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WORKING PAPERS

Equality and Difference: Regional Courts and Women's Human Rights

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Center on Democracy, Development, and the Rule of Law
Stanford Institute for International Studies

Number 18
1 September 2004

This working paper was produced as part of CDDRL's ongoing programming on economic and political development in transitional states. Additional working papers appear on CDDRL's website: http://cddrl.stanford.edu. This paper also appears in the Stanford Public Law and Legal Theory Working Paper Series http://papers.ssrn.com/sol3/papers.cfm?abstract_id=546202.

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Equality and Difference: Regional Courts and Women's Human Rights

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Abstract

Women's human rights lie at the intersection of two intellectual and political movements: gender equality, and multiculturalism. In this chapter I argue that the role and the reach of regional human rights institutions should be expanded so that they participate more fully in developing women's human rights jurisprudence. Regional courts could help to mediate between the human right to be equal and the human right to be different. Regional human rights institutions could provide an important institutional supplement to better adjudicate differences between national and international human rights standards.

Introduction

From its post-WW II inception, the international human rights system has increasingly recognized that certain groups within society are especially vulnerable. As early as the framing of the International Covenant on Civil and Political Rights, women's special needs have been recognized under two principal headings: women's lack of political power relative to men's political power, and women's special vulnerability because of their biology.[1] Women are especially vulnerable to sexual violence, and women's child-bearing and child-raising responsibilities render women especially vulnerable to economic discrimination. In 1979, the Convention for the Elimination of Discrimination Against Women (CEDAW) created international obligations upon signatory nation states to institute national reforms for women's political, economic, social and cultural rights. Catalyzed by the spirit of second wave feminism of the 1960s, CEDAW is one of the institutions of international law that encourages and impels nation states to take better care of their women and children.

In the decades following CEDAW's formation, intellectual trends and empirical global conditions have altered. The politics of feminism have since merged into the concerns of post-colonial peoples and, more recently, into a new debate about the status of minority peoples. Other draft international treaties between the early 1980s and 1990s articulated gender-neutral minority rights, cultural rights, and rights to self-determination. But in seeming contradistinction to the universalist principle driving CEDAW, these treaties exhibit a new respect for human diversity. With the advent of multiculturalism, the politics of feminism must interact with the politics of difference.

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[1] See Ruth Bader Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*" originally delivered as the William T. Joyner Lecture on Constitutional Law at the University of North Carolina School of Law on April 6, 1984, and reproduced in Frances E. Olsen (ed), *Feminist Legal Theory I: Foundations and Outlooks* (1995), 281.

Global economic conditions have also altered markedly in the last decade. Population movements in the post-Cold War period have produced interactions among national, ethnic and religious groups on a scale not envisaged when these international human rights treaties were first framed. New technologies have created a heightened awareness of cultural minorities within nation states and also of the differences between national legal systems. Globalization has given new impetus to the debate about universal standards of human rights versus multiculturalism. Women are at the nexus of this debate.

In this paper, I argue that expanded and invigorated regional human rights systems are an important bridge between women's human rights and multiculturalism. Women's human rights intersect with region-specific problems and contexts as well as national governments' commitments and capacities. A more explicit system of power sharing between the international and the regional human rights systems could lead to more accurate measurements of human rights compliance by states. It could encourage more honest assessments of whether departures from international human rights standards are premised upon legitimate national constraints, or are instead simply a shield for national governments reluctant to step up to their human rights plate. Regional human rights commissions and courts have the advantage of proximity to the local and regional context and could thus formulate standards of human rights for nation states that are both morally credible *and* practically attainable. Through a more practically grounded knowledge of national contexts, regional systems can help to build a women's human rights jurisprudence that is compatible with today's conditions.

In what follows, Part I sets out the architecture of the international women's human rights system, pointing out the practical and conceptual problems in achieving CEDAW compliance from recalcitrant nation states. Part II sets out the changing normative terrain of the debate about women and multiculturalism. This debate is accelerating under the new conditions of globalization and the economic and legal responses to it. Globalization reinforces the need for a better-developed jurisprudence of women's human rights. Finally, Part III proposes a stronger role for regional courts in developing women's human rights jurisprudence, and makes specific recommendations about institutional structure and policy.

1. Setting the women's international human rights scene

(A) CEDAW

"CEDAW", the International Convention on the Elimination of All Forms of Discrimination against Women, sets the international benchmark for women's human rights.[2] Adopted by the General Assembly of the United Nations in December 1979, it remains open for the accession and ratification of individual nation states. CEDAW has

[2] Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature Mar. 1, 1980, T.I.A.S. No. 8289, 1249 U.N.T.S. 14, available at http://www.un.org/womenwatch/daw/cedaw/.

been signed by ninety-eight countries and has received 175 ratifications, accessions and successions.

CEDAW establishes that nation states carry the responsibility of instituting the international standards of human rights for its women. For example, CEDAW requires states to eliminate discrimination against women in the enjoyment of all civil, political, economic and cultural rights and to also establish programmatic measures for the achievement of equality between women and men.[3] Articles 2 and 16 of CEDAW are core provisions because they set out the key principles of gender equality and the obligations of the states to ensure them (Article 2) and the equality of women with men in all matters of family life (Article 16). Like all international human rights treaties, state participation in CEDAW is voluntary. Some nations, like the US, have yet to adopt CEDAW.[4] Other nations have signed on to the treaty but have also entered reservations to specific Articles, exempting themselves from particular human rights obligations under the treaty.

While the main emphasis of CEDAW lies in ensuring women's equal access to, and equal opportunities in, political and public life such as the right to vote and the right to stand for election, there are also provisions about equality of opportunity in education, health and employment. States further agree to take appropriate measures to modify customary, social and cultural behaviors that are based on gender inferiority or on stereotyped roles for men and women (Article 5); and to suppress all forms of traffic in women and exploitation of women (Article 6). The Convention also affirms the reproductive rights of women (Article 11.2); affirms women's rights to acquire, change, or retain their nationality and the nationality of their children (Article 9); and affirms full equality before the law (Article 15).

(B) Practical problems with CEDAW and the international system

While the language of CEDAW seems clear enough, the international system has had some difficulties in applying it to women in all the signatory states. CEDAW is likewise framed in universal language, stating one common human rights standard for all women, regardless of their racial, religious, or ethnic origin. In stating this, CEDAW is like all international human rights treaties, expressing the belief that individual human worth and dignity is the fundamental human value worthy of universal legal protection by the state. Individual autonomy is ranked ontologically prior to group affiliation and group practices and international treaties use the language of universalism to express this. But the individualistic assumptions behind CEDAW's provisions are controversial. They

[3] 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. Currently, 173 countries - more than two- thirds of the members of the United Nations - have ratified the Convention, committing them to a legally binding international treaty, including participation in a country-by-country reporting process. An additional 97 countries have signed the treaty, binding them to do nothing in contravention of its terms.

[4] See Sean D. Murphy, *Contemporary Practice of the U.S. Relating to International Law* 96 A.J.I.L. 956, 971-72 (2002) (explaining that after the U.S. executive signed CEDAW in 1980, continuing attempts to procure the consent of the U.S. Senate have failed).

have led many Asian, Middle Eastern and some Islamic countries to enter reservations to CEDAW, citing theocratic or cultural values that they claim are instead premised on group identity and collective well being.

1) Reservations to CEDAW

Like many international treaties, CEDAW expressly permits state parties to enter reservations. However, CEDAW stands apart from other international human rights treaties in both the large number and the substantive nature of the reservations that nation states have entered to it.[5] CEDAW restates the general Vienna Convention rule, providing that a "reservation incompatible with the object and purpose of the present convention shall not be permitted."[6] But whereas most international treaties carry only a handful of reservations, of the 175 states that have ratified or acceded to CEDAW, 54 have entered treaty reservations.[7] Fifteen states have reservations relating only to the treaty's dispute resolution mechanism, and the remaining 39 states have substantive reservations that eliminate or modify the state's obligations under the Convention. Although the specific structure and language varies, these reservations fall along similar fault lines. States have cited economic imperatives, Islamic law, the purported need for religious freedom, or domestic law to trump even CEDAW's most central guarantees. In this way, CEDAW reservations are both quantitatively and qualitatively more troubling than those in other treaty regimes.[8]

(a) Religious Derogations from CEDAW

Many nations have entered reservations limiting CEDAW's application based on the mandates of Islamic or Sharia law. Often, these reservations are formulated in sweeping language declaring that the state will not comply with any treaty provisions that derogate from Sharia law.[9] This renounces all CEDAW obligations that conflict with Islamic law without specifying the content of that law or the particular instances where it modifies the state's CEDAW commitments, leading one scholar to identify Sharia-based reservations as the "most problematic" of the international human rights treaty regime.[10] Other predominantly Islamic states have more limited reservations to CEDAW.

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[5] *See* Madhavi Sunder, *Piercing the Veil*, 112 Yale L.J. 1399, 1425 (2003) ("CEDAW has the dubious distinction of having the highest number of reservations by the states party to it"). *See also*, William A. Schabas, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child*, 3 Wm. & Mary J. of Women & L. 79, 84-86 (1997).

[6] CEDAW, *supra* note 2, art. 28(a).

[7] *See* Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women* 85 A.J.I.L. 281, 283 (1991) (comparing CEDAW with CERD, to which only four states had entered substantive reservations as of 1991).

[8] *See* Jennifer Riddle, *Making CEDAW Universal: A Critique of CEDAW's Reservation Regime Under Article 28 and the Effectiveness of the Reporting Process*, 34 Geo. Wash. Int'l L. Rev. 605, 627 (2002).

[9] *See, e.g.*, Multilateral Treaties Deposited with the Secretary-General (hereinafter, Multilateral Treaties), at 233, U.N. Doc. ST/LEG/SER.E/14 (2002) (Saudia Arabian reservation stating that "in case of contradiction between any term of the convention and the norms of Islamic law, [it] is not under obligation to observe the contradictory terms of the Convention"); s*ee also*, *Ibid* at 231 (Mauritania reservations approving CEDAW where "not contrary to Islamic Sharia and in accordance with our constitution").

[10] Schabas, *supra* note 5, at 84.

Morocco, the Maldives, and Egypt have entered reservations declaring they will not comply with CEDAW's grant of equal rights during marriage, citing Sharia law's design of "true equality between the spouses."[11] Singapore has limited compliance with CEDAW by reference to preserving diversity, invoking "the context of Singapore's multi-racial and multi-religious society," as justification.[12]

Sharia-based reservations have repeatedly drawn objections from other nations. Finland, for example, has argued that the "unlimited and undefined nature" of reservations based on Sharia law "create serious doubts about [a state's] commitment to fulfill its obligations under the Convention, [as]…[t]hey are clearly contrary to the object and purpose of the Convention."[13] Similarly, the U.N. Committee for the Elimination of All Forms of Discrimination Against Women has declared that reservations like this are "incompatible with the object and purpose of the present convention".[14] In response to these objections, some states in the global south have withdrawn or narrowed the scope of their reservations.[15] However, these may be "little more than semantic"[16] rather than a sincere wish to institute gender equality.

While Sharia-based reservations entered by Muslim countries are generally the most serious, several other nations have used religion to disclaim adherence to CEDAW guarantees. The United Kingdom, Ireland, and Lesotho make clear that CEDAW will not apply to religious groups.[17] Similarly, Israel's reservation rejects the obligation to appoint women to religious courts, and states that Article 16's personal status provisions such as rights within marriage, parental responsibility, and reproductive agency don't bind Israeli religious communities.[18]

(b) Reservations Based on Domestic Law

Many nations have entered reservations that limit CEDAW compliance by reference to their domestic law or their domestic constitution. Some of these nations guarantee compliance only where the Convention is consistent with the domestic constitution. For example, Mauritania has stated that it approves the convention only

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[11] Multilateral Treaties, *supra* note 9, at 231 (Morocco), 230-31 (Maldives), and 228 (Egypt). Other Muslim states have entered similar Sharia-based reservations to specific CEDAW guarantees: Bahrain, *Ibid*. at 227 (reserving compliance w/ Article 16 based on Sharia law); Kuwait, *Ibid*. at 230 (rejecting CEDAW's equal rights to adoption and guardianship based on Sharia); Malaysia, *Ibid*. at 230 (reserving compliance with CEDAW rights to property division, public offices appointment, and children's nationality, all with reference to Sharia mandates).

[12] *Ibid*. at 233. For another example of targeted Islamic CEDAW reservations, see Syria's reservation, *Ibid*. at 233 (stating that Syria will not comply with Article 16's prohibition on betrothal or marriage of a child insofar as it is incompatible with Sharia law).

[13] *Ibid*. at 238.

[14] Schabas, *supra* note 5, at 85, citing Report of the Committee for the Elimination of All Forms of Discrimination Against Women, U.N. GAOR, 49th Sess., Supp. No. 38, at 13, U.N. Doc A/49/38 (1994).

[15] Multilateral Treaties, *supra* note 9, at 250-54 (showing that since 1996, Bangladesh, Brazil, Cyprus, Malawi, Mauritania, and South Korea have withdrawn or narrowed their CEDAW reservations) .

[16] Sunder, *supra* note 5, at 1427.

[17] Multilateral Treaties, *supra* note 9, at 234 (U.K.), at 229 (Ireland), and at 230 (Lesotho).

[18] *Ibid*. at 229-230.

where in accordance with its domestic constitution, and not contrary to Islamic law.[19] Similarly, Pakistan has provided that its accession to the Convention is subject to provisions of the domestic constitution.[20] Even Liechtenstein has reserved the right to apply Article III of its constitution to all its treaty obligations, which preserves the patrilineal monarchy under Liechtenstein's constitution.[21]

Other nations have entered less far-reaching reservations based on domestic law that apply only to specific Convention guarantees. Algeria has entered reservations stating that the Algerian Family Code trumps CEDAW provisions on women's choice of residence and marriage rights and that CEDAW's rights on nationality are subject to the Algerian Nationality Code.[22] Tunisia and France have similarly stated that CEDAW's provisions on nationality will not be interpreted as precluding application of their domestic nationality codes.[23] Even Switzerland has declared that its domestic laws on women in armed conflict, family names, and marriage, override CEDAW.[24]

Commentators have noted that under the Vienna Convention, a country may not justify noncompliance based on domestic law.[25] It is thus unsurprising that CEDAW derogations based on domestic law have also drawn objections. For example, the Netherlands has stated that reservations "invoking national law and the Constitution, may raise doubts as to the [state's] commitment…to the object and purpose of the Convention and, moreover contribute to undermining the basis of international treaty law."[26] Despite objections like this, reservations to CEDAW grounded in domestic law remain common.

(c) Recognition of Economic and Social Realities

A few states share reservations that accept CEDAW rights and endorse their importance, but recognize the state's limited ability to implement those rights. For example, India supports CEDAW Article 16(2)'s requirement of a marriage registry, but states in its reservation that it has practical implementation problems in such a vast country with such varying customs, religions, and literacy levels.[27] Similarly, Mexico's reservation makes it clear that the state will only grant material benefits in accordance with the convention as the state's material and economic resources permit.[28] Niger has entered reservations to several CEDAW treaty provisions that it believes cannot be instituted immediately because they conflict with existing customs, and can only be

[19] *Ibid*. at 231.
[20] *Ibid*. Lesotho and Tunisia provide similar examples, as their reservations free them from taking any action that would conflict with their domestic constitutions. *Ibid*. at 230 (Lesotho) and 223-24 (Tunisia).
[21] *Ibid*. at 230.
[22] *Ibid*. at 226.
[23] *Ibid*. at 223-24 (Tunisia) and 228 (France). *See also* Morocco and Tunisia's reservations that recognize the right to choose domicile only to instances where it would not conflict with domestic law. *Ibid*. at 231 (Morocco) and 223-24 (Tunisia).
[24] *Ibid*. at 233.
[25] Clark, *supra* note 7, at 294.
[26] Multilateral Treaties, *supra* note 9, at 238.
[27] *Ibid*. at 229.
[28] *Ibid*. at 231.

remedied gradually as society evolves.[29] In the same vein, Malta's reservations under Articles 13, 15, and 16 preserve present legislation until such time as the law can be reformed.[30]

2) The CEDAW Committee System

(a) Operation

Like a handful of other important international human rights conventions, CEDAW has its own United Nations Committee. This Committee is responsible for monitoring and enforcing CEDAW and assessing the progress made by nation states through periodic reports submitted by state parties.[31] Country reports submitted to the Committee must describe the state's compliance with CEDAW and measures taken by the state to eradicate discrimination against women.[32] The Committee may make suggestions and general recommendations based on the examination of reports and information received from the States Parties.[33] These reports both praise and castigate, noting progress as well as identifying the worst failures of states to systematize and enforce CEDAW within their domestic systems.[34] The strategy behind this "carrot and stick" approach is that adverse international attention will encourage better compliance from states eager to create a better reputation as good international citizens – a standing that will bring greater credibility in the community of nations and boost external relations when negotiating security and economic issues. CEDAW has no individual petition process or judicial enforcement mechanisms, so shaming states through international scrutiny is its only compliance tool.[35] The reporting procedure is thus the "raison d'etre of the Committee's activities."[36]

(b) Problems and constraints

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[29] *Ibid*. at 232.
[30] *Ibid*. at 231.
[31] CEDAW, *supra* note 2, at Article 17. In considering the extent of the legislative, judicial, administrative or other measures that they have adopted to implement the Convention, the CEDAW Committee takes into account the institutional as well as the cultural capacity of a nation to institute change. Article 21 of the Convention empowers the Committee to make recommendations based on their examination of reports and information received from states parties. Suggestions are usually directed at United Nations entities, while general recommendations are addressed to states parties. The CEDAW Committee is comprised of 23 women's rights experts from 23 countries. These experts are elected from a list of individuals nominated by countries party to the Convention, and consideration is given to equitable geographical distribution as well as to representation of different civilizations and legal systems. The 23 Committee members serve in their personal capacity, rather than as delegates or representatives of their countries of origin.
[32] *Ibid*., Article 18(1).
[33] *Ibid*., Article 21.
[34] U.N. Press Release No. WOM/1251, *Women's Discrimination Committee Continues Consideration of Egypt's Report*, Jan. 1, 2001, available at: www.un.org/News/Press/docs/2001/wom1251.doc.htm.
[35] Afra Afsharipour, *Empowering Ourselves: The Role of Women's NGOs in the Enforcement of the Women's Convention*, 99 COLUM. L. REV. 129, 140 (1999).
[36] Andrew C. Byrnes, *The "Other" Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women*, 14 YALE J. INT'L L. 1, 13 (1989); *see also*, Afsharipour, *supra* note 35, at 139 ("the Convention assumes that the major function of CEDAW is to consider States' reports").

In theory, regular international attention to state implementation of women's human rights ought to produce better state compliance with CEDAW. Initial country reports are due within one year of a state becoming a party to the Convention and then every four years, or sooner should the Committee so request.[37] The CEDAW Committee is frequently outspoken in its criticism of nation states. For example, after examining Egypt's periodic report, the Committee told Egypt that:

> … it was not enough to promulgate laws against domestic violence, rape, or genital mutilation and then wait for women to report the crime… it was necessary to help them overcome their fear and go to the police.[38]

The Committee encouraged Egypt to conduct a survey of the violence occurring throughout the country, and to provide the necessary reporting processes for victims so that more women would report their rape.[39] In another example, the CEDAW Committee noted the predominance in Nigeria of cultural stereotypes that are prejudicial to women and the continued existence of the practices of polygamy, and female genital mutilation. In relation to Denmark, the Committee urged the government to "penalize all Danish residents who arrange for female genital mutilation regardless of where it is performed in order to eliminate this harmful traditional practice;"[40] and regarding Yemen's CEDAW compliance, the Committee criticized the government for its lack of statistical information on violence committed within the family and recommended more data collection.[41]

However, the reporting system does not work smoothly. For example, Libya's second periodic report became due in 1990. It was finally submitted in 1999, but the Committee has yet to review it, or even to designate the session at which it will be reviewed.[42] Similarly, Belarus's fourth periodic report became due for submission in 1994. Belarus finally submitted its report in 2002, but the Committee was only scheduled to review the report at its 30th Session in January 2004. [43] And although the Committee has had its session times extended in recent years,[44] and has also created a pre-session

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[37] Afsharipour, *supra* note 35, at 140-41.
[38] *See* Press Release WOM/1251 January 19, 2001 Committee on Elimination of Discrimination against Women , 493rd Meeting, available at (http://www.un.org/News/Press/docs/2001/wom1251.doc.htm.
[39] See, Ibid.
[40] *See* Report of the Committee on the Elimination of Discrimination against Women, included in *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 38* (A/57/38), 8 October 2002, at p.55.
[41] *See* Press Release WOM/1358 August 14, 2002 Committee on Elimination of Discrimination against Women , 580th and 581st Meetings, available at (http://www.un.org/News/Press/docs/2002/wom1358.doc.htm).
[42] CEDAW Report of the Secretariat, Twenty Ninth Session, May 14, 2003, CEDAW / C / 2003 / II / 4 at 17-18, available at http://www.bayefsky.com/reform/cedaw_c_2003_ii_4.pdf.
[43] *Ibid*. at 18.
[44] Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 51/68, U.N. GAOR, 51st Sess., Supp No. 49, at 198, U.N. Doc. A/Res/51/68 (1996) (extending two annual CEDAW committee sessions of three weeks each).

working group that prepares lists of questions to which submitting states can respond in advance,[45] time constraints reduce the Committee's time available for reviewing each country's ongoing reports. [46] The Committee has a massive backlog of reports and finds it difficult to give timely attention to reports that have been submitted.[47] These delays place additional burdens on reporting states because they are required to update reports that are out of date.[48] As of May 1, 2003, 56 state parties were more than five years late in submitting either initial or periodic reports,[49] and 30 state parties were more than five years late in submitting even their initial reports.[50] Were it not for the failure of many states parties to submit their reports on time, or to submit reports at all, the Committee's workload would be even more crippling.[51]

(c) Applying CEDAW at the international level

Despite these challenges, CEDAW is raising international awareness of women's human rights issues. Not surprisingly, the most controversial work of the CEDAW Committee has been its recommendations about female sexuality, such the as the 1990 recommendation that female circumcision or female genital cutting ("FGM") be viewed as a discriminatory practice against girls and women. At the Fourth World Conference on Women in Beijing in 1995, the largest conference in the history of the United Nations, the U.N. called for CEDAW signatory nations to prohibit female genital mutilation "wherever it exists and [to] give vigorous support to efforts among non-governmental and community organizations and religious institutions to eliminate such practices" and to "take urgent action to combat and eliminate violence against women, which is a human

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[45] Aida Gonzales Martinez, *The U.N. and Protection of Human Rights: Human Rights of Women* 5 WASH. U. J. L. & POL'Y 157, 173 (2001).

[46] Julie A. Minor, *An Analysis of Structural Weaknesses in the Convention on the Elimination of All Forms of Discrimination Against Women*, 24 GA. J. INT'L & COMP. L. 137, 148 (1994). Some scholars have attached significance to the assignment of such a short time period for review, arguing that it is a reflection of the priority that state parties have assigned to women's rights. *See*, Byrnes, *supra* note 36, at 59 ("the notion that a committee overseeing the implementation of the Women's Convention would require considerably less time than the Racial Committee needed for its work is a reflection of the low priority assigned to women's rights").

[47] As of the Committee's most recent (30th) session, held in January 2004, there remained a large backlog of reports due for consideration, despite an ongoing deficit of reports due but not yet submitted. For most nations, approximately two years passed between submission and consideration by the Committee. The issue of the CEDAW Committee's time delays has been discussed in: Margareth Etienne, *Addressing Gender-Based Violence in an International Context*, 18 HARV. WOMEN'S L.J. 139, 149 (1995); Linda A. Malone, *Exercising Environmental Human Rights and Remedies in the United Nations System*, 27 WM. & MARY ENVTL. L. & POL'Y REV. 365, 390 (2002) (arguing that because of the Committee's time restraints, the Committee lacks the power of many other U.N. treaty organizations); Felipe Gomez Isa, *The Optional Protocol for the Convention on the Elimination of All Forms of Discrimination Against Women: Strengthening the Protection Mechanisms of Women's Human Rights* 20 ARIZ. J. INT'L & COMP. LAW 291, 304 (2003) (arguing that the two week limitation is insufficient for an examination of the reports, and is the source of the Committee's backlog).

[48] Afsharipour, *supra* note 35, at 144-45.

[49] CEDAW Report of the Secretariat, Twenty Ninth Session, May 14, 2003, CEDAW / C / 2003 / II / 4 at 13-16, available at http://www.bayefsky.com/reform/cedaw_c_2003_ii_4.pdf.

[50] *Ibid*.

[51] Byrnes, *supra* note 36, at 27.

rights violation, resulting from harmful traditional or customary practices, cultural prejudices and extremism."[52] Then in 1996, the World Health Organization, the U.N. Children's Fund (UNICEF) and the U.N. Population Fund also issued a joint statement regarding harmful practices, calling for the intervention of the international community:

> It is unacceptable that the international community remains passive in the name of a distorted vision of multiculturalism. Human behaviors and cultural values, however senseless or destructive they may appear from the personal and cultural standpoint of others, have meaning and fulfill a function for those who practice them. However, culture is not static but it is in constant flux, adapting and reforming. People will change their behavior when they understand the hazards and indignity of harmful practices and when they realize that it is possible to give up harmful practices without giving up meaningful aspects of their culture.[53]

The CEDAW Committee has also explicitly called for the eradication of cultural practices harmful to women's health or women's agency. In 1999, the CEDAW Committee passed General Recommendation 24, stating that "states parties should ensure… [t]he enactment and effective enforcement of laws that prohibit female genital mutilation and marriage of girl children."[54] In 2000, the General Assembly then followed up with a Resolution that:

> Calls upon states… to develop, adopt and implement national legislation, policies, plans and programmes that prohibit traditional or customary practices affecting the health of women and girls, including female genital mutilation, and to prosecute the perpetrators of such practices…[55]

CEDAW thus provides a language of women's rights that allows other international institutions to leverage their influence over states. CEDAW's sometimes patchy oversight of women's human rights is unquestionably better than no international oversight at all. But the CEDAW Committee's problems are compounded by a lack of enforceability mechanisms at the nation-state level. Nation states continue to cite cultural and religious barriers to CEDAW and there is no co-ordination mechanism at the international level to assess these reservations, even when there is domestic opposition to a state's reservation. Many nation states lack the political will to institute human rights changes for women, and international institutions are unable to fix this completely.

(C) Applying CEDAW at the national level

1. Cultural difference applications

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[52] Fourth World Conference on Women ("FWCW"), Beijing Platform for Action, U.N. Doc. A/CONF.177/20, para. 232(h) and (g) (1995). Reprinted in 35 I.L.M. 409 (1996).
[53] *See* Female Genital Cutting: A Joint WHO/UNICEF/UNFPA Statement, 1996.
[54] CEDAW General Recommendation No. 24 (General Comments); Women and Health Committee on the Elimination of Discrimination Against Women, 20th Sess., art. 12, U.N. Doc. A/54/38/Rev.1 ch. I (1999).
[55] See General Assembly, A/RES/54/133 7 February 2000.

International law is a consensual system, which means that individual nation states decide for themselves how to comply with and enforce CEDAW. There are many impediments to the institution of universal human rights norms at the level of the nation state, especially as women's human rights and gender equality are deeply influenced by embedded social, cultural and religious values. Especially in some non-western states, entrenched values and taken-for-granted cultural practices may be at odds with legislation or policies that seek to implement CEDAW.

Women's lack of political representation is a key problem. The under-representation of women in national political processes in many countries means that decisions about harmful cultural practices are made principally by men. If women are included in decision-making processes, these are likely to be older women – precisely those, as the late Stanford political theorist Susan Okin pointed out, who are most likely to have become acculturated by the status quo and often the strongest advocates of the continuation of harmful practices, such as early marriage and FGM.[56] For example, in May 2002 it was reported that the 1998 Tanzanian law criminalizing FGM had not resulted in a single prosecution.[57] This law deemed the practice as "cruelty" when carried out on girl children under 18 years, sanctioning up to 15 years' imprisonment as punishment plus a hefty fine. Laws like this can only be effective with the active support of the older and more influential community members. The press reported that:

> The few adults who have been tried were acquitted, usually because daughters were unwilling to testify against their parents. Many campaigners worry that the law may be forcing FGM underground. In the Singida region in central Tanzania, people circumvent the law by privately cutting baby girls when they are a few days old.[58]

This story has been repeated elsewhere. Sudan passed a law prohibiting FGM in 1946, so that when the World Health Organization in 1979 held the first international conference on the far-reaching health costs of FGM, it chose Sudan as the "poster child" nation for using legal prohibitions against FGM. But even though several other African nations have since introduced similar legislation, these efforts to combat FGM by means of criminal sanction have largely failed because they do not yet have the widespread support of community elders. For example, although Egypt banned FGM in 1996, a 2001 USAID Report puts the practice at around 97% of Egypt's female population of 35 million.[59]

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[56] Susan Okin, *Reply*, in *Is Multi-Culturalism Bad for Women?* 126 (Joshua Cohen, Matthew Howard, and Martha C. Nussbaum, eds., 1999).

[57] Alakok Mayombo, Emergency FGM Rescue Operation Fails in Tanzania, Arfol News, May 29, 2002, available at http://www.afrol.com/News2002/tan005_fgm.htm.

[58] *Ibid*.

[59] This includes Muslim and non-Muslim women. The Ministry of Health issued a decree banning FGM in 1996, which was upheld by the highest court of appeals in 1997. This ban prohibits medical and non-medical personnel from performing FGM either publicly or privately. Violation of the ban can result in loss of medical license and criminal punishment, and if the case involves loss of life, charges of manslaughter. The press has reported up to thirteen prosecutions of various practitioners, but the State Department holds

Nationally based NGOs have sent out a strong message to the international community that the failure to eradicate FGM through criminal sanctions stems precisely from the fact that these sanctions originated from strong international pressure. Other African countries such as Eritrea have no specific law about FGM, but instead include it as a topic in their government health and general education programs, which in turn co-ordinate with NGOs that campaign to discourage FGM. A Burkina Faso NGO spokesperson notes:

> This experience indicates that a successful movement against FGM must be, and must be seen to be, an African indigenous movement. Africans must themselves see and understand the ill effects of FGM and believe in the necessity of its abolition; communities must embrace the change in tradition, or there will be no change. Instead, practitioners and adherents of FGM will continue to defy the law, which will drive the practice of FGM underground, creating an even more dangerous scenario than the current one. Education is thus a key element of any strategy to stop the practice of FGM.[60]

This suggests that international leadership is necessary, but is also inevitably limited in its effect at the national level. Real change depends upon intellectual ownership by those who implement the change. Formal legal change is empty unless there is a real desire at the national level to change the substance as well as the form. When this is lacking, national human rights reforms are unlikely to change women's lives.

2. Problems and constraints

The impetus to conform to international human rights obligations has sometimes produced cynically incomplete institutional responses at national levels. Typically, these national responses seek to demonstrate a rhetorical level of national commitment to international human rights. Instead, they demonstrate ambivalence, if not an outright lack of national political will to achieve international standards.

For example, there have been a host of human rights commissions established over the 1990s in those African states setting up new democratic structures. They were conceived as part of political transition, either to a new government or to promises of a more open political system following a history of repressive or authoritarian single-party rule.[61] In a recent Human Rights Watch report on 20 of these commissions, 11 have been criticized as being either flawed or ineffective, either because they have been formed by national governments that have no human rights credibility or because there has been no follow-through on the Commission's recommendations. For example, the Benin Commission has been criticized by Beninois as "lethargic," having "a credibility

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that it cannot confirm these reports. *See*, U.S. Department of State, Egypt: Report on Female Genital Mutilation, released June 1, 2001, available at http://www.state.gov/g/wi/rls/rep/crfgm/10096.htm.

[60] Ele Kowalsky, *Between Law and Tradition: The Struggle Against FGM in Senegal*, 7 Hum. Rts. Databank 1 (March 2000), available at http://www.hri.ca/tribune/viewArticle.asp?ID=2544 .

[61] Binaifer Nowrojee, Protectors or Pretenders? Government Human Rights Commissions in Africa (2001), available at http://www.hrw.org/reports/2001/africa.

problem," "unknown to the population," and "in paralysis.""[62] In Cameroon, the commission's credibility and autonomy were "greatly hindered by the strong presidential control over its appointment and operations."[63] The Tunisia commission "has shown itself to be nothing more than a mouthpiece to defend government abuses."[64] And although legislation to establish commissions in Ethiopia, Mali, Niger, and the Central African Republic has been passed, there has been no action taken so far to actually set them up.[65]

This data suggests that many nation states are not highly motivated to give a high priority to human rights. This means that the prospect for women's human rights is bleak, given the low priority of women's rights relative to other rights is a worldwide phenomenon, and especially low in the global south. A universal human rights approach deploying Western legal mechanisms, such as implementing legislation and criminal sanction, can be problematic. Achieving better human rights for women may require a more nuanced approach that complements both domestic systems *and* the international system.

Part II: Intellectual and Empirical Trends

A. Critique of International Law methods for women

CEDAW can only go part of the way towards providing a solution for women because the international system of which it is part has some troubling structural deficiencies. International law and international human rights are framed around two legal and political concepts – the sovereign state, and the international system of law. From the earliest days of the international human rights treaties just after World War II, human rights have sought to produce equality among all people. But the model of the ideal rights bearer that informs this model is a person that exists much more in the public world than in the private domestic realm. International law can be criticized for its disturbingly weak role in conceiving of women as the bearers of human rights.[66]

1) Women's Domestic Representation Is Mirrored in International Representation

Historically, political systems at the state level have seen men in the public realm and women in the private realm, created patterns of low levels of female political representation. National power structures all too often exclude women from elite positions and decision-making roles, virtually ensuring the persistent under-representation of women's views. Political power then becomes an expression of a mind-set of political subordination based on gender.[67] Masculine power in national politics

[62] *Ibid.*
[63] *Ibid.*
[64] *Ibid.*
[65] *Ibid.*
[66] Hilary Charlesworth, Christine Chinkin, and Shelley Wright, *Feminist Approaches to International Law*, 85 A.J.I.L. 613, 621 (1991). *See also*, Fred Halliday, *Hidden from International Relations: Women and the International Arena*, 17 Millenium 419, 424 (1988).
[67] Charlesworth, *Feminist Methods in International Law* 93 A.J.I.L. 379, 392 (1999).

when enacted in international affairs becomes "muscular" and robust assertions of national sovereignty.

The international structure reflects structures within nation states, both in its reproduction of a gendered mind-set, and the consequences this has upon the political representation of women. International law reproduces gendered national power through patterning the ideal nation state on the ideal man by, as feminist international law scholar Hilary Charlesworth puts it, creating "international legal principles of sovereign equality, political independence, and territorial integrity and the legitimation of force to defend those attributes."[68] As a consequence, women are often relegated to insignificant and subordinate roles in global decision-making processes. Women are similarly underrepresented in international organizations, where the structures mirror those of states. Even the United Nations, whose achievements are grounded in universal membership, does not extend equal representation to women.

The result is a structural tilt away from women's interests at both the national *and* the international level. Human rights reflect this. Human rights norms tend to be structurally biased to produce normative international legal rules that virtually ensure that women's concerns are either ignored or trivialized.[69] For example, Charlesworth cites the public/private distinction in human rights law as one way that "international law factors out the realities of women's lives, build[ing] its objectivity on a limited base."[70] For Charlesworth, international law is inextricably intertwined with a gendered perspective, consistently reinforcing a system of male interests and overlooking the interests of women.

Even gender-neutral human rights treaties and conventions have gendered consequences because men dominate the public sphere of politics, while women are associated with the private sphere of family and home.[71] For example, international

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[68] Charlesworth, Chinkin, and Wright, *supra* note 66, at 622.

[69] See Charlesworth, et.al, i*bid.*, at 625 (explaining that international law has drawn various dichotomies and distinctions that correlate with gender lines, permeating the discipline's normative rules with gendered values).

[70] Charlesworth, *supra* note 67 at 382. Other feminists have similarly focused on breaking down the public / private divide in international law. *See, e.g.*, Shelley Wright, *Economic Rights, Social Justice and the State: A Feminist Reappraisal*, in Reconceiving Reality: Women and International Law 117, 122 (Dorinda G. Dallmeyer, ed., 1995).

[71] Similarly, Charlesworth sees a perpetuation of the same gendered normative dichotomies even where the international community has made an effort to recognize the importance of women's rights. For example, unlike the Geneva Convention, the statutes of the two ad hoc UN War Crimes Tribunals, as well as the ICC statute, recognize sexual violence as a crime of genocide, a crime against humanity, and a war crime. However, these categories of international law are concerned only with acts forming part of a systematic attack. In Charlesworth's view, "international criminal law engages sexual violence only when it is an aspect of the destruction of a community." Charlesworth sees this as yet another exemplar of the gendered public/private distinction: international law criminalizes rape only when it impacts the "male" public collective sphere, leaving the private "female" sphere of the individual untouched. From a feminist perspective, this is problematic not because it leaves certain acts of violence unpunishable, but because it draws distinctions with reference to an act's implications for the male-dominated public sphere, rather than with reference to women's experiences of the harm of act of rape upon her. These distinctions tend to reinforce gender inequality because they direct scrutiny away from the domestic realm and toward the

agreements such as the Convention against Torture, and the Declaration on the Elimination of Violence Against Women contemplate a human rights violation only where "public" (state) actors are involved.[72] And although CEDAW tries to rectify the gender bias in international legal norms, there is still the feeling that the international commitment to women's human rights is more a matter of "form over substance":

> [Even the] steps taken to bring women's human rights into mainstream UN activities have in most, although not all, instances been limited to placing women on the agenda, a traditional 'add women and stir' approach that does not demand any radical rethinking of programmes [sic] or gender-awareness.[73]

2) Difficulties of global application

CEDAW also faces the challenge of applying its universal standards to a heterogeneous international community made up of women from 185 nationalities, with many more cultural, religious, and ethnic groups besides.[74] The general and universal language of international law can be a bad fit for this diversity. As Chandra Mohanty points out, "women are constituted as women through the complex interaction between class, culture, religion and other ideological institutions and frameworks. They are not 'women' – a coherent group – solely on the basis of a particular economic system or policy."[75] More recently, as proponents of multiculturalism have increasingly emphasized the diversity among women, it has become clear that CEDAW's universal standards for women's human rights don't easily articulate with the normative injunction of multiculturalism. Universalism and particularism collide. This has both practical and conceptual consequences for human rights. Conceptually, universal standards and norms directed at national governments lose their moral force when they conflict with legitimate claims of cultural expression. States are left struggling with this normative dilemma. Nor is it clear that national legislation and national courts are the best means by which the dilemma ought be resolved. More specifically for women's human rights, the universal language and concepts give no guidance on how to implement what may amount to a paradigmatic, or even seismic, shift in cultural practice and social perspective. The more difference there is between the universal standard for women's human rights and local

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public realm – precisely the structural means by which men have retained their monopoly over the public realm of politics and economy. *See*, Charlesworth, *ibid.*, at 387-88.

[72] Anne Orford, *Contesting Globalization: A Feminist Perspective on the Future of Human Rights*, 8 Transnat'l L. & Contemp. Probs 171, 194 (1998).

[73] Christine Chinkin, *Feminist Interventions into International Law* 19 Adel. L. Rev. 13, 26 (1997).

[74] Charlesworth, *supra* note 67, at 383. Often the most important distinction in the monolithic global grouping of "women" is the distinction between first world feminists and third-world feminists. *See*, Charlesworth, Chinkin, and Wright, *supra* note 66, at 618-621.

[75] Charlesworth, *ibid*, citing Chandra Mohanty, *Under Western Eyes: Feminist Scholarship and Colonial Discourses*, Feminist Rev. 74 (1988). *See also*, Rey Chow, *Violence in the Other Country: China as Crisis, Spectacle, and Woman*, in Third World Women and the Politics of Feminism 81, 82 (Chandra Mohanty, Ann Russo & Lourdes Torres, eds., 1991) (noting that using sex as the single analytical tool may not be appropriate given that local women are situated within specific economic, racial, and class structures).

practice, the higher the likelihood that nation states will seek to avoid the problem through inaction or disinterest.

It is not clear how, or where, these problems are best resolved. Charlesworth concedes that "feminist method" does not provide a ready alternative to the traditional practice of international law because feminist methods emphasize "conversations and dialogue" rather than the production of a single, triumphant truth.[76] The feminist method is more of a critique of international law's assertion of generality, objectivity, and universality.[77] Charlesworth presses for international law to undertake a "radical shift in perspective,"[78] and while she does not articulate specific reforms, she reminds us that reform is needed.[79] Taking up Charlesworth's call, it seems necessary to craft human rights institutions that exhibit three important qualities: first, they need to be close to local women's contexts; second, they need to be independent of nation states; and third, they must still have the persuasive moral authority to induce recalcitrant states to make better progress on rights for women.

B. Globalization's effects upon women

These intellectual and political debates are taking place in new social and economic contexts. Globalization has created an awareness that economic wealth may depend upon the creation of new pockets of human rights violations.[80] Globalization has also prompted a new focus on minority identity,[81] and with it an examination of how women have fared in the crosscurrents of new global conditions.[82] In some cases, these conditions lower women's living standards while raising the economic incentives for states to ignore their CEDAW obligations. Disturbingly, an analysis of nation states' implementation of their international treaty obligations under CEDAW suggests a causal relationship between globalization and gender inequality.[83]

1) Globalization and economy

[76] Charlesworth, *supra* note 67, at 379.
[77] It is difficult to apply feminism to reach any hard "legal" answer, because feminist methods seek to "expose and question the limited bases of international law's claim to objectivity and impartiality and insist on the importance of gender relations as a category of analysis." Charlesworth, *supra* note 67, at 379, citing J. Ann Tickner, *You Just Don't Understand: Troubled Engagements between Feminists and IR Theorists* 41 Int'l Stud. Q. 611, 628 (1997).
[78] Charlesworth, *supra* note 67, at 393.
[79] *Ibid*. at 394. One of Charlesworth's critics has responded that "we can reconceive international law every now and then, but not all the time." *See* Martti Koksenniemi, *Reconceiving Reality: Women and International Law*, 89 A.J.I.L. 227, 230 (1995). For Koksenniemi accepting the basic framework of international law, flawed as it is, will continue to provide some protection from untrammeled subjectivity and analysis.
[80] *See, e.g.*, Frank J. Garcia, *The Universal Declaration of Human Rights at 50 and the Challenge of Global Markets: Trading Away the Human Rights Principle* 25 Brooklyn J. Int'l L. 51 (1999).
[81] *See, e.g.*, Marc W. Brown, *The Effect of Free Trade, Privatization and Democracy on the Human Rights Conditions for Minorities in Eastern Europe: A Case Study of the Gypsies in the Czech Republic and Hungary*, 4 Buff. Hum. Rts. L. Rev. 275 (1998).
[82] *See, e.g.*, Anthony Taibi, *Racial Justice in the Age of the Global Economy: Community Empowerment and Global Strategy*, 44 Duke L.J. 928 (1995).
[83] Jose Richard Paul, *Cultural Resistance to Global Governance* 22 Mich J. Int'l L. 1 (2000).

In many countries, the macroeconomic reforms accompanying globalization have had the effect of shrinking the public sector and cutting government services. These changes frequently have a disproportionate effect on women who labor in the "invisible sector outside the market,"[84] which means that women are bearing a disproportionate burden of the costs of economic liberalization.[85] Because employment offered by new foreign trans-national corporations is often "precarious", globalization has led to higher levels of female unemployment and an increase in casual and part-time work.[86] International investors requiring unskilled to semi-skilled labor hire women "in the 'soft' industries of apparel, shoe- and toy-making, data-processing, and semi-conductor assembling-industries."[87] Worryingly, there is an upward trend of slavery -- women are being sold in human trafficking as economic reforms render their families unable to support them.[88] Even putting aside the question of slavery, women comprise the largest segment of migrant labor flows, a workforce demographic that is usually without state protection.[89] In some parts of the world, the effects of this economic dislocation has inspired women to engage in organized economic resistance, fighting to preserve their traditional ways of life from the WTO agenda of trade and economic liberalization.[90] Paradoxically, this slows progress on CEDAW reforms on issues such as education for girls, early marriage, and cultural practices that are harmful to women's health, because women's political energies are diverted from the gender equalities in their own cultures while they pitch their arguments against transnational corporations.

In fact, when legal scholar Jose Paul examined "cultural" derogations across three different types of international treaties, he found that nation states felt far freer to ignore women's rights than other types of rights.[91] Paul's study of free trade treaties and agreements, environmental treaties and agreements, and women's human rights, showed that only women's rights and gender equality are perceived by the international

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[84] Women have been described as the "shock absorbers" of economic programs imposed by the IMF or World Bank, as they are the first to face the loss of employment when the public sector fires workers or when the workforce is casualized. *See* Orford, *supra* note 72, at 172. *See also*, Johanna E. Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations* 52 Emory L.J. 71, 127 ("Women at the intersection of race, gender, and class oppression have felt the impact of [IMF and World Bank] policies more dramatically than their privileged counterparts"). Women usually pick up the slack in caring for the sick, homeless, or mentally ill family members when the state abdicates these duties pursuant to economic reforms attributable to globalization. Bharati Sadasivam, *The Impact of Structural Adjustment on Women: A Governance and Human Rights Agenda* 19 Hum. Rts. Q. 630 (1997).

[85] Orford, *supra* note 72, at 172.

[86] *Ibid*., at 179, citing Kristi Justine Guest, *Exploitation Under Erasure: Economic, Social and Cultural Rights Engage Economic Globalizations* 19 Adel. L. Rev. 73, 111 (1993).

[87] Riham el-Lakany, *WTO Trades off Women's Rights for Bigger Profits,* 12 WOMEN'S ENV'T & DEV. ORG. 1, 32 (1999).

[88] Martina Vandenberg, *Markets and Women's International Human Rights* 25 Brooklyn J. Int'l L. 141, 148 and 150-1 (1999).

[89] Dinah Shelton, *Protecting Human Rights in a Globalized World* 25 B.C. Int'l & Comp. L. Rev. 273, 296 (2002).

[90] Orford, *supra* note 72, at 179, citing *Julie Stephens, Running Interference: An Interview with Gayatri Chakravorty Spivak*, 7 Austl. Women's Book Rev. 19, 20 (1995).

[91] Paul, *supra* note 83, at 52.

community as a legitimate subject under which states may enter a "cultural" objection to international obligations. Cultural exceptions to GATT and the international norm of free trade are not permitted as they are perceived as necessary for globalization.[92] Similarly, international environmental norms are seen to trump cultural objections because they preserve natural resources for the future economy.[93] Whereas derogations from environmental or free trade agreements are perceived as seriously jeopardizing economic growth, low women's wages for unskilled work are seen as a necessary casualty of economic activity. In many countries, the project of wage equality for women has stalled so that economic expansion can proceed.

2) Globalization producing gender conservatism

Paul's analysis of gender inequality and globalization also demonstrates a more subtle, and arguably more insidious, effect of globalization: a backlash of ideological gender conservatism against gender equality. Globalization challenges a nation's sovereignty by requiring the state to cede control over its national economy to the forces of the international market and international institutions.[94] This loss of control produces a form of "cultural anxiety" that takes legal effect through gendered exceptions to treaty obligations, buried under the rubric of national protection of culture.[95] In other words, states permit each other to depart from gender equality norms so as to discharge political pressures against global forces:

> The cultural exception is an escape valve from the internal political pressure of globalization. The international community recognizes cultural exceptions only to the extent that they relieve displaced anxiety to globalization without obstructing globalization. When states regulate women…states are reaffirming their sovereignty through social controls without hindering the forward movement of globalization. In these circumstances, the international community defers to the 'cultural exception.[96]

Globalization appears to set up deep anxieties in nation states about the rate of economic change, but this anxiety gets channeled as anxiety about gender equality.[97] Women are then pressured to conform to hyper-traditional roles to compensate for the social and cultural dislocation resulting from globalization. [98] Not only do globalization's economic burdens fall disproportionately on women, but because

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[92] *Ibid*. at 54.
[93] *Ibid.* at 76.
[94] *Ibid*. at 74, citing William Grieder, *One World, Ready or Not* 227-58 (1997).
[95] Paul, *supra* note 83, at 76.
[96] *Ibid*. at 77.
[97] *Ibid.*
[98] *Ibid.* at 76, citing Uma Narayan, *Dislocating Cultures: Identities, Traditions, and Third-World Feminism* 17-27 (1997) (describing how the conflict between modernization and third world nationalism is often framed as a conflict to protect traditional womanhood from Western colonizing culture).

women's human rights rank below economic growth, burden is kept on women's shoulders.

To summarize, there are difficulties in CEDAW's application, both at the national and the international level. On one hand, the nation state can express outright opposition or simply exhibit a failure of nerve when it comes to women's human rights. At the international level CEDAW's enforcement mechanisms can be cumbersome and patchy. And now, the advent of globalization has placed additional pressures on women. The scheme of nation states administering international human rights agreements under the U. N. umbrella was devised for the world before globalization, when sovereign borders better contained the movement of both people and capital. Current participants in the global economy care far too little about its adverse affects upon women. Women's human rights under the conditions of globalization need an institutional supplement to the current national/international dyad.

In the following section I make the argument that enlarged and strengthened regional systems should fill this role, particularly for women's human rights. I use the new legal innovation of hybrid criminal courts as an example of an emerging awareness of the drawbacks of the national/international dyad. I give some examples of the regionally influenced nature of particular human rights issues for women and then map out the institutional and normative advantages of an enlarged regional human rights sector. I suggest that regional courts, like the new hybrid criminal courts, can help to build better national compliance with international human rights standards. Regional courts can offer for all human rights the general advantages of legitimacy, of capacity building, and norm penetration.

More particularly in relation to women's human rights, regional human rights courts can be a key location for the development of a women's jurisprudence, particularly where nation states are over-using the "culture" defense. Regional human rights institutions could complement purely international and purely local remedies through their alignment to local conditions, while also keeping the goals of international standards in their sights. For CEDAW and other international women's human rights standards, this will continue pressure on states to increase women's political participation and to create legal and policy measures that accurately reflect women's interests.

Part III: The regional supplement

(A) Institutional models for expanded regional systems

Regional courts form an intermediate tier between national legal systems and the international legal system. They are part of a relatively recent phenomenon of legal institutions guided by international law while also accommodating geographic political and cultural sensibilities. A new legal institution has emerged in recent years that arbitrages between national legal systems and the international legal system in the form of hybrid criminal courts in places like Kosovo, Sierra Leone and East Timor. These new hybrid legal institutions are a good analogy for regional courts and commissions.

Comprised of national and international judges and applying a mix of national and international law and procedure, hybrid courts exemplify the benefits of a legal institution that intercedes between the nation state and the international system. Although fraught with teething problems, the creation of these new legal institutions grows out of a new awareness that, on sensitive issues, neither the nation state's legal system, nor the international legal system, gets it quite right. Adjudication needs to be closer to the locus of human conflict than The Hague, but the nation state alone may not provide the answer.

1) Hybrid courts

The Kosovo War and Ethnic Crimes Court was established in June 1999 with the passage of the U.N. Security Council resolution setting up the United Nations Mission in Kosovo (UNMIK). Deployed in courts throughout Kosovo and comprised of over three hundred international and local judges, the court has jurisdiction over cases of war crimes, other serious violations of international humanitarian law, and serious ethnically motivated crimes.[99] The East Timor Court was established in 2000 at the direction of the United Nations Transitional Authority for East Timor (UNTAET). The court sits in Dili and is comprised of two panels, each including one East Timorese and two international judges. The East Timor Court has jurisdiction to hear matters of genocide, crimes against humanity, war crimes and torture, and applies a combination of international and Indonesian law.[100] The Special Court for Sierra Leone was set up jointly by the government of Sierra Leone and the U.N. to try serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since November 1996. The Special Court has issued indictments against just a handful of individuals so far, charged with war crimes, crimes against humanity, and other serious violations of international humanitarian law. To date, the Kosovo and East Timor courts have had mixed success, and the Sierra Leone court is too new for any hard analysis. But as new and experimental legal forms, these hybrid institutions are worth examination. They are examples of negotiated jurisdiction -- trying to take the best aspects of both international and domestic jurisdiction and merge them into an institutional that sits outside traditional jurisdictional categories.

The Kosovo courts were created primarily to relieve the ICTY of the burdens of trying lesser offenders, and they exercise concurrent jurisdiction with their "parent" tribunal.[101] By June 2002, there had been eighteen trials, some of multiple defendants,

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[99] Laura Dickinson, *Symposium: The ICTY at Ten: A Critical Assessment of the Major Rulings of the International Criminal Tribunal Over the Past Decade: The Relationship Between Hybrid Courts and International Courts: The Case of Kosovo*, 37 New Eng. L. Rev. 1059, 1062 (2003). *See also*, Wendy S. Betts, Scott N. Carlson, & Gregory Gisvold, *The Post-Conflict Transitional Administration of Kosovo and the Lessons Learned in Efforts to Establish a Judiciary and the Rule of Law*, 22 Mich. J. Int'l L. 371, 381 (2001).

[100] *See* Judicial System Monitoring Program, *Justice in Practice: Human Rights in Court Administration* 2 (2001), available at http://www.jsmp.minihub.org/Reports/JSMP1.pdf . It is too soon to evaluate the Sierra Leone Court.

[101] Initially, the court was designed such that local judges comprised a majority of the trial panels and indeed, some trials were held in front of panels comprised only of Kosovar Albanian judges. Following civil unrest in the Mitrovica region, UNMIK 2000/64 was passed, and subsequent cases have been heard in front of majority international panels. The original instruction that applicable law was to be that of the

resulting in fourteen guilty verdicts.[102] However, the court has been dogged by problems of judicial partiality and inexperience. The East Timor court has likewise had difficulties: it has been "hampered by lack of funding, inexperienced personnel, and vacancies in key positions… the appellate panel currently cannot function because too few judges have been hired, and the trial courts have also been forced to suspend proceedings periodically because of lack of personnel."[103] Despite these obstacles, nearly twenty trials had taken place, resulting in the conviction of twenty-three defendants.[104]

Conceptually, the Kosovo and the East Timor hybrid courts are an experiment: they move beyond the traditional paradigm of law that the domestic/international model represents. They have been in place long enough now to observe their advantages and their drawbacks.[105] The evidence so far suggests that hybrid courts are not alternatives to either international or local justice, but rather a complement to both.[106] Rather, they suggest that particular advantages can flow from new institutional arrangements that arbitrage between the nation state and international system. This model also illustrates some disadvantages that could be avoided with good institutional design.

(a) Advantages

(i) Proximity begets legitimacy

Too much distance between people and the courts hearing their legal conflicts can create problems. Situating courts closer to local actors, even as observers, can build legal legitimacy of the court. For example, in a study on the operation of the ICTY sitting in The Hague, it was revealed that Bosnians did not see themselves as equal partners in the reconstruction efforts in their own states – both in the legal and political realms. Instead, the international process was seen as "… promulgating a foreign system of law [leading to a local perception] that the international community [was] imposing foreign values upon them..."[107] Hybrid courts instead have the advantage of proximity. While this on its own will not necessarily produce legitimacy because local courts can be captive to

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Federal Republic of Yugoslavia (Serbian law) was replaced with the directive to apply the law in force in Kosovo prior to March 22, 1989. *See*, Organization for Security and Cooperation in Europe (OSCE), *Kosovo's War Crimes Trials: A Review* 10 (2002), available at http://www.osce.org/kosovo/documents/reports/human_rights/10_WarCrimesReport_eng.pdf. *See also*, Dickinson, *supra* note 99, at 1063.

[102] *See*, OSCE Report, *ibid*., at 54.

[103] *See* Laura Dickinson, *Note and Comment: The Promise of Hybrid Courts*, 97 A.J.I.L. 295, 298 (2003), citing Richard Dicker, Mike Jendrzejczyk & Joanna Weschler, *East Timor: Special Panels for Serious Crimes*, Human Rights Watch, Aug, 6, 2002, *available at* http://www.hrw.org/press/2002/08/etimor-ltr0806.htm.

[104] *See* David Cohen, *Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?* ASIA PACIFIC ISSUES, at 2-3, available *at*, http://www.eastwestcenter.org//stored/pdfs/api061.pdf.

[105] *See* Dickinson, *supra* note 99, at 1059.

[106] *Ibid*. at 1060.

[107] *See* The Human Rights Center and the International Human Rights Law Clinic, University of California, Berkeley, and The Center for Human Rights, University of Sarajevo, *Justice, Accountability, and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors* 18 Berkeley J. Int'l L. 102, 127-36 (2000).

local political forces, appointing some international judges to sit with local judges can ameliorate this. In Kosovo, for example:

> The appointment of international judges to the local courts in these highly sensitive cases may also have helped to enhance the perception of the independence of the judiciary and therefore its legitimacy within a broad cross-section of the local population. In Kosovo this was most apparent, as the previous attempts at domestic justice had failed to win any support among Serbs.[108]

Relative to the U.N. CEDAW Committee, regional institutions have the advantage of proximity to national sensibilities, yet at the same time, regional judges and administrators are less subject to the vagaries of national politics. This provides a good recipe for the legitimacy and credibility of regional courts and commissions.

(ii) Technical and cultural expertise

Placing international legal and administrative personnel side-by-side with local personnel can provide a template for better legal performance at the local level. The new hybrid criminal courts provide:

> …side-by-side working arrangements [that] allow for on-the-job training that is likely to be more effective than abstract classroom discussions of formal legal rules and principles … the teamwork can allow for sharing of experiences and knowledge in both directions.[109]

A court that combines personnel from different legal systems does more than simply provide comparative instruction on formal and administrative matters. It also provides an opportunity for cultural learning across jurisdictions. This crosscutting cultural effect has already been predicted in the operation of the ICTR and the Sierra Leone hybrid court. According to observers, the indictment before Senegalese courts of the former head of state of Chad, Hissein Habre (though later dismissed) was one of the fruits of the ICTR's "Africanization of accountability."[110]

The hybrid courts are giving international actors the opportunity to gain greater sensitivity to local issues, local culture, and local approaches to justice. At the same time, local actors can learn law and procedures from skilled international actors. The layered jurisdictions of hybrid courts are bring together different cultures, different problems and different solutions. They ease the performance pressure on domestic courts and provide an opportunity for framing legal innovations. Regional institutions similarly

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[108] Dickinson, *supra* note 103, at 308-09.
[109] Dickinson, *ibid.*, at 307. Dickinson cites to Joel C. Beauvais, *Note, Benevolent Despotism: A Critique of U.N. State-Building in East Timor*, 33 N.Y.U. J. Int'l L. & Pol. 1101, 1157-59 (2001).
[110] Payam Akhavam, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?* 95 A.J.I.L. 7, 26-27 (2001).

offer opportunities for cultural learning, with the additional advantage that regional judges and administrators are learning of aspects of *shared* culture within the geographic region. A shared colonial history, for example, gives a shared understanding from which regional courts can interpret and apply international human rights norms.

(b) Drawbacks

(i) Legitimacy

One of the drawbacks of hybrid courts is that their very proximity can trigger political flashpoints and local sensitivities. In East Timor, for example, some local actors involved in the criminal justice process criticized the East Timor hybrid court because they allege that international actors were controlling the process, which "smacks of imperialism."[111] The experience in Kosovo has demonstrated that distributing power among various ethnic and political parties may lead to problems of over-correction, such as when large numbers of Serbs were appointed to serve on the bench of the Kosovo court with the intention of diluting ethic tensions. Instead, the legitimacy of the Court was tainted.[112] Institutional legitimacy can clearly suffer when people from outside the local system become involved in adjudication and there is speculation about distribution of power. This is most likely when "outsiders" are jurisdictionally distant. The regional courts could largely sidestep this problem. They already have the advantage of greater jurisdictional proximity to states than international courts. At the same time, regional courts can garner the legitimacy benefits through distancing themselves from national political pressures.

(ii) Lack of resources

The biggest problem facing the new hybrid courts has been a lack of resources. This can lead to erroneous results, as when the Kosovo court's lack of resources led to the court's failure to cite relevant cases of the ICTY. Only two trial court verdicts so far make any reference at all to war crimes case law.[113] Of course, lack of resources is a perennial problem and is not unique to hybrid courts, but applies also to national and international courts.

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[111] Dickinson, *supra* note 103, at 306, citing Suzannah Linton, *Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor*, 25 MELB. U. L. REV. 122, 150 (2001).

[112] Dickinson, *supra* note 99, at 1066.

[113] Dickinson notes in relation to Kosovo that "… the argument that this network will result in the better use and richer development of norms (and of domestic ones) assumes that the foreign judges will be experts in the jurisprudence of the international tribunals, an assumption that has not been borne out in the Kosovo case, where the hybrid courts often have failed even to cite relevant cases from the ICTY." Dickinson, *supra* note 103, at 307. In *Trajkovic*, the international judge cited in passing the ICTY *Tadic* decision on the definition of the customary international law offence of crimes against humanity. However, this judge erred in finding that crimes against humanity (an offence under customary international law and hence a violation of the ICTY statute) is a separate and distinct offence from war crimes under FRY CC 142. The *Jovanovic/Kolasinac* decision is the only example among the trial verdicts under review of adequate reliance on case law and other authorities. Its author cites a variety of judicial and scholarly sources, including, among others, case law of the ICTY and ICTR, commentaries on the FRY criminal code, and a text on crimes against humanity. *See,* OSCE Report, *supra* note 101, at 47.

The only corrective for this is a genuine and ongoing financial commitment, and it may be here that the hybrid courts could suffer "double trouble". On one hand, their regional location places them a long way from their "parent" international bodies and thus heightens their need to account for their jurisprudential output under international human rights standards. On the other hand, the hybrids' geographic proximity to their local constituency could lead to resentful comparisons of the hybrid's resources relative to domestic legal resources, such as between Rwanda and the ICTR. Although prison conditions for those awaiting trial at the ICTR are appalling, and although the ICTR bureaucracy has been criticized for its delays and its ineptitude, it is much better resourced than Rwandan jails and courts. Despite having tried approximately 7,331 persons in Rwanda by the end of 2002, an estimated 110,000 individuals remain in custody awaiting trial on charges of genocide. Prison conditions are life threatening and disease is rampant, but the government lacks the resources to expedite processing. Gacaca courts, a form of traditional justice, were created in order to aid the process, and a pre-Gacaca project was instituted in which prisoners were taken to their villages and villagers were allowed to decide if further reason to detain them existed. However, less than 10 percent of the accused have been released in this manner.[114] Comparatively, the ICTR has completed 18 cases, there are 22 detainees still on trial, nine awaiting appeal, and 22 awaiting trial. Sixteen indictees remain at large.[115]

The Rawandan case is not directly analogous to regional because Rwanda is a purely domestic jurisdiction and the ICTR is a purely international jurisdiction, but it illustrates a point that is possibly also relevant to regional courts. In all of the regional systems there are large disparities between resource allocations to different domestic legal systems. For example, Poland has fewer financial resources than France to expend on human rights enforcement. This suggests that a regional funding formula for shared human rights institutions may need to reflect differential domestic levels of economic capacity. It points to the need for careful planning and allocation of resources across domestic jurisdictions. Regional courts will not render justice if either regional processes or regional jurisprudence are hugely dissimilar to the trends of the domestic jurisdictions within the region.

(c) Lessons learned

There are important lessons for regional courts to be learned from the hybrid tribunals. First, as a matter of sheer quantity, forum sharing can allow for a better distribution of workload. Qualitatively, it permits a strategic allocation of cases. This is exemplified by the distribution of cases between the international and hybrid courts: international courts take the most symbolic high-profile cases that are likely to form international law precedent and the domestic courts handle less complex, lower profile cases. Second, the hybrids allow for skill distribution between jurisdictions, progressively leading to an increased supply of trained personnel. This can in turn

[114] *See*, U.S. Dep't of State, *Country Reports on Human Rights Practice for 2002,* available at http://www.state.gov/g/drl/rls/hrrpt/2002/18221.htm.
[115] *See* www.ictr.org.

promote heightened institutional legitimacy, elevating perceptions of the competence and independence of the judiciary. Finally, hybrid courts demonstrate that new institutional arrangements need not supplant national domestic legal systems, but can instead act as an important supplement when the national systems either function poorly or are imperiled. They neither remove the national nor the international systems, but instead provide an escape valve for domestic systems. At the same time, they retain the safety net of international norms. More compelling still, as legal scholar Laura Dickinson notes: "… hybrid courts can ground [their work] more squarely within local legal and popular culture."[116]

Like the hybrid courts, regional courts are likewise geographically placed to have good knowledge of national political, economic and social issues. Regional courts are not captive to national political systems, so unlike the human rights commissions established in many African states, they are not part of a national showcase intended solely to send an empty message to the international community. This increases the likelihood that they can really grapple with complexities of national political will as well as national capacity to institute legal and social reform. More particularly for women's human rights, the geographic proximity of regional courts to cultural sensibilities means that there can be a nuanced understanding of regional and gender politics. As the FGM issue starkly demonstrates, gender issues are difficult. Taken together, these factors make a case for institutional intercession between national systems and the international system for women's human rights.

(B) Current Regional Framework

There is as yet no body of international case law for women's human rights under the CEDAW treaty. The principal judicial organ of the U.N. with jurisdiction to hear treaty disputes between nation states is the International Court of Justice (ICJ),[117] but it has not yet heard a case under CEDAW.[118] Rather than the ICJ, the paradigmatic human rights court is the European Court of Human Rights (ECHR),[119] which since the demise of communism and the explosive growth of member states of the Council of Europe has

[116] See Dickinson, *supra* note 103, at 308.

[117] It is the UN's primary judicial body, with universal scope and membership. S*ee* U.N. Charter art. 7 and 92; *see also*, Statute of the International Court of Justice, art. 1. One-Hundred-Eighty-Seven States are party to the ICJ's statute. Often referred to as the "World Court," it is composed of 15 independent judges elected by the UNGA and UNSC, no two of which can be from the same country. The members are independent magistrates, not representatives of their governments, and have always included the five permanent members of the UNSC. Its purposes are to resolve legal disputes that states submit to it and to issue advisory opinions on legal questions from certain international organs and agencies Third party information is possible in theory, as is amicus curiae, but in practice both have been extremely rare.

[118] Because the ICJ only hears a case when the states involved have accepted its jurisdiction, much of its work to date has been boundary disputes between states, and related issues of territory. This, combined with its erratic jurisprudence, the specialization of international law that has led to specialized legal fora, and the growth of regionalism, has led over the last two decades to an increase in the number of international and regional judicial bodies hearing human rights claims.

[119] The ECHR was established by the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, concluded under the aegis of the Council of Europe. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

developed extensive human rights jurisprudence.[120] Two other regional court systems exist, those of the Inter-American system and the African Union, each incorporating a sub-set of institutions with human rights jurisdiction. In what follows, I outline the regional bodies that exercise human rights jurisdiction, assessing them particularly from the point of view of women's human rights concerns.

The regional human rights structures frame their jurisdiction under the rubric of international human rights conventions, but each region has its own region-specific human rights instruments. Women's non-governmental organizations have likewise tended to organize regionally under the auspices of international bodies, and play an important role in funneling information between national and international bodies. For example, in preparation for the "Beijing-plus-5" conference in 2000, women's groups organized themselves along regional lines. Coordinated by the U.N. Development Program, an International NGO Committee was formed, along with a global information network aimed at improving women's worldwide access to participation in the Conference and utilizing already-existing regional networks.[121] In other words, geography creates networks among people that do not respect national boundaries.

Notwithstanding each region's reference to the U.N.'s Universal Declaration of Human Rights, the regional human rights instruments exhibit important regional differences.[122] Because Europe was the site for most of the human rights atrocities of the Second World War, Europeans felt compelled to press for human rights guarantees as part of reconstruction efforts.[123] Western European traditions of democracy, the rule of law, and ideas of individual rights fostered a belief that a European regional system could contribute to the avoidance of future conflict on the Continent, while also curbing revolutionary Communist sentiments.[124] The Americas' history of regional approaches to international affairs and human rights stems from the regional solidarity that developed during movements for independence from colonial Spain. It adopted the American

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[120] It has jurisdiction over the largest number of states (40), encompassing all of Europe, including Russia. After the ECJ, it has decided the largest number of cases (837 judgments as of January 1, 2000), developing the most extensive human rights protection jurisprudence. *See* Louis E. Wolcher, *The Paradox of Remedies: The Case of International Human Rights Law* 38 Colum. J. Transnat'l L.J. 515, 521 (2000).

[121] The initiative sought to disseminate and obtain information and input from women throughout the world and included such organizations as the IWTC, the APC Women's Networking Support Program, the APC Women's Program in Africa, Isis-Wicce/Kampala, Isis-International/Santiago, Isis International/Manila, ALAI-Ecuador, the Asian Women's Resource Exchange, the International Archives for the Women's Movement/The Netherlands, and the Women's Feature Service/New Delhi. United Nations Development Program, *Women 2000: Gender Equality, Development and Peace for the 21st Century*, available at www.sdnp.undp.org/gender/beijing5/ngo_info.html

[122] Shelton, *supra* note 89, at 366, citing, European Convention, (providing that the "like-minded" governments of Europe, "considering the Universal Declaration of Human Rights" have resolved to "take the first steps for the collective enforcement of certain rights stated in the Universal Declaration"); American Convention (indicating the Convention's origin in the Universal Declaration of Human Rights); African Charter (pledging to promote international cooperation "having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights).

[123] Shelton, *ibid.*, at 354.

[124] Shelton, *ibid.*, at 354, citing J.G. Merrils, *The Council of Europe: The European Convention on Human Rights*, in An Introduction to the International Protection of Human Rights 221 (Raija Hanski & Markky Suksi eds., 1997).

Declaration on the Rights and Duties of Man some months before the United Nations completed the Universal Declaration of Human Rights.[125] But whereas the European system is particularly concerned with civil rights, especially due process, the history of military coups in Central and South America has led to a strong focus in the Inter-American system on the corrections to militia terror: democracy, restrictions on arbitrary exercises of discretionary executive powers and restrictions on military and police powers.[126]

African systems, on the other hand, grew out of claims to self-determination that were framed as part of the human rights agenda as African nations emerged from colonial rule and battled for national cohesion.[127] The anti-apartheid movement within South Africa also contributed to broader regional human rights efforts.[128] Africa's struggle to regain indigenous sovereignty after its colonial past is also reflected in the emphasis in its key human rights documents on political autonomy.[129] A former president of the African Commission locates a concern for human dignity within African culture, which has influenced the African human rights system.[130] Africa's human rights treaties reflect this shared history in their inclusion of "people's rights", and their embrace of economic, social, and cultural rights to a greater extent than either the European or American conventions.[131] In addition to the duties of the state towards the citizen, African human rights documents emphasize the duties of the citizen towards her community. Unlike the individualistic west, a human rights violation under the African human rights instrument entails a consideration of group interests.

Each region also has specific human rights concerns in relation to gender inequality. For example, women's non-government organizations in Europe have been able to organize around issues of political representation because of their better economic and social status relative to many South American and African states.[132] More recently, the skyrocketing incidence of trafficking of women and girls since the demise of the former Soviet Union and the phenomenon of open borders has led to a renewed sense of

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[125] Shelton, *supra* note 89, at 353-54, citing Thomas Buergenthal & Dinah Shelton, Protecting Human Rights in the Americas 37-44 (4th ed. 1995). In addition, the drafting history of the American Convention shows that the states involved utilitized the UDHR in deciding on the convention's guarantees and institutional structure. Shelton, *ibid.*, at 366, citing Conferencia Especializada Interamericana Sobre Derechose Humanos, San Jose, Costa Rica, 7-22 Noviembre 1969, Actas & Documentos, OEA/Ser.K/XVI/1.2 (1973).

[126] Shelton, *supra* note 89, at 368.

[127] *Ibid.*, at 354.

[128] *Ibid*.

[129] *See* Preamble and Article 20 of African Charter on Human and Peoples' Rights. Concluded at Banjul, June 26, 1981. Entered into force, Oct. 21, 1986. OAU Doc. CAB/LEG/67/3 Rev. 5. Reprinted in 21 I.L.M. 59 (1982).

[130] Shelton, *supra* note 89, at 354-55, citing Isaac Nguema, *L'Afrique, Les Droits de l'homme et Le Developpement* 1 Rev. Comm. Af. Dhp. 16, 26 (1991).

[131] Shelton, *supra* note 89, at 361.

[132] EU member states have an average of 25% women in parliament, and 31% of EU officials and 25% of European Commissioners are women. In the EU private sector, only 9.3% women are in top management positions in the telecommunication industry; 8% of all members of Board of directors of Banks are women (not in leading posts); 5% are women in the Executive Management Committees; 8% women are Directors of divisions of banks. European Women's Lobby Report (http://www.womenlobby.org/htmldoc/wdm.htm)

collective human rights concerns among European women's non-government organizations.[133] In Latin America, on the other hand, the constraints upon sexual and reproductive freedom imposed by the dominance of Roman Catholicism means that a key concern of women's organizations in that region is women's reproductive rights and violence against women.[134]

The frightening plight of African women's incidence of sexual disease and sexual violence virtually defines the work of African women's NGOs. HIV/AIDS for African women is worse than for African men, with 12-13 African women infected for every 10 African men and 55% of adult infections in sub-Saharan Africa occurring in women.[135] FGM is a secondary regional phenomenon that increases the risk of contracting HIV/AIDS through the use of infected instruments. Similarly, the staggering high rate of African domestic violence increases the risk of contracting HIV/AIDS.[136] Rape and sexual assault, especially in South Africa,[137] and abduction and sexual violence in African states in, or recovering from, civil war.[138]

Each region, therefore, has a distinctive "character" that marks it out from other regions, but also from the international system and domestic systems. Women's human rights organizations reflect the human rights issues of their constituencies, and these concerns tend to be shared along regional lines.

1) The European human rights system

Together with the European Commission of Human Rights, the ECHR supervises the observance of rights and freedoms contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms. It has become one of the largest and most accomplished regional judicial bodies, aided by a strongly shared feeling among participant states for the rule of law and their relative cultural homogeneity.[139] In 1994, individuals were given access to the ECHR without an external filter.[140] The ECHR survived a major overhaul in 1998, demonstrating its vitality and importance

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[133] *See* "Trafficking in Human Beings in Southeastern Europe", UNICEF, 2002, available at http://europa.eu.int/comm/justice_home/news/information_dossiers/conference_trafficking/video/img/commun/rapport%20see%20human%20trafficking.pdf .

[134] *See* Corene T. Kendrick, *The Illegality of Abortion in Mexico*, 39 Stan. J Int'l L. 125, 136 (2003).

[135] *See* World Health Organization, Fact Sheet No. 242 (2000), available at www.who.int/mediacentre/factsheets/fs242/en .

[136] *See* Human Rights Watch Report, "Policy Paralysis: A Call for Action on HIV/AIDS-Related Human Rights Abuses Against Women and Girls in Africa", December 2003, available at www.hrw.org/reports/2003/africa1203 .

[137] The highest rate of reported rape worldwide is found in South Africa, where the reported rapes of 52,000 yearly is estimated to only reflect one in every 36 actual incidents of rape.

[138] For example, an estimated 2,700 young girls who were abducted in Sierra Leone following last year's invasion of Freetown were forced to become "rebel wives," serving as sexual and domestic slaves for the RUF. In Liberia, one-third of internally displaced women (about 168,000) were estimated to be victims of rape during the Liberian war.

[139] Rudolth Bernhardt, *Commentary: The European System*, 2 Conn. J. Int'l L 299, 299-300 (1997).

[140] *See* Council of Europe, Protocol No. 11 to the European Convention on Human Rights, Art. 34, Doc. H(94)5 (1994), *reprinted in* 33 ILM 943 (1994). The Court now has 800 million potential claimants. It also set up a single permanent Court instead of the existing two-tier system of a Court and a Commission.

within the region. It has the largest international bench, including the most women judges, both proportionally and absolutely, of any international bench, although European women, like women worldwide, continue to serve on judicial benches, yet are still significantly outnumbered by men.[141]

Europe's jurisprudence reveals a mixed record of influence over domestic courts in relation to women's human rights. Numerous applicants have sought to apply European Community law to their domestic matters, but both the Irish and European courts have managed to sidestep substantive issues.[142] For example, Irish courts have gone out of their way to ground Irish abortion cases in domestic law, with the Irish Court finding that "[n]o decision on any question of European law is… necessary to enable the court to give its judgment." [143] On the other hand, the spread of European norms seems inexorable. A good example is the U.K. Human Rights Act that came into force in October 2000, and which provides for regional influence upon, and harmonization with, its domestic laws.[144] The U.K. Act was modeled on the European Convention on Human Rights and requires the domestic U.K. courts to construe their law (both statutory and common law) as compatible with European norms and in light of public international law. It does not empower courts to strike down domestic law, but only to render a "declaration of incompatibility".[145] In this way, although the jurisprudence currently binds the actions of Member states only partially, the European Convention may become unequivocally binding on national courts and legislatures, albeit in a roundabout way.

At the same time, when cases have reached the European Court of Human Rights, the Court has been able to consider gendered harms against individual women because

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[141] Example ratios are: 14:1 at the International Court of Justice, 11:7 at the International Criminal Court, and 24:13 at the European Court of Human Rights. See http://www.pict-pcti.org .

[142] *See* Bryan Mercurio, *Abortion in Ireland: An Analysis of the Legal Transformation Resulting from Membership in the European Union* 11 Tul. J. Int'l & Comp. L. 141, 154-56 (2003) (discussing *SPUC v. Open Door*, 14 Eur. H.R. Rep. 131, 135-38 (1991), wherein the European Commission "decided the case solely on the freedom of expression claim" before referring it to the Court). Mercurio also discusses *SPUC v. Grogan*, 1991 E.C.R. I-4685, 4733, where "the ECJ went out of its way to avoid deciding the substantive issues of the case."

[143] In *Attorney General v. X and Others*, [1992] 12 I.L.R.M.414 (Ir. S.C.) the case involved a fourteen-year-old rape victim who had become pregnant and had sought, with the help of her parents, to travel to England to obtain an abortion. After the parent contacted the police to inquire whether some fetal tissue should be preserved as DNA evidence for the ongoing rape investigation, the Attorney General responded by obtaining an injunction preventing the girl from traveling outside the country for a period of nine months. The family responded by presenting the girl's apparent risk of suicide, as was evident to several witnesses after hearing suicidal remarks made by the girl. The Supreme Court held that abortion is permitted within Ireland when "it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother which can only be avoided by the termination of her pregnancy." Because the abortion was permissible in Ireland, it was also permissible for the girl to travel abroad to obtain one.

[144] *See*, Human Rights Act, 1998, c. 42 (Eng.). *See also*, Clive Walker & Russell L. Weaver, *The United Kingdom Bill of Rights 1998: The Modernisation of Rights in the Old World*, 33 U. Mich. J.L. Reform 497, 540-41 (2001).

[145] Gerrit Betlem and Andre Nollkaemper, *Giving Effect to Public International Law and European Community Law before Domestic Courts: A Comparative Analysis of the Practice of Consistent Interpretation* 14 Eur. J. Int'l L. 569, 584 (2003).

the ECHR is not hampered by the ICJ's jurisdictional constraints.[146] The ECHR's jurisdictional capacity to scrutinize individualized harm has allowed it to take the first steps in crafting women's jurisprudence. For example, in *Jabari v. Turkey* in 2000, the Court effectively protected an Iranian woman from torture when it intervened to prevent Turkey from deporting her back to Iran. Iran's patriarchal system would have allowed her to be prosecuted for adultery and punished by death by stoning or by being whipped or flogged.[147] Turkey was held to have had a right to protect her against cruel and inhumane treatment under Article 3 of the European Convention on Human Rights (ECHR). Furthermore, the Court found that Turkey's deportation mechanism did not provide an effective legal remedy and therefore was in violation of Article 13 ECHR.[148]

Similarly, in *Abdulaziz, Cabales, and Balkandi v. The United Kingdom*, the Court found discrimination on the basis of sex for the applicants under Articles 8 of the European Convention in conjunction with Articles 13 and 14, holding that "national immigration controls must be exercised in accordance with the European Convention on Human Rights."[149] The applicants, three lawful permanent residents of the U.K., sought permission for their husbands to join them as non-nationals in the U.K. The British government denied their request on the basis of immigration rules restricting the rights of husbands to join only wives with permanent U.K. residency. No such restriction applied to the wives of U.K. resident men. The women sought relief under Article 3 (degrading treatment), Article 8 (violation of the right to respect for family life), Article 13 (right to effective legal remedy for complaint), and Article 14 (discrimination with regard to race and gender). In a more recent example, the Court found in *Wessels Bergervoet v. The Netherlands* that disparate treatment of men and women under social security schemes in the Netherlands constituted discrimination on the basis of gender and marital status, a violation of Article 14 ECHR. The government of the Netherlands had reduced a woman's social security payments on the sole basis of her marital status. The ECHR found that the disparate treatment of men and women under social security schemes constituted discrimination on the basis of gender and marital status, a violation of Article 14 ECHR.[150]

Each of these cases has allowed the ECHR to apply a uniquely European interpretation of human rights standards to nation states of the European Council. Context matters; the ECHR is slowly building a European jurisprudence that describes European values for the European context. At the same time, European jurisprudence also

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[146] See Statute of the International Court of Justice, art. 36, which states that the jurisdiction of the ICJ depends on referrals by the states parties and encompasses those matters specifically referenced in the U.N. Charter. States parties may accept compulsory jurisdiction "in all legal disputes concerning… the interpretation of a treaty; any question of international law; the existence of any fact which, if established, would constitute a breach of an international obligation; [and] the nature of extent of the reparation to be made for the breach of an international obligation."

[147] *Jabari v. Turkey***,** No. 40035/98 (Eur. Ct. H.R. July 11, 2000), available at http://www.echr.coe.int

[148] *Ibid*.

[149]*Abdulaziz, Cabales and Balkandali v. United Kingdom*, 94 Eur. Ct. H.R. (ser. A), (1985) available at http://www.womenslinkworldwide.org/co_reg_echr_abdulaziz.html.

[150] *Wessels-Bergervoet v. Netherlands*, App. 34462/97, Eur. Ct. H.R. (2002), available at http://www.echr.coe.int.

shapes the domestic law of European states. While currently the European courts lack authority to annul national legislation inconsistent with EC law,[151] Article 6 of the European Treaty[152] provides that the ECHR forms part of the principles of EC law.[153] National courts may also ask the European Court of Justice for preliminary rulings on European law. If national courts do this, they must then apply the ECJ ruling, even if it means annulling national legislation.[154] Moreover, if the draft European Constitution becomes a reality,[155] the European-ization of values is likely to accelerate. The time may come when ultimate authority over domestic European legislation passes to the central European court system with the consequence that the more expansive concept of citizenship embodied in the 2000 European Charter of Fundamental Rights will become binding on domestic jurisdictions.[156] This raises the probability that women's human rights will be a subject for the European courts. Given the religious and ethnic diversity of the ten new European states,[157] the ECHR could be a decisive influence in the see-sawing between universal women's human rights standards on the one hand, and respect for cultural diversity on the other.

2) The Inter-American system

The Organization of American States (OAS) dates from 1948 and now comprises thirty-five member states.[158] The two primary human rights bodies of the OAS are the

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[151] Instead, it can find an infringement and if the state then fails to comply, a penalty may be imposed. Additionally, the EC Treaty empowers the jurisdiction of the European Court of Justice and CFI in Article 220 to rule on EU institutions and organs and Member states when implementing EU law, and in so doing, they may rely on general principles of EU law. Walter Van Gerven, *A Government Ruled by Law* (unpublished manuscript, on file with author).

[152] Art 6(2) reads, "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law." Treaty on European Union, Feb. 1, 1992, 31 I.L.M. 247 (1992).

[153] *See* Van Gerven, *supra* note 151, at 19.

[154] *See ibid*., at 11.

[155] The Draft Treaty establishing a Constitution for Europe that was submitted to the Italian presidency of the Council of the European Union in July 2003 is currently being discussed by representatives of member state governments at the Intergovernmental Conference, which will continue in 2004 under the Irish presidency. After the final version is adopted by the IGC, the Constitution must then be ratified by both the 15 current member states, as well as the 10 future member states. . There is some question whether Britain will ratify the draft Constitution since British Prime Minister Tony Blair announced the intention to hold a referendum on the Constitution. Although a date has not yet been named, this is unlikely to occur before the next general election. See BBC News, http://news.bbc.co.uk/2/hi/uk_news/politics/3640949.stm. The full text of the Draft Constitution is available at http://europa.eu.int/futurum/constitution/table/index_en.htm .

[156] Article I-7(2) of the proposed European Constitution states that the Union "shall seek accession to the European Human Rights Convention." Praesidium of the European Convention, Draft Text of the Treaty Establishing the Constituiton, CONV 724/03, May 26, 2003, available at, http://register.consilium.eu.int/pdf/en/03/cv00/cv00724en03.pdf.

[157] On May 10, 2004, the following states became European Union countries: Bulgaria, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, Slovenia, and Turkey.

[158] The Organization of American States encompasses both a General Assembly, which convenes annually and establishes major policies, and a Permanent Council, made up of permanent ambassadors to the Organization, who handle political and administrative issues. The OAS has enumerated several key goals: strengthening democracy, advancing human rights, promoting peace and security, expanding trade, and

Inter-American Court of Human Rights (the Court) and the Inter-American Commission on Human Rights (IACHR). Together, the Court and the Commission hear violations of the rights set out in the 1969 American Convention on Human Rights. The Commission also monitors member states' general human rights situations and receives petitions from individuals who claim their human rights have been violated.[159] If the country involved has accepted the Inter-American Court's compulsory jurisdiction, the Commission may submit a case to the Court for a final binding decision. The Court is grounded in the Inter-American Convention on Human Rights and the American Declaration on the Rights and Duties of Man and has both adjudicatory[160] and advisory[161] jurisdiction, but only the Commission and the states parties to the Convention are empowered to submit cases under its adjudicatory jurisdiction. The Inter-American Commission seems to be growing in credibility.[162]

Key provisions of the American Declaration on the Rights and Duties of Man include Article 5 which protects the right to privacy and family life; Article 7 which guarantees protection of mothers and children; Article 9 which safeguards the inviolability of the home; and Article 30 which enumerates the duty to aid, support,

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combating the problems posed by poverty, drugs, and corruption. As a means to these ends, the OAS has also delineated several specific mandates: to strengthen freedom of speech and thought as a basic human right, to promote greater involvement by civil society in all levels of decision-making, to improve cooperation in efforts to combat the drug trade, and to work toward the creation of a free trade area in the Americas. *See* Organization of American States, available at http://www.oas.org. *See also*, Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394.

[159] If the state in question is party to the Convention, the Commission measures alleged violations of human rights as defined by the Convention; if not, the Commission uses the American Declaration on the Rights and Duties of Man as the basis for its opinions. Therefore, even a non-party to the Convention is still subject to its jurisdiction.

[160] *See*, Inter-American Convention on Human Rights, Nov. 22, 1969, arts. 48-50, 1144 U.N.T.S. 123. This can only occur after procedures before the Commission have been exhausted, and a case against a State Party can only be brought before the Court if the State recognizes the jurisdiction of the Court. An individual seeking a binding decision against a member state can only get one by filing a petition with the Commission, which must decide to submit the case to the Court. This can only happen if the State has accepted the Court's compulsory jurisdiction.

[161] *See*, Inter-American Convention on Human Rights, *ibid.*, art. 64. This advisory power enables any member state of the Organization, as well as certain organs of the OAS, to consult the Court on the interpretation of the Convention or of other treaties regarding human rights protection in the American states. At a member state's request, the Court can also issue its opinion on the compatibility of any of its domestic laws with these international instruments.

[162] In 1999, the Guatemalan government passed the Law for Dignity and Integral Promotion of Women. This law promotes access to health care services for women, training in reproductive technologies for health care professionals, representation of marriage and marital property by both sexes. It also repeals the right of husbands to object to women working outside the home. *See*, Center for Reproductive Law and Policy, Progress Report 2000, available at http://www.crlp.org/pdf/wowlac_pr00_guatemala.pdf. Guatemala on the other hand has not complied with the Commissions recommendation for reform of legislation that refers asymmetrically "to the duty of the husband to protect and assist his wife within the marriage" and that excludes women from guardianship responsibilities. *See*, *Maria Eugenia Morales de Sierra v. Guatemala*, Case 11.625, Inter-Am. C.H.R. OEA/ser.L/V/II. 95 doc.7 rev., at paras. 81-82. *See also*, Richard J. Wilson & Jan Perlin, *The Inter-American Human Rights System: Activities from Late 2000 Through October 2002*, 18 AM. U. INT'L L. REV. 651, 708-12.

educate, and protect minor children, and to honor, support, aid, and protect parents.[163] Essential components of the American Convention on Human Rights include Article 6, which prohibits the trafficking of women, and Article 11(2), prohibiting "arbitrary and abusive interference with private life… family… home". Article 17(2) defers the requirements of marriage to domestic law, as long as this does not result in discrimination, Article 17(3) requires the mutual consent of both parties to conclude a marriage, and Article 17(4) requires state parties to ensure equal distribution of rights and responsibilities of marriage, while Article 24 guarantees the right to equal protection for all persons before the law.

The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women[164] does not cite CEDAW, but does cite the 1994 U.N. Declaration on the Elimination of Violence Against Women.[165] The Inter-American Women's Convention is more specific about certain women's human rights violations that the international women's instruments. For instance, Article 3 clearly designates a woman's right to be free from violence in both public and private spheres. Not only does the Inter-American instrument tend to be more specific in its delineation of rights, it also has more specific descriptions of the steps states should take in order to implement the Convention.[166] But unlike the European system, the Inter-American Court of Human Rights has not developed an extensive human rights jurisprudence, much less a corpus of women's human rights jurisprudence. This is because the massive scale of civil and political human rights abuses among the South American states with histories of military authoritarianism has only left the court with enough time to focus on questions of fact and proof, rather than the fine details of the underlying rights.[167] And because the IACHR has not yet had the opportunity to articulate a finely detailed vision of its human rights jurisprudence, it often relies on the case law of the ECHR.[168]

Despite these constraints, there has been some consideration of both CEDAW and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women in the Commission's recent work. For example, when in 1983

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[163] American Declaration of the Rights and Duties of Man, signed May 2, 1948, OAS Official Records, OEA/Ser.L./V/II.23, doc. 21, rev. 6 (English 1979) . While the Convention on Rights and Duties of Man is not a "treaty" per se, it is generally agreed that the Protocol of Buenos Aires, which amended the OAS Charter, changed the legal status of the Declaration to an instrument binds OAS member states under the Charter of the Organization. *See*, Thomas Buergenthal, *The Advisory Practice of the Inter-American Court of Human Rights* 79 A.J.I.L. 1, 7 (1985).

[164] Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, Mar. 5, 1995, 35 I.L.M. 1534 (1994) [hereinafter, Belem do Para Convention], available at http://www.oas.org/cim/English/Convention%20Violence%20Against%20Women.htm.

[165] Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. GAOR, 48th Sess., art. 2, U.N. Doc. A/RES/48/104 (1994), reprinted in 33 I.L.M. 1049 (1994).

[166] *Compare*, Belem Do Para Convention, *supra* note 164, at art. 4 (delineating ten specific and detailed rights included in the guarantee of women's rights) and art. 6 (explaining in detail the meaning and content of a woman's right to be free from violence) *with* Declaration on Violence, *supra* note 165, at art. 3 and 4.

[167] Shelton, *supra* note 89, at 377.

[168] *See, e.g.*, Advisory Opinion OC-5/85 of November 13, 1985, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Series A, No. 5 (1986); Sunday Times v. UK, 30 Eur. Ct. H. R. (ser. A) (1979).

Maria Da Penha Maia Fernandes was shot and paralyzed during a murder attempt by her then-husband, following extensive domestic abuse, she claimed that Brazil had condoned the violence and violated various international agreements.[169] She successfully pursued her case in the Inter-American Commission for Human Rights, which found violations under the Articles of the American Convention, as well as Articles 3, 4(a)-(g), and 7 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women. This obliges states to:

> … guarantee the rights of women to be free from violence in both the public and private sphere [and to] the recognition, enjoyment, exercise and protection of all human rights and freedoms embodied in regional and international human rights instruments… [and to] condemn all forms of violence against women and to agree to pursue, by all appropriate means and without delay, policies to prevent, punish, and eradicate such violence through the adoption of various measures enumerated in the Articles.[170]

Although Brazil did not participate in the Commission's process or specifically respond to the allegations, there are signs that the role of the Inter-American Commission has created a new awareness of gender inequality in the region. The new Brazilian government that took power in January 2003 may use the Commission's recommendations to guide national reforms in line with CEDAW.[171] Recent press reports have lauded Brazil's attitude towards improving its compliance with the convention.[172]

Encouragingly, some state and municipal governments have made progress on domestic violence as a result of the publicity from the case before the Commission. The Commission's actions have helped to draw the attention of the international human rights community as well as brought international pressure to bear against Brazil and its policies. Similarly incremental progress can be seen in a case from Peru. The Inter-

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[169] *Maria Da Penha Maia Fernandes v. Brazil*, Case 12.051, Report No. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 (2000), available at http://www.cidh.oas.org/annualrep/2000eng/ChapterIII/Merits/Bvrazil 12.051.htm. She claimed violation of: Articles 1(1) (obligation to protect rights), 8 (fair trial), 24, and 25 (judicial remedy) of the American Convention; Articles 3, 4(a)-(g), 5 and 7 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, and articles of the American Declaration of the Rights and Duties of Man. *See also* Wilson & Perlin, *supra* note 162, at 713.

[170] Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, *supra* note 164. The Inter-American Commission also found violations of Article II (right to equality) and Article XVII (right to civil rights and recognition of juridical personality) of the American Declaration of the Rights and Duties of Man, *supra* note 163.

[171] U.N. Press Release WOM/ 1407, Government's Commitment to All of Brazil's Women Affirmed Before Anti-Discrimination Committee: Committee Urges Brazil to Uphold Pledge for Women's Equality (July 7, 2003), at http://www.un.org/News/Press/docs/2003/wom1407.doc.htm ("the delegation of Brazil outlined measures being taken to bring the country's legislation in line with the Convention on the Elimination of All Forms of Discrimination against Women; overcome negative stereotypes; improve the situation of rural women; eliminate inequality in the labor market; and develop a national machinery for the advancement of women").

[172] *See*, Brazil's Attitude Towards Improving Situation of Its Women Praiseworthy, Anti-Discrimination Committee Says, M2 Presswire, July 2, 2003.

American Commission found that the Peruvian government was vicariously responsible for the rape of Marina Machaca, an indigenous woman, by a doctor in the country's public health care system. The government did not dispute the Commission's finding and did not take the matter to trial before the Inter-American Court but instead agreed to a settlement with the victim.[173]

The Inter-American Court is also influencing national policy and legislation about women's human rights. Guatemala has complied with many of the Inter-American Court's recommendations by implementing legislative reform in the form set out by the Commission. In 1999, following the Court's decision in *Maria Eugenia Morales de Sierra v. Guatemala* the Guatemalan government passed the Law for Dignity and Integral Promotion of Women.[174] This law promotes access to health care services for women, training in reproductive technologies for health care professionals, representation of marriage and marital property by both sexes. It also repeals the right of husbands to object to women working outside the home.

3) The African Union system

The new machinery of the African states, the African Union (the AU) was launched at the Durban Summit in 2002, taking over from the Organization of African Unity (OAU). This signals the entry, albeit slowly, of Africa as a mature group of nation-states with shared economic, social and strategic interests that go beyond the OAU's initial concerns of expunging colonization and apartheid. Part of the objectives of the AU are to **"**encourag[e] international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights" and to promote and protect human and peoples' rights "in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments."[175] The new AU recognizes that women in Africa are routinely more disadvantaged than men and has established the Women, Gender and Development Directorate to advise on the special needs of Africa's women.[176] The Directorate has an ambitious program of women's empowerment programs on topics such as education, health, trade and the economy, peace processes, and women in politics, all which are intended to enable African women to compete equally with men.

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[173] See *Press Release*, Center for Reproductive Rights, "Women's Human Rights Groups Win Major Victory for Women of Peru and Latin America", available at http://www.crlp.org/pr_00_0314peruset.html**.**

[174] *See*, Center for Reproductive Law and Policy, *supra* note 162. Guatemala on the other hand has not complied with the Commissions recommendation for reform of legislation that refers asymmetrically "to the duty of the husband to protect and assist his wife within the marriage" and that excludes women from guardianship responsibilities. *See*, *Maria Eugenia Morales de Sierra v. Guatemala*, Case 11.625, Inter-Am. C.H.R. OEA/ser.L/V/II. 95 doc.7 rev., at paras. 81-82. *See also*, Wilson & Perlin, *supra* note 162, at 708-12.

[175] African Union, *African Union in a Nutshell*, available at http://www.africa-union.org/About_AU/Abau_in_a_nutshell.htm.

[176]African Union, *Women, Gender, and Development Directorate*, available at http://www.africa-union.org/Structure_of_the_Commission/depWOMEN, GENDER AND DEVELOPMENT.htm

The African Charter on Human and Peoples' Rights is the key human rights document. It provides for basic civil and political rights, as well as social, economic, and cultural rights, without any internal hierarchy of rights.[177] It requires individuals as well as states to respect these rights, and entrenches the interdependence of human rights. The African Commission on Human and Peoples' Rights based in Banjul, Gambia, was established in 1987 with the intent of promoting and protecting these rights.[178] Although individuals can file communications directly with the Commission, the decision process is slow and secretive, its jurisdiction is not compulsory, and its enforcement powers are only advisory. To date, it has not been particularly effective, especially for the nuanced issues of economic, social and cultural rights.

The Charter provides for a variety of basic civil, political, social, economic, and cultural rights, but the only specific reference to women lies in Article 18(3), which obligates nation states to conform to international women's human rights instruments.[179] If a woman's rights under the Charter are violated she has standing to file a communication with the Commission as long as she can demonstrate that she has exhausted all of her available domestic remedies.[180] Although the African Commission on Human Rights has yet to decide any cases directly upon gendered harms, it drafted a Protocol in 1996 concerning the rights of women and has appointed a Special Rapporteur on the Rights of Women in Africa. This rapporteur is commissioned to work towards implementation of CEDAW at the nation state level, in collaboration with national and international NGOs and to make recommendations to the Commission.[181]

The Protocol for the Establishment of an African Court on Human and Peoples' Rights entered into force in January 2004.[182] The Court is expected to begin operations in July 2004 when its judges are selected at the AU General Assembly. Reinforcing the

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[177] For example, rights to race, ethnic group, color, sex, language, religious or political opinion, national and social origin, fortune, birth, or any other status. *See*, African Charter on Human and Peoples' Rights (Banjul Charter), June 27, 1981, Doc. OAU/CAB/LEG/67/3/Rev.5, 21 I.L.M. 59 (1982).

[178] The Assembly of Heads of State and Government of the Organization of African Unity elect the Commission's eleven members. *See*, Ebow Bondzie-Simpson, *A Critique of the African Charter on Human and Peoples' Rights* 31 How. L.J. 643, 650 (1988).

[179] *See*, African Charter, *supra* note 177, at Article 18(3) ("the State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions"). Most of the charter's provisions do not single women out for protection. Article 15, for example, simply provides that "every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work." Article 17 provides all individuals with the right to education; and Article 22 provides for the general right to economic, social, and cultural freedom.

[180] There are, however, some exceptions to this rule where the gravity of the human rights situation, or the quantity of people affected make local remedies practically infeasible or "unduly prolonged." *See*, African Charter, *supra* note 177, at arts. 50 and 56(5).

[181] *See*, Udeme Essien, *The African Commission on Human and Peoples' Rights: Eleven Years After* 6 Buff. Hum. Rts. L. Rev 93, 100 (2000).

[182] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT(III). Full text available at 9 Afr. J. Int'l & Comp. L. 953 (1997). *See also*, Press Release, Amnesty International, African Union: Entry into Force of the Protocol Establishing an African Court on Human and People's Rights (Jan. 22, 2004), available at http://web.amnesty.org/library/index/engafr010042004.

African Commission and the African Charter,[183] the Court has jurisdiction to hear cases of human rights violations referred from the African Commission.[184] Twenty-eight of the possible fifty-three AU states have signed the Protocol.[185] Unlike the Commission, the Court will have binding jurisdiction over states that are parties, and can also offer advisory opinions on "any legal matter relating to the Charter or any other relevant human rights instruments."[186] Article 7 specifies that the "charter and any other relevant human rights instruments ratified by the States concerned" will govern the decisions of the Court. Both non-governmental organizations and individuals can bring cases directly to the Court if they have the permission of the involved party state.

The new African Court on Human and Peoples' Rights has the potential to develop women's human rights that uniquely respond to the immense human rights challenges on the African continent. Just as the Supreme Court of South Africa has signaled a role for African values by its endorsement of "Ubuntu" a Zulu word meaning "a person is a person through other persons,"[187] so the African court has the opportunity to interpret CEDAW's international obligations in ways that will develop the protection of women's rights in the African context. The Court will need to be responsive to gender dynamics, and also to national, political, and economic reform capacity. At the same time the Court will need to insist on inexorable human rights progress while also cementing its legitimacy with African states. In the following, I will suggest how regional human rights systems could be further developed, and how that system could include a stronger role for women's human rights.

(C) Regional court development: rational and recommendations

1) Rationale

Raising the standard of women's human rights everywhere depends crucially upon both the national and international components of the legal system. Virtually all day-to-day interactions between women and their worlds depend, at some fundamental level, upon their most accessible point of contact with national governments. There can be no effective human rights reform without legislation, policy, and political will at the national level. But nation states are frequently the worst guardians of human rights. Local judicial systems are overburdened. Too often, local administrators and even local

[183] Article 2 of the Protocol notes that the African Court shall "complement the protective mandate of the African Commission on Human and Peoples' Rights conferred upon it by the African Charter on Human and Peoples' Rights."

[184] *See*, African Protocol, *supra* note 182, at art. 5(1). *See also*, Vincent O. Orlu Nmehielle, *Towards an African Court of Human Rights: Structuring and the Court* 6 Ann. Surv. Int'l & Comp. L. 27, 47 (2000).

[185] As of January 23, 2004, states that have signed, but have yet to ratify the Protocol include Benin, Botswana, Central African Republic, Congo, Democratic Republic of Congo, Egypt, Equatorial Guinea, Ethiopia, Gabon, Ghana, Guinea-Bissau, Guinea, Kenya, Liberia, Madagascar, Malawi, Mozambique, Mauritania, Namibia, Niger, Seychelles, Sierra Leone, Sudan, Tanzania, Tunisia, Zambia, and Zimbabwe. See, http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/List/Protocol%20on%20the%20African%20Court%20on%20Human%20and%20Peoples%20Rights.pdf..

[186] *See*, African Protocol, *supra* note 182, at art. 4(1).

[187] *See*, Yvonne Mokgoro, *Ubuntu and the Law in South Africa* 4 Buff. Hum. Rts. L. Rev. 15, 19 (1998).

judges and prosecutors are reluctant to intercede or adjudicate on matters of local controversy. Absent external pressures, women's human rights are the least likely to be the focus of many domestic legal and policy systems. The international system is also crucial as a leader in articulating reform, yet also has some serious drawbacks. International human rights committees and tribunals can only provide partial solutions: their processes can be cumbersome, and they can lack relevance because of their location and because they are staffed by foreigners and run by the U.N. administration. Regional courts sit between the nation state and the international system and can provide solutions to both international and national shortcomings.

2) What regional courts provide

Regional systems offer both practical and normative advantages, many of them similar to the advantages of hybrid courts identified by Dickinson.[188] Practically, by operating at a more local level than that of an international tribunal, regional courts are in a better position to promote local capacity and train local actors in necessary skills.[189] The regional system can provide opportunities for local actors for on-the-job training and knowledge sharing within the context of the politics and capacities across the region.[190] At the same time, regional institutions need not be as constrained by the domestic political constituencies that sometimes constrain national human rights bodies, because regional bodies are more detached from specific political allegiances within nation states. Regional human rights institutions may be better situated than international human rights institutions to resolve tensions between local cultural practices and international treaty standards. Regional courts have more direct access to local legal culture and popular sentiments, and can better appreciate on-the-ground conditions and local peoples' responses to human rights issues. Regional institutions are closer to cultural traditions that are shared *across* nation states. They can have an understanding of cultural arguments in favor of practices that violate human rights standards, and also make it clear that superceding a cultural practice with an international standard is not judgment on a culture *in toto.*

For example in relation to the practice of FGM, petitioners coming before the African Court will have their own knowledge of the pervasiveness of the practice and the cultural reasons for the practice. But unlike the institutional CEDAW Committee, the African Court can have cultural legitimacy: it cannot be charged with being captive to Western feminist thinking, or at the very least, not as captive as U.N. bodies. A good decision from the African Court on FGM would have two outcomes: first, it would affirm the culture of the group or nation before it, legitimating culture *per se*. At the same time, it would disaggregate the culture *per se* from one particular incidence of the culture – FGM. Crucially, it would make it clear that practicing FGM on women and girls does not negate that culture. Rather, that each culture has many markers of its own distinctiveness relative to other cultures and that replacing one harmful practice with a new standard does not negate the culture as a whole.

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[188] Dickinson, *supra* note 99 and *supra* note 103.
[189] Dickinson, *supra* note 99, at 1068.
[190] *Ibid*., at 1070.

Regional courts can utilize their heteredox institutional status, using their distance *and* their proximity from both the nation state *and* the international system. Regional courts can garner the normative advantage of international standards, isolated from internecine political power struggles at the state level. This gives international human rights standards an aura of impartiality when administered by regional courts which can help regional courts build a reputation for independence, away from the overweaning power of any one state within the regional system. And having regional judges and tribunals administer international principles helps to defuse the suspicion that international human rights are simply the modern version of old-style colonialism.[191]

On the other hand, the regional human rights instruments applied by regional courts have their own regional lineage. They are the product of like-minded regional states with similar social histories and overlapping cultural traditions. Armed with a better knowledge of the practical human rights capacity of individual nation states within the region, regional courts can make better judgments about the necessity of affording "wriggle room" for cultural exceptions to universal women's rights standards. And because regional courts can apply both regional and international jurisprudence, cross-fertilization effects will develop a body of women's human rights jurisprudence that tackles the problems of applying universal standards to differing cultural contexts. Juxtaposing local and regional understanding with international human rights standards will produce a more intense mediation between local and international human rights standards: the creation of a women's human rights jurisprudence uniquely shaped to a region's particular human rights problems.

3) Specific Recommendations

(i) Regional Protocols on the Rights of Women

Each region needs its own Protocol to Woman's Human Rights that specifically addresses the special needs of the region's women. While such instruments alone are no guarantee that nations will observe women's human rights, they are an important rallying point for women's non-governmental organizations and they provide a specialized framework for the regional courts' jurisdiction. For example, the Inter-American system has introduced such instruments from its earliest days, from the Inter-American Convention on the Nationality of Women, entered into force Aug. 29, 1934, to the Inter-American Convention on the Granting of Civil Rights to Women, entered into force March 17, 1949,[192] to the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women that entered into force in 1995. Likewise, the Protocol to the African Charter setting out women's human rights gives specific attention to practices of gender discrimination, harmful cultural practices, and issues around

[191] *Ibid*., at 1067-9.

[192] The Inter-American Convention on the Granting of Political Rights of Women entered into force on the same date.

marriage, divorce, and motherhood.[193] These documents give women a language in which to frame their claims to their government, or to their village, or to their family.

Each region's Human Rights Commission and Human Rights Court must ensure it has commissioners and judges with expertise on women's issues. In addition, a specialist Committee on Women's Human Rights should have the task of assessing each country within the region, reporting upon state capacity and will to institute women's rights. Such a committee should assess each country's reservations to CEDAW and make recommendations for the timing of their withdrawal. Finally, the regional Women's Protocol committee ought periodically compile a regional report that explicitly assesses the region's human rights progress for women, against both the international and the other regional systems. In this way, the aspirational connection to international benchmarks will continue to exert upwards pressure, while regional cultural realities frame the application of those benchmarks upon nation states by the regional bodies.

(ii) An Asia-Pacific Human Rights Commission and Court

The Asia-Pacific region is singular absence in the scheme of regional human rights institutions is the. The "Asian Tigers" have a patchy record when it comes to human rights guarantees. In the Bangkok Declaration of 1993, Singapore, Malaysia, Indonesia and China asserted that Asian cultures give human rights a different meaning than do those in the individualistic west.[194] Asian values, they argued, place the group over the individual, place harmony and consensus over adversariness and debate, and deference to authority over individual self-expression and freedom. This attitude has affected compliance with CEDAW. For example, Malaysia has entered reservations to CEDAW based upon religious and constitutional grounds, and a Malyasian report for consideration by the CEDAW Committee was due in 1996 but it has yet to be submitted.[195]

The Bangkok Declaration was crafted at the height of the Asian economic boom when the argument that human rights had to wait their turn while developing countries caught up to the West seemed, while not desirable, at least plausible. In fact, it obscured the real stumbling block to a regional human rights system in Asia-Pacific: that international human rights standards are an affront to national sovereignty. Given their colonial pasts, this attitude is unlikely to disappear overnight in Asia, but there are signs, albeit faint, of a mood change. For example, in 1996 the Asia-Pacific Forum of National Human Rights Institutions was formed with representative human rights commissions

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[193] See *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, adopted by the Second Ordinary Session of the Assembly of the Union, Maputo, 11 July 2003. In particular, with regard to discrimination, see Articles 2, 8, and 9; with regard to cultural practices, see Articles 2 and 5; and with regard to marriage, divorce, and motherhood, see Articles 6, 7, 13, 14, 20, and 21.

[194] *Report of the Regional Meeting for Asia of the World Conference on Human Rights*, World Conference on Human Rights, U.N. GAOR, at 293-95, U.N. Doc. A/Conf.157/ASRM/8 -- A/CONF.157/PC/59, signed April 1, 1993.

[195] Multilateral Treaties, *supra* note 9, at 230. *See also*, CEDAW Report of the Secretariat Twenty-Ninth Session, *supra* note 42, at 13.

from Australia, Fiji, India, Indonesia, Malaysia, Mongolia, Nepal, New Zealand, Philippines, Republic of Korea, Sri Lanka, and Thailand.[196] It follows the "Paris Principles" and provides for observer status to be given for governments, UN agencies and human rights non-governmental organizations. [197] It has held annual meetings since its inception, has held workshops on, *inter alia*, women, HIV/AIDS, and economic, social, and cultural rights, and has issued reports on violence against women, trafficking, and discrimination.

An Asia-Pacific Human Rights Commission and Court should be formed under the aegis of the Asia-Pacific Forum, with the agenda of growing its membership to include Japan, Pakistan, Cambodia, and Vietnam, and, one day, China. Its judges and commissioners should have expertise in the range of human rights problems facing women in the Asia-Pacific region. It should issue a region-wide report on the informal application of CEDAW-like provisions in states that have yet to ratify the treaty, and also issue a clear summary of core human rights for women.

(iv) A cautionary note

A note of caution must also be sounded. Regions must not use their regional autonomy to become geographic human rights ghettos, or even worse, pockets of like-minded human rights abusers. For example, legal scholar Diane Shelton notes the risk of "backsliding" in regional systems – that is, the risk that certain state actors with repressive practices will form their own regional courts and regional human rights instruments, serving to sanctify human rights conditions that would otherwise come under the scrutiny of a broader regional system.[198] Shelton sees evidence of the potential for this phenomenon in the Caribbean, where in 1999, Barbados, Guyana, Jamaica, and Trinidad announced plans to establish a Caribbean Court of Justice in large part out of disagreement with the Inter-American standards on due process in death penalty cases.[199]

Regional institutions will need to keep CEDAW in their sights, working to increase women's political agency and economic autonomy. Any regional concession to international standards must not undermine the spirit and intent of that standard, just as reservations to CEDAW must not, under the Vienna Convention, undermine the general intention of the international treaty.

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[196] The body has the support of the joining nation's governments, national human rights institutions, and non-governmental organizations. The body was formed following the adoption of the Larrakia Declaration, which outlines important principles governing the function of national human rights institutions, available at http://www.asiapacificforum.net/about/about_forum.html .

[197] The "Paris Principles" require that the institution be guaranteed independence by statute or constitution; be pluralistic in membership; and possess autonomy from the government, broad membership based on universal human rights standards, adequate powers of investigation, and sufficient resources. See www.asiapacificforum.net/about/paris_principles.html .

[198] Shelton, *supra* note 89, at 395.

[199] *Ibid*. at 396, citing *4 Nations Shedding Curbs on Executions*, Chicago Sun-Times, July 5, 1998, at 45. Shelton explains that the countries had planned on using Trinidad and Tobago as the seat of the new Caribbean court. *See, Trinidad and Tobago to be Centre for Caribbean Court*, The Lawyer, Aug. 4, 1998, at 36.

Conclusion

In an globalized world typified by increasing movements of people across territorial borders and an accelerating awareness of cultural heterogeneity, it is ever more urgent for human rights institutions to develop a women's human rights jurisprudence. Human rights obligations under international treaties are a quiver in the bow of women who want to expose harmful cultural practices that the state either inflicts or permits. But using the devise of treaty reservations, too many nations give lip service to the international human rights system while actual progress at the nation state level on substantive legal and administrative reforms stagnates. Women living in nations that have not acceded to the full range of women's rights under CEDAW have even less capacity to challenge state-sanctioned harms towards women.

Respect for cultural diversity is now an important goal of international human rights. But it exists alongside the goal of equality among all people. The two goals of the international human rights system -- uniform human rights standards on one hand, and a nuanced approach to cultural difference on the other -- are conceptually in tension and difficult to administer. Together, they seem to give antithetical mandates to nation states. Multiculturalism represents the conceptual complexity of administering a human rights system premised upon a universal framework, but that also respects cultural diversity and national sovereignty.

Multiculturalism ought give women the conceptual freedom to define themselves, but it is difficult to practically assess the claim to cultural difference in countries where women's political involvement is low. The downside to a policy of multiculturalism and toleration towards cultural diversity is that it may in fact be a tool of political repression against women. Arguments about multiculturalism have been utilized cynically to simply shield a nation state's reluctance to improve human rights. This conceptual confusion makes it event more difficult for the international human rights system to make an accurate and fair assessment of women's rights. There needs to be a legal forum with more local insight that can assess state claims to the culture defense. Courts and tribunals need the tools for deciding if cultural practices are oppressive or benign towards women.

Regional human rights courts, commissions and tribunals can play an important role in interpreting the tension between universal standards and cultural or group identity. They can provide a moderated universalism and moderated localism. Regional bodies can act as a clearinghouse between the assumptions of female homogeneity that underlie CEDAW, and claims to cultural difference. Regional forums can listen to both the universal claim of women's autonomy, and the local claim of group identity and loyalty to local practice. Regional human rights institutions are a vital part of developing a women's jurisprudence of human rights in a globalized world.