

## NAVIGATING A HUMAN RIGHTS ROADBLOCK: MAKING THE CASE FOR THE WOMEN'S EQUALITY ACT

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### ABSTRACT

The fight to protect women's rights is critical now more than ever. The World Bank has noted that women throughout the world "have only three quarters of the legal rights afforded to men."<sup>1</sup> On the domestic front in the United States, the battleground remains fraught with blows to the women's rights movement, especially on the heels of the COVID-19 pandemic and the rollback of reproductive rights. Statements made by the Biden Administration in support of global women's rights, for example, have been met with inadequate action on the legislative front; the most pertinent standstill has come from the fight over the ratification of the Convention on the Elimination of all Forms of Discrimination against Women ("CEDAW"), a long and drawn-out battle that has left the United States virtually alone in failing to explicitly affirm the global rights of women. This gap between promise and action leaves one main question open, what can be done?

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<sup>1</sup> *Nearly 2.4 Billion Women Globally Don't Have Same Economic Rights as Men*, WORLD BANK (Mar. 1, 2022), <https://www.worldbank.org/en/news/press-release/2022/03/01/nearly-2-4-billion-women-globally-don-t-have-same-economic-rights-as-men> [<https://perma.cc/V8KD-67LU>].

This comment aims to provide an answer to this question by proposing an alternative approach to the problem: using transnational civil litigation as a way to better protect the rights of women, both domestically and abroad, in United States courts. Specifically, this comment will propose a novel transnational litigation statute, the Women's Equality Act ("WEA"), which will serve as an important, if not imperative, addition to the current domestic legal framework absent CEDAW ratification. Through multiple arguments taking into account practical and policy-oriented benefits, as well as both domestic and international legal elements, this comment's goal is to provide the reader, whether that be a policymaker, a decisionmaker in government, or an expert in the field of global women's rights with the base and the tools to take the WEA from an idea to a reality.

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## INTRODUCTION

Today, one can look at the state of global women's rights and hail its successes in comparison to decades prior. From early legal documents that merely glanced over the explicit rights of women, to the eventual drafting of the CEDAW, the continued development of the movement has consisted of navigating roadblock after roadblock to achieve the necessitated equality that is inherent and deserved. The CEDAW and the successive development of the regime placed women's rights at the forefront of the human rights conversation, leading countries throughout the world to explicitly affirm said rights and to conform their legal systems to these stated norms. At the same time, however, one must also acknowledge the evident gaps that continue to exist on the global scale; societal discrepancies, along with gender-based violence and discrimination, continue to persist in all corners of the world.

One such gap exists in the United States. In previous years, the United States has openly committed to the global women's rights movement through policy statements and has legally guaranteed the right to gender-based equality in certain areas of public and private life. However, the United States is also one of only a handful of countries that have failed to ratify the CEDAW. Since its inception, multiple presidents, legislators, academics, and leaders have pushed for ratification of the treaty, but have been met with legislative roadblocks. On the ground, women have begun facing a rollback of their rights in previous years, particularly in light of the COVID-19 pandemic and the exposed inequalities that have come about as a result. The United States is therefore at a critical juncture regarding how it can better affirm and promote the rights of women, both domestically and abroad.

This comment will offer an alternative route for the United States, allowing them to work around the legislative roadblock preventing CEDAW ratification. Specifically, this comment will argue that "transnational civil litigation" can provide the answer to the conundrum faced. Through drafting and passing the WEA, an inclusive federal statute that would take an intersectional approach to combatting gender-based issues, women will be provided with a private cause of action for gender-based violations, committed both domestically and abroad, in United States courts. Passing the WEA will allow the United States to better position itself as a fervent

leader in the field of global women's rights while closing the existent gap between policy statements and action.

To begin, Part I of this comment will provide the reader with important background on the birth, development, and current state of the global women's rights regime post-World War 2 ("WW2"). Then, Part II will center the United States as the main case study of this comment, looking to their current domestic legal framework related to women's rights, their relationship to the CEDAW, and the gender-based issues currently faced by women in the country. Subsequently, Part III will introduce and provide recommendations for drafting the WEA, the goal of which is to be the ultimate legal avenue in the United States aimed at protecting and affirming the rights of women, domestically and abroad. Specifically, this section will draw on domestic and international legal arguments to support recommendations for language that should be drafted into the statute.

Part IV will then turn to important counterarguments, distinguishing the WEA from the CEDAW and the Equal Rights Amendment, both of which failed to get passed and/or ratified in previous years. Lastly, Part V will provide arguments in support of the strength and efficacy of the WEA should it be passed in the United States. There, the comment will first argue that the WEA is a necessary alternative route to the current fight for CEDAW ratification because, as a transnational litigation statute, it can effectively (a) affirm and (b) protect the rights of women by providing victims with fora to receive justice for gender-based wrongs. Second, this section will also argue that passing the WEA would be an imperative next step, building off of momentum that has already shaped an Administration that is willing to expand pertinent human rights statutes, such as the War Crimes Act and the Violence Against Women Act, and that has committed to global women's rights through the Women, Peace and Security Agenda. Lastly, this section will use the efficacies of other narrowly tailored women's rights statutes, such as the Female Genital Mutilation ("FGM") Law and the Trafficking Victims Reauthorization Act, as a base from which to argue for the passage of a broader and more complete WEA.

I. THE INTERNATIONAL WOMEN'S HUMAN RIGHTS FRAMEWORK:  
HISTORY AND DEVELOPMENT

The argumentative portions of this comment require a strong understanding of the development of the global women's rights regime. Therefore, this section will (A) detail the birth of the modern human rights movement post-WW2; (B) provide a brief overview of the inadequacies of the "nondiscrimination principle" found in the "International Bill of Rights;" (C) delve into the CEDAW; and (D) conclude by looking at how the global women's rights regime has developed after the CEDAW's inception.

*a. Birth of International Human Rights*

Judge Hilary Charlesworth of the International Court of Justice ("ICJ") has said that "[i]nternational human rights law is a product of the post-World War II order."<sup>2</sup> The horrors of fighting and bloodshed that had occurred throughout the 1930s and 40s, leaving 35-60 million soldiers and civilians dead,<sup>3</sup> was too much for the post-war international community to bear. To that end, the atrocities committed throughout the previous years, along with the subsequent Nuremberg and Tokyo Trials,<sup>4</sup> marked the beginning of motivational change on behalf of the international community. Particularly, there was a necessity "of proclaiming and protecting

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<sup>2</sup> Hilary Charlesworth, *What Are "Women's International Human Rights?,"* in HUMAN RIGHTS OF WOMEN 58, 58 (Rebecca J. Cook ed., 1994).

<sup>3</sup> *How Many People Died During World War II?*, BRITANNICA, <https://www.britannica.com/question/How-many-people-died-during-World-War-II> [<https://perma.cc/BU3L-56CS>] (last visited May 3, 2022).

<sup>4</sup> The international military tribunals in Nuremberg and for the Far East, which were both set up after the end of WW2, were used to try leading Nazi and Japanese political and military leaders, as well as Nazi organizations, for war crimes committed throughout the war. While the two tribunals differed in their inception and structure, they both served as "the first international criminal tribunals to prosecute high-level political officials and military authorities for war crimes and other wartime atrocities." Sentences for convicted defendants in both trials ranged from imprisonment to death. See *The Nuremberg Trial and the Tokyo War Crimes Trials (1945-1948)*, U.S. DEP'T OF STATE, OFFICE OF THE HISTORIAN, [https://history.state.gov/milestones/1945-1952/nuremberg#:~:text=the%20full%20notice,-,The%20Nuremberg%20Trial%20and%20the%20Tokyo%20War%20Crimes%20Trials%20\(1945,crimes%20and%20other%20wartime%20atrocities](https://history.state.gov/milestones/1945-1952/nuremberg#:~:text=the%20full%20notice,-,The%20Nuremberg%20Trial%20and%20the%20Tokyo%20War%20Crimes%20Trials%20(1945,crimes%20and%20other%20wartime%20atrocities) [<https://perma.cc/G72Q-4W4F>] (last visited Sept. 28, 2023).

human rights throughout the world.”<sup>5</sup> Thus, from the ashes of war, the modern human rights movement was born.

Outrage at the human rights violations committed throughout the previous decade, namely the atrocities of the Holocaust, “helped spur the founding of the United Nations,”<sup>6</sup> along with the ideal of protecting the human rights of individuals universally.<sup>7</sup> The Preamble of the U.N. Charter called on States “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.”<sup>8</sup>

It was the Universal Declaration of Human Rights (“UDHR”), however, adopted in 1948 to complement the U.N. Charter, which served as a foundation to the development of subsequent human rights treaties; a roadmap, so to speak, “to guarantee the rights of every individual everywhere.”<sup>9</sup> Although not a treaty,<sup>10</sup> the UDHR created a base for what would be considered the “International Bill of Rights,” which included a set of binding treaties aimed at protecting the civil and political, as well as the economic, social, and cultural rights of individuals throughout the world.<sup>11</sup> These documents, including the International Covenant on Civil and

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<sup>5</sup> Johannes Morsink, *World War Two and the Universal Declaration*, 15 HUM. RTS. Q. 357, 357-358 n.5 (1993).

<sup>6</sup> Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467, 1474 (2014).

<sup>7</sup> See *id.* at 1474-75 (noting that the U.N. Charter “requires all [M]ember [S]tates to cooperate to promote respect for human rights”).

<sup>8</sup> Hanna-Mari Kivisto, *The Concept of “Human Dignity” in the Post-War Human Rights Debates*, 27 RES PUBLICA. REVISTA DE HISTORIA DE LAS IDEAS POLITICAS 99, 100 (2012).

<sup>9</sup> *History of the Declaration*, U.N., <https://www.un.org/en/about-us/udhr/history-of-the-declaration> [<https://perma.cc/C3XJ-FL8X>] (last visited Apr. 29, 2023).

<sup>10</sup> See *Universal Declaration of Human Rights*, AMNESTY INT’L, <https://www.amnesty.org/en/what-we-do/universal-declaration-of-human-rights/#:~:text=The%20UDHR%20is%2C%20as%20its,constitutions%20and%20domestic%20legal%20frameworks> [<https://perma.cc/SUF7-A66K>] (last visited Sept. 28, 2023) (describing the UDHR and why it was drafted).

<sup>11</sup> See *id.* (“The Declaration has also provided the foundation from which a wealth of other legally binding human rights treaties have been developed . . .”); *International Bill of Human Rights – A Brief History, and the Two International Covenants*, OHCHR, <https://www.ohchr.org/en/what-are-human-rights/international-bill-human-rights> [<https://perma.cc/AH2F-DAXC>] (last visited Apr. 28, 2023).

Political Rights (“ICCPR”)<sup>12</sup> and the International Covenant on Economic Social and Cultural Rights (“ICESCR”),<sup>13</sup> helped create and codify fundamental norms of which the international community is obligated to respect.

*b. The “Nondiscrimination Principle”*

The early documents of the international human rights framework, in general terms, contained provisions aimed at promoting the “nondiscrimination principle” between men and women. Article 1 of the U.N. Charter notes that one of the U.N.’s purposes is “to achieve international cooperation in promoting and encouraging respect for human rights . . . without distinction as to . . . sex . . . ,”<sup>14</sup> while the UDHR proclaims the entitlement of everyone to “the enjoyment of human rights and fundamental freedoms without distinction of any kind including . . . sex . . . .”<sup>15</sup>

However, while the nondiscrimination principle was considered valuable, it did not adequately detail the realities that women have dealt with in an efficient way.<sup>16</sup> As Judge Charlesworth notes, this development was not “adequate to address the subordination of women worldwide,”<sup>17</sup> and this issue became clear by the late

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<sup>12</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

<sup>13</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

<sup>14</sup> U.N. DEP’T OF PUB. INFO., CEDAW INFORMATION NOTE 3: A SHORT HISTORY OF THE CONVENTION, C DPI/2044 C (1999); see also U.N. Charter art. 1, ¶ 3 (noting the goal of “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”).

<sup>15</sup> U.N. Charter art. 1, ¶ 3; see also G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 2 (Dec. 10, 1948) (noting that everyone is entitled to the rights declared in the document “without distinction of any kind, such as race, colour, [or] sex . . .”). The other international legal documents that encompassed the “International Bill of Rights” also promoted this “non-discrimination principle” in their texts. See, e.g., ICCPR, *supra* note 12, art. 2 (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as . . . sex . . . .”); ICESCR, *supra* note 13, art. 2 (“The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to . . . sex . . . .”).

<sup>16</sup> Charlesworth, *supra* note 2, at 59.

<sup>17</sup> *Id.*

1960's.<sup>18</sup> Then, the lack of any convention or binding treaty "that addressed comprehensively women's rights within political, social, economic, cultural, and family life" eventually led to 1979, where after months of drafting and deliberation, the CEDAW was adopted.<sup>19</sup>

c. CEDAW

Widely referred to as "an international bill of rights for women,"<sup>20</sup> the CEDAW is a treaty that details and affirms the fundamental human rights of and equality for women globally.<sup>21</sup> Adopted in 1979 by the U.N. General Assembly, the CEDAW is monumental in that, unlike the general Covenants mentioned above, it deals *exclusively* with gender equality. Through its various provisions, the treaty aims to ensure the equal access of women as men in all aspects of social, political, economic, and social life, while also focusing on "women in the public sphere . . . and the position of women in the family unit."<sup>22</sup> For example, among other provisions, it ensures the equality of women and men in marriage and family relations,<sup>23</sup> in access to health care services,<sup>24</sup> and in ensuring their right to vote.<sup>25</sup>

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<sup>18</sup> See Harold Hongju Koh, *Why America Should Ratify the Women's Rights Treaty (CEDAW)*, 34 CASE W. RESV. J. INT'L L. 263, 265 (2002) ("But by the late 1960s, it had become clear that a general plea for nondiscrimination did not suffice to guarantee the protection of women's rights.").

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 266.

<sup>21</sup> *The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): . . . Because Women's Rights are Human Rights*, ACLU (Apr. 29, 2010) <https://www.aclu.org/documents/cedaw-fact-sheet> [https://perma.cc/5EPA-TEHW]; see also Convention on the Elimination of All Forms of Discrimination Against Women art. 3, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW] (requiring States parties to take "all appropriate measures, including legislation, to [ensure] the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men").

<sup>22</sup> Rangita de Silva de Alwis & Melanne Verveer, "Time Is A-Wasting": Making the Case for CEDAW Ratification by the United States, 60 COLUM. J. TRANSNAT'L L. 1, 4-5 (2021).

<sup>23</sup> CEDAW, *supra* note 21, art. 16.

<sup>24</sup> *Id.* art. 12.

<sup>25</sup> *Id.* art. 7.

More broadly, the CEDAW “covers three dimensions of the situation of women:” (1) civil rights and legal status; (2) human reproduction; and (3) the interplay of cultural factors and gender relations.<sup>26</sup> As Professor Harold Koh, former Legal Adviser to the United States Department of State, notes, “CEDAW is drafted with the reality of women’s lives in mind,”<sup>27</sup> and per President Biden’s presidential campaign, it is “the most important international vehicle for advancing gender equality.”<sup>28</sup> As of 2023, it has become one of the most widely ratified international legal documents, with 189 States Parties.<sup>29</sup>

*i. General Recommendations*

The framework created by the CEDAW consists not only of the substantive articles of the treaty, but also of its General Recommendations. Much like with any legal document, interpretive tools may be necessary to understand terms that can be considered vague or overbroad. As such, General Recommendations serve as tools to interpret the CEDAW and to clarify its provisions.<sup>30</sup> They are issued by the CEDAW Committee, which is the body of experts tasked with the responsibility of ensuring and monitoring compliance with the treaty.<sup>31</sup> The General Recommendations also serve to highlight and bring attention to areas that the Committee “believes governments should focus on in order to respect, protect, [and] fulfill women’s rights.”<sup>32</sup>

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<sup>26</sup> *Introduction*, OHCHR, <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women> [https://perma.cc/W2XD-VU28] (last visited Apr. 29, 2023).

<sup>27</sup> Koh, *Why America Should Ratify the Women’s Rights Treaty*, *supra* note 18, at 266.

<sup>28</sup> de Silva de Alwis & Verveer, *supra* note 22, at 5; see Beth Roberts et al., *The Dobbs Decision Reminds Us Feminism Must Be Global and Intersectional*, MS MAGAZINE (Aug. 17, 2022), <https://msmagazine.com/2022/08/17/womens-land-rights-dobbs-feminism-global-intersectional/> [https://perma.cc/QL7Z-WNGN].

<sup>29</sup> *Status of Ratifications*, OHCHR, <https://www.ohchr.org/en/treaty-bodies/cedaw> [https://perma.cc/JZS4-A2JK] (last visited Apr. 30, 2023).

<sup>30</sup> *CEDAW General Recommendations*, CITIES FOR CEDAW, [http://citiesforcedaw.org/wp-content/uploads/2020/03/CEDAW\\_General-Recommendations-Factsheet.pdf](http://citiesforcedaw.org/wp-content/uploads/2020/03/CEDAW_General-Recommendations-Factsheet.pdf) [https://perma.cc/26BW-GD9F] (last visited Sept. 28, 2023).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

*d. Development Post-CEDAW*

Beyond the CEDAW and its General Recommendations, which formed an important base for the affirmation and protection of global women's rights, the movement continued to develop on the international stage. In 1993, at the World Conference on Human Rights in Vienna, Austria, women's rights were explicitly recognized as human rights—"not less, not separate."<sup>33</sup> Furthermore, just two years later, at the Fourth World Conference on Women in Beijing, China, global commitments aimed at advancing "a wider range of women's rights" were put forward,<sup>34</sup> including an objective geared toward "the elimination of all forms of violence against women."<sup>35</sup>

Outside of Beijing and Vienna, the international community began to pledge toward the Women, Peace and Security ("WPS") Agenda, which finds its base in U.N. Security Council Resolution 1325. Launched in 2000, Resolution 1325 looks "at the impact of conflict on women and women's contribution to conflict resolution and sustainable peace."<sup>36</sup> Particularly, the resolution focuses on (a) the role of women in the prevention of conflict, (b) the participation of women in peacebuilding, (c) the protection of women's rights during and after conflict, and (d) the specific needs of women during resettlement and repatriation, as well as for reintegration and post-conflict reconstruction.<sup>37</sup>

The Agenda's goals can best be divided into two groups.<sup>38</sup> The first group, initiated by Resolution 1325 and followed up by multiple other resolutions, deals with the need for the effective and active participation of women in peacebuilding and peacemaking.<sup>39</sup> The second group focuses on "preventing and addressing conflict-

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<sup>33</sup> Francisca de Haan, *A Brief Survey of Women's Rights*, U.N. CHRON., <https://www.un.org/en/chronicle/article/brief-survey-womens-rights> [<https://perma.cc/3RQ2-84GP>] (last visited Oct. 13, 2023).

<sup>34</sup> *The Human Rights of Women*, U.N. POPULATION FUND (2006), <https://www.unfpa.org/resources/human-rights-women> [<https://perma.cc/VR5X-B4VR>].

<sup>35</sup> de Haan, *A Brief Survey of Women's Rights*, *supra* note 33.

<sup>36</sup> *Women, Peace and Security*, U.N. DEP'T OF POL. & PEACEBUILDING AFFS., <https://dppa.un.org/en/women-peace-and-security> [<https://perma.cc/HS73-JR6L>] (last visited Apr. 28, 2023).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

related sexual violence.”<sup>40</sup> Beyond the Security Council resolutions, there have been domestic implementations throughout the world of the Agenda’s goals and aims, particularly in the United States.<sup>41</sup>

## II. THE UNITED STATES: A CASE STUDY

What is clear from the preceding section, then, is that a robust global women’s rights framework has developed from the ashes of WW2. However, before delving into the argumentative portions of this comment, it is important to take some time looking at the United States’ approach to the framework more closely. The United States serves as an important case study because, on the one hand, the country has pledged to protect the global rights of women through its policy statements and has passed laws aimed at addressing gender-based issues. Yet, on the other hand, the United States has not ratified the most important document in the global women’s rights regime, the CEDAW, while the rights of women on the ground continue to be at risk.

This gap provides policymakers with the ability to get back to the drawing board to find a solution to reintegrate the United States into the statements they put out about their commitments to global women’s rights. Therefore, this section will briefly overlay the situation domestically prior to providing an important fix in subsequent sections of the comment.

### *a. United States and the CEDAW*

The United States’ approach to CEDAW ratification has been a long and drawn-out fight since the document’s inception. Originally, the CEDAW was drafted “with the significant input” of Patricia Hutar, an American woman who was appointed by the Nixon Administration to lead a delegation in Geneva.<sup>42</sup> Yet, despite

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*; *Women, Peace, and Security*, U.S. DEP’T OF STATE, <https://www.state.gov/women-peace-and-security/> [https://perma.cc/CLV5-UJ3G] (last visited Nov. 12, 2023).

<sup>42</sup> Liane Schalatek, *CEDAW and the USA: When Belief in Exceptionalism Becomes Exemptionalism*, HEINRICH BÖLL STIFTUNG (Dec. 10, 2019), <https://www.boell.de/en/2019/12/10/cedaw-and-usa-when-belief-exemptionalism-becomes-exemptionalism> [https://perma.cc/9Y6Y-JQJF].

American input, and despite eventually being signed by President Jimmy Carter on July 17, 1980,<sup>43</sup> the CEDAW has not been ratified by the United States. Multiple administrations since President Carter, including the Obama Administration, have failed to succeed in the final push for implementation, despite being described as an “important priority.”<sup>44</sup> Currently, the Biden Administration, which has called the lack of ratification “embarrassing,”<sup>45</sup> has yet to push the decision over the finish line, leaving the United States as one of only eight countries to have not yet done so.<sup>46</sup>

*i. Treaty Ratification Process*

To fully appreciate where the country currently stands with regards to the CEDAW, it is important to understand the treaty ratification process in the United States.

Under the United States Constitution, the President is vested with the power to make treaties, “by and with the [a]dvice and [c]onsent of the Senate.”<sup>47</sup> The United States Senate itself does not ratify treaties; instead, “following consideration by the Committee on Foreign Relations,” the Senate will either approve or reject a resolution of ratification.<sup>48</sup> To approve a resolution of ratification, a two-thirds supermajority of the Senate required.<sup>49</sup> If passed,

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<sup>43</sup> *Id.*

<sup>44</sup> See Jessica Sanchez, *Ratifying CEDAW: Is the United States Falling Behind on Women's Rights?*, 17 PUB. INT. L. REP. 64, 64 (2011) (noting that then-President Obama had referred to the ratification of the CEDAW as an “important priority” for the administration); see also Ann M. Piccard, *U.S. Ratification of CEDAW: From Bad to Worse*, 28 MINN. J. L. & INEQ. 119, 120-21 (2010) (noting that, despite the progress of CEDAW in the United States, the U.S. Senate has not provided its consent for the treaty).

<sup>45</sup> de Silva de Alwis & Verveer, *supra* note 22, at 5.

<sup>46</sup> *Id.* at 1-2. The other countries that have not yet ratified the CEDAW are Iran, Sudan, Somalia, Niue, Palau, Tonga, and the Holy See (Vatican City). See *State and Non-State Parties to CEDAW*, IWRAW (Apr. 2022), <https://cedaw.iwraw-ap.org/cedaw/state-and-non-state-parties-to-cedaw/> [<https://perma.cc/J6NM-AQKQ>].

<sup>47</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>48</sup> Senate Historical Office, *About Treaties*, U.S. SENATE, [https://www.senate.gov/about/powers-procedures/treaties.htm#:~:text=Following%20consideration%20by%20the%20Committee,the%20foreign%20power\(s\)](https://www.senate.gov/about/powers-procedures/treaties.htm#:~:text=Following%20consideration%20by%20the%20Committee,the%20foreign%20power(s)) [<https://perma.cc/5TWN-YW94>] (last visited Aug. 22, 2023).

<sup>49</sup> U.S. CONST. art. II, § 2, cl. 2.

ratification of the treaty will occur when instruments of ratification are exchanged formally between the foreign State and the United States.<sup>50</sup>

Regarding the CEDAW, since 1980, the issue of ratification “has been pending in the [Senate Foreign Relations Committee] for over 30 years.”<sup>51</sup> Efforts to “push the Senate to ratify this important treaty” have been without success.<sup>52</sup> As a result, the United States remains solely a signatory to the treaty, leaving the CEDAW without domestic legal effect.<sup>53</sup>

*b. Backlash, Current Legal Framework, and Domestic Issues*

The failure to ratify the CEDAW has drawn important backlash from experts and academics alike. Nearly two decades ago, Secretary of State Madeline Albright stated that it was “long past time” to ratify the treaty,<sup>54</sup> while Harold Koh has argued in his paper, *Why America Should Ratify the Women’s Rights Treaty (CEDAW)*, that doing so would further the country’s commitment to ending violence and discrimination against women.<sup>55</sup> Likewise, Professor de Silva de Alwis and Ambassador Melanne Verveer argue in their landmark paper, “*Time Is A-Wasting*,” that ratifying

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<sup>50</sup> *Id.*

<sup>51</sup> LUISA BLANCHFIELD, CONG. RSCH. SERV., R40750, THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW): ISSUES IN THE U.S. RATIFICATION DEBATE 5 (July 23, 2015) [hereinafter RATIFICATION DEBATE].

<sup>52</sup> de Silva de Alwis & Verveer, *supra* note 22, at 6.

<sup>53</sup> Proponents of the CEDAW looked to local governments, particularly cities, once it became clear that it was not going to be ratified at the national level. See generally U.N. ASSC’N U.S.A. UNA WOMEN AFFINITY GRP., PROMOTING WOMEN’S EQUALITY IN YOUR COMMUNITY GUIDELINES AND TOOLKIT 3 (“Cities for CEDAW is a nationwide, grassroots effort to encourage local governments to support the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) by way of local government proclamations, resolutions and ordinances while at the same time lifting up the need to ratify the international women’s rights treaty.”).

<sup>54</sup> Melanne Verveer & Rangita de Silva de Alwis, *Why Ratifying the Convention on the Elimination of Discrimination Against Women (CEDAW) Is Good for America’s Domestic Policy*, GEORGETOWN INST. FOR WOMEN, PEACE & SEC (Feb. 18, 2021), <https://giwps.georgetown.edu/why-ratifying-the-convention-on-the-elimination-of-discrimination-against-women-cedaw-is-good-for-americas-domestic-policy/> [https://perma.cc/3XPG-G467].

<sup>55</sup> Koh, *Why America Should Ratify the Women’s Rights Treaty*, *supra* note 18, at 264.

CEDAW would be “a central vehicle for change for women in America . . .”<sup>56</sup>

However, while the CEDAW has yet to be ratified, it is true that there are laws in the United States that protect women from discrimination on the domestic front.<sup>57</sup> Title VII of the Civil Rights Act of 1964, for example, prevents gender discrimination in the field of employment.<sup>58</sup> Likewise, Title IX of the Education Amendments of 1972 “prohibits sex discrimination in federally funded education programs.”<sup>59</sup> Yet, while the existence of these laws is imperative, they follow a similar trend: they are all context-based, as opposed to broad and sweeping; these laws are narrow in focus, addressing discrimination and/or violence in certain areas (education, employment) while leaving out others, “inherently leaving gaps within which discrimination can thrive.”<sup>60</sup> There is no comprehensive law in place that explicitly and directly protects the rights of women by prohibiting discrimination and violence in *all* spheres, both domestically and abroad, while providing judicial recourse to victims for said violations in the process.

Unfortunately, discrimination and violence against women continue to persist on the ground in the United States, tracking trends regarding the rollback of women’s rights on the global stage.<sup>61</sup> In 2023, there continued to exist a large gender pay-gap,

<sup>56</sup> de Silva de Alwis & Verveer, *supra* note 22, at 2.

<sup>57</sup> There are also a select few laws that protect against specific types of gender-based violence occurring domestically and abroad, including female genital mutilation and human trafficking. These laws will be explained and drawn upon in more detail in Part V of this comment.

<sup>58</sup> 42 U.S.C. § 2000e-2(a)-(d) (2012).

<sup>59</sup> Robin Bleiweis, *The Equal Rights Amendment: What You Need to Know*, CTR. FOR AM. PROGRESS (Jan. 29, 2020) <https://www.americanprogress.org/article/equal-rights-amendment-need-know/> [<https://perma.cc/8X3W-9W78>]; 20 U.S.C. § 1681(a) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .”). A few other examples of available women’s rights statutes in the United States include the Equal Pay Act of 1963 and Pregnancy Discrimination Act (PDA). See 29 U.S.C. § 206(d)(1) (2012); see also 42 U.S.C. § 2000e(k) (1994).

<sup>60</sup> Bridget L. Murphy, *The Equal Rights Amendment Revisited*, 94 NOTRE DAME L. REV. 937, 939 (2019).

<sup>61</sup> See Piccard, *supra* note 44, at 119-20 (“This pervasive discrimination continues despite the fact that the United States has laws that are enforced to varying degrees, on both state and federal levels, which prohibit such discrimination.”). While there has been progress globally regarding women’s rights, there are still constant threats that need to be addressed, including in Afghanistan, where the Taliban has banned women and teenage girls from

where “women working full time, year round are paid 83.7% of what men are paid.”<sup>62</sup> Reproductive health is under attack after the United States Supreme Court decision in *Dobbs v. Jackson Women’s Health*, where the Court held that there is no federal right to abortion, and that it is up to the states to regulate these rights of women.<sup>63</sup> COVID-19 also exposed deep inequalities; a recent McKinsey study showed that women were more likely to have been laid off from their jobs during the pandemic.<sup>64</sup> The #MeToo movement, which began in 2006, resurged in 2017 and has since then been instrumental in sharing the stories of victims of sexual assault in multiple aspects of professional and personal life in the country.<sup>65</sup>

Therein lies the gap that has motivated this comment. Promises and commitments to global women’s rights<sup>66</sup> made in the face of

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attending secondary school and universities and working in certain jobs. See Susanné Seong-Eun Bergsten & Song Ah Lee, *The Global Backlash Against Women’s Rights: A Stark Reminder on International Women’s Day*, HUM. RTS. WATCH (Mar. 7, 2023), <https://www.hrw.org/news/2023/03/07/global-backlash-against-womens-rights> [https://perma.cc/84FX-8S6B]. Likewise, in Myanmar, women are facing increasing difficulty “accessing basic health care services and struggle to secure sufficient income.” See Meetings Coverage, General Assembly, As Women Worldwide Still Struggle to Achieve Basic Rights, Third Committee Emphasizes Importance of Access to Citizenship, Education, Work, Justice, U.N. Meetings Coverage GA/SHC/4375 (Oct. 3, 2023); see also *Only 14 Countries Have Full Equal Rights for Women*, WORLD ECON. F. (Mar. 10, 2023), <https://www.weforum.org/agenda/2023/03/only-14-countries-have-full-equal-rights-for-women/>. <https://press.un.org/en/2023/gashc4375.doc.htm> [https://perma.cc/S9KQ-LA4M] (noting that in 2023, only 14 countries in the world offered “full legal protections” to women).

<sup>62</sup> Wendy Chun-Hoon, *5 Fast Facts: The Gender Wage Gap*, U.S. DEP’T OF LABOR BLOG (Mar. 14, 2023), <https://blog.dol.gov/2023/03/14/5-fast-facts-the-gender-wage-gap#:~:text=Stats.,for%20Black%20and%20Hispanic%20women> [https://perma.cc/6M87-99SJ].

<sup>63</sup> *Dobbs v. Jackson Women’s Health Organization*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/dobbs-v-jackson-womens-health-organization/> [https://perma.cc/3HBV-9DGB] (last visited Apr. 27, 2023).

<sup>64</sup> *COVID-19 and Gender Equality: Countering the Regressive Effects*, MCKINSEY & COMPANY (July 15, 2020), <https://www.mckinsey.com/featured-insights/future-of-work/covid-19-and-gender-equality-countering-the-regressive-effects> [https://perma.cc/DQR7-MGNJ].

<sup>65</sup> de Silva de Alwis & Verveer, *supra* note 22, at 9.

<sup>66</sup> See Press Release, Joseph Biden, President, Statement on the Women, Peace, and Security Report (July 1, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/01/statement-by-president-joseph-biden-on-the-women-peace-and-security-report/>, [https://perma.cc/X9DB-2DCH ] (“My Administration is committed to a simple but profoundly meaningful proposition – all people, everywhere, are entitled to be treated with inherent human dignity. Yet, in far too many places, women and girls are denied their basic rights, cut off from

legislative inaction regarding the CEDAW, leading to a lack of firm affirmation by and a rollback of said rights in the United States. It is true that ratification of the CEDAW would have had “the potential of helping to improve the domestic human rights situation in the United States.”<sup>67</sup> This would have allowed the treaty to guide policymaking on gender-based discrimination issues while also helping address intersectional issues relating to racial and gender inequality.<sup>68</sup> It is also true, however, that other options must be put to the table to address these issues that are very much prevalent now within the country.

### III. THE WOMEN’S EQUALITY ACT

Therefore, the remainder of this comment will posit a proposal aimed at solidifying the United States’ commitment to global women’s rights absent CEDAW ratification. To begin, this section will provide recommendations for drafting a new transnational litigation statute, the WEA, which will provide federal jurisdiction to women that have been victimized by acts of gender-based discrimination or violence, both domestically and abroad. The goal of this section is to introduce an alternative route to protecting global women’s rights in the absence of CEDAW ratification by Congress, while also positioning the United States as a fervent leader and member of the global women’s rights regime. This introduction will thus serve as a base for subsequent sections of this comment, which will proceed to argue in favor of the WEA’s adoption and ratification.

Preliminarily, as will be shown, there have been multiple attempts in previous years at passing laws aimed at protecting women from violence and discrimination in the United States, to no avail. This section will acknowledge many of these attempts while providing recommendations for how the WEA, and the way it should be drafted, will be a stronger step forward in the fight to protect global women’s rights.

First, Part A will define “transnational litigation” for the reader, introducing a process by which the WEA may be used as a vehicle

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opportunity, subjected to violence and abuse, or prevented from pursuing their dreams and ambitions.”).

<sup>67</sup> de Silva de Alwis & Verveer, *supra* note 22, at 19.

<sup>68</sup> *Id.*

of affirmation and protection for victims of gender-based human rights violations by United States courts. Subsequently, Parts B-F will each provide recommendations for specific provisions that should be drafted into the WEA, drawing upon research, data, and jurisprudence to support the need for the specifically mentioned right. Each Part will also look to potential roadblocks that lawmakers may face in attempting to draft the specific provision, such as previous failed attempts in passing other laws or domestic legal issues that may stand in the way of ratification in the United States. Then, each Part will conclude with ways to navigate such roadblocks should they come about.<sup>69</sup>

*a. Introduction to “Transnational Litigation”*

While there are many ways for States to realize the international norms laid out in the post-WW2 order, “human rights litigation is an important tool in the struggle to protect human rights.”<sup>70</sup> Under international law, it is well-settled that States are obligated to ensure the human rights of the people subject to their jurisdictions.<sup>71</sup> This ideal grew out of the international war crimes tribunals post-WW2, which reaffirmed that domestic and international courts are appropriate fora for determining rights and responsibilities for wrongs and violations.<sup>72</sup> In the eyes of many, human rights litigation may entail the prosecution of war criminals at the International

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<sup>69</sup> Scholars, such as Elizabeth M. Schneider, have similarly looked to the potential efficacies of using transnational law as a resource in the fight to protect women’s rights. See, e.g., Elizabeth M. Schneider, *Transnational Law as a Domestic Resource Thoughts on the Case of Women’s Rights*, 38 NEW. ENG. L. REV. 789, 801 (2004) (encouraging the implementation of transnational law into the U.S. legislative framework, potentially as a way to adequately protect the rights of women, much like statutes such as the Alien Tort Statute have done in the past for other human rights violations). This comment, however, takes the conversation a few steps further, delving deeply into recommending a specific transnational litigation statute, how it would add to our domestic legal framework, what it should be drafted like, and the sources it draws from.

<sup>70</sup> BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS xxiii (2d ed. 2008).

<sup>71</sup> GISSOU NIA, THE ATLANTIC COUNCIL, CLOSING THE ACCOUNTABILITY GAP ON HUMAN RIGHTS VIOLATORS IN THE ISLAMIC REPUBLIC OF IRAN THROUGH GLOBAL CIVIL LITIGATION STRATEGIES 4 (2020).

<sup>72</sup> Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2358-59 (1991).

Criminal Court (“ICC”),<sup>73</sup> or ad hoc tribunals for abuses committed in Rwanda and the former Yugoslavia.<sup>74</sup> However, *transnational litigation* is also an important vehicle, leading countries to establish and strengthen their judicial and administrative mechanisms with regards to human rights violations.

In the simplest sense, transnational litigation is litigation brought in domestic courts that “involves parties of more than one nationality or activity with connections to more than one country’s territory,” generally based off of the forum country’s own laws or statutes.<sup>75</sup> Domestically, “U.S. courts have incorporated and developed international human rights norms,”<sup>76</sup> allowing for litigants to bring claims with international elements against perpetrators of human rights abuses. Victims, particularly individual plaintiffs, have used this process in the United States as a way to sue individuals, government officials, and foreign governments in domestic courts, “claiming that they have been victimized by international wrongs.”<sup>77</sup> As will be shown later in this comment, this process has enormous benefits, both for victims of human rights violations and for legitimizing the very rights the statutes themselves aim to uphold. Therefore, as this section will go on to argue, the WEA should be drafted as a transnational litigation statute, with both domestic and international legal elements.

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<sup>73</sup> Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

<sup>74</sup> S.C. Res. 827, art. 21(4)(g) (May 25, 1993); S.C. Res. 955 (Nov. 8, 1994).

<sup>75</sup> Marcus S. Quintanilla & Christopher A. Whytock, *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law*, 18 SOUTHWESTERN J. INT’L L. 31, 31 (2011); see also Anggraeni & Partners, *Brief Introduction on Transnational Litigation: An Indonesia Perspective*, LEXOLOGY (Mar. 1, 2023), <https://www.lexology.com/library/detail.aspx?g=4264b6b7-6622-4ae3-b4f7-e79eb24f3d47> [https://perma.cc/58R7-DRKJ] (“Litigation involving individuals, occasions, or transactions connected to multiple countries is referred to as transnational litigation, or also known as international litigation.”).

<sup>76</sup> Roxanna Altholz, *Chronicle of a Death Foretold: The Future of U.S. Human Rights Litigation Post-Kiobel*, 102 CAL. L. REV. 1495, 1513 (2014).

<sup>77</sup> Koh, *Transnational Public Law Litigation*, *supra* note 73, at 2369.

*b. Provision 1: Civil Statute*

*i. Explanation*

Building off the preceding overview of transnational litigation, the first suggestion for the WEA is that it should be drafted as a *civil* statute, not a criminal one, for a few reasons. First, a civil statute would provide for an easier route to litigation by private litigants, as opposed to the need for government intervention in each specific case. This would directly benefit victims seeking effective and efficient routes of justice for gender-based wrongs. Further, because of the diminished need for government prosecution, the civil nature of the WEA can increase the number of cases brought against perpetrators of gender-motivated violations. This benefit comes from a magnified deterrent effect which, as will be explored more fully in Part V, has been the basis for the drafting of other successful transnational civil litigation statutes in the United States.

The civil nature of the WEA would also be beneficial for women aiming to receive justice for the gender-motivated harms committed against them, through what this paper will call the “victim-centered” benefit. “Justice” in this respect may take the form of compensation; victims of human rights violations may seek to use transnational civil litigation as a way to make their perpetrators *pay* for the harms they have inflicted.<sup>78</sup> In fact, many victims have used available transnational civil litigation statutes, such as the Foreign Sovereign Immunities Act (“FSIA”), to be mentioned shortly, as a way to receive “retrospective redress.”<sup>79</sup>

Even beyond compensation, the victim-centered benefit of transnational civil litigation allows victims to receive justice in other ways, particularly to receive closure through directly confronting the defendant in court. Specifically, these victims or their families may find “tremendous personal satisfaction from filing a lawsuit, forcing the defendant to answer in court . . . and creating an official record of the human rights abuses inflicted on them or their families.”<sup>80</sup> To give an example, the family of Otto Warmbier, a University of Virginia student who was sentenced to 15 years of hard labor and was returned to the United States in a comatose state,

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<sup>78</sup> STEPHENS, *supra* note 71, at xxiii.

<sup>79</sup> Koh, *Transnational Public Law Litigation*, *supra* note 73, at 2369.

<sup>80</sup> STEPHENS, *supra* note 71, at xiv.

brought a suit against the North Korean government through the FSIA, winning a judgment on his behalf.<sup>81</sup> The judgment against North Korea was considered a “symbolic victory” for Otto’s family, who had stated that “we put ourselves and our family through the ordeal of a lawsuit and public trial because we promised Otto that we will never rest until we have justice for him . . . today’s thoughtful opinion . . . is a significant step on our journey.”<sup>82</sup>

Therefore, drafting the WEA with a private cause of action would provide immense benefit for female victims who are aiming to receive justice for the gender-based violations committed against them. Whether it is to receive compensation or to receive closure, providing for a private cause of action, as opposed to requiring government interference and prosecution, will best provide victims with the ability to receive justice. This, coupled with the easier path to the increased number of cases that may be brought against perpetrators of gender-based violence, supports the need for the WEA to be drafted as a civil statute.

*c. Provision 2: Extraterritorial Application*

*i. Explanation*

Next, the WEA should be drafted in a way that clearly allows for extraterritorial application, with the allowance of private causes of action for gender-motivated violations committed against women on foreign soil. Providing the WEA with extraterritorial reach is extremely imperative from a global women’s rights perspective absent CEDAW ratification. Such a provision would be a firm pronouncement to the world that the United States is not a safe harbor for perpetrators of violence and discrimination against women. For a country that aims to be committed to the protection of women within their borders, a provision like this in the WEA is a strong symbol and beacon; one that states, “we are a country that will not accept nor endorse the commission of violence and discrimination against women, either in our borders, or abroad.”

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<sup>81</sup> Reuters, *North Korea Ordered to Pay \$501m in Damages Over Otto Warmbier’s Death*, GUARDIAN (Dec. 24, 2018), <https://www.theguardian.com/world/2018/dec/24/north-korea-otto-warmbier-damages-us-court-judge> [<https://perma.cc/8ZN4-8TJW>].

<sup>82</sup> *Id.*

ii. *Avoiding the “Presumption against Extraterritoriality”*

Congress has the power to draft civil statutes with extraterritorial effect,<sup>83</sup> and doing so explicitly will help the WEA avoid the “presumption against extraterritoriality.” The presumption against extraterritoriality is a “judge-made rule of statutory interpretation,”<sup>84</sup> which instructs courts that “legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”<sup>85</sup> Specifically, per Chief Justice John Roberts, who quoted the late Justice Antonin Scalia, “When a statute gives no clear indication of an extraterritorial application, it has none.”<sup>86</sup> In recent years, the Supreme Court has relied on the presumption to limit the territorial reach of various transnational litigation statutes.<sup>87</sup> However, because the presumption is used by courts as a tool to discern the reach of a statute when Congress’ intent as to its extraterritoriality is *ambiguous*, the WEA should draft the provision *clearly* and *unequivocally* to avoid this inquiry.<sup>88</sup>

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<sup>83</sup> See *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (“Congress has the authority to enforce its laws beyond the territorial boundaries of the United States.”).

<sup>84</sup> Zachary D. Clopton, *Replacing the Presumption against Extraterritoriality*, 94 B.U. L. REV. 1, 5 (2014).

<sup>85</sup> *EEOC*, 499 U.S. at 248 (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

<sup>86</sup> See *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124-25 (2013) (quoting *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010), and holding that there is a presumption against extraterritorial application of the ATS).

<sup>87</sup> See *id.* at 124-25 (striking down the extraterritoriality of the Alien Tort Statute unless it touches and concerns the territory of the United States “with sufficient force”).

<sup>88</sup> See Franklin A. Gevurtz, *Extraterritorial Application of Statutes and Regulations*, 20 AMER. J. COMPAR. L. i347, i360 (2022) (“The most persuasive evidence showing Congress intended a statute to apply extraterritorially is language in the statute explicitly calling for its application to events outside the United States.”).

*d. Provision 3: Cause of Action for Violence Against Women, Including Physical, Emotional, and Intellectual Harm*

*i. Explanation*

Lawmakers should draft a provision in the WEA that provides a private cause of action for women who have been victims of gender-based violence. Gender-based violence is an extremely prevalent issue faced by women globally and in the United States. 85% of domestic violence victims in the United States are female,<sup>89</sup> while 35.6% of American women have reported experiencing physical violence, stalking, or rape by an intimate partner.<sup>90</sup> The effects of gender-motivated violence are stark, as it “seriously inhibits women’s ability to enjoy inalienable rights and freedoms on a basis of equality with men.”<sup>91</sup> The Working Group on Ratification of the CEDAW has noted that “U.S. policy must address this linkage between discrimination and violence” to effectively combat this phenomenon.<sup>92</sup> Therefore, the WEA *must* include a provision prohibiting gender-motivated violence, while providing a cause of action to victims in the case of violations.

A key point that any lawmaker should take note of is that gender-motivated violence can and does occur both physically *and* emotionally.<sup>93</sup> Per the U.N., violence against women includes “any act of gender-based violence that results in, or is likely to result in, physical, sexual, or mental harm or suffering to women, including

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<sup>89</sup> Schalatek, *supra* note 42.

<sup>90</sup> *Id.*

<sup>91</sup> WORKING GROUP ON RATIFICATION OF THE U.N. CEDAW, CEDAW: THE TREATY FOR THE RIGHTS OF WOMEN: RIGHTS THAT BENEFIT THE ENTIRE COMMUNITY 18 (Leila Rassekh Milani et al. eds., 2004).

<sup>92</sup> *Id.* The inclusion and importance of a violence provision in the WEA was also motivated by a statement made by Radhika Coomaraswamy, the U.N. Special Rapporteur on Violence against Women. *See also id.* (“Throughout a woman’s life cycle, there exists various forms of gender-based violence that manifest themselves at different stages. Most of this violence is domestic, occurring within the home, perpetrated by those to whom the woman is closest. Even before birth, females in cultures where son preference is prevalent are targeted by the violent discriminatory practices of sex-selective abortion and female infanticide.”).

<sup>93</sup> *See* EMILY J. HANSON, CONG. RSCH. SERV., R47570, 2022 VIOLENCE AGAINST WOMEN ACT (VAWA) REAUTHORIZATION 2 (May 22, 2023) (detailing different types of abusive behavior that occurs against women, including physical abuse, sexual abuse, emotional abuse, economic abuse, psychological abuse, and technological abuse).

threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”<sup>94</sup>

Furthermore, this provision in the WEA will be novel in that it should also re-imagine the definition of violence against women to include *intellectual* violence. Scholars have recently been arguing for this re-conceptualization of violence, especially as it relates to the WPS Agenda.<sup>95</sup> In light of the situation in Afghanistan, for example, where the crisis has been “accompanied by denial of women’s access to education and economic resources,” it has become clear that prohibiting women from accessing educational resources leads to inequality and disempowerment in their communities.<sup>96</sup> Therefore, the WEA should take care to include and define these actions as forms of intellectual violence, alongside provisions dealing with physical and emotional violence, in order to adequately address and protect women from the harms that they have faced and continue to face throughout the world.

## ii. *The Morrison Issue*

Drafting a provision to include a private right of action for gender-motivated violence will require a revisitation of the Supreme Court’s decision in *United States v. Morrison*, which struck down the United States’ previous attempt at drafting such a provision as unconstitutional. The cause of action at issue was found in the landmark Violence Against Women Act (“VAWA”). While the VAWA as a whole will be discussed more fully in Part V of this comment, the Supreme Court specifically took issue with the Act’s “Civil Rights Remedy,” which provided for a private cause of action

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<sup>94</sup> *Violence Against Women*, WHO (Mar. 9, 2021), <https://www.who.int/news-room/fact-sheets/detail/violence-against-women> [https://perma.cc/7HP2-7LG8].

<sup>95</sup> See, e.g., Rangita de Silva de Alwis, *Reflecting on the 10<sup>th</sup> Anniversary of the CEDAW’s General Recommendation 30 on Women Peace and Security*, GEORGETOWN INST. FOR WOMEN, PEACE & SEC. (Jun. 8, 2023), <https://giwps.georgetown.edu/reflecting-on-the-10th-anniversary-of-the-cedaws-general-recommendation-30-on-women-peace-and-security/>, [https://perma.cc/5FX8-L9YS] (“The primary focus on sexual violence limits the focus on WPS to women’s bodies as the only battle ground of violence. The dichotomization of violence must give way to an understanding of the overlapping forms of physical and intellectual violence.”).

<sup>96</sup> *Id.*

against perpetrators of gender-motivated crimes of violence.<sup>97</sup> The Court in *Morrison* struck down the Civil Rights Remedy as beyond Congress' power under both Section 5 of the Fourteenth Amendment and the Commerce Clause.<sup>98</sup> The Court's decision was seen as a setback for the women's rights movement and was heavily criticized by civil rights activists.<sup>99</sup>

In light of the Court's decision in *Morrison*, it is important that a lawmaker drafts the WEA in a way that enhances (1) the efficacies of the statute and (2) the chances that it can be passed. This may mean that the drafter will need to sacrifice one to increase the chances of the other (as will be shown with recommendation 1 below). Or, if the lawmaker is willing, the *Morrison* issue might mean that they would need to get back to the drawing board to find creative arguments to get the WEA's private right of action provision passed in light of the Court's decision. To help in this process, this comment will provide a few suggestions for any lawmaker willing to tackle this conundrum.

This section does not aim to provide the exact answer to the *Morrison* issue and leaves that solution more squarely to lawmakers and/or constitutional scholars. Instead, the goal of this section is to provide starting-point recommendations that reinvigorate the conversation surrounding how to get such a private right of action for gender-based violence passed. In light of the importance of a private right of action for gender-motivated violence noted above, the reader should address this issue, as well as this section, carefully.

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<sup>97</sup> See 42 U.S.C. § 13981(b) (1994) ("All persons within the United States shall have the right to be free from crimes of violence motivated by gender."); see also *id.* at (c) ("A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.").

<sup>98</sup> *United States v. Morrison*, 529 U.S. 598 (2000). While I do not plan to delve into a full-on Commerce Clause analysis, the important point to note is the Court in *Morrison* found that, although violence against women had a substantial effect on interstate commerce, the power to suppress crime and police the citizenry has always been vested to the individual states. See Jennifer L. Wethington, *Constitutional Law – Commerce Clause – Violence Against Women Act's Civil Rights Remedy Exceeds Congress's Powers to Regulate Interstate Commerce*, *United States v. Morrison*, 120 S. Ct. 1740 (2000), 23 U. ARK. LITTLE ROCK L. REV. 485, 504 (2001).

<sup>99</sup> Julie Goldscheid, *The Civil Rights Remedy of the 1994 Violence Against Women Act: Struck Down but Not Ruled Out*, 39 CUNY L. REV. 157, 159 (2005).

### 1. Recommendation 1: Jurisdictional Hook

The first recommendation is to draft the WEA's private cause of action in a way that avoids the constitutional issues of *Morrison*, particularly with a jurisdictional hook. The original Civil Rights Remedy was broad in nature, and attempted to regulate activity that was considered more intrastate, an issue that held against its constitutional validity.<sup>100</sup> A jurisdictional element, or "hook," linking "a specific gender-motivated act of violence directly to interstate commerce . . . might have sustained the VAWA's validity . . ."<sup>101</sup> Thus, after the *Morrison* decision, Congress introduced variations of the Civil Rights Remedy that differed slightly in its language and protections to fit within these parameters. For example, these proposals, such as the Violence Against Women Civil Rights Restoration Act of 2001, reworked the cause of action by providing a jurisdictional element.<sup>102</sup> Unfortunately, however, none of these proposals ended up becoming the law.

A lawmaker may consider drafting the language of the WEA's private cause of action (for both gender-based violence and gender-based discrimination below) with a jurisdictional hook to avoid any constitutional challenges and to re-invigorate Congress' previous willingness to do so. Much like with the Restoration Act of 2001, the cause of action could be drafted in a way that connects the violation committed to traveling through or using instrumentalities of interstate or foreign commerce, or something of the like. Advocates

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<sup>100</sup> See Wethington, *supra* note 98.

<sup>101</sup> Wethington, *supra* note 98; *Morrison*, 529 U.S. at 612-13.

<sup>102</sup> Goldscheid, *The Civil Rights Remedy of the 1994 Violence Against Women Act*, *supra* note 99, at 166; see Violence Against Women Civil Rights Restoration Act of 2001, H.R. 429, 107th Cong. (2001) (providing for a gender-based cause of action where "in connection with the offense, (A) the defendant or the victim travels in interstate or foreign commerce, the defendant or the victim uses a facility or instrumentality of interstate or foreign commerce, or the defendant employs a . . . weapon, a narcotic or drug listed pursuant to . . . the Controlled Substances Act, or other noxious or dangerous substance, that has traveled in interstate or foreign commerce; (2) the offense interferes with commercial or other economic activity in which the victim is engaged; or (3) the offense was committed with intent to interfere with the victim's commercial or other economic activity"); see also Violence Against Women Civil Rights Restoration Act of 2000, H.R. 5021, 106th Cong. (2000) (providing a jurisdiction element to the cause of action).

like the ACLU have promoted reviving proposals just like this in recent years.<sup>103</sup>

A counter-consideration for a lawmaker, however, is that the cause of action with a jurisdictional hook does not adequately protect women from gender-based violence in all circumstances. It is inherently narrow and limits the reach and effectiveness of the statute's protections, especially since violence can be committed in the privacy of one's own home, as opposed to while traveling through interstate commerce. This issue is stark, but this recommendation would need to be considered as an option in the drafting process, especially after *Morrison*, which is why this section takes care to mention it.

## 2. Recommendation 2: Wholly Extraterritorial Application

Second, a lawmaker can consider drafting the statute as one that applies wholly to violence and discrimination that occurs outside of the United States and does not regulate domestic conduct. This approach is not one that is highly recommended, as doing so severely undermines the purposes for which the WEA would be passed in the first place, which is to fill in the gaps left by the lack of CEDAW ratification by the United States. The option is put on the table, regardless, in the unfortunate situation that it is the only likely route to getting a version of the WEA passed.

### *e. Provision 4: Cause of Action for Discrimination Against Women, Both in the Public and Private Spheres*

#### *i. Explanation*

The WEA should also include language providing for a private cause of action for gender-based discrimination as well. The key takeaway of this provision and its language is that discrimination,

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<sup>103</sup> Julie Goldscheid, *Is Sexual Harassment a Civil Rights Violation? It Should Be.*, ACLU (Jan. 26, 2018), <https://www.aclu.org/news/womens-rights/sexual-harassment-civil-rights-violation-it-should-be> [https://perma.cc/GKX4-KAFF] [hereinafter Goldscheid ACLU].

in many cases based upon stereotypes, can occur in both the public and private spheres.<sup>104</sup>

Gender-based discrimination in the public sphere may seem more familiar and prevalent in the eyes of many. Wage gaps, unequal access to employment benefits and services, labor market segregation, and unequal practices in the workplace are all unfortunately commonplace forms of discrimination against women in all levels of society.<sup>105</sup> The inclusion of a public life discrimination provision has also been highlighted in Article 7 of the CEDAW, which takes care to notify States Parties to take measures to eliminate it.<sup>106</sup> The effects of public life discrimination against women is drastic; the International Labor Office (“ILO”) has noted that, in comparison to men, women are “clustered in the lower rungs of the employment ladder”<sup>107</sup> as a result.

On the other end, discrimination is also prevalent with regards to the private lives of women. Article 16 of the CEDAW, for example, states that “Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.”<sup>108</sup> Furthermore, General Recommendation No. 19 specifically highlights aspects of the CEDAW that require States to protect women in areas relating to the family and other areas of social life.<sup>109</sup> Focusing solely on discrimination in the public

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<sup>104</sup> See Rangita de Silva de Alwis, *Examining Gender Stereotypes in New Work/Family Reconciliation Policies: The Creation of a New Paradigm for Egalitarian Legislation*, 18 DUKE J. GENDER L. & POL’Y 305, 306 (2011) (noting that there has been a history of subordination with regards to women in both the public and private spheres).

<sup>105</sup> *Id.*

<sup>106</sup> See CEDAW, *supra* note 21, part II, art. 7 (“States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right: (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies; (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government; (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.”).

<sup>107</sup> *Women Swell Ranks of Working Poor, says ILO*, ILO (July 30, 1996), [https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_008066](https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_008066)

<sup>108</sup> CEDAW, *supra* note 21, art. 16.

<sup>109</sup> CEDAW General Recommendation No. 19: *Violence Against Women*, DIVISION FOR THE ADVANCEMENT OF WOMEN (1992), [https://www.legal-tools.org/doc/f8d998/pdf/&ved=2ahUKEwi4r8KY2dX#:~:text=\(b\)%20States%20parties%20should%20ensure,should%20be%20provided%20for%20victims](https://www.legal-tools.org/doc/f8d998/pdf/&ved=2ahUKEwi4r8KY2dX#:~:text=(b)%20States%20parties%20should%20ensure,should%20be%20provided%20for%20victims) [https://perma.cc/64ZD-7L8G].

sphere is too narrow in scope, and does not adequately detail the realities of discrimination that women face on a day-to-day basis. Therefore, the draft WEA should make sure to focus on all aspects of gender-based discrimination.

*ii. An Intersectional Approach*

For this provision to be inclusive and effective, it must include language promoting an intersectional approach to gender-based discrimination. As stated above, the recent COVID-19 pandemic exposed deep inequalities, particularly at the intersection of race and gender.<sup>110</sup> In what has been called the “Shadow Pandemic,”<sup>111</sup> the Georgetown Institute for Women, Peace and Security, as well as others, have shown that women, “especially women of color, have suffered disproportionate impacts”<sup>112</sup> as a result of COVID-19. Issues at the intersection of gender and race (among others), however, are not a new phenomenon, and have been addressed by the international women’s rights regime. CEDAW General Recommendation 28 provides an important understanding of State obligations with regards to intersectionality, stating that “the discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste, sexual orientation, and gender identity.”<sup>113</sup> Even President Biden has indicated his willingness for an intersectional approach to women’s equality, stating that “the persistent unequal treatment of women around the world – particularly women of color, LGBTQI+ women, and other

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<sup>110</sup> SARAH CORY ET AL., *WOMEN IN THE WORKPLACE*, MCKINSEY & CO. 6 (2020) [hereinafter *WOMEN IN THE WORKPLACE 2020*] (“The pandemic has intensified challenges that women already faced. . . . Black women already faced more challenges to advancement than most other employees. . . . [T]hey’re also coping with the disproportionate impact of COVID-19 on the Black community. . . . As a result of these dynamics, more than one in four women are contemplating what many would have considered unthinkable just six months ago: downshifting their careers or leaving the workforce completely. This is an emergency for corporate America.”).

<sup>111</sup> See María-Noel Vaeza, *Addressing the Impact of the COVID-19 Pandemic on Violence Against Women and Girls*, U.N. CHRON. (Nov. 27, 2020) <https://www.un.org/en/addressing-impact-covid-19-pandemic-violence-against-women-and-girls> [<https://perma.cc/837W-V4J6>].

<sup>112</sup> Verveer & de Silva de Alwis, *supra* note 55.

<sup>113</sup> Comm. on the Elimination of Discrimination against Women, General Recommendation No. 28, ¶ 18, U.N. Doc. CEDAW/C/GC/28 (2010).

women who face overlapping forms of discrimination—remains a critical, unfinished project of our time.”<sup>114</sup> Between 2016 and 2020, of the 107 countries that reported to the CEDAW Committee, intersectionality was mentioned in 100% of their reports.<sup>115</sup> It is therefore imperative that the United States firmly position itself into this conversation through the WEA’s language, taking into account what the international community already has: that gender-based discrimination is inherently interlinked with other qualities, including, for example, race and ethnicity.

*f. Provision 5: No Nationality Requirement*

*i. Explanation*

Lastly, the protections provided under the WEA *should not* be limited solely to United States “nationals.” Limiting jurisdiction to nationals will only serve to protect a certain sub-set of women, while leaving out other victims that should be equally as eligible to receive the WEA’s protections.

A pertinent example of the negative effects of limited jurisdiction is found in the “terrorism exception” of the FSIA, an exception to the federal statute that allows for victims of torture or extrajudicial killing to bring civil claims against certain designated foreign States.<sup>116</sup> Plaintiffs have jurisdiction under this section if “the claimant or the victim was, at the time the act . . . a *national* of the United States.”<sup>117</sup> The FSIA cross-references the Immigration and Nationality Act (INA), which defines “national” as either a U.S. citizen or “a person who, though not a citizen of the United States, owes permanent allegiance . . .”<sup>118</sup> A majority of federal courts have

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<sup>114</sup> Biden, Statement on the Women, Peace, and Security Report, *supra* note 66.

<sup>115</sup> *Data on CEDAW Committee Concluding Observations, 2016–2020*, PENN L. WOMEN L. & LEADERSHIP PROJECT (2021), <https://www.law.upenn.edu/live/files/11591-cedaw-2016-2020> [<https://perma.cc/KAS5-RWXU>] [hereinafter *Data on CEDAW*].

<sup>116</sup> See Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1605A (1975).

<sup>117</sup> See *id.* at (a)(2)(A)(i)(I). The plaintiff may also be a member of the armed forces or an employee of the United States government or performing a contract awarded by the government. *Id.* at (a)(2)(A)(i)(II)-(III).

<sup>118</sup> See generally FSIA § 1605A (creating an exception to jurisdictional immunities in the case of terrorism); see also 8 U.S.C. § 1101(a)(22) (defining a “national of the United States”).

applied the standard of “permanent allegiance” only to those “born in, or possessing a specified personal or parental connection with, an outlying possession of the United States,” particularly the American Samoa and Swains Island.<sup>119</sup>

The purpose of a broadened nationality requirement in the WEA can further be illustrated by a hypothetical. Imagine a situation where two friends, both women and neighbors, are unfortunately attacked by two men, both of which yell sexist epithets at them in the process. Woman A is a citizen of the United States, born and raised in the country, while Woman B is a legal permanent resident, having a green card for at least four years. Both friends have jobs, pay taxes, and contribute to the economy, but only Woman A is allowed to bring a claim for gender-based violence due to their citizenship. Woman B, on the other hand, is left unable to bring a claim because they are not considered a United States “national.”

The WEA seeks to avoid this unfortunate situation. For the United States to fully position itself as a leader in global women’s rights, and to adequately protect the rights of women in its borders, Congress will need to provide its courts with the ability to allow claims from non-nationals who are just as deserving of the WEA’s protections as others. A pertinent example to take after is the Torture Victim Protection Act (TVPA), which will be discussed in more depth in Part V. What is important to note about the TVPA, which provides a private cause of action against individuals who have committed torture or extrajudicial killing, is that it *does not* limit causes based on the nationality of the plaintiff.<sup>120</sup> The WEA should thus be drafted similarly, which would allow for a broader set of plaintiffs and increase the number of cases brought and the court judgments won against defendants, affirming and protecting the individual rights of women at higher rates.

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<sup>119</sup> *Mohammadi v. Islamic Republic of Iran*, 782 F.3d 9, 15 (D.C. Cir. 2015); see generally 8 U.S.C. § 1408 (defining non-citizen by birth nationals); see also *U.S. v. Jimenez-Alcala*, 353 F.3d 858, 861 (10th Cir. 2003) (noting that the only noncitizen U.S. nationals are residents of American Samoa and Swains Island); *Abou-Haidar v. Gonzales*, 437 F.3d 206, 207 (1st Cir. 2006) (noting that, aside from meeting the limited provisions of 8 U.S.C. § 1408, “a long period of residence in the United States, military service and/or registration with the Selective Service, and completing a portion of the naturalization process (including an oath of allegiance) do not suffice” for one to be considered a “national of the United States”).

<sup>120</sup> See generally Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as amended at 28 U.S.C. § 1350 note (2012)) (not requiring the victim or perpetrator to be a U.S. national).

#### IV. COUNTERARGUMENTS

Should these recommendations be taken seriously by a policymaker or by a lawmaker in government, they will likely be faced with a question that would need to be addressed: what makes the WEA different from the CEDAW, or other similarly situated laws, that failed to get passed and/or ratified? In other words, how do we know that the process of getting the WEA ratified in the United States will not fall into the same legislative roadblocks?

To answer these questions, this section will address important counterarguments that may try and undermine the WEA and its legislative efficacies, prior to eventually arguing for its strengths in Part V. First, Part A will address popular arguments made against the CEDAW's ratification and why those arguments will not hold against the WEA. Next, Part B will look to how the WEA differs from the Equal Rights Amendment ("ERA"), a proposed amendment to the United States Constitution that failed to get ratified by the requisite number of states by the required deadline.

##### *a. How the WEA Differs from the CEDAW*

First, debates over the CEDAW's ratification have been contentious among lawmakers, particularly along party lines. While this section does not include each and every issue brought up in the ratification debates, it will briefly touch on a few to illustrate how the WEA will find a more efficient path to getting passed than the CEDAW. Specifically, this section will touch on debates regarding (a) the CEDAW's potential effect on national sovereignty, (b) the CEDAW's potential effect on privacy issues, and (c) the efficacy of the CEDAW in eliminating gender-based discrimination.

##### *i. CEDAW Counterargument 1: National Sovereignty*

One of the biggest fears that opponents have had regarding CEDAW ratification is that the treaty would undermine the United States' national sovereignty. Opponents have argued that the treaty represents a trend of favoring international law over domestic self-government and constitutional law, and specifically point to the role of the CEDAW Committee and its oversight. In criticizing the

Committee's role, they have argued that it "would have authority over the actions of the U.S. government and private citizens regarding discrimination against women."<sup>121</sup> The main worry in this respect stems from the belief that the United States would be forced to change its own laws to conform to the recommendations of the CEDAW Committee. Opponents, such as Secretary of State Powell and Assistant Attorney General Bryant, pointed to specific recommendations by the Committee to other countries in relation to Mother's Day and the decriminalization of prostitution.<sup>122</sup>

These issues, however, would not come to fruition were the WEA to be drafted and passed. Allowing the WEA to go through the normal legislative process diminishes any worry that the laws of the United States are coming second to a body of international jurisprudence. Instead, the WEA would serve as an extension, as opposed to a contradiction, to existing national laws regarding gender-related issues. Furthermore, by nature of being a federal law, the WEA will not be overseen by an outside committee, such as the CEDAW Committee, that would provide recommendations and monitor compliance. The goal is that the WEA, while allowing the United States to engage internationally, will be administered nationally, without any arguments that it would undermine the country's sovereignty or its laws.

ii. *CEDAW Counterargument 2: Privacy Rights (Family and Abortion)*

Second, opponents contended that the CEDAW would undermine domestic policies and laws with regards to privacy.<sup>123</sup> An area of focus that opponents have taken issue with is the CEDAW's potential effects on the traditional family structure.<sup>124</sup> For example, they have argued that the CEDAW would obligate families and individuals to adhere to an artificial set of values, regardless of whether said values would align with family traditions or personal

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<sup>121</sup> RATIFICATION DEBATE, *supra* note 52, at 8; *see also id.* ("The minority views in the 2002 SFRC report on the Convention, for instance, state that CEDAW represents a disturbing international trend' of favoring international law over U.S. constitutional law and self-government, thereby undermining U.S. sovereignty.").

<sup>122</sup> *Id.*

<sup>123</sup> RATIFICATION DEBATE, *supra* note 52, at 12.

<sup>124</sup> *Id.*

convictions.<sup>125</sup> Other arguments have centered around fears that the CEDAW Committee would be able to determine the best interests of children in the United States, while undermining the roles of parents.<sup>126</sup>

Beyond familial privacy issues, a significant portion of the ratification debate has centered around abortion, particularly whether or not the CEDAW is “abortion neutral.”<sup>127</sup> Opponents have feared that the language of the treaty “could lead to the abolishment of [S]tate parental notification laws, require federal funding for abortions, or obligate the U.S. government to promote and provide access to abortion.”<sup>128</sup>

These privacy issues will likely not be as central to the debates over the WEA. The WEA, as a litigation statute, serves to provide women of gender-based violations with a route to justice against their perpetrators. Its provisions, such as the prohibition against discrimination in private life, do not aim to eliminate traditional familial roles that are based consensually. To the contrary, the goal of the WEA is to promote the ability for women to choose how they would like to live their lives, free from constraints placed upon their ability to pursue work, to name children, to choose a spouse, etc . . . . In other words, the WEA does not explicitly state that “no family is allowed to follow a traditional model, or a model set by culture.” Instead, it sets a minimum standard of treatment, one where women are not *forced* into a familial model, or into a matrimonial role, that they are not comfortable with.

Furthermore, regarding the abortion issue, the hotly contested debates occurred prior to the Supreme Court’s decision in *Dobbs* in 2022. In the United States, there is no longer a federal right to abortion, as it is an issue reserved to individual States, and the WEA’s provisions do not contradict this ruling. Instead, where the WEA will be relevant would be in situations regarding gender-based violence, such as forcing a woman to get an abortion without her consent.

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<sup>125</sup> *Id.* at 13.

<sup>126</sup> *Id.* at 14.

<sup>127</sup> *Id.* Senator Jesse Helms famously noted, as a way to increase the chances of CEDAW ratification, that “nothing in this Convention shall be construed to reflect or create any right to abortion and in no case should abortion be promoted as a method of family planning.” *Id.* at 17; S. EXEC. REP. NO. 107-9, at 7 (2002).

<sup>128</sup> RATIFICATION DEBATE, *supra* note 52, at 15.

*iii. CEDAW Counterargument 3: Effectiveness*

Lastly, while opponents have recognized that gender-based discrimination is a prevalent issue that requires elimination, they have also argued that the CEDAW would be particularly ineffective in serving this goal.<sup>129</sup> Opponents have specifically pointed to the fact that “countries with reportedly poor women’s rights records—including China and Saudi Arabia—have ratified CEDAW.”<sup>130</sup>

The very nature of the WEA as a federal statute, as opposed to a global treaty, solves these worries. First, because the WEA will be a national law as opposed to a treaty, there will be no worry as to its effectiveness based on arguments regarding which countries are or are not following it. To the contrary, having the WEA passed as a federal statute will place the United States into a position of moral authority, allowing the country to shape its own actions and laws to the statute without the need to look beyond its borders at other signatories or States Parties.

Beyond this, as Part V of this comment will show, the WEA’s provisions will be extremely effective in addressing global women’s rights issues, particularly through (1) affirming and (2) protecting the rights of women domestically and abroad.<sup>131</sup> The WEA’s explicit cause of action will serve as a counterweight to the very atrocities it aims to eliminate. Congress would be able to draft and debate this law themselves, looking not at the human rights track records of other countries, but at how the law will be effective here in the United States.<sup>132</sup>

*b. How the WEA Differs from the ERA*

Aside from the CEDAW, the United States has also attempted to pass and ratify an amendment to the Constitution, the ERA, which would have explicitly guaranteed the equality of men and women

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<sup>129</sup> *Id.* at 9.

<sup>130</sup> RATIFICATION DEBATE, *supra* note 52, at 1, 9 (quoting S. TREATY DOC. NO. 96-53, at 15 (2002)).

<sup>131</sup> *See infra* Part V.

<sup>132</sup> While not an argument put forward directly by opponents of the treaty’s ratification, it has still been argued that, even if the CEDAW were to be ratified, it would not have an effect on the rights of women in the United States without enabling legislation. *See Piccard, supra* note 44, at 121.

under the law. This section will (a) provide a brief background to the ERA and why it failed to become law, (b) delve into popular arguments made against its passage, and (c) portray why the WEA will follow a different path.

*i. Introduction to the ERA*

The ERA is a proposed amendment to the United States Constitution that would guarantee equal rights for both men and women,<sup>133</sup> stating that “equality of rights under the law shall not be denied or abridged by the United States or any State on account of sex.”<sup>134</sup> Originally drafted and introduced in 1923 by Alice Paul, a suffragist leader,<sup>135</sup> the ERA was eventually considered by Congress in 1972.<sup>136</sup> There, it was approved by the necessary two-thirds vote required by the Members of both houses of Congress in 1973,<sup>137</sup> who gave States six years (which was eventually extended nine years) to ratify it so that it can become part of the Constitution.<sup>138</sup>

However, despite being passed in Congress, the ERA failed to get ratified by three fourths of the States by the deadline, a requirement set by Article V of the Constitution, and the Amendment ultimately failed.<sup>139</sup> Were the ERA to have been passed,

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<sup>133</sup> JON O. SHIMABUKURO, CONG. RSCH. SERV., R47619, THE EQUAL RIGHTS AMENDMENT: BACKGROUND AND RECENT LEGAL DEVELOPMENTS 1 (July 11, 2023).

<sup>134</sup> H.R.J. Res. 208, 92d Cong. § 1 (1972).

<sup>135</sup> Murphy, *supra* note 61, at 939; *see also History of the ERA*, CNN (Mar. 7, 2019), <https://www.cnn.com/2015/03/20/us/gallery/history-of-the-era/index.html> [https://perma.cc/BSV9-QC8D].

<sup>136</sup> Murphy, *supra* note 61, at 940.

<sup>137</sup> SHIMABUKURO, THE EQUAL RIGHTS AMENDMENT, *supra* note 133.

<sup>138</sup> *See* Bleiweis, *supra* note 60 (“Boosted by activism of women’s rights and civil rights advocates, Congress passed the ERA in 1973 and initially gave states until 1979 to ratify it by a three-fourths majority. The deadline was extended to 1982 . . .”).

<sup>139</sup> *Id.*; *see* U.S. CONST. art. V. (stating that a proposed amendment must be ratified by three fourths of states to become effective). It is also important to note that, despite not reaching the threshold of required state support, there was still fervent support for an Equal Rights Amendment. The late Justice Ruth Bader Ginsburg, for example, is credited with famously stating:

If I could choose an amendment to add to this Constitution, it would be the Equal Rights Amendment . . . It means that women are people equal in stature before the law. That’s a fundamental constitutional principle. I think we have achieved that through legislation, but legislation can be repealed; it can be altered. I mentioned Title VII of the Civil Rights Act, and the first one was the Equal Pay Act. But that principle belongs in our Constitution. It is in every constitution written since the

its explicit prohibition of sex discrimination “could help to sustain or expand critical protections that have been used to challenge a wide range of discriminatory conduct and practices,” while also providing additional support for protections against gender-based violence.<sup>140</sup> Specifically, the ERA would pave the way to reexamining the Civil Rights Provision of the VAWA “by bolstering arguments in support of Congress’ constitutional authority . . .”<sup>141</sup>

ii. *Why the ERA Failed*

The ERA, at the time it was being considered by Congress in the early 1970s, was receiving vigorous support throughout the country.<sup>142</sup> However, once it became time for states to ratify it, an anti-ERA movement began to grow, led by Phyllis Schlafly.<sup>143</sup> Schlafly, a conservative political activist, formed a group called STOP ERA, which was short for “Stop Taking Our Privileges, Equal Rights Amendment.”<sup>144</sup> Through her speeches while lobbying states against the Amendment, Schlafly claimed that the ERA would erode the traditional roles and identities of women, while risking the loss of “their femininity and the opportunities presented by marriage.”<sup>145</sup> Particularly, per one of her main arguments, if the ERA

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Second World War. So I would like my granddaughters, when they pick up the Constitution, to see that that notion, that women and men are persons of equal stature, I’d like them to see that that is a basic principle of our society.

*Justices Scalia and Ginsburg on the First Amendment and Freedom*, C-SPAN (Apr. 17, 2014), <https://www.c-span.org/video/?318884-1/conversation-justices-scalia-ginsburg-2014> [<https://perma.cc/W9GL-VU33>].

<sup>140</sup> Bleiweis, *supra* note 60.

<sup>141</sup> *Id.*

<sup>142</sup> See Erin Blakemore, *Why the Fight Over the Equal Rights Amendment Has Lasted Nearly a Century*, HISTORY (MAR. 21, 2022), <https://www.history.com/news/equal-rights-amendment-fail-phyllis-schlafly> [<https://perma.cc/Q7KT-K68M>] (noting that the Amendment passed in the House of Representatives with a 93.4% majority and in the Senate with a 91.3% majority).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* A pertinent excerpt from one of her speeches that she published in her newsletter, *The Phyllis Schlafly Report*, states,

“Suddenly, everywhere we are afflicted with aggressive females on television talk shows yapping about how mistreated American women are, suggesting that marriage has put us in some kind of ‘slavery,’ that housework is menial and degrading, and – perish the thought – that women are discriminated against.”

Blakemore, *supra* note 142.

passed, “women would be forced to go to war, would lose their right to child support and alimony, and society would fall apart.”<sup>146</sup> Other opponents also disagreed with the ERA on the ground that strict equality in America would “make women 50% financially responsible for their families” and “remove the obligation of men to support their wives and children.”<sup>147</sup>

Schlafly’s arguments gained traction, splitting the feminist movement as she painted ERA advocates as dangerous and unappealing.<sup>148</sup> The culture war that had begun over the ERA, backed by more traditionalist and conservative arguments, had slowed the pace of ratification, and had led to states rescinding their prior support for the Amendment, eventually leading to its lack of passage.<sup>149</sup>

### iii. How the WEA Differs

The WEA, which takes after many of the arguments that pushed forward the ERA, will differ in a few key respects that will only serve to make its passage simpler. The first difference will be in structure. As stated above, the WEA would be passed as a federal statute, not as an amendment to the Constitution, which will avoid the necessity that the requisite number of states ratify it to ultimately pass. Instead, the aim would be to allow the WEA to go through the normal legislative process, which will require a simple majority vote

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<sup>146</sup> *Id.*

<sup>147</sup> Jennifer Granat, *The Failure of the Equal Rights Amendment*, DIGITAL GEORGETOWN (Jan. 21, 1997), <https://repository.library.georgetown.edu/handle/10822/1051268> [https://perma.cc/L2D2-N2TZ]. Opposition was also seen by religious groups, including Mormons and fundamentalist Christians, who claimed that the ERA “conflicted with God-given differences between men and women and disregarded traditional family and gender roles embedded in their religious beliefs.” *Id.*

<sup>148</sup> Schlafly also called feminism “an antifamily movement that is trying to make perversion acceptable as an alternate life-style,” while arguing that the ERA would mean “coed everything – whether you like it or not.” See Lila Thulin, *Why the Equal Rights Amendment Is Still Not Part of the Constitution*, SMITHSONIAN MAGAZINE (Nov. 13, 2019), <https://www.smithsonianmag.com/history/equal-rights-amendment-96-years-old-and-still-not-part-constitution-heres-why-180973548/> [https://perma.cc/AT9B-LNYG].

<sup>149</sup> Blakemore, *supra* note 142.

in both the House of Representatives and in the Senate, which the ERA easily cleared in the past.<sup>150</sup>

The second difference will be in substance and effect. While the ERA split the feminist movement along traditional lines, the WEA's language will promote unity. First, the WEA's focus on an intersectional approach to gender-based issues is a key difference, particularly since the ERA was seen more as a non-pluralist feminist agenda. Focusing on the issues of underrepresented minority women, or women with disabilities, allows for broader inclusion into the conversation surrounding the Statute's efficacies. Beyond this, the WEA does not aim to "thwart" traditional familial roles, reduce the femininity of women, or to force women into combat in any way shape or form. To the contrary, it is a protective statute that lays out basic rights that are not to be violated, while providing a route to litigation as a tool for effectuating them, particularly in the face of heightened disparities today.<sup>151</sup>

These differences, combined with momentum by the current Administration (to be discussed in the next section) for protecting global women's rights, will only serve to push the WEA over the edge were it to be taken seriously and drafted by a policymaker or lawmaker.

#### V. BENEFITS OF WEA RATIFICATION AS AN ALTERNATIVE ROUTE TO CEDAW RATIFICATION

Lastly, the final section of this comment will provide favorable arguments for the drafting and ratification of the WEA absent the CEDAW ratification. This section will consist of three main parts, all of which provide arguments that draw upon legal and policy-oriented bases to justify the WEA as an effective route to protecting and affirming the global rights of women in the United States, positioning them as a fervent leader in this field.

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<sup>150</sup> *The Legislative Process*, U.S. HOUSE OF REPRESENTATIVES, <https://www.house.gov/the-house-explained/the-legislative-process> [https://perma.cc/USF9-YMN2] (last visited Oct. 14, 2023); Blakemore, *supra* note 142 (noting the passage of the ERA with vigorous support in the House and Senate).

<sup>151</sup> See *Women and Gender in Public Policy*, GAO, <https://www.gao.gov/women-and-gender-public-policy#:~:text=While%20federal%20laws%20prohibit%20discrimination,areas%20covered%20by%20federal%20programs> [https://perma.cc/292N-3Q9Q] (last visited Nov. 10, 2023) (providing various examples of societal disparities that negatively affect women today).

Part A will argue that the WEA would be an effective alternative to CEDAW ratification because it would carry important weight in (1) affirming and (2) protecting the specific rights of women plaintiffs through court judgments and pronouncements. Part B will then argue that the WEA should be passed because it will serve as a broadened continuation of the path that the United States has taken in recent years with regards to women's rights statutes. Particularly, the WEA will build off of the Biden Administration's current momentum with regards to global women's rights, including the expansion of the War Crimes Act and the VAWA, as well as its commitment to the WPS Agenda. Lastly, Part C will argue that the WEA will serve to expand upon already existing statutes that protect women in a narrow set of circumstances, such as the FGM Law and the Trafficking Victims Protection Act, serving as the ultimate law aimed at protecting and promoting the global rights of women.

*a. Argument 1: The WEA Would Allow for Courts to Affirm and Protect the Rights of Women*

First, the WEA should be passed because litigation can be an extremely effective path to ensuring the rights of women, domestically and abroad, in the absence of explicit ratification of the CEDAW. This section will put forward the argument that transnational litigation as a tool has two main advantages that can bear on the efficacy of the WEA: (1) one relating to the affirmation of the violated right, and (2) the other relating to the protection of said right.

*i. The Affirmation of the Right*

The WEA, as a transnational litigation statute, will allow United States courts to *affirm* the existence and prevalence of an individual woman's right each time a judgment is found against the defendant. Favorable judgments under the WEA will both signal and pronounce to the defendant and to the world the existence of the violated right, while also providing the victim(s) with the necessary closure they would have otherwise been unable to obtain absent the statute. These benefits of announcing and affirming the existence of

specific rights will serve as important alternatives to firmly committing to an explicit document like the CEDAW.

Professor Christopher Whytock describes the benefits of transnational litigation in his paper, *Transnational Shadow of the Law*, where he notes that the process can “allocate rights” among transnational actors; a decision against a defendant perpetrator implicates “basic values of safety and human dignity.”<sup>152</sup> As Harold Koh further argues, the litigation process gives “domestic courts a role in the transnational process of articulating and defending global norms,”<sup>153</sup> a way to declare that the conduct of a defendant “violates a norm of international law.”<sup>154</sup>

It helps to see how this looks in practice, and a great example comes from a line of cases based on the Alien Tort Statute (“ATS”) from the 1980’s. This history of ATS litigation serves as an important backdrop because, aside from receiving compensation, many plaintiffs explicitly “expressed satisfaction simply to have won default judgments announcing that the defendant had transgressed universally recognized norms of international law.”<sup>155</sup>

Enacted in 1789 by the First Congress,<sup>156</sup> the ATS states, “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>157</sup> While drafted at the Founding of the United States, the ATS was largely ignored until *Filártiga v. Peña-Irala* in 1980, a landmark human rights decision that transformed transnational litigation for years to come.<sup>158</sup> There, Paraguayan plaintiffs in district court sued a Paraguayan official that had tortured their relative to death in Paraguay while acting under the color of their governmental authority.<sup>159</sup> The United States Court of Appeals for the Second Circuit held that the district court had

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<sup>152</sup> Christopher A. Whytock, *Litigation, Arbitration, and the Transnational Shadow of the Law*, 18 DUKE J. COMP & INT’L L. 449, 453 (2008).

<sup>153</sup> Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT’L L. 251, 254 (2006).

<sup>154</sup> Koh, *Transnational Public Law*, *supra* note 73, at 2369.

<sup>155</sup> *Id.* at 2368.

<sup>156</sup> Christopher Ewell, et. al., *Has the Alien Tort Statute Made a Difference?: A Historical, Empirical, and Normative Assessment*, 107 CORNELL L.J. 1205, 1207 (2022).

<sup>157</sup> 28 U.S.C. § 1350.

<sup>158</sup> Ewell et. al., *supra* note 156, at 1207.

<sup>159</sup> Koh, *Transnational Public Law*, *supra* note 73, at 2367; *Filártiga v. Peña-Irala*, 577 F. Supp. 860, 864-67 (E.D.N.Y. 1984).

jurisdiction under the ATS, and the lower court eventually awarded over ten million dollars to the plaintiffs.<sup>160</sup>

What is important to note about *Filártiga* and its progeny, however, is that the ATS was used as a vehicle to announce and affirm a right owned by the individual plaintiffs. The court stated, “the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind.”<sup>161</sup> As Harold Koh adequately describes, the court, in using the ATS, “reaffirmed the Nuremberg ideal: *that torture (like genocide) is never a legitimate instrument of [S]tate power.*”<sup>162</sup>

The argument for drafting and passing the WEA falls along these very same lines. The WEA will have, as one of its benefits, the hook to allow for federal courts within the United States to affirm the rights of women enshrined in the international regime, regardless of nationality. Take, for example, its provisions regarding the prohibition of discrimination in private life. Much like the ATS did with allowing courts to announce the right to be free of torture, court judgments under this provision of the WEA would be an affirmation of the existence of the right of women to be able to *choose* who they want to love and to spend their life with, without interference from others. This benefit of the WEA would indicate a firm commitment by the United States that this right, along with all other rights of women, are in fact valuable, and do in fact exist. More broadly, it would be a clear sign of engagement by the United States in the field of global women’s rights, where one of its national laws takes care to affirm the many rights set by the post-WW2 order.

Therefore, absent CEDAW ratification, the WEA would serve as an important step in promoting the equality of women within United States borders, as the power of court judgments will serve as a signal, and a beacon, that portrays and promotes the rights of women in each case that is won.

## ii. *The Protection of the Right*

Second, the WEA will allow federal courts to not only affirm the existence of the rights of women plaintiffs, but to also *protect* said rights from further violations. Absent explicit ratification of the

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<sup>160</sup> Koh, *Transnational Public Law*, *supra* note 73, at 2367.

<sup>161</sup> *Filartiga*, 577 F. Supp. at 863.

<sup>162</sup> Koh, *Transnational Public Law*, *supra* note 73, at 2367.

various rights and provisions laid out in the CEDAW, having a statute like the WEA that would protect women from having their human rights violated would be crucial, particularly in an age where gender-based inequality and violence, domestically and abroad, remain rampant.

To be specific, beyond compensation or affirmation, many plaintiffs pursue transnational litigation to place “constraints upon the defendants’ future conduct.”<sup>163</sup> The United States has passed transnational litigation statutes with the very goal of deterring future human rights violations against individuals, such as the FSIA. Looking to the effects of the FSIA on the conduct of perpetrators of various human rights violations will add credence to the argument that the WEA could be an effective addition in the fight to protect the rights of female victims absent CEDAW ratification.

As mentioned earlier, of the most pertinent exceptions of the FSIA, particularly with regards to the effective deterrent goals of transnational litigation more generally, is found in Section 1605A. Often called the “terrorism exception,” this exception provides a cause of action against a foreign State for

personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act . . . is engaged in by an official, employee, or agent of such foreign [S]tate while acting within the scope of his or her office, employment, or agency.<sup>164</sup>

One of the main goals that Congress had in passing this exception was to deter foreign States from engaging in the commission of acts of terror.<sup>165</sup> Many NGO’s, such as The Center for Justice & Accountability (“CJA”) (shown below), use Section 1605A for purposes similar to this, and have filed cases to hold perpetrator States accountable and have won key judgments as a result.

The strength of deterrence in this respect was particularly seen in a Section 1605A case brought against the Syrian Arab Republic by the family of Marie Colvin, a veteran war correspondent who had

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<sup>163</sup> *Id.* at 2369.

<sup>164</sup> See FSIA § 1605A; see also *Mohammadi*, 782 F.3d at 14.

<sup>165</sup> Jeewon Kim, *Making State Sponsors of Terrorism Pay: A Separation of Powers Discourse Under the Foreign Sovereign Immunities Act*, 22 BERK. J. INT’L L. 513, 516-17 (2004); see also Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 [hereinafter AEDPA] (noting in its preamble that the statute’s purpose, in part, is “to deter terrorism” and “to provide justice for victims”).

died under regime fire in the country.<sup>166</sup> The judgment against Syria in 2019 marked the first time the regime was held responsible for its actions during the conflict.<sup>167</sup> Particularly, the suit “provided an unprecedented opportunity to judicially examine extensive evidence regarding the systematic and highly regulated nature of the regime’s campaign to quell civil dissent from the very start of the conflict.”<sup>168</sup> This judgment also led to pronouncements all across popular media, including the New York Times and The Independent, which placed the regime squarely in the spotlight for its continued violations of international norms.<sup>169</sup> The case embodied the ideal that transnational tort suits promote important goals such as deterrence, even if a judgment is never actually collected for the plaintiff.<sup>170</sup>

Here, a strong aim and benefit of the WEA is that it would be a way for U.S. courts to *protect* women from a range of violations that may be committed against them. The WEA would contain multiple provisions, such as prohibitions against violence, physical, emotional, and intellectual, that would serve as a protective visor against future perpetrators due to the high possibility of civil penalties and court pronouncements. Court judgments won against an individual for physically abusing a woman for reason of her gender would have a deterrent effect on future potential perpetrators. Whether it be through pronouncements across media about specific cases won, or fear on behalf of perpetrators of increased civil violations, the WEA would be a crucial tool in the fight to protect global women’s rights.

Therefore, absent formal accession to the CEDAW, the United States can still signal and show solidarity with women within their borders and, more broadly, with the global women’s rights movement, much like it has with other statutes like the FGM Law, to be mentioned in Part B.

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<sup>166</sup> *Colvin v. Syrian Arab Republic*, CIJA (Feb. 22, 2021), <https://cijaonline.org/news/2021/2/22/colvin-v-syrian-arab-republic-1> [<https://perma.cc/5BNC-2KPS>].

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> Koh, *Transnational Public Law*, *supra* note 73, at 2397-98.

*b. Argument 2: The WEA Would Be an Imperative and Necessary Next Step in a Line of Statutes Relating to Human Rights Passed and Expanded by the United States*

Beyond affirmation and protection, passing the WEA would fall squarely within the momentum built by the Biden Administration throughout the last two years, which has shown its willingness to increase jurisdiction over human rights violations in United States courts, while also providing support for initiatives aimed at decreasing gender inequality and violence on the global scale. Three important areas to look at in detailing this momentum, which passing the WEA will build off of, is the Biden Administration's recent expansion of the War Crimes Act and the VAWA, as well as their approach to WPS.

*i. Expansion of War Crimes Act*

While this statute is not one that relates to women's rights specifically, the January 2023 amendment to the War Crimes Act serves as an important catalyst for change by the current Administration in wanting to allow for more perpetrators to be tried for serious human rights violations in U.S. courts.

The War Crimes Act of 1996, prior to its amendment in 2023, permitted "the prosecution of people who commit war crimes in the United States or abroad," but was limited to situations in which the victim or perpetrator was a U.S. national or service member.<sup>171</sup> In 2023, however, Congress passed the Justice for Victims of War Crimes Act, which expanded the jurisdiction over war criminals in the United States.<sup>172</sup> The new amendment specifically allows the United States to now prosecute war crimes whenever the perpetrator is on domestic soil, "irrespective of where the crimes were committed or the nationality of the victims or alleged perpetrators."<sup>173</sup>

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<sup>171</sup> Paras Shah, *Congress Passes Justice for Victims of War Crimes Act*, JUST SECURITY (Dec. 22, 2022), <https://www.justsecurity.org/84588/senate-passes-justice-for-victims-of-war-crimes-act/> [<https://perma.cc/32CF-MBAQ>]; see generally 18 U.S.C. § 2441 (defining war crimes and associated jurisdictional and criminal legal standards).

<sup>172</sup> *Id.*

<sup>173</sup> Gissou Nia, *Congress Just Passed a Big Change to War Crimes Law. Here's What It Means for Ukraine and Beyond*, ATLANTIC COUNCIL (Dec. 23, 2022),

The motivation behind this recent amendment is extremely important for purposes of getting the WEA passed. First, it is known that in recent years, human rights advocates have heavily advocated for this change, particularly as a way to bring domestic legislation “in line with its obligations under the four Geneva Conventions.”<sup>174</sup> In other words, the United States had bilateral support in expanding prosecutorial jurisdiction over war crimes, despite not ratifying one of the most important international legal instruments in the field of criminal law, the Rome Statute of the ICC.<sup>175</sup>

While the War Crimes Act is a criminal statute, the civil nature of the WEA would be just as effective in providing jurisdiction over human rights violations as they pertain to women on a domestic and an international scale. Drafting and passing the WEA will fall squarely within the already prevalent willingness that the current Administration has to take global human rights more seriously through litigation. Building off of the back of an important expansion in the War Crimes Act, passing the WEA will thus solidify the motivation of the current Administration to protect the international human rights of individuals, especially women, outside of CEDAW ratification.

ii. *Reauthorizing and Strengthening VAWA*

Beyond the expansion of the War Crimes Act, the Biden Administration has also reauthorized and strengthened the VAWA.<sup>176</sup> The reasoning behind the Biden Administration’s decision is extremely important to look at because, unlike the War Crimes Act, the VAWA, as mentioned briefly earlier in this comment, is a statute relating directly to women’s rights. The Biden

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<https://www.atlanticcouncil.org/blogs/new-atlanticist/congress-just-passed-a-big-change-to-war-crimes-law-heres-what-it-means-for-ukraine-and-beyond/> [https://perma.cc/LQU6-JUVD].

<sup>174</sup> *Id.*

<sup>175</sup> Michel Martin, *The U.S. Does Not Recognize the Jurisdiction of the International Criminal Court*, NPR, (Apr. 16, 2022), <https://www.npr.org/2022/04/16/1093212495/the-u-s-does-not-recognize-the-jurisdiction-of-the-international-criminal-court> [https://perma.cc/T9TF-V4GU].

<sup>176</sup> Press Release, White House, Fact Sheet: Reauthorization of the Violence Against Women Act (VAWA) (Mar. 16, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/16/fact-sheet-reauthorization-of-the-violence-against-women-act-vaawa/> [https://perma.cc/7L78-ZME9].

Administration's reauthorization of VAWA thus signals even more willingness to address women's rights issues head-on, and the WEA will serve as the logical next step.

Passed in 1994, the VAWA is a landmark federal law that "provides critical resources supporting comprehensive, cost-effective responses to domestic violence, sexual assault, dating violence and stalking," and in turn criminalizes these acts.<sup>177</sup> The VAWA has been extremely successful since its inception, with intimate-partner violence dropping 64% from 1993 to 2010.<sup>178</sup> The law was most recently renewed in 2022.

Specifically, the Violence Against Women Act Reauthorization Act of 2022, which was passed with bipartisan support, strengthened and expanded the law in many respects.<sup>179</sup> Some expansions include the improved prevention of and response to sexual assault through added support for the Rape Prevention and Education Program and Sexual Assault Services Program, as well as improvements to the response of the healthcare system to domestic violence and sexual assault by enhanced training, among others.<sup>180</sup> A key addition, however, for purposes of this comment, is that the Reauthorization Act established "a federal civil cause of action for individuals whose intimate visual images are disclosed without their consent . . ."<sup>181</sup>

The Biden Administration's expansion of the VAWA to include a new civil cause of action for a specific type of harassment is an important step forward, and further signals an aim to expand protection for women within United States borders. Particularly, despite losing the Civil Rights Remedy in *Morrison*, adding a cause of action in a narrower sense still portrays an important trend by the current Administration. The White House notes that, while the VAWA has been successful, "much work remains,"<sup>182</sup> but the United States should clearly not stop here. Professor de Alwis, in arguing

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<sup>177</sup> *President Biden Signs Violence Against Women Act Reauthorization Act into Law*, EVERYTOWN (Mar. 5, 2022), <https://www.everytown.org/press/president-biden-signs-violence-against-women-act-reauthorization-act-into-law/> [<https://perma.cc/7L78-ZME9>].

<sup>178</sup> Tara Law, *The Violence Against Women Act Was Signed 25 Years Ago. Here's How the Law Changed American Culture*, TIME (Sept. 12, 2019), <https://time.com/5675029/violence-against-women-act-history-biden/> [<https://perma.cc/P6AB-3WX6>].

<sup>179</sup> Press Release, White House, *supra* note 176.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

for CEDAW ratification in her paper, noted that “the CEDAW is the natural extension of this crucial domestic project, bringing the goals of the VAWA to the international stage.”<sup>183</sup> In turn, the WEA can serve a similar purpose in the absence of CEDAW ratification. There is clear bilateral support for expanding jurisdiction over human rights violations, as is shown in both the Reauthorization Act and in the Justice for Victims of War Crimes Act, and the WEA would be another imperative step in a line of actions and commitments by the current Administration to global women’s rights. While “much work remains” to adequately place global women’s rights at the forefront, the WEA can serve as a viable solution.

*iii. WPS Act and Executive Order 14020*

Third, beyond the expansion of current laws, the WEA will build off of the United States’ commitment to the WPS Agenda, which, as mentioned above in Part II, is an extremely important development in the international women’s rights regime. The WPS Agenda has received support from both sides of the political aisle in the United States.<sup>184</sup> In 2008, for example, then Secretary of State Condoleezza Rice chaired the Security Council when she introduced Resolution 1820, which focused on the prevention of sexual violence against women in conflict.<sup>185</sup> Furthermore, in 2017, the United States “became the first country in the world with a comprehensive law” on WPS when it passed the Women, Peace, and Security Act (“WPS Act”),<sup>186</sup> setting in stone “the United States’ commitment to WPS at a high level of international cooperation and integration.”<sup>187</sup> This was eventually followed up by the 2019 U.S. Strategy on WPS, which “seeks to increase women’s meaningful leadership in political and civil life by helping to ensure they are empowered to lead and contribute, equipped with the necessary skills and support to succeed, and supported to participate through access to

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<sup>183</sup> de Silva de Alwis & Verveer, *supra* note 22, at 61.

<sup>184</sup> *Id.* at 25.

<sup>185</sup> *Id.* at 26.

<sup>186</sup> *Women, Peace, and Security*, U.S. DEP’T OF STATE, <https://www.state.gov/women-peace-and-security/> [https://perma.cc/5NR6-44WC] (last visited Apr. 30, 2023).

<sup>187</sup> de Silva de Alwis & Verveer, *supra* note 22, at 28.

opportunities and resources.”<sup>188</sup> Key departments and agencies in the United States have implemented this strategy, including the Department of State and U.S. Agency for International Development.<sup>189</sup>

In March of 2021, President Biden also signed Executive Order 14020, which established the Gender Policy Council (“GPC”) to advance gender equality “in both domestic and foreign policy development and implementation . . .”<sup>190</sup> Furthermore, as part of a “National Strategy on Gender Equity and Equality,” the current Administration has pledged to advance gender equality through various methods, including, but not limited to, “preventing and responding to gender-based violence” by “developing and strengthening national and global laws and policies . . .”<sup>191</sup>

To that end, there is further willingness by both the previous *and* current Administrations to take a global approach to advancing gender equality and preventing gender-based violence and discrimination. Bipartisan support for the WPS Agenda, the WPS Strategy, and the Gender Policy Council, coupled with landmark national plans aimed directly at preventing gender-based violence and at advancing gender equality on a global scale, only serve to promote the need for the WEA’s passage. The WEA will strengthen these steps that the United States is taking to integrate itself as a leader in global women’s rights and will serve as a tool, so to speak, for victims to use to vindicate those very rights the country seeks to promote. It will transform policy goals into concrete ideals through opening court room doors to victims that seek to vindicate the very rights the United States has been committing itself to protecting.

Combined with the strengthening of other important laws such as the War Crimes Act and the VAWA, there is no question that the WEA, with its intersectional approach and private cause of action for a broadened set of gender-based violations committed

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<sup>188</sup> THE UNITED STATES STRATEGY ON WOMEN, PEACE, AND SECURITY 2 (2019), [https://www.state.gov/wp-content/uploads/2021/01/WPS\\_Strategy\\_10\\_October2019.pdf](https://www.state.gov/wp-content/uploads/2021/01/WPS_Strategy_10_October2019.pdf) [<https://perma.cc/46LF-DUWA>].

<sup>189</sup> *Id.*

<sup>190</sup> *Advancing Women, Peace, and Security*, U.S. INST. PEACE, <https://www.usip.org/programs/advancing-women-peace-and-security> [<https://perma.cc/3Q7V-2QFT>] (last visited Dec. 30, 2023).

<sup>191</sup> Press Release, White House, Fact Sheet: National Strategy on Gender Equity and Equality (Oct. 22, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/22/fact-sheet-national-strategy-on-gender-equity-and-equality/> [<https://perma.cc/4LQ5-72YP>].

domestically and abroad, will be the ultimate predecessor in a time of increasing momentum by the United States government absent CEDAW ratification.

*c. Argument 3: The WEA Should Be Passed Because It Will Expand upon the United States' Already Existing Statutes Aimed at Curbing Certain Women's Rights Abuses*

Lastly, beyond the momentum build by this current Administration, the United States within the last few decades has already passed and used multiple litigation statutes aimed at curbing abuses of specific women's rights on the domestic and international stages. Passing the WEA would thus serve not only as a continuation of the momentum built with its recent expansions, but also as an extension of the various women's rights statutes that have been passed in recent years that are, in many ways, too narrow.

*i. FGM Law*

A pertinent example of one of these statutes is found in 18 U.S. Code § 116 and is called the Female Genital Mutilation Act of 1996 ("FGM Law"). It states, in pertinent part:

[W]hoever, in any circumstance described in subsection (d), knowingly (1) performs, attempts to perform, or conspires to perform female genital mutilation on another person who has not attained the age of 18 years; (2) being the parent, guardian, or caretaker of a person who has not attained the age of 18 years facilitates or consents to the female genital mutilation of such person; or (3) transports a person who has not attained the age of 18 years for the purpose of the performance of female genital mutilation on such person, **shall be fined under this title, imprisoned not more than 10 years, or both.**<sup>192</sup>

The history of the FGM Law provides helpful credence to the argument that the WEA can serve as an important step forward in the absence of CEDAW ratification. FGM came to the forefront in

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<sup>192</sup> 18 U.S.C. § 116(a).

the mid-1990s, when 17-year-old Fauziya Kassindja escaped from Togo to the United States fleeing FGM and forced marriage in 1994.<sup>193</sup> After a campaign launched by NGO Equality Now, Fauziya was granted asylum, and “her case helped establish FGM as a form of gender-based persecution on the basis of which women could receive asylum in the [United States].”<sup>194</sup> Since the passage of the FGM Law, 16 states have passed legislation that similarly address FGM “by prohibiting its practice and instituting criminal sanctions.”<sup>195</sup> The FGM Law signals an objective by the United States to protect the personal violability of women, as was seen in the “STOP FGM Act of 2020,” which increased the maximum prison sentence to 10 years and was accompanied by a statement by former President Donald Trump, who called FGM “a form of child abuse, gender discrimination, and violence.”<sup>196</sup>

The WEA can be seen as an extension of a belief by the United States government that gender discrimination and violence against women can and should be criminalized, or at least subject to fines, penalties, or court judgments. The FGM Law is a clear example of a successful path unfinished by the government; a path to protect women from the horrors that may be bestowed upon them due to their gender. The WEA will serve to continue and broaden the types of protections that women may receive under statutes like the FGM Law through litigation. The motivations behind the FGM Law and the government’s insistence on protecting women against gender-based violence in many areas will serve as an important base to build the WEA off of. This base will help with any congressional debates on the topic of passing a new and improved statute aimed at a broader set of relevant issues in this realm.

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<sup>193</sup> *Female Genital Mutilation in the United States*, EQUALITY NOW, [https://www.equalitynow.org/fgm\\_in\\_the\\_us\\_learn\\_more/](https://www.equalitynow.org/fgm_in_the_us_learn_more/) [<https://perma.cc/RY29-9ECY>] (last visited Apr. 30, 2023).

<sup>194</sup> *Id.*

<sup>195</sup> CTR. FOR REPRODUCTIVE RTS. LEGISLATION ON FEMALE GENITAL MUTILATION IN THE UNITED STATES (2004).

<sup>196</sup> Emma Batha, *U.S. Toughens Ban on “Abhorrent” Female Genital Mutilation*, REUTERS (Jan. 7, 2021), <https://www.reuters.com/article/us-usa-law-fgm/u-s-toughens-ban-on-abhorrent-female-genital-mutilation-idUSKBN29C2OF> [<https://perma.cc/8J6S-SBS2>].

ii. *The Trafficking Victims Protection Act (“TrVPRA”)*

Another relevant transnational litigation statute to look to as an example is the TrVPA.<sup>197</sup> The TrVPA originated from the “Victims of Trafficking and Violence Protection Act” of 2000, which had two primary goals when passed: (1) “[t]o combat trafficking in persons, especially into the sex trade, slavery, and involuntary servitude, (2) [and] to reauthorize certain Federal programs to prevent violence against women.”<sup>198</sup> Importantly, the statute provides a private cause of action for litigants and victims of various forms of trafficking,<sup>199</sup> and has proven successful in vindicating the rights of trafficking victims since its inception. Specifically, by 2009, it was known that trafficking lawsuits were increasing “overall deterrence by creating financial disincentives for traffickers, who are subject to both compensatory and punitive damages if found liable for trafficking violations.”<sup>200</sup>

Beyond its success, the motivations behind passing the statute, much like those behind the FGM Law, are important to note for purposes of getting the WEA passed. In passing the TrVPA, Congress described human trafficking as being “a contemporary manifestation of slavery whose victims are predominantly women and children.”<sup>201</sup> This language makes it clear that the government had an interest in protecting the lives of women and chose litigation as a tool for doing so. The success of the TrVPA, coupled with the FGM Law, should signal that a new and improved statute meant to affirm and protect the rights of women in the broader sense should be on the horizon, particularly as an alternative to the never-ending fight to ratify the CEDAW. The WEA will be the perfect addition to

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<sup>197</sup> While the statute is usually abbreviated “TVPA,” I am abbreviating it as “TrVPA” to avoid confusion with the Torture Victim Protection Act discussion above.

<sup>198</sup> Sara Sun Beale, *The Trafficking Victim Protection Act: The Best Hope for International Human Rights Litigation in the U.S. Courts?*, 50 CASE W. RES. J. INT’L L. 17, 22-23 (2018); Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

<sup>199</sup> Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN’S L.J. 1, 1 (2005); Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 1595, 117 Stat. 2875, 2878 (2003).

<sup>200</sup> Kathleen Kim, *The Trafficked Worker as Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers*, 2009 U. CHI. LEGAL F. 247, 293 (2009).

<sup>201</sup> The Trafficking Victims Protection Act, 22 U.S.C. § 7101.

an already available sentiment to protect the rights of women since at least the mid 1990's.

Therefore, as these arguments have shown, the WEA is a statute that will fall along the lines of a natural progression from the path that the United States has put itself on with regards to women's rights. Through the current Administration's expansion of statutes aimed at protecting the human rights of individuals, coupled with already existing laws aimed at protecting narrowly tailored rights of women in court, the WEA will serve as the ultimate statute, one that takes pieces from each and serves as an adequate alternative path to CEDAW ratification.

## VI. CONCLUSION

To conclude, the United States is at a critical juncture in this very moment with regards to how it can proceed in positioning itself as a leader in the global women's rights regime. The last few decades, especially the last few years, have proved critical for the United States, which has portrayed its willingness to better engage with the global women's rights regime through its policy statements and laws. This momentum, however, has been met with legislative inaction regarding the CEDAW, leading the United States to become one of only a few countries that have not provided the treaty with domestic legal force, while women's rights are continually at risk on the domestic front.

As a result, this comment proposed an alternative route to the fight to ratify the CEDAW. Through passing the WEA, a novel transnational litigation statute, the United States can more effectively ensure the affirmation and protection of the various rights of women laid out in the international women's rights regime post-WW2; a necessary and imperative continuation of the path that the country has set itself on through the passage of other more narrowly-tailored human rights statutes in previous years. The WEA, with its various provisions aimed at curbing the violence and discrimination against women and with its intersectional approach, can be critical for the United States, and policymakers should find a way to both develop it and eventually pass it in the near future.