

Legal Tools: Using International Law for Gender Equality

Introduction

International law is not just for lawyers. Rather, it can be a powerful tool for women's rights activists to promote gender equality everywhere in the world. As a result, learning about how to use international law can help any activist in their women's rights campaigns.

This introduction to international law has two main goals: first to introduce the non-lawyer to the international legal system, and second to demonstrate what areas of international law are important to the gender equality advocate.

A. Advocacy Background

Generally, different countries approach international law in different ways. But no matter how your country integrates international law into its domestic legal framework, every country which has signed a treaty, such as CEDAW, must by law uphold the provisions of that treaty.

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

Activists can also use their domestic and international courts to address women's rights issues. Our CEDAW Case Bank [link: <http://www.globaljusticecenter.net/tools/casebank/index.html>] is a great place for activists to study how women in their country and others have used international law as a means to bring meaningful change using domestic and international courts.

Citing to international obligations, such as those set out in CEDAW [link: <http://www.un.org/womenwatch/daw/cedaw/>] or SCR 1325 [link: <http://www.unfpa.org/women/1325.htm>] are key to making these two treaties part of the international vocabulary with regards to women's equality rights. The more that domestic and international courts use cite to these international obligations, the more powerful they become as an advocacy tool for women in countries around the globe.

Below is an in depth legal discussion of the concepts. Activists need not know all of the details of international law in order to get an understanding on how utilize international instruments such as CEDAW. But for those who wish to learn more, the discussion below is meant to be a more in-depth primer on the issues introduced above.

B. Legal Background

I. The Role of International Law in Domestic Courts

Two Approaches to International Law:

Countries typically approach international law from two different standpoints.

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

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

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

The Global Justice Center advocates for a view of international law in which countries compliance with international obligations should be automatic and above all domestic obligations. This corresponds highly with a monist view. However, as is described in the case study below, some dualist countries can also use international law as a means to implement constitutional guarantees.

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

Determining Your Country’s Approach.

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

Looking at your country’s constitution may help determine your country’s approach to international law. Some constitutions set out rules governing when international law must be considered by the judiciary. However, just looking to your country’s constitution is frequently not enough. You should also research how the courts in your country have interpreted these constitutional provisions, such as by reading recent cases or books on the issue. Again, the case study below demonstrates that even dualist countries can place high importance upon

international obligations.

If your government has not been following its international legal obligations, activists can advocate for change through a number of different domestic or international means. For example, if your country accepts lower sentences for perpetrators of honor killings, they are in violation of CEDAW [link: <http://www.un.org/womenwatch/daw/cedaw/>]. If a country has ratified CEDAW, these laws must be struck down as invalid because they are in violation of international law.

Judicial Activism – The Bangalore Principles

In 1998, a collection of chief justices from former commonwealth countries gathered in Bangalore, India to discuss the role of international human rights law in domestic courts. The result of this conference was the issuance of the *Bangalore Principles* [link: http://www.chr.up.ac.za/hr_docs/african/docs/other/cwn1.doc]. These principles empower judges in dualist countries to employ international human rights obligations, regardless of whether implementing legislation has been passed:

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

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

Case Study: Sexual Harassment in India. Using CEDAW in a Dualist Country. *Vishaka v. State of Rajasthan* (3 BHRC 261)

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

Judicial Holding. The court ruled that any international convention not inconsistent with the fundamental rights guaranteed in the Constitution and in harmony with its spirit *must* be used to construe the meaning and content of the constitutional guarantee and to promote its object, regardless of whether implementing legislation has been passed. This is now an accepted rule of judicial construction in India.

The case follows that Arts 11 and 24 of CEDAW, General Recommendations Nos 22, 23 and 24 of the CEDAW Committee, relating to sexual harassment in the workplace, may be relied upon to construe the nature and ambit of the gender equality guarantee in India's constitution. The court issued a series of guidelines to be observed at all workplaces or other institutions for the preservation and enforcement of the right to gender equality of working women.

Importance for Advocates. This is a perfect example of applying the Bangalore Principles, whereby progressive judges used International Law to influence domestic policy. The court side-stepped dualist problems by arguing that any international human rights treaty that is in

harmony with the country's constitution can automatically be used to promote the values set out by the constitution. Advocates in dualist countries can use this case as an example of how to use international treaties, such as CEDAW, in domestic courts.

The Interplay of Local Custom and International Legal Norms

There are numerous examples of progressive judges applying CEDAW in dualist countries which have not fully implemented the provisions of the treaty into domestic legislation. But for many women's rights activists, a cultural barrier exists between their society's traditions and their cause. There is a great deal of writing on the interplay between of cultural relativism (each culture should comply only with its traditional values) and universalism (all cultures share a single bare-minimum set of values), and indeed this topic has been the subject of numerous scholarly writings. However, there is a compromise between these two sides. Many women's rights advocates have settled on a test whereby cultural values should only be scrutinized if they affect the *autonomy* of the women. Autonomy is violated if a cultural norm or value affects the capacity of a woman to make decisions about her own life.

This level of scrutiny, which protects a minimum core of rights, has been embraced by a number of progress judges throughout the world. The success of these cases lay in the fact that the lawyers did not challenge all cultural traditions relating to women, but only those which discriminated. Here are a few examples – more detail can be found in our casebank [link: <http://www.globaljusticecenter.net/tools/casebank/index.html>]:

- *Mudaliar v. Thirukoil* (India 1996). The Supreme Court of India ruled that a reservation the Indian government made to CEDAW that protected local cultural practices were negated by other provisions and declarations of CEDAW and by the Indian Constitution itself.
- *Noel v. Toto* (Vanuatu 1994). The Supreme Court of Vanuatu considered laws which enforced patrilineal succession. The court weighed Article 5 of the Vanuatu Constitution, preventing discrimination on the grounds of sex, against Article 74, protecting custom as the basis of land ownership. The court concluded that it would be inconsistent with the Constitution and intent of Parliament to rule that some women have fewer rights than men.
- *Gurung v. Department of Central Immigraiton, Ministry of Home Affairs* (Nepal 1994). The Supreme Court of Nepal struck down a residency law based on cultural traditions which favoring men's marriages rather than women's as a contravention of Nepal's Constitutional equality provision.
- *Romualdez-Marcos v. Commission on Elections and Cirolo Roy Montejo* (Philippines 1995). The Supreme Court of Philippines struck down a law based on traditional custom whereby a woman's domicile was defined by the residence of her husband (even after her husband's death). The court relied upon the newly enacted Family Code of the Philippines which was enacted to embody many of the principles set out in CEDAW.

II. Bringing a Claim in Domestic Court using an International Law

A. Using a Human Rights Treaty in Domestic Court

CEDAW has been cited by domestic courts in over 20 countries in cases addressing women's equality and gender justice. Our CEDAW Case Bank [link: <http://www.globaljusticecenter.net/tools/casebank/index.html>] is a compendium of these groundbreaking decisions from around the world. This section describes for the non-lawyer how human rights treaties have been used in domestic courts. This discussion will provide an understanding of how to understand these decisions and the process through which they came about and thus how to better use them in your own advocacy.

Signature and Ratification.

In order to understand how a treaty affects a country, you have to figure out whether your country has actually ratified the treaty in question. There are two steps a country must take to ratify the treaty. First, it must sign the treaty which usually involves a dignitary or head of state actually signing a printed copy of the treaty. Second, it must ratify the treaty. This usually involves the legislature or other law-making body to vote the treaty into power. For example, in the United States, if the President signs a treaty, the Senate must approve the treaty by a 2/3 vote ("advice and consent" of the Senate) in order for the President to then ratify it. Once a state has signed and ratified a treaty, it is said to be a "party" to the treaty. The term "*states parties*" refers to the group of countries which are party to a treaty.

Signature but NO Ratification.

If a state has signed but not ratified the treaty, it has not yet affirmatively obligated itself to the provisions outlined therein. However, according to the Vienna Convention on the Law of Treaties, Article 18, when a country has signed but not ratified a treaty it is still obligated to "refrain from acts which would defeat the object and purpose of [the] treaty" [link: http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf]).

For example, if a state has signed but not ratified CEDAW, it would defeat the object and purpose of CEDAW for the country to implement domestic legislation which on its face discriminates against women. In this regard, the state's actions are arguably actionable under Vienna Convention, Article 18 (not that this is "arguable" because there has never been a case testing Article 18).

Treaty Enforcement.

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

B. Customary International Law

Understanding customary international law (CIL) is important to women's rights advocates. As will be discussed below, certain tenets of women's rights, such as rape as a war crime, can be argued by the advocate to be part of CIL and thus part of a state's obligations towards its citizens.

Definition.

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

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

Uniform and Consistent Practice.

There must be a recurrent and repetitive practice between countries for this to give birth to a customary rule. Major departures from this rule may negate the existence of custom, but minor deviations are not enough to do so.

There is no real consensus on how long it takes for custom to arise. This generally depends on the issue in question. Also, customary law is not simply a question of how many state's "tread the path" but also on the size of the foot prints of particular states. As expected, the practice of states with more weight internationally will have greater standing than states which may have less sway within the geographical and political area in question.

Opinio Juris.

Opinio juris refers to a belief by the State concerned that the practice being interpreted as CIL has been undertaken by the country as a legal obligation. As countries regularly and repeatedly act in a specific way to each other, the expectation starts to arise that this behavior becomes expected of them in future dealings. When this expectation evolves into a belief that this behavior in future dealings becomes both a right and obligation, the practice becomes customary international law.

It is generally thought that *state practice* is the objective element of custom while *opinio juris* is a subjective element of custom. Evidence of *opinio juris* can sometimes be found in statements made by a state when engaging in relevant conduct or general assembly resolution.

Using CIL.

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

If a country has not ratified a treaty, then depending on the legal norm in question and the acceptance of that norm in the country in question (along with a cross-section of similarly situated nations), advocates can argue that these treaty obligations are actually part of CIL, and thus still binding upon the state in question. For example, it could be argued that while a country

may not have ratified CEDAW, many of the provisions set out therein, such as women's equality rights and access to justice, are already part of CIL that binds the state nonetheless.

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

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

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

*CASE STUDY: The Road from General Assembly Resolution to a customary law?
Universal Declaration of Human Rights*

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

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

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

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

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

“Violence against women” as part of CIL.

It seems absurd that customary international law does not already exist condemning violence against women in all forms, but unfortunately there are many countries whose laws do not protect women as they should. Here are some specific difficulties in recognizing this norm as part of CIL:

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

This is a place where the work of women's rights advocates can be incredibly helpful. Through

advocacy both in and outside the courtroom, the better educated the public and different governments become on issues of violence against women, the more this practice, in all its forms will be condemned. Also the more decisions using CEDAW [link: <http://www.un.org/womenwatch/daw/cedaw/>] and SCR 1325 [link: <http://www.unfpa.org/women/1325.htm>] the more evidence can be cited to for the evolution of this norm across the globe. Women's rights advocates should be aware of how their actions can truly change global legal trends and in fact how advocacy in one country can help improve the rights of women everywhere.

C. Peremptory Norms (*Jus Cogens*).

Definition.

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

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

A norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. *See* http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

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

List of Peremptory Norms

While the list of accepted peremptory norms is not solidified, the generally accepted list includes but is not limited to: genocide; slavery or slave trade; torture or other cruel, inhuman, or degrading punishment; summary execution; prolonged arbitrary detention; war crimes or crimes against humanity; and piracy. *See* Customary International Law of Human Rights, Restatement (Third) Foreign Relations Law of the United States. *See also* David Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine*, DUKE J. COMP. & INT'L L. (2005) at ["http://www.law.duke.edu/journals/djcil/articles/djcil15p219.htm#F36%23F36"](http://www.law.duke.edu/journals/djcil/articles/djcil15p219.htm#F36%23F36)

Key Features.

Peremptory norms represent the top of the international legal hierarchy and take precedence over national law at the international level and other sources of international law.

They protect the most compelling and essential interests of the international community as a whole and invalidate treaty law and other 'ordinary' rules of customary international law not endowed with the same normative force.

A peremptory norm permits no derogation, thereby creating a deterrent effect against contrary state practice that shapes and limits the legislative powers of sovereign nation-states with respect to the given principle.

Peremptory norms identify the ethical underpinnings of the international system and legally obligate states to uphold them. For some peremptory rules, this relationship gives rise to universal jurisdiction. The universality principle enables any state to arrest and prosecute those who have violated certain *jus cogens* norms and is restricted by neither territory nor nationality.

Recognizing New Peremptory Norms.

During the drafting of the Vienna Convention some members of the International Law Commission (ILC) suggested that a peremptory norm could be identified by the following objective criteria:

whether the norm is incorporated into norm-creating multilateral agreements and is prohibited from derogation in those instruments;

whether a large number of nations have perceived the norm to be essential to the international public order, whereby the norm is reflected in general custom and is perceived and acted upon as an obligatory rule of higher international standing;

whether the norm has been recognized and applied by international tribunals, such that when violations occur, the norm is treated in practice as a *jus cogens* rule with appropriate consequences ensuing.

Rape as Jus Cogens?

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

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

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

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

Although, the court did not address the question of *jus cogens* specifically. The case provides

implicit confirmation that the international disapproval of violent sexual acts is so fundamental and so compelling that the prohibition amounts to a *jus cogens* rule.

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

For more information on this issue, see David Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine*, DUKE J. COMP. & INT'L L. (2005) at "<http://www.law.duke.edu/journals/djcil/articles/djcil15p219.htm#F36%23F36>"

III. Bringing a Claim to an International Tribunal or Treaty Committee

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

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

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

The Optional Protocol to CEDAW [link: <http://www.un.org/womenwatch/daw/cedaw/protocol/text.htm>] allows individuals or NGOs representing individuals, whose rights have been violated to lodge a complaint with the Committee. Therefore non-governmental organizations can bring complaints to the CEDAW Committee against countries that have signed the CEDAW Optional Protocol.

Exhaustion of Local Remedies.

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