with the treaty. The existing laws will suffice.

2. CUSTOMARY INTERNATIONAL LAW

Understanding **Customary International Law** (CIL) is also important to women’s rights advocates. As will be discussed below, certain tenets of women’s rights can be argued by the advocate to be part of CIL and thus part of a state’s obligations towards its citizens.

Definition.

CIL is law is not written down, as in a treaty, but can be *found* through two components:

- (a) uniform and consistent state practice; and
- (b) a state’s belief that it is legally obligated to follow the custom (*opinio juris*)

Uniform and Consistent Practice.

There must be a recurrent and repetitive practice among countries for a practice to become customary rule. Major departures from this rule may negate the existence of custom, but minor deviations are not enough to do so (unless those minor deviations are persistent).

There is no real consensus on how long it takes for uniform and consistent practice to become customary law as it generally depends on the issue in question. Also, customary law is not simply a question of how many states “tread the path” but also of the size of the foot print of the particular states involved. That is, the practice of states with more international weight will have greater impact upon the establishment of a customary norm than states with less sway within the geographical and political area in question.

⁸ See http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

Using CIL

The concept of CIL is difficult for non-lawyers and even lawyers to grasp. Indeed, many law scholars regularly debate the status and use of CIL. But regardless of its theoretical status, practically speaking, using CIL in domestic and international courts has proven to be very useful in human rights and gender justice over the course of the past century.

Even if a country has not ratified a treaty, advocates could argue that these treaty obligations are actually part of CIL, and thus still binding. For example, it could be argued that while a country may not have ratified CEDAW, many of the provisions set out therein, such as women's equality rights and access to justice, are already part of CIL that nonetheless bind states.

It is important to recognize that while all states recognize the validity of CIL, some states will be less inclined to apply customary law in its courts. However if CIL is found, arguments can always be made that a country should apply CIL, as recognized in the Statute of the International Court of Justice, Article 38(1)⁹:

“The court whose functions is to decide in accordance with international law such disputes as are submitted to it, shall apply... (b) international custom as evidence of a general practice accepted as law.”

Case Study 1.3: The Road from General Assembly Resolution to a customary law?

Universal Declaration of Human Rights

The Universal Declaration (1948) was created by the UN General Assembly without a single dissenting vote. In formal terms it is not legally binding, but possesses only moral and political force. The Preamble declares it a common standard of achievement for all peoples and nations.

The question is whether the Declaration has subsequently become binding by way of custom. The Declaration has had a marked influence upon the constitutions of many states and upon the formulation of subsequent human rights treaties and resolutions.

1. Proclamation of Tehran (1968). UN International Conference on Human Rights stressed that the Declaration constituted an obligation for members of the international community

2. Vienna Convention and Programme for Action (1993). Universal Declaration referred to as a 'source of inspiration' and the 'basis for the UN in making advances in standard setting as contained in the existing international human rights instruments.

The establishment of the UN High Commissioner of Human Rights in April 1994 is seen as further evidence of the centrality of the Universal Declaration as binding custom within International Human Rights Law.

⁹ See <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>

“*Violence against women*”: part of CIL?

Although one might think that **customary international law** should condemn violence against women in all forms, unfortunately there are many countries whose laws do not protect women as they should. Here are some specific difficulties in recognizing this norm as part of CIL:

- private violence against women is not formally condemned as ‘illegal’ in many societies
- the violence may be tolerated on social, traditional or religious grounds and is therefore excluded from international concern
- it is difficult for women's groups voices to make an impact through official government channels in order to be considered *opinio juris*

This is an area where the work of women's rights advocates can be incredibly helpful. Through advocacy, both inside and outside the courtroom, the public and different governments can become better educated on issues of violence against women, and the more this practice, in all its forms, will be condemned. Also, the more decisions using CEDAW¹⁰ and SCR 1325¹¹, the more evidence can be cited for the evolution of this norm across the globe. Women's rights advocates should be aware of how their actions can truly change global legal trends and how advocacy in one country can help improve the rights of women in many.

3. PEREMPTORY NORMS (*JUS COGENS*).

Definition.

The highest form of a **customary international law** is when a legal norm becomes a **peremptory norm**, or *jus cogens*, meaning a state recognizes the norm as essential to a just society. These norms are so widely accepted that there can never be a situation in which they can be violated (they are **non-derogable**). For example, there would never be a situation in which slavery or **genocide** would be accepted by society; however, given certain wartime situations one could imagine, in contrast, an abridging of our freedom of speech, when otherwise this would be unacceptable.

Jus Cogens is defined by the Vienna Convention on the Law of Treaties, Article 53 as:

A norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.¹²

Also, Article 44(5) states that if a treaty provision violates a *jus cogens* norm, the entire treaty is void, not just the offending article(s).

¹⁰ See <http://www.un.org/womenwatch/daw/cedaw/>

¹¹ See <http://www.unfpa.org/women/1325.htm>

¹² See http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

List of Peremptory Norms

While the list of accepted **peremptory norms** is not solidified, the generally accepted list includes but is not limited to: **genocide**; slavery or slave trade; **torture** or other cruel, inhuman, or degrading punishment; summary execution; prolonged arbitrary detention; **war crimes** or **crimes against humanity**; and piracy.

Recognizing New Peremptory Norms.

During the drafting of the Vienna Convention, some members of the ILC suggested that a peremptory norm could be identified by the following objective criteria:

- the norm is incorporated into norm-creating multilateral agreements and is prohibited from derogation in those instruments;
- a large number of nations have perceived the norm to be essential to the international public order, whereby the norm is reflected in general custom and is perceived and acted upon as an obligatory rule of higher international standing;
- the norm has been recognized and applied by international tribunals, such that when violations occur, the norm is treated in practice as a **jus cogens** rule with appropriate consequences ensuing.

Prohibition of Rape as Jus Cogens?

It can be argued that although the prohibition of rape has not been formally designated as **jus cogens** rule by the courts, its peremptory status, like that of **torture**, is likely to become an important normative standard within the international legal system.

Under international humanitarian law, there is evidence that a norm prohibiting rape could arguably rise to the level of **jus cogens**. For example, the jurisprudence of the Yugoslav and Rwanda Tribunals recognizing **sexual violence** as **war crimes**, **crimes against humanity** and instruments of **genocide** and **torture**, the inclusion of various forms of **sexual violence** in the ICC Statute, the increasing attention given to gender violence in international treaties and UN documents and statements made by the Secretary General.

The domestic law of every state in the world outlaws rape. The universality of this general norm regarding the prohibition of rape elucidates the existence of a widespread rule and the practice ingrained in the legal conscience of the international community.

Case Study 1.4: Kadic v Karadzic (1995)

Croat and Bosnian Women filed tort actions alleging various atrocities including brutal acts of rape, forced prostitution, forced impregnation, **torture** and summary execution. The US Second Circuit Court recognized that “acts of murder, rape, **torture** and arbitrary detention” had long been recognized as violations of the most fundamental norms of the law of war and direct violations of international law (70 F.3d 232,242 (1995)).

Although the court did not address the question of *jus cogens* specifically, the case provides implicit confirmation that the international disapproval of violent sexual acts is so fundamental and compelling that the prohibition amounts to a *jus cogens* rule.

Growing consensus confirms that the interest of the international community in prohibiting rape is both morally and legally a value so basic and fundamental to the international public order that this prohibition has acquired the status of *jus cogens*. By developing the legal capacity to prosecute rape as a serious violation independently from other **peremptory norms**, states will be compelled to ensure accountability and deter future violations. After centuries of disregard, it is time to firmly establish a **non-derogable** protection against rape as a high level constitutional principle of the international legal system.¹³

C. BRINGING A CLAIM TO AN INTERNATIONAL TRIBUNAL OR TREATY COMMITTEE

Violation by One State Party, Enforced by Another State Party.

Many treaties (such as CERD, ICCPR, CESC, CEDAW, CAT, and CRC) have committees which oversee the continuing compliance of countries. These committees, as well as regional international tribunals, can hear grievances against a country's compliance with its treaty obligations. However, most of these tribunals and committees only allow grievances to be filed by one country against another. For example, the Human Rights Committee and the committee formed by the Convention Against Genocide only allow inter-state complaints.

Violation by State Party, Enforced by a Non-State Actor.

In order for NGOs or individuals to be able to bring claims to the CEDAW committee the optional protocol was introduced in 2000. The Optional Protocol to CEDAW allows individuals or NGOs representing individuals, whose rights have been violated, to lodge a complaint with the Committee. Therefore non-governmental organizations can bring complaints to the CEDAW Committee against countries that have signed the CEDAW Optional Protocol.¹⁴

Exhaustion of Local Remedies.

¹³ For information on *jus cogens*, see Customary International Law of Human Rights, Restatement (Third) Foreign Relations Law of the United States. See also David Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine*, DUKE J. COMP. & INT'L L. (2005) at "<http://www.law.duke.edu/journals/djcl/articles/djcl115p219.htm#F36%23F36>"

¹⁴ See <http://www.un.org/womenwatch/daw/cedaw/protocol/text.htm>

International tribunals and courts require that **parties** exhaust all possible ways to solve their dispute domestically before being able to bring the claim before the international body in question. In certain situations, **parties** may alternatively show that seeking a resolution in their domestic courts would be futile. For example, in a country whose government does not prosecute rape as a war crime, a party can use evidence of this government policy as an alternative to having to bring their case in domestic courts before seeking international relief. For any other situation, a domestic claim must be brought and appealed until no more domestic remedies are available – if, and only if, relief is not granted through the domestic legal process, the **parties** may seek remedies in international courts or tribunals. Note that this rule does not apply for special criminal and **war crimes** tribunals, such as the International Criminal Tribunals for Rwanda and Yugoslavia, or the Iraq High Tribunal.

CHAPTER 2: THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)

I. CEDAW

The CEDAW¹⁵ is often described as an international bill of rights for women. CEDAW defines what constitutes discrimination against women and sets a framework for national action to end such discrimination. CEDAW contains a far-reaching definition of discrimination, stating that any law that has either the purpose or the effect of discriminating is in violation.

Article 1. For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Beyond defining discrimination, CEDAW obligates courts to take affirmative steps on temporary measures to ensure gender equality.

CEDAW is the most authoritative human rights instrument to protect women from discrimination. It is the first international treaty to comprehensively address fundamental rights for women in politics, health care, education, economics, employment, law, property, and marriage and family relations.

With 185 **states parties** (as of March 2007), CEDAW is the second most widely ratified international treaty in existence. To learn which countries have ratified CEDAW see ¹⁶.

Women's rights activists should become familiar with the provisions of CEDAW in order to use it as a tool for change. Every country that has ratified CEDAW has a positive obligation to abide by its provisions. Women's rights activists in those countries can therefore use CEDAW as a tool to advocate for change in both the public and private sectors.

In countries which have not ratified CEDAW, women's rights activists can still use CEDAW as an advocacy tool. Many of its provisions can be argued to be part of **customary international law**. Also, while the provisions in CEDAW may not be binding upon the government, they can still serve as a powerful advocacy tool in the private sector.

¹⁵ See <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>

¹⁶ See <http://www.un.org/womenwatch/daw/cedaw/states.htm>

Reservations. Upon signing CEDAW, many countries have filed *reservations*, *declarations*, or *understandings* (RUDs). CEDAW has more reservations than any other treaty. **Reservations** are statements that exclude certain sections of the treaty from creating any obligations on the ratifying country (eg the government of Argentina considers itself not bound by Art. 29, paragraph 1) RUDs may limit a country's obligations under CEDAW. Declarations and understandings are typically statements about how a country's government interprets specific provisions in CEDAW.

Advocates should become familiar with the RUDs that their country has filed upon ratifying CEDAW. For more information about **reservations**, including a list of **reservations** filed by each country, see "<http://www.un.org/womenwatch/daw/cedaw/reservations.htm>".

II. CEDAW AS A LEGAL TOOL

A. SELECT EXCERPTS¹⁷

Setting out legislative measures to promote equality.

Article 2. States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) 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;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.

Article 3. States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Case Study 2.1: Using CEDAW to strike down domestic laws in Uganda

CEDAW has also been used by some judges to remove domestic laws that are discriminatory to women. The Global Justice Center, fully supports the approach of Judge Lugayizi in *Uganda v. Matovu*, summarized below;

Uganda v. Matovu, High Court of Uganda at Kampala, Oct. 21, 2002.

Defendant Peter Matovu was indicted on charges of defilement. The common law in Uganda states that when considering a sexual offenses trial, the victim must be proven as truthful before the court will base a conviction on her testimony alone.

In *Uganda v. Matovu*, Judge E. S. Lugayizi cited a case from 1997 which espoused the traditional reason behind this rule: "...for all sorts of reasons and sometimes for no reason at all, women and girls tell a false story which is very easy to fabricate but extremely difficult to refute..." However, Judge Lugayizi recognized that this traditional rule was in conflict with Uganda's legal obligations under CEDAW.

¹⁷ To access the full text of CEDAW, see "<http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>"

He argued that, "under Article 21 of the [Ugandan] Constitution that proclaims equality of all persons under the law, equal protection of the law, and prohibition against discrimination on the ground of sex, Uganda enacted the heart of the above international instruments in one stroke and therefore Uganda has the obligation to give effect to the contents of those international instruments." Thus, the judge held that the discriminatory rule was unconstitutional and therefore null and void.

This case shows how a country's local jurisprudence must be made to comply with international legal obligations, specifically the **ratification** of CEDAW.

Case Study 2.2: South African Legislation Adopting CEDAW

Due to its 1995 **ratification** of CEDAW, South Africa has

“assumed the obligation to pursue by all appropriate means and without delay a policy of eliminating discrimination against women ‘by refraining’ from engaging in any act or practice of discrimination against women.”

As a result, South Africa must ensure that public authorities and institutions act in conformity with the obligation not to discriminate against women. This includes (a) adopting legislative or other measures to prohibit discrimination and (b) ensuring through competent national tribunals and other public institutions the effective protection of women against any act of discrimination.

Consistent with international legal standards, South African constitutional law Act no. 108, Section 9 (3) states, “The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”

Surveys conducted in and around Cape Town found that one-third of all interpersonal violence was in the home. One organization in the area estimated in 1992 that one in every three women had been assaulted by her male partner.

However, improvements began in 1992 with the creation of The Wynberg Sexual Offenses Court. This court was established following protest by women's organizations about the manner in which the courts had dealt with two rape cases. In the Wynberg Sexual Offenses Court, women assessors are used to offset possible male bias and specially trained regional court prosecutors deal with cases.

The two prosecutors have lighter case loads to allow them more time to consult with rape complainants so as to better prepare their cases. In addition, a police officer from each of the Criminal Investigation Units in the Western Cape has been trained as a police rape specialist.

B. CEDAW COMMITTEE

Committee Description.

As set out in Article 17 of CEDAW, the CEDAW Committee is a monitoring body made up of women leaders that tracks the progress and status of women in countries who have ratified the convention. The CEDAW Committee reviews periodic reports written by each country describing its national implementation of its treaty obligations. The committee then issues general recommendations based on these reports elaborating the Committee's view of the State's CEDAW obligations.

The CEDAW Committee is made up of twenty-three experts on women's rights nominated and elected by CEDAW **states parties**. They serve four-year terms and can be re-elected. Although nominated by governments, members of the CEDAW Committee serve in their individual capacities, not as government representatives¹⁸.

Country Reports.

Each country that has ratified CEDAW is required to submit a report at least every four years outlining its efforts to implement the legal obligations set out in CEDAW. For copies of the most recent country reports, *see* ¹⁹.

Shadow Reports

Shadow Reports are one of the most effective ways of a non-governmental organization influencing both the international community and implementing change at a domestic level. **Shadow Reports** are written to expose inconsistencies or issues not reported on by **states parties** in their country reports. They are addressed to the CEDAW Committee and usually deposited alongside a State party's report. A **Shadow Report** allows the Committee to better scrutinize a country's reports and can lead to a direct questioning of the state party's practices outlined in the **Shadow Report**, but perhaps not covered by a state party's country report.

The International Women's Rights Action Watch has published a useful guide on how to write a **Shadow Report**, complete with time lines to ensure successful receipt of a report and suggestions for follow-up actions. For more information, *see*²⁰.

Committee's feedback to States parties

¹⁸ See <http://www.un.org/womenwatch/daw/cedaw/committee.htm>

¹⁹ See <http://www.un.org/womenwatch/daw/cedaw/reports.htm>

²⁰ For a list of recent statements, *see* <http://iwraw.igc.org/shadow/CEDAWNGOguideJune2003.pdf>

General Recommendations. General Recommendations by the CEDAW committee are the Committee's interpretation and elaboration on the text of CEDAW. They contribute to an ongoing dialog between State parties and the Committee that ensures the continuous erosion of the barriers facing women from living free from discrimination. General recommendations are often thematic (eg: health or discrimination) and are viewed as the CEDAW committee's interpretation of CEDAW. General recommendations are not binding on **states parties**.²¹

Recent Statements. The CEDAW Committee also issues statements directed at specific **states parties**, issues, or regions.²²

C. THE OPTIONAL PROTOCOL

The Optional Protocol to CEDAW adds an enforcement mechanism to CEDAW. It provides women whose rights have been violated a means to seek an international remedy. If a country has ratified the CEDAW-OP, an individual, or NGO representing individuals whose rights have been violated, can lodge a complaint with the CEDAW Committee.

The Optional Protocol, which came into force in December 2000, offers two mechanisms to hold governments accountable for their obligations under CEDAW:

1. a communications procedure, which provides individuals and groups the right to lodge complaints with the CEDAW Committee
2. an inquiry procedure, which enables the CEDAW Committee to conduct inquiries into serious and systematic abuses of women's rights. These mechanisms are only applicable in countries that are **states parties** to the Optional Protocol.

Useful Links

Full Text of the CEDAW Optional Protocol:

“<http://www.un.org/womenwatch/daw/cedaw/protocol/text.htm>”

Resource Guide to Advocating for implementation of CEDAW:

“<http://www.iwraw-ap.org/aboutus/tools.htm>”

CEDAW Committee Decisions under the Optional Protocol:

“<http://www.un.org/womenwatch/daw/cedaw/protocol/dec-views.htm>”

CEDAW Optional Protocol Database (decisions and complaints brought through the Optional Protocol):

“<http://sim.law.uu.nl/SIM/CaseLaw/CEDAWcase.nsf/CommNo?OpenView>”

²¹ See <http://www.un.org/womenwatch/daw/cedaw/recommendations/index.html>

²² See <http://www.un.org/womenwatch/daw/cedaw/c-recent-stats/stats.htm>

Case Study 2.3: Using CEDAW-OP to protect victims of domestic violence in Hungary.

This example demonstrates how an individual living in a country which has ratified CEDAW-OP can use the optional protocol to live a life free from discrimination.

A.T. v Hungary (10th October 2003)

Ms. AT, a Hungarian national, claimed to be a victim of a violation by Hungary of articles 2 (a), (b) and (e), 5 (a) and 16 of CEDAW. AT stated that for the past four years she has been subjected to regular severe domestic violence and serious threats by her common law husband, L. F., father of her two children, one of whom is severely brain-damaged. There are currently no protection orders or restraining orders available under Hungarian law.

The CEDAW Committee's General Recommendation no. 19 states that "[U]nder general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation".

Applying this general principle, the CEDAW Committee had this to say about AT's case:

With regard to article 2 (a), (b), and (e), the Committee notes that the State party has admitted that the remedies pursued by the author were not capable of providing immediate protection to her against ill-treatment by her former partner and, furthermore, that legal and institutional arrangements in the State party are not yet ready to ensure the internationally expected, coordinated, comprehensive and effective protection and support for the victims of domestic violence.

Accordingly, the Committee's recommendations were as follows:

I. Concerning the author of the communication

- (a) Take immediate and effective measures to guarantee the physical and mental integrity of A. T. and her family;
- (b) Ensure that A. T. is given a safe home in which to live with her children, receives appropriate child support and legal assistance as well as reparation proportionate to the physical and mental harm undergone and to the gravity of the violations of her rights;

II. General

- (a) Respect, protect, promote and fulfill women's human rights, including their right to be free from all forms of domestic violence, including intimidation and threats of violence;
- (b) Assure victims of domestic violence the maximum protection of the law by acting with due diligence to prevent and respond to such violence against women;
- (c) Take all necessary measures to ensure that the national strategy for the prevention and effective treatment of violence within the family is promptly implemented and evaluated;
- (d) Take all necessary measures to provide regular training on the Convention on the Elimination of All Forms of Discrimination against Women and the Optional Protocol thereto to judges, lawyers and law enforcement officials.

D. COMMISSION ON THE STATUS OF WOMEN

The Commission on the Status of Women (CSW) was established as a functional commission of the Economic and Social Council by Council resolution 11(II) of 21 June 1946 to prepare recommendations and reports to the Council on promoting women's rights in political, economic, civil, social and educational fields. The object of the Commission is to promote implementation of the principle that men and women shall have equal rights. The Commission's mandate was expanded in 1987 by Council Resolution 1987/22 and following the Fourth World Conference on Women in 1995, the General Assembly mandated the Commission to integrate into its program a follow-up process to the Conference, and to develop its catalytic role in mainstreaming the gender perspective in UN activities

Following the 23rd General Assembly session²³, a comprehensive review was taken and the Assembly adopted Resolution S-23/2: *A Political Declaration and Further Actions and Initiatives to Implement the Beijing Declaration and Platform of Action*.²⁴

Links

Further Actions and Initiatives to Implement the Beijing Declaration and Platform of Action:
“<http://www.un.org/womenwatch/daw/followup/ress233e.pdf>”

Has my Country submitted an Action Plan?:

“<http://www.un.org/womenwatch/daw/country/national/natplans.htm>”

Has my country replied to the Secretary General's questionnaire on the implementation of the Platform of Action?:

“<http://www.un.org/womenwatch/daw/followup/countrylist.htm>”

²³ Beijing+5, See <http://www.un.org/womenwatch/confer/beijing5/>

²⁴ See <http://www.un.org/womenwatch/confer/beijing5/>

CHAPTER 3: OTHER TREATIES

I. INTRODUCTION

Alternatively to CEDAW, there are a number of other useful international treaties for women's rights activists to use in their work. These are compiled below for a quick reference.

Treaty Bodies. Many of these treaties also include treaty bodies. A **treaty body** oversees each **signatory** country's compliance with the treaty concerned. If a treaty calls for regular country reports outlining the country's compliance, these reports are submitted to the relevant **treaty body**. Accordingly, organizations writing **shadow reports** submit these to a **treaty body** and some treaty bodies also hear claims of treaty violations brought by states or individuals.

II. TREATIES AND INTERNATIONAL AGREEMENTS

Major Human Rights Treaties

- Universal Declaration on Human Rights (1948)²⁵
- Convention on the Prevention and Punishment of the Crime of Genocide (1948)²⁶
- Convention on the Elimination of all forms of Racial Discrimination (1969)²⁷
- Committee on the Elimination of Racial Discrimination (CERD)²⁸
- International Covenant on Civil and Political Rights (ICCPR) (1976)²⁹
- UN Human Rights Council (HRC)³⁰
- International Covenant on Economic, Social and Cultural Rights (1976)³¹
- Committee on Economic, Social and Cultural Rights (CESCR)³²
- Convention on the Elimination of all forms of Discrimination Against Women (1981)³³
- Committee on the Elimination of Discrimination Against Women (CEDAW)³⁴
- Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987)³⁵
- Committee Against Torture³⁶

²⁵ See <http://www.udhr.org/UDHR/default.htm>

²⁶ See http://www.unhchr.ch/html/menu3/b/p_genoci.htm

²⁷ See <http://www.unhchr.ch/html/menu3/b/9.htm>

²⁸ See <http://www.ohchr.org/english/bodies/cerd/>

²⁹ See http://www.unhchr.ch/html/menu3/b/a_ccpr.htm

³⁰ See <http://www.ohchr.org/english/bodies/hrcouncil/>

³¹ See http://www.unhchr.ch/html/menu3/b/a_ceschr.htm

³² See <http://www.unhchr.ch/html/menu2/6/ceschr.htm>

³³ See <http://www.un.org/womenwatch/daw/cedaw/>

³⁴ See <http://www.un.org/womenwatch/daw/cedaw/committee.htm>

³⁵ See <http://www.ohchr.org/english/law/cat.htm>

³⁶ See <http://www.ohchr.org/english/bodies/cat/>

- Convention on the Rights of the Child (1990)³⁷

Treaty Bodies

- Committee on the Rights of the Child (CRC)³⁸
- Rome Statute of the International Criminal Court (2002)³⁹
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (2003)⁴⁰
- Committee on Migrant Workers (CMW)⁴¹
- Convention on the Rights of Persons with Disabilities (2007)⁴²
- The Committee on the Rights of Persons with Disabilities⁴³

Regional Instruments

- European Convention on Human Rights (1950)⁴⁴
- American Convention on Human Rights (1969)⁴⁵
- African Charter of Human and People's Rights (1989)⁴⁶
- Association of South East Asian Nations Charter (ASEAN – *currently in progress*)

Instruments of Humanitarian Law (The Laws of War)

- Geneva Conventions I – IV (1864, 1906, 1929, 1950)⁴⁷

Legal Obligations under Treaties – the concept of “Due Diligence”⁴⁸

International law requires states to show due diligence in preventing and responding to human rights violations. With respect to violations of bodily integrity in particular, governments have a duty to prevent, investigate and prosecute such abuse, including cases in which the perpetrator is a private citizen. Where states do not prohibit such abuse or routinely fail to respond to evidence of murder, rape or assault of women by their intimate partners, they send the message that such attacks are justified or, at a minimum, will not be punished. In doing so, states fail to take the minimum steps necessary to protect their female citizens' rights to physical integrity and, in extreme cases, to life. To the extent that this failure reflects discrimination on the basis of gender and/or race, it also constitutes a violation of the state's international obligation to guarantee equal protection of the law.

³⁷ See <http://www.unhchr.ch/html/menu3/b/k2crc.htm>

³⁸ See <http://www.ohchr.org/english/bodies/crc/>

³⁹ See <http://www.un.org/law/icc/statute/rome.htm>

⁴⁰ See <http://www.ohchr.org/english/law/cmw.htm>

⁴¹ See <http://www.ohchr.org/english/bodies/cmw/>

⁴² See <http://www.un.org/esa/socdev/enable/rights/convtexte.htm>

⁴³ See <http://www.un.org/esa/socdev/enable/rights/adhoccom.htm>

⁴⁴ See <http://www.hri.org/docs/ECHR50.html>

⁴⁵ See http://www.today.kg/index.php?option=com_frontpage&Itemid=1

⁴⁶ See <http://www.hrcr.org/docs/Banjul/afrhr.html>

⁴⁷ See <http://www.genevaconventions.org/>

⁴⁸ See <http://www.hrw.org/reports/1995/Safricawm-02.htm>

III. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

Introduction

The ICCPR is a United Nations treaty based on the Universal Declaration of Human Rights, created in 1966 and entered into force on March 23, 1976. As of December 2006, 160 countries have ratified the ICCPR.⁴⁹

Defining Equality.

Art. 3 - The **States Parties** to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

The Human Rights Committee and Human Rights Council.

The Human Rights Committee was the body of independent experts that monitored implementation of the ICCPR by its State parties. The Human Rights Council was established in April 2006 to effectively replace the Human Rights Committee. For all intents and purposes, the Council serves the same purpose as the committee. For more information on the change, *see*⁵⁰ ..

Countries are obligated to submit regular reports to the Council on how they have complied with ICCPR provisions. Countries must report initially one year after ratifying the Covenant and then whenever the Council requests (usually every four years). The Council examines each report and addresses its concerns and recommendations to the State party in the form of "concluding observations."

In addition to the reporting procedure, Article 41 of the Covenant provides for the Council to consider *inter-state complaints*. As long as domestic remedies have been exhausted, the Committee will review the complaint made and write a report. The Council will also make its **good offices** available to countries with the view of making a friendly resolution in line with the Covenant.

The First Optional Protocol to the Covenant gives the Committee competence to examine complaints from individuals or organizations representing individuals. These claims are made based on alleged violations of the Covenant by State parties to the Protocol. To bring the complaint to the Committee, the individual must first have exhausted all available domestic remedies. In addition, no other international procedure can be examining the complaint in order for it to be heard by the Committee.

Each complaint is addressed in three steps:

⁴⁹ A full list, along with dates of signature and ratification can be found at "<http://www.ohchr.org/english/countries/ratification/4.htm>".

⁵⁰ See General Assembly Resolution 60/25 at "http://www.ohchr.org/english/bodies/hrcouncil/docs/A.RES.60.251_En.pdf"

1. The Secretary General gathers basic information about the complaint. She then presents this information to the Working Group on Communication of the Committee. This Committee then decides whether further information is required or communication is inadmissible.
2. The Committee then addresses the case in terms of procedural admissibility and then looks at the merits of the case.
3. The Committee's final view is then communicated to the **parties**.

Second Optional Protocol to the Covenant extends the competence of the Committee to implement the abolition of the death penalty with regard to States who have accepted the Protocol. This must be ratified separately.

IV. OTHER TREATIES AND TREATY BODIES

A. CONVENTION AGAINST TORTURE, AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

The Convention against Torture (CAT) and other cruel, inhuman or degrading treatment or punishment was signed on 10th December 1984 and entered into force in 1987.

Defining Torture:

Art. 1 – 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The state parties to the Convention are also under duties to take measures:

- Art 2 - to prevent such activities in territories under their **jurisdiction**
- Art 3 - not to return a person to a country where he may be subjected to torture
- Art 4, 5 - to make torture a criminal offence and to establish **jurisdiction** over it
- Art 7 - to prosecute or extradite persons charged with torture
- Art 14 - to provide a remedy for persons tortured

The Committee Against Torture was established under Part II of the CAT, and commenced work in 1987. The Committee receives states reports and has inter-state complaint competence and may hear individual communications.

B. CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

Definition

The Genocide Convention bans acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group (Art. 2). The Convention declares **genocide**, conspiracy or incitement to commit **genocide**, and attempts to commit or complicity in the commission of **genocide**, all to be illegal (Art. 3, 4).

Prevention

It declares **genocide** a crime under international law whether committed during war or peacetime. It binds all signatories of the convention to take measures to prevent and punish any acts of **genocide** committed within their **jurisdiction** (Art. 1).

Genocidal Means

The Convention bans killing, causing serious bodily or mental harm, inflicting living conditions intended to destroy, imposing measures intended to prevent births, taking group members' children away from them and given them to members of another group (Art. 2).

Accountability for Public and Private Actors

Individuals held responsible for these acts whether they were acting in their official capacities or as private individuals (Art. 3, 4).

Domestic Legislation

Signatories to the convention are bound to enact appropriate legislation to make the acts named in Article 3 illegal under their national law and provide appropriate penalties for violators (Art. 5).

Jurisdiction, Courts, Extradition.

People suspected of acts of **genocide** may be tried by a national tribunal in the territory where the acts were committed or by a properly constituted international tribunal whose **jurisdiction** is recognized by the state or states involved. For purposes of extradition, an allegation of **genocide** is not to be considered a political crime, and states are bound to extradite suspects in accordance with national laws and treaties. Any state party to the Convention may also call upon the United Nations to act to prevent or punish acts of **genocide** (Art. 6, 7, 8). The remainder of the Convention specifies procedures for resolving disputes between nations about whether a specific act or acts constitute(s) **genocide**, and gives procedures for **ratification** of the convention (Art. 9).

C. UNIVERSAL DECLARATION ON HUMAN RIGHTS

Fifty years after its proclamation, the Secretary-General at the UN, Kofi Annan has called the Universal Declaration, “*the yardstick by which we measure human progress.*”

Defining Equality - Article 1.

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood

Gender Specific provisions - Article 16.

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 25.

(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection

D. MILLENNIUM DEVELOPMENT GOALS

The legal and cultural exclusion of women from governance throughout history means that affirmative steps are necessary to ensure this representation is achieved. In September 2000 at the UN Millennium Summit in New York, world leaders pledged to “promote gender equality and the empowerment of women as effective ways to combat poverty, hunger and disease and to stimulate development that is truly sustainable.” World leaders adopted the MDG’s,⁵¹ one of which is “to promote gender equality and empower women.” Since then, the number of women in leadership positions has been rising. While the MDG’s do not represent binding law, most UN member states have signed on to these goals. Each country’s progress is being monitored by the Millennium Campaign.⁵²

⁵¹ See <http://www.un.org/millenniumgoals/>

⁵² See <http://www.millenniumcampaign.org/site/pp.asp?c=grKVL2NLE&b=138312>

E. LAWYERS NOTE: AN EXAMPLE OF THE UNITED STATES COURT OF APPEAL USING THE UDHR

Case Study 3.1: Filartiga v Pena Irala

The suit was brought by an alien residing in the United States against a former official of Paraguay then visiting the United States. The complaint alleged **torture** of the plaintiff's brother leading to his death. The court of appeals ruled that deliberate **torture** perpetrated by a person invested with official authority was a violation of customary law. The court further declared that "indeed, for purposes of civil liability, the **torturer** has become like the pirate and slave trader before him, an enemy of all mankind."

In its holding the United States Court of Appeal, used the Universal Declaration of Human Rights, which states that "no-one shall be subject to **torture**..." thus, a Declaration creates an expectation of adherence, and "insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon the States."

CHAPTER 4: U.N. SECURITY COUNCIL RESOLUTION 1325 (SCR 1325)

I. INTRODUCTION

Background to the Security Council

Under the United Nations Charter, the UN Security Council has been primarily responsible for the maintenance of international peace and security. The Security Council acts on behalf of the members of the organization as a whole in performing its functions, and its decisions are binding upon all member states.⁵³

U.N. Security Council Resolution 1325

On October 31, 2000, the Security Council unanimously adopted Resolution 1325⁵⁴ on women, peace and security. SCR 1325 is a groundbreaking achievement for the furthering of women's rights around the world.

“It marks the first time the Security Council addressed the disproportionate and unique impact of armed conflict on women, recognized the under-valued and under-utilized contributions women make to conflict prevention, peacekeeping, conflict resolution and peace-building, and stressed the importance of their equal and full participation as active agents in peace and security.”

Use of SCR 1325

Member States have begun to implement Resolution 1325 by drafting National Action Plans. Global Justice Center encourages women leaders in transitional democracies to use these plans as a means to advocate for support from their countries.

Despite its binding nature and broad applicability in a myriad of countries, regions, and situations, 1325 has unfortunately never been used as a legally binding instrument.

NGO Working Group on 1325

The NGO Working Group for Women, Peace, and Security⁵⁵ was formed to advocate for a Security Council resolution on women, peace, and security. They were successful in this goal when the Security Council adopted SCR 1325. The NGO Working Group currently advocates and monitors different countries' compliance with the resolution.

Their stated mission is as follows:

⁵³ For more information on the Security Council, *see generally*, UN Charter, Articles 39-45 at “<http://www.un.org/aboutun/charter/chapter7.htm>”

⁵⁴ *See* <http://www.peacewomen.org/un/sc/1325.html>

⁵⁵ *See* <http://www.womenpeacesecurity.org/>

The NGO Working Group's mission is to collaborate with the United Nations, its member states and civil society towards full implementation of SCR 1325, including ensuring the equal and full participation of women in issues relating to peace and security. Using SCR 1325 as our guiding instrument, the NGO Working Group promotes a gender perspective and respect for human rights in all peace and security, conflict prevention and management and peacebuilding initiatives of the United Nations.

Case Study 4.1: Political Participation in Afghanistan

In her article on the political participation of women in Afghanistan, Jessica Neuwirth, President of Equality Now, discusses the ability of SCR 1325 to implicate government policy on a national and an international level. Excerpted below is a summary of how 1325 was instrumental in this process.

In the political opportunism surrounding the situation of women in Afghanistan, Security Council Resolution 1325 proved to be instrumental in efforts to make the stated commitment to women's rights more than a rhetorical device to justify military action. The U.N. resolution recognizes the importance of a central role for women in the political process, and a growing demand for its implementation helped to shift the focus from Afghan women as victims, as they were initially portrayed, to Afghan women as active participants in a post-Taliban political process.

Pressure for the inclusion of women in the process and an insistence on the recognition of women's rights came from many directions -- women in Congress, women Ambassadors to the United Nations, women's rights organizations such as Equality Now, V-Day, the European Women's Lobby, and The Feminist Majority all called on governments and the United Nations to seize the moment to ensure the emancipation of the women of Afghanistan.

...

The Afghan Women's Summit for Democracy was initially conceived of as an initiative designed to facilitate the implementation of Security Council Resolution 1325, by bringing Afghan women together and giving them an opportunity to discuss the future of their country as well as their role in bringing peace to Afghanistan. The Summit was jointly convened by the Equality Now, the European Women's Lobby, V-Day, the Center for Strategic Initiatives of Women and The Feminist Majority.

...

The international NGO women's movement has gone to extraordinary lengths to facilitate the presentation of the views of Afghan women to the United Nations Security Council. In the spirit of its Resolution 1325, the Security Council and its member states should heed their advice: disarmament is critical to the maintenance of peace and security and the restoration of democracy and human rights. There is some hope that the reconstruction of Afghanistan and the role of women in the process could serve as a model for the rest of the world, but only time will tell whether there is sufficient political will and commitment to turn this hope into a reality.⁵⁶

⁵⁶ See <http://www.law.duke.edu/shell/cite.pl?9+Duke+J.+Gender+L.+&+Pol'y+253>

II. OCTOBER ADVOCACY WEEK

The objective of the October Advocacy Program is to ensure women's experiences and concerns in areas affected by violent conflict are heard at UN Headquarters. It also gives women's rights activists a chance to lobby at the UN on 1325 issues and to network with each other on these issues.

Each year, the Security Council hears from women on the progress of the implementation of Resolution 1325 during the October Advocacy Program. Advocates develop concrete recommendations on issues of women, peace and security for the work of the Security Council, U.N. Agencies, Member States and civil society. These recommendations are communicated to audiences at strategic events, panels, and meetings at UN Headquarters.

III. COUNTRY SPECIFIC RESOLUTIONS

In order to discover the most recent Security Council Resolutions affecting your country, the SC website is a good place to start.⁵⁷

It may also be helpful to consider Presidential Statements⁵⁸ and Reports of the Secretary General.⁵⁹

As Security Council Resolutions are binding on all member states, it may be possible to use the resolution directed at your country to ensure a change in government policy to act in conformity with the Resolution.

IV. LINKS

- 2005 Report from the Secretary General: "<http://www.un.org/Docs/sc/sgrep05.htm>"
- 2004 Report from the Secretary General: "<http://www.un.org/Docs/sc/sgrep04.html>"
- 2003 Report from the Secretary General: "<http://www.peacewomen.org/un/UN1325/CombinedRecommendations.html>"
- 2002 Report from the Secretary General: "<http://www.peacewomen.org/un/UN1325/sgreport.pdf>"
- Peace Women: "<http://www.peacewomen.org>"⁶⁰
- Country Reports: "<http://www.peacewomen.org/1325inaction/index.html>"

⁵⁷ See http://www.un.org/Docs/sc/unsc_resolutions.html

⁵⁸ See <http://www.un.org/sc/presidency.html>

⁵⁹ See <http://www.un.org/Docs/sc/sgrep06.htm>

⁶⁰ The Peace Women Project monitors and works toward rapid and full implementation of United Nations Security Council Resolution 1325 on women, peace and security.

CHAPTER 5: REGIONAL BODIES

What are Regional Bodies?

Most regions in the world have a body which handles human rights issues only in that region. These regional bodies typically include (a) a human rights-based treaty which acts as a charter for the organization; (b) a court which can oversee and adjudicate violations of the treaty, and; (c) a committee which can advise **parties** and countries on compliance with the treaty.

Some of these regional bodies have extensive, well-developed case law strictly followed by their member countries, while others are newer organizations yet to be tested. For example, the due process guarantee found in the European Convention on Human Rights has been followed by a number of domestic courts both in commercial and public interest cases, while the Association of Southeast Asian Nations is currently in the process of drafting its charter.

Importance to Women Advocates.

Regional bodies are another place where women advocates can pursue gender justice. Regional human rights treaties can provide additional protections for women, as well as serve as another body of international law backing up advocates' claims. Also, the more cases that are brought in regional courts on gender issues, the stronger gender equality jurisprudence becomes for all women around the world.

*Individuals as **Parties**.*

All of the regional bodies allow individuals to file a case in its court. This is different from other international courts which only allow countries to file cases, with the exception of optional protocols of some treaties (such as CEDAW) that allow individuals to file complaints.

Exhaustion of Local Remedies.

Similar to other international courts, the courts of these regional bodies require **parties** to first either (a) attempt to remedy their issue using their domestic legal system, or (b) show that such a pursuit would be futile (i.e. by demonstrating domestic courts do not protect the right in question). Note that there is no exhaustion of local remedies requirement for bringing issues up in front of the various regional Commissions.

African Region

Organization: Organization of African Unity (1963)

Charter: African Charter on Human and Peoples' Rights (1986)

Commission: African Commission on Human and Peoples' Rights (1986)

Protocol: Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2001) ⁶¹

The African Commission, created by the African Charter, is a younger organization than its European and Inter-American counterparts; however its mechanisms are similar. Countries must submit periodical reports on their compliance with the Charter (which means advocates can submit **shadow reports**), and individuals, organizations, and counties can file complaints against a member country.

Of particular interest to women's rights advocates is the Protocol on the Rights of Women in Africa⁶². The treaty sets out a range of rights, including marital, property, equal protection, political participation, education, social welfare, health and reproductive, housing, environmental, development, inheritance, disability, dignity, integrity, and security rights.

Since the Protocol is part of the African Charter, individuals can file complaints with the African Commission based upon provisions set out in the Women's Protocol.

Inter-American Region

Organization: Organization of American States (1948)

Charter: Charter of the Organization of American States (1948)

Treaty: American Declaration on the Rights and Duties of Man (1948)

Commission: Inter-American Commission on Human Rights (1959)

Treaty: American Convention on Human Rights (1978)

Court: Inter-American Court of Human Rights (1978)

Website: "<http://www.corteidh.or.cr/>"

Although there are a number of organizations and charters in the Americas, the most important is the Inter-American Court of Human Rights. Individuals, or organizations representing individuals, can bring a case in the Inter-American Court against a State Party of the Convention.

The CEJIL⁶³, is a great resource for anyone wanting to bring a case in the Inter-American court. The NGO has a legal defense program which specializes on bringing human rights cases in front of the Inter-American court.

⁶¹ See <http://www.achpr.org/>

⁶² See http://www.achpr.org/english/_info/women_en.html

⁶³ See www.cejil.org

European Region

Court: European Court of Human Rights

Judicial Organ: Council of Europe

Charter: European Convention on Human Rights

Website: "<http://www.echr.coe.int/ECHR/>"

The European Court of Human Rights (ECHR), based in Strasbourg, France, is perhaps the most active and influential of the regional bodies. The Council of Europe is a distinct entity from the European Union, although all member nations of the European Union are signatories of the ECHR. As of early 2007 there are 46 signatories to the ECHR. Many of these countries have signed onto its numerous additional protocols.

Southeast Asian Region

Organization: Association of Southeast Asian Nations (ASEAN)

Website: "<http://www.aseansec.org/>"

The Association of Southeast Asian Nations (ASEAN) is almost 40 years old. ASEAN is a regional bloc of 10 nations: Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam. It was formed by these countries in the 1960's as a means to counteract de-colonization in the region. Over the past 40 years ASEAN has operated without a formal charter. Its decision-making processes are by unanimous vote. In recognition of the difficult challenges facing the region, ASEAN is planning to establish a Charter. Through its Charter, ASEAN plans to set up a judicial body which will hear human rights-based complaints filed by individuals and countries.

CHAPTER 6: TRIBUNALS

Over the course of the past two decades, international tribunals and special courts have been instrumental in advancing women's equality rights. Many of these courts have been using CEDAW and 1325 as the basis of their reasoning in groundbreaking gender justice cases. Traditionally, rape was considered an incidental and normal consequence of war. Over the past few decades, this has changed largely due to the transnational women's movement and a greater understanding of the widespread social cost of **sexual violence**. As a result, international **war crimes** tribunals have found acts of **sexual violence** to be violations of the laws of war. At Global Justice Center, we recognize that these past and present tribunals are the proving grounds for creating international precedent for issues of gender justice.

As a result, it is important to understand the cases that have come out of these tribunals. These cases can all be found in the "international courts" section of our casebank.⁶⁴

Below is a quick overview of these courts and links to online resources for further research on these courts.

I. INTERNATIONAL CRIMINAL COURT

"The ICC and a robust system of international criminal justice will disrupt the culture of impunity that often protects architects of massive human rights violations and will deter others from committing these crimes."

- Jonathan F. Fanton, President, John D. and Catherine T. MacArthur Foundation⁶⁵

The ICC is the first permanent court to be charged with trying **war crimes, crimes against humanity, genocide**, and the crime of aggression. The court was setup by the Rome Statute⁶⁶, a treaty ratified by 104 countries. For a list of **state parties** and their **signatory** declarations and **reservations**, see⁶⁷.

Complimentarity.

Articles 17 and 20 set out the principle of complimentarity. Namely, the ICC will not investigate or issue warrants for crimes if the country in which they occurred has viable remedies for these crimes in its national courts. This makes the ICC a court of last resort, meaning that:

"If a case is being considered by a country with **jurisdiction** over it, then the ICC cannot act unless the country is unwilling or unable genuinely to investigate or prosecute. A country may be determined to be 'unwilling' if it is clearly shielding someone from responsibility for ICC crimes. A country may be "unable" when its legal system has collapsed,"⁶⁸

⁶⁴ See <http://www.globaljusticecenter.net/tools/casebank/cedaw/internationalcourts.html>

⁶⁵ For the full text, see www.globalpolicy.org/intljustice/icc/2005/0329usobstructs.htm

⁶⁶ See <http://www.un.org/law/icc>

⁶⁷ See <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp>

⁶⁸ See <http://www.icc-cpi.int/about/ataglance/faq.html#faq4>

Complimentarity and Domestic Reform.

Complimentarity strengthens domestic respect for international law by creating an incentive for states to prosecute these cases themselves, rather than have the ICC assert **jurisdiction**. To succeed, state parties must ensure that these cases can be tried under valid state law, i.e. that the states need to recognize **genocide, war crimes and crimes against humanity** as crimes under their domestic criminal law, and that the trials will meet international legal standards for a fair trial.

Even when a case is prosecuted by the ICC, state parties are still involved. Although the Rome Statute creates an international court, it does not create an international police force. The ICC is therefore dependant on the police forces of member states to arrest suspects and assist in gathering and preserving evidence. In order for their police to provide this assistance, state parties to the Rome Statute must change their domestic criminal law to allow for international cooperation. For this reason, the Rome Statute requires state parties to pass legislation to allow the relevant government agencies to work with the ICC.

The process of adapting domestic criminal law to the Rome Statute provides an opportunity to push for changes to bring domestic law into line with international legal standards. At a minimum, countries must recognize basic human rights like the right to legal representation and the right to be tried within a reasonable amount of time. It also creates opportunities to help victims of gender-based violence. The Rome Statute requires the ICC to provide physical and psychological protection to victims throughout the investigation and prosecution of crimes. Because the ICC lacks a police force, much of this protection would actually have to come from the state parties to the treaty. So far, countries adapting their domestic laws to the ICC's requirements have tended to ignore the issue of victim and witness protection, or offer it only at the specific request of the ICC. Whether your country has passed domesticating legislation or not, suggest to your legislature that protection should be provided to all victims and witnesses in your country. You can also press for the adoption of other sections of the Rome Statute, such as the rule that victims of sexual assault are permitted to testify in private rather than in open court. Adopting the Rome Statute's language on the treatment of witnesses and victims would empower them to come forward and prosecute these crimes.

Even if your country is not party to the Rome Statute, you can still lobby your legislature to adopt some of its provisions. Many international law treaties create affirmative duties that a state must meet. Depending on what treaties your country is party to, it may already be required under international law to protect victims and witness of crime. In that case, adopting the language of the Rome Statute is an easy way to meet that obligation.

Gender Justice and the ICC.

For more information about Gender and the International Criminal Court, visit the Women's Initiatives for Gender Justice⁶⁹, an international women's human rights organization advocating for gender-inclusive justice and working towards an effective and independent ICC.

⁶⁹ See <http://www.iccwomen.org>

Other International Tribunal Links

- International Criminal Tribunal for the Former Yugoslavia: “<http://www.un.org/icty/>”
- International Criminal Tribunal for Rwanda: “<http://www.icttr.org>”
- Special Court for Sierra Leone: “<http://www.sc-sl.org/>”
- Iraq High Tribunal:⁷⁰ “<http://www.iraqspecialtribunal.org/en/home.htm>”

Other Sites on the Iraq High Tribunal

“Grotian Moment: Saddam Hussein Trial Blog, Case Western University Law School”⁷¹ features key documents related to the Iraqi Special Tribunal, answers to frequently asked questions, and expert debates and public commentary on the major issues and developments related to the trials of Saddam Hussein and other former Iraqi leaders.

⁷⁰ Note: This site is not always current.

⁷¹ See <http://www.law.case.edu/saddamtrial/index.asp>

CHAPTER 7: CONSTITUTIONAL AND PARLIAMENTARY QUOTAS

I. CONSTITUTIONS

One of the strongest steps your government can take to guarantee women's rights to political participation is to place these rights in the constitution.

Writing a Constitution that protects Women's Rights

Incorporating true equality and democracy into the constitution requires:

- affirmative measures to enforce women's right to participate in the governance of their country – particularly within the judiciary
- a recognition of the historical discrimination against women
- recognition of international law as above [or in full compliance with] domestic law

Case Study 7.1: The Work of the Global Justice Center in Burma

The effort to achieve peace, security and democracy in Burma is an on-going struggle against a repressive and brutal military regime. It is also a struggle by the women of Burma to change strongly held ideas about women's role in society, including the belief that women do not belong in political leadership and should be subordinate to men.

In January 2006, Global Justice Center led a three-day Seminar in Chiang Mai, Thailand, on the importance of a gender perspective in the constitution for the Women's League of Burma. Global Justice Center is focused on changing the way quotas have been implemented to ensure that women are included in all decision-making bodies, including the courts.

Case Study 7.2: Constitutional Protection of Reproductive Rights in South Africa

In South Africa, the road to equality for women is shaped by the South African Constitution placing international law above domestic law. This means that domestic law can be invalidated if it violates its obligations under CEDAW.

One of the strongest ways of ensuring the right of women to maintain autonomy over their bodies and access to reproductive education is to place this right into the constitution through an equality provision. South Africa has the only constitution in the world which specifically protects pregnant women.

South African Constitution:

Section 9 (3) "The state may not unfairly discriminate directly or indirectly against anyone

on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”

The Choice on Termination of Pregnancy Act of 1996 (Choice Act) recognizes that both men and women “have the right to be informed of and to have access to safe, effective, affordable and acceptable methods of fertility regulation of their choice.”

When a woman requests a termination of pregnancy from a medical practitioner or registered midwife, the Choice Act requires that the practitioner inform the woman of her rights as set out in this law. The Choice Act also places an obligation on the state to “promote the provision of non-mandatory and non-directive counseling, before and after the termination of pregnancy.”

However a **shadow report** written for the CEDAW Committee in 1998 expresses the practical difficulties of applying this constitutional provision, especially in light of the AIDS epidemic.

“In reality, because media work in this arena is expensive and the cumbersome procedures to obtain government contracts are complex, the health-promotion field is not attractive to media groups. As a result, the quality and quantity of media coverage of health generally and of reproductive and women’s health in particular tends to be inadequate and inappropriate.

Perhaps most disturbingly, One third of the women were unaware of the permanence of sterilization. In fact, only half of the women in the African community inquiring about contraceptive methods are able to gain access to services at all; and, not surprisingly, a number of these women find that they have little choice and their concerns are paid little attention.”

Not only is it important to have constitutional protection of gender rights, but these rights must also be practically enforced by law. As demonstrated, a **shadow report** to the CEDAW committee can be a useful tool to push a country to enforce obligations it has already agreed to follow.

II. QUOTAS

One of the most common and arguably most effective affirmative measures for reaching equality in women's representation is the implementation of quotas, if possible through a constitutional provision. According to the IDEA, 92 countries have some type of quota system in place.

Quotas can be enforced via the constitution or legislation of a country and can impose equal representation in the political process or in the judiciary. However, a quota system alone is not enough to ensure equal representation. Mandatory sanctions for non-compliance are needed to ensure that a codified quota system is enforced.

Additionally, quotas can be gender neutral – requiring that there are not less than 40% of either men *or* women.

*Three Types of Quota Systems:*⁷²

(1) Constitutional Quota:

- Quotas mandated in the constitution of the country.
- Quotas cannot be changed without amending the constitution.
- Examples include: Rwanda, Burkina Faso, Nepal, the Philippines and Uganda.

(2) Law or Regulation:

- The quota is mandated in the laws or regulations of the country.
- These quotas can be changed by the government at any time by the legislative body.
- Widely used in Latin America as well as in Belgium, Serbia, Bosnia & Herzegovina and Sudan.

(3) Political Party Quota for Electoral Candidates:

- Rules or targets set by political **parties** to include a certain percentage of women as election candidates. There might also be quotas for internal party structures.
- These quotas can be voluntary or can be required by law.
- Many political parties that have adopted some type of quota provisions in Argentina, Bolivia, Ecuador, Germany, Norway, Italy and Sweden. But in many other countries, only one or two parties have adopted quotas.
- Note: If the majority party in a country uses quotas, like African National Congress in South Africa, this may have a substantial effect on the overall representation of women. However, most political parties in the world do not apply any quota systems.

Case Study 7.3: Representation Quotas in Rwanda's Constitution

Women in Rwanda now top the world rankings of women in national parliaments, with 49 percent of representation compared to a world average of 16.7%.⁷³

In the 2003 elections, in the lower house, 39 of the 80 people elected were women - 48.8% - greater than the constitutional minimum of 30%. In the upper house women constituted 6 of 20 or 30%. Rwanda's percentage of female representation is now the highest in the world.

*Rwandan Constitution*⁷⁴

Article 9 (4): The State of Rwanda commits itself...to ensuring that women are granted at least thirty percent of posts in decision making organs.

Article 82: The Senate shall be composed of twenty-six (26) members at least thirty per cent (30%) of whom are women.

Article 82: The Senate shall be composed of twenty six (26) members serving for a term

⁷² See <http://www.quotaproject.org>

⁷³ See <http://www.idea.int/gender/>

⁷⁴ See <http://www.concourt.am/wwwconst/constit/rwanda/rwanda-e.htm>

of eight years (8) and at least thirty per cent (30 %) of whom are women. In addition, former Heads of State become members of the Senate upon their request as provided for in paragraph 4 of this article.

The organs responsible for the nomination of Senators shall take into account national unity and equal representation of both sexes.

Article 77: The list shall be compiled in full respect of the principle of national unity as stipulated in Articles 9 and 54 of this Constitution and the principle of gender equality in matters relating to elective offices as stipulated in article 54 of the Constitution.

Election Law Quota, National Parliament.

Rwanda's 80 members of the Chamber of Deputies are elected as follows: 53 members elected in Closed List Proportional Representation; 24 women with two from each province and from the city of Kigali (by an electoral college with a women-only ballot); 2 members are appointed by the National Youth Council, and 1 member by the Federation of the Associations of the Disabled.

Constitutional Quota, Sub-National Level.

There is a parallel system of women's councils and women-only elections guaranteeing a women's mandate for all elected bodies. There is a triple ballot system at the sector and district levels: a general ballot, a women's ballot and a youth ballot. Through indirect elections a district council is chosen guaranteeing women 20% of councilors at that level.

UN Development Fund for Women (UNIFEM) Executive Director Noeleen Heyzer: "Especially in post-conflict situations, where new constitutions and legislative structures are being created, it is critical that women are present at the peace table and in post-war policy making."

Rwanda demonstrates how a quota system can successfully operate, especially when written into the Constitution.

For more reading on Quotas, see Women, Quotas and Politics, edited by Drude Dahlerup, Routledge, New York (2006)

III. EXAMPLES OF COUNTRIES WITH QUOTAS⁷⁵

Country	Type of Quota	# of Women Elected	% of Women in Parliament
RWANDA List Proportional Representation (PR)	Constitutional Quota for National Parliaments; Election Law Quota Regulation, National Parliament; Constitutional or Legislative Quota, Sub National Level	39 of 80	48.8%
SWEDEN <i>Europe</i> - List PR	Political Party Quota for Electoral Candidates	157 of 349	45.0%
SPAIN <i>Europe</i> - List PR	Political Party Quota for Electoral Candidates	126 of 350	36.0%
COSTA RICA <i>South America</i> - List PR	Election Law Quota Regulation, National Parliament; Political Party Quota for Electoral Candidates	20 of 57	35.1%
ARGENTINA <i>South America</i> - List PR	Constitutional Quota for National Parliaments; Election Law Quota Regulation, National Parliament; Constitutional or Legislative Quota, Sub-National Level; Political Party Quota for Electoral Candidates	87 of 255	34.1%
SOUTH AFRICA <i>Africa</i> - List PR	Constitutional or Legislative Quota, Sub-National Level; Political Party Quota for Electoral Candidates	131 of 400	32.8%
IRAQ List PR	Constitutional Quota for National Parliaments; Election Law Quota Regulation, National Parliament	87 of 275	31.6%
EAST TIMOR <i>Asia</i> - Parallel	Quotas existed previously or quota legislation has been proposed	23 of 88	26.1%

⁷⁵ See <http://www.quotaproject.org>

CHAPTER 8: RESEARCHING INTERNATIONAL LAW AND HUMAN RIGHTS

I. GENERAL INTERNATIONAL LAW RESOURCES

- **GlobaLex:** “<http://www.nyulawglobal.org/globalex>”
- **UN-I-QUE - UN information portal:** “<http://lib-unique.un.org/lib/unique.nsf>”
- **Office of the Special Advisor on Gender Issues and the Advancement of women:** “<http://www.un.org/womenwatch/osagi/>”
- **Institute of Advanced Legal Studies:** “<http://ials.sas.ac.uk/>”
- **American Society of International Law (ASIL):** “<http://www.asil.org/resource/home.htm>”
- **Project Diana: An Online Human Rights Archive:** “<http://www.yale.edu/lawweb/avalon/diana/index.html>”

II. HUMAN RIGHTS SPECIFIC RESOURCES

- **The University of Minnesota Human Rights Library:** “<http://www.umn.edu/humanrts>”
The library houses one of the largest collections of human rights documents, including several hundred human rights treaties and other primary international human rights instruments. The site also provides access to more than four thousands links and a unique search device for multiple human rights sites. Documents are available in six languages - Arabic, English, French, Japanese, Russian, and Spanish.
- **Bayefsky.com - The UN Human Rights Treaty Data Base:** “<http://www.bayefsky.com>”
A database containing a range of data concerning the application of the UN human rights treaty system by its monitoring treaty bodies since the database’s inauguration in the 1970's
- **International Criminal Court:** “<http://www.icc-cpi.int/>”
The Legal Tools Project aspires to equip users with the legal information, commentaries and software required to work effectively with international criminal law. It seeks to serve as a complete virtual library on international criminal law and justice. The Tools comprise at present over 25,000 documents and legal commentaries. Some 13 collections and databases of legal documents are included, together with four legal research and reference tools developed by the Court: the Case Matrix, the Elements Commentary, the Proceedings Commentary and the Means of Proof document.
- **Global Directory of Gender, Peace and Security Research Institutions:** “<http://www.un-instraw.org/en/index.php?option=content&task=view&id=1043>”

The United Nations International Research and Training Institute for the Advancement of Women (INSTRAW) keeps an online searchable directory of institutions that research gender, peace and security issues. Over one hundred institutions from around the world are featured, including universities/colleges, research institutions, NGOs and UN organizations. In addition to the directory, INSTRAW has compiled lists of gender, peace and security journals, databases and scholarships/fellowships. These tools are designed to serve as a resource for researchers, practitioners, policy makers and potential students.

- **Bora Laskin – University of Toronto:**
“<http://www.law-lib.utoronto.ca/resguide/women2.htm>”
This database provides a comprehensive collection of documents, articles, links and background material relating to women's human rights
- **SIM Documentation Center of the Netherlands Institute of Human Rights Faculty of Law:** “<http://sim.law.uu.nl/sim/Dochome.nsf>”
Case law provides access to the databases containing the case law of international supervisory organs. These contain jurisprudence of the Human Rights Committee (CCPR), the Committee Against Torture (CAT), the Committee on the Elimination of Racial Discrimination (CERD) and the Committee on the Elimination of Discrimination against Women (CEDAW). Furthermore, there is a database containing information on judgments of the European Court of Human Rights (ECHR). The concluding observations of the United Nations treaty bodies in the context of the country reports have also been made accessible. Finally the general comments and general recommendations of the UN treaty bodies are available. The case law of the International Criminal Tribunal for Rwanda was recently included (ICTR).
- **CEDAW Optional Protocol Database:**
“<http://sim.law.uu.nl/SIM/CaseLaw/CEDAWcase.nsf/CommNo?OpenView>”
Search CEDAW Committee Decisions on complaints brought through the Optional Protocol by article, subject, keyword, state, name, date, conclusion, general comment
- **Office of the United Nations High Commissioner on Human Rights (OHCHR) Treaty Bodies Database:** “<http://www.unhchr.ch/tbs/doc.nsf>”
- **Jeannette Rankin Library Program at the United States Institute of Peace:** “<http://www.usip.org/library/>”
The library supports the research needs of the USIP's programs, outside practitioners, researchers, libraries, and a worldwide virtual audience, in the field of international conflict management, through its print and digital collections.

LEGAL DEFINITIONS

ACCESSION

This concept is similar to **ratification** (see below) but when done by a country that did not take part in negotiating the treaty. It has the same legal effect as **ratification**.

CIVILIANS

Any person not belonging to the armed forces or who did not take part in the hostilities at the time of the alleged violations is considered a civilian.

CRIMES AGAINST HUMANITY

Crimes against humanity are acts of violence committed on a widespread or systematic basis against any civilian population, with knowledge of the attack. According to the ICTY, crimes against humanity, which can occur in war or peace time, are “serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health and/or dignity. They are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment.” Rape is explicitly listed among the crimes against humanity within the **jurisdictions** of both ad hoc tribunals.

Akayesu case. ICTR convicted the defendant of crimes against humanity based on the evidence that he had witnessed and encouraged rapes of Tutsi women while he was a communal leader.⁷⁶

CUSTOMARY INTERNATIONAL LAW

Unlike treaty law, international customary law is not adopted formally by governments. It is created by the common practice of States developed over a period of time and the belief of States that they are legally bound to follow that practice. That belief can be evidenced in a variety of ways, including on the basis of resolutions and declarations—on women's rights, for example—adopted by the United Nations and other intergovernmental bodies, as well as from patterns of national practice, including legislation and national court decisions. International customary law is binding on all States once the norms have been accepted or acquiesced to by the international community as a whole. The Statute of the ICC illustrates this process. According to Justice Theodor Meron of the ICTY, the crimes recognized by the ICC Statute, including the gender-specific offences, may well, “take on a life of their own as an authoritative and largely customary statement of international humanitarian and criminal law, and ... become a model for national laws to be enforced under the principle of universality of **jurisdiction**.” Universal Jurisdiction covers grave breaches of the Geneva Conventions, certain very serious human rights violations

⁷⁶ Taken from <http://www.womenwarpeace.org/issues/justice/justice.htm>

(like **torture**) and **genocide**. All States have a duty to prosecute the perpetrators, regardless of their nationality, the nationality of the victims or where the crimes took place.⁷⁷

GOOD OFFICES

Beneficial acts performed usually by a mediator of a dispute, or a diplomat, on behalf of another party. For example, in the United Nations, the secretary general may make his “good offices” available to parties attempting to resolve a dispute or conflict.

GENOCIDE

Under certain conditions, **sexual violence** can also be one of the means of committing the international crime of genocide. Genocide was first defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, which has since passed into **customary international law**. Acts of genocide are committed with the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, by killing or causing serious bodily or mental harm to members of the group, deliberately inflicting conditions calculated to bring about destruction of the group in whole or in part, imposing measures intended to prevent births or forcibly transferring children of the group to another group. Thus, rape, sexual enslavement, forced prostitution, forced sterilization, forced abortion and forced pregnancy—impregnation with the intent of forcing a woman to give birth to the rapist's child—can all be means of conducting acts of genocide.

Akayesu case. The ICTR found the defendant guilty of genocide, based in part on evidence that he had witnessed and encouraged rapes and forced nudity of women during the genocidal campaign.⁷⁸

JURISDICTION

The legal right for a court to hear and decide a dispute. Jurisdiction can arise from several factors: the physical location of the incident leading to the dispute or crime, the nationality of the **parties** to, and the subject matter of the case.

Example: ICC Jurisdiction

Temporal Jurisdiction. The Court has jurisdiction only with respect to crimes committed after the entry into force of the Statute (July 1, 2002)

Subject-Matter Jurisdiction. **Genocide, Crimes Against Humanity, and War Crimes.**

Personal/Territorial Jurisdiction. ICC has jurisdiction only over crimes committed on the territory of, or by nationals of, **States Parties**⁷⁹, or crimes referred by the UNSC.

The ICC can exercise jurisdiction

⁷⁷ Taken from <http://www.womenwarpeace.org/issues/justice/justice.htm>

⁷⁸ Taken from <http://www.womenwarpeace.org/issues/justice/justice.htm>

⁷⁹ The ICC also has jurisdiction over crimes committed on the territory of or by nationals of States submitting a declaration of acceptance of jurisdiction.

The Court may exercise its jurisdiction with respect to crimes referred to under Article 5 of the Statute if:

1. It is referred to the Prosecutor by a State Party;
2. It is referred to the Prosecutor by the Security Council acting under Chapter VII of the UN Charter; or

The Prosecutor has initiated an investigation *proprio motu*.

JUS COGENS

See “Peremptory Norm.”

NON-DEROGABLE

An international norm which can never be set aside, no matter what the circumstances. For example, in the United States, in war-time situations, certain freedom of speech guarantees can be relaxed. Thus, a country can derogate from its freedom of speech laws. On the other hand, certain crimes, such as **genocide** and slavery can never be derogated from, no matter what the social or political situation. Thus, these are *non-derogable* norms.

PARTIES (to a convention)

The term “parties” refers to State and other entities with treaty-making capacity that have signed and ratified a treaty, and are therefore bound to its terms by international law. The term “Parties” includes both “Parties” and “Signatories.” “Signatories” refers to States and other entities with treaty-making capacity that have expressed their consent to be bound by a treaty where the treaty has not yet entered into force or where it has not entered into force for such States and entities. Thus, a **signatory** is a State which has signed onto a convention, but is not yet bound

PEREMPTORY NORM (also *Jus Cogens*)

A legal norm becomes a peremptory norm, or *jus cogens*, as states recognize the norm as typical to a notion of a just society. These norms are so widely accepted as wrong that there can never be a situation in which they are justified (i.e. **non-derogable**). For example, there would never be a situation in which slavery or **genocide** would be accepted by society; however, given certain wartime situations, one could imagine an abridging of our freedom of speech.

PROTECTED PERSONS

Each treaty/convention defines those individuals who are protected and covered by each individual document. In the Geneva Conventions, protected persons include the wounded, the sick, the shipwrecked, prisoners of war and other persons deprived of their freedom in relation to international or non-international armed conflict, for example, **civilians** and other persons such as medical and religious personnel, the staff of relief operations, the staff of civil defense organizations and mediators not taking part in the hostilities. **War crimes** committed against protected persons are considered grave breaches.

RATIFICATION

The process by which a country becomes a party to a convention. A country must first sign the treaty, then depending on the country's domestic law, the country's government must affirm that signature. For example, in the United States, if the President signs a treaty, the Senate ratifies the treaty through a 2/3rd vote.

RESERVATIONS

It's a declaration made by a State by which it asserts that it will not adhere to certain provisions of the treaty when it ratifies and which do not bind that state. It allows States to accept a treaty by giving it the possibility not to apply certain provisions with which it does not want to comply. Reservations can be made when the treaty is signed, ratified, accepted, approved or acceded to. They must not be incompatible with the object and the purpose of the treaty. Furthermore, a treaty might prohibit reservations or only allow for certain reservations to be made.⁸⁰

SEXUAL VIOLENCE

The founding statutes of the ICC and other international courts include crimes of sexual violence –rape, sexual slavery, enforced sterilization, forced pregnancy, enforced prostitution, and other forms of grave sexual violence- as **crimes against humanity** and/or **war crimes**. Rape has been defined by many national **jurisdictions** as non-consensual intercourse, and variations of this act can involve the insertion of objects and/or use of bodily orifices not considered to be intrinsically sexual. However, growing international jurisprudence indicates that rape cannot be captured in a mechanical description of objects and body parts. Rape is a physical invasion of sexual nature, committed on a person under coercive circumstances, but crimes of sexual violence do not require physical contact: the incident in which a victim was ordered to undress and do gymnastics naked in front of a crowd in the public courtyard, was considered sexual violence by the ICTR.⁸¹

SHADOW REPORT

A report submitted to a **treaty body** filed as a commentary upon a specific country report. Typically shadow reports highlight issues that a country glosses over or does not address in their country report. Submitting a shadow report can be an effective tool to put pressure upon governments in front of the international community.

SIGNATORY

A state which has signed onto a convention, but is not yet bound.

STATES PARTIES

The group of countries that have signed and ratified a specific treaty. Only States may become party to international treaties, and thus to the Geneva Conventions and their Additional Protocols. However, all **parties** to an armed conflict whether States or non-State actors are bound by international humanitarian law

⁸⁰ See Arts.2 (1) (d) and 19-23, Vienna Convention of the Law of Treaties 1969.

⁸¹ See <http://www.womenwarpeace.org/issues/justice/justice.htm>

TORTURE

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for purposes such as intimidation, coercion, punishment, or eliciting information or confessions or for any reason based on discrimination of any kind. Rape or other sexual assaults constitute torture and as such, can be prosecuted under international and national law. The Convention requires ratifying states to ensure torture is a criminal offense under domestic law and to prosecute or extradite alleged perpetrators.

Celebici case. ICTY characterized the rape and sexual assaults committed against Bosnian Serb prisoners at the Celebici prison camp as acts of torture—as both a violation of Common Article 3 and a grave breach of the Geneva Conventions. In July 2003, Zdravko Mucic, the former commander of the camp was granted an early release after serving two-thirds of his nine-year sentence.⁸²

TREATY BODY

The body which oversees each **signatory** country's compliance with a treaty. If a treaty calls for regular country reports outlining the country's compliance, these reports are submitted to the treaty body for that treaty. Accordingly, organizations writing **shadow reports** (see *CEDAW Legal Tools Page*) would submit these to a treaty body. Also, some treaty bodies hear claims of treaty violations brought by states or individuals.

UNIVERSALITY PRINCIPLE/ UNIVERSAL JURISDICTION

Universal jurisdiction is a concept in international human rights law that allow a country's national courts to have jurisdiction over (the ability to hear cases about) certain severe violations of international human rights law even though the country where the courts are located may have little or no connection to the crime. The idea is that some crimes are so terrible that any country can try the perpetrators even if there is no connection to the country holding the trial. Universal jurisdiction can be established by statute or accepted by a court as a norm of international law, and generally applies to **genocide, war crimes, and/or crimes against humanity**.

WAR CRIMES

War crimes are serious violations of humanitarian law, whether customary or conventional, and include grave breaches and violations of Common Article 3 of the Geneva Conventions, which prohibits "violence to life and person," "cruel treatment," "**torture**" or "other outrages upon personal dignity." The Conventions explicitly require nations to prosecute persons of any nationality who commit acts such as "**torture** or inhuman treatment" and "willfully causing great suffering or serious injury to body or health" against any person. Further, Article 27 of the Fourth Geneva Convention states that women should be protected against "rape, enforced prostitution, or any form of indecent assault" in times of war. Protocol II Additional to the 1949 Geneva Conventions, governing the protection of **civilians** in internal armed conflicts, explicitly outlaws "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault" at Article 4(2)(e). A single act of such violation can constitute a war crime.

⁸² Taken from <http://www.womenwarpeace.org/issues/justice/justice.htm>

Furundzija case. At ICTY, a paramilitary leader was convicted of outrages upon personal dignity and **torture** by means of rape (a violation of Common Article 3 to the Geneva Conventions) for verbally interrogating a woman in front of laughing soldiers while his colleague physically raped her.⁸³

⁸³ Taken from <http://www.womenwarpeace.org/issues/justice/justice.htm>