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International Law and the Disaggregated Democratic State: Two Case Studies on Women's Human Rights and the United States

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ABSTRACT

The two United States case studies in this paper demonstrate that whether or not a state is party to a particular treaty, in a disaggregated democratic state both the central government and different parts of the state have a remarkable range of possibilities for configuring their law and politics around that treaty and thereby configuring the contours of the state internationally. The cases center on women's human rights: San Francisco's "implementation" of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), despite the fact that the United States is not a party; and the work of the US Commission on International Religious Freedom (USCIRF), an independent bi-partisan federal agency which advises the President on sanctioning other countries for severe violations of the international right to religious freedom and is increasingly taking on issues of women's equality in that context.

The paper shows that the normative effects produced by San Francisco's CEDAW initiative are not well captured by existing schematic approaches to the behaviour of sub-state actors, which tend to apply either a linear measure of compliance with international law or some general idea about good and/or bad local variation. Applying a more ethnographic alertness to mutation and transposition, the analysis reveals that in the case of USCIRF as well, the result is both under- and ultra-compliance as these sub-state actors transform the substantive content of the treaty. The hallmark of both cases, however, proves to be more the replication of the treaty's *form* than the application of its *substance*.

KEYWORDS: human rights, gender, United States

***International Law and the Disaggregated Democratic State: Two Case-Studies on Women's
Human Rights and the United States***

Karen Knop*

I Introduction

A volume on “we the people(s)” is an apt occasion to examine how some branch, level or other part of government in a disaggregated democratic state may use international law to arrange its law and politics domestically – and how to approach such a study. This chapter offers two United States case-studies involving women’s human rights that shed light on both questions.

A *Bringing a Non-State Sensibility to the Study of the State*

As is well known, states are the only full subjects of international law, however international lawyers have also analyzed the extent to which provinces, say, or minority groups, have or should have legal personality.¹ The traditional tendency is to deal with this “who” question one category at a time, and thus important arguments specific to indigenous peoples, for instance, have been made.² Broader analytical swaths have been cut by authors who ask what would follow for international law from analyzing the state more generally as disaggregated.³ Similarly, the growth of theorizing about the “hows” of international law – how legitimacy or

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All electronic documents cited were available as of 26 June 2011.

¹ For historical context, see Fleur Johns “Introduction” in Fleur Johns (ed) *International Legal Personality* (Ashgate, Farnham (UK), 2010) xi at xii-xv.

² See for example Claire Charters “A Self-Determination Approach to Justifying Indigenous Peoples’ Participation in International Law and Policy-Making” (2010) 17 Int’l J Min & Group Rts 215.

³ See Peter J Spiro “Disaggregating U.S. Interests in International Law” (2004) 67 L & Contemp Probs 195.

compliance with international law rules can be maximized,⁴ how international law is translated into local contexts,⁵ how states create informal transnational norms and practices,⁶ – incorporates a variety of state and sometimes non-state actors into the analysis. This trend conceives of international law less in terms of “the stagecraft of an exclusive pantheon of permanent players” and more in terms of “networks, patterns and probabilities.”⁷

Particular “how” questions, though, may study a greater range of actors in international law without studying the variety of normative effects these actors create: a narrow preoccupation with rule compliance by states, observe Robert Howse and Ruti Teitel, “leads to inadequate scrutiny and understanding of the diverse complex purposes and projects that multiple actors impose and transpose on international legality.”⁸ Alternatively, as in this chapter, the aim may be to capture normative effects not contemplated by a treaty itself nor by a focus on whether the state’s actions rise to the level of compliance with the treaty.⁹ In this light, recent work on the roles played by cities in the international legal order is instructive, returning us to the “who” question in new ways.¹⁰ Yishai Blank, for instance, emphasises not the additive (yet one more sub-state candidate for international legal personhood) but rather the dual character of cities as “state agents” and “voluntary human associations.”¹¹

⁴ See for example Jutta Brunnée and Stephen J Toope *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press, Cambridge, 2010); Harold Koh “Transnational Legal Process” (1996) 75 *Nebraska L R* 181.

⁵ See for example Sally Engle Merry *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press, Chicago, 2006).

⁶ See for example Anne-Marie Slaughter *A New World Order* (Princeton University Press, Princeton, 2004).

⁷ Johns, above n 1, at xv.

⁸ Robert Howse and Ruti Teitel “Beyond Compliance: Rethinking Why International Law Really Matters” (2010) 1 *Global Policy* 127 at 128.

⁹ For examples, see *ibid*, at 131.

¹⁰ See for example Yishai Blank “The City and the World” (2006) 44 *Colum J Transnat’l L* 875; Gerald E Frug and David J Barron “International Local Government Law” (2006) 38 *Urb Law* 1; Judith Resnik, Joshua Civin and Joseph Frueh “Ratifying Kyoto at the Local Level: Sovereigntism, Federalism, and Translocal Organizations of Government Actors (TOGAS)” (2008) 50 *Arizona L Rev* 709.

¹¹ Blank, above n 10, at 936.

Indeed, an inquiry into any use of international law by a sub-state government actor should similarly be dual: set against the state's formal participation or non-participation in an international treaty, but attentive to the potential for a variety of normative effects domestically and internationally. Yet such ethnographic alertness to diversity, duration, imposition and transposition, variation and mutation is more often found in studies of non-state actors. That is, international lawyers are accustomed to the idea that a variety of non-state actors may exist in international civil society, and these actors may emerge and disappear. Their modes of engagement with international law are informal: they generate law, strictly speaking, neither internationally nor domestically – and hence there is no formal accountability. Relatedly, international lawyers recognize that non-state actors may present international law creatively in ways ranging from elaborate adaptations of state law and institutions in such forms as people's tribunals or codes of conduct, to alternative modes like street theatre. Non-state actors often trade on or cross over the margins of formal and informal law, multinational corporations pledging themselves to international legal standards, for example, or NGOs lobbying to have their manifestos adopted by states. Finally, just as non-state actors may pick up international law and interpret it in their own fashion, they may also blend it with, or trade it for, some other form of normativity.

Through an unlikely pairing of cases within a single disaggregated democratic state and a single issue area, this chapter illustrates what can be learned from bringing what might be called a “non-state sensibility” to the study of sub-state government actors, as opposed to resting on valuable but more schematic predictive models.¹² Both cases involve the United States and a sub-state government actor's use of international human rights law on issues of gender equality. First, faced with continuing opposition to United States ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),¹³ San Francisco decided

¹² More extensively ethnographic projects with this sort of sensibility include Sally Engle Merry, Peggy Levitt, Mihaela Șerban Rosen and Diana H Yoon “Law from Below: Women's Human Rights and Social Movements in New York City” (2010) 44 *L & Society Rev* 101 and Galit Sarfaty “International Norm Diffusion in the Pimicikamak Cree Nation: A Model of Legal Mediation” (2007) 48 *Harv Int'l L J* 441.

¹³ Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981).

in 1998 to go it alone and make CEDAW's underlying principles part of its local law¹⁴ – despite the fact that the United States Constitution prohibits the states from entering into treaties,¹⁵ and international law defers to national law in this regard.¹⁶ Second, while the United Nations Human Rights Committee monitors whether states party to the International Covenant on Civil and Political Rights (ICCPR) comply with the rights in the Covenant,¹⁷ among them the right to freedom of religion, the 1998 United States International Religious Freedom Act created an independent bi-partisan agency of the Federal Government to assess the performance of foreign countries on certain aspects of the Covenant's right to religious freedom.¹⁸ The Commission on International Religious Freedom (USCIRF) advises the President, the Secretary of State and Congress, including by identifying the worst violators of religious freedom as “countries of particular concern”, keeping a watch list of other countries and making recommendations that can include serious diplomatic and economic sanctions.¹⁹ Over time, it has increasingly dealt with the right to religious freedom as articulated with women's equal rights,²⁰ particularly in the context of Islam.²¹

¹⁴ Local Implementation of the United Nations Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) SF, Cal Admin Code, ss 12K.1–6 (2001) <www.sfgov3.org> [“CEDAW Ordinance”]. San Francisco is both a city and a county. For convenience, I will refer to it as a city.

¹⁵ United States Constitution, art I, § 10, cl 1 (“No State shall enter into any Treaty”).

¹⁶ See Duncan B Hollis “Why State Consent Still Matters – Non-State Actors, Treaties, and the Changing Sources of International Law” (2005) 23 Berkeley J Int'l L 137 at 146–155.

¹⁷ International Covenant on Civil and Political Rights and Optional Protocol (opened for signature 16 December 1966, entered into force 23 March 1976), part IV and Optional Protocol.

¹⁸ International Religious Freedom Act of 1998 22 USC § 6431 (1998) [“IRFA”].

¹⁹ Ibid, at § 6432(a)–(b).

²⁰ Although the Act does not incorporate any international human rights other than freedom of religion, it specifies that religious freedom is a fundamental right of every individual regardless of sex: Ibid, at § 6401(a)(3). Among severe and violent forms of religious persecution, it lists forced marriage and rape (§ 6401(a)(5)), forms of persecution more often associated with women, and it defines violations of religious freedom to include rape if committed on account of an individual's religious belief or practice (§ 6402(13)(B)).

²¹ USCIRF's Annual Reports from 2000 to 2007 are available at United States Commission on International Religious Freedom “Annual Report Archive” <www.uscirf.gov/index.php?option=com_content&task=view&id=2136&Itemid=106>. USCIRF's Annual Reports from 2008 onward are available at United States Commission on International Religious Freedom “Annual Report” <www.uscirf.gov>. USCIRF Annual Reports will hereinafter be cited by year.

B The Disaggregated State

Taken together, the two cases highlight that international law can contribute to the configuration and attributes of virtually any part of a state for virtually any length of time.²² The phenomenon of counties or cities like San Francisco endorsing or “implementing”²³ treaties suggests that in a disaggregated democratic state, the pool of sub-state government actors that shape themselves through international law can conceivably extend down to the most local.²⁴ And, along the lines of USCIRF, a government can create any number of agencies, commissions of inquiry, advisory bodies and the like with a mandate that involves international law. Indeed, the proposed International Women’s Freedom Act of 2011 would create a United States Commission on International Women’s Rights modeled on USCIRF.²⁵ The Philippine and German Governments are each considering establishing an institution similar to USCIRF, and the Canadian Government has announced the establishment of an Office of Religious Freedom within its Department of Foreign Affairs and is consulting on the appropriate structure.²⁶

Furthermore, San Francisco’s CEDAW apparatus and USCIRF’s modalities demonstrate two quite different ways that government actors within a single state can choose to organize themselves through international law (San Francisco) or be organized through international law

²² Compare Note “Constructing the State Extraterritorially: Jurisdictional Discourse, the National Interest, and Transnational Norms” (1990) 103 Harv L Rev 1273 (arguing that the state’s territory should be understood not as an invariable given, but rather as constituted as infinitely variable by the potential variety of extraterritorial regimes).

²³ Other than for emphasis, I will omit the quotation marks for reasons of style, although San Francisco’s initiative would not qualify as treaty implementation under international law.

²⁴ As a concerted strategy, see Columbia Law School, Human Rights Institute and International Association of Official Human Rights Agencies “State and Local Human Rights Agencies: Recommendations for Advancing Opportunity and Equality Through an International Human Rights Framework” at 6 <www.law.columbia.edu>. See also Sarfaty, above n 12.

This having been said, I thank Henry J Richardson, III for emphasising that not all sub-state groups are equally well positioned to access international law.

²⁵ International Women’s Freedom Act of 2011, HR 418, 112th Cong, ss 2, 201–205 and 209 (2011).

²⁶ See Department of Foreign Affairs and International Trade Canada “Address by the Honourable John Baird, Minister of Foreign Affairs, to the United Nations General Assembly” (26 September 2011) <www.international.gc.ca>; CBC News “New ‘Religious Freedom’ Office Raises Questions; Office Could be Based on American Model, Critics Warn of Potential Backlash” (3 October 2011) <www.cbc.ca>; USCIRF *Annual Report 2011*, above n 21, at 5 and 7.

(USCIRF), even within a single issue area like women's rights. San Francisco is a municipality, USCIRF is a federal agency. San Francisco is a permanent subdivision of the state, USCIRF has a fixed-term mandate. (As of this writing, it is unclear whether its mandate will be renewed.²⁷) San Francisco's CEDAW ordinance is directed inward, toward improving the lives of women and girls locally; USCIRF's mandate is mainly directed outward, toward advancing religious freedom abroad.²⁸ San Francisco's grass-roots initiative has been hailed as an innovative strategy for overcoming so-called United States exceptionalism to international human rights law,²⁹ whereas critics of the International Religious Freedom Act anticipated that what USCIRF would actually apply to other countries would be the United States Constitution's view of religious freedom, backed up by unilateral sanctions.³⁰ In the case of San Francisco, hitching one's wagon to the international is associated with the promise of social movements "from

²⁷ Nina Shea "Will the Senate Quietly Kill the U.S. Commission on International Religious Freedom?" (17 October 2011) National Review Online <www.nationalreview.com>.

²⁸ While this chapter does not deal with the aspects of the International Religious Freedom Act regarding United States immigration and refugee policy, the Commission's work on asylum seekers in the expedited removal process is noteworthy. See United States Commission on International Religious Freedom, "Frequently Asked Questions" at question 8 <www.uscirf.gov> ["FAQ"].

²⁹ See for example New York City Human Rights Initiative "Human Rights in the US" <www.nychri.org>; Catherine Powell "Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States" (2001) 150 U Pennsylvania L Rev 245.

³⁰ See for example United States Commission on International Religious Freedom "FAQ", above n 28, at question 4 ("[I]s USCIRF trying to impose American values or the American conception of separation of church and state on other countries?"); Winnifred Fallers Sullivan "Exporting Religion: Where the Religious Freedom Act Fails" (1999) 126(4) *Commonweal* 10 at 11. Contrast Christy Cutbill McCormick "Exporting the First Amendment: America's Response to Religious Persecution Abroad" (1998) 4 *J Int'l Legal Stud* 283 (favouring export of the First Amendment via IRFA).

For what critics mean by exceptionalism in this context, see Michael Ignatieff "Introduction: American Exceptionalism and Human Rights" in Michael Ignatieff (ed) *American Exceptionalism and Human Rights* (Princeton University Press, Princeton, 2005) 1 at 1:

Since 1945 America has displayed exceptional leadership in promoting international human rights. At the same time, however, it has also resisted complying with human rights standards at home or aligning its foreign policy with those standards abroad. Under some administrations, it has promoted human rights as if they were synonymous with American values, while under others, it has emphasized the superiority of American values over international standards. This combination of leadership and resistance is what defines American human rights behavior as exceptional ...

On fields of reluctance (human rights, environment, arms control) versus fields of engagement (trade, investment, legal assistance), see Nico Krisch "Weak as Constraint, Strong as Tool: The Place of International Law in U.S. Foreign Policy" in David M Malone and Yuen Foong Khong (eds) *Unilateralism and U.S. Foreign Policy* (Lynne Rienner, Boulder, 2003) 41 at 48-51.

below,”³¹ while USCIRF’s use of international law is regarded with suspicion as part of the state’s arsenal.³²

C Formal Law Inside and Informal Law Outside

While the differences between the two cases are readily apparent, the actions of San Francisco and USCIRF share a less obvious similarity: what might be called a formal law/informal law character. San Francisco’s CEDAW ordinance is municipal law and therefore has legal consequences for the city. But the United States is not a party to CEDAW, which means that the city’s actions are effectively under the radar of the law of treaties in general and of this multilateral treaty framework in particular.³³ San Francisco’s “implementation” is invisible to the Convention’s expert monitoring body, the UN Committee on the Elimination of Discrimination Against Women (the CEDAW Committee).³⁴ Thus the city’s ordinance is formal law from a domestic perspective, informal law from the international one.³⁵ Something similar is true of USCIRF. From the perspective of United States law, USCIRF is a federal agency acting under a federal statute, and the statute requires that its recommendations be considered by the Secretary of State and the President. As an independent government agency that can only

³¹ This is Merry, Levitt, Şerban Rosen and Yoon’s focus in “Law from Below,” above n 12, at 101, citing Boaventura de Sousa Santos and César A Rodríguez-Garavito “Law, Politics, and the Subaltern in Counter-Hegemonic Globalization” in Boaventura de Sousa Santos and César A Rodríguez-Garavito (eds) *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University Press, Cambridge, 2005) 1.

³² This pair of assumptions fits with what scholars of feminism, nationalism and colonialism have shown, namely, that the status of women is often treated as, on the one hand, a carrier of the nation’s most cherished traditions (hence opposition to the United States ratifying CEDAW) and, on the other, symbolic of a nation’s modernisation and advancement (hence USCIRF’s focus on women in Islamic countries). See for example Catherine Powell “Lifting our Veil of Ignorance: Culture, Constitutionalism, and Women’s Human Rights in Post-September 11 America” (2005) *Hastings LJ* 331.

³³ Because the United States has signed (although not ratified) CEDAW, it has a certain bare-bones responsibility under the law of treaties. See below n 69 and accompanying text.

³⁴ While this invisibility is the norm, it is noteworthy that the International Labour Organization monitors member states’ compliance with unratified ILO conventions. See Laurence R Helfer “Monitoring Compliance with Unratified Treaties: The ILO Experience” (2008) 71 *L & Contemp Probs* 193.

³⁵ This dual character is distinct from the much-discussed phenomenon of substituting some purely informal mode of international regulation, such as policy coordination, a model law or best practices, for the purely formal mode of a treaty.

recommend and is at some remove from United States foreign policy decisions, however, USCIRF too is mainly an informal actor as far as international law is concerned.³⁶

In the case of San Francisco, as we will see, this formal law/informal law character reminds us that *not* joining a treaty can also be a form of joining that treaty. A state's choice not to ratify an international human rights treaty does not equate with that state's not giving effect to the treaty. Instead, its choice leaves space precisely for sub-state government actors to organise themselves according to that treaty and the treaty mechanisms, or, more accurately, according to their understanding of them. How much space, of course, depends on the particular state. A constitution could prohibit such gestures outright, or by ratifying but not implementing the treaty, a state could seek to occupy the field – although constitutional law can never, of course, eliminate the possibility of the international law's unacknowledged influence.³⁷ The constitutionality of what might be called “local foreign policy” and of compacts between United States states and foreign powers³⁸ have both been well canvassed, and I do not deal with them in this chapter.³⁹ I also note but bracket the related administrative law questions which have arisen in other common-law countries.⁴⁰ The point here is simply that a state's decision not to join a treaty, and therefore to eschew formal participation organised centrally around the multilateral

³⁶ When the United States Government takes up the Commission's recommendations, the actions become simply those of the state. In the absence of take-up, it is conceivable, but remote, that the Commission's actions would be attributable to the United States under the doctrine of state responsibility. See below n 145 and accompanying text.

³⁷ See Judith Resnik “Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry” (2006) 115 Yale L J 1564 at 1594–1597.

³⁸ See Duncan B Hollis “Unpacking the Compact Clause” (2010) 88 Texas L Rev 741.

³⁹ On possible constitutional objections to San Francisco's CEDAW ordinance, see for example Gaylynn Burroughs “More than an Incidental Effect on Foreign Affairs: Implementation of Human Rights by State and Local Governments” (2006) 30 NYU Rev L & Soc Change 411 at 425–439; Judith Resnik “Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism” (2007) 57 Emory L J 31 at 71–78; Lesley Wexler “Take the Long Way Home: Sub-Federal Integration of Unratified and Non-Self-Executing Treaty Law” (2006) 28 Mich J Int'l L 1 at 41–47. Interestingly, a constitutional challenge of this type would need to take seriously the fiction of San Francisco as a “party” to CEDAW, as opposed to the downloader of a set of useful standards divorced from any community constituted by the treaty or message to the world.

⁴⁰ See Michael Taggart “Globalization, ‘Local’ Foreign Policy, and Administrative Law” in Grant Huscroft and Michael Taggart (eds) *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan* (University of Toronto Press, Toronto, 2006) 259 (discussing Canada and United Kingdom).

treaty institutions, leaves the door open to various government branches, levels or bodies to engage informally in heterogeneous national and trans-national activities oriented around the treaty.

Similarly, as we will also see, the creation of a commission like USCIRF becomes a magnet for public-private partnerships that potentially feed findings and recommendations not only into the pipeline to the Department of State and the President and via them to foreign governments, but also, perhaps more strongly, into other conduits: to Congress, to United States faith-based media, to transnational activist networks, to religious minorities abroad and so on. Thus the design of USCIRF is potentially both a formal work-through and an informal work-around.

The dual formal/informal character shared by the case-studies might seem particular to the United States or, at least, a somewhat unusual mode of using international law. Part of the point of pairing San Francisco with USCIRF is that whereas international lawyers theorize this duality in the case of San Francisco, they generally neglect it in the case of USCIRF, neglect, that is, the nature of USCIRF's existence beyond its input into the state's decision to sanction. Whether or not the formal/informal character is unusual, however, its broader interest lies in the idea that it is simply one end of a spectrum of ways in which a disaggregated democratic state may organize its law and politics domestically around international law. A state's engagement with a treaty should be studied as potentially more diverse, improvised, looser, mutable and fantasized than is captured either by traditional international law or by alternative models of how international law works.

The chapter next discusses existing approaches to the disaggregated informal state in the modes of San Francisco and USCIRF, which sets the stage for the discussion of these cases that follows.

II Approaches to the Disaggregated Informal State

In each of our two cases, the initial decision by the state is a compromise that reconfigures, but continues, some conflict over the appropriate stance for the state to take toward international law. With CEDAW, which the United States has signed but not ratified, the compromise is between those who were against even signing the treaty and those who are for ratification. In the case of

international religious freedom, the original Wolf-Specter version of the legislation would have made sanctions automatic, but encountered resistance, including from the Clinton administration concerned with its ability to conduct foreign policy, the business wing of the Republican Party with an eye on Sudan's oil reserves and other foreign opportunities, and secular human rights groups who considered sanctions counterproductive.⁴¹

The writing on local initiatives like San Francisco's CEDAW ordinance is dominated by this conflict about how the United States should engage with international law. For some authors, compromises are desirable as way stations, whether en route to ratifying a treaty or to "un-signing". For others, they are appealing as end games. For transnational legal process scholars, for instance, local treaty "implementation" is partly of interest as a way station; the hypothesis is that it might substitute for and ultimately build support for ratification and hence the achievement of a coherent multilateral application of the treaty.⁴² Indeed, this was some of the thinking behind San Francisco's initiative.⁴³ To the contrary, local implementation can be touted as an end game, where the game is cherry-picking and auto-interpreting desirable provisions of the treaty. It enables local governments to fashion what they will with the treaty without risk that the larger state will be penalized for their actions under international law. Successful informal implementation may even lessen the likelihood of ratification by demonstrating how to capture the benefits of a treaty without the burdens.⁴⁴ While any degree of international influence may be too much for the staunchest sovereigntists, local implementation as end game potentially appeals to those who see a limited role for international law and seek to bend international law to

⁴¹ See Joshua Green "God's Foreign Policy" (November 2001) Washington Monthly <www.washingtonmonthly.com>. See also William Martin "The Christian Right and American Foreign Policy" (Spring 1999) 114 *Foreign Policy* 66 at 76–78; Pew Forum on Religion and Public Life, "Legislating International Religious Freedom" (20 November 2006) <<http://pewresearch.org/>> (Allen D Hertzke speaking on the legislative battle).

⁴² See generally Harold Hongju Koh "The 1998 Frankel Lecture: Bringing International Law Home" (1998) 35 *Hous L Rev* 623 at 679 and, specifically on San Francisco, Powell, above n 29, at 276, 279 and 289–291; Cynthia Soohoo and Suzanne Stolz "Bringing Theories of Human Rights Change Home" (2008) 77 *Fordham L Rev* 459 at 495–500.

⁴³ See Martha F Davis "Thinking Globally, Acting Locally: States, Municipalities, and International Human Rights" in Cynthia Soohoo, Catherine Albisa and Martha F Davis (eds) *Bringing Human Rights Home* (Praeger, Westport (Conn), 2007) vol 2, 127 at 135.

⁴⁴ See Wexler, above n 39, at 39.

the state's rational self-interest.⁴⁵ Such a rational-choice stance is also found as a justification for United States compliance without ratification more generally. This “flying buttress mentality” – supporting but standing outside international law⁴⁶ – affords the United States freedom of action: it may comply with an unsigned treaty, or not, as it sees fit without incurring responsibility. If this is exceptionalism, it is an exceptionalism shared with other empires which strategically mixed formal with informal modes of domination.⁴⁷

Informal local implementation as an end game also resonates with legal pluralists, who celebrate local autonomy and diversity for its own sake.⁴⁸ Lastly, the end game appeals to scholars who favour reference to CEDAW's progressive standards within the United States, but predict that because of its status as the single super-power and its relatively conservative positions on certain gender issues, the United States would negatively affect those standards if it were a party and thus participated in the deliberations of the CEDAW Committee.⁴⁹ In comparison, informal reference enables the downloading of progressive standards to like-minded localities without this risk of uploading.

Similarly, the establishment of unilateral regimes such as the International Religious Freedom Act has been read as either a way to school the United States in international law or a way for the United States to take control of international law's agenda. On the school hypothesis,

⁴⁵ Ibid, at 32–38.

⁴⁶ Harold Hongju Koh “On American Exceptionalism” (2003) 55 *Stan L Rev* 1479 at 1484 (citing Louis Henkin).

⁴⁷ See for example James Thuo Gathii *War, Commerce and International Law* (Oxford University Press, New York, 2010); Martti Koskenniemi “Empire and International Law: The Real Spanish Contribution” (2011) 61 *UT LJ* 1.

⁴⁸ Janet Koven Levit's bottom-up approach to international lawmaking adds a dose of legal pluralism to transnational legal process analysis. Janet Koven Levit “A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments” (2005) 30 *Yale J Int'l L* 125 at 180–182 (noting that her approach shares much with transnational legal process); Janet Koven Levit, “Bottom-Up Lawmaking Through a Pluralist Lens: The ICC Banking Commission and the Transnational Regulation of Letters of Credit” (2008) 57 *Emory LJ* 1147 (using legal pluralism as a lens on her approach); Janet Koven Levit “Bottom-up International Lawmaking: Reflections on the New Haven School of International Law” (2007) 32 *Yale J Int'l L* 393 at 395 (“the international lawmaking universe is disaggregating into multiple – sometimes overlapping – lawmaking communities ... I ... celebrate this moment as one of possibility and promise, as an opportunity ‘to invite new worlds.’”).

⁴⁹ See Resnik, above n 37, at 1580 and 1658–1666.

certification processes such as USCIRF's can be an organising mechanism for attracting public-private consensus around international law domestically, and thus important in building a stronger international law culture within government and civil society. This account explicitly requires that the standards being applied are those found in international law and are applied even-handedly.⁵⁰ Consistent with the alternative reading of unilateral regimes as agenda setting, early commentators on USCIRF emphasised that its interpretation of the international right to freedom of religion would tend to reflect the priorities of certain interest groups within the United States, or the United States constitutional frame of mind.⁵¹ One reason for this prediction is that the legislation was initially proposed by an evangelical Christian lobby concerned with the persecution of Christians abroad and with advancing the work of their missionaries.⁵² The Act as passed encompasses all religions and beliefs. However, it is explicitly rooted in a view of religious freedom as underpinning the very origin and existence of the United States, its founders having established freedom of religion in law as "a fundamental right and as a pillar of our Nation."⁵³ Given this specifically United States vantage point, multilateralists remained troubled that USCIRF's recommendations could set in motion serious diplomatic and economic sanctions.⁵⁴

⁵⁰ See Sarah H Cleveland "Norm Internalization and U.S. Economic Sanctions" (2001) 26 *Yale J Int'l L* 1 at 85–88.

⁵¹ See above n 30. See also for example John Shattuck "Religion, Rights, and Terrorism" (2003) 16 *Harv Hum Rts J* 183 at 185; David M Smolin "Exporting the First Amendment?: Evangelism, Proselytism, and the International Religious Freedom Act" (2001) 31 *Cumb L Rev* 685. Contrast Jeremy Gunn "A Preliminary Response to Criticisms of the International Religious Freedom Act of 1998" [2000] *BYU L Rev* 841 at 845–856.

⁵² See Green, above n 41. For a detailed account of the creation of the IRFA, see Allen D Hertzke *Freeing God's Children: The Unlikely Alliance for Global Human Rights* (Roman & Littlefield, Lanham, Maryland, 2004) at ch 6.

⁵³ IRFA, above n 18, at § 6401(a)(1). For references to Christianity in the Act, see § 6401(a)(7)(A)–(B) (citing Congressional resolutions on persecution of Christians worldwide) and § 6402(13)(A)(iv) (Bibles). But see also § 6401(a)(7)(C) (citing resolution on emancipation of the Iranian Baha'i community), § 6412(b)(1)(A)(iv) (directing State Department in its country descriptions to attend to anti-Semitism).

⁵⁴ See for example Peter G Danchin "U.S. Unilateralism and the International Protection of Religious Freedom: The Multilateral Alternative" (2002) 41 *Colum J Transnat'l L* 33. Contrast T Jeremy Gunn "American Exceptionalism and Globalist Double Standards: A More Balanced Approach" (2002) 41 *Colum J Transnat'l L* 137 at 146–149 and 151–152. For further critical discussion of IRFA, see Rosalind IJ Hackett, Mark Silk and Dennis Hoover (eds) *Religious Persecution as a U.S. Policy Issue: Proceedings of a Consultation Held at Trinity College, Hartford, September 26–27, 1999* (Center for the Study of Religion in Public Life, Trinity College, Hartford (Conn), 2000); Matthew L Fore "Shall Weigh Your God and You: Assessing the Imperialistic Implications of the International Religious Freedom Act in

Commentators' interest in sub-state implementation of treaties as way stations versus end games thus tends to concentrate on working out the hypothetical consequences for international law. This necessarily involves making assumptions about the interpretation given to the substance of international law domestically, which is also true in discussions of the pros and cons of unilateral sanctions. Transnational legal process scholars who theorize that local treaty implementation will move the state toward ratification tend to assume that the interpretation given to the treaty by a proliferation of different localities will cohere with its interpretation internationally, or they posit some national way to guarantee this coherence.⁵⁵ In contrast, rational choice scholars and legal pluralists alike feature the end-game in which local interpretation of the treaty diverges from the international interpretation. And in the last account of the end-game mentioned above, the advantage of non-ratification rests on the assumption that liberal localities will download the international interpretation coupled with the assumption that if the United States were a party, it would upload its more conservative interpretation through the multilateral treaty regime.

As will be shown, the assumption or desideratum that sub-state government actors will be faithful to the treaty does not quite hit the mark: in each of the case-studies, the actors draw on the respective treaty in ways that change its thrust, or they innovate in ways not well captured by a scale of fidelity that stops at "faithful". Howse and Teitel argue generally that prominent theories of compliance fail to register the normative effect Howse and Teitel term "ultracompliance:" "autonomous from that of compliance ... effects which go beyond what is desired from the perspective of the objectives of the legal regime, and which may even be perverse."⁵⁶ At the same time, assumptions that actors will vary, or value varying, the treaty for reasons of national interest or pluralism are also short of the mark. In the case-studies, there is evidence that those involved understand their interpretations as true to the treaty or at least to one

Muslim Countries" (2002) 52 Duke L J 423; Eugenia Relaño Pastor "The Flawed Implementation of the International Religious Freedom Act of 1998: A European Perspective" [2005] *BYU L Rev* 711 at 738–746.

⁵⁵ Powell, above n 29, at 270–271, 280, 283 and 293. See also Shanna Singh "Brandeis's Happy Incident Revisited: U.S. Cities as the New Laboratories of International Law" (2005) 37 *Geo Wash Int'l L Rev* 537 at 553–557.

⁵⁶ Howse and Teitel, above n 8, at 130.

position in existing international debates about its meaning.⁵⁷ While it is true, of course, that no state responsibility would attach to variation, this is not what motivates these actors. Finally, the argument for local downloading without the anticipated risks of United States uploading does not pursue (although does not exclude) the possibility of uploading local variations.

In addition, applied to our case-studies, these various hypotheses about interpretation focus mainly on the shaping of the domestic discussion by the substantive content of the rights in CEDAW or the international right to religious freedom, or vice versa. The two case-studies suggest, however, that what is at work is less the obligations *in* the treaties and more the techniques *of* them. What stands out is the transposition of techniques familiar from the UN human rights treaty bodies: regular reporting, scrutiny of the reports by an expert body, persuasion in place of coercion. These techniques arguably function at two levels. At the domestic level, they are the tools to carry out gender mainstreaming under San Francisco's ordinance or to operationalize part of a legislative regime of unilateral sanctions for violations of international religious freedom. At a domestic level imagined to be international, they function in lieu of access to the UN CEDAW Committee or in lieu of a UN treaty body on religion.⁵⁸

Finally, models of the uses of international law that are closely tuned to the substantive commitments assumed under a treaty or to compliance with these commitments may not register changes in sub-state government actors' uses of the treaty over time, in particular, the ways in which the treaty may become yesterday's paradigm for them.

II San Francisco's CEDAW Ordinance

⁵⁷ Interview with Elizabeth K Cassidy, Deputy Director for Policy and Research, United States Commission on International Religious Freedom (the author, Washington DC, 2 May 2011).

⁵⁸ In attending to form, I join legal anthropologists Annelise Riles *The Network Inside Out* (University of Michigan Press, Ann Arbor, 2000) and Merry, Levitt, Rosen and Yoon, above n 12, at 114, 115–116 and 118 (arguing that in the campaign to “implement” CEDAW and the Convention on the Elimination of All Forms of Racial Discrimination (CERD) in New York City, the focus shifted from actualizing the texts of the human rights to instituting the reporting and monitoring used by the human rights treaty bodies). See also Stacy Laira Lozner “Diffusion of Local Regulatory Innovations: The San Francisco CEDAW Ordinance and the New York City Human Rights Initiative” (2004) 104 Colum L Rev 768 at 783 (noting that San Francisco imported the normative model of compliance found in international human rights regimes). Whereas Merry, Levitt, Rosen and Yoon, and Lozner are concerned with the “process principles” as such, my interest is in the international as well as national, virtual as well as actual, effects of this treaty body-like behaviour.

A *Overview of CEDAW*

The Convention on the Elimination of All Forms of Discrimination Against Women is often described as an international bill of rights for women. Based on the recognition that “extensive discrimination against women continues to exist,”⁵⁹ it affirms the right of all women to exercise their human rights in the political, economic, social, cultural, civil or any other field on an equal basis with men. Under CEDAW, discrimination means any sex-based distinction, exclusion or restriction which has the effect or purpose of impairing women’s equal rights. It permits states to take temporary special measures aimed at accelerating *de facto* equality between men and women, and directs states to modify social and cultural patterns of behaviour based on the idea of one sex’s superiority or inferiority over the other, or on stereotyped roles for men and women. CEDAW goes beyond civil and political rights, specifying what equality entails in education, employment, health care and other areas of economic and social life including family benefits, bank loans and mortgages, and sports. In matters related to marriage and family relations, CEDAW obliges states to ensure women, *inter alia*, the same rights as men to marry, the same rights and responsibilities during marriage and at its dissolution, the same rights and responsibilities as parents, and the same rights to decide on the number and spacing of their children.⁶⁰

CEDAW was adopted in 1979 by the UN General Assembly and signed by United States President Carter the following year. Close to three decades later, CEDAW remains un-ratified by the United States, which also has not signed the Optional Protocol. Attempts to ratify have encountered strong opposition, although there are indications the Obama Administration may transmit CEDAW to the Senate Committee on Foreign Relations for its advice and consent.⁶¹ This resistance is partly based on the firmly held convictions of some that CEDAW would compromise United States values as they see them, including by promoting stronger abortion

⁵⁹ CEDAW, above n 13, Preamble.

⁶⁰ *Ibid*, arts 1, 3–5, 10–13 and 16.

⁶¹ See generally Luisa Blanchfield “The U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): Issues in the U.S. Ratification Debate” (Congressional Research Service, R40750, 15 April 2011) <fpc.state.gov>; and at 4 (for the Obama Administration’s position).

rights, altering gender roles and destabilising families, decriminalising prostitution, prohibiting same-sex education, authorising same-sex marriage – and even outlawing Mother’s Day.⁶²

Faced with this impasse, a number of United States states, counties and cities have endorsed United States ratification of CEDAW.⁶³ San Francisco has gone further. In 1998, the city passed an ordinance implementing the Convention’s underlying principles within the city’s areas of jurisdiction.⁶⁴ In addition, it later incorporated the need to examine the intersection of gender and race and the particular experiences faced by women of colour with reference to the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),⁶⁵ a treaty the United States has ratified but not implemented.⁶⁶ Several other sub-federal jurisdictions have followed San Francisco by undertaking similar efforts, whether to implement CEDAW alone or in combination with CERD.⁶⁷

San Francisco’s adoption of CEDAW is, of course, not binding on the United States under international law. The United States therefore cannot be scrutinised by the CEDAW Committee, nor can state parties to CEDAW take action against the United States for breach of the Convention. In contrast, because Brazil is a party, the 1992 Paulista Convention on the Elimination of All Forms of Discrimination Against Women adopted by the state of São Paulo and many São Paulo municipalities is part of Brazil’s implementation of CEDAW, for which it is answerable internationally.⁶⁸ The one qualification is that because the United States is a

⁶² See *ibid*, at 11–18 and 19–21.

⁶³ For a list of states, counties and cities that have passed resolutions about CEDAW as of July 2005, see New York City Human Rights Initiative “States, Counties and Cities That Have Passed Resolutions About CEDAW” <www.nychri.org>.

⁶⁴ CEDAW Ordinance, above n 14.

⁶⁵ *Ibid*, at ch 12K.1(e), 12K.1(f)(3) and 12K.3.

⁶⁶ International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969). The United States ratified CERD in 1994. See *Report of the Committee on the Elimination of Racial Discrimination* at 65, A/56/18 (2001) (noting the absence of specific implementing legislation).

⁶⁷ On New York City see Merry, Levitt, Rosen and Yoon, above n 12. For other initiatives see New York City Human Rights Initiative “Other Human Rights Initiatives and Resources” <www.nychri.org>.

⁶⁸ See Ilana Landsberg Lewis (ed) *Bringing Equality Home: Implementing the Convention on the Elimination of All Forms of Discrimination Against Women* (United Nations Development Fund for Women, New York, 1998) at 14–16 <www.unifem.org>.

signatory, the general law of treaties requires it to refrain from acts that would defeat CEDAW's object and purpose unless it has made clear its intention not to become a party.⁶⁹ Thus the United States might be held accountable for San Francisco's actions should they have a fundamentally negative impact.⁷⁰

The other side of the coin is that San Francisco cannot participate in and be judged by the CEDAW Committee even if it so chooses. State parties are required to submit periodic reports to the CEDAW Committee indicating the measures they have adopted to give effect to the CEDAW's provisions. During the Committee's annual sessions, its members discuss these reports with the government representatives and explore with them areas for further action by the specific country. The Committee also makes general recommendations to the parties. If a state is party to the 1999 Optional Protocol to CEDAW,⁷¹ the CEDAW Committee can also consider communications by or on behalf of individuals or groups under the state's jurisdiction who claim to be victims of a violation of a CEDAW right. Parties participate in the interpretation of CEDAW through these interactions with the CEDAW Committee, and also through their right to nominate an expert to the Committee and to vote on the election of its members.

B From Bill of Rights to Principles of Governance

San Francisco's goal is to implement CEDAW's underlying principles. Its CEDAW ordinance spells out "local principles" in three major areas: economic development, violence against women and girls, and health care. The ordinance covers the city's employment practices, its allocation of funding and its provision of both direct and indirect services. It requires the city to work toward integrating principles of gender equity and human rights into all city operations.

⁶⁹ This is the rule under the Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980). The United States is not a party, but for the case that this is also customary international law, see Joni S Charme, "The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma" (1991) 25 *Geo Wash J Int'l L & Econ* 71 at 74–85.

⁷⁰ See International Law Commission "Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries" in *Report of the Law Commission on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001)*, art 4 and commentary, at 40–42 and especially 41–42, A/56/10 (2001) <untreaty.un.org/ilc/texts/texts.htm>.

⁷¹ Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (opened for signature 6 October 1999, entered into force 22 December 2000).

Selected departments, programs and policies, and private entities to the extent permitted by law, must undergo a gender analysis and must develop an action plan. The ordinance created a CEDAW Task Force charged with carrying out CEDAW's local implementation and composed of both governmental and non-governmental representatives.⁷² The first step in the process was the preparation of a set of guidelines to assist city departments in carrying out a gender analysis.⁷³ The Task Force oversaw the gender analysis of six city departments and provided progress reports to the mayor and Board of Supervisors.⁷⁴ San Francisco's Commission on the Status of Women now oversees the implementation of the CEDAW Ordinance.⁷⁵

The Departments of Adult Probation and of Juvenile Probation, Department of the Environment, Department of Public Works, the Arts Commission and the Rent Board have all completed gender analyses and two or more follow-up reports. The Department on the Status of Women itself (as distinct from the Commission on the Status of Women) also submitted a gender analysis report. In addition, gender analyses of commissions, boards and task forces and a gender analysis of city departments' budget cuts have been conducted.⁷⁶ Public Works was chosen as one of the first two departments to undergo analysis because of "its large size, non-traditional employment opportunities for women and provision of public infrastructure services such as street construction and building design."⁷⁷ The resulting statistics revealed some obvious gender disparities. For example, only two percent of the skilled craftspeople in the Department were women, as compared to nine percent in the San Francisco Bay Area workforce overall.

⁷² CEDAW Ordinance, above n 14, s 12K.3–5. See generally Anu Menon, *Human Rights in Action: San Francisco's Local Implementation of the United Nations' Women's Treaty (CEDAW)* (Department on the Status of Women, City and County of San Francisco, San Francisco, 2010) <www.sfgov3.org>.

⁷³ Menon, *ibid*, at 2–4. The Gender Analysis Guidelines, since revised, are available at City and County of San Francisco, Department on the Status of Women "Gender Analysis Guidelines" (July 2008) <www.sfgov3.org>.

⁷⁴ City and County of San Francisco, Department on the Status of Women "Progress Reports" <www.sfgov3.org>.

⁷⁵ City and County of San Francisco, Department on the Status of Women "CEDAW Task Force 1998–2006" <www.sfgov3.org>.

⁷⁶ City and County of San Francisco, Department on the Status of Women, "Gender Analysis Reports" <www.sfgov3.org>. For an overview, see Menon, above n 72, at 4–10.

⁷⁷ Menon, above n 72, at 5. Department of Public Works "Gender Analysis Report 1999" (1999) City & County of San Francisco <www.sfgov3.org>. Follow-up reports were provided in 2001, 2002, 2006 and 2007, and a gender analysis of the departmental budget was conducted for 2007–2008.

Women were seven percent of the architects, yet comprised twenty percent of all architects in the Bay Area. They were fifteen percent of the engineers, slightly above the percentage of women in the Bay Area pool of engineers.⁷⁸ Among the Department's responses were the adoption of part-time, flex-time and compressed work week schedules, which would benefit female employees with family responsibilities,⁷⁹ and plans for increased job-training and mentoring, including specifically for women employees.⁸⁰ In addition, the Department started a women engineers' caucus.⁸¹

With respect to the Department's provision of services, better street lights are often cited as an example of CEDAW's everyday impact. The Public Works Department upgraded the lighting in certain neighbourhoods, which had a greater impact on women's safety than men's because women are at greater risk on dark streets.⁸² Curb cuts are another such illustration. In 2006, Public Works reported positive feedback on its curb ramp programme from families with

⁷⁸ Public Works "Gender Analysis Report 1999", *ibid*, at s 3(a). See also s 5 (Recommendations) and compare, for example, Department of Public Works "Survey Update – 2001" (2001) City & County of San Francisco at s 4(a) <www.sfgov3.org> (13% of architects, for increase of 5%; 18% of engineers, for increase of 3%) and Department of Public Works "2006 Update" (2006) City & County of San Francisco at s II <www.sfgov3.org> (13% of architects, holding steady; 21% of engineers, for a further gain of 3%).

⁷⁹ Public Works "Gender Analysis Report 1999", above n 77, at s 3(c). See also s 5 (Recommendations) and compare, for example, Public Works "Survey Update – 2001", above n 78, at s 4(c) (finding work-life policies and practices effective in retaining employees, improving morale and helping employees balance family obligations and career demands, and continuing to offer part-time, flex-time and compressed work week schedules) and Public Works "2006 Update", above n 78, at s IV (in addition to continuing to offer part-time, flex-time and compressed work week schedules, adoption of a telecommuting program).

⁸⁰ Public Works "Gender Analysis Report 1999", above n 77, at s 3(b). See also s 5 (Recommendations) and compare, for example, Public Works "Survey Update – 2001", above n 78, at s 4(b) (detailing new developmental resources added for employees, including the establishment of the Women's Mentoring Program following from the initial CEDAW report); Public Works "2006 Update", above n 78, at s VI (detailing continuing training and development programs, notably increased female attendance at the Department's twelve-week management training program for engineers and architects and the development of the women's support group begun in 2001 from a forum in which women's concerns could be comfortably discussed into the Women's Enrichment Group which meets monthly and is envisaged as a grassroots self-lead group that will take on issues such as childcare and work hours) and Department of Public Works "2007 Update" (Oral Report) (2007) City & County of San Francisco <www.sfgov3.org> (describing the growth of the Women's Enrichment Group (also open to men) from a dozen women to more than seventy).

⁸¹ Public Works, "Gender Analysis Report 1999", above n 77, at s 3(b).

⁸² *Ibid*, at s 2(a).

children in strollers.⁸³ “Let’s think about who uses curb cuts: primarily caregivers to the very young (in strollers) and the very old (in wheelchairs),” the executive director of the city’s Department on the Status of Women has stated, “Caregivers are predominantly women, so women are disproportionately impacted when curb cuts do not exist at our street corners.”⁸⁴ Examples from other San Francisco departments could be added.

Furthermore, department-by-department reporting led to the conclusion that issues of work-life balance required attention across *all* city agencies. In 2001 the Commission on the Status of Women produced a policy report on work-life policies and practices in thirty-nine different city agencies, collecting information that helped pave the way for paid parental leave legislation passed in 2002.⁸⁵ Another city-wide report was the first local government publication to focus on girls’ issues and concerns based on disaggregated gender and race data, documenting, for example, “the disproportionately high percentages of African American girls in the juvenile justice and foster care systems where gender-specific services were scarce.”⁸⁶ In 2003, a five-year CEDAW Action Plan was approved, with the overall vision being that ultimately:

- All aspects of public and private sector will fully integrated [sic] CEDAW into their systems and structures; and
- Everything that happens to San Francisco women and girls will be interpreted and acted upon using the CEDAW conceptual framework, analysis and language.⁸⁷

Although the Convention is a rights protecting document, and human rights charters designed for cities do exist (for example, the European Charter for the Safeguarding of Human Rights in the

⁸³ Public Works, “2006 Update”, above n 78, at s VII(b).

⁸⁴ Emily M Murase “Testimony of Emily M. Murase, PhD, Executive Director, San Francisco Department on the Status of Women, Intro 512 – Human Rights GOAL Hearing, Governmental Operations Committee, New York City Council, Friday, April 8, 2005” (2005) New York City Human Rights Initiative at 3 <www.nychri.org>.

⁸⁵ Ann Lehman and Jennifer Mitchell “Work-Life Policies and Practices Survey Report” (September 2001) City & County of San Francisco <www.sfgov3.org>. For an overview of city-wide initiatives, see Menon, above n 72, at 10.

⁸⁶ Menon, above n 72, at 10. Ann Lehman and Carol Sacco “A Report on Girls in San Francisco: Benchmarks for the Future” (2003) City & County of San Francisco <www.sfgov3.org>.

⁸⁷ “CEDAW Action Plan” (2003) City & County of San Francisco <www.sfgov3.org>.

City and the Montréal Charter of Rights and Responsibilities),⁸⁸ San Francisco’s ordinance is not framed as a charter of rights which can be enforced.⁸⁹ In this major respect, the ordinance changes the fundamental nature of CEDAW.⁹⁰

Instead the ordinance aims for gender mainstreaming, a concept that had become popular internationally by the time of the UN Fourth World Conference on Women in Beijing in 1995, appears throughout the Beijing Declaration and Platform for Action, and was taken up by the United Nations.⁹¹ For San Francisco, gender mainstreaming entails integrating CEDAW’s principles of gender equity into the way the city operates - each day every day - and the ways in which it makes policy. The ordinance emphasises education, fostering awareness, disseminating information and best practices, and building capacity. The CEDAW Task Force was not a regulatory body; it relied on a process of reporting, monitoring and capacity building.⁹² That is, the approach to compliance is “voluntary”.⁹³

⁸⁸ “European Charter for the Safeguarding of Human Rights in the City” <www.idhc.org/cat/documents/Carta_ingles.pdf>. Montréal Charter of Rights and Responsibilities (adopted by Montréal city council 20 June 2005, in effect 1 January 2006) <ville.montreal.qc.ca>. In a different vein, see European Charter for Women in the City <www.cityshelter.org>. See also Lesley Wexler “The Promise and Limits of Local Human Rights Internationalism” (2010) 37 *Fordham Urb L J* 599 at 617–621 (giving a typology of human rights legislation and ordinances by cities).

⁸⁹ See CEDAW Ordinance, above n 14, s 12K.3(d).

⁹⁰ See CEDAW, above n 13, art 2; and Committee on the Elimination of Discrimination against Women *General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women* CEDAW/C/GC/28 (2010) <www2.ohchr.org/english/bodies/cedaw/comments.htm>. See also arts 3 and 24. For a detailed list of CEDAW legislative indicators of compliance, developed in conjunction with UNIFEM and the United Nations Development Programme Pacific Centre, see Vedna Jivan and Christine Forster *Translating CEDAW into Law: CEDAW Legislative Compliance in the Cook Islands* (UNDP Pacific Centre and UNIFEM Pacific Regional Office, Suva (Fiji), 2008). On the limitations of the San Francisco ordinance, see Davis, above n 43, at 137 (“In fact, many of the changes generated by the CEDAW ordinance are so small and limited that, according to one report, ‘few residents are even aware that the city adopted the treaty.’”).

⁹¹ See “Beijing Declaration and Platform for Action” in *Report of the Fourth World Conference on Women: Beijing, 4-15 September 1995* 1 at [79], [105], [123], [141], [164], [189] and [229], A/CONF.177/20/REV.1 (1996); Hilary Charlesworth “Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations” (2005) 18 *Harv Hum Rts J* 1 at 3.

⁹² See Lozner, above n 58, at 783–785.

⁹³ Andrew Stelzer “For U.S., Lessons in CEDAW From San Francisco” (25 November 2009) Inter Press Service <www.ipsnews.net> (quoting Emile Murase, former chair of the CEDAW Task Force).

San Francisco's CEDAW ordinance therefore looks unlike the familiar implementation of women's international human rights. Indeed, the city's extensive CEDAW reporting is striking for its lack of reference to — CEDAW, its framework, provisions or jurisprudence. The reflection of CEDAW is instead found in the local reproduction of the CEDAW *Committee* mechanisms: San Francisco's ordinance involves one group of municipal bureaucrats reporting regularly to another, who respond with their assessment of the progress toward gender equity and recommendations for improvement.⁹⁴

Indeed, San Francisco's local expert oversight body assumes a twofold importance. First, gender mainstreaming generally is not self-explanatory (is the aim integration of gender into existing policy paradigms or the transformation of these paradigms?), and, some argue, mainstreaming's vision of gender equality cannot be distinguished from the strategy to get there.⁹⁵ Second, absent access to the "real" CEDAW Committee, there is no authoritative way to determine, for example, whether San Francisco's state-of-the-art automatic public toilets (APTs) give effect to CEDAW's principles on violence against women, as claimed by the city's Public Works Department. Although the program that places free or low-cost single-occupant APTs throughout the city is gender neutral on its face, "the fact that these toilets are self-locking and are equipped with emergency 911 call buttons provide added security and other benefits to women ... In effect, the new single occupant APTs could provide a buffer from potential assault."⁹⁶ Yet Seattle's experience with APTs, for example, was that they became a magnet for drug use and prostitution.⁹⁷

C Projecting an International

⁹⁴ Compare Sylvia Walby "Gender Mainstreaming: Productive Tensions in Theory and Practice" (2005) 12 Soc Pol 321 at 322 and 331–336 (discussing whether gender mainstreaming privileges expertise over democracy).

⁹⁵ Ibid, at 321–329.

⁹⁶ Public Works "Survey Update – 2001", above n 78, at s 2.

⁹⁷ See Christopher Maag "Seattle to Remove Automated Toilets" (17 July 2008) The New York Times <www.nytimes.com>.

What does San Francisco's alternative to the formal CEDAW regime look like more generally? Locally, San Francisco replicated the UN CEDAW Committee's expertise somewhat by requiring two of the eleven members of the city's CEDAW Task Force to be community members who worked in the field of international human rights and were knowledgeable about CEDAW.⁹⁸ One member was from the Women's Institute for Leadership Development for Human Rights (WILD), and the other from Amnesty International. WILD was founded after the 1995 UN Fourth World Conference on Women in Beijing in response to the call to "bring Beijing home" and describes itself as the first organisation in the United States to use international human rights law at the local level. In partnership with the San Francisco Commission on the Status of Women, Amnesty International and other community organisations, WILD was the lead force behind San Francisco's implementation of CEDAW.⁹⁹

Internationally, the CEDAW Committee Chairperson has, in fact, made brief reference to "the decision by certain local authorities of Monroe County, New York to follow the example of San Francisco", drawn to her attention by unspecified "letters".¹⁰⁰ Some of the other UN human rights treaty bodies,¹⁰¹ Charter-based human rights bodies and UN agencies dealing with gender issues are other potential fora in which San Francisco's "implementation" of CEDAW could be

⁹⁸ CEDAW Ordinance, above n 14, s 12K.5(d)(1). The task force was extended in 2003, and the members of the successor committee were "expected to have a commitment to the values and principles of CEDAW, and knowledge and experience" in one or more enumerated areas, one of which was human rights issues. "CEDAW Action Plan" above n 87 ("Membership").

⁹⁹ Department on the Status of Women "Progress Report #6" (December 2001) City & County of San Francisco <www.sfgov3.org>. WILD is now housed at the Miller Institute for Global Challenges and Law, University of California at Berkeley: "WILD for Human Rights" Berkeley Law <www.law.berkeley.edu>.

¹⁰⁰ Committee on the Elimination of All Forms of Discrimination Against Women *Summary Record of the 445th Meeting*, 17 January 2000, UN Doc. CEDAW/C/SR.445 (26 July 2001) at 3. See also Committee on Non-Governmental Organizations *Quadrennial reports for the period 2006-2009 submitted by non-governmental organizations in consultative status with the Economic and Social Council through the Secretary General pursuant to Council resolution 1996/31* UN Doc. E/C.2/2011/2/Add.31 (10 May 2011) at 17 (Women's Intercultural Network).

¹⁰¹ The UN Human Rights Committee, which monitors the ICCPR, has registered its concern about the reported persistence of employment discrimination against women in the United States. Human Rights Committee *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding observations of the Human Rights Committee: United States of America* at [28] CCPR/C/USA/CO/3/Rev.1 (2006).

considered.¹⁰² The Universal Periodic Review considers member states' actions to improve the human rights situations in their countries and to fulfil their human rights obligations, and, in fact, San Francisco's Department on the Status of Women testified as part of the Federal Government's consultations with civil society in the lead-up to the United States report submitted in 2010 to the UN Human Rights Council as part of the Universal Periodic Review.¹⁰³ The United States report, however, does not mention San Francisco.¹⁰⁴

In contrast, cutting-edge gender initiatives by the city have been recognised as positive local experiments in CEDAW implementation by the UN Development Fund for Women (UNIFEM). UNIFEM showcased the San Francisco model in its 1998 report on CEDAW implementation¹⁰⁵ and, more recently, in the context of gender responsive budgeting.¹⁰⁶ In 2003, the San Francisco Board of Supervisors passed a resolution urging all city departments to quantify the impact of proposed budget cuts on employment and services to the public, disaggregated by gender, race and other identities.¹⁰⁷ In 2008, staff of the Mayor's Budget Office received training in gender-responsive budgeting, which led the Office to survey all city departments to ascertain their policies and practices in data collection and how that data is used in developing programmes and policies.¹⁰⁸ In 2010, San Francisco's efforts received the Americas Award, a UN joint initiative

¹⁰² See Charlesworth, above n 91, at 6–11.

¹⁰³ Department on the Status of Women "Department at the United Nations 2010" (2010) City & County of San Francisco <www.sfgov3.org>.

¹⁰⁴ Human Rights Council Working Group on the Universal Periodic Review *National report submitted in accordance with paragraph 15(a) of the annex to Human Rights Council Resolution 5/1 A/HRC/WG.6/9/USA/1* (2010).

¹⁰⁵ Lewis, above n 68, at 26–28.

¹⁰⁶ Diane Elson *Budgeting for Women's Rights: Monitoring Government Budgets for Compliance with CEDAW* (United Nations Development Fund for Women, New York, 2006) at 43–44 <www.unifem.org> (UNIFEM has since become part of the new UN Entity for Gender Equality and the Empowerment of Women, known as UN Women.). See also Commission on the Status of Women *Statement Submitted by Human Rights Advocates, a non-governmental organization in consultative status with the Economic and Social Council* UN Doc. E/CN.6/2010/NGO/1 (7 December 2009) at 4–5.

¹⁰⁷ San Francisco Board of Supervisors *Resolution urging City Departments to consider a CEDAW gender analysis and impact on the City's Equal Access to City Services For Limited English Speakers Ordinance prior to proposing departmental budget and/or staff cuts* Res 249–03 <www.ci.sf.ca.us>.

¹⁰⁸ Menon, above n 72, at 9. Department on the Status of Women *Gender Responsive Budgeting: A Path to Accountability and Data-Based Policy-Making* (City and County of San Francisco, San Francisco, 2010) <www.sfgov3.org>.

with the Organization of American States and the Atlanta hub of the UN network *Centre International de Formation des Autorités/Acteurs Locaux* (CIFAL), in the category of “Promoting Gender Equality and Empowering Women.”¹⁰⁹ The CIFAL network, however, is aimed at developing the capacity of local actors to implement the Millennium Development Goals and thus not centrally concerned with CEDAW.¹¹⁰

Most attention from commentators has focused on the extent to which San Francisco’s model of CEDAW implementation has spread translocally,¹¹¹ mainly within the United States but also internationally. San Francisco’s strategy has been a precedent for local CEDAW implementation by other United States municipalities, and participants in the San Francisco process have been in extensive contact with leaders of these other efforts, notably the New York City Coalition.¹¹² The New York bill resembles the San Francisco ordinance in implementing CEDAW and CERD as principles of governance via UN-style reporting and monitoring.¹¹³

San Francisco’s self-presentation as “implementing” CEDAW arguably helps to brand and package its initiatives for export. The website of San Francisco’s Department on the Status of Women includes a PDF booklet with an overview of the city’s CEDAW initiatives together with all of the analytical tools and resources needed to replicate them.¹¹⁴ It also reports that the year 2010 “has cemented the Department’s role as a global player in the field of human rights. From March 2010 through June 2010, Department staff have educated and trained hundreds of individuals at events sponsored by the United Nations and the Global Compact about our

¹⁰⁹ “San Francisco Receives Prestigious International Award for Gender Equality Work” (2010) Friends of the San Francisco Commission on the Status of Women <www.friendscosw.org/award>.

¹¹⁰ See United Nations Institute for Training and Research, Local Development Programme “What We Do” and “CIFAL Network” <www.unitar.org>.

¹¹¹ See Resnik, above n 37, at 1638–1643. For a cautionary note, see Judith Resnik “Comparative (In)Equalities: CEDAW, the Jurisdiction of Gender, and the Heterogeneity of Transnational Law Production” ICON (forthcoming) (quantifying CEDAW’s small footprint in United States case law and law reviews).

¹¹² Lozner, above n 58, at 796.

¹¹³ Merry, Levitt, Rosen and Yoon, above n 12, at 115.

¹¹⁴ Menon, above n 72.

groundbreaking work implementing the Women’s Human Rights (CEDAW) ordinance here in San Francisco.”¹¹⁵

D – A New International? San Francisco’s Gender Equality Principles Initiative

If we think of the city of San Francisco as projecting, so to speak, its own international, then its recently launched Gender Equality Principles lead us to ask whether this international has shifted in form from a multilateral human rights treaty paradigm to one of corporate social responsibility.¹¹⁶

CEDAW standards apply to private actors, and the UN CEDAW Committee has emphasised that the obligation to eliminate discrimination by any public or private actor is not limited to constitutional or legislative measures, but should also include measures that ensure the practical realisation of women’s equality with men and ensure that women are able to make complaints about violations of their rights under CEDAW and have access to effective remedies.¹¹⁷ San Francisco’s CEDAW Ordinance is vaguer, stating that “there is a need to work toward implementing the principles of CEDAW in the private sector.”¹¹⁸ The city’s Gender Equality Principles “offer practical standards to which companies can aspire and a measure against which they can assess their progress on 7 fundamental gender equality issues.”¹¹⁹ In 2008–2009, the Gender Equality Principles Initiative’s first year, 18 of San Francisco Bay Area’s largest companies joined the Initiative, including Deloitte and IBM.¹²⁰ The Principles are based on the Calvert Women’s Principles, a global code of conduct for corporations launched in 2004 by the Calvert Group, a large United States group of socially responsible mutual funds, in partnership with UNIFEM.¹²¹ Calvert describes its Women’s Principles as the first comprehensive attempt to gather well-established labour and human rights standards affecting women and apply them

¹¹⁵ “Department at the United Nations 2010”, above n 103.

¹¹⁶ The Gender Equality Principles are available at <www.genderprinciples.org>.

¹¹⁷ CEDAW, above n 13, art 2(e)–(f); Committee on the Elimination of Discrimination against Women *General recommendation No. 28*, above n 90, at [36].

¹¹⁸ CEDAW Ordinance, above n 14, s 12K.1(c).

¹¹⁹ Gender Equality Principles, above n 116.

¹²⁰ Menon, above n 72, at 11.

¹²¹ Calvert Investments “Special Report: Calvert Women’s Principles®” (2010) <www.calvert.com>.

directly and specifically to corporate conduct, and as supportive of CEDAW's goals.¹²² Yet San Francisco's Gender Equality Principles shift the city away not only from remedies for individuals but also from the reporting and monitoring techniques that characterise its work with government entities, toward a voluntary and also aspirational and self-regulating model.

III The United States Commission on International Religious Freedom and Women's International Human Rights

In comparison to San Francisco's CEDAW Ordinance, the United States Commission on International Religious Freedom is a less obvious instance of a sub-state government entity active on gender equality in a way that applies select aspects of an international human rights treaty yet flies below the relevant multilateral treaty regime. This part therefore begins by showing that USCIRF's relevance extends beyond its impact on state sanctions and by tracing USCIRF's increasing attention to issues of gender equality.

A Overview of USCIRF

Created by the 1998 International Religious Freedom Act, the United States Commission on International Religious Freedom is an independent bi-partisan agency of the Federal Government that advises the President, the Secretary of State and Congress.¹²³ It monitors international religious freedom abroad, as defined by the internationally recognised right to freedom of "religion and religious belief and practice" in article 18(1) of the International Covenant on Civil and Political Rights and article 18 of the Universal Declaration of Human Rights (UDHR).¹²⁴ USCIRF designates governments that engage in or tolerate particularly severe violations as countries of particular concern (CPCs), "particularly severe" violations of religious freedom being defined by the Act as "systematic, ongoing, and egregious," including torture, prolonged detention without charge, disappearances, or "other flagrant denial[s] of the right to life, liberty, or the security of persons". In addition, it places governments found to engage in other violations of religious freedom on its Watch List. Based on its findings, USCIRF recommends

¹²² Calvert Investments *The Calvert Women's Principles: A global code of conduct for corporations* (Calvert Group, Bethesda, MD, 2009) at [4] and [12] <www.calvert.com>.

¹²³ IRFA, above n 18, at §§ 6431 and 6432(a)–(b).

¹²⁴ *Ibid.*, at §§ 6401(a)(2)–(3) and 6402(13).

options for individual countries including diplomatic inquiries, diplomatic protest, condemnation within multilateral fora, delay or cancellation of cultural or scientific exchanges, delay or cancellation of working, official or state visits, reduction or termination of certain assistance funds, imposition of targeted or broad trade sanctions, and withdrawal of the chief of mission.¹²⁵

USCIRF's work revolves around its annual report,¹²⁶ which, as currently organized, considers CPCs, countries on the Watch List and additional countries closely monitored.¹²⁷ USCIRF also evaluates the Department of State's work in promoting international religious freedom,¹²⁸ and discusses in its annual report how to promote international religious freedom through multilateral institutions, specifically the United Nations and the Organization for Security and Cooperation in Europe (OSCE). USCIRF issued its first report in May 2000,¹²⁹ and its mandate was set to expire in September 2011.¹³⁰ The date was extended to mid-November, but, as of this writing, the reauthorization legislation is being held up in the Senate.¹³¹

The International Religious Freedom Act also establishes an Office of International Religious Freedom within the Department of State and headed by an Ambassador-at-Large.¹³² Separate from USCIRF's annual report, which covers only countries in which USCIRF judges the issues of religious freedom to be acute, the Act requires the State Department to issue an annual report on religious freedom and persecution in all foreign countries. If particularly severe violations are found, the State Department, like USCIRF, is obliged to designate the country as a CPC. The

¹²⁵ At § 6432(b). USCIRF notes progress and makes recommendations on that basis as well. At § 6432(c). Particularly severe violations of religious freedom and violations are defined at § 6402(11) and (13) respectively.

¹²⁶ At § 6433(a).

¹²⁷ USCIRF *Annual Report 2011*, above n 21.

¹²⁸ IRFA, above n 18, at § 6432 and 6433(a).

¹²⁹ USCIRF *Annual Report 2000*, above n 21.

¹³⁰ IRFA, above n 18, at § 6436.

¹³¹ Shea, above n 27.

¹³² IRFA, above n 18, at § 6411(a).

State Department's annual report must take into consideration USCIRF's recommendations.¹³³ In turn, the Act requires the President to oppose religious freedom violations and promote the right to freedom of religion based, inter alia, upon the State Department's annual report and "tak[ing] into account any findings or recommendations by the Commission with respect to the foreign country."¹³⁴ In general, the President has the discretion to take the actions he sees fit,¹³⁵ except when it comes to countries of particular concern.¹³⁶ In those cases, the President must take more serious actions, ranging from limiting development assistance to prohibiting certain other financial relationships between the United States and the government in question.¹³⁷ However, even if the President determines that a country is a country of particular concern, he can decide that the need for sanctions is satisfied by existing sanctions against that country.¹³⁸ There is also a waiver for the severe sanctions he can exercise if it would further the purposes of the Act or if important national interest of the United States so requires.¹³⁹

Thus, USCIRF's advice need not be followed by the State Department or the President, or by Congress for that matter.¹⁴⁰ And indeed its CPC list is routinely longer than the State Department's. At present, USCIRF's list has fourteen countries, whereas the State Department has designated only eight: Burma, the Democratic People's Republic of Korea (North Korea), Eritrea, Iran, the People's Republic of China, Saudi Arabia, Sudan and Uzbekistan. The State Department also issued a 180-day waiver on taking any action against Uzbekistan and an

¹³³ Ibid, at § 6412(b)(1).

¹³⁴ At § 6441(a). See also at § 6442(b)(1)(B).

¹³⁵ At § 6441(c)(1)(A). See also at § 6441(b)(1) and 6445(a)(1)–(15).

¹³⁶ At § 6442(b)(1)(A).

¹³⁷ At § 6442(c) and 6445(a)(9)–(15). However in no case may a Presidential action prohibit or restrict the provision of medicine, medical equipment or supplies, food or other humanitarian assistance. At § 6445(d).

¹³⁸ At § 6442(c)(5).

¹³⁹ At § 6447(a)(2)–(3).

¹⁴⁰ For an instance of explicit disagreement, see Harold Hongju Koh, Assistant Secretary for Democracy, Human Rights and Labor, and Robert Seiple, Ambassador-at-Large for International Religious Freedom responding to USCIRF's first annual report, U.S. Department of State, EPF108, 1 May 2000 <usinfo.org/wf-archive/2000/000501/epf108.htm>. For USCIRF's involvement with Congress, see United States Commission on International Religious Freedom "Advising Government" (2010) <www.uscirf.gov>.

indefinite waiver for Saudi Arabia, in both cases to “further the purpose of the Act.” Furthermore, Presidential actions levied against the other current CPC designees have now expired. Also notable is that in all cases but one – Eritrea – the President has relied on existing sanctions against that country as opposed to imposing new sanctions for violations of religious freedom.¹⁴¹

While USCIRF has attracted much interest as a cog in the wheel to United States unilateral sanctions, my emphasis here is on USCIRF as an actor in its own right.¹⁴² Indeed, USCIRF early on took issue with the Department of State’s listing of USCIRF actions as United States Government actions, stating that this might “blur the distinction between it and the State Department – in the minds of the American public, non-governmental organizations, religious communities, and foreign governments.”¹⁴³ In addition to its annual reports, the most recent of which runs to almost four hundred pages, USCIRF issues detailed studies, policy briefs, newsletters, press releases, webcasts, op-eds, speeches and the like. USCIRF carries out its own research, holds hearings, conducts country visits and engages in other activities.¹⁴⁴ Under the international law doctrine of state responsibility, the United States can be held responsible for USCIRF’s actions on the basis that USCIRF is a government organ or empowered to exercise elements of governmental authority, but this possibility seems relatively remote given that USCIRF is both independent and advisory.¹⁴⁵

It is striking that for Michael Horowitz, the former Reagan official who helped catalyze evangelical Christians in support of persecuted Christians abroad,¹⁴⁶ the real story is USCIRF –

¹⁴¹ USCIRF *Annual Report 2011*, above n 21, at 7–10.

¹⁴² This is not to suggest, of course, that USCIRF’s separate stature is entirely independent of its role in the sanctions process. Indeed, this interplay is part of my point about the variety of convergent and divergent ways a disaggregated democratic state can arrange itself using international law.

¹⁴³ USCIRF *Annual Report 2001*, above n 21, at 176.

¹⁴⁴ For its range of activities, see United States Commission on International Religious Freedom “FAQ”, above n 28, at question 9.

¹⁴⁵ See International Law Commission, above n 70, arts 4–5 and commentary, at 40–43.

¹⁴⁶ See Green, above n 41.

not the State Department.¹⁴⁷ “The commission will have a \$3 million annual budget, will be free to hire its own staff ... has the power to hold public hearings and the duty to produce at least one annual report on worldwide religious persecution, with recommendations for action,” Horowitz stated in 1999. “If, as I expect, the commission ... does its job,” he went on, “world press attention to religious persecution will significantly increase – and with it, massive pressure on persecuting regimes.”¹⁴⁸ Horowitz’s vision for USCIRF was an independent body akin to the Civil Rights Commission in its early days: travelling around the country, holding public hearings in large halls and raising awareness at the grass-roots level. If USCIRF had been true to his idea, it would be “holding hearings on Sudan in Chicago and getting 10,000 church members just to jam-pack the hearing room,” then on to another city for a meeting on Pakistan, then to a third city to draw attention to the atrocities in North Korea, and so on. USCIRF has not lived up to Horowitz’s expectations, although he recognised that progress had been made and the press had become more open to framing events as religious:

It used to be when in Indonesia, Muslim groups were murdering Christians, the story would be “ethnic conflict” and the word “Christian” would never appear. ...The *Baltimore Sun* had a four-part series ... on slavery in Sudan. It was an astonishing series about how you could buy and sell black slaves in Sudan. And it was so indicative – the word “Christian” never appeared. They talked as if it were part of some “ethnic conflict” ... But I think we’re changing that somewhat.¹⁴⁹

As distinct from Horowitz’s emphasis on consciousness-raising about religion, we might also think about USCIRF on its own as akin to a treaty body monitoring religious freedom. The core UN human rights treaties include treaties on racial discrimination, discrimination against women, children’s rights and the rights of persons with disabilities, but there is no treaty and hence no treaty body devoted to religion. There is a UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, and a Special Rapporteur on

¹⁴⁷ See Steven Wales “Remembering the Persecuted: An Analysis of the International Religious Freedom Act” (2002) 24 *Hous J Int’l L* 579 at 633 (citing Michael Horowitz).

¹⁴⁸ Quoted in Michael Cromartie “The Jew Who is Saving Christians” (1 March 1999) *Christianity Today* <www.ctlibrary.com>.

¹⁴⁹ Wales, above n 147, at 634–635 (quoting Horowitz).

Religious Freedom,¹⁵⁰ and otherwise the right to freedom of religion is treated holistically as one of the rights in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights respectively. By singling out the right of religious freedom in these and other international instruments and combining them into USCIRF's mandate for international human rights monitoring,¹⁵¹ the International Religious Freedom Act might be seen as unilaterally creating USCIRF in the image of the missing treaty body for religion.¹⁵²

B From Freedom of Religion to Women's Participation in Governance

Released in 2000, USCIRF's first report discusses China, Russia and Sudan and makes no recommendations regarding countries of particular concern or countries to be placed on a watch list.¹⁵³ The only mention of women is a recommendation that the United States publicise the Sudanese Government's complicity in militia raids to abduct civilians, particularly women and children.¹⁵⁴ The 2001 report deals with ten countries and continues to raise the issue of the abduction and enslavement of women in Sudan.¹⁵⁵ In addition, USCIRF raises issues of gender in the cases of Indonesia and Nigeria. In its discussion of Indonesia, USCIRF describes the intensification of fighting between the Christian and Muslim communities on the Moluccas with the arrival of the Laskar Jihad, an Indonesian Muslim group, on the islands, and cites reports of

¹⁵⁰ *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* GA Res 36/55, A/RES/36/55 (1981); Office of the United Nations High Commissioner for Human Rights "Special Rapporteur on freedom of religion or belief" <www2.ohchr.org>.

¹⁵¹ IRFA, above n 18, at § 6402(13) defines "violations of religious freedom" to mean "violations of the internationally recognized right to freedom of religion and religious belief and persecution ... as described in" article 18 of the UDHR and article 18(1) of the ICCPR. Ibid, referring to § 6401(a)(3). It further defines them "as set forth in" numerous international instruments. In addition to the UDHR and ICCPR, these instruments include the Helsinki Accords, the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, the United Nations Charter and the European Convention for the Protection of Human Rights and Fundamental Freedoms. Ibid, referring to § 6401(a)(2). Finally, § 6402(13) provides for the inclusion of certain enumerated violations.

¹⁵² The Act has been criticised for establishing a hierarchy of international human rights by singling out freedom of religion and using the clout of United States diplomatic and economic sanctions to remedy its violation. See for example Danchin, above n 54, at 41 and 104–106.

¹⁵³ USCIRF *Annual Report 2000*, above n 21.

¹⁵⁴ Ibid, at 30.

¹⁵⁵ USCIRF *Annual Report 2001*, above n 21, at 125, 127 and 135.

forced conversion to Islam, including forced circumcision of men and women.¹⁵⁶ Introducing a theme of diversity and gender equality within Islam that it would develop later, USCIRF adds that moderate Muslim leaders have condemned the forced conversions and circumcisions as contrary to Islamic teachings, and that female circumcision is generally not a practice common to Moluccan Muslims, although among other Muslim groups in Indonesia there has existed a symbolic, that is, non-mutilating, circumcision ceremony to which Muslim girls are sometimes subject.¹⁵⁷ As regards Nigeria, USCIRF gives an account of the expansion of Sharia-based law in northern Nigeria and cites northern Christians' fears that this will "[restrict] Christian women's access to public transportation (which affects all women)."¹⁵⁸

In USCIRF's 2002 report, the number of countries examined jumped from 10 to 22.¹⁵⁹ The references to women are fewer, but by 2002 Afghanistan is among countries examined, and the report states that despite the defeat of the Taliban by international coalition forces, "the roots of religious intolerance and abuses of religious freedom and other human rights still exist in Afghanistan, particularly with respect to vulnerable groups such as women, minorities, internally displaced persons, and returning refugees."¹⁶⁰ Following the launch of United States military action in Afghanistan, USCIRF wrote to Secretary of State Powell urging the Administration "to promote ... the idea of a future Afghan political system that practices religious tolerance and respects the basic human rights of all, including religious minorities and women."¹⁶¹

From then on, references to women in the annual reports become more numerous. In the 2003 report, 22 countries are surveyed and gender-related issues are mentioned in six.¹⁶² In the analyses of Afghanistan and Saudi Arabia, women's equality figures systematically in USCIRF's recommendations, particularly in their efforts to influence United States policy regarding the

¹⁵⁶ Ibid, at 66 and 68.

¹⁵⁷ Ibid, at 77, n 18.

¹⁵⁸ Ibid, at 93.

¹⁵⁹ USCIRF *Annual Report 2002*, above n 21.

¹⁶⁰ Ibid, at 26.

¹⁶¹ Quoted in *ibid*, at 6.

¹⁶² USCIRF *Annual Report 2003*, above n 21, at 3, 10, 49, 63, 65–68 and 70 (Afghanistan); 31 (India); 33 (Iran); 77 (Russia); 8, 20, 38–39 and 79–80 (Saudi Arabia); 39 and 100 (Sudan) <www.uscirf.gov>.

transition in Afghanistan. Concerned that Afghanistan was “being reconstructed as a state in which an extreme interpretation of Sharia would be enforced,”¹⁶³ USCIRF sets out recommendations covering security, legal rights, education about rights and the recovery and reconstruction process.¹⁶⁴ It is striking that under the right to religious freedom, USCIRF includes the repeal of legislative and other measures that discriminate against women – whether or not they relate to religion.¹⁶⁵ More broadly still, under its recommendations on the primacy of the Afghan constitution, USCIRF recommended that the United States Government ensure that women’s universal human rights are fully guaranteed by the new constitution.¹⁶⁶ And its recommendations on women extend to the active recruitment and appointment of women to the judiciary in all courts at all levels and support for the expanded participation of women in government at all levels.¹⁶⁷ This attention to the empowerment of Afghani women is also found in the most recent annual reports. Notably, recruiting women into the judiciary is a recommendation in the 2009 and 2010 reports, and their representation in any reconciliation talks is a priority recommendation in the 2010 and 2011 reports.¹⁶⁸

Classifying Saudi Arabia as a CPC, USCIRF’s 2003 report found that Wahhabism, the doctrine of Islam dominant in Saudi Arabia, “affects every aspect of women’s lives and results in serious violations of their human rights.”¹⁶⁹ As with Afghanistan, USCIRF included under the universal right to freedom of religion in Saudi Arabia the “equal protection of the law and the equal rights of men and women to the enjoyment of their human rights, including religious freedom.” In the realm of education, USCIRF recommended the exclusion from textbooks of language or images promoting intolerance, hatred or violence toward any group of persons based, inter alia, on

¹⁶³ Ibid, at 63.

¹⁶⁴ Ibid, at 64–68.

¹⁶⁵ Ibid, at 67.

¹⁶⁶ Ibid, at 65.

¹⁶⁷ Ibid, at 66–68.

¹⁶⁸ USCIRF *Annual Report 2009*, above n 21, at 146–148; USCIRF *Annual Report 2010*, above n 21, at 204, 206–207 and 210–211; USCIRF *Annual Report 2011*, above n 21, at 215 and 219–221.

¹⁶⁹ USCIRF *Annual Report 2003*, above n 21, at 79.

gender.¹⁷⁰ Again as with Afghanistan, the three most recent annual reports pay attention to women's institutional representation.¹⁷¹

In 2004, USCIRF surveyed 23 countries, mentioning gender-specific issues in twelve.¹⁷² Noting that "Iraq and Afghanistan present a unique set of circumstances because the United States is directly involved in nation-building and political reconstruction," USCIRF made these two countries a major focus, in particular the development of new constitutions in those countries.¹⁷³ In USCIRF's view the new Afghan constitution contained inadequate human rights protection, and it was concerned that this mistake not be repeated in Iraq. As in 2003, the position of women in these majority Muslim countries, together with that of disfavoured or nonconformist Muslims and minorities, was a central concern.

From 2005-2010, USCIRF deals with gender-specific issues in about half of the countries it surveys, and in its 2011 report gender figures in 21 of the 28 countries discussed.¹⁷⁴ These findings and recommendations overwhelmingly relate to women and Islam, whether Islam's unequal treatment of women (for example, Saudi Arabia's prohibition of women driving), the government's mistreatment of women's rights activists who advocate ending discrimination against women in the application of Islamic law (for example, their imprisonment in Iran), or the government's limiting of Islamic women's religious expression (for example, Tadjikistan's reported ban on the *hijab* in public places).¹⁷⁵

Thus, a commission charged with safeguarding international religious freedom and widely expected to concentrate on the persecution of Christians abroad has come to focus considerable attention on changing Islam to make it less discriminatory against women (to allow women in

¹⁷⁰ Ibid, at 80 and 81.

¹⁷¹ USCIRF *Annual Report 2009*, above n 21, at 92; USCIRF *Annual Report 2010*, above n 21, at 131–132; USCIRF *Annual Report 2011*, above n 21, at 151.

¹⁷² USCIRF *Annual Report 2004*, above n 21.

¹⁷³ Ibid, at 5.

¹⁷⁴ See USCIRF Annual Reports, above n 21: 11 of 22 in 2005, 13 of 24 in 2006, 15 of 25 in 2007, 10 of 26 in 2008, 15 of 27 in 2009, 16 of 28 in 2010 and 21 of 28 in 2011.

¹⁷⁵ USCIRF *Annual Report 2011*, above n 21, at 146, 86 and 315.

Turkmenistan to study Islamic theology, for example)¹⁷⁶ and even to recommend broader based changes concerning women's participation in public life and their institutional empowerment (to ensure the inclusion of women on Bangladesh's National Human Rights Commission, for example).¹⁷⁷

C *How International?*

To what degree is USCIRF's work animated by international human rights, as opposed to religion (as Horowitz emphasised) or national interests? Even USCIRF's composition raises this question. USCIRF's members are selected from among "distinguished individuals noted for their knowledge and experience in fields relevant to the issue of international religious freedom, including foreign affairs, direct experience abroad, human rights, and international law." The President selects three Commissioners, the congressional leaders of the party not in the White House selects four, and the leaders of the President's party in Congress select two.¹⁷⁸ Although commissioners are selected for their expertise, as opposed to their representation of specific religious communities, there has consistently been religious diversity in the composition of USCIRF. Commissioners have ranged from outspoken critics of international institutions to liberal international lawyers and activists involved in mainstream international non-governmental organisations, and from evangelical Christian and other religious leaders to scholars and public policy thinkers.¹⁷⁹ It is difficult to imagine anyone less inclined toward international institutions than John Bolton, a lawyer and influential advocate of hard-line foreign and defence policies who was one of the Republicans' picks for the original Commission (1999–2001).¹⁸⁰ It was Bolton who signed the letter renouncing the United States' signature of the

¹⁷⁶ Ibid, at 178.

¹⁷⁷ USCIRF *Annual Report 2011*, above n 21, at 349. See also USCIRF *Annual Report 2009*, above n 21, at 220; USCIRF *Annual Report 2010*, above n 21, at 327.

¹⁷⁸ IRFA, above n 18, at § 6431(b)(2)(A) and 6431(b)(1)(B). The Ambassador at Large serves ex officio as a non-voting member of the Commission: § 6431(b)(1)(A).

¹⁷⁹ For biographies of commissioners, former commissioners and professional staff, see United States Commission on International Religious Freedom "About USCIRF" (2010) <www.uscirf.gov>.

¹⁸⁰ See for example John Bolton *Surrender is Not an Option: Defending America at the United Nations and Abroad* (Threshold Editions, New York, 2007); Fred Kaplan "Bush to U.N.: Drop Dead" (March 7 2005) SLATE <www.slate.com>.

Rome Statute that set up the International Criminal Court, calling that moment his happiest at the State Department.¹⁸¹ Current chair Leonard Leo (2007–present) is executive vice president of the conservative Federalist Society and is involved with its international law project. He also writes on religious liberty under the United States constitution and is actively involved in Catholic Church affairs. In contrast, Commissioner Felice Gaer (2001–present) is a liberal international human rights activist on issues of anti-Semitism and women’s rights and longtime member of the UN Committee Against Torture; and former commissioner Leila Nadya Sadat (2001–2003) is a professor of international law who was involved in the drafting of the Rome Statute and, unlike Bolton, supports the International Criminal Court. Also among the present and past commissioners are Nina Shea (1999–present), an international human rights lawyer whose 1997 book on anti-Christian persecution, *In the Lion’s Den*, is a standard in the field;¹⁸² and Islamic law scholar Dr Khaled Abou El Fadl (2003–2007), who argues in *Speaking in God’s Name: Islamic Law, Authority and Women* that Muslim authorities have frequently misinterpreted divine law at the expense of women.¹⁸³ The most recent addition to USCIRF is Azizah Y al-Hibri, a law professor and former professor of philosophy, founding editor of *Hypatia: a Journal of Feminist Philosophy*, and founder and president of KARAMAH: Muslim Women Lawyers for Human Rights.¹⁸⁴

Staffed by a number of professionals with an international law background,¹⁸⁵ USCIRF has expanded its framework of international human rights beyond the International Religious Freedom Act’s signal reference to the right to freedom of thought, conscience, and religion in

¹⁸¹ Bolton, *ibid*, at 85.

¹⁸² Nina Shea *In the Lion’s Den: A Shocking Account of Persecution and Martyrdom of Christians Today and How We Should Respond* (Broadman & Holman, Nashville, 1997).

¹⁸³ Khaled Abou El Fadl *Speaking in God’s Name: Islamic Law, Authority and Women* (Oneworld, Oxford, 2001).

¹⁸⁴ United States Commission on International Religious Freedom “President Obama Appoints Professor al-Hibri to U.S. Commission on International Religious Freedom” (press release, 8 June 2011) <www.uscirf.gov>.

¹⁸⁵ Cassidy interview, above n 57.

Article 18(1) of the International Covenant on Civil and Political Rights.¹⁸⁶ Conspicuously absent from the Act are the rest of ICCPR Article 18, which includes limits on the right; ICCPR Article 20(2) prohibiting advocacy of religious hatred (to which the United States has reserved); and ICCPR Article 27 on the rights of persons belonging to minorities. As of 2005, however, USCIRF's annual reports include an appendix that collects and organizes a broad range of international provisions on religion. In addition to the three ICCPR articles mentioned and relevant provisions of other international instruments, the appendix cites from their interpretation by the relevant treaty bodies. And the 2011 report, for instance, invokes the limits in Article 18 in its analysis of Morocco,¹⁸⁷ weighs in on the correct interpretation of Article 20(2)¹⁸⁸ and recommends that Turkey remove its reservation to Article 27.¹⁸⁹ On women's equal right to freedom of religion or belief, the Appendix cites the UN Human Rights Committee's interpretation of the ICCPR articles on non-discrimination and equal rights respectively, and a study on women by the UN Special Rapporteur on Freedom of Religion or Belief. A number of USCIRF's findings and recommendations on individual countries also incorporate references to international law and its application by international institutions.¹⁹⁰

This having been said, USCIRF remains wedded to a strong reading to the individual's right to freedom of religion in Article 18(1) and seeks to shift the balance with minority rights. USCIRF stated in 2004:

The individual dimension to the right to freedom of religion or belief has all too often been neglected. Although the right to freedom of thought conscience, and religion explicitly refers to the right of every individual, international attention has often been directed toward protecting the

¹⁸⁶ Critics note that IRFA enables the United States to sanction states based on international legal norms not binding on those states, for example, non-parties to the ICCPR. See Danchin, above n 54, at 56 and 108–109.

¹⁸⁷ USCIRF *Annual Report 2011*, above n 21, at 352.

¹⁸⁸ *Ibid.*, at 356.

¹⁸⁹ *Ibid.*, at 337. See also 331.

¹⁹⁰ Compare Cleveland, above n 50, at 73 (noting that the State Department's annual Country Reports "significantly expand the consideration of human and labor rights norms beyond those designated by statute ... thus at least appear to narrow the major dissonances between the rights which the United States purports to enforce by statute and the core norms of the international human rights system.")

freedoms of religious groups or communities, including their freedom to worship, educate, and organize their affairs according to their own doctrines.¹⁹¹

Accordingly, USCIRF's recommendations for Afghanistan and Iraq focused not only on protecting religious minorities, but also on protecting what is sometimes called "internal dissent": the individual's right to challenge religious orthodoxies from within a religion, particularly that of the majority, including challenging the position of women within religious groups.¹⁹² Similarly, USCIRF has worked to move away from resolutions in the UN General Assembly and UN Human Rights Council outlawing "defamation of religions", taking the position that international human rights law, specifically ICCPR Article 20(2), protects individuals from acts of discrimination or violence rather than protecting religious institutions or ideas from criticism.¹⁹³

It is USCIRF's emphasis on the individual dimension of the right to religious freedom read together with non-discrimination and equal rights that ensures women the right to advocate for equality through the reinterpretation or reorientation of a religious tradition. No guarantee of individual religious freedom in Afghanistan, USCIRF wrote, means "fewer protections for Afghans to debate the role and content of religion in law and society, *to advocate the rights of women* and members of religious minorities, and to question interpretations of Islamic precepts without fear of retribution."¹⁹⁴

More broadly, USCIRF's engagement with issues of gender equality that go beyond religion can be understood in human rights terms as addressing conditions needed to make the international

¹⁹¹ USCIRF *Annual Report 2004*, above n 21, at 5. See also *ibid*, at 5–12 and *Annual Report 2005*, above n 21, at 14–17 and 121–124.

¹⁹² The Commission sought a positive constitutional model for Iraq from among other Middle Eastern countries or countries where Islam is the state religion, and prepared an extensive comparative study in English and Arabic of freedom of religion in such constitutions, including the issue of gender equality. See USCIRF *Annual Report 2005*, above n 21, at 4. Published as Tad Stahnke and Robert C Blitt, "The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries" (2005) 36 *Geo J Int'l L* 947.

¹⁹³ USCIRF *Annual Report 2011*, above n 21, at 6 and 356–7. See also Leonard A Leo, Felice D Gaer and Elizabeth K Cassidy, "Protecting Religions from 'Defamation': A Threat to Universal Human Rights Standards" (2011) 34 *Harv J L & Pub Pol'y* 769.

¹⁹⁴ USCIRF *Annual Report 2005*, above n 21, at 122 [emphasis added].

right to freedom of religion fully functioning. USCIRF's support for a free and fair referendum concerning independence for South Sudan, for instance, was based on the view that this was necessary for the long-term sustainability of freedom of religion in Sudan.¹⁹⁵ In addition, USCIRF's conduit to United States foreign policy makers means it can propose issue linkages and regional approaches that no international human rights body would have the jurisdiction to raise. In 2008, to give a notable example, USCIRF recommended that if the Government of Pakistan did not "take active measures immediately to cease its direct and indirect toleration and support of the Taliban in the country's border regions ... [it] should result in a curtailment of U.S. military assistance to that country."¹⁹⁶ In fact, two commissioners dissented, stating that "[t]he geopolitical dynamics in that country are enormously complicated" and "[t]he Commission has not undertaken the kind of thoroughgoing inquiry that would shed light on the issue, and, we are not certain that it ever could here."¹⁹⁷

In this connection, we might question whether in construing the conditions necessary for religious freedom broadly, USCIRF frames too much in terms of religion or captures too much as religiously motivated, such that religion becomes an outsized lens on the world. This question arises particularly because USCIRF operates in the wake of Samuel Huntington's "clash of civilizations" thesis, which maintains that the ideological conflict of the Cold War has been replaced by a clash of civilizations where the ground of confrontation is religion,¹⁹⁸ and indeed Huntington has chapters in two books edited by commissioners.¹⁹⁹

¹⁹⁵ USCIRF *Annual Report 2011*, above n 21, at 5.

¹⁹⁶ USCIRF *Annual Report 2008*, above n 21, at 152.

¹⁹⁷ *Ibid.*, at 153.

¹⁹⁸ Samuel P Huntington *The Clash of Civilizations and the Remaking of World Order* (Simon & Schuster, New York, 1996). See Andrew J Bacevich and Elizabeth H Prodromou "God Is Not Neutral: Religion and U.S. Foreign Policy After 9/11" (2004) *Orbis* 43 at 44; Leila Nadya Sadat, "Religious Freedom and American Foreign Policy: The United States Commission on International Religious Freedom" (2003) 9 *New Eng J Int'l & Comp L* 1 at 5, n 14.

¹⁹⁹ See Elliott Abrams (ed) *The Influence of Faith: Religious Groups and U.S. Foreign Policy* (Rowman & Littlefield, Maryland, 2001) and Michael Cromartie (ed) *Religion, Culture and International Conflict: A Conversation* (Rowman & Littlefield, Maryland, 2005). Huntington also figures in commentary on USCIRF: see for example Fore, above n 54, at 434 (using Huntington to frame the criticism of IRFA as imperialistic); Shattuck, above n 51, at 186 (Shattuck was Chair of Secretary of State's Advisory Committee on Religious Freedom Abroad from 1996 to 1998, and agrees with Huntington's diagnosis, but not his ultimate conclusion.).

It can also be asked whether Realpolitik leads USCIRF to treat international human rights instrumentally. Because the President can waive sanctions for violations of religious freedom for reasons of important national interest, there is incentive for USCIRF to present the promotion of the right to freedom of religion as helping national interests. Perhaps the most Huntington-like moment came in 2005, when USCIRF quoted from the United States 9/11 Commission – “The United States finds itself caught up in a clash *within* a civilization ... Usama bin Ladin and other Islamic terrorist leaders draw on a long tradition of extreme intolerance within [a minority] stream of Islam” – and adopted its conclusion that the United States must engage in the struggle of ideas in the Muslim world by promoting voices of moderation within Islam.²⁰⁰ Although USCIRF has voiced the concern that the war on terrorism not be used as a pretext to restrict freedom of religion,²⁰¹ it has also presented international religious freedom as a national security imperative:

When 15 Saudi nationals and four others, armed with jetliners filled with people and a religiously motivated ideology of terror, caused the events of September 11, 2001, the world was reminded again that promotion of freedom – especially religious freedom – is not simply a matter of altruism. It is the keystone of regional peace and American security. Indifference to tyranny abroad has allowed the growth of radical forces who, in the name of religion, now aim to destroy the West, as well as misinterpret the traditions of Islam. It is in our enlightened self-interest to pursue foreign policies that help minorities persecuted for their religious beliefs and help ensure that international rights to religious freedom be respected for every individual, Muslim and non-Muslim alike.²⁰²

Also in a national interest vein, USCIRF’s analysis of a given country often mentions the United States’ relationship with that country. Finally, for all the bold sweep of USCIRF’s recommendations on women and Islam, it has not entered into the treatment of women under any other religion or recommended that other religions make room for gender equality. Its other references to gender tend to be about forced conversion or religiously-motivated violence against women. One relevant contrast might be the State Department’s reports covering religious

²⁰⁰ USCIRF *Annual Report 2005*, above n 21, at 2.

²⁰¹ See USCIRF *Annual Report 2004*, above n 21, at 64–65 (Uzbekistan); USCIRF *Annual Report 2005*, above n 21, at 93 (Russia).

²⁰² USCIRF *Annual Report 2005*, above n 21, at 2.

freedom in Israel²⁰³ and in particular the issue of *agunot* or “chained women”: “Under the Jewish religious courts’ interpretation of personal status law, a Jewish woman may not receive a final writ of divorce without her husband’s consent,” the State Department reported in 2007, and “thousands of women ... are unable to remarry or have legitimate children because their husbands have either disappeared or refused to grant divorces.”²⁰⁴ Rabbinical tribunals can sanction husbands who refuse to divorce their wives, but they cannot grant a divorce without the husband’s consent, and some husbands take advantage of this law to demand a favourable distribution of property as a condition for agreeing to divorce. The State Department tracked this issue until the Israeli Knesset closed the financial extortion loophole by providing that assets can be divided during the Rabbinate’s divorce proceedings.²⁰⁵

D Projecting an International

As with San Francisco’s CEDAW initiative, commentators on USCIRF have directed their attention more to substance than form. Yet noteworthy again here is an arguably double use of international human rights body techniques: reporting, monitoring, recommendations, persuasion. These techniques perform a domestic role (giving foreign policy advice, or raising consciousness inside the United States about religious persecution) *and* they produce the domestic as international (operating as if there were a human rights treaty on religion and as if it were the treaty body).

USCIRF’s recommendations may, of course, influence the executive and legislative branches and thus official United States actions on the world stage.²⁰⁶ Besides being a public agency, though, USCIRF functions as a private coalition of diverse opinion leaders, and its work may therefore be picked up by domestic civil society directly. In this connection, the ties of some

²⁰³ Apart from a dissenting view by Commissioner Laila Al-Marayati in 2001, USCIRF has never reported on Israel. United States Commission on International Religious Freedom *Addendum to the Report of the United States Commission on International Religious Freedom* (2001) at 13.

²⁰⁴ US Department of State “Israel and the Occupied Territories: International Religious Freedom Report 2007” <www.state.gov>.

²⁰⁵ US Department of State “Israel and the Occupied Territories: International Religious Freedom Report 2009” <www.state.gov>.

²⁰⁶ See above n 140 and 141 and accompanying text.

evangelical Christian members of USCIRF to significant Christian media correlate with greater coverage in certain Christian publications. Current commissioner Dr Richard D Land (first appointed in 2001) is a good example. President of the Southern Baptist Convention's Ethics and Religious Liberty Commission and one of Time magazine's "Twenty-five Most Influential Evangelicals in America" in 2005, Land hosts the nationally syndicated radio programme "For Faith and Family".²⁰⁷ As of October 2011, the New York Times had referred to USCIRF twenty-six times,²⁰⁸ as compared to over one hundred mentions on the For Faith and Family website.²⁰⁹ To give an example of secular ties, Commissioner Felice Gaer is a member of the Council on Foreign Relations, and the Council on Foreign Relations website shows that various commissioners have been Council on Foreign Relations task force members or speakers.²¹⁰ However, members' networks do not necessarily correlate with USCIRF's reach. For instance, Dr Leila Al-Marayati, one of the original commissioners, was past president of the Muslim Women's League, but the League's website makes almost no reference to USCIRF, even when its work would have been relevant.²¹¹ In a web item critical of the French government's decision to ban the hijab in public schools, the Muslim Women's League called on USCIRF to address the issue,²¹² but the website makes no reference to USCIRF's subsequent public statement

²⁰⁷ See "About USCIRF", above n 179.

²⁰⁸ A Westlaw search of The New York Times for "Commission on International Religious Freedom" (1 October 2008) turned up 24 mentions, 5 of which were about the commissioners in other capacities. Updating to October 2011 yielded an additional 7 substantive references.

²⁰⁹ Eighty items mentioning the Commission were turned up by a search of "Commission on International Religious Freedom" on <faithandfamily.com> (1 October 2008). Updating brought the total of different references to 111.

²¹⁰ A search of <www.cfr.org> for "Commission on International Religious" (6 July 2011) turned up sixteen different references to USCIRF. The Council on Foreign Relations launched a Religion and Foreign Policy Initiative in 2006. See Council on Foreign Relations "Role of Religion in U.S. Foreign Policy Focus of New Council Initiative" (6 February 2006) <www.cfr.org>.

²¹¹ A search of the website <www.mwluca.org> for "Commission on International Religious Freedom" turned up no references, however some do exist.

²¹² Muslim Women's League "The MWL and MPAC Strongly Oppose French Ban on Religious Expression" (18 December 2003) <www.mwluca.org>.

expressing its concern that the proposed law might violate France's international human rights commitments nor to the treatment of the ban in its next annual report.²¹³

USCIRF's ambiguous status as a formal actor under domestic law and informal actor under international law is demonstrated by foreign states' conflicting approaches to its reports. Whereas the President has a duty to request consultations with the government of a country prior to taking action with respect to alleged violations of religious freedom and, if agreed to, to enter into such consultations either publicly or privately,²¹⁴ USCIRF's report does not trigger any such engagement. Nevertheless, USCIRF's assessments have attracted some critical responses from foreign governments and religious organisations.²¹⁵ For instance, a statement released by the secretaries general of China's five major religious groups rejected the analysis of China in the 2011 report as prejudiced, calling the report's "finger-pointing" inconsistent with a religious spirit,²¹⁶ and Chinese Government officials have also criticised CIRF's reports.²¹⁷ In contrast, the Government of India has taken the position that USCIRF's report is an internal United States Government document and it does not take cognizance of such non-official reports.²¹⁸ As distinct from its annual reports, country visits by USCIRF may contribute to results such as

²¹³ USCIRF *Annual Report 2004*, above n 21, at 53–54. This may, of course, be attributable to the varying resources available to non-profit organisations for posting and updating their websites.

²¹⁴ IRFA, above n 18, at § 6443(b)(1).

²¹⁵ See for example Barbara Crossette "New Protests in Old Conflict with Vietnam; The Montagnards Bring their Fight to New York" (5 May 2001) *The New York Times* <www.nytimes.com>; Kees Hulsmann "Egypt: Religious Freedom Delegation Gets Cold Shoulder" (21 May 2001) *Christianity Today* <www.ctlibrary.com>; "Islamic Saudi Academy refutes US Commission on International Religious Freedom report" 13 July 2008, Royal Embassy of Saudi Arabia, Washington, D.C. (on file with author); Press Release: The Embassy of the Republic of Sudan in Washington Responds to the Annual Report of the United States Commission on International Religious Freedom on Sudan, 9 May 2002, Sudan Embassy, Washington, D.C. (on file with author).

²¹⁶ "China Rejects US Report on Religious Freedom" (6 May 2011) *China Daily* <www.chinadaily.com.cn>.

²¹⁷ See for example Foreign Ministry Spokesperson Jiang Yu's Remarks on the 2007 Annual Report Released by the "US Commission on International Religious Freedom" (11 May 2007) Embassy of the People's Republic of China in the United Kingdom of Great Britain and Northern Ireland <www.chinese-embassy.org.uk>.

²¹⁸ Ministry of External Affairs Spokesman's statement on U.S. Commission on International Religious Freedom's recent report, Embassy of India, Press Releases, 4 August 2000 (on file with author).

legislative reforms, the bringing of a particular prosecution or the release of a particular detainee.²¹⁹

Finally, a search of the UN document system reveals that USCIRF's work has been relied upon on occasion by UN special rapporteurs,²²⁰ other governments²²¹ and NGOs.²²² USCIRF members have also met with the UN Special Rapporteur on Freedom of Religion or Belief.²²³

Conclusion

As we have seen, the normative effects produced by San Francisco's CEDAW initiative are not well captured by some no-to-yes scale of compliance nor by general ideas about local variation. On the one hand, substantively, the city's ordinance changed CEDAW from an international bill of rights for women into a set of principles for gender mainstreaming. Yet Martti Koskenniemi has written of "the emptiness of mainstreaming",²²⁴ and indeed CEDAW seems to have provided little or no actual content to San Francisco's reforms. On the other hand, San Francisco's home-

²¹⁹ See for example USCIRF *Annual Report 2011*, above n 21, at 5–7.

²²⁰ See for example General Assembly, Situation of Human Rights in the Democratic People's Republic of Korea: Note by the Secretary General, UN Doc.A/64/224 (4 August 2009) at 12, n.20 (report of the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea, Vitit Muntarbhorn); General Assembly, Situation of Human Rights in the Democratic People's Republic of Korea: Note by the Secretary General, UN Doc.A/63/322 (22 August 2008) at 11 (report of the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea, Vitit Muntarbhorn).

²²¹ See Human Rights Council, Letter dated 18 January 2011 from the Permanent Representative of Cyprus to the United Nations Office at Geneva addressed to the President of the Human Rights Council, UN Doc. A/HRC/16/G/5 (7 March 2011) at 2.

²²² See for example Human Rights Council, Written statement submitted by the Society for Threatened Peoples, a non-governmental organization in special consultative status, UN Doc.A/HRC/16/NGO/133 (2 March 2011) at 2; Human Rights Council, Written statement submitted by European Centre for Law and Justice (ECLJ), a non-governmental organization in special consultative status, UN Doc.A/HRC/6/NGO/32 (5 September 2007) at 2; Commission on Human Rights, Written statement submitted by the South Asia Human Rights Documentation Centre (SAHRDC), a non-governmental organization in special consultative status, UN Doc. E/CN.4/2004/NGO/127 (8 March 2004) at 3.

²²³ See for example United States Commission on International Religious Freedom "USCIRF Meets with UN Special Rapporteur on Freedom of Religion or Belief" (12 September 2004) <www.uscirf.gov>. USCIRF is active in the Organization for Security and Co-operation in Europe (OSCE) as part of the United States delegation, as discussed in the annual reports.

²²⁴ Martti Koskenniemi "Human Rights Mainstreaming as a Strategy for Institutional Power" (2010) 1 *Humanity* 47 at 49.

grown ideas of gender auditing and gender budgeting have registered domestically and internationally as a bold and innovative implementation of CEDAW with real results for women and girls in the city. In under-complying with CEDAW, San Francisco has thus also ultra-complied.

The substantive story of USCIRF's application of the international right to religious freedom is somewhat similar. On the one hand, USCIRF has linked the right to a project of "transforming Islam from within", a project that has attracted anxiety. As one government official put it: "It goes to the core of American belief that we don't mess with freedom of religion. Do we have any authority to influence this debate?"²²⁵ Indeed, USCIRF's broad recommendations concerning women's rights appear to be part and parcel of transforming Islam and Islamic states – a blunt treatment that would worry many multicultural and postcolonial feminists,²²⁶ who might also question why recommendations about women in other countries are being made by a commission of Americans appointed for their knowledge of religious issues. On the other hand, USCIRF's attention to women's participation in public life and their representation in the institutions of governance is the result of ultra- not under-compliance. It flows from USCIRF's enlargement of the human rights it applies by articulating the right to religious freedom with gender equality.

In addition, we have seen that a hallmark of both cases is more the replication of the treaty's form than the application of its substance. San Francisco uses CEDAW Committee-style monitoring, not only in the service of its gender mainstreaming commitments locally, but arguably also as a stand-in "internationally" for the Committee. The city's documentation of its CEDAW activities projects an image of its successful participation in an informal network of actors on CEDAW "implementation" ranging from UNIFEM to other cities and counties in the

²²⁵ David E Kaplan "Hearts, Minds, and Dollars" (17 April 2005) US News & World Report, <www.usnews.com>. See also Saba Mahmood "Secularism, Hermeneutics, and Empire: The Politics of Islamic Reformation" (2006) 18 Public Culture 323 at 329–330 (The current US project to reform Islam is not "secular in the simple sense of being non-religious; indeed, as widely noted, it is shot through with the interests, agendas, and aspirations of the Christian Right", rather it is secular "inasmuch as secularism is a modality of political rule that seeks to transform religious subjectivity and give it a certain modular form.")

²²⁶ See for example Karen Knop, Ralf Michaels and Annelise Riles "From Multiculturalism to Technique: Feminism, Culture, and the Conflict of Laws Style" Stan L Rev (forthcoming 2012).

United States, yet a network from which states formally party to CEDAW and the CEDAW Committee are absent. Similarly USCIRF activities, the types of documents it produces, its website's record of USCIRF's advice to government and its compilation of press clippings are among the ways in which USCIRF is styled as a formal foreign policy advisor domestically and informally as if it were an international human rights body on religion internationally.

A focus on form also brings out an irony. International law's nemesis has long been the Austinian positivist who claims that international law is not "real" law because it is not usually backed up by sanctions: most of the time, international law depends on persuasion because it cannot coerce. Enthusiasm for the domestic application of international law is, in part, enthusiasm for the ability to enforce. In the cases of San Francisco and USCIRF, the opposite has occurred. Although each is a domestic government actor acting under a domestic law, each lacks the hard power to enforce international human rights or even to make binding decisions about violations. Instead, both rely on soft techniques such as reporting, monitoring, engagement, persuasion, the techniques of international human rights bodies. This point is true domestically for the process of gender mainstreaming in San Francisco and USCIRF's role in the United States foreign policy process. It is more apt still internationally, where not even engagement with them is mandated, and influence must be improvised or fantasized via form. In this regard, it is striking that San Francisco has now taken up an even softer global form, namely, corporate codes of conduct.

The broader point that flows from the discussion of USCIRF in particular, though, is that even when a state is party to a treaty, the central Government as well as parts of the state have a remarkable range of possibilities for configuring their politics and law around the treaty, and thereby the contours of the state internationally.