

WE SHOULD SHOOT FOR THE MOON WITH CEDAW,
FOR EVEN IF WE MISS, WE MAY LAND AMONG THE STARS.

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Women don't get half as much rights as they ought to; we want more, and we will have it.

-Sojourner Truth

INTRODUCTION	2
I. INTERNATIONAL LAW AND ITS PRIMARY SOURCES	4
A. The Role of Treaties	5
B. The Significance of Customary Law and Jus Cogens	6
C. General Principles of Law	8
II. CEDAW'S PROVISIONS	9
III. ACCEPTING, BUT TEMPERING CEDAW	17
A. States that Have Ratified CEDAW	17
B. The Many Reservations to CEDAW	19
IV. APPLYING FEMINIST THEORY TO CEDAW	23
A. Liberal Feminism	23
B. Cultural Feminism	25
C. Radical Feminism	27
V. THE UNITED STATES AND CEDAW	29
A. Status of CEDAW in the United States	30
B. Rebutting the Republicans' Objections to CEDAW	34
C. The "Real" Reason the United States Has Not Ratified CEDAW	36
CONCLUSION	38

INTRODUCTION

The problems women face adversely affect the entire world's population – not just women – and deep changes in women's circumstances can produce significant change throughout social, economic, and political structures. Since the Second World War, the human rights movement¹ has vigorously addressed racial discrimination, but, until recently, has responded to gender discrimination with relative apathy.² Although the human rights movement has only produced measured progress in the area of racial discrimination and there remains much work to be accomplished,³ at least the movement has been promulgating and enforcing standards in response to racial discrimination for six decades.⁴ In contrast, the human rights movement has only just begun to respond actively to the issues of gender discrimination; most of the efforts have occurred in the last ten years.⁵ This increased focus on solutions to gender discrimination arose because of and in response to the Convention on the Elimination of all forms of Discrimination Against Women⁶ (CEDAW or the Convention).⁷

The title of this paper borrows from an anonymous quote⁸ that aptly describes my philosophy regarding the Convention. The goals of CEDAW are immense – similar to shooting for the moon. However, success does not require landing on the moon. If the world's nations

¹ This paper uses the term "human rights movement" to describe governmental, international, and nongovernmental developments, rather than merely to describe nongovernmental actors, as some papers and texts define the term.

² HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 159 (2d ed. 2000).

³ *Id.*

⁴ *Id.* at 112-13.

⁵ *Id.* at 159. Steiner and Alston note that:

[i]t was the rare report of a human rights NGO [nongovernmental organization] before the 1990s that gave specific attention to human rights violations against women, although women often figured with men as victims in reports dealing with themes like arbitrary detention, disappearances, or torture. Numbers of NGOs have been organized during the past decade that were devoted to women's human rights issues, and leading NGOs of general scope now frequently address women's problems. *Id.* at 168.

⁶ Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) (hereinafter "CEDAW") (reproduced in Appendix I of this paper).

⁷ See STEINER & ALSTON, *supra* note 1.

and people were able to implement only half of CEDAW's provisions, women (and through them, everyone else) would still be much better off. Therefore, shooting for the moon is not absurd, nor does it merely produce a "worthless piece of paper" (as CEDAW has been called). By setting our goals high and shooting for the moon, we have the chance to better women's – and thus everyone's – lives, and to land amongst the stars.

This analogy is important to consider throughout this paper because, without this context, the struggle to end discrimination against women seems too overwhelming, requiring tremendous effort that is unlikely to achieve total equality in the foreseeable future. Obviously, complete equality and the full valuing of women are the highest goals; however, if the women's movement⁹ and the human rights movement do not celebrate the small victories as they occur – analogous to the passing of each star on the way to the moon – then the movements will lose their momentum and impetus. The movement toward full and equal participation of women in all areas of society requires both an energetic reaction to current oppression and optimistic goal setting.

This paper analyzes CEDAW, by applying both feminist theory and international law maxims. Part I describes the foundations and content of international law, briefly illustrates how disputes in international law are settled, and elucidates the difference between a treaty and custom. Part II introduces CEDAW's design, requirements, and aims by reviewing CEDAW's background and its textual provisions. Part III explores how it is possible that the Convention is the most ratified of the human rights conventions, while at the same time it has the most

⁸ The actual quote is, "Shot for the moon, for even if you miss, you may land among the stars."

⁹ The paper uses the term "women's movement" to describe the coalition of women's organizations, politicians, writers, philosophers, and activists that work toward bettering women's circumstances and lives, whether the individuals or organizations believe in and advocate liberal feminist theory, cultural feminist theory, or radical feminist theory. There are great factions within this movement; for example, only a portion of the women's movement would consider themselves to be feminist, since the term "feminist" carries its own connotation within the overall women's movement.

reservations against it as a result of custom's impact. Part IV briefly reviews the three feminist theories and then analyzes the Convention in light of these feminist theories. Finally, Part V explains how the United States has responded and failed to respond to CEDAW, and analyzes the purported and "real" reasons why United States has failed to ratify CEDAW.

I.

INTERNATIONAL LAW AND ITS PRIMARY SOURCES

It would be nearly impossible to grasp the foundation of CEDAW without first understanding international law and how it applies to the Convention and other multi-national treaties. International law has an effect on the laws of the United States. Where Congress – through a statute or treaty – or the President – through foreign policy or an executive order – has not spoken, then international law is binding on the United States.

Article 38 of the Statute of the International Court of Justice¹⁰ – the judicial organ of the United Nations that was created by the UN Charter in 1945 – instructs the International Court on the method of applying international law to resolve disputes.¹¹ The article "repeats in relevant respects the provisions of the 1921 Statute of its predecessor court, the Permanent Court of International Justice" and has "long served as a traditional point of departure for examining questions about the sources of international law."¹² This article has shaped more than just the International Court of Justice; its influence has been felt by other international tribunals, by national courts, and in debates on international law outside the court system.¹³ The International

¹⁰ International Court of Justice, Statute of the International Court of Justice, 59(II) Stat. 1063 (1945), Doc. 840, IV/1/69, 13 U.N.C.I.O. Docs. 319 (1945) (hereinafter ICJ).

¹¹ STEINER & ALSTON, *supra* note 2 at 58.

¹² *Id.*

¹³ *Id.*

Court of Justice is required to apply: 1) conventions or treaties, 2) customary law, 3) general principles of law, and 4) persuasive judicial opinions and scholarly articles.¹⁴

This article affects CEDAW and its enforcement by international courts. The following sections will describe conventions, customary law, and general principles of law. CEDAW is a convention; thus, it should be applied before other forms of law by the International Court of Justice when the Court is deciding disputes. Next the Court applies customary law, and often customary law conflicts with CEDAW. This conflict will be discussed in Part III.

A. *The Role of Treaties*

Conventions and multi-national treaties have been the driving force leading to the development of human rights.¹⁵ Treaties “have become the primary expression of international law and, particularly when multilateral, the most effective if not the only path toward international regulation of many contemporary problems.”¹⁶ Treaties can create jurisdiction for international institutions and define the duties of member states of those institutions.¹⁷ There are many different – and nearly interchangeable – terms for international agreements: pacts, protocols, covenants, conventions, charters, exchanges of notes, and treaties. Treaties can serve many different purposes, but most significant for this paper is the role that treaties can serve to extend protection and equality to women across the globe.

¹⁴ *Id.* The article states:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of a general practice accepted by law;
 - c. the general principles of law recognized by civilized nations;
 - d. subject to the provisions of Article 59 [stating Court decisions are only binding on the parties of the case], judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determinations of rules of law.

¹⁵ STEINER & ALSTON, *supra* note 2 at 104.

¹⁶ *Id.*

¹⁷ *Id.*

Whatever the treaty's purpose, "the international agreement is generally recognized from the perspective of international law as an authoritative starting point for legal reasoning about any dispute to which it is relevant."¹⁸ Treaty law is based on the maxim *pacta sunt servanda*.¹⁹ This maxim promotes the prevailing view that formal, public, voluntarily made commitments made by a nation should be honored.²⁰ Therefore, "[t]he treaty represents one of the most effective means for bringing some order to relationships among states or their nationals, and for the systematic development of new principles responsive to the changing needs of the international community."²¹ Because the treaty is so effective, the human rights movement has used it as the "prime legal form" to institutionalize ideals of human rights.²² CEDAW is one of the many multi-national treaties created since the Second World War in hopes that it will secure individual human rights.

B. The Significance of Customary Law and Jus Cogens

Custom is the oldest and original source of international law and "remains indispensable to an adequate understanding of human rights law."²³ Customary law is defined as "conduct, or the conscious abstention from certain conduct, of states that becomes in some measure a part of international legal order."²⁴ A particular conduct then becomes a legal obligation. Customary international law occurs when a general and consistent practice of states is followed by the states out of a sense of legal obligation. There are two elements required for a custom: 1) there must be a practice or abstention of practice, and 2) it must appear that the states follow the practice

¹⁸ *Id.*

¹⁹ *Id.* at 105. *Pacta sunt servanda* is codified in Article 26 of the Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/Conf 39/28, UKTS 58 (1980), 8 I.L.M. 679, art. 26.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 69.

²⁴ *Id.* at 70.

from a sense of legal obligation.²⁵ Evidence of customary law can appear in: 1) bi-lateral treaties between two nations and multi-national treaties, 2) national policies and press clippings, and 3) the writings of lawyers and opinions of international law judges.²⁶

The lines between custom and treaties are blurred. Custom can result from the promulgation of an international standard in a treaty; however, it is also true that an international standard can arise from custom.²⁷ In other words, there is a “what came first, the chicken or the egg” circular argument when discussing state or regional custom and international standards promulgated in treaties. Thus, treaties and custom become “complexly intertwined and reciprocally influential.”²⁸

Jus cogens is the highest form of custom; it is a norm above all norms. *Jus cogens* has been defined as a “peremptory norm of general international law accepted . . . by the international community of States . . . as a norm from which no derogation is permitted.”²⁹ Noncompliance of *jus cogens* would “shock the conscience of mankind and be contrary to elementary considerations of humanity.”³⁰ To create a *jus cogens*, an overwhelming majority of states must have already adopted the norm. Moreover, those states must be diverse and cut across cultural and ideological differences.³¹

²⁵ *Id.* at 75. The second requirement is also known as *opinio juris*. *Id.* *Opinio juris* is the psychological element in the formation of customary law, that is defined as a conviction of a state’s government that international law requires or permits a certain form of conduct. *Id.* One can infer *opinio juris* indirectly from the actual behavior of states gathered from acts or omissions. *Id.* Usually four circumstances are present for to indicate *opinio juris*, allowing a custom to become international law: 1) concordant practice by a number of states relating to a particular situation; 2) continuation of that practice over an extensive time; 3) conception that the practice is required by or consistent with international law; and 4) general acquiescence of that practice by other states. *Id.*

²⁶ Professor Ibrahim Gassama, Lecture to the Human Rights Law Class at the University of Oregon School of Law (Spring Term, 2002).

²⁷ STEINER & ALSTON, *supra* note 2 at 72.

²⁸ *Id.*

²⁹ Vienna Convention on the Law of Treaties, *supra* note 19, art. 53.

³⁰ Martti Koskenniemi, *The Pull of the Mainstream*, 88 MICH L. REV. 1946 (1990).

³¹ *Id.*

Some scholars consider *jus cogens* to play the same role in the international order that constitutionally protected rights play in domestic order.”³² International courts regularly apply *jus cogens* to international disputes as the highest order of custom.³³ Examples of *jus cogens* are the complete prohibitions against slavery, genocide, and racial discrimination.³⁴ Sadly and shockingly, discrimination against women is not considered to be a *jus cogens*.³⁵ Section III will discuss the ramifications of this absence of a custom or *jus cogens* of equality for women.

C. General Principles of Law

General principles of law are elements of municipal law – the law of a state – that is found in various municipal systems.³⁶ The difference between a general principle and a custom is whether the norm dictates the internal or external actions of a state. A general principle is a norm that is internally focused within a state, while a custom is a rule that states use when dealing with each other.³⁷ At its core, a general principle is a “gap filler” reasoning tool for the courts.³⁸ International courts will ordinarily use a general principle of law to support its reasoning and decisions, after conventions and custom have already been applied, and the court has already arrived at its decision.³⁹ Thus, general principles of laws, while interesting, do not hold the same power as conventions and custom and do not actually sway international courts in their decision making process. Therefore, general principles of law will likely not impact international court decisions regarding CEDAW.

³² STEINER & ALSTON, *supra* note 2 at 173.

³³ *E.g.* Judgment of Nuremberg Tribunal, International Military Tribunal, reprinted at 41 AM. J. INT. L. 172 (1947).

³⁴ STEINER & ALSTON, *supra* note 2 at 77. Scholars disagree on whether the prohibition of torture is a *jus cogens*. *Id.*

³⁵ Hilary Charlesworth and Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63 (1993). Part III of this paper includes a discussion on the ramifications of this failure to address such discrimination.

³⁶ OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 50 (1991).

³⁷ *Id.*

³⁸ *Id.*

³⁹ Professor Ibrahim Gassama, Lecture to the Human Rights Law Class at the University of Oregon School of Law (Spring Term 2002). Professor Gassama labels general principles of law the “oh, by the way” doctrine. *Id.*

II.

CEDAW'S PROVISIONS

The First World Conference on Women in Mexico City in 1975 first advocated a Women's Convention but until CEDAW was adopted in 1979 by the UN General Assembly, there was no convention that addressed comprehensively women's rights within political, cultural, economic, social, and family contexts. CEDAW is often described as an international bill of rights for women.⁴⁰ CEDAW includes a preamble and 30 articles. It defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination.⁴¹ States that ratify CEDAW commit to undertake measures to end discrimination against women in all forms, including: to incorporate the principle of equality of men and women in their legal system, to abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women; to establish tribunals and other public institutions to ensure the effective protection of women against discrimination; and to ensure elimination of all acts of discrimination against women by persons, organizations or enterprises.⁴² The Convention's text and provisions are further discussed in this part.

The Convention serves as the foundation for realizing equality between the genders through ensuring women's equal access to, and equal opportunities in, political and public life, including equal rights to education, health and employment. States agree to take all appropriate measures and legislative acts required so that women can enjoy all their human rights and

According to Gassama, the court will mention that "oh, by the way" it can also support its decision with a general principle of law. *Id.*

⁴⁰ United Nations Division for the Advancement of Women, *Comments on the Convention on the Elimination of All Forms of Discrimination against Women* at <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> (last visited Mar. 7, 2002).

⁴¹ See generally CEDAW, *supra* note 6.

⁴² *Id.*

fundamental freedoms.⁴³ The Convention is “the only human rights treaty which affirms the reproductive rights of women and targets culture and tradition as influential forces shaping gender roles and family relations.”⁴⁴

CEDAW’s Preamble states that discrimination against women violates the principles of equality.⁴⁵ This Convention protecting women is needed because women have less access than men to food, health, education, training and opportunities for employment.⁴⁶ Moreover, full development of a country, the world’s welfare, and the aim of peace all require the full participation of women on equal terms with men in all fields.⁴⁷

Article 1 defines discrimination against women as 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 marital status, on the basis of equality between men and women, of human rights or fundamental freedoms in the political, economic, social, cultural, civil, or any other field.”⁴⁸ This article defines discrimination not only through its purpose, but also through its effect. Therefore, government actions need to have both a purpose of ending discrimination against women and positive consequences for women. Also, the definition does not merely cover those discriminatory actions of those acting under governmental orders; the definition includes the actions of private citizens or groups.⁴⁹

Article 2 addresses implementation of CEDAW by the states that ratify the Convention.⁵⁰ States must condemn gender discrimination in all its forms and agree to pursue by all appropriate

⁴³ CEDAW, *supra* note 6, art. 3.

⁴⁴ Division for the Advancement of Women, *Convention on the Elimination of all Forms of Discrimination Against Women*, at <http://www.un.org/womenwatch/daw/cedaw/> (last visited April 1, 2002).

⁴⁵ CEDAW, *supra* note 6, Preamble.

⁴⁶ *Id.*

⁴⁷ STEINER & ALSTON, *supra* note 2 at 159.

⁴⁸ CEDAW, *supra* note 6, art. 1.

⁴⁹ STEINER & ALSTON, *supra* note 2 at 179.

⁵⁰ CEDAW, *supra* note 6, art. 2.

means a policy of eliminating discrimination against women.⁵¹ To achieve this end, states must undertake to ensure a legal framework – including all constitutions, laws, tribunals, policies, and practices – to provide protection against discrimination and embody the principle of equality.⁵² States must also repeal all “national penal provisions which constitute discrimination against women.”⁵³ Moreover, states are required to purge public institutions of discriminatory practices⁵⁴ and to “take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.”⁵⁵ The effect of these two requirements means that state parties are responsible for securing the rights of women in *all* governmental and private organizations.

The scope of state action is broadly outlined in Article 3 by requiring states take action in all fields – civil, political, legislative, economic, social, and cultural – to guarantee women's human rights.⁵⁶ An exception to CEDAW for gender-based affirmative action programs is made in Article 4.⁵⁷ States are permitted to take “temporary special measures” to accelerate de facto equality, and CEDAW provides that these special measures will not be considered discriminatory.⁵⁸

States are required to help modify social norms under Article 5.⁵⁹ The Convention declares the need to take “all appropriate measures”⁶⁰ to modify “social and cultural patterns of

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*, art. 2(g).

⁵⁴ *Id.*, art. 2(d).

⁵⁵ *Id.*, art. 2(e).

⁵⁶ *Id.*, art. 3.

⁵⁷ *Id.*, art. 4.

⁵⁸ *Id.*

⁵⁹ *Id.*, art. 5.

⁶⁰ Though Article 5 of CEDAW does not describe all appropriate measures; see *id.*, Article 2 describes “all appropriate means” by which state parties are to condemn and end discrimination against women; *id.*, art. 2; and Article 3 mandates that state parties shall take action in “all fields” to end discrimination against women; *id.*, art. 3. Under CEDAW, state parties are responsible for the action of their governments, citizens, residents, and nongovernmental organizations, therefore, the responsibility of state parties under Article Five to “take all

conduct of men and women, with a view to achieving the elimination of prejudices,” customs, and practices “which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”⁶¹ Moreover, states need to take all appropriate measures to ensure that family education recognizes the social function of motherhood and identifies the common responsibility for raising children.⁶²

CEDAW completely condemns prostitution.⁶³ Under Article 6, states must “take all appropriate measures . . . to suppress all forms of traffic in women and the exploitation of prostitution of women.”⁶⁴ CEDAW’s writers attempted to expand and centralize all preceding anti-trafficking treaties.⁶⁵ Activities such as trafficking and exploitation of prostitution are sex-based discriminatory activities that harm women, and therefore violate women’s fundamental equality rights.⁶⁶

appropriate measures” to “modify the social and cultural patterns of conduct of men and women” requires immense and extremely broad state action.

⁶¹ *Id.*, art. 5(a).

⁶² *Id.*, art. 5(b).

⁶³ *Id.*, art. 6. Part IV will analyze CEDAW under the leading feminist theories. This discussion will include an argument that CEDAW does not endorse the legalization of prostitution because legalized prostitution and CEDAW stem from different feminist theories.

⁶⁴ *Id.* “Many other U.N. documents reflect the official international stance on the issue of violence against women during times of war and conflict.” Rumna Chowdhury, *Kadic v. Karadzic – Rape as a Crime Against Women as a Class*, 20 *LAW & INEQ.* 91, n.98 (2002). For examples, see the four Geneva Conventions of 1949 (the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, which describe as prohibited acts towards people not actively involved in the hostilities); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, art. 4, 1125 U.N.T.S. 609, 612, listing “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault”; International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 7, 999 U.N.T.S. 171, 175, stating that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”; Optional Protocol to the Declaration on the Elimination of Violence Against Women, G.A. Res. 104, U.N. GAOR, 48th Sess., art. 2, U.N. Doc. A/48/629 (1993) defining “violence against women” generally and explicitly. *Id.*

⁶⁵ Susan Jeanne Toepfer & Bryan Stuart Wells, *The Worldwide Market for Sex: A Review of International and Regional Legal Prohibitions Regarding Trafficking in Women*, 2 *MICH. J. GENDER & L.* 83, 102 (1994).

⁶⁶ *See id.*

CEDAW gives women fundamental political rights⁶⁷ and international representational rights.⁶⁸ States are mandated to end discrimination against women in political and public life, and to ensure women's equal rights to vote, be eligible for election, participate in the formulation of policy, hold office, and participate in associations and non-governmental organizations in these spheres.⁶⁹ Furthermore, states are required act to allow women to represent their governments internationally on an equal basis with men.⁷⁰

Article 9 addresses women's nationality rights and mandates that women will have equal rights with men to acquire, change, or retain their nationality and that of their children.⁷¹ CEDAW requires that states ensure that neither marriage to an alien nor change of nationality by the husband shall automatically change the wife's nationality.⁷²

The states' responsibilities and duties in the massive area of education are outlined in Article 10.⁷³ It obligates the states to end discrimination in education, including in professional and vocational training.⁷⁴ To ensure that women and girls receive equal education, the states must assure equal access to curricula, teaching staff, scholarships, and other means of receiving an equal education.⁷⁵ Moreover, states have an affirmative duty to eliminate stereotyped concepts of the roles of men and women through the revision of textbooks and teaching methods.⁷⁶ Finally, the states must enact programs to reduce female dropout rates.⁷⁷

⁶⁷ CEDAW, *supra* note 6, art. 7.

⁶⁸ CEDAW, *supra* note 6, art. 8.

⁶⁹ *Id.*, art. 7(a)-(c).

⁷⁰ *Id.*, art. 8.

⁷¹ *Id.*, art. 9.

⁷² *Id.*

⁷³ *Id.*, art. 10.

⁷⁴ *Id.*, art. 10(a).

⁷⁵ *Id.*, art. 10(b)-(d).

⁷⁶ *Id.*, art. 10(c).

⁷⁷ *Id.*, art. 10(f).

Article 11 mandates the end of discrimination against women in the field of employment.⁷⁸ State parties must ensure that women will enjoy the same rights as men in the field of employment.⁷⁹ These rights include: “[t]he right to work as an inalienable right of all human beings”, the right to the same employment opportunities and selection criteria, equal remuneration, “free choice of profession and employment,” equal promotion opportunities, job security and benefits.⁸⁰ Equal rights in employment also entitles women to social security, and protection of health – including maternal health – and safe working conditions.⁸¹ Finally, state parties must end discrimination in employment on the grounds of marriage or maternity, prohibit sanctions or dismissal for pregnancy, and introduce maternity leave with pay.⁸²

Article 12 focuses on women’s health care. It requires steps to eliminate discrimination in health care in order to ensure equal “access to health care services, including those related to family planning.”⁸³ Moreover, states must ensure that women receive “appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.”⁸⁴ The Convention does not specifically address abortion, even in this article and other articles that articulate women’s rights in family planning.⁸⁵

Article 13 covers social and economic rights.⁸⁶ This article requires that women be ensured the same rights as men in all areas of social and economic life⁸⁷. Women shall have

⁷⁸ *Id.*, art. 11.

⁷⁹ *Id.*

⁸⁰ *Id.*, art. 11(1)(a)-(d).

⁸¹ *Id.*, art. 11(1)(e).

⁸² *Id.*, art. 11(2)(a)-(b).

⁸³ *Id.*, art. 12(1).

⁸⁴ *Id.*, art. 12(2).

⁸⁵ *See id.*, art 12(1), 14(2)(b), and 16(c).

⁸⁶ *Id.*, art. 13.

⁸⁷ *Id.*

equal rights to family benefits, bank loans, mortgages, and financial credit.⁸⁸ Furthermore, women are entitled to equal participation in recreational activities, sports, and all other aspects of cultural life.⁸⁹

Interestingly, rural women's rights are specifically outlined in Article 14. This article focuses on the particular problems rural women face and their special roles in the economic survival of their families, including their work in the non-monetized sectors of the economy.⁹⁰ States are required ensure rural women's participation in development planning, access to adequate health care, social security programs, community services, and adequate living conditions.⁹¹ Furthermore, the states must ensure rural women's right to training and education, including education relating to functional literacy.⁹² States are also required to give women access to agricultural credit and loans, appropriate technology, and equal treatment in land and agrarian reform.⁹³

Next, the Convention secures all women's legal rights in Article 15.⁹⁴ States are obligated to take steps to ensure equality before the law and the same legal capacity to act in such areas as contracts, administration of property, civil matters, and choice of residence.⁹⁵

Article 16 requires the states to take steps to ensure equality in marriage and family relations.⁹⁶ The Convention outlines the women's rights regarding marriage to include: the right to choose marriage, the right to choose a spouse, equal rights and responsibilities as men in

⁸⁸ *Id.*, art. 13(a)-(b).

⁸⁹ *Id.*, art. 13(c).

⁹⁰ *Id.*, art. 14(1).

⁹¹ *Id.*, art. 14(2)(a), (b), (d), (h).

⁹² *Id.*, art. 14(2)(d).

⁹³ *Id.*, art. 14(2)(g)

⁹⁴ *Id.*, art. 15.

⁹⁵ *Id.*

⁹⁶ *Id.*, art. 16.

marriage, and equal rights to property.⁹⁷ States shall also ensure that women have equal rights and responsibilities as men toward children, including the right to decide freely and responsibly on the number and spacing of children and the means to do so.⁹⁸

Countries that have ratified or acceded to the Convention are “legally bound” to put its provisions into practice. They are also committed to submit national reports, at least every four years, on measures they have taken to comply with their treaty obligations.⁹⁹ Article 17 calls for the establishment of the Committee on the Elimination of Discrimination Against Women (“CEDAW Committee”) to evaluate progress made in implementation of the Convention by the United Nations and the individual States.¹⁰⁰ Article 21 directs the Committee to report annually to the General Assembly, and to make suggestions and general recommendations based on the states’ reports. Agency reports by the specialized agencies of the United Nations are allowed upon the Committee’s invitation.¹⁰¹ Finally, Articles 23 through 30, address treaty structure, reservations, and dispute resolution.¹⁰² These Articles set forth elements of the operation of the treaty, including how the treaty comes into operation, the limits on the scope of permissible reservations, and the way in which disputes between States can be settled.¹⁰³

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*, art. 18.

¹⁰⁰ *Id.*, art. 17. Committee members have been all women, except for one man from Sweden who served from 1982 through 1984. STEINER & ALSTON, *supra* note 2 at 188. Some scholars argue that the Committee should include more male feminists. *Id.* at 189. However, other scholars criticize this argument, and reply that if one was really interested in gender equality that person should start by addressing the low percentage of women on other U.N. Committees. *See id.* Committee members come from diverse fields such as sociology, medicine, international relations, education, political science, law, and government. *Id.* at 188.

¹⁰¹ CEDAW, *supra* note 6, art. 21.

¹⁰² *Id.*, art. 23-20.

¹⁰³ *Id.*

III.

ACCEPTING, BUT TEMPERING CEDAW

CEDAW has the dubious distinction of being the convention with the most ratifications and the most reservations. Section A of this part reviews the positive aspect of CEDAW's distinction – its ratifications. However, the Convention also “remains the leader among human rights treaties with respect to the number of reservations that its state parties have entered.”¹⁰⁴ Many of these reservations are the result of conflicts between custom or religion and women's rights.¹⁰⁵ These reservations are discussed in Section B of this Part. The United States' “real” concern with CEDAW is that it conflicts with our culture. This argument is explored in Part V.

A. *States that Have Ratified CEDAW*

As of June 2001, 168 countries – over two-thirds of the members of the United Nations – are party to the Convention. In total, CEDAW has 168 ratifications and accessions.

CEDAW has already facilitated change in many of the countries that have ratified the Convention. Women have used CEDAW to incorporate women's rights into constitutions, to update or eliminate national laws that discriminate against women, and to influence court decisions in their countries. For example, in Brazil, the women's movement used the Convention as the foundation to recommend changes to the Brazilian constitution.¹⁰⁶ The new constitution was newly drafted in 1988 and reflects many of the women's demands.¹⁰⁷ An example of reforms to national law comes from Japan. To comply with Article 11 of the Convention, the country enacted an employment discrimination law and a child-care leave

¹⁰⁴ STEINER & ALSTON, *supra* note 2 at 439.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 172-73.

¹⁰⁷ *Id.*

law.¹⁰⁸ Finally, Canada offers an example of a country's judicial system giving weight to CEDAW when interpreting national laws. Although domestic law takes precedence over international conventions in Canada, decisions of the Supreme Court of Canada have held that "[c]onvention provisions are germane to the interpretation of the Canadian Charter of Rights and Freedoms . . . and that the Charter's interpretations should not be narrower than the equivalent provisions" of conventions such as CEDAW.¹⁰⁹ These examples represent only small fraction of the positive impact CEDAW has had on women's lives around the world.

Despite CEDAW's requirement that countries file reports with the United Nations, fifty-eight countries have never submitted a report.¹¹⁰ The United States of America and twenty-four other states have not ratified CEDAW.¹¹¹ The other countries that have not ratified the Convention are (in alphabetical order): Afghanistan, Bahrain, Brunei Darussalam, Federated States of Micronesia, Democratic People's Republic of Korea, Iran, Kiribati, Marshall Islands, Mauritania, Monaco, Nauru, Oman, Palau, Palestine, Qatar, San Marino, Sao Tome & Principe,

¹⁰⁸ *Report of the Committee on the Elimination of Discrimination Against Women*, U.N. GAOR 13th Sess., 49th Sess., Supp. No. 38, U.N. Doc A/49/38 (1994) available at <http://www.un.org/documents/ga/docs/49/plenary/a49-38.htm> (last visited April 14, 2002). The U.N. Report summarizing the Japanese Report states:

The main features of the current situation of women in Japan were the progressive ageing of the female population, a decrease in the number of births, a trend towards higher educational attainment, the tendency of women to marry at a later age and an increase in the number of working women. Women occupied prominent positions in the Administration, the judiciary and the legislature . . . The proportion of women filling managerial posts in the public and private sectors had also been increasing . . . Harmonization of work and family responsibility was of great importance to attaining de facto equality. That was why the Child-care Leave Law had been put into force and subsidies given to employers to set up and run child-care facilities. In the Japanese civil service women were free to take entrance examinations in every job category. The representative said that de jure equality had almost been attained; however, customs deeply rooted in stereotypes and the poor representation of women in the decision-making process prevented women from achieving full de facto equality. *Id.*

¹⁰⁹ Barbara Roberts, *Information on CEDAW*, at <http://www.athabascau.ca/html/staff/academic/coseen/cedaw.htm> (last visited April 5, 2002).

¹¹⁰ United Nations Division for the Advancement of Women, *Country Reports at* <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (last visited Mar. 7, 2002).

¹¹¹ United Nations Division for the Advancement of Women, *State Parties at* <http://www.un.org/womenwatch/daw/cedaw/states.htm> (last visited Mar. 7, 2002).

Saudi Arabia, Solomon Islands, Somalia, Sudan, Swaziland, Tonga, Tuvalu, and United Arab Emirates.¹¹²

B. The Many Reservations to CEDAW

The Vienna Convention on the Law of Treaties defines a reservation to a treaty as a “unilateral statement” a state makes in the ratification process to “exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.”¹¹³ States may make a reservation to a treaty unless the reservation is “prohibited by the treaty” or “is incompatible with the object and purpose of the treaty.”¹¹⁴ The traditional concept was that “no reservation was valid unless it was accepted by all the contracting parties without exception.”¹¹⁵ However, the current prevailing view regarding human rights treaties is “a more flexible application of this principle,”¹¹⁶ because “permitting any one state party that objected to another state’s reservation of any type to block adherence to the convention by that other state would frustrate the convention’s goal of universal membership.”¹¹⁷ In other words, reservations are tolerated with the hope that allowing reservations will secure more ratifications.

CEDAW breaks new ground with regard to reservations submitted by state parties. As Henry J. Steiner and Philip Alston, human rights scholars, have noted:

[t]he high number of reservations that have accompanied ratification of CEDAW have become a regrettably notorious feature of the Convention, which is in this respect first among the human rights treaties. . . . Moreover, many of the CEDAW reservations are directed to fundamental provisions.¹¹⁸

¹¹² *Id.*

¹¹³ Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/Conf 39/28, UKTS 58 (1980), 8 I.L.M. 679, art. 2(1)(d).

¹¹⁴ *Id.*, art. 9.

¹¹⁵ Advisory Opinion, 1951 I.C.J. 15 (holding that the Genocide Convention permitted a state to enter a reservation although the treaty was silent regarding reservations, and thus, did not expressly allow reservations by state parties.

¹¹⁶ *Id.*

¹¹⁷ STEINER & ALSTON, *supra* note 2 at 440 (summarizing the Court’s reasoning in Advisory Opinion, 1951 I.C.J. 15.).

¹¹⁸ *Id.* at 440-41. As of January 2000, sixty-seven states have entered reservations to CEDAW. *Id.* at 442.

The Convention permits ratification subject to reservations.¹¹⁹ However, CEDAW prohibits reservations that are incompatible with the object and purpose of the Convention.¹²⁰ Some states parties that enter reservations to the Convention do not enter reservations to analogous provisions in other human rights treaties, such as the International Convention on the Elimination of All Forms of Racial Discrimination.

Oddly, some states enter a reservation to article 2, although their national constitutions or laws prohibit discrimination. These reservations leave an inherent conflict between the provisions of the state's constitution and its reservation to CEDAW. Several states have objected to these reservations on the grounds that they cheapen the coin of the Convention and all human rights treaties.¹²¹ Some scholars argue that any reservations to Article 2 are “manifestly incompatible” with CEDAW’s purpose, and therefore, should not be allowed.¹²²

Some reservations are drawn so widely that their effect cannot be limited to specific provisions in the Convention. An example is Turkey’s nebulous reservation “with regard to the articles of the Convention dealing with family relations which are not completely compatible with the provisions of the Turkish Civil Code.”¹²³

Many fundamentalist religious groups oppose the human rights movement’s goal of gaining equality for women through the transformation of traditional gender roles. In addition, many states still follow customary law and religious beliefs, rather than being bound by state-secular law. Therefore, a number of states enter reservations to particular articles on the grounds that national law, tradition, religion or culture are not congruent with Convention principles. The

¹¹⁹ CEDAW, *supra* note 6, art. 28(1).

¹²⁰ *Id.*, art. 28(2).

¹²¹ STEINER & ALSTON, *supra* note 2 at 441.

¹²² *E.g.* Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J INT’L L. 643, 644 (1990); Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination against Women*, 85 AM. J. INT. L. 281 (1991).

conflict between CEDAW's objectives and customary laws and religious practices is evident in the many reservations to the Convention.

The CEDAW Committee considers Articles 2 and 16 to be the core of the Convention and are very concerned when states enter reservations to either of these articles, even if the reservations are in response to a state's religion or culture.¹²⁴ However, the Committee has been forced to accept many of these reservations to Article 2, CEDAW's requirement of implementation measures, because there is no gender equality *jus cogens*.

Women, like men, are protected from violations of *jus cogens*: genocide, slavery, murder, disappearances, torture, prolonged arbitrary detention, and systematic racial discrimination. However, this list of *jus cogens* norms is silent regarding issues of distinctive concern to women. This absence indicates that women's experiences have not directly contributed to the development of *jus cogens*.¹²⁵ *Jus cogens* norms were all developed within the patriarchal international system to protect men from their worst fears.¹²⁶

Some social problems that affect females more than men are: 1) female fetuses are more likely to be aborted for their gender, 2) girls receive less nutrition as children, 3) women have a lower quality of life than men and women are a higher percentage of those living in poverty, and 4) there is a worldwide epidemic of violence against women. Although these problems threaten women's lives internationally, these issues have not led to the development of protective *jus cogens* norms. The struggle for equality requires that the international community unite with moral outrage over the problems women must face. Gender equality must be a *jus cogens*.

¹²³ Reservation of the Government of the Republic of Turkey to CEDAW, reprinted in STEINER & ALSTON, *supra* note 2 at 444.

¹²⁴ United Nations Division for the Advancement of Women, *Reservations at* <http://www.un.org/womenwatch/daw/cedaw/reservations.htm> (last visited Mar. 7, 2002).

¹²⁵ Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63, 65 (1993).

¹²⁶ *Id.*

Racial discrimination was elevated to a *jus cogens* because of the world's horror over the Second World War and Jewish Holocaust. The harm caused by the war and holocaust was felt by women too. Moreover, women are continuing to suffer. How many more women must be aborted, left to die, starved, beaten, raped, and killed before the world considers discrimination against women to be a *jus cogens*? Currently half the world's population is not protected by those problems that affect them the most.

Why are women left unprotected and without the rights that they need the most? Because patriarchy depends upon the subordination of women, and the world's governments and institutions are patriarchal. By not granting women the rights that are most important to them, sexist governments and individuals can choose when to "protect" women. Without a *jus cogens* dictating women's rights or granting all women protection from discrimination, patriarchal structures and systems will continue to oppress women. A *jus cogens* norm of gender equality could be codified in Article 53 of the Vienna Convention on the Law of Treaties. All norms codified in the Vienna Convention on the Law of Treaties are binding on all states and treaties.¹²⁷ Treaties are not allowed to include reservations that break a *jus cogens* norm. If a *jus cogens* protecting women's rights existed and was codified, then the United Nations would only be able to allow reservations that were consistent with both CEDAW's provisions and with the norms of *jus cogens*. Therefore, many of the current reservations to CEDAW would be void and would have to be withdrawn. CEDAW would have even more bite. The women of the world deserve such a *jus cogens* and a stronger CEDAW. Unfortunately, the thing that would benefit women the most (a *jus cogens*), is the very thing that the sexist and patriarchal institutions are least likely to give women.

IV.

APPLYING FEMINIST THEORY TO INTERNATIONAL LAW AND CEDAW

It will always take all kinds of women to make up the world, and only now and then will they unite their interests. When they do, I think it is safe to say that something historically important will happen.

-Eleanor Roosevelt¹²⁸

There are three main theories of feminism: Liberal Feminism, Cultural Feminism, and Radical Feminism. The theories diverge on whether men and women are inherently the same or different and how this sameness or difference influences equality. Though many feminists strongly disagree with one another, all three theories should be incorporated into the interpretation of CEDAW's provisions. It is only through uniting that women will be able to gain the advances they deserve. However, recommending unity is easier said than done. The three theories are discussed below and applied to the analysis of the Convention and the reports of the CEDAW Committee.

A. *Liberal Feminism*

Liberal Feminists have demanded equal treatment and rights for women under the law. Liberal Feminism theory is based on individual choice and promises equal rights and equal opportunity.¹²⁹ The concept is that men and women are inherently equal and the same, and thus, women deserve the same rights as men.

The collective human rights field is focused on the equal rights and equal protection of all

¹²⁷ Vienna Convention on the Law of Treaties, *supra* note 20, art. 53

¹²⁸ Eleanor Roosevelt, *Women in Politics*, GOOD HOUSEKEEPING, April 1940, at 45. Eleanor Roosevelt is a distinguished founder of the human rights movement. STEINER & ALSTON, *supra* note 3 at 138. She helped shape the United Nations and write the Universal Declaration of Human Rights. *Id.* She also fought for women's rights in the United States and internationally.

¹²⁹ Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 829 (1990).

people.¹³⁰ Likewise, CEDAW's general approach to equality follows liberal feminist theory. The Convention promotes Liberal Feminism because it defines the discrimination against women as the "impairing or nullifying the recognition, enjoyment or exercise by women . . . on a basis of equality of men and women."¹³¹ The application of the Liberal Feminist's equal protection principle is easily applied to basic issues like voting or admission to college. Article 7 is another example of straight Liberal Feminist theory. This Article requires states to ensure that women have the same rights as men to vote, to participate in government, and to participate in non-governmental organizations.¹³² The remaining articles are also predominately based on the concepts of Liberal Feminism.

Critics of Liberal Feminism argue that the entire premise of Liberal Feminism is flawed, because the rights that women are seeking were created by males and for males in the first place. Furthermore, critics point out that this approach relies upon male dominated institutions to enact and enforce change. Unfortunately, the state is not a neutral party; it is a biased patriarchal system, so it cannot be counted upon to enforce equal rights for women. Therefore, the liberal feminist approach does not give women the rights and protection they deserve. Women receive equal protection against infringement on rights designed to benefit males, but women do not have the protection of against the most pervasive harms afflicted upon women. Hilary Charlesworth and Christine Chinkin critique the Liberal Feminist's narrow view of equal rights:

"In the major human rights treaties, rights are defined according to what men fear will happen to them, those harms against which they seek guarantees. The primacy traditionally given to civil and political rights by Western international lawyers and philosophers is directed towards protection for men within their

¹³⁰ STEINER & ALSTON, *supra* note 3 at 177. However, women are often marginalized in human rights instruments such as the Universal Declaration of Human Rights. *Id.* Scholar Laura Reanda has termed this marginalization the "ghettoization" of women's issues in the United Nations. Laura Reanda, *Human Rights and Women's Rights: The United Nations Approach*, 3 HUM. RTS. Q. 11, 15 (1981).

¹³¹ See CEDAW, *supra* note 6, art. 1.

¹³² See CEDAW, *supra* note 6, art. 7.

public life – their relationship with government. The same importance has not been generally accorded to economic and social rights which affect life in the private sphere, the world of women, although these rights are addressed to states. This is not to assert that women are victims of violations of the civil and political rights they are not accorded the same protection, but that these are not the harms from which women most need protection.”¹³³

Thus, following the applying the theory of Liberal Feminism to CEDAW’s plain words will not work to rectify the poor situation of women in the world.

B. Cultural Feminism

Cultural Feminism asserts that women are different from men and that the legal system fails to recognize important differences between men and women. Women reason differently than men and that difference must be accepted, appreciated, and valued. Therefore, women should be valued in the law. Women’s strengths and additions to the world should be a factor in the law. The goal of Cultural Feminism is not to merely identify the unique traits of women. Additionally, women’s traits and characteristics should be celebrated and incorporated into the law. Equality will only result from valuing both women and men’s societal roles and conceptions of morality.

Cultural Feminists critique Liberal Feminism for failing to recognize and value the difference women bring to the table. The legal system is currently a male-dominated system. Therefore, to give women equal rights to men does not give her the equality she deserves. A Cultural Feminist historian argues that “in areas of law fundamental to women’s day-to-day well-being – including economic freedom, reproductive autonomy, marital equality, and personal security – the female rights basket was filled not to the male standard, but to the level a deeply sexist society would tolerate.”¹³⁴

¹³³ Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63, 65 (1993).

¹³⁴ SANDRA F. VANBURKLEO, “BELONGING TO THE WORLD:” WOMEN’S RIGHTS AND AMERICAN CONSTITUTIONAL CULTURE 304-05 (2001).

Cultural Feminists assert that women work hard, but have little to show for it. The work that women produce inside the home is mostly overlooked by women's families and their patriarchal societies. Many women are not given the training or opportunity to work outside the home; women in developing countries only participate in employment at half the rate of men.¹³⁵ Those women that do work outside the home earn significantly less than men; women in industrial countries only receive 51% of male wages.¹³⁶

Some of CEDAW's articles include the Cultural Feminist approach to women's work in the home and the role women play as mother. Article 5(b) states that nations must take all appropriate measures "[t]o ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children . . ." The first part of the Article 5(b) adopts Cultural Feminist theory. However, portion of Article 5(b) that discusses the roles of men and women in the family is an endorsement of the liberal feminist approach.

Article 14 is also based on Cultural Feminist theory. The Article grants special recognition to the value and rights of rural women. Here, the Convention mentions the work that women do for the family as part of their roles as wife, mother, or sister. Specifically CEDAW requires states to take into account "the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy."¹³⁷ The Cultural Feminist theory evident in Articles 5 and 14 help to give the Convention a different perspective on possible solutions to gender inequality.

¹³⁵ *Id.*

¹³⁶ *Id.*

C. Radical Feminism

Radical Feminism focuses on the differences in power between men and women. It reviews the physical, social, economic and sexual power differences that exist between the sexes. To Radical Feminist's, women are oppressed because they must live by the man's rules: social and sexual mores that require them to submit to men. Equality, defined by Radical Feminists, would encompass actual social, legal, and economic equality for women. Radical Feminists argue that male-created and dominated institutions will not be capable of securing equality for women. The very structures of power must change, before equality can result.

On its face, CEDAW does not espouse or push Radical Feminism. The Convention is written as if governmental structures will continue to exist as they are today. However, some organs of the United Nations have interpreted the Convention through a Radical Feminist lens. For example, two United Nations organs, the CEDAW Committee and the Special Rapporteur on Violence Against Women, have sometimes taken a radical feminist approach when analyzing the problems women face and recommending solutions.

The first example of the inclusion of the Radical Feminist approach to CEDAW appears in the CEDAW Committee's observations of China's combined third and fourth periodic reports.¹³⁷ In this report, the Committee deviated from Article 6 of the Convention, which calls for the suppression of prostitution. The Committee stated that it was "concerned that prostitution, which is often a result of poverty and economic deprivation, is illegal in China" and recommended "decriminalization of prostitution." Calling for the decriminalization of prostitution, the Committee has adopted a Radical Feminist attitude towards prostitution.

The second example of the application of Radical Feminist theory comes from the

¹³⁷ CEDAW, *supra* note 6, art. 14(2).

Special Rapporteur on Violence Against Women has also applied. This Special Rapporteur position was established after the CEDAW Committee recommended the creation of such a position to address the specific problem of gender-based violence.¹³⁹ Radhika Coomarasawamy, from Sri Lanka, serves as the special rapporteur.¹⁴⁰ She leads the United Nations efforts to engage in field missions, to seek and receive information from governments, consults with the CEDAW Committee, and submits annual reports to the United Nations General Assembly.¹⁴¹ In these reports, she uses the language of radical feminism to explain the entrenched and sexual nature of violence against women.¹⁴²

Specifically, an excerpt from Coomarasawamy's first report to the General Assembly discussed how their male family members within patriarchal family institutions often oppress women.¹⁴³ She also borrowed from Radical Feminism to make the strong point that women are constrained by sexual roles they are required to play within the family.¹⁴⁴ She noted that the feminine sexual role within patriarchal family structures traps and disempowers women.¹⁴⁵ She wrote in her report:

Violence against women is a manifestation of historically unequal power relations between men and women . . . and is not natural or born of biological determinism. . . . The institution of the family can be the source of positive nurturing where individuals bond through mutual respect and love. On the other hand, it can be a social institution where labor is exploited, where male sexual power is violently expressed and where a certain type of socialization disempowers women. Female sexual identity is often created by the family environment. The negative images of the self which often inhibit women from realizing their full potential may be

¹³⁸ See Concluding Observations of CEDAW Committee on Third and Fourth Periodic Reports of China, CEDAW/C/1999?1?L.1/Add.7, 1999, available at www.un.org/womenwatch/daw/cedaw.

¹³⁹ General Recommendation No. 19 of CEDAW Committee, 11th Sess., 1992, UN Doc. A/47/38, available at www.un.org/womenwatch/daw/cedaw/recomm.htm.

¹⁴⁰ STEINER & ALSTON, *supra* note 3 at 204.

¹⁴¹ *Id.*

¹⁴² See e.g. Special Rapporteur on Violence Against Women, Preliminary Report, UN Commission on Human Rights, E/CN.4/1995,42, Nov. 22, 1994.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

linked to familial expectation. . . .The ideologies which justify the use of violence against women base their discussion on a particular construction of sexual identity. The construction of masculinity often requires that manhood be equated with the ability to exert power over others, especially through the use of force. Masculinity gives man power to control the lives of those around him, especially women. The construction of femininity in these ideologies often requires women to be passive and submissive, to accept violence as a part of a woman's estate. Such ideologies also link a woman's identity and self-esteem to her relationship to her father, husband or son. An independent woman is often denied expression in feminine terms.¹⁴⁶

CEDAW Committee's recommendation that China decriminalize prostitution and Coomarasawamy's report are United Nations reports, not scholarly human rights pieces or law review articles. Thus, Coomarasawamy and the members of the CEDAW Committee are not critics working "outside the system" when examining the United Nations and its policies on women. On the contrary, they are part of the United Nations institution and work within its structure. Because they inject Radical Feminist theory into their reports and analysis, the United Nations has a better view of the problems women face and possible solutions to those problems. Thus, Radical Feminists working inside the United Nations, such as Coomarasawamy, can have a great impact on CEDAW and its provisions.

V.

THE UNITED STATES AND CEDAW

In June 1997, the Clinton Administration made the ratification of CEDAW a priority. The administration notified the Senate Foreign Relations Committee of the administrations priorities regarding the ratification of international treaties by the 105th Congress.¹⁴⁷ The Convention was the only human rights treaty listed the first category which was titled: "Treaties

¹⁴⁶ Special Rapporteur on Violence Against Women, Preliminary Report, UN Commission on Human Rights, E/CN.4/1995.42, Nov. 22, 1994.

¹⁴⁷ The Bahá'í Association, *Current Status and Importance of US Ratification* at <http://www.safnet.com/cedaw/current.html> (last visited April 10, 2002).

for which there is an urgent need for Senate approval.”¹⁴⁸ Moreover, the Clinton Administration suggested reservations to CEDAW to ensure that the Convention will not inappropriately intrude on states’ rights or into the areas the United States considers to be private domain.¹⁴⁹ However, CEDAW was not ratified before President Clinton left the White House. The Bush Administration has taken no action on CEDAW, and is not likely to ratify the Convention even though the Democrats have narrow control of the Senate.

A. The Status of CEDAW in the United States

The United States took an active role in drafting CEDAW and Jimmy Carter signed it on July 17, 1980.¹⁵⁰ Signing the Convention is different from ratifying it. Signing CEDAW is hortatory (meaning that the state will view the document as a recommendation), while a ratification is binding on the state. The Convention was given to the Senate Foreign Relations Committee in November 1980.¹⁵¹ For ten years, CEDAW received no attention from the Committee until the Senate Foreign Relations Committee finally held hearings on the Convention in the summer of 1990.¹⁵²

The Democrats were in control of the White House, Senate, and House of Representatives from 1992 through 1994, and the government took more vigorous action to ratify CEDAW. In the spring of 1993, sixty-eight senators wrote a letter to President Clinton, requesting President Clinton to take begin the ratification process of CEDAW.¹⁵³ Then, Secretary of State Warren Christopher announced at the 1993 World Conference on Human

¹⁴⁸ *Id.*

¹⁴⁹ These recommended reservations appear at Appendix 2.

¹⁵⁰ The Bahá’í Association, *Current Status and Importance of US Ratification* at <http://www.safnet.com/cedaw/current.html> (last visited April 10, 2002).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

Rights in Vienna that the Administration would work to ratify CEDAW and the Convention on the Right's of the Child.¹⁵⁴

In September 1994, the Democratic-led Senate Foreign Relations Committee released a favorable report on CEDAW.¹⁵⁵ Thirteen of the Committee voted for CEDAW, five voted against it, and one abstained.¹⁵⁶ The Committee also recommended several reservations, understandings, and declarations.¹⁵⁷ These reservations, understandings, and declarations expressed that the “United States does not accept any obligation under the Convention to enact legislation or to take any other action with respect to private conduct except as mandated by the Constitution and United States Law.”¹⁵⁸ The Committee also recommended reservations to the right to equal pay understood as comparable worth, the right to paid maternity leave, and any obligation under Articles 5, 7, 8, and 13 of the Convention that might restrict constitutional rights to free speech, expression and association.¹⁵⁹

Unfortunately, the Foreign Relations Committee vote did not occur until the final days of the congressional session. At that time, several senators, including Senator Jessie Helms, blocked CEDAW from a Senate vote during the 103rd Congress. The Clinton Administration was still hopeful that the United States would ratify CEDAW soon, and made a public commitment to ratify CEDAW by 2000 at the UN Conference on Women in Beijing.¹⁶⁰

However, the new Republican-led Senate convened in January 1995 and sent CEDAW back to the Senate Foreign Relations Committee.¹⁶¹ Hard-nosed Republican Senator Jessie

¹⁵⁴ *Id.*

¹⁵⁵ S. DOC. NO. 384-10, *reprinted in* 89 AM. J. INT. L 102 (1995).

¹⁵⁶ *Id.*

¹⁵⁷ The Bahá'í Association, *Current Status and Importance of US Ratification*, *supra* note 132.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

Helms took over as Chairman of the Committee.¹⁶² Not surprisingly, the Committee took no formal action on CEDAW during Republican control, and Senator Helms declined to meet with supporters of the Convention.¹⁶³ Senator Helms did make headlines when he ordered the removal of ten female House members from a Committee hearing after the women presented him with a letter supporting the ratification of CEDAW.¹⁶⁴ The women were led by Representative Lynn Woolsey of California.¹⁶⁵ Senator Helms was taken aback by the situation and gavelled the hearing to a halt.¹⁶⁶ He chastised Representative Woolsey by barking, “please be a lady,” and then ordered the uniformed officers to force the women to leave.¹⁶⁷ Representative Nancy Pelosi responded to Senator Helms’ condescending behavior by telling the press that “while he was asking us to be ladies, he could have been more gentlemanly in treating us like colleagues in Congress.”¹⁶⁸ This event is a good representation of the disdain that Senator Helms and many other Republicans in Congress have for CEDAW and those who support the Convention.

Senator Barbara Boxer, a Democrat from California, continues to push the Senate and the Bush Administration to take steps to ratify CEDAW.¹⁶⁹ She has sponsored three resolutions in calling for the Senate to ratify CEDAW.¹⁷⁰ Senator Ron Wyden from Oregon and thirty-three other Senators supported the Resolutions.¹⁷¹ Moreover, Senator Boxer has lobbied Secretary of

¹⁶² See Eric Schmitt, *Helms Orders 10 Women From House Out of a Senate Hearing*, N.Y. TIMES, Oct. 28, 1999, at A25.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ See *UN Human Rights Commission: Hearing Before the Senate Foreign Relations Subcomm. on International Operations and Terrorism*, 106th Cong. (2001) (statement of Barbara Boxer, Member of the Senate Foreign Relations Subcomm.), available at 2001 WL 553997.

¹⁷⁰ S. 237, 106th Cong. (1999); S. 279, 106th Cong. (2000), S. 286, 106th Cong. (2000).

¹⁷¹ Sixty-seven “yes” votes within the Senate are needed for that body to consent to ratification. No action by the House of Representatives is required to ratify international conventions. Ten state legislatures have endorsed U.S. ratification of CEDAW: California, Hawaii, Iowa, Maine, Massachusetts, New Hampshire, New York, North Carolina, South Dakota, and Vermont. Oregon has not taken any action on the Convention.

State Colin Powell to review the Convention, and has requested that the Senate Foreign Relations Committee begin the ratification process.¹⁷² Last May, the Senate was about to change hands from Republican control to a Democratic leadership. Senator Boxer noted that a change in leadership might happen and, if so, that she might end up with a leadership role in the Subcommittee on International Operations and Terrorism.¹⁷³ She made it clear that if she were in charge, things would be very different:

But let me just announce today, that if I have a chance and the honor to hold the gavel, I do intend to bring hearing on these various treaties. And I would encourage you and the administration to take a really hard look [at CEDAW and other human rights treaties], because I can't explain to my constituents when they raise their hand, and if they do, why we're not taking action [to ratify CEDAW and the other treaties]. And even if the Senate doesn't vote on them, Mr. Chairman, for some reason, I think it is our responsibility to look at them.¹⁷⁴

Indeed, Senator Boxer now holds the gavel as the Chairwoman of the Subcommittee.¹⁷⁵

Senator Joseph R. Biden, a Democrat from Delaware, is now the Chairman of the Senate Foreign Relations Committee.¹⁷⁶ However, the Foreign Relations Committee and the Subcommittee on International Operations and Terrorism have had many other pressing priorities since September 11, 2001. Therefore, Senator Boxer and the other Senators have been busy responding to the terrorism crises and have not yet had the opportunity to hold those hearings on CEDAW.

¹⁷² *UN Human Rights Commission: Hearing Before the Senate Foreign Relations Subcomm. on International Operations and Terrorism*, *supra* note 149.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Senate Foreign Relations Subcommittee on International Operations and Terrorism*, at http://foreign.senate.gov/committee/sub_mbr.html#intl_ops. The subcommittee's responsibilities include: all matters, problems and policies involving international operations and terrorism. This jurisdiction includes the general oversight responsibility for the Department of State, the Foreign Service, international educational and cultural affairs, foreign broadcasting activities, foreign buildings, United States participation in the United Nations, its affiliated organizations, and other international organizations not under the jurisdiction of other subcommittees. The subcommittee also has jurisdiction over general matters of international law, law enforcement, and illegal activities. Finally, the subcommittee oversees all U.S. foreign policy, programs and cooperative efforts to combat international terrorism. *Id.*

¹⁷⁶ *Senate Foreign Relations Committee*, at <http://foreign.senate.gov/>.

San Francisco became weary while waiting for the United States Senate to ratify CEDAW. The liberal city came up with another approach to secure women's equality. San Francisco incorporated the Convention's principles into city ordinances, which bind the City and its residents.¹⁷⁷ Other communities can follow San Francisco's lead and agree to be bound by the CEDAW's provisions. Enacting CEDAW as state or local law would send a strong pro-ratification message to the United States Senate and the White House.

Hopefully, the Senate will begin the ratification process soon because the United States is placing its credibility as a leader for human rights on the line, by not ratifying the Convention. The United States stands in lonely company with the other few nations that have failed to ratify the Women's Convention. This country has committed to ratify the Convention, and it must keep that commitment.

B. Rebutting the Republicans' Objections to CEDAW

Naturally, the five senators who voted against CEDAW when it was under consideration by the Senate Foreign Relations Committee in 1994 were all Republican males. Their purported reason for not voting for CEDAW was that they were not "persuaded" that the Convention was "a proper or effective means of pursuing" the elimination of discrimination against women.¹⁷⁸ The dissenting senators stated that CEDAW is "unlikely to convince governments to make policy changes they would otherwise avoid."¹⁷⁹ The dissenting senators believed that the Convention was overreaching and created "another set of unenforceable international standards."¹⁸⁰

The senators suggested that CEDAW was an empty promise and was not realistic or

¹⁷⁷ See San Francisco, Cal., Admin. Code, ch. 12K (2001).

¹⁷⁸ 146 Cong.Rec. S1381-02, available at 2000 WL 263524.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

achievable. In effect, the senators were arguing that if gender inequality can not be fixed completely through CEDAW, then the administration and Congress should just give up and accept the patriarchal status quo. Catherine MacKinnon has heard this realism argument often and rebuts it by stating that “of course realism is desirable. But accepting the status quo as the only reality that can be, and the other side's myths as characterizing it, is not realism for a political movement for equality; it is suicide.”¹⁸¹

In actuality, the dissenting senators reached erroneous conclusions. CEDAW has had a tremendous effect on governments and women. A few of the successes women have achieved in other countries are outlined above in Part III. There are many more examples of CEDAW’s success in transforming the status of women.

Another example appears in *Ephrahim v. Pastory*.¹⁸² Pastory inherited clan land from her father and sold it to a non-clan member and the sale was held invalid by the Primary Court.¹⁸³ The Tanzania High Court deviated from national customary law and granted females the power to sell clan land.¹⁸⁴ In part, the Court based its decision on CEDAW, to which Tanzania is a party.¹⁸⁵ The Court exclaimed that “[f]rom now on, females all over Tanzania can at least hold their heads high and claim to be equal to men as far as inheritance of clan land and self-acquired land of their father’s is concerned.”¹⁸⁶ The Court recognized that the ability to sell land was but one step on the road to gender equality. Finally, the Court noted that it was surprised that “it has taken a simple, old rural woman to champion the cause of women in this field, not the elite women in town who chant jejune slogans years on end on women’s lib but without delivering the

¹⁸¹ Catharine A. MacKinnon, *Unthinking ERA Thinking*, 54 U. CHI. L. REV. 759, 762 (1987).

¹⁸² *Ephrahim v. Pastory*, Tanzania High Court (1990), reprinted in 87 IN. L. REP. 106 (1992).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

goods.”

This case offers more proof to dissenters of CEDAW that the Convention can help change national laws. Moreover, Pastory is another example of how an individual woman can use CEDAW to gain equality for a nation’s women. Therefore, CEDAW does impact women’s lives and can transform the laws, structures, and systems of other states.

C. The REAL Reason the United States Has Not Ratified CEDAW

The purported reason given by Republican senators for blocking CEDAW is a mere pretext. In actuality, opponents to CEDAW likely have a very different fear that stems from the political ideology of the United States. The “real” reason the United States has not ratified CEDAW is that the Convention grants many positive rights. Historically, the United States avoids granting a right that requires an obvious out-put from the government. Indeed, the United States has not granted very many positive rights to its citizens and residents. Those positive rights the United States has granted, social security and welfare have remained in the limelight.

Human rights scholars define rights by the type of correlative duty that the right places upon the state. There are two types of rights: positive and negative. Negative rights impose a “hands-off” duty – a duty of a state’s non-interference with a person’s inherent dignity and physical security.¹⁸⁷ Positive rights impose an affirmative duty on the state, if the state is required to provide an element essential to satisfy a basic human right.¹⁸⁸ Thus, economic and social rights such as the right to food (through food stamps or subsidies) were considered positive rights, because they often required state financing. Most classic negative rights – like physical security rights, the rights to fair process, equal protection, and speech – were thought to

¹⁸⁷ STEINER & ALSTON, *supra* note 3 at 181.

¹⁸⁸ *Id.*

merely require “abstention from unjustified interference with another person.”¹⁸⁹ Negative rights have been considered by some male scholars to be the only genuine rights.¹⁹⁰ For example, Locke argued that it is not very costly to respect a man’s right to life, liberty, and property.¹⁹¹ Obviously, this argument comes from a man who supported patriarchy and was deeply indebted to patriarchal society for his success.

Usually the United States has been adverse to positive rights and shies away from granting very many positive rights.¹⁹² Through the years, the Republican leadership has been chipping away at whatever positive rights we do have in the United States. This erosion has impacted women more than men. An example of this Republican led corrosion is the changes in welfare laws – an idea sold to the public as “welfare reform.” The two-year cap on welfare disparately affects women, especially single mothers.

However, the United States fails to see the financial cost of negative rights. The right to be free from torture is often considered to be a classic negative right, but it is hardly cost-free for the government. The government is required to create and finance systems to enforce and guarantee the right against torture. Even offering a remedy through the courts for a violation of a right requires public money. Police, jails, and courts are all expensive institutions that promote and ensure many “negative” rights. Because the government forgets to factor in all the costs of putting institutional machinery in place to guarantee “negative” rights, the patriarchal government has concluded that negative rights, such as the right to equal protection of laws, are cheaper than positive rights, such as the right to health care. Therefore, the government is

¹⁸⁹ *Id.*, at 181-82.

¹⁹⁰ *Id.*, at 185.

¹⁹¹ Maurice Cranston, *Are There Any Human Rights?*, 112/4 DAEDALUS 12 (1983).

¹⁹² STEINER & ALSTON, *supra* note 3 at 363.

defending its patriarchal system by making this nonsensical distinction between what it views as negative and positive rights.

Negative rights are also frequently thought to maintain a person's circumstance, while positive rights can actually advance a person's well being. The Convention's provisions do require states to advance the circumstances of women, by offering equal education, health care, and more employment opportunities. Opponents of CEDAW see the Convention's provisions as being a "leg-up" or an "extra boost" for women. However, this kind of reasoning is flawed. Women have been subjected to oppression and discrimination for so long that they are not starting on equal ground as men. CEDAW does not give women an edge over men; it merely claims for women a place on the starting line of the race, and requires that the race not be fixed by the patriarchy. Equality for women will mean nothing unless women are given a chance to stand on the same starting line with the men.

CONCLUSION

The United State's failure to ratify CEDAW is hurting all women. The Convention is the primary tool that women around the world are using in their struggle against the effects of discrimination by establishing a minimum set of standards state parties must follow and support to eliminate this discrimination. Universal ratification of the Convention will help counter the claims that a custom of discrimination against women exists through certain culture's acceptance of discrimination, domestic violence, and other forms of oppression against women. However, partly because the United States is not a party to the treaty, repressive governments have ignored CEDAW's requirements and their obligations under the Convention.

Finally, all people, women as well as men, must put in the effort to rethink our patriarchal structures and the customs, traditions, and rules created by the patriarchy. All feminists, no

matter what their philosophies, need to contribute ideas and possible solutions. We must be committed to working together for the common goal of gender equality and the full participation of women throughout the world. We must set our goals high, and we must invest the work to accomplish them. For if we improve the lives of women, we improve the lives of us all. We must shot for the moon. We must experience full equality.