

NOTE

BLAZING A TRAIL FOR THE ENHANCED ENFORCEMENT OF WOMEN'S RIGHTS: *ERGA OMNES PARTES* STANDING

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The revolutionary principle of erga omnes partes standing can be utilized as an enforcement tool for the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"). Recent judicial developments within the International Court of Justice propel this argument forward, providing a novel solution to enforce international human rights obligations. While erga omnes partes standing has only been confirmed in the context of the Genocide Convention and the Convention Against Torture, its applicability to other human rights treaties remains untested by the Court. This Note advances that erga omnes partes standing is an asset for enforcing CEDAW obligations, casting a vision to ameliorate gender-based discrimination around the world.

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INTRODUCTION

In every corner of the world, women¹ face systematic discrimination. No one country prohibits gender-based discrimination and violence while also guaranteeing equal marriage rights, equal pay, and reproductive health care.² Progress to achieve gender equality is lagging, weighed down by discriminatory social norms and the dearth of gender-responsive laws. Violence against women remains ubiquitous—one in every

1 For the scope of this Note, I use the broad term “women,” but this is also meant to include lesbian, bisexual, transgender and intersex women. The CEDAW Committee previously stated that “the rights enshrined in the Convention belong to all women, including lesbian, bisexual, transgender and intersex women.” See *Rosanna Flamer-Caldera v Sri Lanka*, Views of the U.N. Human Rights Committee, Communication No. 134/2018 ¶ 9.7, U.N. Doc. CEDAW/C/81/D/134/2018 (Mar. 24, 2022). The CEDAW Committee has also acknowledged that gender-based discrimination is closely intertwined with other intersecting forms of discrimination, including discrimination based on sexual orientation and gender identity. See Committee on the Elimination of Discrimination Against Women [hereinafter CEDAW Committee], General Recommendation No. 28 ¶ 18, U.N. Doc. CEDAW/C/GC/28 (Dec. 16, 2010); CEDAW Committee, General Recommendation No. 33 ¶¶ 8, 49, U.N. Doc. CEDAW/C/GC/33 (Aug. 3, 2015); CEDAW Committee, General Recommendation No. 35 ¶ 12, U.N. Doc. CEDAW/C/GC/35 (July 26, 2017); CEDAW Committee, General Recommendation No. 39 ¶ 22, U.N. Doc. CEDAW/C/GC/39 (Oct. 31, 2022). Note that a more in-depth analysis is beyond the scope of this Note.

2 UN WOMEN, PROGRESS ON THE SUSTAINABLE DEVELOPMENT GOALS: THE GENDER SNAPSHOT 36 (2024) (“No country has all relevant laws to prohibit discrimination, prevent gender-based violence, uphold equal rights in marriage and divorce, guarantee equal pay, and provide full access to sexual and reproductive health.”) [hereinafter GENDER SNAPSHOT].

eight women and girls is subjected to sexual and/or physical violence by an intimate partner.³ Girls are still forced to endure harmful practices such as child marriage and female genital mutilation.⁴ Over one hundred million girls are stripped of their right to an education.⁵ Women hold fewer seats in parliament, local government, and managerial positions, while disproportionately providing two and a half times the unpaid domestic labor as men.⁶ Moreover, the data gap in reporting women's rights violations leaves women's experiences invisible to necessary change by government bodies.⁷

States are obligated to respond to these grave injustices. Adopted by 189 States,⁸ the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") requires States parties to take all appropriate measures to eliminate discrimination against women in all areas of life, including in education, health, employment, and politics.⁹ By ratifying or acceding to the treaty, States are legally bound to abide by and implement the treaty's provisions.¹⁰

Yet, States often act as the perpetrator of gender-based discrimination and violence. Governments in sixty-seven countries have not enacted laws that prohibit direct and indirect discrimination against women.¹¹ In 18% of countries, women

³ *Id.* at 2 ("1 in every 8 women and girls aged 15–49 was subjected to sexual and/or physical violence by an intimate partner in the previous year.").

⁴ *Id.* at 13 ("In 2023, 1 in 5 women aged 20–24 years was married before age 18 Globally, over 230 million girls and women worldwide have undergone female genital mutilation, including 21.7% in sub-Saharan Africa and 73.6% in Northern Africa. This represents a 15% increase, or 30 million more girls and women over the last 8 years.")

⁵ *Id.* at 2 ("Today, 119.3 million girls remain out of school, down by 5.4 million since 2015.").

⁶ *Id.* at 2 ("Globally, women spend 2.5 times as many hours a day on unpaid care and domestic work as men. In 2023, women held 26.9% of seats in parliaments, 35.5% of seats in local governments and 27.5% of managerial positions.").

⁷ See UN WOMEN, MAKING WOMEN AND GIRLS VISIBLE: GENDER DATA GAPS AND WHY THEY MATTER 1 (2018).

⁸ CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-8&chapter=4&clang=_en [<https://perma.cc/JK5N-KHJ4>] (last visited Feb. 28, 2025) [hereinafter CEDAW TREATY COLLECTION].

⁹ Convention on the Elimination of All Forms of Discrimination against Women, arts. 1, 7–12, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

¹⁰ See *id.* at Introduction.

¹¹ UN Women, *The 11 Biggest Hurdles for Women's Equality by 2030*, UN WOMEN NEWS AND STORIES (Sept. 7, 2023), <https://www.unwomen.org/en/news-stories/feature-story/2023/09/the-11-biggest-hurdles-for-womens-equality-by-2030> [https://perma.cc/6U9U-W4A9].

legally cannot pass on their citizenship rights to their spouse or children.¹² Rape laws in 54% of countries do not include a legal definition of rape based on lack of freely-given consent.¹³ Girls are not legally protected from child marriage in 72% of countries.¹⁴ In addition, many States have claimed exemptions to creating antidiscrimination laws due to their cultural and religious customs through the practice of issuing reservations to CEDAW.¹⁵

So, who can hold States accountable for these violations? CEDAW is monitored by the Committee on the Elimination of Discrimination against Women (“CEDAW Committee”).¹⁶ States who are parties to CEDAW must submit national reports every four years.¹⁷ And, only if States have adopted the Optional Protocol may individuals file a complaint to the CEDAW Committee for the State’s discriminatory actions.¹⁸ Although the recommendations of the CEDAW Committee influence state practice, they are not technically binding on States.¹⁹

Recent judicial developments in the International Court of Justice (“ICJ”), however, have resulted in the launch of a new potential enforcement mechanism for human rights obligations—*erga omnes partes* standing. A pivotal tool, *erga omnes partes* standing is the ability of a non-injured State to have standing in a dispute against another State if both States are parties to the same treaty and have consented to the jurisdiction of the ICJ.²⁰ CEDAW contains a compromissory clause that confers

¹² GENDER SNAPSHOT, *supra* note 2, at 2.

¹³ *Id.* at 12; France is one of the countries that does not include “consent” in their rape law. Gisèle Pélicot, a survivor sexual assault, has become a feminist icon in France by waiving anonymity and requesting a public trial of over 50 men who were invited into her home by her husband to rape her drugged body. The trial in September 2024 has ignited a feminist movement in France to amend the law to include “consent” in the definition of rape. See Victor Goury-Laffont, *French Justice Minister Says He’s Open to Adding Consent to Legal Definition of Rape*, POLITICO (Sept. 27, 2024), <https://www.politico.eu/article/french-justice-minister-didier-migaud-open-adding-consent-legal-definition-rape-dominique-pelicot/> [<https://perma.cc/RZ9P-JAYQ>].

¹⁴ GENDER SNAPSHOT, *supra* note 2, at 2.

¹⁵ See *infra* notes 59–69.

¹⁶ CEDAW, *supra* note 9, art. 17.

¹⁷ CEDAW, *supra* note 9, art. 18.

¹⁸ The Optional Protocol has been ratified by 115 State Parties. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Oct. 6, 1999, 2131 U.N.T.S. 83 [hereinafter Optional Protocol].

¹⁹ See *infra* note 92.

²⁰ See, e.g., *Questions Relating to the Obligation to Prosecute or Extradite* (Belg. v. Sen.), Judgment, 2012 I.C.J. Rep. 422, ¶ 69 (July 20) [hereinafter *Obligation to Prosecute*]; Application of the Convention on the Prevention and

jurisdiction to the ICJ for disputes between States concerning the interpretation or application of the Convention, but this clause has never successfully been invoked.²¹ In comparison to enforcement through the CEDAW Committee, ICJ decisions are binding on the parties subject to the litigation.²² Currently, this standing principle has only been utilized in the context of the Genocide Convention and the Convention Against Torture.²³ In the spring of 2024, for instance, South Africa instituted proceedings against Israel at the ICJ, accusing Israel of genocidal acts against the Palestinian people.²⁴ Mirroring the rationale of earlier cases such as *The Gambia v. Myanmar*, the Court recognized South Africa's *prima facie* standing on the grounds of *erga omnes partes* standing because both States are parties to the Genocide Convention and have essentially consented to the "common interest" of preventing genocide.²⁵

Although untested by the Court, *erga omnes partes* standing in the context of CEDAW can blaze a trail for enhanced enforceability of women's rights. A landmark first,²⁶ States parties of CEDAW could bring a case before the ICJ for another State party's violation of CEDAW. During the U.N. General Assembly

Punishment of the Crime of Genocide (Gam. v. Myan.), Judgment, 2022 I.C.J. Rep. 477, ¶ 107 (July 22) [hereinafter *The Gambia v. Myanmar*].

²¹ CEDAW, *supra* note 9, art. 29; in the *Case Concerning Armed Activities on the Territory of the Congo*, the Democratic Republic of Congo instituted proceedings against Rwanda for human rights violations, including armed aggression, rape, and murder. The DRC attempted to establish jurisdiction of the ICJ in its dispute against Rwanda by invoking the jurisdictional clause of CEDAW, Article 29. The Court determined that this article did not grant jurisdiction to the DRC because the State had not attempted to pursue arbitration prior to bringing the case before the ICJ, a prerequisite of Article 29 of CEDAW. See *Armed Activities on the Territory of the Congo (Congo v Rwanda)*, Judgment, 2006 I.C.J. Rep. 6, ¶¶ 80–93 (Feb. 3). Since this case, no other State has brought a dispute before the ICJ based on the interpretation or application of a breach of CEDAW.

²² U.N. Charter art. 94.

²³ See *e.g.*, *Obligation to Prosecute*, *supra* note 20; *The Gambia v. Myanmar*, *supra* note 20.

²⁴ After Hamas attacked and killed more than 1,200 people in Israel on October 7th, Israel launched a large-scale military operation in the Gaza Strip, resulting in massive civilian casualties and displacement of Palestinians in Gaza. South Africa instituted proceedings against Israel in the ICJ for its alleged breach of the Genocide Convention. The Court determined that South Africa had standing to bring this case before the ICJ because both States consented to the jurisdiction of the court through Article IX of the Genocide Convention and had a "common interest" in preventing, suppressing and punishing genocide. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.)*, Provisional Measures, 2024 I.C.J. (Mar. 28).

²⁵ *Id.* at ¶¶ 33–34.

²⁶ See *supra* note 21.

in September of 2024, Australia, Canada, Germany, and the Netherlands announced that they will take this groundbreaking first step—litigation in the ICJ through the jurisdiction of the compromissory clause of CEDAW—to hold Afghanistan accountable for its numerous violations of CEDAW.²⁷ According to Article 29 of CEDAW, Australia, Canada, Germany, and the Netherlands must first attempt to resolve the dispute with Afghanistan.²⁸ If not successful, the States will have six months to organize arbitration before they can refer the dispute to the ICJ.²⁹

Scholars have already started to explore the applicability of *erga omnes partes* standing to other human rights treaties.³⁰ But CEDAW is unique and requires careful analysis. With the most reservations “with the potential to modify or exclude most, if not all, of the terms of the treaty” of any human rights treaty,³¹ CEDAW exemplifies the tension of cultural norms and universal human rights for women. After all, “patriarchy is the only system that’s . . . universal and inescapable in nature.”³²

In this Note, I will discuss the current challenges of enforcing the obligations of CEDAW and propose a novel solution of pursuing litigation in the ICJ through *erga omnes partes* standing. Part I outlines the hurdles of enforcing the obligations of CEDAW. From the inception of the treaty, tension has existed

²⁷ Three female foreign ministers, Penny Wong (Australia), Annalena Baerbock (Germany), and Mélanie Joly (Canada), along with Caspar Veldkamp (the Netherlands), lead the charge to hold Afghanistan and effectively, the Taliban, accountable for violations of CEDAW. On September 25, 2024, during the High-Level Week at the United Nations General Assembly in New York, the States announced pursuit of this litigation in the ICJ. See Patrick Wintour, *Taliban to be Taken to International Court over Gender Discrimination*, THE GUARDIAN (Sept. 25, 2024), https://www.theguardian.com/world/2024/sep/25/taliban-to-be-taken-to-international-court-over-gender-discrimination?CMP=share_btn_url [<https://perma.cc/L5VX-R23B>]. The Open Society Justice Initiative (OSJI) has been conducting research on a potential case strategy since 2021. See Fereshta Abbasi, Natasha Arnpriester & Duru Yavan, *An Avenue to Justice for Afghan Women: Bringing a CEDAW Case Before the International Court of Justice*, CAMBRIDGE J. LAW, POL., & ART: SPECIAL EDITION: THE HUMAN AGENDA, 244, 244 n.1 (2024) (outlining the potential of an ICJ case against Afghanistan for violations of CEDAW).

²⁸ See CEDAW, *supra* note 9, art. 29.

²⁹ See *id.*

³⁰ See e.g., Alaa Hachem, Oona A. Hathaway & Justin Cole, *A New Tool for Enforcing Human Rights: Erga Omnes Partes Standing*, 62 COLUM. J. TRANSNAT'L L. 259 (2024) [hereinafter Hachem, *A New Tool*].

³¹ Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 AM. J. INT'L L. 281 (1991).

³² ALLAN G. JOHNSON, THE GENDER KNOT: UNRAVELING OUR PATRIARCHAL LEGACY 49 (2005).

between cultural relativism and universal human rights, exemplified by the numerous reservations to CEDAW. Part II reviews the procedural protocols of the ICJ and the jurisprudence laying the foundation for *erga omnes partes* standing. Inspired by Oona Hathaway's analysis, I lay out a theoretical framework for *erga omnes partes* standing in the ICJ. Finally, Part III applies that theoretical framework to CEDAW, offering a hypothetical case study on *Finland v. Libya* to demonstrate this theory's feasibility. Understanding the unique complexity of CEDAW, I address the potential barrier of the copious reservations to CEDAW, specifically to Article 29 (the jurisdictional clause). Furthermore, *erga omnes partes* standing has only been applied in disputes of treaties that protect *jus cogens* norms. I posit that the prohibition against gender-based discrimination should be regarded as a *jus cogens* norm. But even if it is not recognized as such, *erga omnes partes* standing can still be applied in a dispute to enforce CEDAW. Finally, the conclusion casts a vision to enhance enforcement of CEDAW so that women around the world can be free from oppression.

I

CHALLENGES IN ENFORCEMENT OF CEDAW

A. History of CEDAW

The Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), coined as the international bill of rights for women, plays a vital role in galvanizing the fight for gender equality around the world.³³ Currently adopted by 189 States parties,³⁴ CEDAW requires States to guarantee gender equality in all aspects of life and to eliminate discrimination by enacting and enforcing gender-responsive laws.³⁵ The treaty covers a wide range of human rights: political and public life (Articles 7 and 8), nationality (Article 9), education

³³ CEDAW, *supra* note 9; compare Rikki Holtmaat, *The CEDAW: A Holistic Approach to Women's Equality and Freedom*, in WOMEN'S HUMAN RIGHTS: CEDAW IN INTERNATIONAL, REGIONAL AND NATIONAL LAW (Anne Hellum & Henriette Sinding Aasen eds., 2013) with Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 634 (1991) and José E. Alvarez & Judith Bauder, *Critiques of the CEDAW Regime, International Law, and International Human Rights*, in WOMEN'S PROPERTY RIGHTS UNDER CEDAW (2024) [hereinafter Alvarez & Bauder, PROPERTY RIGHTS].

³⁴ According to the United Nations Treaty Collection website, there are currently 189 parties to CEDAW. See CEDAW TREATY COLLECTION, *supra* note 8.

³⁵ See Benedetta Faedi Duramy, *#MeToo and the Pursuit of Women's International Human Rights*, 54 U.S.F. L. REV. 215, 248 (2020).

(Article 10), employment (Article 11), health (Article 12), economic and social benefits (Article 13), and marriage and family life (Article 16).³⁶ Bewilderingly, the United States is among the only seven countries—along with Iran, Sudan, Somalia, Nauru, Palau, and Tonga—that have not yet ratified CEDAW.³⁷

Dating back to the infancy of the United Nations (“U.N.”), the U.N. Charter established a link between human rights and women’s rights within the preamble, which declared the protection of “the equal rights of men *and women*.”³⁸ Soon after, in 1946, the U.N. Commission on the Status of Women (“CSW”) was established to promote women’s rights and charged with creating a U.N. Secretariat office headed by a competent woman, collecting data on women-related laws, promoting equal educational opportunities for women, and launching the world’s first women’s conference.³⁹ Compelled by the feminist movement of the 1970s, the United Nations named 1975 the “International Women’s Year” and held the first World Conference on Women in Mexico City to create a global plan of action, lighting a spark for a treaty specifically focused on women’s rights.⁴⁰ Within the United Nations Decade for Women from 1976–1985, the CSW led the charge for drafting CEDAW—including leading extensive negotiations revolving around the differing cultural and legal perspectives of member States—eventually leading to its adoption in 1979.⁴¹

³⁶ CEDAW, *supra* note 9, arts. 1–16.

³⁷ The United States is only a signatory of CEDAW. Although the United States has some obligations as a signatory, there is much international debate around the United States’ refusal to ratify CEDAW. See generally LISA BALDEZ, *DEFYING CONVENTION: U.S. RESISTANCE TO THE U.N. TREATY ON WOMEN’S RIGHTS* (2014).

³⁸ U.N. Charter Preamble (“to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men *and women* and of nations large and small”) (emphasis added); see also, U.N. Charter art. 8.

³⁹ See Arvonne S. Fraser, *Becoming Human: The Origins and Development of Women’s Human Rights*, 21 HUM. RTS. Q. 853, 887 (1999) [hereinafter Fraser, *Becoming Human*].

⁴⁰ See Susanne Zwingel, *Chapter 3: The Creation of CEDAW Within the Global Discourse on Gender Equality*, in *TRANSLATING INTERNATIONAL WOMEN’S RIGHTS* 40–42 (2016) [hereinafter Zwingel, *TRANSLATING INTERNATIONAL WOMEN’S RIGHTS*] (discussing the global shift toward focusing on equality, development, and peace during the U.N. Decade for Women (1976–1985)); see also HILKKA PIETILÄ & JEANNE VICKERS, *MAKING WOMEN MATTER: THE ROLE OF THE UNITED NATIONS* 76 (3d ed. 1996) (stating that the conference had “repercussions such as the initiators had hardly dared to dream of.”).

⁴¹ See Margaret E. Galey, *Women Find a Place*, in *WOMEN, POLITICS, AND THE UNITED NATIONS* 11–27 (Anne Winslow ed., 1995); Zwingel, *TRANSLATING INTERNATIONAL WOMEN’S RIGHTS*, *supra* note 40, at 42 (discussing the global shift toward

Following the success of the landmark World Conference on Women in Mexico City, three other world conferences offered a forum to review gaps in women's rights and renew States' commitments to gender equality: Copenhagen in 1980, Nairobi in 1985, and Beijing in 1995.⁴² Yet, no central entity focused on women's rights until the U.N. established U.N. Women in 2010.⁴³ Today, U.N. Women advocates for global standards for achieving gender equality and works with governments to design laws in line with the obligations delineated in CEDAW.⁴⁴

Since its adoption, CEDAW has effectuated invaluable improvements to gender equality.⁴⁵ As mandated in Article 2 of CEDAW, countries have adopted new laws: Mongolia passed a law on gender equality; Rwanda enacted a law prohibiting sex-based discrimination in access to land; Turkey, Nepal, South Africa, and the Republic of Korea adopted domestic violence laws; Canada launched a national inquiry into missing and murdered indigenous women; and Ukraine and Moldova established anti-trafficking laws.⁴⁶ CEDAW, through its demand for equality, has also propelled the development of citizenship rights in Botswana, inheritance rights in Tanzania, and property rights in Costa Rica.⁴⁷

B. Cultural Relativism and Reservations to CEDAW

Although there have been significant improvements in women's rights since the 1970s,⁴⁸ gender inequality remains ubiquitous. As discussed in the introduction, the statistics on the status of women expose the lack of State action to remedy

focusing on equality, development, and peace during the U.N. Decade for Women (1976–1985).

⁴² See Fraser, *Becoming Human*, *supra* note 39, at 398, 900, 904.

⁴³ See Zwingel, *TRANSLATING INTERNATIONAL WOMEN'S RIGHTS*, *supra* note 40, at 152.

⁴⁴ UN WOMEN, ABOUT UN WOMEN, <https://www.unwomen.org/en/about-us/about-un-women> [<https://perma.cc/72MB-JLDW>] (last visited Oct. 13, 2024).

⁴⁵ See Zwingel, *TRANSLATING INTERNATIONAL WOMEN'S RIGHTS*, *supra* note 40, at 190–93 (outlining the difference that CEDAW makes through assessments of impact).

⁴⁶ See CEDAW IN YOUR DAILY LIFE, OHCHR, <https://www.ohchr.org/en/treaty-bodies/cedaw/cedaw-your-daily-life> [<https://perma.cc/AAC6-SXGE>] (last visited May 12, 2024).

⁴⁷ See *id.*

⁴⁸ From 1970 to 2018, researchers examined improvements for women in education and employment. See Paula England, Andrew Levine & Emma Mishel, *Progress Toward Gender Equality in the United States Has Slowed or Stalled*, 117 PROC. NAT'L ACAD. SCI. U.S. AM. 6990 (2020) (“[T]he ratio of women's to men's pay increased from 0.61 to 0.83 between 1970 and 2018.”)

the current disparity in women's rights. Malaysia, for example, does not criminalize female genital mutilation, even though 95% of Muslim girls in the country are subjected to this harmful practice.⁴⁹ Kuwait's penal code renders lenient sentences for honor killings.⁵⁰ Although Estonia welcomed their first woman Prime Minister in 2021, the State has seen a decrease in women's representation in decision-making positions.⁵¹ Afghanistan, under Taliban rule, has extensive restrictions on women, including forbidding speaking in public, showing their face, and using public transport alone.⁵²

Discriminatory laws *still* exist. States often weaponize religion and culture to justify sexism,⁵³ generating a paradox of universalism and cultural relativism. Human rights treaties, such as CEDAW, uphold *universal* standards for human rights.⁵⁴ Cultural relativism, on the other hand, proposes that the values and ethics of people should be understood within a cultural context, challenging the notion that human rights are actually *universal* in nature.⁵⁵ The tension between these

⁴⁹ CEDAW Committee Concluding Observations on the Sixth Periodic Report of Malaysia ¶¶ 24–25, U.N. Doc. CEDAW/C/MYS/6 (May 16, 2022); *see also* United Nations, *UN Women's Rights Committee Publishes Findings on Brazil, Estonia, Kuwait, Malaysia, Montenegro, Republic of Korea, Rwanda and Singapore*, PRESS RELEASES: UNITED NATIONS (June 5, 2024), <https://www.ohchr.org/en/press-releases/2024/06/un-womens-rights-committee-publishes-findings-brazil-estonia-kuwait-malaysia> [<https://perma.cc/N95Y-ZRC4>] [hereinafter United Nations, *U.N. Women's Rights Committee Publishes Findings*].

⁵⁰ CEDAW Committee Concluding Observations on the Sixth Periodic Report of Kuwait ¶ 35, U.N. Doc. CEDAW/C/KWT/6 (Dec. 21, 2021); *see also* United Nations, *UN Women's Rights Committee Publishes Findings*, *supra* note 49.

⁵¹ CEDAW Committee Concluding Observations on the Sixth Periodic Report of Estonia ¶ 25, U.N. Doc. CEDAW/C/EST/7 (Aug. 10, 2022); *see also* United Nations, *U.N. Women's Rights Committee Publishes Findings*, *supra* note 49.

⁵² *See* UN WOMEN, *UN Women Deeply Concerned by New Afghanistan Morality Law*, UN WOMEN NEWS & STORIES (Aug. 28, 2024), <https://www.unwomen.org/en/news-stories/statement/2024/08/un-women-deeply-concerned-by-new-afghanistan-morality-law> [<https://perma.cc/9DZ4-X2TR>].

⁵³ *See generally* Michele Brandt & Jeffrey A. Kaplan, *The Tension Between Women's Rights and Religious Rights: Reservations to CEDAW by Egypt, Bangladesh and Tunisia*, 12 J.L. & RELIGION 105 (1995).

⁵⁴ *See* Vedna Jivan & Christine Forster, *What Would Gandhi Say? Reconciling Universalism, Cultural Relativism and Feminism through Women's Use of CEDAW*, 9 SING. Y.B. INT'L L. 103, 110–12 (2005) ("Universalists and cultural relativists see the implications of 'universal' rights in the following terms: universalists support the equal application of a set of 'core' human rights norms, whilst cultural relativists maintain the view that those 'core' human rights should not supercede cultural, religious and traditional differences.").

⁵⁵ *See id.*; *see generally*, Fernando R. Teson, *International Human Rights and Cultural Relativism*, 25 VA. J. INT'L L. 869 (1985); Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400 (1984).

two theories is illuminated in conflicts between women's rights and deeply ingrained cultural or religious practices, such as female genital mutilation or child marriage.⁵⁶ CEDAW specifically calls on States to modify social and cultural patterns that are based on harmful stereotypes.⁵⁷ But States may be unwilling to ratify and implement CEDAW if the obligations cannot be reconciled with local cultural practices. As a compromise, States have ratified CEDAW with reservations.⁵⁸

Reservations to CEDAW are abundant, albeit at the expense of full compliance.⁵⁹ As defined by the Vienna Convention on the Law of Treaties ("VCLT"), reservations are statements made by a State that intend "to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."⁶⁰ Essentially, reservations allow a State to become a party to a treaty while not agreeing to abide by all of the obligations. But these reservations cannot conflict with the object and purpose of a treaty.⁶¹ The CEDAW Committee has indicated that Article 2 (policy measures) and Article 16 (marriage and family life) are essential to the object and purpose of

⁵⁶ See Kathy Davis, *Responses to W. Njambo's 'Dualisms and Female Bodies in Representations of African Female Circumcision: a Feminist Critique': Between Moral Outrage and Cultural Relativism*, 5 FEMINIST THEORY 305, 305 (2004) (highlighting the contrast between moral outrage and cultural relativism in regards to FGM); see also Loretta M. Kopelman, *The Forced Marriage of Minors: A Neglected Form of Child Abuse*, 44 J.L. MED. & ETHICS 173, 178 (2016) (arguing that allowing child marriage results in ethical relativism).

⁵⁷ CEDAW, *supra* note 9, art. 2(f) ("customs and practices which constitute discrimination against women"), art. 5(a) ("To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women"), art. 10(c) ("The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation . . .").

⁵⁸ DECLARATIONS, RESERVATIONS, OBJECTIONS AND NOTIFICATIONS OF WITHDRAWAL OF RESERVATIONS RELATING TO THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, U.N. Doc CEDAW/SP/2006/2 (Apr. 10, 2006) [hereinafter CEDAW RESERVATIONS REPORT].

⁵⁹ See Kelebogile Zvobgo, Wayne Sandholtz & Suzie Mulesky, *Reserving Rights: Explaining Human Rights Treaty Reservations*, 64 INT'L STUD. Q. 785, 791 (2020) ("Among treaties, the ICCPR, CEDAW, and CRC have the highest per-state reservations average, while the CED has the lowest."); see also Clark, *supra* note 31.

⁶⁰ Vienna Convention on the Law of Treaties art. 2(1)(d), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

⁶¹ CEDAW, *supra* note 9, at art. 28(2); VCLT, *supra* note 60, at art. 19(c).

CEDAW, which is to eliminate discrimination against women.⁶² Yet, eighteen States have issued reservations to Article 2, twenty-six to Article 16, and thirty-nine States to Article 29 (the jurisdictional clause).⁶³

Several States' reservations are underpinned by cultural norms and religious practices, such as Islamic Sharia law.⁶⁴ Kuwait, for example, issued a reservation to Article 16(1)(f) stating that it "conflicts with the provisions of the Islamic sharia, Islam being the official religion of the State."⁶⁵ Egypt also issued a reservation to Article 16 laying out Sharia principles around marriage and divorce.⁶⁶ Beyond reservations based on

⁶² UN WOMEN, *Reservations to CEDAW*, <https://www.un.org/womenwatch/daw/cedaw/reservations.htm> [<https://perma.cc/HHF4-KWBA>] (last visited May 12, 2024) ("Articles 2 and 16 are considered by the Committee to be core provisions of the Convention."); see also CEDAW Committee, General Recommendation 21: Equality in Marriage and Family Relations ¶¶ 41, 44 (Feb. 4 1994) ("The Committee has noted with alarm the number of States parties which have entered reservations to the whole or part of article 16, especially when a reservation has also been entered to article 2, claiming that compliance may conflict with a commonly held vision of the family based, inter alia, on cultural or religious beliefs or on the country's economic or political status.").

⁶³ CEDAW RESERVATIONS REPORT, *supra* note 58. As of the 2006 report, nineteen states had issued a reservation to Article 2, thirty states had issued a reservation to Article 16, and thirty-eight states had issued a reservation to Article 29. Although the report is from 2006, there have only been seven additional states that have become parties to CEDAW since the report was issued on April 10, 2006 (Cook Islands, State of Palestine, Nauru, Montenegro, Brunei Darussalam, Qatar, and South Sudan). Of these additional States, Qatar issued reservations to various articles, including Articles 2, 16, and 29, and Brunei Darussalam issued reservations to Articles 9 and 29. In addition, since 2006, the following States parties have withdrawn their reservations to Article 2 (Democratic People's Republic of Korea and New Zealand (Cook Islands)); Article 16 (Bahamas, France, Luxembourg, Morocco, Thailand, and Tunisia), and Article 29 (Tunisia). Note that Mauritania modified its general reservation to issue a specific reservation to Article 16. See CEDAW TREATY COLLECTION, *supra* note 8. Refer to "TABLE 1 – RESERVATIONS TO CEDAW" in the APPENDIX for an updated list of relevant reservations to CEDAW.

⁶⁴ See Samar El-Masri, *Challenges Facing CEDAW in the Middle East and North Africa*, 16 INT'L J. HUM. RTS. 931, 933–34 (2012); see also, AMNESTY INTERNATIONAL, RESERVATIONS TO THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: WEAKENING THE PROTECTION OF WOMEN FROM VIOLENCE IN THE MIDDLE EAST AND NORTH AFRICA REGION 11 (2004) ("Bahrain, Egypt, Libya, and Morocco have entered reservations to Article 2 based on Shari'a. Reservations to Article 16 (in part or as a whole) were entered by Bahrain, Egypt, Iraq, Kuwait, Libya, Morocco, and Syria, while Saudi Arabia entered a general reservation covering any unspecified discrepancies between Islamic Shari'a and CEDAW.").

⁶⁵ CEDAW RESERVATIONS REPORT, *supra* note 58, at 16–17 ("The Government of the State of Kuwait declares that it does not consider itself bound by the provision contained in article 16, paragraph 1 (f) inasmuch as it conflicts with the provisions of the Islamic sharia, Islam being the official religion of the State.").

⁶⁶ *Id.* at 11 ("This is out of respect for the sacrosanct nature of the firm religious beliefs which govern marital relations in Egypt . . .").

Sharia law, India issued a declaration that due to the variety of customs, religions, and levels of literacy throughout the country, it may not be practical to require compulsory registration of marriages.⁶⁷ Singapore also stated that due to its multi-racial and multi-religious society, minorities should be free to practice their religious and personal laws.⁶⁸ Other States have issued reservations based on cultural practices around succession, such as Micronesia, New Zealand, and Niger.⁶⁹

So how is it possible that numerous States can hold reservations to these articles? Article 28 of CEDAW allows reservations, but only if they do not conflict with the object and purpose of CEDAW.⁷⁰ Other States parties—Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Mexico, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Spain, Sweden, and the United Kingdom—have consistently objected to these reservations, stating that the reservations conflict with the object and purpose of CEDAW, but have included a statement in the objection that this does not preclude the entry into force

⁶⁷ *Id.* at 14 (“[T]he Government of the Republic of India declares that, though in principle it fully supports the principle of compulsory registration of marriages, it is not practical in a vast country like India with its variety of customs, religions and level of literacy.”). According to the ILC’s Guide to Practice on Reservations to Treaties, an interpretative declaration is “a unilateral statement . . . whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions.” See INT’L L. COMM’N, *Guide to Practice on Reservations to Treaties*, 2 Y.B. INT’L L. COMM’N 26, ¶ 1.2 (2011).

⁶⁸ CEDAW RESERVATIONS REPORT, *supra* note 58, at 27 (“In the context of Singapore’s multiracial and multireligious society and the need to respect the freedom of minorities to practise their religious and personal laws, the Republic of Singapore reserves the right not to apply the provisions of articles 2 and 16 where compliance with these provisions would be contrary to their religious or personal laws.”).

⁶⁹ *Id.* at 20 (“The Government of the Federated States of Micronesia, in its capacity as trustee of the heritage of diversity within its States under article V of its Constitution, reserves the right not to apply the provisions of articles 2 (f), 5 and 16 to the succession of certain well-established traditional titles, and to marital customs that divide tasks or decision-making in purely voluntary or consensual private conduct.”); *id.* at 24 (“The Government of the Cook Islands reserves the right not to apply article 2 (f) and article 5 (a) to the extent that the customs governing the inheritance of certain Cook Islands chief titles may be inconsistent with those provisions.”); *id.* (“The Government of the Republic of the Niger expresses reservations with regard to article 2, paragraphs (d) and (f), concerning the taking of all appropriate measures to abolish all customs and practices which constitute discrimination against women, particularly in respect of succession.”).

⁷⁰ CEDAW, *supra* note 9, art. 28 (“A reservation incompatible with the object and purpose of the present Convention shall not be permitted.”).

of CEDAW.⁷¹ Article 21(3) of the VCLT states that when this is the case, the treaty goes into force but the “provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.”⁷² Scholars have examined the complexity of these reservations and corresponding objections, implying that the objections may be just a “symbolic gesture.”⁷³ The CEDAW Committee has consistently urged states to review and withdraw their reservations, signifying the importance of abiding with treaty obligations.⁷⁴ However, the impact and enforcement of these objections—as well as the obligations of CEDAW—is tenuous.

C. Current Enforcement Regime of CEDAW

1. *The CEDAW Committee*

CEDAW is currently enforced through the following mechanisms: State periodic reporting, general recommendations, individual complaints, and inquiry procedures. After the adoption of CEDAW, the CEDAW Committee, consisting of a body of twenty-three experts on women’s rights, was charged with monitoring States parties’ implementation of the treaty provisions.⁷⁵ States parties are required to submit a report on the

⁷¹ See CEDAW RESERVATIONS REPORT, *supra* note 58, at 35–45; see also PHILIP ALSTON & RYAN GOODMAN, *Vertical Interpenetration: International Human Rights Law*, in INTERNATIONAL HUMAN RIGHTS: THE SUCCESSOR TO INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS AND MORALS 1082 (2012).

⁷² VCLT, *supra* note 60, at art. 21(3).

⁷³ See Clark, *supra* note 31; see also Christian Walter, *Article 21: Legal Effects of Reservations and of Objections to Reservations*, in VIENNA CONVENTION ON THE LAW OF TREATIES 347–51 (Oliver Dörr & Kirsten Schmalenbach eds., 2d ed. 2018); see generally Tom Ginsburg, *Objections to Treaty Reservations: A Comparative Approach to Decentralized Interpretation*, in COMPARATIVE INTERNATIONAL LAW (Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier & Mila Versteeg eds., 2018).

⁷⁴ See CEDAW Committee, General Recommendation No. 20 (1992) (“States parties should: (a) Raise the question of the validity and the legal effect of reservations to the Convention in the context of reservations to other human rights treaties; (b) Reconsider such reservations with a view to strengthening the implementation of all human rights treaties; (c) Consider introducing a procedure on reservations to the Convention comparable with that of other human rights treaties.”); CEDAW Committee, General Recommendation No. 4 (1987); CEDAW Committee, General Recommendation No. 21 ¶¶ 41, 48 (Feb. 4, 1994); see also Clark, *supra* note 31.

⁷⁵ CEDAW, *supra* note 9, at art. 17; see Marsha A. Freeman, Christine Chinkin & Beate Rudolf, *Introduction*, in THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY 1 (Marsha A. Freeman, Christine Chinkin & Beate Rudolf eds., 2012) [hereinafter CEDAW COMMENTARY]; see also Alvarez & Bauder, *PROPERTY RIGHTS*, *supra* note 33, at 33 (discussing the CEDAW Committee’s authority in regards to jurisprudence over property rights).

implementation status of CEDAW one year after ratification, and then every four years thereafter.⁷⁶ When a State is on the docket for review, NGOs can file shadow reports, providing an independent assessment of the State's compliance with CEDAW.⁷⁷ Then, the Committee will identify gaps in national legislation and issue recommendations through "concluding observations."⁷⁸ Malaysia, for example, received the recommendation to criminalize all forms of female genital mutilation in the CEDAW Committee's most recent "concluding observations" on the State.⁷⁹

As a supplement to CEDAW, the CEDAW Committee issues "general recommendations" in order to provide additional guidance to States parties.⁸⁰ As of the most recent general recommendation in October 2024, the CEDAW Committee has adopted forty general recommendations,⁸¹ including the noteworthy General Recommendation No. 35 calling for the eradication of gender-based violence.⁸² Other general recommendations have called for necessary improvements for the rights of specific populations, such as indigenous, rural, and older women, as well as the prohibition of sex trafficking and harmful practices.⁸³

⁷⁶ CEDAW, *supra* note 9, at art. 18; *see also* Ineke Borefijn & Julie Fraser, *Article 18*, in CEDAW COMMENTARY, *supra* note 75, at 500.

⁷⁷ COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, RULES OF PROCEDURE AND WORKING METHODS, <https://www.ohchr.org/en/treaty-bodies/cedaw/rules-procedure-and-working-methods> [<https://perma.cc/63VK-U7MY>] (last visited Oct. 20, 2024) [hereinafter CEDAW, RULES OF PROCEDURE AND WORKING METHODS]; *see also* Ineke Boerefijn & Julie Fraser, *Article 18*, in CEDAW COMMENTARY, *supra* note 75, at 505–07.

⁷⁸ CEDAW Committee, General Recommendation No. 28 on the Core Obligations of States Parties ¶ 2, U.N. Doc. CEDAW/C/GC/28 (Dec. 16, 2010); *see also* Ineke Boerefijn & Julie Fraser, *Article 18*, in CEDAW COMMENTARY, *supra* note 75, at 501–05.

⁷⁹ CEDAW Committee, Concluding Observations on the Sixth Periodic Report of Malaysia ¶¶ 24–25, CEDAW/C/MYS/6 (May 16, 2022); *see also* United Nations, *UN Women's Rights Committee Publishes Findings*, *supra* note 49.

⁸⁰ CEDAW, *supra* note 9, art. 21; CEDAW, RULES OF PROCEDURE AND WORKING METHODS, *supra* note 77.

⁸¹ Refer to the database for the general recommendations issued: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=3&DocTypeID=11 [<https://perma.cc/4XLS-DT38>].

⁸² CEDAW Committee, General Recommendation No. 35 on Gender-Based Violence Against Women, Updating General Recommendation No. 19, CEDAW/C/GC/35 (July 26, 2017).

⁸³ The Committee on the Elimination of Discrimination against Women has adopted the following general recommendations: CEDAW/C/GC/39 (indigenous women), CEDAW/C/GC/34 (Mar. 7, 2016) (rural women), and CEDAW/C/GC/27

The Optional Protocol to CEDAW, adopted in 1999, allows the CEDAW Committee to receive and review complaints from both individuals and groups, but only in regards to States that are parties to the Optional Protocol.⁸⁴ The scope of the complaints is limited to States parties of the Optional Protocol and only after the individual or groups have exhausted local remedies.⁸⁵ The Committee will then review the claims and issue recommendations to the State involved.⁸⁶ The State must respond with a written explanation of the remedial actions taken within six months, promoting accountability of States parties.⁸⁷ In matters of grave or systematic violations of women's rights, the Committee can initiate inquiries and potentially conduct visits and investigations,⁸⁸ exposing widespread women's rights issues to the international community.

Although the Committee engages in "constructive dialogue"⁸⁹ and may influence subsequent state practice,⁹⁰ the

(Dec. 16, 2010) (older women), CEDAW/C/GC/31/REV.1 (May 8, 2019) (harmful practices), CEDAW/C/GC/38 (Nov. 20, 2020) (sex trafficking).

⁸⁴ The Optional Protocol has been ratified by 115 State parties. See Optional Protocol, *supra* note 18; see also, OHCHR, CEDAW INDIVIDUAL COMMUNICATIONS, <https://www.ohchr.org/en/treaty-bodies/cedaw/individual-communications> [<https://perma.cc/YN7M-AHTR>].

⁸⁵ Optional Protocol, *supra* note 18, at arts. 1, 2, & 4. For a list of CEDAW Committee cases, refer to the following link: https://www.law.cornell.edu/women-and-justice/court/cedaw_committee [<https://perma.cc/QDG9-ABSK>] (last visited Oct. 20, 2024).

⁸⁶ *Id.* at art. 5.

⁸⁷ *Id.* at art. 6.

⁸⁸ *Id.* at art. 8(1); The CEDAW Committee has only conducted inquiries under this article concerning seven countries: Poland, Canada, the United Kingdom, South Africa, Kyrgyzstan, Philippines, and Mexico. See the database of the inquiries here: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=3&DocTypeCategoryID=7 [<https://perma.cc/S3K4-ZRP5>]. Notably, in October 2003, the CEDAW Committee performed their first country visit to Mexico to investigate the abduction, rape, and murder of women in and around Ciudad Juárez, State of Chihuahua, Mexico. See CEDAW Committee, Report on Mexico, U.N. Doc. CEDAW/C/2005/OP.8/MEXICO (Jan. 27, 2005).

⁸⁹ CEDAW, RULES OF PROCEDURE AND WORKING METHODS, *supra* note 77 ("The lists of issues and questions are intended to facilitate the preparation by States parties for their constructive dialogue with the Committee and to provide a focus for the dialogue."); see also Ineke Boerefijn & Julie Fraser, *Article 18, in CEDAW COMMENTARY*, *supra* note 75, at 499–500 (explaining the procedures of the "constructive dialogue").

⁹⁰ See INT'L LAW ASSOC., FINAL REPORT ON THE IMPACT OF FINDINGS OF UNITED NATIONS HUMAN RIGHTS TREATY BODIES 5 (2004) [hereinafter REPORT ON THE IMPACT]; see also Audrey L. Comstock, *Signing CEDAW and Women's Rights: Human Rights Treaty Signature and Legal Mobilization*, 49 L. & SOC. INQUIRY 1222 (2024).

Committee “has no power to enforce its recommendations.”⁹¹ The recommendations, both specific to countries and general to the international community, are non-binding, meaning they have no legal or binding force.⁹² Pressure and shame from the international community can potentially compel States to follow the recommendations. CEDAW enforcement, nevertheless, is essentially an honor system to individual governments because “[t]he treaty grants no enforcement authority to the United Nations or any other international body.”⁹³ Even though scholars have indicated that this enforcement mechanism can be improved by enhancing timeliness, strengthening follow-up mechanisms, and clarifying legal standards of “systematic” violations,⁹⁴ the recommendations are still not binding on States.

2. Other Human Rights Enforcement Mechanisms

Under the umbrella of the United Nations, there are various mechanisms for accountability for violations of human rights. The Human Rights Council conducts a universal periodic review of each U.N. Member State every four and a half years to ensure that each State is fulfilling its human rights obligations.⁹⁵ Other treaty bodies, such as the Human Rights Committee over the International Covenant on Civil and Political Rights (“ICCPR”), review States parties’ actions and issue general comments.⁹⁶ In addition to the CEDAW Optional Protocol,

⁹¹ See S. COMM. ON FOREIGN RELATIONS, CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, S. EXEC. REP. 107-9, at 5 (2d Sess. 2002).

⁹² The International Law Association stated that treaty bodies have no binding force. REPORT ON THE IMPACT, *supra* note 90, at 5 (“It seems to be well accepted that the findings of . . . treaty bodies do not themselves constitute binding interpretations of . . . treaties.”); see also Chelsea Purvis, *The Role of the Committee to the Convention on the Elimination of All Forms of Discrimination Against Women* (2011), https://law.yale.edu/sites/default/files/documents/pdf/cglc/Purvis_RoleOfTheCEDAWcommittee.pdf [<https://perma.cc/7FSE-6LY2>].

⁹³ Elizabeth M. Schneider, *Transnational Law as a Domestic Resource: Thoughts on the Case of Women’s Rights*, 38 NEW ENG. L. REV. 689, 713 (2004).

⁹⁴ See Catherine O’Rourke, *Bridging the Enforcement Gap? Evaluating the Inquiry Procedure of the CEDAW Optional Protocol*, 27 AM. U. J. GENDER, SOC. POL’Y & L. 1, 31-32 (2018) (outlining the effectiveness of the Optional Protocol and suggesting changes to improve the inquiry procedure of CEDAW).

⁹⁵ UNITED NATIONS HUMAN RIGHTS COUNCIL, *Universal Periodic Review*, <https://www.ohchr.org/en/hr-bodies/upr/upr-home> [<https://perma.cc/CSW3-6HQQ>] (last visited Nov. 2, 2024).

⁹⁶ UNITED NATIONS, HUMAN RIGHTS COMMITTEE, *Introduction to the Committee*, <https://www.ohchr.org/en/treaty-bodies/ccpr/introduction-committee> [<https://perma.cc/X335-9MSB>] (last visited Jan. 16, 2025).

other international human rights instruments can be utilized to hear individual complaints: the Commission on the Status of Women Communications Procedures, the U.N. Special Rapporteur on Violence against Women Individual Complaints, Optional Protocol procedures of other international human rights treaties, and the Human Rights Council Complaint Procedure.⁹⁷ These mechanisms, however, face similar problems of enforceability. Only the U.N. Security Council can impose mandatory coercive sanctions and military action against a State in matters of grave violations that present threats to peace and security.⁹⁸

Depending on the location of the violations, States may be able to be held accountable in regional human rights bodies: the Inter-American Human Rights System, the European Human Rights System, and the African Human Rights System. Each of these bodies abide by their own regional agreements and treaties and all have adopted specific measures on women's rights.⁹⁹ Nevertheless, only States parties of these regional treaties can be held accountable in these forums, and implementation of the recommendations or judgments from these bodies can still be an issue.¹⁰⁰

Non-governmental organizations ("NGOs") play an important role in the mobilization of human rights movements and development of international law.¹⁰¹ NGOs may be more willing to openly challenge women's rights abuses of governments than political actors, essentially utilizing shame to pressure

⁹⁷ EQUAL. & HUM. RTS. COMM'N, A LEVER FOR CHANGE: USING THE OPTIONAL PROTOCOL TO THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 38-40 (2010), https://www.equalityhumanrights.com/sites/default/files/a_lever_for_change.pdf [https://perma.cc/6WUA-VTR9].

⁹⁸ U.N. Charter arts. 23-32.

⁹⁹ Each regional body has adopted measures specific to women's rights: Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (Belém do Pará Convention); Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention); and Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol). See GEORGETOWN HUMAN RIGHTS LAW RESEARCH GUIDE, REGIONAL HUMAN RIGHTS SYSTEMS, <https://guides.ll.georgetown.edu/c.php?g=273364&p=6025368> [https://perma.cc/YY6W-YTEV] (last visited Dec. 10, 2024).

¹⁰⁰ See *id.*; The European Court of Human Rights, however, does utilize the Council of Europe's Committee of Ministers to enforce judgments. COUNCIL OF EUROPE COMMITTEE OF MINISTERS, *The Supervision Process*, <https://www.coe.int/en/web/execution/the-supervision-process> [https://perma.cc/487S-Y63R] (last visited Dec. 10, 2024).

¹⁰¹ LOUIS HENKIN, SARAH H. CLEVELAND, LAURENCE R. HELFER, GERALD L. NEUMAN & DIANE F. ORENTLICHER, HUMAN RIGHTS 790 (2d ed. 2009).

States into compliance.¹⁰² These organizations curate litigation strategies pulling on the mechanisms discussed above and file various reports, such as amicus briefs and shadow reports. Depending on the violations of women's rights, this strategy may also include holding individuals—as opposed to State actors—accountable in the International Criminal Court or national courts through universal jurisdiction.¹⁰³

II

ENFORCEMENT THROUGH THE INTERNATIONAL COURT OF JUSTICE

In addition to the various enforcement mechanisms discussed, the International Court of Justice (“ICJ”), the principal judicial body of the United Nations,¹⁰⁴ can potentially serve as an additional forum to enforce the obligations of CEDAW. Located in The Hague, Netherlands, and consisting of fifteen judges, the ICJ settles legal disputes submitted by States or issues advisory opinions in accordance with international law.¹⁰⁵ Although decisions of the ICJ are underpinned by State consent,¹⁰⁶ States involved in the dispute are obligated to comply with the holding, as per Article 94 of the U.N. Charter.¹⁰⁷ Therefore, the decisions of the ICJ are binding on parties involved and can be enforced by the U.N. Security Council, unlike the recommendations of the CEDAW Committee. Furthermore, these rulings shape the legal landscape and influence subsequent State practice.¹⁰⁸

A. Standing in the ICJ

For a State to bring a dispute before the ICJ, the Court first needs to establish jurisdiction over the case and both

¹⁰² See *id.* at 794.

¹⁰³ See *id.* at 698–700.

¹⁰⁴ U.N. Charter art. 92.

¹⁰⁵ See Conditions of Admission of a State to Membership in the United Nations (Charter, art. 4), Advisory Opinion, 1948 I.C.J. 61 (May 28); Northern Cameroons (Cameroon v. U.K.), Judgment, 1963 I.C.J. Rep. 15, 30 (Dec. 2); see also SERENA FORLATI, *THE INTERNATIONAL COURT OF JUSTICE: AN ARBITRAL TRIBUNAL OR JUDICIAL BODY?* 4 (2014).

¹⁰⁶ See CONSTANZE SCHULTE, *2 The Legal Framework*, in COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 19 (2004).

¹⁰⁷ U.N. Charter art. 94.

¹⁰⁸ See Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2 J. INT'L DISP. SETTLEMENT 5, 9–10 (2011) (discussing the impact of precedent in ICJ judgments).

parties must consent to the Court's jurisdiction.¹⁰⁹ According to Article 34(1) of the Statute of the ICJ, "[o]nly States may be parties in cases before the Court."¹¹⁰ During the admissibility stage of litigation in the ICJ, the Court will determine if a State has standing—the entitlement of a State to be a party in these contentious cases.¹¹¹ Although neither the Statute of the ICJ nor the Rules of the Court explicitly use the word 'standing' or '*jus standi*,' there is an implication that standing is the ability of one State to invoke the responsibility of another State for the alleged breach of obligations.¹¹² In order to utilize the ICJ to enforce CEDAW, a State would need to bring a case against another State for its alleged breach of a CEDAW obligation and both States need to consent to the jurisdiction of the Court. Because human rights are usually violated within the territorial borders of a State by the State actor, a non-injured State, who is also a party to CEDAW, would need to bring the case before the ICJ.

Within international law, however, there is debate whether a non-injured State can have standing or a "legal interest"—as opposed to a moral interest—to hold another State accountable for women's rights violations.¹¹³ Previously, a State would need to be directly impacted by the breach.¹¹⁴ For instance, a State could have standing if its nationals abroad were directly impacted by a breach of CEDAW, allowing for the invocation

¹⁰⁹ Statute of the International Court of Justice, June 26, 1945, arts. 36, 33 U.N.T.S. 993 [hereinafter Statute of the International Court of Justice].

¹¹⁰ *Id.* at art. 34(1).

¹¹¹ See Giorgio Gaja, *Standing: International Court of Justice (ICJ)*, Max Planck Encyclopedias of International Law [MPIL], <https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3661.013.3661/law-mpeipro-e3661> [https://perma.cc/UP78-UFDM] (last visited Jan. 16, 2025); see also McCleary H. Sanborn III, Comment, *Standing Before the International Court of Justice: The Question of Palestinian Statehood Exemplifies the Inconsistencies of the Requirement of Statehood*, 7 CAL. W. INT'L L.J. 454, 456 (1977).

¹¹² See CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS ERGA OMNES IN INTERNATIONAL LAW 158–60 (2005); see also Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-Third Session, U.N. GAOR, 56th Sess., Supp. No. 10, at 43, U.N. Doc. A/56/10 (2001), arts. 42, 48.

¹¹³ See generally, Krystyna Marek, *Criminalizing State Responsibility*, 14 REVUE BELGE DE DROIT INT'L 460, 481–82 (1978–79); Peter D. Coffman, *Obligations Erga Omnes and the Absent Third State*, 39 GER. Y.B. INT'L L. 285, 296–97 (1996); Evan J. Criddle, *Standing for Human Rights Abroad*, 100 CORNELL L. REV. 269, 329 (2015).

¹¹⁴ See *Standing: International Court of Justice (ICJ)*, *supra* note 111; see also Pok Yin S. Chow, *On Obligations Erga Omnes Partes*, 52 GEORGETOWN J. INT'L L. 469, 469 (2021) [hereinafter Chow, *On Obligations*].

of diplomatic protection,¹¹⁵ or if the CEDAW violation, despite being carried out by another State, took place within its own territory.¹¹⁶ However, the Court has implied that there is a legal interest in obligations that are owed to the “international community as a whole.”¹¹⁷ These are defined as obligations *erga omnes*, a Latin phrase that means “towards all” or “towards everyone.”¹¹⁸ In addition, through recent ICJ cases in the 21st century, the Court has expanded on obligations *erga omnes* to the concept of *erga omnes partes* standing.¹¹⁹ *Erga omnes partes* standing confirms that non-injured States can have legal standing if the States involved are parties to the same treaty.¹²⁰ Applied to CEDAW, both the non-injured State and the State responsible for the violation must be parties to CEDAW.

B. History of *Erga Omnes Partes* Standing

Over the course of fifty years, three international cases have formed the foundation for the revolutionary principle of *erga omnes partes* standing.¹²¹ In response to the *South West Africa* cases,¹²² the ICJ first recognized in dictum in *Barcelona*

¹¹⁵ See, e.g., *Nottebohm* (Liech. v. Guat.), Judgment, 1955 I.C.J. Rep. 4, 24 (Apr. 6); *Ahmadou Sadio Diallo* (Guinea v. Congo), Judgment, 2007 I.C.J. Rep. 599, ¶ 39 (May 24).

¹¹⁶ See, e.g., *Application of Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43 (Feb. 26); *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14 (June 27).

¹¹⁷ *Barcelona Traction, Light and Power Co., Ltd.* (Belg. v. Spain), Judgment, 1970 I.C.J. Rep. 3, ¶ 33 (Feb. 5) [hereinafter *Barcelona Traction*].

¹¹⁸ “*Erga omnes* obligations,” OXFORD REFERENCE, <https://www.oxfordreference.com/display/10.1093/oi/authority.20110803095756413> [https://perma.cc/Q6MZ-YQ7Z] (last visited Oct. 20, 2024).

¹¹⁹ Hachem, *A New Tool*, *supra* note 30, at 265–66.

¹²⁰ See e.g., *Obligation to Prosecute*, *supra* note 20, at ¶ 69; *The Gambia v. Myanmar*, *supra* note 20, at ¶ 107.

¹²¹ See *Barcelona Traction*, *supra* note 117; *Obligation to Prosecute*, *supra* note 20; *The Gambia v. Myanmar*, *supra* note 20; *Application of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Can. & Neth. v. Syria), Provisional Measures, 2023 I.C.J. (Nov. 16); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (S. Afr. v. Isr.), Provisional Measures, 2024 I.C.J. (Mar. 28).

¹²² See Hachem, *A New Tool*, *supra* note 30, at 272 (“Indeed, it is widely believed that four years later, in deciding *Barcelona Traction*, the Court’s reference to *erga omnes* obligations was an attempt to correct its mistake in the *South West Africa* cases.”); see, e.g., Priya Urs, Guest Post: Are States Injured by Whaling in the Antarctic?, *OPINIO JURIS* (Aug. 14, 2014), <http://opiniojuris.org/2014/08/14/guest-post-states-injured-whalingantarctic> [https://perma.cc/985V-8DAZ]; ROSALYN HIGGINS, *The International Court and South West Africa: The Implications of the Judgment*, in *THEMES AND THEORIES* 758, 758–82 (2009); John Dugard, 1966 and

Traction that States have obligations that are owed to the international community as a whole—*erga omnes* obligations.¹²³ Over forty years later, the Court utilized this dictum to grant standing to Belgium in its case against Senegal in *Obligation to Prosecute*.¹²⁴ The Court did not rely, however, on *erga omnes partes* standing as the sole basis for standing until *The Gambia v. Myanmar* in 2022.¹²⁵ Now, the Court has continued this revolutionary progression by granting *prima facie* standing in both the *Canada and the Netherlands v. Syria* and *South Africa v. Israel* cases.¹²⁶

1. Erga Omnes Obligations

To begin, the Court first recognized the term “obligations *erga omnes*” in the dictum in *Barcelona Traction*.¹²⁷ Belgium filed this case against Spain on behalf of its citizens after Belgian shareholders were harmed by the bankruptcy of the utility company, Barcelona Traction, claiming that Spain had violated international law. The Court, however, did not grant standing to Belgium through diplomatic protection because only the State of incorporation (Canada) could exercise protection of the company itself.¹²⁸ Notably, the Court indicated that there is a difference between “the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection.”¹²⁹ These are obligations *erga omnes* because “all States can be held to have a legal interest in their protection.”¹³⁰ The Court articulated that *erga omnes* obligations include “the outlawing of acts of aggression, and of genocide . . . and rules concerning the basic rights of the human person, including protection from

All That. The South West Africa Judgment Revisited in the East Timor Case, 8 AFR. J. INT’L & COMPAR. L. 549, 553 (1996) (“[Barcelona Traction] did, however, present the International Court of Justice with an opportunity to denounce the approach of the Court in the 1966 *South West Africa Cases*.”).

¹²³ *Barcelona Traction*, *supra* note 117, at ¶ 34.

¹²⁴ *Obligation to Prosecute*, *supra* note 20, at ¶ 68.

¹²⁵ *The Gambia v. Myanmar*, *supra* note 20, at ¶ 108.

¹²⁶ Application of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Can. & Neth. v. Syria), Provisional Measures, 2023 I.C.J. (Nov. 16); Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Provisional Measures, 2024 I.C.J. (Mar. 28).

¹²⁷ *Barcelona Traction*, *supra* note 117, at ¶ 33.

¹²⁸ *Id.* at ¶¶ 100–02.

¹²⁹ *Id.* at ¶ 33.

¹³⁰ *Id.*

slavery and racial discrimination.”¹³¹ This dictum was groundbreaking because it was the first explicit recognition by the ICJ that all States have a legal interest in safeguarding universal obligations.

In order to understand the Court’s reasoning, it is worth visiting the two preceding cases: *S.S. Wimbledon* (1923) and the *South West Africa* cases (1966). In *S.S. Wimbledon*, the Permanent Court of International Justice (“PCIJ”), the predecessor to the ICJ, allowed England, France, Italy, and Japan to hold Germany accountable for its breach of the Treaty of Versailles after Germany denied entry to the steamship *Wimbledon* through the Kiel Canal.¹³² The Court accepted the four States’ standing under Article 386(1) of the Treaty, implying that a non-specially affected State can invoke the responsibility of another State if both are parties to a treaty.¹³³

Yet a few years later, the ICJ seemed to reverse this rationale in the *South West Africa* cases.¹³⁴ In the *South West Africa* cases, Ethiopia and Liberia attempted to hold South Africa accountable for its alleged breach of the League of Nations Mandate for South West Africa for the practice of apartheid.¹³⁵ However, the Court denied standing because the States could not establish a clear “legal interest” beyond the treaty’s jurisdictional clause, ultimately reversing course from the *S.S. Wimbledon* holding.¹³⁶ In the aftermath, the *South West Africa* cases faced global criticism for not condemning apartheid.¹³⁷ Scholars have indicated that the Court may have been attempting to correct this mistake four years later through the dictum in *Barcelona Traction*, confirming that there are indeed obligations that are owed to the international community as a whole, such as protection from racial discrimination.¹³⁸

¹³¹ *Id.* at ¶ 34.

¹³² The *S.S. “Wimbledon”* (Eng., Fr., It. Japan, & Pol. v. Ger), Judgment, 1923 P.C.I.J. (ser. A) No. 1 (Aug. 17).

¹³³ *Id.* at 19–20.

¹³⁴ See Hachem, *A New Tool*, *supra* note 30, at 272 (“The *South West Africa* cases faced severe criticism, including by the dissenting judges.”).

¹³⁵ *South West Africa Cases* (Eth. v. S Afr.; Liber. v. S. Afr.), Preliminary Objections, Judgment, 1962 I.C.J. Rep. 319, at 326–27 (Dec. 21).

¹³⁶ *Id.* at ¶ 49.

¹³⁷ See Hachem, *A New Tool*, *supra* note 30, at 272.

¹³⁸ See *id.* at 273.

Although the idea of *erga omnes* obligations dates back to Roman law,¹³⁹ the concept of *erga omnes* obligations has become foundational to modern international law.¹⁴⁰ In 2001, the International Law Commission (ILC), which is responsible for codifying customary international law,¹⁴¹ included in the Articles on Responsibility of States for International Wrongful Acts ("ARSIWA") conditions for which both an "injured State" and "other States" may invoke the responsibility of another State for an obligation breached.¹⁴² Article 48(1) states that a non-injured State may "invoke the responsibility of another State . . . [if] the obligation breached is owed to the international community as a whole,"¹⁴³ essentially codifying the dictum found in *Barcelona Traction*.¹⁴⁴

2. *Erga Omnes Partes Obligations*

The Court has not yet recognized standing for *erga omnes* obligations. However, the Court, relying on *Barcelona Traction*, expanded the *erga omnes* principle and granted standing for *erga omnes partes* obligations in *Obligation to Prosecute*.¹⁴⁵ While *erga omnes* obligations are those that are owed to the international community as a whole and can be enforced by any State,¹⁴⁶ *erga omnes partes* obligations are those that are owed specifically to fellow States parties to a treaty.¹⁴⁷ Essentially, as parties to a treaty, States have consented to be bound to obligations that each State has a common interest in protecting.¹⁴⁸

¹³⁹ See M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 88 (2001) (denoting the Roman concept of *actio popularis*).

¹⁴⁰ See e.g., Juan-Antonio Carrillo-Salcedo, Book Note, 92 AM. J. INT'L L. 791 (1998) (reviewing MAURIZIO RAGAZZI, *THE CONCEPT OF INTERNATIONAL OBLIGATIONS ERGA OMNES* (1997)); Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1 (1986); Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 823 (1988); Veronica A. Perry, *Human Rights and the Movement of Persons*, 78 AM. SOC'Y INT'L L. PROC. 339 (1984).

¹⁴¹ U.N. Charter art. 13(1)(a).

¹⁴² Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-Third Session, U.N. GAOR, 56th Sess., Supp. No. 10, at 43, U.N. Doc. A/56/10 (2001), arts. 42, 48.

¹⁴³ *Id.* at art. 48(1)(b).

¹⁴⁴ *Barcelona Traction*, *supra* note 117, at ¶ 33.

¹⁴⁵ *Obligation to Prosecute*, *supra* note 20, at ¶ 68.

¹⁴⁶ *Barcelona Traction*, *supra* note 117, at ¶ 33.

¹⁴⁷ *Obligation to Prosecute*, *supra* note 20, at ¶ 68.

¹⁴⁸ Chow, *On Obligations*, *supra* note 114, at 494-95.

The ICJ first endorsed the notion of obligations *erga omnes partes* in *Obligation to Prosecute*.¹⁴⁹ In this 2009 case, Belgium brought a case against Senegal for its failure to prosecute or extradite the former Chadian dictator, Hissène Habré, who was accused of torture and crimes against humanity.¹⁵⁰ Belgium, which acted on behalf of several of Habré's victims who subsequently acquired Belgian nationality, claimed to be specially affected as an injured state.¹⁵¹ Nevertheless, the Court found it unnecessary to opine on if Belgium had a "special interest."¹⁵² Because both Belgium and Senegal are parties to the Convention Against Torture ("CAT"), the Court ruled in favor of Belgium, stating that Senegal was indeed obligated to prosecute Habré or extradite him to a country where he would face trial.¹⁵³ The ICJ affirmed that the obligations under the CAT are *erga omnes partes* obligations, meaning they are owed towards all other parties to the convention, thus enabling any party to the CAT to invoke the responsibility of another party that fails to comply with its obligations.¹⁵⁴

Ten years later, the Court eliminated any uncertainty established in *Obligation to Prosecute* through its landmark decision in *The Gambia v. Myanmar* confirming *erga omnes partes* standing.¹⁵⁵ In 2019, The Gambia filed a case against Myanmar, who are both parties to the Genocide Convention, accusing Myanmar of committing genocide against the Rohingya population.¹⁵⁶ The Court stated that "[a]ll the States parties to the Genocide Convention . . . have a common interest to ensure the prevention, suppression[,] and punishment of genocide,

¹⁴⁹ *Obligation to Prosecute*, *supra* note 20, at ¶ 68.

¹⁵⁰ *Id.* at ¶¶ 15–22.

¹⁵¹ *Id.* at ¶ 103.

¹⁵² *Id.* at ¶ 70.

¹⁵³ *Id.* at ¶ 122.

¹⁵⁴ *Id.* at ¶¶ 68–70.

¹⁵⁵ In between the *Obligation to Prosecute* and *The Gambia v. Myanmar* cases, the Court subtly acknowledged *erga omnes partes* standing in the *Whaling in the Antarctic* decision of 2014. Australia and New Zealand brought a case against Japan for its alleged breach of the International Convention for the Regulation of Whaling and other international commitments to marine animal conservation. Japan did not challenge the standing of the applicants, implying that the Court did not deny the applicability of *erga omnes partes* standing for other treaties. *Whaling in the Antarctic* (Austl. v. Japan: N.Z. intervening), Judgment, 2014 I.C.J. Rep. 226 (Mar. 31).

¹⁵⁶ *The Gambia v. Myanmar*, *supra* note 20, at ¶ 28 ("[I]n October 2016 the Myanmar military and other Myanmar security forces . . . committed mass murder, rape and other forms of sexual violence, and engaged in the systemic destruction by fire of Rohingya villages.").

by committing themselves to fulfilling the obligations contained in the Convention.”¹⁵⁷ Citing *Obligation to Prosecute* and *Barcelona Traction*, the Court affirmed that “such a common interest implies that the obligations in question are owed by any State party to all the other States parties to the relevant convention; they are obligations *erga omnes partes*, in the sense that each State party has an interest in compliance with them in any given case.”¹⁵⁸ As such, the Court confirmed that The Gambia had standing through *erga omnes partes* obligations to invoke the responsibility of Myanmar for its alleged breach of the obligations within the Genocide Convention.¹⁵⁹ Furthermore, the Court had jurisdiction to hear the case because both parties had consented to the jurisdictional clause articulated in Article IX of the Genocide Convention.¹⁶⁰

Following the rationale of *Obligation to Prosecute* and *The Gambia v. Myanmar*, the Court concluded in the 2023 Provisional Measures of *Canada and the Netherlands v. Syrian Arab Republic* that Canada and the Netherlands had prima facie standing through *erga omnes partes* obligations because the States are parties to the CAT.¹⁶¹ Then, in 2024, the Court again recognized prima facie *erga omnes partes* standing for South Africa in its case against Israel for its alleged breach of the Genocide Convention.¹⁶²

C. Framework of *Erga Omnes Partes* Standing

Scholars have indicated that the rulings in *Obligation to Prosecute* and *The Gambia v. Myanmar* provide an avenue for the court to expand standing to other human rights treaties.¹⁶³ Oona Hathaway and co-authors have proposed a two-part test: (1) “the alleged violations must have an *erga omnes partes*

¹⁵⁷ *Id.* at ¶ 107.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at ¶ 114.

¹⁶⁰ *Id.* at ¶ 49.

¹⁶¹ On June 8, 2023, Canada and the Netherlands filed a case against Syria, alleging violations of the CAT for its acts of torture, arbitrary detention, and inhumane conditions of detainees. The Court determined that the States have prima facie standing on the basis of *erga omnes partes* obligations through the CAT. See Application of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Can. & Neth. v. Syria), Provisional Measures, 2023 I.C.J. (Nov. 2023).

¹⁶² See Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Provisional Measures, 2024 I.C.J. (Mar. 28).

¹⁶³ See generally Hachem, *A New Tool*, *supra* note 30.

character—that is, the obligations must be the concern of all States parties to the treaty” and (2) “standing can only arise if the Court has jurisdiction over the dispute, [which is] most likely to arise if the treaty in question provides for mandatory jurisdiction over disputes arising from the treaty.”¹⁶⁴

First, to determine if obligations are of *erga omnes partes* character, the treaty must create an obligation that States parties have a “common interest” in protecting and the provision invoked must be “relevant” to that common interest.¹⁶⁵ Underpinning a treaty, the concept of a “common interest” can be traced to the 1951 ICJ Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*:

In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention.¹⁶⁶

The *Obligation to Prosecute* and *The Gambia v. Myanmar* cases imply that the common interest of each treaty can be found by looking at the object and purpose of the treaty, usually found in the preamble.¹⁶⁷ The preamble of the CAT, for example, states that the object and purpose is to “make more effective the struggle against torture . . . throughout the world.”¹⁶⁸ The Court references this preamble in *Obligation to Prosecute* as evidence of the common interest to “ensure . . . that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity.”¹⁶⁹ The preamble of the Genocide Convention states that “genocide is crime” and “international

¹⁶⁴ Hachem, *A New Tool*, *supra* note 30, at 287.

¹⁶⁵ *Id.* at 289.

¹⁶⁶ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 I.C.J. 15 (May 28) [hereinafter *Reservations to the Genocide Convention*].

¹⁶⁷ Hachem, *A New Tool*, *supra* note 30, at 296 (“Whether a common interest exists is assessed by analyzing the object and purpose of the treaty, which can be expressed through the text, including in the preamble, as well as how the rights and obligations enshrined in the treaty give effect to its purpose.”). According to VCLT, *supra* note 60, at art. 31, “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

¹⁶⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Preamble, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].

¹⁶⁹ *Obligation to Prosecute*, *supra* note 20, at ¶ 68.

co-operation is required.”¹⁷⁰ In *The Gambia v. Myanmar*, the Court reiterated this and stated that treaty parties have a common interest to “ensure the prevention, suppression[,] and punishment of genocide, by committing themselves to fulfilling the obligations contained in the Convention.”¹⁷¹

Similarly, in both cases, the Court explained that the “common interest in compliance with *relevant* obligations” under each Convention entails the ability of States to invoke the responsibility of another State.¹⁷² Therefore, the relevant obligations must be those that are essential to the object and purpose of a treaty.¹⁷³ In the same way that Article 18 of the VCLT obligates signatories to refrain from defeating the “object and purpose” of a treaty,¹⁷⁴ the treaty parties must also refrain from violating provisions that are essential to the object and purpose of a treaty. In other words, not all treaty obligations are obligations *erga omnes partes*, only those that are *essential* to the object and purpose of a treaty or the “common interest” consented to by treaty parties. In *Obligation to Prosecute*, the Court determined that Article 6(2), the obligation to immediately make a preliminary inquiry into the facts, and Article 7(1), the obligation to submit the case to the competent authorities for the purpose of prosecution, were essential to the object and purpose of the CAT.¹⁷⁵ These specific provisions, therefore, are obligations *erga omnes partes*.

Second, the treaty in question must have a mandatory jurisdictional element because the Court lacks true compulsory jurisdiction.¹⁷⁶ The Statute of the ICJ provides for four sources of jurisdiction, all relying on consent: (i) a special agreement or *compromis*;¹⁷⁷ (ii) a compromissory clause in a treaty;¹⁷⁸ (iii) an optional clause declaration;¹⁷⁹ and (iv) forum prorogatum, in

¹⁷⁰ Convention on the Prevention and Punishment of the Crime of Genocide, Preamble, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

¹⁷¹ *The Gambia v. Myanmar*, *supra* note 20, at ¶ 107.

¹⁷² *Id.*

¹⁷³ Chow, *On Obligations*, *supra* note 114, at 496–97.

¹⁷⁴ VCLT, *supra* note 60, at art. 18.

¹⁷⁵ *Obligation to Prosecute*, *supra* note 20, at ¶ 69–70; Convention Against Torture, *supra* note 168, arts. 6(2), 7(1).

¹⁷⁶ Hachem, *A New Tool*, *supra* note 30, at 288; see generally Malcolm N. Shaw, *The International Court of Justice and the Law of Territory*, in *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT OF JUSTICE* (Christian J. Tams & James Sloan eds., 2013).

¹⁷⁷ Statute of the International Court of Justice art. 36(1).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at art. 36(2).

which parties show their consent through specific actions or declarations.¹⁸⁰ As parties to a treaty, States have essentially consented to jurisdiction through a compromissory clause. Currently, there are fifteen human rights treaties with jurisdictional clauses, including the Genocide Convention (Article IX), the CAT (Article 30), the Slavery Convention (Article 8), ICERD (Article 22), and CEDAW (Article 29).¹⁸¹

III

ERGA OMNES PARTES STANDING AS AN ENFORCEMENT MECHANISM OF CEDAW

A. Applying the Framework to CEDAW

Although the ICJ has only recognized *erga omnes partes* standing or *prima facie* standing for alleged breaches of two human rights treaties—the CAT and the Genocide Convention¹⁸²—there is potential for the Court to employ this standing doctrine to other human rights treaties, including CEDAW. Applying the test established above, CEDAW meets both requirements of the framework: (1) CEDAW establishes a clear object and purpose that is the “common interest” of all treaty parties, and (2) CEDAW contains a jurisdictional clause in Article 29.

First, CEDAW establishes a clear object and purpose that is the “common interest” of all treaty parties. Within the preamble, CEDAW seeks to “adopt the measures required for the elimination of . . . discrimination [against women] in all its forms and manifestations.”¹⁸³ The CEDAW committee has indicated that the object and purpose of CEDAW is to “eliminate all forms of discrimination against women with a view to achieving women’s de jure and de facto equality with men in the enjoyment of their human rights and fundamental freedoms.”¹⁸⁴

¹⁸⁰ International Court of Justice, Rules of the Court art. 38(5), Apr. 14, 1978; see also *Corfu Channel* (U.K. v. Albania), Preliminary Objection, 1948 I.C.J. 15 (Mar. 25) (suggesting Albania’s consent through its involvement in the proceedings without challenging jurisdiction); *Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v. France), Judgment, 2008 I.C.J. 177, ¶¶ 60–94 (June 4) (implying Djibouti’s implicit consent from its procedural participation in the case).

¹⁸¹ Hachem, *A New Tool*, *supra* note 30, at 299 n.201; see also *Treaties*, INT’L CT. OF JUST., <https://www.icjciij.org/treaties> [<https://perma.cc/YUB9-ADBW>].

¹⁸² See *supra* note 65.

¹⁸³ CEDAW, *supra* note 9, *Preamble*.

¹⁸⁴ CEDAW Committee, General Recommendation No. 25, on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures, U.N. Doc. A/59/38 annex I (Mar. 18, 2004).

As such, States have consented to a common interest in eliminating discrimination against women and promoting women's rights.

Furthermore, the CEDAW Committee has indicated that Articles 2 and 16 are core provisions central to the object and purpose of CEDAW.¹⁸⁵ If a non-injured State invokes the responsibility of another State for its alleged breach of Article 2 or 16 of CEDAW, the Court could potentially find a basis for *erga omnes partes* standing because these provisions are essential to the object and purpose of CEDAW and all States have a "common interest" in their compliance in any given case.

Second, CEDAW contains a jurisdictional (or compromissory) clause. Article 29 states that if the parties cannot settle a dispute through arbitration within six months, then "any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court."¹⁸⁶ This is the same wording contained in Article 30 of the CAT.¹⁸⁷ Unless a State has issued a reservation to Article 29,¹⁸⁸ the State has essentially consented to jurisdiction in accordance with Article 36 of the ICJ Statute.

B. Hypothetical Case Study: Finland v. Libya

In practice, a non-injured State party of CEDAW could hold another State party accountable for its violations of women's rights by invoking *erga omnes partes* standing in the ICJ. To illustrate this theory and delineate the procedures of the ICJ, suppose that Finland hypothetically announces, perhaps during the U.N. General Assembly, that it will hold Libya accountable for its violations of CEDAW, such as Article 2 (policy measures) and Article 16 (marriage and family life), given

¹⁸⁵ UN WOMEN, RESERVATIONS TO CEDAW, <https://www.un.org/womenwatch/daw/cedaw/reservations.htm> [<https://perma.cc/HHF4-KWBA>] (last visited Oct. 20, 2024) ("Articles 2 and 16 are considered by the Committee to be core provisions of the Convention."); see also CEDAW Committee, General Recommendation 21: Equality in Marriage and Family Relations ¶¶ 41, 44 (Feb. 4, 1944) ("The Committee has noted with alarm the number of States parties which have entered reservations to the whole or part of article 16, especially when a reservation has also been entered to article 2, claiming that compliance may conflict with a commonly held vision of the family based, inter alia, on cultural or religious beliefs or on the country's economic or political status.").

¹⁸⁶ CEDAW, *supra* note 9, at art. 29.

¹⁸⁷ Convention Against Torture, *supra* note 168, at art. 30.

¹⁸⁸ Thirty-nine States have issued a reservation to Article 29. CEDAW RESERVATIONS REPORT, *supra* note 58. Refer to "TABLE 1 – RESERVATIONS TO CEDAW" in the APPENDIX.

Libya's laws that do not criminalize marital rape or domestic violence.¹⁸⁹ Finland is providing a forum to elevate the voices of Libyan women. This would be considered a contentious case because it involves a dispute between states regarding the interpretation or application of CEDAW. Finland and Libya are both parties to CEDAW—Finland ratified the treaty in 1986, and Libya acceded in 1989.¹⁹⁰

Underpinned by the principle of state sovereignty, Finland and Libya must first consent to the jurisdiction of the Court, most likely through the compromissory clause of CEDAW (Article 29).¹⁹¹ Neither State has issued a reservation to this article.¹⁹² If a different State—such as one of the thirty-nine—issued a reservation to Article 29, then there would need to be other means of jurisdiction, such as through a special agreement or optional clause jurisdiction.¹⁹³

According to Article 29, Finland must first attempt to negotiate with Libya.¹⁹⁴ If not successful, the States will have six months to organize arbitration before either can refer the dispute to the ICJ.¹⁹⁵ This step is crucial, as the Democratic Republic of the Congo was previously denied jurisdiction under Article 29 of CEDAW because the State did not first pursue arbitration with Rwanda.¹⁹⁶ After the six months, Finland

¹⁸⁹ According to UN Women, Libya does not criminalize marital rape or domestic violence. Through Article 424 of the Penal Code, a rapist can be exonerated if he marries his victim and does not divorce her for a period of three years. Refer to the UN Women Report on Libya for additional details on Libya's laws and their abidance with CEDAW. UN WOMEN, LIBYA (Dec. 2019), <https://www.undp.org/sites/g/files/zskgke326/files/migration/arabstates/Libya.Summary.19.Eng.pdf> [<https://perma.cc/3CF7-GZTQ>]. In addition, the CEDAW committee recommended that Libya recalls its reservations to Articles 2 and 16. CEDAW Committee, Concluding Observations ¶¶ 13–14, U.N. Doc. CEDAW/C/LBY/CO/5 (Feb. 6, 2009). The report also details Libya's discriminatory laws and calls for reform. "The Committee recommends that the State party introduce legislative reforms to provide women with equal rights in marriage, divorce and inheritance. It calls upon the State party to end the practice of polygamy in accordance with the Committee's general recommendation No. 21, on equality in marriage and family relations." *Id.* at ¶¶ 17–18.

¹⁹⁰ See CEDAW TREATY COLLECTION, *supra* note 8.

¹⁹¹ See CEDAW, *supra* note 9, art. 29; Statute of the International Court of Justice art. 36.

¹⁹² See CEDAW RESERVATIONS REPORT, *supra* note 58. Refer to "TABLE 1 – RESERVATIONS TO CEDAW" in the APPENDIX.

¹⁹³ Statute of the International Court of Justice art. 36; see also *supra* notes 177–80.

¹⁹⁴ See CEDAW, *supra* note 9, art. 29.

¹⁹⁵ See *id.*

¹⁹⁶ In *Armed Activities on the Territory of the Congo*, the Democratic Republic of the Congo instituted a proceeding against Rwanda for human rights violations,

can unilaterally file an application, detailing the facts and legal grounds of the dispute, to the ICJ.¹⁹⁷

If Finland believes that this is an urgent matter to prevent irreparable harm, the State can request provisional measures.¹⁹⁸ In this hypothetical case, the Court will consider the arguments of both Finland and Libya, delivered in written form through memorials and orally during public hearings.¹⁹⁹ Other States will most likely “intervene” in the proceeding by submitting Declarations of Intervention to the Court.²⁰⁰ The Court will deliberate in private and review the primary sources of treaties (CEDAW), customary international law, and general principles, as well as secondary sources of judicial decisions and writing of highly qualified publicists.²⁰¹ Although not bound by the common law principle of *stare decisis*, the Court will give serious weight to previous judgments, such as *Barcelona Traction, Obligation to Prosecute*, and *The Gambia v. Myanmar*—cases that provide a foundational basis for *erga omnes partes* standing.²⁰²

Regarding standing, the Court will consider whether Finland is the appropriate State to bring this dispute. Applying the framework for *erga omnes partes* standing, the Court may modify previous language on *erga omnes partes* obligations and issue the following:

The States parties to the Convention have a common interest to “eliminate all forms of discrimination against women with a view to achieving women’s de jure and de facto equality with men in the enjoyment of their human rights and fundamental freedoms.”²⁰³ “Such a common interest implies that

including armed aggression, rape, and murder. The DRC attempted to establish jurisdiction of the ICJ in its dispute against Rwanda by invoking the jurisdictional clause of CEDAW, Article 29. The Court determined that this article did not grant jurisdiction to the DRC because the State had not attempted to pursue arbitration prior to bringing the case before the ICJ, a prerequisite of Article 29 of CEDAW. See *Armed Activities on the Territory of the Congo (New Application) (Congo v Rwanda)*, Judgment, Jurisdiction and Admissibility, 2006 I.C.J. Rep 6 ¶¶ 80–93 (Feb. 3). Since this case, no other State has brought a dispute before the ICJ based on the interpretation or application of breach of CEDAW.

¹⁹⁷ Statute of the International Court of Justice art. 40.

¹⁹⁸ *Id.* at art. 41.

¹⁹⁹ *Id.* at art. 43.

²⁰⁰ *Id.* at arts. 62, 63.

²⁰¹ *Id.* at art. 38.

²⁰² *Id.* at art. 59; see also Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2 J. INT’L DISP. SETTLEMENT 5, 9–10 (2011).

²⁰³ CEDAW Committee, General Comment No. 25, on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures, U.N. Doc. A/59/38 annex I (Mar. 18, 2004).

the obligations in question are owed by any State party to all the other States parties to the relevant convention; they are obligations *erga omnes partes*, in the sense that each State party has an interest in compliance with them in any given case.”²⁰⁴

The Court will consider the articles in contention, Article 2 and Article 16, and most likely deem these articles obligations *erga omnes partes* because they are essential to the object and purpose of CEDAW and States parties have a “common interest” in their compliance “in any given case.”²⁰⁵

Adding complexity, Libya has issued a reservation to both Article 2 and Article 16(c) and (d), essentially reserving the ability to “exclude or modify” the legal effect of these provisions because of Sharia law.²⁰⁶ Finland has formally objected to this reservation stating that it is “incompatible with the object and purpose of the Convention.”²⁰⁷ Before finding a breach of CEDAW, the Court will have to adjudicate the validity of the reservation and its consequences.²⁰⁸ The Court will most likely deem the reservation incompatible with the object and purpose of CEDAW, in accordance with Article 28 of CEDAW and Article 19(c) of the VCLT.²⁰⁹ But this is not without contemplation—state sovereignty and freedom of religion are core tenets

²⁰⁴ Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Provisional Measures, 2024 I.C.J., ¶ 33 (Mar. 28).

²⁰⁵ See *id.*

²⁰⁶ Libya is among the States that have issued reservations to one or both of these articles. CEDAW RESERVATIONS REPORT, *supra* note 58. Refer to “TABLE 1 – RESERVATIONS TO CEDAW” in the APPENDIX.

²⁰⁷ See CEDAW TREATY COLLECTION, *supra* note 8.

²⁰⁸ VCLT, arts. 19–23; see INTERNATIONAL LAW COMMISSION, GUIDE TO PRACTICE ON RESERVATIONS TO TREATIES ¶ 1.2 (2011); see e.g., Fisheries Jurisdiction (Spain v. Can.), Judgment, 1998 I.C.J. 432, ¶ 49 (Dec. 4); Border & Transborder Armed Actions (Nicar. v. Hond.), Judgment, Jurisdiction and Admissibility, 1988 I.C.J. 69, ¶ 38 (Dec. 20); Armed Activities on the Territory of the Congo (Congo v. Rwanda), Judgment, Jurisdiction and Admissibility, 2006 I.C.J. Rep. 6, ¶ 67 (Feb. 3).

²⁰⁹ CEDAW, *supra* note 9, at art. 28; VCLT, *supra* note 60, at art. 19(c). The Court will most likely review the previous advisory opinion, *Reservations to the Genocide Convention*, setting forward the foundational “object and purpose” test. See Reservations to the Genocide Convention, *supra* note 166; see also Armed Activities, 2006 I.C.J. at 55, ¶ 11 (dissenting opinion by Koroma, J.) (“While a reservation to a treaty clause concerning dispute settlement or the monitoring of the implementation of the treaty is not, in itself, incompatible with the object and purpose of the treaty, it is incompatible if the provision to which the reservation relates constitutes the *raison d’être* of the treaty.”).

of international law.²¹⁰ Nevertheless, the Court will consider that the CEDAW Committee “has noted with alarm the number of States parties which have entered reservations to the whole or part of [A]rticle 16, especially when a reservation has also been entered to [A]rticle 2, claiming that compliance may conflict with a commonly held vision of the family based, inter alia, on cultural or religious beliefs or on the country’s economic or political status.”²¹¹

Once the issue of reservations has been addressed, the judges will consider all the evidence presented during the hearings, interpret the provisions of CEDAW, and deliberate whether Libya violated these obligations.²¹² Because the Court has only issued a judgment granting *erga omnes partes* standing in the context of the Genocide Convention and the CAT, the Court will most likely compare these conventions to CEDAW, bearing in mind that these conventions protect *jus cogens* norms. After the Court issues a judgment, perhaps calling on Libya to modify its discriminatory laws, Libya will be required to comply with the ruling because of its binding nature.²¹³ Finland will also maintain the prerogative to bring the issue before the U.N. Security Council for enforcement if Libya does not comply with the judgment.²¹⁴

Although hypothetical, this case study between Finland and Libya exemplifies the power of *erga omnes partes* standing to enforce CEDAW. Although Finland is not directly affected by the marriage or domestic violence laws in Libya, the State can hold Libya accountable for its alleged breach of CEDAW. A judgment from the ICJ is not only binding on Libya, but also significantly shifts the legal and diplomatic landscape on women’s rights. As a result, other States may be prompted to reform discriminatory laws under the pressure of the international community.

²¹⁰ See generally, Samantha Besson, *Sovereignty*, MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW [MPIL] (Apr. 2011); Nicola Wenzel, *Opinion and Expression, Freedom of, International Protection*, MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW [MPIL] (Apr. 2014).

²¹¹ CEDAW Committee, General Recommendation 21: Equality in Marriage and Family Relations ¶ 41 (Feb. 4, 1994).

²¹² See INT’L COURT OF JUSTICE, *How the Court Works*, <https://www.icj-cij.org/how-the-court-works> [<https://perma.cc/WTB2-Q3WX>] (last visited Nov. 2, 2024).

²¹³ See U.N. Charter art. 94.

²¹⁴ See *id.*

C. Potential Challenges

Although in theory non-injured States, such as Finland, would be able to utilize *erga omnes partes* standing as a mechanism for accountability and enforcement of CEDAW, there may be limitations because (1) States have issued reservations to Article 29 of CEDAW, limiting the compromissory jurisdiction of the ICJ, and (2) the prohibition against gender-based discrimination is not yet a *jus cogens* norm.

1. Reservations to CEDAW

Reservations to CEDAW, unfortunately, can limit enforceability. Article 28 of CEDAW allows States to submit reservations to specific articles, including the jurisdictional clause (Article 29), as long as the reservations do not conflict with the object and purpose of CEDAW.²¹⁵ Thirty-nine States have submitted a reservation to Article 29,²¹⁶ essentially limiting the mandatory jurisdiction of the ICJ. In *The Gambia v. Myanmar*, the Court refused to address whether Bangladesh, who had issued a reservation to the compromissory clause (Article IX) of the Genocide Convention, had standing.²¹⁷ Most likely, States would need to consent to the jurisdiction of the Court, which is still possible—albeit unlikely—through other means of jurisdiction, such as a special agreement (*compromis*), an optional clause declaration, or forum prorogatum.²¹⁸

2. The Prohibition Against Gender-Based Discrimination is not yet a *Jus Cogens* Norm

The Court may consider whether the prohibition against gender-based discrimination is a *jus cogens* norm—or at least an *erga omnes obligation*. *Jus cogens* norms, or peremptory norms, are norms that are non-derogable, meaning that these rights are absolute and can never be violated, even in times of war or emergency.²¹⁹ Although not all *erga omnes* obligations

²¹⁵ CEDAW, *supra* note 9, at arts. 28–29.

²¹⁶ CEDAW RESERVATIONS REPORT, *supra* note 58. Refer to “TABLE 1 – RESERVATIONS TO CEDAW” in the APPENDIX.

²¹⁷ *The Gambia v. Myanmar*, *supra* note 20, at ¶ 113.

²¹⁸ See *supra* notes 177–80.

²¹⁹ VCLT, *supra* note 60, at art. 53; see also Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT’L L. 291, 297 n.37 (2006) (“The terms *jus cogens* and peremptory norms are used interchangeably. Article 53 of the VCLT . . . is entitled ‘Treaties conflicting with a peremptory norm of general international law (*jus cogens*).’”); N.G. Onuf & Richard K. Birney, *Peremptory Norms of*

are *jus cogens* norms,²²⁰ in practice, the Court has only explicitly acknowledged *erga omnes partes* standing in cases where the treaty protected a *jus cogens* norm—the prohibition against genocide²²¹ and the prohibition against torture.²²²

This creates a potential hurdle: the prohibition against gender-based discrimination is not *yet* considered a *jus cogens* norm.²²³ Certain treaties, such as the ICCPR, have explicitly named rights or obligations that are non-derogable.²²⁴ Examples include prohibitions against genocide, slavery, torture, and racial discrimination²²⁵—but not gender-based discrimination. In the most recent report, the International Law Commission (“ILC”) overtly excluded gender-based discrimination when it confirmed a non-exhaustive list of peremptory norms.²²⁶ A member of the ILC stated, in 2006, that “the condemnation of gender discrimination is still limited to certain parts of the world[,] . . . which prevents it to be considered a norm accepted and recognized by the international community.”²²⁷ The Special Rapporteur tasked with providing recommendations on peremptory norms to the ILC, Dire Tladi of South Africa, stated in his Fourth Report that he believes that “gender discrimination should be prohibited in the same way as other *jus cogens* norms,” but there are various restraints to achieving this status, including the significant number of reservations to

International Law: Their Source, Function and Future, 4 DENVER J. INT’L L. & POL’Y 187, 190 (1974); Georg Schwarzenberger, *International Jus Cogens?*, 43 TEX. L. REV. 455 (1965).

²²⁰ INT’L L. COMM’N REP., *Chapter IV Peremptory Norms of General International Law (Jus Cogens)*, U.N. Doc. A/77/10, Conclusion 17 Commentary (3) (2022).

²²¹ *The Gambia v. Myanmar*, *supra* note 20, at ¶ 107.

²²² *Obligation to Prosecute*, *supra* note 20, at ¶ 68–70.

²²³ Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63, 70 (1993) [hereinafter Charlesworth & Chinkin, *Gender of Jus Cogens*].

²²⁴ International Covenant on Civil and Political Rights art. 4, Dec. 16, 1966, 999 U.N.T.S. 171; Human Rights Committee, General Comment No. 24 ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 2, 1994).

²²⁵ See Bassiouni, *supra* note 139, at 108 (identifying prohibitions on piracy, slavery, war crimes, crimes against humanity, genocide, apartheid, and torture as rising to the level of *jus cogens*).

²²⁶ INT’L L. COMM’N REP., *Chapter IV Peremptory Norms of General International Law (Jus Cogens)*, U.N. Doc. A/77/10, Conclusion 23 (2022).

²²⁷ Alain Pellet, *Comments in Response to Christine Chinkin and in Defense of Jus Cogens as the Best Bastion Against the Excesses of Fragmentation*, 17 FINN. Y.B. INT’L L. 83 (2006).

CEDAW and “the limited explicit *opinio juris cogentis* regarding the . . . prohibition of gender discrimination.”²²⁸

Because gender equality is universal and foundational to human dignity, the prohibition against gender-based discrimination should be elevated to a *jus cogens* norm, reflecting the evolutionary nature of customary international law. Numerous human rights instruments, in addition to CEDAW, prohibit discrimination against women.²²⁹ Yet, scholars Hilary Charlesworth and Christine Chinkin have argued that due to gender-bias in international law, “*jus cogens* norms reflect a male perspective of what is fundamental to international society that may not be shared by women or supported by women’s experience of life.”²³⁰ Arguing that this masculine approach lives on in the 21st century, Patricia Viseur Sellers criticizes the normative approach taken by prominent male scholars²³¹ and concludes that “freedom from gender discrimination would disrupt and dislodge the gender hierarchies still embedded in *jus cogens*.”²³² The ILC has also failed to acknowledge the International Criminal Court’s view that rape and sexual slavery, “in times of war and peace” were peremptory norms.²³³ Mary H. Hansel has challenged the ILC’s methodology of inconsistently

²²⁸ Dire Tladi, *Fourth Report of the Special Rapporteur on Peremptory Norms of General International Law (Jus Cogens)* ¶¶ 134, 135, n.411 U.N. Doc. A/CN.4/727 (Jan. 31, 2019). Note that *opinio juris cogentis* refers to “the acceptance and recognition of the international community of States as a whole. See *id.* at ¶ 135, n.413.

²²⁹ The Universal Declaration of Human Rights states that there can be no discrimination on the basis of sex, including the right to equal pay. Universal Declaration of Human Rights, arts. 2, 23, U.N. Doc. A/810 (1948). The U.N. Charter indicates that both men and women should be allowed to participate in U.N. organs in any capacity. U.N. Charter art. 8. See also U.N. Women, Law and Policies, <https://www.unwomen.org/en/how-we-work/gender-parity-in-the-united-nations/laws-and-policies> [<https://perma.cc/LD5F-8QMY>] (last visited May 12, 2024).

²³⁰ Charlesworth & Chinkin, *Gender of Jus Cogens*, *supra* note 223, at 67 (1993).

²³¹ Patricia Viseur Sellers, *Jus Cogens: Redux*, 116 AJIL UNBOUND 281, 283 (2022) (“Essentially, the cosmopolitan citizens framed in the fiduciary theory’s normative approach, retain presumptions of masculinity that consign overt female values to a silenced existence.”) (citing Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT’L L. 331 (2009) (“Ohlin’s normative law examination of *jus cogens* does not generate any serious contemplation of freedom from gender discrimination”) (citing Jens David Ohlin, *In Praise of Jus Cogens’ Conceptual Incoherence*, 63 MCGILL L.J. 701, 714 (2018))).

²³² See Sellers, *supra* note 231, at 286.

²³³ See *id.* at 285; see also Prosecutor v. Ntaganda, Second Decision on the Defence’s Challenge to the Jurisdiction of the Court in Respect to Counts 6 and 9 ¶¶ 51–52, ICC-01/04-02/06 (Jan. 4, 2017).

weighing the evidence of reservations to CEDAW more heavily than reservations to the CAT, which protects a *jus cogens* norm.²³⁴ A feminist rethinking of *jus cogens* norms indicates that gender equality is fundamental to international human rights law.²³⁵

Even if the prohibition against gender-based discrimination does not rise to a *jus cogens* norm, *erga omnes partes* standing could still be applied in the context of CEDAW. Scholars, like Oona Hathaway and her co-authors, have explored expanding *erga omnes partes* standing to other treaties—human rights treaties, counterterrorism and weapons treaties, and environmental treaties—in which achieving *jus cogens* status may not be necessary.²³⁶ Nevertheless, in the human rights section of the analysis, the authors do not explicitly address the applicability of *erga omnes partes* obligations to CEDAW. Instead, the authors primarily outline the applicability of *erga omnes partes* obligations in human rights treaties that protect *jus cogens* norms: the Slavery Convention (slavery), the International Convention on the Elimination of All Forms of Racial Discrimination (racial discrimination), and the Refugee Convention (nonrefoulement).²³⁷ Although the Hathaway analysis does apply the framework to the International Convention for the Protection of All Persons from Enforced Disappearance, which does not explicitly protect a *jus cogens* norm, or even an *erga omnes* obligation,²³⁸ the authors might have considered a more in-depth analysis of CEDAW. This omission may be due to the significant number of reservations to CEDAW or the lack of an explicit acknowledgment that the prohibition of gender-based discrimination is an *erga omnes* obligation.

The Court could potentially apply a test of whether gender-based discrimination is an *erga omnes* obligation in line with the dictum of *Barcelona Traction*. The fundamental nature of the prohibition against gender-based discrimination could be considered a “basic right of the human person” that is of

²³⁴ See Mary H. Hansel, “Magic” or Smoke and Mirrors? The Gendered Illusion of *Jus Cogens*, in PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW (*JUS COGENS*) 491–92 (Dire Tladi ed., 2021).

²³⁵ Charlesworth & Chinkin, *Gender of Jus Cogens*, *supra* note 223, at 74–75; see also, Sarah Brown, *Feminism, International Theory, and International Relations of Gender Inequality*, 17 *MILLENNIUM: J. INT’L STUD.* 461, 472 (1988).

²³⁶ See Hachem, *A New Tool*, *supra* note 30.

²³⁷ See *id.* at 300–04.

²³⁸ See *id.* at 302.

concern to the “international community as a whole.”²³⁹ Scholars suggest that environmental protection, for example, could be viewed as an *erga omnes* obligation,²⁴⁰ albeit not necessarily achieving the status of a *jus cogens* norm. In *Whaling in the Antarctic*, a case concerning environmental regulations, *erga omnes partes* standing was implicit, but not an issue in the dispute between Australia and Japan,²⁴¹ suggesting that other treaties, such as the International Convention for the Regulation of Whaling, can provide *erga omnes partes* standing without protecting a *jus cogens* norm. As such, the Court should apply *erga omnes partes* standing in the context of CEDAW because the prohibition against gender-based discrimination—at the very least—should be considered an *erga omnes* obligation. Women deserve the acknowledgement that freedom from gender-based discrimination is a “basic right of the human person” that is of concern to the “international community as a whole.”²⁴²

CONCLUSION

The Convention on the Elimination of All Forms of Discrimination against Women advances not only obligations on nations but a broader commitment to eradicate gender-based discrimination, pioneering a world where men and women are equal. But what if CEDAW cannot be effectively enforced? By postulating *erga omnes partes* standing as a legal tool for enhanced enforcement of CEDAW, States can demand justice for women who face grave violations to their fundamental human rights.

²³⁹ Barcelona Traction, *supra* note 117, at ¶ 34; see also Eric Posner, *Erga Omnes Norms, Institutionalization, and Constitutionalism in International Law*, 165 J. INST. & THEORETICAL ECON. 5 (2009).

²⁴⁰ See also Maria José Alarcon, *Consequences of Recognizing Environmental Protection as an Emerging Erga Omnes Obligation in the ISDS Context*, KLUWER ARB. BLOG (Aug. 31, 2021), <https://arbitrationblog.kluwerarbitration.com/2021/08/31/consequences-of-recognizing-environmental-protection-as-an-emerging-erga-omnes-obligation-in-the-isds-context/> [<https://perma.cc/EU34-8BXA>] (arguing that environmental protection is an *erga omnes* obligation); see also Nilufer Oral, *Environmental Protection as a Peremptory Norm of General International Law: Is It Time?*, in PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW (JUS COGENS) 575–77 (Dire Tladi ed., 2021) (discussing whether harm to the environment constitutes a *jus cogens* norm).

²⁴¹ See *Whaling in the Antarctic* (Austl. v. Japan), Judgment, 2014 I.C.J. Rep. 226 (Mar. 31).

²⁴² Barcelona Traction, *supra* note 117, at ¶ 34.

A landmark case in the ICJ, such as a potential case against Afghanistan,²⁴³ would open a new forum for States to hold other States accountable for discrimination against women. The first of its kind, this contentious case would bolster accountability and shape the diplomatic landscape around women's rights. Litigation provides a voice for survivors and victims of gender-based atrocities, such as rape, domestic violence, and other harmful practices. A synergistic approach, seen in the situations of genocide in Gaza and Myanmar, can be an effective avenue for justice and reparations for women. Activists not only can leverage an integrated strategy to pull on various accountability mechanisms (e.g., CEDAW Committee, Human Rights Council, regional human rights bodies, the International Criminal Court, etc.), but also potentially utilize a new tool—litigation in the ICJ through *erga omnes partes* standing. The next step is a State having the gumption to stand up for women's rights in the largest international court in the world, blazing a trail for the enhanced enforcement of women's rights.

²⁴³ See *supra* note 27.

APPENDIX

Article	<i>State party issuing the reservation</i>
2	(1) Algeria; (2) Bahrain; (3) Bangladesh; (4) Bahamas; (5) Egypt; (6) Iraq; (7) Lesotho; (8) Libya (Libyan Arab Jamahiriya); (9) Maldives; (10) Micronesia (Federated States of); (11) Morocco; (12) Niger; (13) Qatar; (14) Singapore; (15) Syrian Arab Republic; (16) Thailand; (17) United Arab Emirates; (18) United Kingdom of Great Britain and Northern Ireland (on behalf of: British Virgin Islands, Falkland Islands (Malvinas), South Georgia and South Sandwich Islands, and Turks and Caicos Islands).
16	(1) Algeria; (2) Bahrain; (3) Egypt; (4) India; (5) Iraq; (6) Ireland; (7) Israel; (8) Jordan; (9) Kuwait; (10) Lebanon; (11) Libya (Libyan Arab Jamahiriya); (12) Malaysia; (13) Maldives; (14) Malta; (15) Mauritania; (16) Micronesia (Federated States of); (17) Monaco; (18) Niger; (19) Oman; (20) Qatar*; (21) Republic of Korea; (22) Singapore; (23) Syrian Arab Republic; (24) Switzerland; (25) United Arab Emirates; (26) United Kingdom of Great Britain and Northern Ireland (on behalf of: British Virgin Islands, Falkland Islands (Malvinas), South Georgia and South Sandwich Islands, and Turks and Caicos Islands).
29	(1) Algeria; (2) Argentina; (3) Bahamas; (4) Bahrain; (5) Brazil; (6) Brunei Darussalam; (7) China; (8) Cuba; (9) Democratic People's Republic of Korea; (10) Egypt; (11) El Salvador; (12) Ethiopia; (13) France; (14) India; (15) Indonesia; (16) Iraq; (17) Israel; (18) Jamaica; (19) Kuwait; (20) Lebanon; (21) Mauritius; (22) Micronesia (Federated States of); (23) Monaco; (24) Morocco; (25) Myanmar; (26) Niger; (27) Oman; (28) Pakistan; (29) Qatar; (30) Saudi Arabia; (31) Singapore; (32) Syrian Arab Republic; (33) Thailand; (34) Trinidad and Tobago; (35) Turkey; (36) United Arab Emirates; (37) Venezuela; (38) Viet Nam; (39) Yemen.