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## WOMEN'S RIGHTS AND THE "WAR ON TERROR": WHY THE UNITED STATES SHOULD VIEW THE RATIFICATION OF CEDAW AS AN IMPORTANT STEP IN THE CONFLICT WITH MILITANT ISLAMIC FUNDAMENTALISM

RAVI MAHALINGAM<sup>\*</sup>

### ABSTRACT

This article examines the link between women's rights and the "War on Terror," and advocates a change in the United States' policy to incorporate women's rights into a national security strategy to confront militant Islamic fundamentalism. Specifically, the U.S. should ratify the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and take advantage of the Treaty's status as the authoritative international statement on women's rights to direct such efforts towards the Arab and Muslim world.

The United States' promotion of CEDAW can reinitiate a debate on women's rights in Muslim societies, shift the political balance of power towards progressive forces, and weaken the appeal of the fundamentalist ideology, which opposes such ideas from within. The Treaty would shield the U.S. from the political costs of activism, and would represent an important

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<sup>\*</sup> Ravi Mahalingam is an attorney in California and his practice focuses on intellectual property, Internet law and international transactions. He is the current Editor-in-Chief of the California International Practitioner, a publication of the State Bar of California. He earned his J.D. from the U.C.L.A. School of Law (Class of 1996), where he co-founded and served as Editor-in-Chief of the U.C.L.A. Journal of International Law & Foreign Affairs, and also holds a M.Sc. degree in International Relations from the London School of Economics and Political Science (LSE).

step in winning the hearts and minds of Muslims, which is essential to changing the current political dynamic that allows fundamentalism to flourish.

## I. INTRODUCTION

The “War on Terror”<sup>1</sup> represents a distinct stage in a long-running conflict between militant Islamic fundamentalism<sup>2</sup> and the West.<sup>3</sup> The existence of this conflict is plainly evident in the rhetoric of prominent militant Islamic fundamentalists during the second half of the twentieth century, as well as the escalation of acts of violence by such groups against Western and U.S. targets since the 1970s, punctuated by the September 11, 2001 attacks in New York and Washington D.C. From the U.S. perspective, the “War on Terror” is a reaction to the September 11<sup>th</sup> attacks and a recognition in part that militant Islamic fundamentalist groups have become a significant threat to U.S. national security.<sup>4</sup>

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1. The phrase “War on Terror” was popularized in the U.S., in part by the Bush Administration and in part by the U.S. media, following the attacks of September 11, 2001 and has become common usage. Though the phrase may be popular, it is in certain respects overly broad and a misnomer. “Terror” is not an enemy per se, but a method of violence that is often used for political purposes. Political leaders often conflate their concern with, and see little distinction between, the methods of terror with the political agenda of terrorist groups. That the methods of modern terror pose certain risks to the basic functioning of civil societies and should therefore be condemned regardless of the perpetrator is a valid argument. However, it is not the terrorist acts of Hamas, the IRA, or Chechen Rebels that have mobilized the U.S. and its allies to expend resources on a new global campaign, but the attacks of Al-Qaeda, the militant Islamic fundamentalist group that declared war on the United States in the 1990s and has escalated the conflict between militant Islamic fundamentalism and the West. Had there been no September 11<sup>th</sup>, there would not have been a mass mobilization of U.S. resources to combat “terror.” Therefore, the more accurate understanding of the “War on Terror,” in my view, is a response to a threat posed by militant Islamic fundamentalist groups, rather than the method of violence used itself.

2. The term “militant Islamic fundamentalism” is used to clearly distinguish this ideology from the religion of Islam. Militant Islamic fundamentalism is a political movement that has adapted a particularly strict interpretation of Islam, which is often at odds with mainstream schools of Islamic law, to serve a political agenda that seeks to reorganize Islamic societies and relationships with foreign (i.e., western) powers in accordance with its tenets.

3. All references to “West” or “Western” are to the commonly understood model of political, social, economic and cultural organization associated with the U.S. and Western Europe: capitalist economies, social liberty, political freedom, and some measure of independence of society from state and religion. From the perspective of militant Islamic fundamentalists, Arabs and Muslims, the West typically means Western Europe and North America.

4. The Second Gulf War of 2003 and subsequent occupation of Iraq by a U.S. led coalition, which removed the regime of Saddam Hussein from power (“Iraq War of 2003”), is often characterized by supporters as part of the “War on Terror.” Although the Iraq War of 2003 is not the subject of this article, it represents a pivotal event in U.S.-Middle East relations and deserves comment. In the author’s opinion, the Iraq War of 2003 is not part of the “War on Terror,” as Iraq was not connected in any demonstrable or significant way with Al-Qaeda or more specifically with the attacks of September 11, 2001. Arguments made by the Bush Administration and its supporters alleging such connections have failed to establish any conclu-

However, what is somewhat overlooked is that within Islamic societies there has been an equally contentious political and cultural struggle over several decades between militant Islamic fundamentalists and modernizers, a key aspect of which centers on the rights and liberties of women. Wherever fundamentalists have taken power in the Arab and Muslim world, they have almost invariably moved to sharply restrict the rights of women relative to secular or mixed legal systems.<sup>5</sup> In describing the program of militant Islamic fundamentalist movements throughout the Muslim world in the twentieth century, Professor Bernard Lewis succinctly states, "[t]he emancipation of women is one of the main grievances of the fundamentalists and its reversal is in the forefront of their programme."<sup>6</sup>

Militant Islamic fundamentalists view both the international struggle against western power and the cultural struggle within Islamic societies as equally important to their cause. Both are products of the same source, namely, western, and in particular U.S., power and values. Overcoming the threat of militant Islamic fundamentalism cannot be reduced simply to breaking up prominent terrorist networks like Al-Qaeda. The history of militant Islamic fundamentalist movements suggests that other variants will appear regardless of a particular leader or organization, and will continue, unless challenged and discredited, to be a potent political force within the Islamic world. Moreover, because of their intense ideological commitment, fundamentalist groups will continue to confront Western and U.S. interests. The scale and audacity of the September 11<sup>th</sup> attacks will be the barometer by which future militant Islamic fundamentalist activity is measured. Therefore, one can, and should, expect an intensified conflict that extends from the capitals of Arab states to the U.S. itself.

This article argues that a decisive victory in the "War on Terror" must include winning the hearts and minds of Muslims to affirmatively reject the world-view and prescriptions of militant Islamic fundamentalism. This will require the West to address the internal debate within Islamic societies between fundamentalists and modernizers, which will necessarily focus in part on the rights and liberties of women. Just as the U.S. often promoted human rights and individual liberty as part of its challenge to the Communist world-

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sive evidence, and in many cases proffered theories have been affirmatively disproved. Saddam Hussein's Iraq can best be characterized as a brutal secular fascist dictatorship. Hussein spent most of his political career opposing fundamentalists, often violently suppressing them (especially Shiites), because fundamentalists desired to replace his regime and others throughout the Arab world. During the 1980's Saddam Hussein's Iraq was seen as an ally by the West (including the U.S.) to confront and curb the revolutionary aims of fundamentalist Iran. Though the Hussein regime ran afoul of the U.S. following its invasion of Kuwait in 1990, prompting the first Gulf War of 1991 and a decade of U.N. sanctions, weapons inspections, isolation and containment, connections to Al-Qaeda or other fundamentalist groups were not part of the many grievances against that regime.

5. See BERNARD LEWIS, *THE MIDDLE EAST, A BRIEF HISTORY OF THE LAST 2,000 YEARS* 383 (1995).

6. *Id.*

view during the Cold War,<sup>7</sup> so too should the West advance women's rights as part of its strategy to challenge militant Islamic fundamentalism.

To do so, the U.S. should seek international consensus and use the tools available under international law to promote women's rights in countries that have a strong fundamentalist presence. In no way could the U.S. demonstrate its commitment to women's rights more clearly than by ratifying the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (also known as the Women's Rights Convention).<sup>8</sup> CEDAW represents the most comprehensive statement regarding the political, economic, social and cultural rights of women, and thus, presents a direct challenge to some of the most ardently held views of militant Islamic fundamentalism. Moreover, with an impressive number of signatories, including many from the Arab and Muslim world,<sup>9</sup> CEDAW provides an established framework of consensus through which the U.S. can exert influence in this region.

If the U.S. were to assert itself as a leading proponent of CEDAW, it would have a broad platform to challenge militant Islamic fundamentalists while promoting a social vision that Muslims could adapt to their own societies. The U.S. could tilt the political balance of power within Islamic countries towards reform by encouraging governments to comply with CEDAW's provisions and reporting process. With the active support and leadership of the U.S. government in setting priority areas of concern regarding women's rights, moderates in Islamic societies would be empowered and emboldened to challenge, critique and weaken Islamic fundamentalist movements from within. Furthermore, CEDAW's broad acceptance by the international community would partially insulate the U.S. from the political risks of such activism, while providing a useful vehicle to seek changes in the political dynamics of Arab and Muslim societies that have lent support to militant Islamic fundamentalism.

Part II of this article provides a brief history of militant Islamic fundamentalist movements during the twentieth century and examines their impact

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7. See generally DAVID RYAN, U.S. FOREIGN POLICY IN WORLD HISTORY 1-18, 83-93, 116-62 (2000).

8. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, available at <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> (last visited Aug. 27, 2003) [hereinafter "CEDAW," the "Treaty" or the "Convention"]. CEDAW entered into force on September 3, 1981 in accordance with Article 27, paragraph 1, which states: "The present convention shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession." *Id.* art. 27 para. 1.

9. For the most up to date list of ratifications and accessions to the Treaty, See *State Parties*, <http://www.un.org/womenwatch/daw/cedaw/states.htm> (last visited Aug. 27, 2003) [hereinafter CEDAW Ratifications]. There are currently twenty-five Arab and Muslim countries that are State Parties to CEDAW including the following: Afghanistan, Albania, Algeria, Bahrain, Bosnia & Herzegovina, Chad, Egypt, Indonesia, Iraq, Jordan, Kazakhstan, Kuwait, Lebanon, Lybia, Malaysia, Morocco, Pakistan, Saudi Arabia, Syria, Tajikistan, Tunisia, Turkey, Turkmenistan, Uzbekistan, and Yemen. *Id.*

on the rights of women. Part III analyzes the provisions of CEDAW and the Treaty's effect on women's rights around the world. In addition, Part III analyzes criticisms of CEDAW and the status of ratification in the United States. Part IV describes the historic importance of human rights to U.S. foreign policy, and how women's rights intersect with the "War on Terror." This section concludes with general recommendations on how the U.S. should incorporate CEDAW into its foreign policy in the context of the "War on Terror."

## II. MILITANT ISLAMIC FUNDAMENTALISM

Are we to be trampled underfoot by the boots of America simply because we are a weak nation and have no dollars? America is worse than Britain, Britain is worse than America. The Soviet Union is worse than both of them. They are all worse and more unclean than each other. But today it is America that we are concerned with. (Ayatollah Ruhollah Khomeini, Oct. 24, 1963).<sup>10</sup>

If the religious leaders have influence, they will not permit people's innocent daughters to be under young men at school; they will not permit women to teach at boys' schools and men to teach at girls' schools, with all the resulting corruption. (Ayatollah Ruhollah Khomeini, Oct. 24, 1963).<sup>11</sup>

Hostility toward America is a religious duty, and we hope to be rewarded for it by God. . . . I am confident that Muslims will be able to end the legend of the so-called superpower that is America. (Osama Bin Laden, Dec. 23, 1998.)<sup>12</sup>

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10. BAQER MOIN, *KHOMEINI: LIFE OF THE AYATOLLAH* 125 (2000); *ISLAM AND REVOLUTION: WRITINGS AND DECLARATIONS OF IMAM KHOMEINI* 185 (Hamid Algar trans., 1981). The quote is from a speech made by Ayatollah Khomeini in his hometown of Qom, Iran denouncing certain immunities granted under Iranian law to U.S. troops operating in Iran, and more generally, the secular reforms known as the "White Revolution" enacted by Iran's pro-western leader and dictator, Mohammed Reza Shah Pahlavi. *Id.* at 122-27. This fiery speech, among others, eventually led the Shah to forcibly exile Khomeini from Iran. *See id.* at 127-28. Khomeini eventually settled in the Shiite holy city of Najaf, Iraq where he spent the better part of the next twelve years fashioning his vision of an Islamic Republic and organizing resistance to the Shah's regime. Khomeini was later exiled from Iraq and settled in Neu-aphle-le-Chateau, near Paris, France in 1978, where he drew the attention of the world media and became recognized worldwide as the spiritual and political leader of the 1978-79 Iranian revolution.

11. *ISLAM AND REVOLUTION*, *supra* note 10, at 183.

12. *Osama Bin Laden v. the U.S.: Edicts and Statements*, PBS FRONTLINE, at <http://www.pbs.org/wgbh/pages/frontline/shows/binladen/who/edicts.html> (last visited Aug. 27, 2003). This quote is from an interview that Osama Bin Laden gave to Time Magazine. The interview was excerpted on the PBS Frontline web site.

### A. Tenets of Militant Islamic Fundamentalism

These statements by Ayatollah Khomeini and Osama Bin Laden, two leaders of modern militant Islamic fundamentalist movements, each from distinct religious sects, ethnicities, socio-economic backgrounds and generations, provide useful insight into the world-view shared by the movement's followers. Adherents and sympathizers often highlight a cultural and strategic threat posed by the West to Islamic societies.<sup>13</sup> The cultural threat to Islam is exemplified by the relative openness and permissiveness of western cultures, whose "poisonous" values are transmitted to Muslim youth by way of mass media and are subversive of Muslim culture, representing a direct threat to Islam itself.<sup>14</sup> Moreover, fundamentalists often point to the rights and liberties accorded to women in western societies as among the most tangible examples of the corrosive influence of western values.<sup>15</sup>

The fundamentalist prescription: a complete reorganization of Islamic societies in accordance with the teachings of the *Qur'an*<sup>16</sup> as interpreted by fundamentalist clerics, who generally envision a return to an idyllic Islamic community of the seventh century when the Prophet Mohammed founded the religion.<sup>17</sup> In practice, as exemplified by Iran under Khomeini<sup>18</sup> and Afghanistan under the Taliban,<sup>19</sup> this reorganization has meant the strict imposition and enforcement of fundamentalist interpretations of Islamic law, the elimination of equal rights accorded to women and non-Muslim minorities by prior governments, strict censorship of mass media and entertainment media, mandatory religious training, and constant monitoring of social conduct by religious police organizations.<sup>20</sup> The fundamentalist

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13. See, e.g., FEREDOUN HOVEYDA, *THE BROKEN CRESCENT: THE "THREAT" OF MILITANT ISLAMIC FUNDAMENTALISM* 134-36 (1998).

14. *Id.* at 64, 135.

15. See LEWIS, *supra* note 5, at 382-83; Nayereh Tohidi, *Modernity, Islamization and Women in Iran*, in *GENDER AND NATIONAL IDENTITY: WOMEN AND POLITICS IN MUSLIM SOCIETIES*, 110, 124-26 (Valentine M. Moghadam ed. 1994) (describing how fundamentalist religious clerics identified the westernized or "'westoxicated' woman" as contributing to the moral decline of pre-revolutionary Iranian society).

16. The *Qur'an* is a compilation of the Prophet Mohammed's sermons—"revelations in Arabic that purportedly came to him from the archangel Gabriel." DILIP HIRO, *IRAN UNDER THE AYATOLLAHS* 9-10 (1985).

17. *Id.*

18. For a detailed discussion of the policies implemented by the Ayatollah Khomeini's Islamic government in Iran, see generally SHAUL BAKHASH, *THE REIGN OF THE AYATOLLAHS: IRAN AND THE ISLAMIC REVOLUTION* 55-69, 71-91, 166-94 (1990); HIRO, *supra* note 16, at 250-63.

19. For a detailed discussion of the policies implemented by the Taliban in Afghanistan, see generally ROSEMARIE SKAINE, *THE WOMEN OF AFGHANISTAN UNDER THE TALIBAN* 61-86, 156-60 (2002); Nancy Gallagher, *The International Campaign Against Gender Apartheid in Afghanistan*, 5 *UCLA J. INT'L L. & FOREIGN AFF.* 367, 372-79 (2000-01); U.S. State Department, *Afghanistan—Country Reports on Human Rights Practices* (2001), available at <http://www.state.gov/g/drl/rls/hrrpt/2001/sa/8222pf.htm> (last visited Aug. 27, 2003) [hereinafter *Afghanistan Report 2001*].

duct by religious police organizations.<sup>20</sup> The fundamentalist program also calls for the systematic withdrawal of Islamic Republics from the western economic system, with an emphasis on nationalization of industry and self-sufficiency.<sup>21</sup> Further, militant Islamic fundamentalists completely reject western social, economic and political values, reject the possibility of cooperation with western countries, and demand the imposition of a quasi-totalitarian Islamic state run by religious clerics.<sup>22</sup>

The strategic threat posed by the West to the Islamic world, according to militant Islamic fundamentalists, is demonstrated by 1) European colonialism of Muslim lands during the inter-war period; 2) U.S. support for "corrupt" Arab dictatorships (e.g., Egypt, Saudi Arabia, Kuwait, Oman, Qatar, U.A.E., Bahrain); 3) the presence of U.S. troops on Arab and Muslim soil (e.g., Iran, Saudi Arabia, Kuwait, Bahrain, Qatar, U.A.E, Yemen, and Iraq); and 4) the enduring U.S. policy of support for the State of Israel since the latter's establishment in 1948.<sup>23</sup> Each is viewed by militant Islamic fundamentalists as an example of how western political power has been used to subjugate and frustrate a true Muslim power, Caliphate,<sup>24</sup> or Islamic super-state, from arising to challenge western dominance.<sup>25</sup> The fundamentalists' objective is a continual confrontation against U.S., Israeli and western interests worldwide, the purpose of which is to destroy western civilization, re-establish a Caliphate, and impose fundamentalist Islam upon the world.<sup>26</sup>

Another key aspect of militant Islamic fundamentalism is its Pan-Islamic focus. Borrowing a theme from many anti-colonial nationalist movements, fundamentalists exhort all Muslims to see themselves as one community (umma)<sup>27</sup> in relation to the "infidel" enemy, the West. Furthermore, fundamentalist groups believe they should assist each other in establishing Islamic Republics throughout the Arab and Muslim world.<sup>28</sup>

Khomeini, an Iranian Shiite Muslim, and Bin Laden, a Saudi Sunni Muslim,<sup>29</sup> have each emphasized such support for like-minded militant fun-

20. See HOVEYDA, *supra* note 13, at 64-65.

21. *See id.* at 64-68.

22. For an extensive discussion of militant Islamic fundamentalism, *see generally* HOVEYDA, *supra* note 13; AMAL SAAD-GHORAYEB, *HIZBU'LLAH: POLITICS & RELIGION* (2002).

23. *See* HOVEYDA, *supra* note 13, at 133-36.

24. LEWIS, *supra* note 5, at 54-55. Caliphate is the name given to the early Muslim empires that succeeded the Prophet Mohammed after his death in 632, and expanded Islam from the Arabian Peninsula to the Fertile Crescent, Palestine, North Africa, the Iberian Peninsula, and Southwest Asia. *Id.*

25. *See* HOVEYDA, *supra* note 13, at 134-35.

26. *See* HOVEYDA, *supra* note 13, at 126-28, 133-36, 157-58, 162-63.

27. *Id.* at 20, 152 ("umma" is the "community of believers," as Muslims call the state headed and created by the Prophet).

28. *See id.* at 119, 163.

29. The Shi'a and Sunni are distinct sects within Islam. About 85% of Muslims belong to the Sunni sect and 15% are Shi'a. Huda, *What's the Difference Between Shia and Sunni Muslims?*, at [http://islam.about.com/cs/divisions/f/shia\\_sunni.htm](http://islam.about.com/cs/divisions/f/shia_sunni.htm), (last visited Apr. 25,

damentalist groups, largely without regard to ethnic background or Islamic religious sect. This sense of urgency for unity is additionally underscored in the fundamentalists' concomitant call for a holy war or "jihad" against the West.<sup>30</sup>

### *B. Militant Islamic Fundamentalism in the Twentieth Century*

Modern militant Islamic fundamentalism arose as a somewhat delayed reaction to the collapse of the Ottoman Empire<sup>31</sup> at the end of World War I and the subsequent partition of large parts of the Arab world between the United Kingdom and France.<sup>32</sup> Many Muslim conservatives and nationalists decried foreign rule and the division of the former Islamic Caliphate into artificial nation-states, as well as the shame of Arabs (having been conquered by the West), the growing impact of western culture and values on Islamic societies, and the increasing Jewish presence in Palestine under Ottoman and British rule.<sup>33</sup> Although they were a relatively fringe presence during the years between World War I and II, militant Islamic fundamentalists were involved in movements with nationalists and communists to rid the Middle East of western power and influence during the inter-war period. Many involved in such movements, fundamentalist and otherwise, allied themselves

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2004). The differences between the two sects have evolved over many years in historical lore, religious practice and custom, but are primarily rooted in a political dispute over the issue of succession. See *id.* Specifically, Sunnis and Shiites disagree over how successors to the Prophet Mohammad (Caliphs) should be chosen to head the Islamic nation (the Caliphate). Sunnis believe that the Caliph should be selected by a group of contemporary Islamic religious and political leaders. *Id.* Shiites believe that only direct descendants of the Prophet Mohammad should be eligible to serve as and/or appoint the Caliph. *Id.* The Shiite view is based on the experience of the fourth Caliph to succeed the Prophet Mohammed, Ali, who was the Prophet's cousin and son-in-law and headed a political movement through which he ascended to the position. See LEWIS, *supra* note 5, at 63-67. After a five-year reign, Ali was killed in 661 A.D. by political rivals in the city of Najaf (present day Iraq). *Id.* A power struggle ensued in the years following Ali's death in which other rivals wrested control of the Caliphate from Ali's political supporters and established a dynasty known as the Umayyad Caliphate. Many of Ali's supporters, including Ali's son, Husayn, were defeated and killed at a battle in Karbala (present day Iraq). *Id.* These two events at Najaf and Karbala had a profound and searing impact on Islam, as Ali's political movement transformed itself into a distinct religious sect. *Id.* The two holiest shrines in the Shi'a faith are located in Najaf and Karbala, and were erected to commemorate the suffering of Ali and Husayn, respectively, and what Shiites view as the tragic usurpation of power from the rightful rulers of the Islamic Caliphate. *Id.*

30. See HOVEYDA, *supra* note 13, at 153-58 (describing the fundamentalist conception of Jihad as distinguished from the mainstream Islamic understanding of the term).

31. The Ottoman Empire was the last Muslim empire. See LEWIS, *supra* note 5, at 342, 354.

32. *Id.* at 343 (Britain and France divided the Fertile Crescent into colonies and dependencies which came under their rule).

33. See generally HOVEYDA, *supra* note 13, at 133-36; LEWIS, *supra* note 5, at 342-68, 371-84.



with Germany during World War II in the hope that British and French colonial power could be overthrown and a Caliphate restored.<sup>34</sup>

Following World War II, fundamentalists allied themselves with nationalists to oppose foreign interference and support the establishment of independent Muslim nation-states,<sup>35</sup> but quickly parted ways on the issue of modernization, which involved reform programs favorable to women's rights and the introduction of western models of industrialization, education and social organization.<sup>36</sup> Many nationalist governments cracked down, arrested and purged fundamentalists throughout the Arab and Muslim world, from Algeria to Egypt to Iran.<sup>37</sup> However, over time, these purges served to elevate the standing of fundamentalists among Muslims who became disaffected with repressive regimes, a lack of social and economic progress, the humiliation of Arab defeat at the hands of Israel in the 1967 Arab-Israeli War, and the impact of western culture on their societies and values.<sup>38</sup>

Although fundamentalist groups had made an impact on Middle East politics from the end of World War II through the 1970s, the first watershed moment for militant Islamic fundamentalism was the triumph of the Islamic Revolution in Iran in 1979, and the imposition by Ayatollah Ruhollah Khomeini of an Islamic Republic according to his Shiite fundamentalist program.<sup>39</sup> Khomeini's revolution galvanized many like-minded people (Shiite as well as Sunni) throughout the Muslim world and gave inspiration to similar movements in the Arabian Peninsula, North Africa, Southwest Asia and Southeast Asia.<sup>40</sup> Many Arab regimes viewed Khomeini's Iran as a regional threat because of the regime's openly stated ambition to export its revolution throughout the Muslim world.<sup>41</sup>

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34. See LEWIS, *supra* note 5, at 348-50.

35. See HOVEYDA, *supra* note 13, at 9-13, 23-26 ("religious activists and secular nationalists worked hand in hand against the collaborationists and the foreigners," and "[f]undamentalists themselves often worked in nationalist groups").

36. See *id.* at 117-18 (Muslim countries introduced capitalist and socialist development ideas, while fundamentalists called for a return to traditional ways of living).

37. See *id.* at 46.

38. *Id.* at 133-36.

39. See *id.* at 88-89, 189 (noting the "turning point" in militant Islamic fundamentalism was triggered by Khomeini's seizure of power in Iran).

40. See *id.* at 89, 109 ("Iranian revolution has . . . become a model for all the "power seekers" of Muslim countries.").

41. *Id.* at 109. The Iranian revolution was one of the largest mass revolts in recent history. The Pahlavi regime had come under great pressure at home from Iranians disappointed with the progress of economic growth, heightened inflation, increasing inequality leading to class conflict, HIRO, *supra* note 16, at 62-63, and the heavy-handed tactics of the Shah's secret police force, the Savak. *Id.* at 41 (Savak was the Shah's "Organisation of National Security and Intelligence). In addition, the Shah's regime had been criticized by the U.S. for its poor human rights record and lack of democratic reforms. See *id.* at 63-65. This public criticism from a country that many saw as the Pahlavi regime's principal benefactor led opponents (Khomeini included) to believe that the U.S. did not strongly support the Shah and would not intervene to protect his regime in the event of a sustained uprising. From mid-1977 through 1978, public demonstrations and strikes became commonplace and the police and the Savak

The second important event in the rise of militant Islamic fundamentalism was the end of the Soviet Union's occupation of Afghanistan in 1989, and the victory claimed by those that opposed the Soviet army, which included a disparate group of "Mujaheddin" fighters<sup>42</sup> who were more or less conservative and anti-modernist, if not fundamentalist in nature. The messy aftermath of the Soviet-Afghan war saw the emergence of the Pakistani supported Taliban in the mid-1990s, which imposed one of the most draconian fundamentalist regimes in recent memory and essentially turned back the clock on Afghanistan's previous modernization efforts during the middle part of the twentieth century.<sup>43</sup>

The third important event in the rise of militant Islamic fundamentalism was the emergence of Al-Qaeda as the major player among a large number of loosely affiliated but ideologically linked groups of militant fundamentalist organizations, sympathizers, business associates and terrorist cells during the 1980s and 1990s. Osama Bin Laden, the leader of Al-Qaeda,<sup>44</sup> internationalized the conflict between militant Islamic fundamentalism and the

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responded with force, killing and wounding scores of Iranians. *See generally id.* at 66-94 (detailing events leading up to the "end of monarchy"). Rather than silence the demonstrators, the Shah's crackdown served to swell their ranks, to the point where units of the Army began to mutiny and join the mass revolt. *Id.* at 85. Despite belated attempts at political reform, the Shah, in ill-health, concluded in January, 1979 that he could no longer rule Iran and left the country in control of an appointed Prime Minister, Shahpur Bakhtiar. *See id.* at 86-88. The new government lacked any political legitimacy, and Khomeini, who had become the spiritual and figurative leader of the mass revolution, returned to Iran on February 1, 1979. *Id.* at 90. Khomeini effectively took over the country following a national referendum in April, 1979 in which the Iranian public gave an overwhelming victory to the creation of an Islamic Republic. *See id.* at 108. The Constitution of the Islamic Republic, drafted in December, 1979, vested supreme authority to control the government in Khomeini and the religious clerical establishment. In November, 1979, Khomeini directly challenged the United States by lending support to fundamentalist students who seized the U.S. embassy in Tehran and held U.S. hostages for 444 days. *See generally id.* at 136-63 for a discussion of the hostage situation. The event served to sour U.S.-Iranian relations for the next two decades. In addition to confronting the U.S., Khomeini consolidated his power base and further extended theocratic rule by using groups outside the government, including the Islamic Republic Party (IRP) to root out relatively more moderate elements within Iran and undermine the elected government of Abolhassan Bani-Sadr. For a general timeline of events during and since the Iranian Revolution and their impact on the rights of women, see Elham Gheytaichi, *Appendix: Chronology of Events Regarding Women in Iran Since the Revolution of 1979*, 67 SOC. RES. 439 (2000), available at [http://www.findarticles.com/cfdls/m2267/2\\_67/63787338/p1/article.jhtml](http://www.findarticles.com/cfdls/m2267/2_67/63787338/p1/article.jhtml) (last visited Aug. 28, 2003).

42. *The Global Reach of Al-Qaeda: Hearing before the Subcomm. on International Operations and Terrorism of the Comm. On Foreign Relations United States Senate*, 107<sup>th</sup> Cong., 1<sup>st</sup> Sess., at 4 (2001) [hereinafter *The Global Reach of Al-Qaeda*] (prepared statement of J.T. Caruso, Acting Assistant Director, Counterterrorism Division, Federal Bureau of Investigation) available at <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107senatehearings&docid=f:77601.wais> (last visited May 30, 2003).

43. *See HOVEYDA, supra* note 13, at 182 (describing the Taliban as "superfundamentalist").

44. *See, e.g., The Global Reach of Al-Qaeda, supra* note 42, at 4 (prepared statement of J.T. Caruso, Acting Assistant Director, Counterterrorism Division, Federal Bureau of Investigation).

West to a much larger degree than any of his predecessors, sponsoring attacks against U.S. interests in several countries, including the U.S. itself, and training and supplying Al-Qaeda fighters to several global hotspots (e.g., Chechnya, Kashmir).<sup>45</sup> It is against this backdrop, and in light of the September 11<sup>th</sup> attacks, that the U.S. government has redefined terrorism sponsored by militant Islamic fundamentalist groups and their supporters from a regional problem limited to the Middle East and North Africa, to a threat to global peace and security.<sup>46</sup>

### C. Militant Islamic Fundamentalism and the Rights of Women

Militant Islamic fundamentalist movements have demonstrated a capacity and commitment to erode, check and reverse political reforms designed to emancipate women that have been attempted or enacted by many Muslim countries since the colonial era. Fundamentalists have skillfully appealed to the socially conservative sensibilities of many Muslims, and have exploited regional conflicts like the Arab-Israeli wars, the dominance of western power, and domestic political and economic instability to raise their own political profile, and in some notable cases, gain power. In each Muslim country where Islamic fundamentalists have achieved some measure of political power or influence, they have acted decisively to redefine the civil legal structure according to their vision, and have often targeted the rights of women to underscore their objectives.<sup>47</sup>

One of the most effective arguments made by fundamentalists in advancing their agenda has been that all Muslims should be governed exclusively by the Islamic civil code (the Shar'ia or "path to follow") and not foreign imported norms, because Islamic law better reflects the values and traditions of Muslims.<sup>48</sup> Consequently, they argue, the Shar'ia should be given priority over and supercede all other secularly enacted civil and criminal laws.<sup>49</sup> Shar'ia is not a fixed, uniform or centralized body of law, but has many sources and is subject to interpretation, which varies in important ways from community to community.<sup>50</sup> Fundamentalists have taken full advantage

45. *See id.* at 5.

46. *See generally* *The Global Reach of Al-Qaeda*, *supra* note 42.

47. *See* HOVEYDA, *supra* note 13, at 186-87; Courtney W. Howland, *The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis Under the United Nations Charter*, 35 COLUM. J. TRANSNAT'L L. 271, 279, 311-16 (1997).

48. *See generally* AHMAD S. MOUSSALI, MODERATE AND RADICAL ISLAMIC FUNDAMENTALISM: THE QUEST FOR MODERNITY, LEGITIMACY AND THE ISLAMIC STATES 133-54, 140-43 (1999) (describing the writings of Sayyid Qutb, one of the most influential modern fundamentalist thinkers. Qutb argued that a rigid interpretation of the Shar'ia should exclusively govern all Muslims, and that no other man-made law, western or otherwise, could contradict or oppose the holy laws.). *See also* Howland, *supra* note 47, at 315-16.

49. *See generally* MOUSSALI, *supra* note 48.

50. There are four principle sources of Islamic Law. *E.g.*, Bharathi Anandhi Venkatraman, *Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari'a and the Convention Compatible?*, 44 AM.

of the decentralized nature of Islam to develop doctrines regarding the role of women in society, which they have incorporated into their conception of Islamic law.

According to fundamentalists, female sexuality must be carefully controlled, as its free expression leads to corruption, immorality and the breakdown of social values.<sup>51</sup> They believe women are inherently unstable and are unable to control their sexual behavior absent strictly enforced moral codes; women are, therefore, inferior to men and must be controlled by men for the sake of societal stability.<sup>52</sup> The primary, and virtually only, role for a woman in a fundamentalist society is to be an obedient and dutiful housewife.<sup>53</sup> A man must control the family and women must be entirely submissive to men in all matters.<sup>54</sup> Moreover, economic independence, education and work outside of the home are discouraged.<sup>55</sup> As a result, fundamentalists generally favor gender segregation in order to carefully restrict the behavior of women and reinforce the dominant role of men.<sup>56</sup> Furthermore, the laws that govern Muslim women in fundamentalist societies mandate a strict dress code (the *hijab*), and place restrictions on personal choice in virtually all aspects of life,<sup>57</sup> while men are afforded special rights such as the unilateral right of divorce and the right to enter into polygamous marriages.<sup>58</sup> Disobedience of

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U.L. REV. 1949, 1965 (1995). The *Qur'an* is the primary source of Islamic Law. *Id.* The second source is the *Sunnah*, the recorded and codified statements of the Prophet Mohammed. *Id.* at 1967. The third source is *Al-Ijma*, which are the consensus opinions of the Muslim clergy (the *Ullamah*) and powerful members of various Muslim communities. *See id.* at 1969. The fourth source is *Al-Qiyas*, *id.*, which is direct analogy or analogical deduction; it is an extension of the notion of applying Islamic principles to the modern era relying upon the *Qur'an*, *Sunnah* and *Ijma* as primary sources. *See* Hamid M. Khan, Note, *Nothing is Written: Fundamentalism, Revivalism, Reformism, and the Fate of Islamic Law*, 24 MICH. J. INT'L L. 273, 291; Mohamed H. Al-Hoshan & Maren Hanson, *Islamic Law in Saudi Arabia*, 11 CAL. INT'L PRACTITIONER 33-38 (2002). As a strictly legal matter, the concept of interpretation has been a controversial subject in Islamic law. Many Islamic scholars (mostly from the Sunni sect) argue that there was a finite period of interpretation, known as *Ijtihad*, which existed for approximately 250 years following the Prophet Mohammed's death (until A.D. 900) and closed. *See, e.g.*, LEWIS, *supra* note 5, at 226. A consensus of Sunni jurists held that all issues of Islamic law had been sufficiently addressed and that further legal interpretation was not permitted. *Id.* Nonetheless, the process of interpretation has continued in some de facto form as societal changes over many centuries have raised new problems or issues that require the attention of Islamic legal jurisprudence. *See* Urfan Khaliq, *Beyond the Veil?: An Analysis of the Provisions of the Women's Convention in the Law as Stipulated in Shari'ah*, 2 BUFF. J. INT'L L. 1, 6 (1995).

51. Howland, *supra* note 47, at 307-08.

52. *See id.*

53. *Id.* at 308.

54. *Id.* at 308-09.

55. *Id.* at 309-10.

56. *Id.* at 308-10.

57. *Id.* at 312-16.

58. *Id.* at 314.

Shar'ia mandates in fundamentalist societies is often punished harshly, including by the use of violence.<sup>59</sup>

As a result of the fundamentalist's interpretation of women's role, Islamic law is often perceived as more conservative or restrictive than western laws with respect to the rights of women. However, a closer examination of legal systems throughout the Muslim world indicates that this is not necessarily accurate. For example, the legal structure in many Islamic countries reflects a patchwork of western-inspired norms and competing interpretations of the Shar'ia by mainstream and fundamentalist schools of Islamic law.<sup>60</sup> And although Shar'ia recognizes certain distinctions between men and women that do not always dovetail neatly with western conceptions of gender equality, many mainstream Islamic scholars would also cast doubt on the notion that the primary sources of Islamic law support many positions which the fundamentalists assert as divinely inspired.<sup>61</sup> This leads to the conclusion that the scope and meaning of the Shar'ia is often a political question, not a strictly legal or religious one. However, fundamentalists, because of their generally strong organizational power within the religious establishment in many Islamic societies, have largely controlled the political debate as to how to define the meaning, scope and application of Shar'ia since the end of the colonial era.<sup>62</sup> Put simply, those who control the Mosques define the Shar'ia and thereby exert control over the daily lives of many Muslims. And almost invariably, militant Islamic fundamentalists across the Arab and Muslim world have interpreted the Shar'ia to sharply restrict the rights of women.

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59. *Id.* at 315. Women who failed to adequately comply with the hijab requirement in Sudan could be "subject to amputation of hands and feet, hanging, stoning to death or hanging followed by crucifixion of the body." *Id.* In Iran, violation of the hijab requirement could subject a woman to a punishment of seventy-four lashes. *Id.*

60. See Venkatraman, *supra* note 50, at 1976-2000 (analyzing the application of Shar'ia in Morocco, Tunisia, Egypt, and Pakistan, as well as the different viewpoints of various long-standing schools of Islamic Law, including the Maliki, Shafi'i, Hanafi and Hanbali schools).

61. See Khaliq, *supra* note 50, at 18-44 (discussing several positions claimed by fundamentalists as rooted in Qurranic principles, and concluding that the claims are questionable when analyzed against the primary sources of Islamic law).

62. See Howland, *supra* note 47, at 311-12. The success of fundamentalists in defining the role of religion in politics is perhaps best exemplified by Khomeini. Khomeini's call for the clergy to directly run the government was a significant departure from the traditional Shi'ite view that religious clerics should only serve as monitors or judges to ensure that a ruler's decisions were consistent with religious law. See HOVEYDA, *supra* note 13, at 75. The traditional view is based in the theology of Shiism, which holds that the Prophet Mohammed entrusted his son-in-law Ali, the fourth Caliph (ruler), and his direct descendants, the Imams (guides), to interpret and reveal the hidden meanings of the Qur'an (the literal word of God). Shi'ite theology further states that the twelfth Imam went into hiding and will appear as a messiah (madhi) to restore and impose Islam on the world before its end. See *id.* Until the twelfth Imam returns, rulers serve as necessary caretakers, but do not have formal legitimate status. See *id.* The clergy's role is even more limited politically, as only the twelfth Imam is the true legitimate supreme religious leader in Shi'ia Islam.

### 1. Women and the Islamic Revolution in Iran

Ayatollah Khomeini made the modernization of women in Iran a key element of his critique of the Shah's<sup>63</sup> regime during the 1978-79 Islamic revolution.<sup>64</sup> He had long established his opposition to the secular reforms of Mohammed Reza Shah Pahlavi, known as the "White Revolution"<sup>65</sup> that partially liberated women in the 1960s. During the 1978-79 revolution, fundamentalists skillfully manipulated popular stereotypes of women to move the country in a fundamentalist direction.<sup>66</sup> In Iran, the phrase "westoxication" was often referenced to express a widely held notion of the toxic influence of western culture on modern Iranians, and women in particular.<sup>67</sup> As the proponents of this argument stated, it was through the insidious nature of "westoxication," which distorted people's identity and culture and degenerated the moral fabric of society, that foreign powers were able to exploit and dominate Iran.<sup>68</sup> The modern, westernized Iranian women became a visceral personification of what was wrong in Iran, and became a focal point for criticism and acts of defiance against the Shah's regime and the emergence of an Islamic fundamentalist response to the problem.<sup>69</sup>

Khomeini's fundamentalist program was outlined in detail in his book, *Islamic Government*.<sup>70</sup> However, to ensure a wide appeal to Iranians, his political campaign to take over a broad-based revolutionary movement tended to co-opt the popular nationalist themes of opposition to the Shah's dictatorial rule, anti-corruption, anti-colonialism, justice and democracy.<sup>71</sup> Though

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63. The term "Shah" refers to the sovereign of Iran.

64. See, e.g., Tohidi, *supra* note 15, at 125; Ruhollah Khomeini, *Address to a Group of Women in Qum*, in *ISLAM AND REVOLUTION: WRITINGS AND DECLARATIONS OF IMAM KHOMEINI* 264 (Hamid Algar, trans., 1981) ("The repressive regime of the Shah wanted to transform our warrior women into pleasure-seekers.").

65. E.g., HOVEYDA, *supra* note 13, at 74.

66. Tohidi, *supra* note 15, at 121-22.

67. *Id.* "Westoxication" is an English translation of the Farsi phrase "Gharbzadegi," the title of a book by the leftist populist Iranian writer, Jalal Al-e Ahmad written in 1964. *Id.* at 121.

68. *Id.* at 122.

69. See Tohidi, *supra* note 15, at 124 ("The Westoxicated woman was culturally constructed as a negative image of the modern-minded woman. The stereotype was of a middle-class unveiled and Westernized woman without productive contributions or reproductive responsibilities. If she worked at all, it was as a secretary in private or public offices of the service sector, and her work was viewed mainly as decorative and dispensable . . . . She was pre-occupied with her physical appearance and European fashions, would wear mini-skirts, excessive make-up, mingle freely with men, smoke, drink, and laugh in public. She would read romantic novels, if she read at all, and pick her role models from among Hollywood stars, American soap operas, and pop singers. Her light-headedness and lack of interest in politics and national issues had made her easy prey for commercialization and toxication by the West. . . .").

70. AYATOLLAH RUHOLLAH KHOMEINI, *ISLAMIC GOVERNMENT* (Joint Publications Research Service trans., 1979).

71. See generally HOYVEDA, *supra* note 13, at 71-91.

many non-fundamentalist Iranians opposed the Shah and actively took part in the mass revolt,<sup>72</sup> the movement was nonetheless directly affected by the mixed nationalist and religious messages orchestrated by Khomeini and his followers. For example, Iranian fundamentalists gradually enforced the adoption of the traditional veil (chador) upon women; both in order to demonstrate their distaste for secular reforms as well as to make Iranians politically identify the veil as a nationalist symbol of opposition to the Shah.<sup>73</sup> Thereby, Iranian fundamentalists subtly created a basis of legitimacy for fundamentalist rule.<sup>74</sup>

So effective was Khomeini at obscuring the fundamentalist agenda and portraying himself as a saintly leader of a popular nationalist movement, that many Iranians and western commentators who were not advocates of fundamentalism acknowledged his leadership and authority to implement a new agenda for Iran with little questioning of his long-term aims.<sup>75</sup> When the Shah's regime had been toppled, and Khomeini took power in 1979, the new Islamic government wasted little time implementing a fundamentalist agenda. The measures that directly impacted the lives of all Iranians, especially women, included: mandatory dress codes, including the imposition of the veil (hijaab); legal right of polygamy for men; a unilateral right of divorce for men; gender segregation in many public settings; a ban on women pursuing certain fields of higher education and employment; and the creation of a religious police organization to monitor strict societal compliance with the laws of the Islamic Republic.<sup>76</sup> These changes demonstrated a critical distinction between the militant Islamic fundamentalist and the modernist. According to fundamentalists, a moral Islamic republic required strict controls on its citizens, and women in particular.

## 2. *The Impact of the Iranian Revolution*

The Iranian Revolution inspired millions of Muslims around the world, especially Shiites, and Khomeini's picture and posters could be found in almost every Muslim community.<sup>77</sup> Khomeini was looked upon in some circles as a hero for defeating a western-supported tyrant and for challenging U.S. power. Iran's foreign policy was dramatically altered almost overnight, as the new Islamic Republic sought to export its revolution abroad and take a confrontational approach with Western interests.<sup>78</sup> Arab governments reacted

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72. Tohidi, *supra* note 15, at 123.

73. *Id.*

74. *Id.*

75. See generally HOVEYDA, *supra* note 13; MOIN, *supra* note 10; HIRO, *supra* note 16.

76. Tohidi, *supra* note 15, at 136-37.

77. HOVEYDA, *supra* note 13, at 101-02.

78. *Id.* at 109.

with alarm as fundamentalist movements, inspired by Iran, emerged and became active in many countries.<sup>79</sup>

Arab Sunni Muslims displayed two distinct reactions to the Islamic revolution in Iran. Many saw Iran as a regional threat and allied themselves with the United States and Saddam Hussein's Iraq during the Iran-Iraq war in the 1980s to strategically weaken and contain Iran while focusing on crushing Iranian-inspired fundamentalist revolutionaries within the Arab world.<sup>80</sup> On the other hand, many conservative Sunni Arabs in the Arabian Peninsula (especially in Saudi Arabia) implicitly acknowledged the inspirational effect of Khomeini's fundamentalist revolution and actively sought to promote and export their own equally fundamentalist version of Sunni Islam, based on the Wahhabi doctrine,<sup>81</sup> to other Muslims.<sup>82</sup> Though their agendas were broadly similar, Sunni Arab Fundamentalists, in some cases with the tacit acquiescence of pro-U.S. regimes, competed with Shiite Iranian Fundamentalists for influence throughout the Muslim world, giving aid to various fundamentalist schools and groups.<sup>83</sup> In addition, like Shiite fundamentalists, Sunni fundamentalists (most notably Osama Bin Laden) actively sought to undermine Sunni regimes in the Arabian peninsula (e.g., Saudi Arabia), which have long-standing ties with the United States.<sup>84</sup>

### 3. Taliban Rule in Afghanistan

Of the many examples of fundamentalism's march to power, the case of Afghanistan is perhaps most striking. Like Iran, Afghanistan experienced many decades of modernization under monarchical and communist rule prior to the Soviet invasion in 1979.<sup>85</sup> However, the country was weakened by United States support of more conservative and fundamentalist mujheddin Afghan resistance groups and the bitter factional and regional infighting following the war.<sup>86</sup> Accordingly, the Saudi and Pakistani backed Taliban emerged to bring order to the majority of the country that it controlled.<sup>87</sup> The imposition by the Taliban of its Wahhabi inspired radical fundamentalist agenda was swift and its enforcement severe, with women often facing the

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79. *Id.*

80. Interview on PBS Frontline with Vali Nasser, Professor of Political Science, University of San Diego, (Oct. 25, 2001) available at <http://www.pbs.org/wgbh/pages/frontline/shows/saudi/interviews/nasr.html> (last visited Aug. 27, 2003).

81. Wahhabism is an extreme brand of orthodox Islam. *Id.*

82. *Id.*

83. *Id.* Vali Nasser describes in detail the close connections between the growth of Wahhabi inspired fundamentalist schools in Pakistan (madrassa), which spawned the Taliban, and the Saudi network of religious charities that provide extensive funding as well as the basic curricula.

84. See HOVEYDA, *supra* note 13, at 146-47.

85. See Gallagher, *supra* note 19, at 368-69

86. *Id.* at 369-70.

87. *Id.* at 372-74.



harshest consequences.<sup>88</sup> In some sense, what war and conflict failed to do in terms of reversing Afghanistan's decades long trend of modernization, the Taliban completed with shocking success.

Upon taking power in major cities like Kabul, Qandahar and Herat, the Taliban swiftly imposed their interpretation of Shar'ia.<sup>89</sup> They banned women from working in most professions and government positions, forbade women from attending school, mandated the burkha (a most oppressive form of the veil), closed public schools and universities, and made several other seemingly arbitrary and haphazard rulings, often proclaimed as mandates of the Shar'ia, that underscored the totalitarian power of the Taliban regime to control the lives of Afghans at their whim.<sup>90</sup> In addition to the complete loss of personal freedom, education and economic opportunity, women in Afghanistan suffered a sharp deterioration in health care and general well being under Taliban rule.<sup>91</sup>

Even in Islamic countries where militant fundamentalists have not taken power, parts of the fundamentalist agenda have been co-opted by governments as a way to strengthen their own legitimacy while limiting the power and influence of fundamentalist movements. These actions, though possibly keeping fundamentalists temporarily at bay, nonetheless acknowledge their political strength, alter the political direction of internal reform and, in some cases, the political orientation of the country vis-à-vis the West. In Bangladesh, for example, in a concession to a growing fundamentalist movement, the original national constitution was amended to delete references to secularism and to install Islam as the State religion.<sup>92</sup> Emboldened by this success, Bengali fundamentalists have successfully restricted certain rights of women, especially with regard to family laws.<sup>93</sup> Similar challenges to the rights of women have taken place in Pakistan,<sup>94</sup> Egypt,<sup>95</sup> and Nigeria,<sup>96</sup>

88. *Id.* at 373-74; SKAINE, *supra* note 19, at 61; *Afghanistan Report 2001*, *supra* note 19.

89. *See* SKAINE, *supra* note 19, at 61.

90. *Id.* at 156-60 (providing samples of restrictions and decrees imposed by the Taliban, including, by way of example, "[w]hipping of women in public for having non-covered ankles," and "[b]an on women's wearing brightly colored clothes").

91. *Id.* at 71-73. The Taliban regime was ousted by a U.S. led military coalition in November 2001 in response to the September 11<sup>th</sup> attacks. *See The Global Reach of Al-Qaeda*, *supra* note 42, at 1. Al-Qaeda's principal leadership was based in Afghanistan and had a close relationship with the Taliban regime. *Id.* at 1, 5. The U.S. supported caretaker government of Hamid Karzai replaced the Taliban in 2002 following approval by a legislative council of representatives from all parts of Afghanistan called a *Loya Jirga*. *E.g.*, Pamela Constable, *Karzai Takes Afghan Helm With Nod to Ethnic Rivals*, WASH. POST, June 20, 2002, at A14.

92. Salma Sobhan, *Women in Bangladesh*, in GENDER AND NATIONAL IDENTITY, *supra* note 15, at 73.

93. *Id.* at 74.

94. Venkatraman, *supra* note 50, at 1993-98.

95. Roger Hardy, *Egypt: Crisis of Identity*, BBC NEWS, Jul. 16, 2002, available at [http://news.bbc.co.uk/1/hi/in\\_depth/world/2002/islamic\\_world/2131219.stm](http://news.bbc.co.uk/1/hi/in_depth/world/2002/islamic_world/2131219.stm) (last visited Aug. 27, 2003); Venkatraman, *supra* note 50, at 1987-1990; John O. Voll, *Fundamentalism in the Sunni Arab World*, in FUNDAMENTALISMS OBSERVED 359-66, 377-90 (Martin E. Matty & R. Scott Appleby eds., 1991) (describing the activities of the influential Egyptian fundamentalist

among others, as a result of the growing power of fundamentalist movements.

The growth of militant Islamic fundamentalism has not only resulted in increased tensions between Islamic countries and the West, but has also presented a direct challenge to advocates of modernization within the Muslim world. The most dramatic impact within Islamic societies has been on the lives of women; as discussed above, the emergence of fundamentalist power has coincided with substantial restrictions imposed on women in the name of Islamic values. Accordingly, with modernizers embattled and fundamentalists strengthened, CEDAW can play an important role, injecting new life into this debate, because the values embodied in the Treaty are diametrically opposed to the ideology of militant Islamic fundamentalism and may be a platform from which fundamentalists can be more effectively challenged.

### III. CEDAW AND WOMEN'S RIGHTS

#### A. *The Treaty*

CEDAW has been widely recognized as the most comprehensive international statement on women's rights and has been called the "Charter of Human Rights of Women."<sup>97</sup> The Convention represents a culmination of ef-

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group, the Muslim Brotherhood, during the Nasser, Sadat and Mubarak regimes). In Egypt, fundamentalists and modernizers have clashed on several issues pertaining to women's rights, including the right of divorce, inheritance, and the issue of female genital mutilation (FGM). With the assistance of international public pressure, including scrutiny from CEDAW's Committee, progressive elements in Egypt have succeeded in pushing the Mubarak government to advance new laws, such as the personal status law enacted in 2000 which provided modest rights to women (which the Committee nonetheless criticized as deficient in key respects), and a change in policy regarding FGM. During the 1980s and early 1990s, the Egyptian government had been noncommittal on FGM, fearing a potential backlash from fundamentalist groups that supported the practice. However, in 1996, the Government reversed course after Egypt's Health Minister issued a decree outlawing FGM. See Deborah Horan, *Egypt-Women: The Miserable Tradition Of Female Circumcision*, INTER PRESS SERVICE, Sept. 28, 1997, available at <http://www.oneworld.org/ips2/sep/circum.html> (last visited Aug. 28, 2003); *Report of the Committee on the Elimination of Discrimination against Women*, U.N. GAOR, 24th and 25th Sess., pt. 1, Supp. No. 38, at 36, ¶ 348, U.N. Doc A/56/38 (2001) [hereinafter *Egypt Report*]. In 2003, the Mubarak Government signed an agreement with UNICEF to end practices harmful to women and pledged to eradicate FGM by the end of 2003. *Egypt Signs Plan To End Female Genital Mutilation This Year*, UN WIRE, Aug. 5, 2003, available at <http://www.unwire.org/UNWire/20030805/4497220.asp> (last visited Aug. 28, 2003);.

96. See *Nigeria: Woman Sentenced to Death Under Sharia*, HRW WORLD REPORT 2001: WOMEN'S HUMAN RIGHTS, available at <http://www.hrw.org/press/2001/10/nigeria1023.html> (last visited May 28, 2003) (woman sentenced to death after having pre-marital sex); Ayesha Imam, *Promoting Women's Rights in Muslim Laws*, 2002, available at <http://www.ichrdd.ca/english/commdoc/humphrey2002/acceptanceSpeechAyeshaImamEnglish.htm> (last visited May 28, 2003) (noting that Nigerian states began passing fundamentalist laws in 1999).

97. Aida Gonzalez Martinez, *The U.N. and the Protection of Human Rights: Human Rights of Women*, 5 WASH. U. J.L. & POL'Y 157, 166 (2001).

forts at the international level to develop an authoritative document encompassing the civil, cultural, political and social rights of women.<sup>98</sup> CEDAW was drafted under the auspices of the United Nations, largely by the U.N. Commission on the Status of Women, and was opened for signature to the U.N. member states following approval by the U.N. General Assembly on December 18, 1979.<sup>99</sup> As of December 2003, CEDAW had an impressive 175 ratifications, including 25 countries from the Muslim world, representing over ninety percent of the entire U.N. membership.<sup>100</sup>

As the title of CEDAW suggests, the Treaty's focus is "discrimination against women," which is defined broadly to mean any "distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women . . . on a basis of equality of men and women, of human rights and fundamental freedoms."<sup>101</sup> CEDAW emphasizes two general principles which are reflected throughout its articles: (i) nondiscrimination and equal treatment of women with respect to men; and (ii) mandating that States undertake reforms in both the public and private spheres to remove obstacles that adversely affect women so as to ensure opportunity for women on a basis of equality with men.<sup>102</sup>

Article 2 applies the aforementioned principles to compel States to incorporate the Convention into national policy by mandating legal equality for women and the elimination of all laws that constitute discrimination against women. For example, Article 2(f) states that State Parties are "to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."<sup>103</sup> Article 5 expands the State's role, requiring affirmative measures to "modify the social and cultural patterns of conduct of men and women with a view to achieving the elimination of prejudices . . . and other practices which are based" on traditional or cultural ideas of gender roles or gender inferiority.<sup>104</sup> The Treaty's focus on equality and nondiscrimination extends still further to education,<sup>105</sup> employment,<sup>106</sup> and health care.<sup>107</sup>

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98. *Id.* at 166-67. One of the main purposes of CEDAW was to consolidate and update the many prior and disparate international pronouncements on women's rights into one authoritative document. The precursors of CEDAW include the U.N. Declaration of Human Rights, the Covenant on Civil and Political Rights, and Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. *Id.* at 164-67.

99. CEDAW, *supra* note 8.

100. CEDAW Ratifications, *supra* note 9.

101. CEDAW, *supra* note 8, art. 1.

102. *Id.* annex.

103. *Id.* art. 2.

104. *Id.* art. 5.

105. *Id.* art. 10.

106. *Id.* art. 11.

107. *Id.* art. 12.

Equally important, CEDAW does not limit itself to advocating general principles, but attempts to incorporate into its provisions the reality of the status of women obtained through decades of study, research and experience.<sup>108</sup> Hence, CEDAW pays special attention to areas where women are uniquely or disproportionately affected, such as the condition of women living in rural areas and prostitution.<sup>109</sup> CEDAW further focuses on matters such as marriage, maternity, reproductive rights and the family,<sup>110</sup> where discrimination on the basis of gender is not easily addressed by a reliance on a principle of equal treatment due to acknowledged biological differences between men and women and the traditional social roles that have followed to some extent from these distinctions.<sup>111</sup> CEDAW exhorts States to adopt affirmative action programs to help women reach a level playing field, and in certain cases, such as maternity, women are to be given additional, special rights.<sup>112</sup>

CEDAW does not simply require legal equality, but actual equality in practice. It scrutinizes existing political, social and cultural practices by States and societies that define and limit the scope of women's roles and rights. Seen in this light, CEDAW's scope is potentially breathtaking, as it directly challenges the legitimacy of arguments of sovereignty and cultural relativism that many States have often relied upon to resist the demands of human rights treaties. CEDAW assumes that, as a matter of law, all ratifying countries to the Convention and its related predecessors have accepted their principles by the legitimate exercise of sovereign free will and are, therefore, obliged to implement these principles or be in violation of a legal obligation. CEDAW is further empowered as a voice on women's rights by its Committee on the Elimination of Discrimination Against Women (the Committee). The Committee is composed of twenty-three experts on women's issues drawn from the State Parties and provides an analysis of State actions in regards to treaty compliance.<sup>113</sup> The Committee also has a Permanent Working Group that participates in an ongoing study and review of CEDAW's articles to more precisely interpret and define how current practices in signatory countries impinge upon the Treaty and the obligations of member States.

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108. *Id.* annex.

109. *Id.* arts. 6, 14.

110. *Id.* art. 16.

111. Other articles of the Convention that highlight specific areas of concern for women include: student drop-out rates, *id.* art. 10(f); right to safe working conditions in regards to safeguarding pregnancy, *id.* art. 11(1)(f); prevention of employment discrimination based on maternity, *id.* art. 11(2)(a); and, pregnancy health services, *id.* art. 12(2)(d).

112. *Id.* art. 11(2). Article 11(2) requires State Parties to take measures to require maternity leave rights without loss of employment, provide social services to enable women to fulfill family and work obligations, and provide special protection for pregnant women with respect to certain types of work that are demonstrated to be physically harmful. *Id.* art. 11(2).

113. CEDAW, *supra* note 8, art. 17. The Committee's mandate is to monitor progress made by signatories in fulfilling treaty obligations. At biannual meetings, Committee members review reports submitted by states the year after signing the treaty and every four years thereafter. *Id.* art. 18.

Countries are required to submit periodic reports on their compliance with CEDAW and the Committee has the opportunity to critique and question the State submitting the report.<sup>114</sup> Although the Committee's scope was initially limited to reviewing reports submitted by States, the U.N. General Assembly adopted the Optional Protocol to CEDAW<sup>115</sup> in 1999 to enable individuals or groups of individuals to submit complaints to the Committee for review and comment.<sup>116</sup> As of November 2003, there were 75 signatories to the Optional Protocol, of which 52 had submitted instruments of ratification.<sup>117</sup>

### *B. The Impact of CEDAW on Women's Rights*

CEDAW has made a tangible contribution to the development of a normative and jurisprudential framework on women's rights that has served as an interpretative guide for national lawmakers, judges and women's rights advocates. In the years since CEDAW entered into force, the Treaty has been cited as an important influence in national legal reform efforts in a number of countries.<sup>118</sup> For example, Brazil relied upon CEDAW to reform its national constitution and add specific rights for women relating to gender based violence, marriage, family planning and employment parallel to those elaborated in CEDAW.<sup>119</sup> Additionally, Tanzania relied on CEDAW to develop laws on inheritance rights,<sup>120</sup> and Botswana revamped its citizenship rights laws in accordance with the Treaty.<sup>121</sup> Other countries that have acknowledged CEDAW's influence in reform efforts include Japan, Colombia, India, Zambia, and Uganda.<sup>122</sup>

Moreover, the Committee, through its reports and recommendations, has assisted in developing specific norms that give tangible meaning to the principles of nondiscrimination and equality outlined in the Treaty. One of the

114. *Id.* art. 18-21.

115. *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, G.A. Res. A/54/4, U.N. GAOR, 54th Sess., U.N. Doc. A/RES/54/4 (1999) [hereinafter *Optional Protocol*], available at <http://www.un.org/womenwatch/daw/cedaw/op.pdf> (last visited May 28, 2003).

116. *Id.* art. 2.

117. *Signatures to and Ratifications of the Optional Protocol*, at <http://www.un.org/womenwatch/daw/cedaw/sigop.pdf> (last visited Apr. 3, 2004). The Optional Protocol entered into force on December 22, 2000. *Optional Protocol*, *supra* note 115.

118. See *Treaty Doc. 96-53: Convention on the Elimination of All Forms of Discrimination Against Women, Adopted by the U.N. General Assembly on December 18, 1979, and Signed on Behalf of the United States of America on July 17, 1980: Hearing Before the Comm. On Foreign Relations United States Senate*, 107<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (2002), available at <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107senatehearings&doid=f:80461.wais> (last visited Apr. 3, 2003) [hereinafter *CEDAW Hearing*].

119. See BRINGING EQUALITY HOME, IMPLEMENTING THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 14-16 (Ilana Landsberg-Lewis ed., 1998).

120. *Id.* at 21.

121. *Id.*

122. *Id.* at 10, 13, 18, 23, 31.

Committee's most significant contributions has been its identification of violence against women as a form of discrimination within the meaning of the Treaty.<sup>123</sup> Violence against women does not appear anywhere in the Treaty's provisions; nonetheless, in General Recommendation No. 19 (11<sup>th</sup> session, 1992), the Committee characterized gender-based violence as impairing or nullifying women's enjoyment of human rights, which constitutes a breach of the Convention "regardless of whether those provisions expressly mention violence."<sup>124</sup> The report highlighted specific practices and sources of gender-based violence, including female genital mutilation (FGM)<sup>125</sup> and family violence,<sup>126</sup> and further held that CEDAW applied to both acts of States as well as individuals and private actors.<sup>127</sup> Hence, any State that condones these practices or fails to take measures to eradicate them, whether actually perpetrated by the State or private actors residing within the State, has failed to satisfy its obligations under the Treaty.

Partly as a result of the Committee's work, many human rights advocates favorably cite CEDAW as an effective tool, used by women around the world, to combat violence and hold States accountable for the condition and treatment of women within their jurisdictions.<sup>128</sup> At the Committee's behest, many States have attempted to address the issue of violence against women in their reports to the Committee, thereby opening themselves up to comment and criticism.<sup>129</sup> The Committee's emergence as an interpretative body has helped enhance its legitimacy as an authoritative voice on women's rights. For many critics, however, the Committee's emergence in this regard has been very controversial, as Treaty opponents have denounced Committee's rulings as arbitrary, overly intrusive, and subversive of national sovereignty and culture.<sup>130</sup>

### C. Criticisms of CEDAW

States have made more reservations to CEDAW's provisions than most other human rights treaties. Fifty-five countries have entered reservations to

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123. General Recommendations Made by the Committee on the Elimination of Discrimination Against Women, General Recommendation No. 19 ¶ 6 (11<sup>th</sup> Sess. 1992) [hereinafter General Recommendations] available at <http://www.un.org/womenwatch/daw/cedaw/recommendations.htm> (last visited Aug. 27, 2003).

124. *Id.*

125. See discussion *supra* note 95.

126. *Id.*

127. *Id.* ¶ 9.

128. CEDAW Hearing, *supra* note 118, at 89-92 (statement submitted by Amnesty International).

129. See *Egypt Report*, *supra* note 95, at 35 (expressing the Committee's concern and encouraging the Government of Egypt to withdraw its reservations to Articles 2, 9 and 16 of the Convention).

130. See *Contemporary Practice of the United States Relating to International Law*, 96 A.J.I.L 956, 973 (Sean D. Murphy ed., 2002).

the Treaty, representing nearly one-third of all State Parties.<sup>131</sup> More importantly, reservations have been made to key articles, including Article 2 (discriminatory laws), Article 5 (discriminatory practices), Article 7 (right to participate in the public sphere), and Article 16 (marital and family relations).<sup>132</sup> Equally significant, the United States, the world's most important democracy and only superpower, has not ratified CEDAW, making it the only major industrialized country not to do so.<sup>133</sup> The issue of reservations and lack of U.S. ratification underscore two general criticisms of CEDAW relating to its compatibility with state and cultural sovereignty, and the overall effectiveness of the Treaty in achieving its stated aims.

## 1. Preservation of State & Cultural Sovereignty

### a. Critique of U.S. Conservatives

Many cultural conservatives in the U.S. have criticized Committee recommendations as overbroad, arbitrary, and reflecting a mindset that is seemingly unconcerned with or unrestrained by the exigencies of state sovereignty, religion or local culture.<sup>134</sup> Some have criticized the Committee for issuing recommendations that identify seemingly innocuous policies as potentially violating the Treaty. For example, critics have pointed to the Committee's review of Belarus' report in 2000, where the Committee noted with concern the extolling of Mother's Day and government policies that tended to promote a traditional role for women as mothers as inhibiting the progress of women to achieve equality with men in professional spheres.<sup>135</sup> Similarly, U.S. conservatives have chided the Committee for some statements regarding the decriminalization of prostitution, mandatory paid maternity leave,

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131. Jennifer Riddle, *Making CEDAW Universal: A Critique of CEDAW's Reservation Regime Under Article 28 and the Effectiveness of the Reporting Process*, 34 GEO. WASH. INT'L L. REV. 605, 606 (2002).

132. *Id.* at 625.

133. *Contemporary Practice of the United States Relating to International Law*, *supra* note 130, at 971-72.

134. See *CEDAW Hearing*, *supra* note 118, at 137 (statement submitted by Patrick Fagan, The Heritage Foundation) ("Despite the many good elements within CEDAW few Americans are aware that CEDAW is also used by certain agencies within the United Nations system in a campaign to undermine the foundations of society—the two-parent married family, the religions that espouse the primary importance of marriage and traditional sexual morality, and the legal and social structures that protect these institutions. Using the pretext of international treaties that promote women's rights, the social policy sector of the United Nations—specifically, committees that oversee implementation of U.N. treaties in social policy areas and assisted by special-interest groups—is urging countries to change their domestic laws and national constitutions to adopt policies that will adversely affect women and children.").

135. *Report of the Committee on the Elimination of Discrimination against Women*, U.N. GAOR, 22nd and 23rd Sess., Supp. No. 38, at 37, ¶ 361, U.N. Doc A/55/38 (2000); *CEDAW Hearing*, *supra* note 118, at 126 (statement submitted by Tanya K. Skeen, Vice President, Family Action Council International).

and equal access to family planning services, including abortion, where the practice is legally permitted.<sup>136</sup>

The general thrust of the American conservative critique is that although highlighting some important issues that affect women, such as prostitution and violence against women, the Committee promotes a social agenda to re-define gender roles in an incremental way which is subversive of “traditional values,” as that term is commonly understood by American social conservatives. The Bush Administration echoed these concerns; first in a letter by Secretary of State Colin Powell to Senator Joseph Biden of the U.S. Senate Foreign Relations Committee,<sup>137</sup> and later in the Administration’s subsequent decision in 2002 to back away from endorsing ratification of CEDAW pending further review.<sup>138</sup>

In addition, Treaty skeptics argue that the Committee’s authority to interpret substantive provisions of CEDAW might have arbitrary, yet substantial effects on domestic law that are unintended and uncontrollable by ratifying States.<sup>139</sup> Underlying this criticism is the impact that ratified treaties have upon a State that observes the rule of law. In the U.S., for example, ratified treaties have supervening authority over any prior or future laws that run in conflict with Treaty obligations.<sup>140</sup> Article VI(2) of the U.S. Constitution expressly makes treaties the supreme law of the land.<sup>141</sup> This principle has been affirmed in several U.S. Supreme Court cases, most notably *Missouri v. Holland*, where the court affirmed that a treaty has priority and prohibitive effect on the acts of States.<sup>142</sup>

Another potential effect on domestic law is that ratified treaties may allow judges to look for additional sources of legal authority to interpret and apply to specific cases. Judges may use findings from bodies like the Committee as persuasive authority to make a ruling and establish a chain of precedent that will have a major impact on U.S. law in a manner that may not have been contemplated or desired. There are numerous examples of U.S. courts relying on evidence or rulings by international legal institutions in deciding cases. One example is the growing body of U.S. law establishing tort liability for corporations that are complicit in human rights violations

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136. *CEDAW Hearing*, *supra* note 118, at 143-44 (letter to President George W. Bush submitted by the Family Research Council).

137. *Contemporary Practice of the United States Relating to International Law*, *supra* note 130, at 972-73.

138. *Id.* See also Howard LaFranchi, *Women’s Treaty Revives Old Debates*, *CHRISTIAN SCI. MON.*, July 30, 2002, available at <http://www.csmonitor.com/2002/0730/p01s02-usgn.html> (last visited June 5, 2003).

139. See *Contemporary Practice of the United States Relating to International Law*, *supra* note 130, at 973.

140. U.S. CONST. amend. VI, § 2.

141. *Id.*

142. *Missouri v. Holland*, 252 U.S. 416, 432 (1920) (“Valid treaties of course are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States.”).



committed against foreign nationals. In some significant cases, U.S. Courts have relied on the analysis of international tribunals, courts, and jurists to define the scope of human rights abuses that could entitle a plaintiff to remedies.<sup>143</sup>

*b. The Islamist Critique: Cultural Relativism*

The most significant reservations to CEDAW have come from Islamic countries, which argue that CEDAW should not conflict with laws derived from the Shar'ia. For example, Egypt, Bangladesh, Libya and Iran each made reservations based on Article 2 (eliminating legal discrimination) and Article 16 (marriage and the family), in effect granting supremacy to Shar'ia based codes over CEDAW.<sup>144</sup> These countries have taken a cultural relativist approach in defending their reservations, arguing that CEDAW represents the active imposition of western secular values or "cultural imperialism" upon non-western countries.<sup>145</sup> Reservations, they argue, are therefore necessary to develop a better balance between maintaining national sovereignty and respecting the general objectives of the Treaty.<sup>146</sup>

However, the reservations entered by Islamic countries are general in nature and beg the question of whether Shar'ia does, in fact, conflict with CEDAW to the extent cultural relativists claim. It is fairly clear that a mili-

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143. See *Wiwa v. Royal Dutch Petroleum Company*, 2002 U.S. Dist. LEXIS 3293, \*25-\*47 (2002). In this case, the surviving family of slain Nigerian human rights activist, Ken Saro-Wiwa, filed suit against Royal Dutch Petroleum ("Shell") for tort violations committed under the Alien Tort Claims Act (ATCA) (18 U.S.C. § 1350). *Id.* at \*6. The plaintiffs alleged Shell's complicity with the Nigerian government in the murder of Saro Wiwa, in addition to other human rights violations committed against the Ogoni people who resided in the oil-rich Niger River delta region in Southern Nigeria. *Id.* In this ruling, the Second Circuit denied in part Shell's motion to dismiss, and allowed the case to go forward to trial. *Id.* at \*2. Judge Kimba Wood expressly relied on an analysis of conventions and tribunals, and international jurists to give meaning to the concept of violations of international law that would trigger the remedies available under the ATCA, and cited a number of cases where U.S. courts have followed a similar process of legal reasoning. See *id.* at 25-47. The Court's reasoning thus exemplifies the important persuasive role that international legal statements can have on domestic legal proceedings. The ATCA allows foreign nationals to file suit in the U.S. for tort claims committed in violation of a U.S. treaty or international law. *Id.* at \*8-\*9. The statute was rarely invoked until a landmark decision in 1980, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), which affirmed the right of plaintiffs to seek damages against a corporate U.S. defendant for torts committed abroad in violation of international law. *Id.* The *Filartiga* decision was later codified in Federal law by the Torture Victim Protection Act, 28 U.S.C. § 1350.

144. Kimberly Younce Schooley, *Cultural Sovereignty, Islam, and Human Rights—Toward a Communitarian Revision*, 25 CUMB. L. REV. 651, 659 (1994); Khaliq, *supra* note 50, at 4 n.15; Riddle, *supra* note 131, at 627.

145. See Schooley, *supra* note 144, at 658-59.

146. Bangladesh's reservation to the Convention reads as follows: "The Government of the People's Republic of Bangladesh does not consider as binding upon itself the provisions of Articles 2, 13(a) and 16.1(c) and 16(f) as they conflict with Shari'ah law as based on the Holy Qur'an and Sunnah." Khaliq, *supra* note 50, at 4 n.15. Egypt's reservation to Article 2 reads as follows: "The Arab Republic of Egypt is willing to comply with the content of this Article, provided it does not run counter to the Islamic Shari'ah." *Id.*

tant Islamic fundamentalist interpretation of Shar'ia is in many respects incompatible with CEDAW.<sup>147</sup> Nor is there a way to reconcile the practices of the Taliban with the tenets of CEDAW.<sup>148</sup> However, as many observers have pointed out, the clear evidence of diverse views regarding the meaning and scope of Shar'ia suggests a more nuanced picture.<sup>149</sup> For example, though fundamentalists often support the hijab as rooted in the *Qur'an*, mainstream Islamic scholars argue that there is no support for such practices among the primary sources of Islamic law.<sup>150</sup> Moreover, contrary to positions claimed by militant Islamic fundamentalists, the primary sources of Islamic law do not expressly or necessarily prohibit the right of women to receive an education, to have access to health care, to work, to vote or even to have an abortion.<sup>151</sup> In each of these examples, there is no direct conflict between CEDAW and the Shar'ia.

The international community has responded by criticizing the arguments put forth by Islamic countries and has insisted that the reservations be withdrawn or sharply limited in scope.<sup>152</sup> Sustained international pressure over time has resulted in many countries reexamining their reservations and duties to affirmatively comply with the Treaty's provisions.<sup>153</sup> In the 1980s many Islamic countries were largely dismissive of the Treaty; many refused to join or issued broad, general reservations.<sup>154</sup> By 2003, however, the number of ratifications by Islamic countries grew substantially and existing Treaty members did not extend reservations to other key articles.<sup>155</sup> In some notable cases, Islamic countries enacted controversial reforms (e.g., revisions to family laws) to come into compliance with the Treaty's provisions, while justifying such changes as consistent with Islamic law.<sup>156</sup> Given the Muslim world's initial objections to CEDAW, this change in behavior, although far from a full embracing of the Treaty, is nonetheless remarkable given the fundamentalist wave that has swept the region since the Iranian

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147. See discussion *supra* Part II(C).

148. See *id.*

149. See *id.*

150. Khaliq, *supra* note 50, at 19-20.

151. *Id.* at 21-44. Some interpretations of Islam hold that a woman can obtain an abortion up to the 119<sup>th</sup> day of the fetus' development, or at any time where the life of the mother is threatened. *Id.* at 43.

152. See General Recommendations, *supra* note 123, General Recommendation No. 4. The Committee has made a point to urge each country that has made a reservation to reevaluate its position, with the ultimate goal to have all significant reservations to the Treaty removed. See generally *Egypt Report*, *supra* note 95.

153. Khan, *supra* note 50, at 334.

154. *Id.*

155. See *CEDAW Ratifications*, *supra* note 9. The number of ratifications by Islamic countries has grown to 31 as of May, 2003, with the majority occurring since 1991. Of these 31 countries, 15 have entered reservations. See also Khan, *supra* note 50, at 334.

156. See Khan, *supra* note 50, at 334-35 (summarizing Tunisia's efforts to reform women's rights to seek a divorce and obtain family planning (including abortion) services along the lines of the Treaty).

revolution in 1979. It is unlikely that such steps at accommodation would have been taken without international pressure, as many of these countries lack strong democratic institutions, which allow women and progressive modernizers to express themselves effectively and build consensus through a political process.

## 2. Effectiveness of Treaties

### a. Political Realists

A third group of critics contend that CEDAW is largely ineffective at achieving progress on women's rights.<sup>157</sup> Political realists, who comprise part of this group, argue that treaties, without specific, enforceable obligations, do very little to make meaningful strides in achieving stated goals in the context of international relations.<sup>158</sup> They argue that since CEDAW has no effective enforcement mechanism, it is nothing more than a statement of aspiration and can have no real impact on the status of women's rights.<sup>159</sup> They claim reforms that have occurred over the years in areas such as the former communist bloc of Eastern Europe have come from changes in political climates that are wholly unrelated to the workings of treaties.<sup>160</sup> Further, they assert that while the ends of CEDAW are laudable, the U.S. and its allies would be better served to focus on changing the institutions or regimes within specific countries in order to achieve these aims.<sup>161</sup>

This argument was summed up by Jeane Kirkpatrick who, testifying in 2002 before the U.S. Senate Foreign Relations Committee regarding U.S. ratification of CEDAW, expressed the following:

This convention unfortunately is unable to have much effect. Because I lived at the U.N. for 5 years I became extremely impressed with the emptiness of words. I would like very much to see women all over the world have all of the rights that are enumerated in CEDAW. . . . I might say, too, and I believe that it is important, it is more important to do than to speak. . . . What really bothers me is the impression that people have that they have solved the problem because they have passed their U.N. treaty. The fact is, U.N. treaties read well and they act almost not at all. I mean, they simply do not lead to improvement and progress almost never, . . . unless and until there is implementation . . . and that is true for all the treaties, I might say, not just this treaty but all the treaties. . . .<sup>162</sup>

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157. See A.M. Weisburd, *Implications of International Relations Theory for the International Law of Human Rights*, 38 COLUM. J. TRANSNAT'L L. 45, 53-60 (1999).

158. See *id.*; Lester Munson, *CEDAW: It's Old, It Doesn't Work, and We Don't Need It*, 10 HUM. RTS. BRIEF 23, 25 (2003).

159. *Id.*

160. See Weisburd, *supra* note 157, at 70-86.

161. See *id.* at 112; Munson, *supra* note 158, at 25.

162. *CEDAW Hearing*, *supra* note 118, at 29-30 (statement of Hon. Jeane Kirkpatrick, Senior Fellow and Director of Foreign and Defense Policy Studies, American Enterprise Insti-

### *b. Critics of CEDAW's Reservations Regime*

A fourth group of critics argue that reservations to key provisions of CEDAW, especially those entered by Islamic countries, undermine its very purpose, as they preserve the discrimination between men and women present in many Shar'ia influenced codes.<sup>163</sup> Further, the reservations regime of CEDAW is too permissive, enabling States to enjoy the benefits of Treaty membership without the burdens.<sup>164</sup> These critics point out that most reservations to CEDAW have been accepted with only a few exceptions.<sup>165</sup>

State Parties to CEDAW have essentially taken a universalist view of treaty reservations, tolerating them in order to secure broad acceptance without threatening state sovereignty. The merit of this approach is that it lowers the political costs of participation while enabling States to establish a foothold within the Treaty framework in order to benefit from its provisions. Differences, it is argued, can be worked out among the members over time in a manner that is politically feasible.<sup>166</sup> However, as critics contend, this approach to reservations is better suited to a commercial treaty or other contractually structured treaties where there are direct advantages and benefits to participation.<sup>167</sup> The cost of noncompliance in commercial treaties is easily measurable in terms of reciprocal treatment from other States.<sup>168</sup> Human rights treaties, on the other hand, are created by States for the benefit of individuals, and there are no direct benefits to a complying State nor direct disadvantages to non-compliance.<sup>169</sup> Rather, human rights treaties attempt to develop normative standards to which States are to adhere, enforce, and refrain from violating.<sup>170</sup> Accordingly, many have argued that CEDAW should move towards revising the reservations regime and placing limits on the scope of reservations.<sup>171</sup>

In recognition of these criticisms, it should be noted that the Committee has regularly demanded in its review of State practices that member states reconsider previously entered reservations.<sup>172</sup> Nonetheless, to date the Committee has no effective procedural mechanism or authority to force States to abandon or remove reservations other than by political pressure and moral

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tute, Former Permanent Representative to the United Nations).

163. Riddle, *supra* note 131, at 626-27.

164. *See id.* at 614.

165. *Id.* at 614-15.

166. *See id.* at 623-24.

167. *See id.* at 624.

168. *Id.*

169. *Id.*

170. *Id.* at 625.

171. *Id.* at 634-38.

172. General Recommendations, *supra* note 123, at General Recommendation No. 20. For an example of the Committee's focus on scrutinizing reservations see *Egypt Report*, *supra* note 95, at 35 ¶¶ 326-327.

suasion.<sup>173</sup> In this respect, CEDAW is less effective than other treaties which restrict the free right to make reservations by subjecting such decisions to a vote of the member States. For example, under the Convention on the Elimination of Racial Discrimination (CERD)<sup>174</sup> reservations may be rejected as invalid by a two-thirds vote of the member States.<sup>175</sup> This reservations regime is credited with substantially limiting the number of reservations that significantly modify obligations under CERD.<sup>176</sup>

#### D. Status of U.S. Ratification

As of April 2004, the United States had not ratified CEDAW, despite the fact that President Carter signed CEDAW and submitted the Treaty to the U.S. Senate for ratification in 1980 in accordance with Article II of the U.S. Constitution.<sup>177</sup> The U.S. Senate did not make a definitive statement on the matter until 1994, when the Senate Foreign Relations Committee recommended that the full Senate enact CEDAW subject to certain reservations, understandings and declarations.<sup>178</sup> The Clinton Administration formally recommended ratification in 1998,<sup>179</sup> but the matter languished in the U.S. Senate, largely because of objections by American conservatives, until July 2002, when the Senate Foreign Relations Committee again recommended ratification of CEDAW by the full Senate on a committee vote of twelve to seven.<sup>180</sup>

The Bush Administration, which at one time appeared open to supporting ratification, abruptly reversed course after sharp criticism of the Treaty by American conservative groups in the summer of 2002.<sup>181</sup> The Bush Administration echoed many of the arguments of these cultural conservatives; it raised questions about the judgment of the Committee with respect to the selection of matters for review, and also raised concerns regarding the interpretive power of the Committee and the impact its decisions might have on U.S. and international law.<sup>182</sup> In short, the U.S. has not reached consensus on

173. Riddle, *supra* note 131, at 629-30.

174. International Convention on the Elimination of all Forms of Racial Discrimination, opened for signature Mar. 7, 1966, 660 U.N.T.S. 195.

175. *Id.* See also Riddle, *supra* note 131, at 635.

176. Riddle, *supra* note 131, at 635.

177. *CEDAW Hearing*, *supra* note 118, at 1. See also LaFranchi, *supra* note 138.

178. *CEDAW Hearing*, *supra* note 118, at 7 (opening remarks of Senator Barbara Boxer). The U.S. Senate Committee on Foreign Relations approved CEDAW in 1994 by a vote of 13 to 5. *Id.*

179. See Valerie A. Dormady, *Status of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) in 1998*, 33 INT'L LAW 637 (1999).

180. See National Organization for Women, *Legislative Update, Senate Foreign Relations Committee Approves CEDAW*, available at <http://www.now.org/issues/legislat/200208.html#senate> (last visited Aug. 28, 2003).

181. See LaFranchi, *supra* note 138 (noting that neo-conservatives and other members of Bush's constituency oppose the Treaty).

182. *Contemporary Practice of the United States Relating to International Law*, *supra*

whether CEDAW is compatible with U.S. law and values, or on whether it can be an effective or worthwhile tool to promote women's rights around the world.

#### IV. CEDAW AND THE WAR ON TERROR

##### *A. The Role of Human Rights and U.S. Foreign Policy*

United States foreign policy has, since the country's inception, contained a values-based dimension, which is rooted in the American national experience of British colonial rule, independence, democracy, territorial expansion, and its emergence as a global superpower. Throughout U.S. history, the concepts of liberty, democracy, free markets, self-determination, human rights and American exceptionalism have permeated the thinking and statements of U.S. Presidents and policymakers from George Washington onwards.<sup>183</sup> Though the emergence and application of these concepts have invariably been interconnected with realpolitik concerns, the importance of values-based arguments in U.S. foreign policy can scarcely be denied.<sup>184</sup>

Moreover, when faced with ideologically based threats, U.S. foreign policy has tended to emphasize values-based arguments to confront the challenge. For example, during the Cold War, successive American administrations consistently emphasized individual liberty, democracy, human rights and free markets as part of a message to confront and critique Communist regimes that were autarkic and totalitarian.<sup>185</sup> It was in the context of the Cold War that the U.S. actively supported decolonization, European integration, free trade agreements, international institutions and the framework of international human rights.<sup>186</sup> This emphasis on values during the Cold War

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note 130, at 973.

183. See generally DAVID RYAN, U.S. FOREIGN POLICY IN WORLD HISTORY 1-18, 83-93, 116-62 (2000); CECIL V. CRABB JR., THE DOCTRINES OF AMERICAN FOREIGN POLICY: THEIR MEANING, ROLE AND FUTURE 371-437 (1982).

184. Even in a conflict such as the Spanish-American War, which many historians characterize as a quest to promote U.S. power in the Western Hemisphere masked by the rhetoric of the liberation of Cuba and the right of Cuban self-determination, the appeal to values based arguments that went beyond power politics was important to justify the action and create a political rationale for a post-war U.S. relationship in Cuba. See RYAN, *supra* note 184, at 58-62.

185. RYAN, *supra* note 184, at 94-135.

186. *Id.* The following statement appears on the U.S. Department of State web site:

The protection of fundamental human rights was a foundation stone in the establishment of the United States over 200 years ago. Since then, a central goal of U.S. foreign policy has been the promotion of respect for human rights, as embodied in the Universal Declaration of Human Rights. The United States understands that the existence of human rights helps secure the peace, deter aggression, promote the rule of law, combat crime and corruption, strengthen democracies, and prevent humanitarian crises.

U.S. Department of State, *Human Rights*, available at <http://www.state.gov/g/drl/hr/> (last visited Apr. 1, 2004).

underscored that the conflict was much more than a contest between global powers for territory or resources; it was a battle for the allegiance of people to adopt a particular form of government and a way of life.

Like communism, militant Islamic fundamentalism represents an ideological challenge to Western and U.S. values. Although there is no rival Islamic state to challenge the U.S., like the Soviet Union or China during the Cold War, militant Islamic fundamentalists nonetheless have long-term objectives to defeat Western power, weaken Western culture, and impose fundamentalist Islam upon the world.<sup>187</sup> In this context, human rights matter to U.S. foreign policy because it clearly distinguishes Western values from those of militant Islamic fundamentalism, and provides a rationale to challenge and critique this ideology within the Arab and Muslim world. The value in confronting fundamentalism is further demonstrated by the U.S. focus on women's rights and political freedom in Afghanistan and other parts of the Arab and Muslim world following the September 11, 2001 attacks.<sup>188</sup>

### *B. The Connection Between Women's Rights and the "War on Terror"*

The U.S. openly acknowledged that women's rights are connected in part with the "War on Terror" with respect to the Taliban regime in Afghanistan.<sup>189</sup> The Bush Administration and its allies linked the Taliban regime's support for Al Qaeda with the regime's draconian policies towards women often referring to both in the same public statements.<sup>190</sup> The U.S. and the Western world, implicitly and explicitly recognized that both policies stemmed from the same political philosophy that openly rejected the western way of life.

However, it is important to emphasize that the Taliban regime was but one manifestation of an ideology that has transcended particular groups or leaders, and has built a global following over several decades. One should

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187. See discussion *supra* Part II.

188. E.g., White House Press Release (Mar. 12, 2004) 2004 WL 61638206 (discussing women and freedom in Afghanistan and Iraq).

189. See President Signs Afghan Women and Children Relief Act: Remarks by the President at Signing Ceremony For Afghan Women and Children Relief Act of 2001, Dec. 9, 2001, available at <http://www.whitehouse.gov/news/releases/2001/12/20011212-9.html> (last visited Aug. 27, 2003).

190. See *id.* ("America is beginning to realize that the dreams of the terrorists and the Taliban were a waking nightmare for Afghan women and their children. . . . In Afghanistan, America not only fights for our security, but we fight for values we hold dear. We strongly reject the Taliban way. We strongly reject their brutality toward women and children. They not only violate basic human rights, they are barbaric in their indefensible meting of justice. . . . You know, life in Afghanistan wasn't always this way. Before the Taliban came, women played an incredibly important part of that society. Seventy percent of the nation's teachers were women. Half of the government workers in Afghanistan were women, and forty percent of the doctors in the capital of Kabul were women. The Taliban destroyed that progress. And in the process, they offered us a clear image of the world they and the terrorists would like to impose on the rest of us.").

not mistake the use of different tactics by fundamentalist organizations for a diminishing or splintering of ideological focus, tenacity or intensity among followers. Many fundamentalist groups have simply adapted to the political realities of their respective situations, yet continue to adhere to and advance the long-term objectives of imposing fundamentalism at home and confronting the West abroad. For example, it is accurate to view Hezbollah, a fundamentalist organization that participates in a multi-party democracy in Lebanon, as having the same long-term objectives as the Taliban, in spite of striking differences in their approaches.<sup>191</sup> As Fereydoon Hoveyda writes,

Militant fundamentalists everywhere identify the West and its leader, the United States, as the enemies of Islam and as the targets against whom the ultimate jihad will be directed. But they know that no militant fundamentalist government is in a position to wage a successful "classical" war against any European country, let alone the United States. They therefore bide their time and prepare thoroughly for the "final" confrontation. In this respect, they must pursue three major objectives: seize power in Muslim countries whose rulers are pro-Western and train and equip modern armies; stall the Middle East peace process and eventually destroy Israel, which is the West's Trojan horse in the Muslim world; and finally, weaken Western societies as much as possible and frighten their people through terrorism and sabotage.<sup>192</sup>

The defeat of the Taliban in Afghanistan in October 2001 by a U.S. led coalition did not end the threat of militant Islamic fundamentalism. Rather, history suggests that fundamentalists will adapt to the post September 11, 2001 climate and find new ways to survive and advance their agenda. This conflict did not begin or end with the rise of Al-Qaeda or the Taliban regime, and therefore a long-term strategy is required for the West to effectively confront militant Islamic fundamentalism.

One of the key objectives of U.S. foreign policy, therefore, should be to discredit militant Islamic fundamentalism as a viable political philosophy within the regions where it is strongest, in the Arab and Muslim world, and to strengthen and promote an alternative political philosophy that Muslims can adapt to their own societies. This will necessarily require a debate on values that extends to the streets of Arab and Muslim countries. One of the most tangible and visceral issues that expose the stark difference in values between the West and militant Islamic fundamentalists is the position and role of women in society. As important as the emancipation of women is to Western culture, the reverse is central to militant Islamic fundamentalists.

Therefore, if the U.S. is to effectively challenge militant Islamic fundamentalism as a viable political philosophy in the Arab and Muslim world, it must confront the issue of women's rights. Secretary of State Colin Powell underscored the importance of women's rights to U.S. foreign policy when he stated, "the worldwide advancement of women's issues is not only in

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191. HOVEYDA, *supra* note 13, at 63.

192. *Id.*



keeping with the deeply held values of the American people, it is strongly in our national interest as well."<sup>193</sup> Since the September 11, 2001 attacks, the U.S. has placed a greater emphasis on the condition and rights of women in the Muslim world, particularly in Afghanistan, and has explicitly advocated political freedom, liberty, nondiscrimination, and equal opportunity for women values that are largely consistent with the objectives of CEDAW and the statement by Secretary Powell. In fact, the U.S. backed Afghan government, led by Hamid Karzai, ratified CEDAW in 2003.<sup>194</sup> Militant Islamic fundamentalists unabashedly reject these values as contrary to their agenda and anti-Islamic.<sup>195</sup> However, the West should not reject the possibility of constructive influence in the debate between fundamentalist and modernist forces within the Islamic world, but should actively support those who do not see the values of Islam and the West as irreconcilable and seek progressive reform.

If militant Islamic fundamentalists are allowed to define the terms of debate and control the agenda in Muslim countries regarding the interpretation of the Shar'ia, the role of women, and relations with the West, they will continue to hold and gain power in and will be emboldened to advance their anti-West agenda. In contrast, if fundamentalist ideas are actively challenged, alternative moderate forces can be empowered to discredit this ideology among Arabs and Muslims and the global security threat that emanates from it.

### *C. Why the U.S. Should Incorporate CEDAW into its Foreign Policy*

From the perspective of the "War on Terror," CEDAW provides the U.S. with many potential benefits. First, the Treaty's general principles are largely consistent with official U.S. policy and law regarding women's rights.<sup>196</sup> Many observers, including the U.S. Senate Foreign Relations Committee, have determined that the U.S. would not have to add or change any laws in order to achieve compliance with the Treaty.<sup>197</sup> Furthermore,

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193. *CEDAW Hearing*, *supra* note 118, at 33-34 (statement of Hon. Harold Hongju Koh, Professor, Yale Law School, Former Assistant Secretary of State for Human Rights).

194. *CEDAW Ratifications*, *supra* note 5.

195. *See* discussion *supra* Part II(C).

196. *CEDAW Hearing*, *supra* note 118, at 34 (statement of Hon. Harold Hongju Koh, Professor, Yale Law School, Former Assistant Secretary of State for Human Rights).

197. *See CEDAW Hearing*, *supra* note 118, at 3-4 (opening remarks of Senator Biden) ("For the United States, the treaty will impose a minimal burden. The U.S. Constitution and existing Federal laws will satisfy the obligations of the treaty. The United States will need to enter a handful of reservations to a treaty where it is inconsistent with our Constitution or current Federal law, as we do with nearly every treaty, but the United States will not need to enact any new laws to be in compliance with this treaty."). Given that the Committee on Foreign Relations approved the Treaty following the hearing, it can be assumed that the Senate either accepted or did not challenge Senator Biden's view. *See also CEDAW Hearing*, *supra* note 62, at 99-109 (statement of the International Human Rights Law Group, Lawyers Committee for Human Rights) (going further than Senator Biden by critiquing the proposed reservations,

given that CEDAW is supported by a broad consensus of U.N. members, U.S. ratification would represent a clear endorsement of the values shared by the world community that the U.S. seeks to champion in the Arab and Muslim world.

Second, contrary to the predictions of political realists, CEDAW has already made a positive impact in its first few decades. This is evident in the large number of countries and human rights activists that have cited CEDAW as both inspirational and instructive in legal reform movements. Even among Muslim countries, the number of ratifications has increased and international pressure has forced others to reconsider their approach to reservations.<sup>198</sup> Internal movements for change often draw inspiration by the force of example from international sources, and the volume of evidence from countries that have enacted reforms relating to women's rights indicate that the Treaty has made some progress in fulfilling this valuable role. A Treaty with a measurable record of success is something that the U.S. could build upon in achieving its oft-stated foreign policy goals with respect to the rights of women worldwide, and in the Muslim world in particular.

Third, cultural critiques of CEDAW have been overstated. Cultural conservatives have relied on slippery slope arguments to underscore their belief that CEDAW is subversive of traditional values.<sup>199</sup> Absent from their arguments is substantive evidence that the U.S. would be required to significantly revamp its laws to comply with the Treaty, or that the U.S. legal system or legislative process would have insufficient discretion to interpret or implement laws that may conflict in part with sensitive Committee rulings. Moreover, the bulk of the criticism from U.S. conservatives is largely aimed at membership and rulings of the Committee, not the Treaty itself.<sup>200</sup> It stands to reason that since even these critics implicitly concede (and in some cases explicitly acknowledge) that the aims of the Treaty are generally worthwhile, the best way to address concerns about the operation of the Committee is to participate within the CEDAW framework and seek reform rather than stand apart from it.

More importantly, although CEDAW is clearly at odds with militant Islamic fundamentalism, it is not incompatible with more conventional interpretations of the Shar'ia.<sup>201</sup> CEDAW is even more compatible with progressive Islamic movements that are less orthodox in their interpretation and implementation of Islamic law and seek to achieve some balance between

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understandings and declarations of the Bush Administration to CEDAW as legally unnecessary and politically undesirable).

198. See discussion *supra* Part III(C)(1)(b).

199. See *CEDAW Hearing*, *supra* note 118, at 122-46 (petition and statements in opposition to ratification of CEDAW).

200. See, e.g., *CEDAW Hearing*, *supra* note 118, at 123-25 (statement submitted by Tanya K. Skeen, Vice President, Family Action Council International, Charlottesville, Virginia) (specifically objecting to the views of the CEDAW Committee).

201. See discussion, *supra* Part III(C)(b).

modernization and respect for local culture. With thoughtful political leadership, CEDAW can be presented to Muslims in a way that does not fundamentally threaten mainstream notions of Islamic values—which themselves are the subject of rigorous debate within the Islamic world—but rather addresses the excesses of militant Islamic fundamentalism. The cautious steps by Muslim countries at compliance with CEDAW, as evidenced by modest local reform efforts, a steadily increasing number of ratifications and the absence of additional or expanded reservations, underscore this possibility.

Seen in this light, CEDAW could be used as a tool to empower modernizers in the Islamic world to advocate and achieve progressive reform in a manner consistent with local values and culture. Every act of reform in the Arab and Muslim world, along the lines prescribed in CEDAW, correspondingly weakens the impact of militant Islamic fundamentalism because the principles of equality and nondiscrimination embodied in the Treaty are diametrically opposed to the fundamentalist agenda. When women are sufficiently empowered, their collective voice will further dilute the political power of militant Islamic fundamentalists because women will be an important constituency for leaders to court in order to secure political legitimacy.

Furthermore, U.S. advocacy of CEDAW in the Arab and Muslim world on matters ranging from political freedom to preventing violence against women can be useful in tilting the political balance of power away from fundamentalists. If the U.S. put its weight behind CEDAW, political leaders in the Arab and Muslim world that desire peaceful and productive relations with the West would be more inclined towards reform and marginalization of the fundamentalists. This would represent an important change in the political dynamic that has existed in the Muslim world since the 1967 Arab-Israeli war and the 1979 Islamic Revolution in Iran, where fundamentalism has steadily gained political support.<sup>202</sup> Critiquing the fundamentalist social agenda from within is important, if not necessary, to effectively overcome the global security threat that has emerged and grown in earnest since the 1970s.

Finally, the U.S. should incorporate CEDAW into its foreign policy because collective action is widely recognized by U.S. policymakers as indispensable to an effective strategy against the threat posed by militant Islamic fundamentalist groups,<sup>203</sup> which have a decentralized and international base of operations. CEDAW can help the U.S. maintain its “anti-terror” coalition around a common goal of protecting and promoting women’s rights. One recognized advantage of treaties—and why their use has been an enduring feature of international relations over many years—is that they lower transaction costs for States to engage in collective action because such instruments offer a transparency of purpose that lends greater legitimacy to the

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202. See discussion, *supra* Part II(B).

203. See, e.g., Terrorism, the Future, and U.S. Foreign Policy, CRS Issue Brief for Congress, at <http://fpc.state.gov/documents/organization/9040.pdf> (last visited Feb. 20, 2004).

underlying effort.<sup>204</sup> States and their populations are less likely to suspect ulterior motives when aims are pursued through an open, collectively endorsed framework.<sup>205</sup>

However, the continued advocacy of women's rights in the Arab and Muslim world is incongruous with the U.S. failure to ratify CEDAW. Many advocates of ratification in the U.S. have made this argument, often with direct reference to the Taliban regime in Afghanistan.<sup>206</sup> In the absence of ratification, the U.S. advocacy of women's rights remains an ad-hoc policy subject to the vicissitudes of political considerations and priorities. Furthermore, the failure to acknowledge CEDAW's authority limits the ability of the U.S. to persuade other countries to pursue reforms. As Senator Joseph Biden, an advocate of ratification, stated:

For the United States, the [T]reaty can be a powerful tool to support women around the world who fight for equal rights. Our voice on women's rights will be enhanced by becoming a party to this treaty, because we will be empowered to call nations to account for their compliance with the [T]reaty. Absent our membership, we cannot do that.<sup>207</sup>

Ratification would make CEDAW a permanent part of U.S. law and would transform women's rights from the realm of politics to official government policy. This would not only bind future U.S. administrations, but also condition the expectations of other States that deal with the U.S. States would be forced to recognize that the issue of women's rights is non-negotiable as a matter of U.S. law, and would have to factor this into the cost/benefit analysis decision making. States may not be able to wholly disregard women's rights if they know that doing so would run afoul of the U.S.

#### *D. Prescriptions for a U.S. Role in CEDAW*

Strong U.S. participation could alleviate many of the acknowledged weaknesses or shortcomings of CEDAW. Accordingly, the U.S. should seek to take a leadership role to raise the profile of the Treaty and push for reform in its operation and management. In order to incorporate the principles embodied in CEDAW into the "War on Terror," the U.S. government should 1) ratify CEDAW and incorporate a CEDAW review; 2) advocate reform of the

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204. See Cary Coglianese, *Globalization and the Design of International Institutions*, in GOVERNANCE IN A GLOBALIZING WORLD 297, 309-12 (Joseph S. Nye & John D. Donahue eds., 2000) (noting that treaties remain a frequently used form of international cooperation and that there are 34,000 treaties registered with the United Nations as of 2000).

205. See *id.*

206. See generally CEDAW Hearing, *supra* note 118, at 3-9 (opening remarks of Senator Biden and Senator Barbara Boxer).

207. *Id.* at 4.

Treaty and the Committee; and 3) highlight areas where women's rights issues confront the fundamentalist agenda.

### *1. Ratify CEDAW & Incorporate a CEDAW Review*

The first step the U.S. needs to take is to follow the recommendation of the U.S. Senate Foreign Relations Committee and ratify CEDAW. The very act of ratification would send a clear message that the U.S. is prepared to unify its position with its allies, and that women's rights are a priority in U.S. foreign policy. Following ratification, the U.S. government should take the additional step of incorporating a CEDAW compliance review into the annual U.S. State Department Human Rights report.<sup>208</sup> These two acts would emphasize that the U.S. government places a high priority on women's rights, shifting the issue from the realm of ad hoc politics to official government policy, resulting in a consistent, permanent policy that restrains, conditions and influences the actions of U.S. administrations and other States regardless of political or ideological persuasion.

### *2. Advocate Reform of the Treaty and the Committee*

Once within CEDAW's framework, the U.S. should use its political leverage to push for reform to strengthen the Treaty. First, the reservations regime should be reformed. Countries that have entered reservations, like Egypt, Libya and Bangladesh, should be encouraged to remove them. Furthermore, the Treaty should be amended to adopt a reservations regime along the lines of the Convention on the Elimination of Racial Discrimination, enabling countries to reject reservations made by another country with a two-thirds vote. Limiting reservations strengthens the integrity of treaties and reinforces the shared commitment to the basic principles.

Moreover, the U.S. should lend its voice to recommend reform of the Committee's reporting process. A typical Committee report addresses a veritable laundry list of issues affecting women, with little indication of a priority ranking. While this approach has been effective in broadening the scope of the Committee's competence to review State practices, it has created some confusion and controversy regarding the Committee's principal objectives and priorities with respect to advancing the Treaty's aims. Not all women's rights issues are created equal, and the U.S. should make its voice heard on what it thinks are priority issues. For example, future Committee reports should focus less on the psychological impact of cultural and national holidays or public relations campaigns and emphasize matters such as violence against women, education and health care in more detail. The U.S.

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208. The U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, issues a yearly Country Reports on Human Rights Practices, which can be accessed at <http://www.state.gov/g/drl/hr>.

could compellingly argue that ratification subjects it to the risks of the Committee's rulings and, therefore, it should have a say in recommending priorities.

### *3. Highlight Areas Where Women's Rights Issues Confront the Fundamentalist Agenda*

Finally, one of the top priorities for the U.S. should be to focus on issues where there is an intersection between women's rights and confronting the fundamentalist agenda. The U.S. should not be shy about highlighting issues like female circumcision, education, and access to health care in the Muslim world. This approach would not only further U.S. interests but would also strengthen the legitimacy and effectiveness of the Treaty. The U.S. would benefit because it can shed the proper spotlight on the implications of a fundamentalist agenda for women's rights by highlighting practices advocated by fundamentalists that violate the Treaty. This will spur a debate within the Muslim world that places militant Islamic fundamentalism on the defensive, strengthens reformers, and makes it harder for U.S. motives to be questioned or misinterpreted. Even skeptics of the U.S. would be compelled to acknowledge the significance of underlying issues like combating violence against women. Additionally, the Treaty would be strengthened because active U.S. involvement would lead to greater awareness of CEDAW and would enhance incentives for compliance among all member states.

Moreover, international pressure and support for reform is vital to effecting meaningful change within countries. For example, international support for groups within Egypt that opposed female genital mutilation helped push the Egyptian government to move against the fundamentalist position on this issue.<sup>209</sup> Similarly, modernizers in the Arab and Muslim world are likely to be strengthened, not deterred, by an international focus on other women's rights issues. The U.S. should encourage women's rights groups, both in the West and in the Arab and Muslim world, to file complaints before the Committee to initiate a broader debate on the role of women in the Muslim world. By shedding light on such issues, the U.S. will confront an important part of the fundamentalist agenda, which heretofore has not been effectively challenged.

## V. CONCLUSION

Today, one of the most important issues facing the U.S. and its allies is the challenge posed by militant Islamic fundamentalism. Since the Islamic revolution in Iran in 1979, militant Islamic fundamentalism has turned more aggressively towards confronting and changing regimes within the Arab and

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209. See Horan, *supra* note 95.

Muslim world and directly targeting the center of western power, the United States, in a bid to create a clash of civilizations between Islam and the West.

The challenge posed by militant Islamic fundamentalism will endure, unless the underlying ideology is directly confronted. This requires the United States to actively engage in a debate with fundamentalists within the countries in which this ideology has taken root. Military power, though certainly necessary to confront imminent security threats and at times to establish the conditions for reform, is less effective than discourse. Rather, as the Cold War demonstrated, it is the power of ideas that matters most when trying to win the hearts and minds of people over the long-term.

One of the critical fault lines between militant fundamentalist Islam and the West is the issue of women's rights. Where the West advocates social and political liberty for women, Islamic fundamentalists have systematically sought to reverse such trends in accordance with their ideology. These struggles have been on going in Muslim countries for several decades, with fundamentalists demonstrating notable successes beginning with the Islamic revolution in Iran in 1979.<sup>210</sup> By empowering women and modernizers within the Islamic world, the U.S. can go a long way towards marginalizing militant Islamic fundamentalism and consequently reducing the threat posed to global peace and security.

An important step in advancing women's rights and integrating it with the "War on Terror" is the U.S. ratification of CEDAW. CEDAW is acknowledged as the authoritative statement on women's rights,<sup>211</sup> and its principles directly challenge the tenets of militant Islamic fundamentalism. Given the structure of CEDAW, the interpretative role of the Committee, and its large number of signatories, which include many Muslim nations, CEDAW represents a potentially useful vehicle to force States to engage in a debate on women's rights, and empower Arab and Muslim modernizers who link the cause of women's rights with progress and prosperity.

In the context of the "War on Terror," the U.S. could lend important political leadership within CEDAW to focus the Committee's priorities on those issues that are of the highest priority including political freedom, violence against women, education, and health care. This would build a consensus with which to confront militant Islamic fundamentalism. Furthermore, by integrating the cause of women's rights into the "War on Terror," the U.S. would present a tangible vision of the society and values it envisions for the Muslim world. The force of example and political leadership would inspire and resuscitate a much needed debate on the role of women in Islamic societies, and could be vitally important to contain and defeat the threat posed by militant Islamic fundamentalism.

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210. See discussion *supra* Part II(B).

211. E.g., Venkatraman, *supra* note 50, at 1950, 1953.

