



Institute for International Law
and Justice

IILJ International Legal Theory Colloquium Interpretation and Judgment in International Law

NYU Law School

Professors Benedict Kingsbury and Joseph Weiler
Pollack Colloquium Room, FH 9th Floor, 245 Sullivan St.
Thursdays 4.00pm-5.50pm

Note: speakers' topics listed are indicative of areas, not final titles, and may change

January 17 – Jeremy Waldron, NYU Law School
Topic: *"Partly Laws Common To All Mankind": Foreign Law In American Courts*

January 24 - Catharine MacKinnon, University of Michigan Law School
Topic: *Women's Status, Men's States*

January 31 - Beth Simmons, Harvard University Government Department
Topic: *Participation in and Effects of Human Rights Treaties*

February 7 - Richard Stewart, NYU Law School
Topic: *Accountability in Global Governance*

February 14 - Joseph Weiler, NYU Law School
Topic: *The Theory and Practice of Interpretation in International Law*

February 21 - NO COLLOQUIUM

February 28 - Derek Jinks, University of Texas Law School
Topic: *Fragmentation of International Law concerning Individuals in Armed Conflict*

March 6 - Robert Howse, University of Michigan Law School
Topic: *Interpretation in the World Trade Organization*

March 13 - Martti Koskenniemi, University of Helsinki/NYU Law School
Topic: *Natural Law between Moral History and Raison d'Etat: Understanding the Pre-History of International Law*

Note: March 14 and 15, the Program in the History and Theory of International Law convenes in the same room a conference on Roman Law and Imperialism in the Foundations of Modern International Law (all welcome – see iilj.org)

March 20 - NO COLLOQUIUM – Spring Break

March 27 - Jose Alvarez, Columbia University Law School
Topic: *Interpretive Problems in International Investment Law*

April 3 - Ryan Goodman, Harvard Law School
Topic: *Sociological Theory Insights into International Human Rights Law*

April 10 - Sally Engle Merry, NYU Anthropology Dept & Law and Society Institute
Topic: *Indicators in Global Governance*

April 17 - Christopher McCrudden, Oxford University/U. of Michigan Law School
Topic: *Human Dignity in Human Rights Interpretation*

April 24 - Stephen Gardbaum, University of California at Los Angeles Law School
Topic: *Is U.S. Constitutional Rights Jurisprudence Exceptional?*

Program and papers available at: <http://iilj.org/courses/2008IILJColloquium.asp>

Women's Status, Men's States¹

Women's refusal to accept the double-edged denial of their humanity—the denial that sex-specific violations are commonly committed and that, when they are, it is women's humanity that they violate—has been slowly shifting the form and content of the transnational human rights paradigm over the last twenty-five to thirty years. Recognition by women that states per se are not usually the most immediate violators of their humanity, although they are often deeply complicit, has underlined the fact, even more visible after September 11, 2001, that other-than-state actors regularly perpetrate serious human rights violations. Since states have usually not represented women's interests as women, whether by acts or failures to act within the sphere of their power and authority,¹ women facing unresponsive official mechanisms, doctrines, and authorities have often promoted women's issues through nongovernmental organizations (ngos), forming a grassroots civil society to be reckoned with in international relations.² They have reached not only to make states more accountable but to hold the law in their own hands, seeking perpetrator accountability to them directly through civil legal means. Women's assertion of their human rights has thus sought not only to make states adhere to human rights but to separate human rights from states. In supplementing or at times pushing to supplant the state as international law's historically nearly exclusive unit, women have pushed for the formal changes needed to secure their substantive rights internationally. In the process, they are moving human beings—violators and violated alike—to the center of the human rights process.³

¹ Earlier versions of some of these ideas were published as the introduction to *Are Women Human? And Other International Dialogues* (Harvard, 2006). It brings together and builds upon international work collected in that volume, referred to here only by numbers in that collection. Some of these ideas were also previously published in the University of Michigan Law School's *Law Quadrangle Notes*, Fall-Winter 1999, 3. They benefited from being presented to the European Court of Justice at a meeting held by the University of Michigan Law School at the Hay-Adams Hotel, Washington, D.C. (Apr. 19, 2000), from being delivered as the Contemporary Civilization Coursewide Lecture at Columbia University titled "Women's Worlds, Men's States" (Apr. 29, 2004), [Radcliffe; Melbourne; Sendai; Madrid; Kyoto, TBA], and from the discussions that followed. Comments from Jessica Neuwirth, Lisa Cardyn, Jose Alvarez, and Tom Bender were helpful in their development. Exceptional technical assistance was provided by Anna Baldwin and Emma Cheuse, the University of Michigan Law Library, and the Harvard Law Library. A fellowship at the Center for Advanced Study in the Behavioral Sciences (CASBS) at Stanford helped support its writing.

In the mid-1990s, Bosnian women in particular, as their communities were being attacked by Serbian forces, spoke out against being raped en masse as an instrumentality of a genocide conducted in part through war. The terms of their resistance challenged the legal lines between genocide and war and between inequality in war and in peace.⁴ Bosnian Muslim, Bosnian Croat, and Croatian women and children survived the atrocities of Serbian extremist forces in Bosnia-Herzegovina and Croatia from 1991 to 1994 determined to stop the genocide, to hold the perpetrators accountable for the sexual atrocities, and to change the way sexual violations are addressed by law.⁵ Although inequality in peace is not the same as genocide through war, rape was clarified as more a collective than an individual crime, an insight that could apply with modifications outside of zones of recognized conflict.⁶ To respond adequately to these women's violations, human rights law needed to come further to terms with the fact that group identifications compose much of the content of the human, making group-based injuries central to the denial of humanity, locating sex and ethnically-based harms at the core of, rather than peripheral to, human rights. To enhance the accountability of international processes to such survivors, civil proceedings and civil remedies have been favored by them.⁷ This is not because perpetrators should not be incarcerated, or because society as a whole is not seen as having been violated by the acts involved. It is because social change and reparation are found to be more effective relief and potentially deterrence than is punishment alone.⁸ Too, violation of women is seen as violation of the community and relief to individuals as group members is relief to the community. Steps toward establishing these features are creating what might be termed a women's model of human rights—not because it is exclusive to one sex, but because it is predicated on women's experiences of violation as women and of denial of that violation. Converging with other developments, these women's responses to their experience of violent sexual and ethnic inequality combined have contributed to making women's action on their status and treatment the cutting edge of change in international human rights around the turn of the twenty-first century.

Being human here is a normative social status, not an existential fact that can be taken for granted. Becoming human in the legal and lived senses is a social and political

process.⁹ The contribution of law to this process requires prohibiting or otherwise delegitimizing all those acts by which human beings as such are violated, guaranteeing people what they need for a fully human existence, and then officially upholding those standards and delivering on those entitlements.¹⁰ But, in circular epistemic fashion, invalidating or even seeing what members of subordinated groups are distinctively deprived of, subjected to, and delegitimized by requires first that they be real to power, which in turn calls for them to be seen as human. Put another way, human rights can be observed to be a response to atrocity denied. Before atrocities are recognized as such, they are authoritatively regarded as either too extraordinary to be believable or too ordinary to be atrocious. If the events are socially considered unusual, the fact that they happened is denied in specific instances; if they are regarded as usual, the fact that they are violating is denied: if it's happening, it's not so bad, and if it's really so bad, it isn't happening. The status of certain people becomes rendered tautologous with, even justified by, the deprivations of their human rights. Law often collaborates by making an unusual or extreme or uncommon or even almost impossible form of a common violation illegal, so that what is illegal almost never happens, yet the law appears to stand against the violation. Victims are thereby ideologically rendered appropriate to their treatment, the effectively unequal treatment serving to confirm their ontological status as lesser humans. When nothing is done, the treatment, and social status accordingly, confirm and create who one is in the social sense. Legally, one is less than human when one's violations do not violate the human rights that are recognized. Acts common in human experience, such as rape in war and rape in peace, have been beneath serious notice because they are so familiar, while acts that are uncommon, like the Nazis' industrial murder and the Serbs' industrial rape, have been beyond belief. Disbelief and associated impunity reign, effectively rendering the violated systemically and effectively not fully human legally or socially. When and where this denial is overcome, and rights against the extreme and the normal are recognized, the treatment is defined as inhuman and the victims as human. Women are in the midst of this process, at a precise midpoint, a process that is also necessarily changing human rights themselves.

Meantime, the status and treatment of men still tacitly but authoritatively tend to define the human universal, eliding the particularity of being a man as well as obscuring the humanity of women. Even as masculinity marks what men want and have and touch and make and do in social space, political institutions included, the gender is often not apparent. In this view, the state, an apex form in which male power is organized both among men and over women while purporting to institutionalize peace and justice, stands revealed as an institution of male dominance.¹¹ To describe the state as a male institution not only demographically (i.e. of the male sex, which is true but not very interesting) but socially and politically (gendered male) is to contend that its structures and actions are driven by an ideology predicated on an epistemic angle of vision with concomitant values, attitudes, and behaviors based on the status location of the male sex in society, members of which (with variations) occupy a superior position in gender hierarchy, resulting in a sexual politics.¹² Male in this sense of male dominance, occupying a superior position in gender hierarchy, is not an epithet, name-calling, nor trivially true.¹³ Nor is everything men do “male” in this systemic political analytical sense, meaning distinctively determined and marked by their status as members of the dominant sex, any more than everything middle class people do is bourgeois, everything white people do is white, or everything children do is childish. “Male” as used here means exhibiting or contributing to male dominance as a political system, political meaning power-ordered relations. The behavior and norms of this system being partial and gendered creates structural barriers to the realization of women’s rights that usually appear as gender-neutral formal requirements.

The question here is, given that states have been shown to be male in a number of significant ways, is the international system a counterbalance to that? Or is it meta-male? Does the international order, specifically international human rights and humanitarian law, confront and challenge the maleness of states? Or does it reproduce, reinscribe, and reinforce this tendency at yet higher institutional levels? If the state has a gender (as well as being of, by, and usually for men, a sex), so that the state through its distinctive instrument, law, sees and treats women the way men in society see and treat women,¹⁴ is international law, the order states make among states, gendered as well? Even as

international law and institutions exist to challenge and limit the power of individual states, their distinctive mandate, does it build on and depend upon and support the power of states as such at the same time? Seen in its gendered dimensions, does the move from national to international in essence magnify the scale and diversity of law's masculinity, or does it offer distinct qualifications, dynamics, challenges, and opportunities?

Two prominent themes in existing literature interact interestingly with this question. One is the so-called “democratic deficit” of the international,¹⁵ the other the decline or death of the state.¹⁶ The notion that the international has a deficit of democracy sees national institutions as more democratic than international ones, hence preferable for resolving human rights and other disputes. Viewed from the standpoint of the status of women, this widely-accepted notion is, as will emerge, questionable, even backwards. Second, the state has long appeared outmoded to some, more recently superseded by institutions and forces with bases of power independent of states, such as globalization, multinational corporations, organized criminality, and religion.¹⁷ From the standpoint of women, there is much validity to this general observation, but it is not new, as male power has been just such a force all along. If the state is arguably being transcended by these forces for politics among men, the question is whether the masculinity of international laws, norms, and institutions is also withering away. Or is male dominance equally characteristic of, present in, and transmuting itself into these transnational forms, where it has perhaps been along, only now more visibly, as these other dynamics are also following its lines of force? Both these questions refine focus on whether gender is a largely overlooked transnational force and dynamic—both from the top down, ensuring male dominance over women and of some men over other men, and, with women's emergence as a global force, from the bottom up, challenging that dominance.

Four analytical themes that cohere and cut across current developments in the international human rights of women permit pursuit of these questions, paralleling dimensions along which national behavior through law has been analyzed in gendered terms. State behavior that promotes and institutionalizes male dominance has been found to distinguish public from private, naturalize dominance as difference, hide coercion

behind consent, and obscure sexual politics behind morality.¹⁸ Does the order that states have created among states behave in similar gendered ways? If so, are there nonetheless particular dynamics in the international order that offer distinctive potential for pursuing women's rights and status as human?

Public and Private

To distinguish public from private is to create an "in here" space that is exempt from authoritative intervention from an "out there." In law and politics, the interior space is presumptively regarded as not needing resort to any of the guarantees that monitor freedom or equality in the exterior space, or at least that intrusion into it does more harm than good. The public is formally supreme over the private, the private a space inside which power is properly left alone by public authorities. Transnationally, women have historically been relegated to and identified with the private, excluded from and, when present, subordinated in public. The public, the supreme hierarchically superior side of the line, the site of legitimated force, is the ideologically and historically male side, defined by distinction from the subordinate, lesser, no-force-permitted female private side.¹⁹ Power is held accountable, if at all, for its abuse outside the border's threshold that delineates where the public begins. This line is moveable.

The international legal structure can be visualized as a set of interesting boxes defined by layers upon layers of distinctions between public and private.²⁰ The hierarchy of the state over civil society provides a structural example. The state has power over civil society, a feminized realm within which male dominance is permitted free rein, simultaneously masculinizing the state. War and peace offer another kind of international distinction with classically sex-stereotyped dimensions. Men violently dominating other men for control of states is called war; men violently dominating women within states is relegated to peace.²¹ Peace historically is that passive time in between the activity of war, when certain things such as organized violence are imagined to be not happening. Parallel legal categories distinguish combatants, widely thought of in male terms (permitted to engage in force) from civilians, construed in female terms (unarmed and putatively to be

protected).²² Apart from the relatively constant fact that men organize themselves to compete and conflict with other men, and share agreed-upon rules for doing so, contemporary conflicts among men have increasingly become more group-to-group than simply state-to-state, resembling women's treatment by men more than they resemble classic armed conflict. In this light, international law has much to learn from understanding women's treatment by men and women's attempts to use law to address it.

Public/private lines also discernibly distinguish the conventionally so-called "generations" of human rights.²³ The first generation is regarded as being political and civil rights. These amount to what empowered men feel they most need against other empowered men and are axiomatically considered public. Economic and social rights—those rights of which women as such are largely deprived along with many men—are usually regarded as second generation, even though they are in the Universal Declaration of Human Rights and recognized as interdependent with and integral to the so-called first generation throughout the covenants themselves. Yet their lower status as rights is reflected by their terrain being considered more private: social, not political, and often considered not readily enforceable or implementable in the usual form rights take. Public intervention here is more contested. Group or collective rights are called the third generation. These are regarded as definitively social, quintessentially private; these rights are least guaranteed, and sometimes not considered properly rights at all in the enforceable sense. This hierarchical ordering among generations, controversial in itself, ranks systemic regard. From women's standpoint, the rank ordering might well be reversed. Women are men's unequals as groups. Real equality rights are collective in the sense of being group-based in their essential nature. Individuals may suffer discrimination one at a time, but the basis for the injury is group membership. What women as such most need thus simply, as usual, does not fit. Lacking effective guarantees of economic and social rights, women have found political and civil rights, however crucial, to be largely inaccessible and superficial. The generational distinctions and their rankings, questionable for men as well, are clearly premised on gendered assumptions, perceptions, and priorities.

But it is in jurisdiction—the technical doctrine governing who has power to decide what and where—that the public/private distinction finds its natural home and becomes most quintessentially male. Jurisdiction delineates legal turf. Internationally, jurisdiction revolves around sovereignty. A sovereign has exclusive dominion within a sphere, a concept that is spatial conceptually as well as often concretely—accountable, if at all, only to equal sovereigns (and often not voluntarily). A state is sovereign: defined by a public/private line at its border. This line is principally territorial, such that what happens within is private in the sense that it is the exclusive domain of the patriarchal order called government. Sovereignty structures international justice procedurally on the submerged substantive principle of male power at home, prioritizing the place where women have the least power and men have the most as the legal place where women's distinctive injuries by men are to be legally addressed. This line that includes by excluding creates the same unit that is incarnated in international law as at once the guarantor and violator (including as ignorer) of women's human rights. Dynamically described, male power sets itself up as exclusive within, justifying its hegemony as protection, then violates the protected with relative impunity or permits their violation by those it empowers by ignoring them, creating a rule that it is not responsible for what it does not do, only for what it does, thus appearing to some not to be acting when it does nothing about this violation. Think marital rape, incest. With the globe divided spatially into nation-states, male dominance over women begins at home, within and beneath states, internal to jurisdictions including the family. Male structural privacy is the supposedly merely technical principle that animates the geography of both male power and international justice. It rules the world.

Because jurisdiction gives men power over a sphere, encompassing women within it, international jurisdiction, which could make these men accountable to other men, is jealously guarded and carefully constrained. This is familiar on the national level in the United States in the case of *United States v. Morrison*, disallowing a federal civil remedy against violence against women because sexual violence was regarded as local and private.²⁴ On the international level, the fact that state boundaries define the line where men divide power among themselves, within which they seek to exercise exclusive

dominion, including over women, explains why the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is so widely reserved.²⁵ Similarly, among the most reserved international provisions in all treaties are those jurisdictional provisions that designate the authority to resolve disputes.²⁶ Tellingly, CEDAW, along with the Convention on the Rights of the Child, has no state-to-state procedure, while the Convention on Torture, the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Elimination of All Forms of Racial Discrimination (CERD) all do.²⁷ This is what a real hierarchy of rights looks like. Of course, interstate claims are rare even where available. Interpreted in gendered terms, men respect other men's control over their own domains in the hope and expectation of reciprocity: the male bond.

States often resist having non-state acts adjudicated by anyone other than themselves without their express consent or at all, and domestically often insist on sovereign immunities for official acts and acts of states.²⁸ The result is to insulate states as such from accountability to anyone. A systemic structural bias militates against holding perpetrators of injuries to women as such responsible to public authority, meaning any authority beyond the men who rule the private realm in which a woman's violation occurs and is typically effectively permitted.²⁹ Even the Rome Statute of the International Criminal Court does not claim universal jurisdiction but sets preconditions for its exercise over international crimes, relying on a state committing the crime or adopting the statute.³⁰ The particular combination of requiring state acts for many international violations with layers of immunity for official acts and acts of state, added to rules favoring local resolution and disallowing extraterritorial jurisdiction and to the lack of interstate claims, shuts women out.

If men have guarded against partiality, classically thought to be based on identification with people-like-me, by replacing government of men with rule of law, women continue to be governed by the rule of men's laws. Their best hope has been to appeal up the jurisdictional hierarchy to men and laws more jurisdictionally (meaning spatially) distant from, thus hopefully less controlled by and identified with, the men/laws

that violate them--exactly those sites where they have been least likely to be granted access to rights and where implementation and enforcement are least assured and least concrete. In this context, the ruling in the United States case of *Kadic v. Karadzic*, which permitted sexually violated Bosnian women to seek remedies under a statutory jurisdictional authority (the Alien Tort Act) for violations of substantive international law for rape as genocide in another country against the self-declared leader of a rogue regime at home,³¹ is a signal victory on the jurisdictional frontier. Its focus on less-than-state actors under international humanitarian law appears particularly prescient since September 11th, which impelled greater interest by men in their role as states in the legal regulation of activities of less-than-state actors under international law, opening a real opportunity for women.³²

Difference and Dominance

The standard approach to equality since Aristotle has revolved around the “likes alike, unlikes unlike” concept termed formal equality. The metric of sameness and difference that has derived from this notion privileges sameness with a dominant standard, which for women is men, and often punishes difference from that standard, including by not seeing that women’s differences from men—such as sexuality and reproduction—can give rise to inequalities at all.³³ In the face of deeply gendered legal and social arrangements, up against the recognition that inequality with men is women's global condition, the spread and effectiveness of international sex equality rights provide one sensitive and striking indicator of women's progress in becoming human in the legal sense. Considerable strides have been made under the aegis of international influence in the courts of some countries, notably Canada and South Africa,³⁴ toward substantive equality, meaning measuring the realities of sex-based subordination. The opposite of equality is understood as hierarchy, not difference: inequality is gender hierarchy rather than sex difference.³⁵ India's constitutional equality thinking too has a chance to reach an equal future from an unequal present.³⁶ Sweden has moved effectively against prostitution through a de facto sex equality approach.³⁷ Historically, women have not found strength in numbers. In settings where facing facts and respecting principle and

living up to commitments and shaming still fail, and effective external enforcement remains unavailable and corruption rules, these developments suggest that international influence and pressure on democratic states, in a setting of international women's mobilization, can promote sex equality in reality instead of merely in form. Such developments reverse the predicted dynamics of the democratic deficit so far as women's equality rights are concerned. Internationalization promotes democracy, including on the national level.

Admittedly, as in most states, sex equality rights in the major human rights instruments have tended to employ the purportedly neutral sameness/difference model.³⁸ Showing more vision, however, the UN Human Rights Committee, interpreting the ICCPR, has taken a substantive and subtle approach to the sex equality questions within its sphere.³⁹ So, to some extent, has the CEDAW Committee, which guarantees women as a group the right not to be discriminated against, focusing on the concrete situation of a substantive group of people instead of abstract spheres called civil, political, economic, and social as the primary units of analysis. By its language, CEDAW⁴⁰ also reaches private acts,⁴¹ although it can do so only through states, the parties to it. Most of CEDAW's active provisions grant women equality of rights in gender-neutral terms, often using men as the standard. This approach, producing some advances, limits women to what men have or need, resulting in difficulty in dealing, for example, with pregnancy (which CEDAW covers) and reproductive questions and sex-specific and sexual violence. Seemingly realizing that violence against women is not just one issue on a list of important problems but goes to the core of women's status and the relation of states to it, the CEDAW Committee has interpreted the Convention to prohibit violence against women as sex discrimination.⁴² No state has yet proven capable of this recognition.⁴³ The CEDAW Committee may be coming to recognize male dominance as the real name of the problem of discrimination against women.⁴⁴

Notably, two of the finest illustrations of a substantive equality approach internationally are regional: the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belem do Para)⁴⁵ and the

African Protocol on the Rights of Women,⁴⁶ to which women from cultures across the regions contributed. The Convention of Belem do Para recognizes violence against women, "a manifestation of the historically unequal power relations between women and men," as a distinctive human rights violation "based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or private sphere."⁴⁷ The Convention squarely grants "every woman ... the right to be free from violence in both the public and private spheres," backed by "the right to simple and prompt recourse to a competent court for protection against acts that violate her rights."⁴⁸ The right to freedom from violence notably includes "the right of women to be valued and educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination," implemented by "progressively specific measures" to modify and counteract such prejudices and practices that "legitimize or exacerbate violence against women."⁴⁹ This is what a substantive equality approach, complete with the necessary substance, looks like.

The African Protocol, for its part, embeds its sex equality and antiviolenace guarantees in a broadly conceived substantive vision. Its positive equality recognizes rights for women "to live in a positive cultural context" and to peace and sustainable development.⁵⁰ Leaving formalistic negative equality—that which declares equality in law when people are legally sorted into existing social orderings—in the dust,⁵¹ the African Protocol explicitly and in diverse concrete settings prohibits violence against women, not recognized as sex discrimination but defined to include "all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm."⁵² The Protocol guarantees appropriate and effective measures to enact and enforce laws against "unwanted or forced sex whether ... in private or public,"⁵³ covers "verbal violence,"⁵⁴ and rejects violence against women in "private or public life in peacetime and during situations of armed conflicts or of war."⁵⁵ Far from being paralyzed by cultural differences or intimidated by cultural relativism,⁵⁶ the African Protocol at once guarantees rights to women in polygamous unions and prefers monogamy.⁵⁷ It moves to eliminate "harmful practices which negatively affect the human rights of women and which are contrary to recognized international standards," including

"female genital mutilation."⁵⁸ Its economic and social rights run to "the informal sector" and "work of women in the home"⁵⁹ well as covering the public workplace. The Protocol not only guarantees women's right to control their fertility and to decide whether and when to have children⁶⁰ but also, uniquely in a multilateral treaty, requires states to authorize "medical abortion" in certain circumstances.⁶¹ It puts Africa on a par with Latin America on the question of violence against women and in the lead on women's equality in world law.⁶²

As more and more of the substantive reality of women's deprivation of humanity through sexual violence in particular has been reflected in law, recognition of sex equality as a peremptory international norm has advanced.⁶³ Sex equality, although subject to varying interpretations, is nearly universally embraced as an international norm.⁶⁴ International human rights law, including the United Nations Charter, pervasively guarantees the right to equality before the law without discrimination on the basis of sex.⁶⁵ Many, even most, countries recognize sex equality as a value in their legal systems, widely guaranteeing legal equality based on sex in constitutions and other foundational statements this despite the fact that sex discriminatory laws continue in force around the world⁶⁶ in settings of pervasive social inequality of the sexes in reality. The fact that a norm is not lived up to or delivered upon with consistency does not mean that it is not a norm. Much like racial discrimination, which is widely recognized to violate customary international law, sex discrimination's rejection is normatively vigorous if feebly implemented, displaying strong belief in legal obligation but weak state practice. Virtually no one says they support sex discrimination. Even more unanimous than the rejection of discrimination against women by law is the rejection of the idea of the biological inferiority of women to men⁶⁷ and the condemnation of the subordination of women by men, particularly when it is violent. If discrimination by law is widely rejected on principle if not in practice, ideologies of sex-based inferiority by nature and violent sexual subordination in society are broadly condemned, at least ostensibly. Rape, a form of sex inequality widely practiced and permitted, is nonetheless universally abhorred officially and virtually uniformly made criminal. The ad hoc criminal tribunals are moving the international order toward an understanding of sexual violence against women as a crime of violent inequality.⁶⁸ Indeed, international law often

gets further in addressing the realities of sex inequality when it uses other legal frameworks. International trafficking prohibitions, for instance, show more awareness of the dynamics of sex-based inequality that women and girls face in a sex-unequal world than does anything in sex equality law per se.⁶⁹ Perhaps the pervasive presence of women pressuring male states to recognize their humanity in principle as well as in practice, with international backing, is shifting professed custom.⁷⁰ By these measures, particularly for gross or systematic acts, sex equality is moving toward recognition as a peremptory norm at the highest level of international principle.⁷¹

Coercion and Consent

Despite this level of acceptance of sex equality as a principle, women's actual second-class status continues to be concealed, therefore maintained, by pervasive practices, potent among which is the tendency of law to conceal coercion behind what it terms consent. Particularly in sexual relations, the assumption with respect to women continues to tend to be that people can be free without being equal, thus if sex took place, consent to it is effectively assumed unless negated by evidence of considerable physical force. This approach tends to privilege sexual access to others without regard for their circumstances of inequality, which empowers the typical masculine gender role.

The acceptance of the legal claim for sexual harassment, with its standard of welcomeness rather than consent, has tended to problematize this approach. The acceptance of sexual harassment as a legal claim has spread from its origin in one state to national and international systems around the world.⁷² In the European setting, the European Court of Human Rights, refusing to use consent as a cover for coercion, has required, on facts of acquaintance rape, that member states actually enforce their rape laws in *M.C. v. Bulgaria*.⁷³ In the greatest advance, the ICTR in the *Akayesu* case conceived sexual assault as “an attack of a sexual nature under circumstances that are coercive.”⁷⁴ In this jurisprudence, far from using consent to cover coercion, as remains typical in national systems, consent was deemed so irrelevant in the context of genocide, war, and campaigns of crimes against humanity as to not be mentioned. The resolution by

the ICTY/ICTR Appeals Chamber of the tension with consent-based definitions of sexual assault in *Gatcumbisi*⁷⁵ is favorable to the *Akayesu* insight, one that is as relevant outside recognized zones of conflict as within them. Conceived more broadly, if sexual assault is understood as a crime of inequality, whether forced by means of physical aggression or status hierarchy, sex will often be consented to when it is far from desired. The developing international law of sex trafficking, some of it implemented nationally, exhibits a growing awareness of these factors.⁷⁶ The general assumption that disempowered people, including women, consent to the rule of the state itself, purportedly giving it legitimacy, could be criticized in similar terms. In this light, the voice of women through NGOs in international politics could be seen as giving the international order legitimacy that few states can claim.

Morality and Politics

Presenting what are functioning divisions of power as if they are only a discourse in ideas of right and wrong, garbing politics as morality, hides power divisions. If the equality of the sexes were recognized to be a fact, equalizing socially unequal groups would merely be a problem to be solved. So long as sex equality is seen as a moral value, it can be accepted or rejected as one side in a normative discussion. In policy, a fact is either reflected or distorted; a value can be debated endlessly. Its recognition ebbs and flows with time and place, majorities and hegemonies. This distinction in logical status and some of its implications can be illustrated by comparing two passages in the preambular language of CEDAW with that of CERD. CERD's ratifiers are "[c]onvinced that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere."⁷⁷ Racial equality is a fact. Doctrines of racial supremacy are based on the lie of the superiority of some races over others. At bottom, racism is inaccurate. It grounds a politics of equality in the world of reality. The only reason not to reject racism is left exposed as the interest of one racial group seeking to dominate another. Racism is naked; the ideology of the self-interest of bigots.

Nothing in the preamble to CEDAW is equivalent to this. The CEDAW preamble rejects sexism principally not as false and inherently without basis but as a barrier to the exercise of other rights, hence derivative, and an inefficient use of human resources. The closest it comes is, "Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity."⁷⁸ Sex discrimination violates other abstract ideas; that discrimination violates equality principles is a tautology. The strongest reality-based argument against discrimination against women offered is consequentialist: it interferes with the ability of families and societies and countries to use women to grow and prosper. CERD's formulation does not just turn up the rhetorical heat. Sex equality inhabits the realm of the good idea, the right view, a guide to proper thought and action, rather than being the only position consistent with the evidence. This is not a practical legal criticism. The preambular language is not in itself operative, and the operational language of CEDAW squarely addresses many concrete problems this preambular language leaves in question, including the traditional roles of the sexes, traditional cultural and religious practices, prostitution, and reproduction.⁷⁹ But on the level of express principle, CEDAW never says that sexism is a lie. It does not say that there is no justification for the inferiority of women in theory or practice anywhere. Nowhere does it state that the doctrine of male supremacy based on sexual differentiation can never justify the subordination of women. As significant an advance for women as CEDAW is, opposition to discrimination based on sex is, on this preambular level of principle, framed as a moral judgment of value. Sexism remains clothed, sexual politics ungrounded. The broader tendency to view sex equality as a nice idea rather than a reality being denied effect in actual social orderings undermines progress toward sex equality worldwide.

Taking one long step in the direction of reality, the International Criminal Tribunal for Rwanda, Trial Division I, illustrates one route to addressing hate speech in

nonwar settings, a problem that has been addressed largely as moral in contexts outside recognized zones of conflict.⁸⁰ Holding three media leaders guilty of genocide and persecution (a crime against humanity) for broadcasts and publications that impelled the killing of Tutsi and moderate Hutu civilians in the Rwandan genocide of 1994,⁸¹ Trial Division I did not decry the negative and hateful statements but found as fact what they caused and what they did. Fear-mongering, justifying aggression as self-defense, circulating hit lists and targeting individuals' movements and locations, and spreading a climate of ethnic animosity and terror so that one spark could ignite the prairie fire in which 800,000 people were massacred in a hundred days were found to be genocidal.⁸² The issue was not defamation or offensiveness but the power of media to kill. Cartoons that sexualized hate and fear of Tutsi women were linked to their mass rape.⁸³ The *Media Case's* approach to causality in particular offers powerful guidance for the regulation of pornography, including racist pornography, a practice of inequality connected to violence against women outside as well as within zones of recognized conflict.⁸⁴ This is not to say that authoritatively saying something is wrong cannot be a step in stopping it. It is to say that it is not as powerful a step—nowhere near—for purposes of stopping it, as saying that it is false and harmful. For another example, with female genital mutilation, it is one thing to strike a pose to declare it wrong. It is quite another to expose it as harmful and unequal. The first is open to a cultural defense; the second is not.

* *

Observably gendered against women's interests, the international system has nonetheless produced gains for women unavailable elsewhere. The motion brought about by women, largely originating in civil society, converging with other developments internationally, is congealing into a new model of human rights. Central features include the recognition that other-than-state actors are often both perpetrators and victims of human rights, the public\private fix; realization that injuries to one's humanity are often group-based even when the individual is harmed, the difference\dominance change; understanding that civil society, not only the state, is part of the problem and must be part

of the solution, recognizing that coercion is socially-based and does not only emanate from the state; and pursuit of civil remedies as more transformative, hence restorative, than standard criminal approaches alone, providing material remedies for actual, not merely moral, harms.

In challenging men's rule to produce these gains, women as such have emerged as not only a group in itself—a transnational group created through treatment that is not limited by national boundaries—but also as a group for itself, self-consciously realized through organizing.⁸⁵ That the international is the authentic locale for the fight for women's rights explains the explosive productivity of the series of international conferences of the past three decades.⁸⁶ Consciousness of sex-based subordination and the possibilities for change went global through these conferences, mobilizing women worldwide and producing influential forward-looking (despite some crucial shortcomings)⁸⁷ drafts of legislation and policy, blueprints for where women's world could move. These documents have led international opinion and focused national efforts under an international umbrella. In this process, the legitimacy of the NGOs that have spoken for women whom states have long ignored has been repeatedly questioned, even as the legitimacy of states in representing their countries' women—half the population excluded from the public order for centuries and remaining outside public power even in most democracies today—is left unquestioned.

Women have emerged as a global group in the sense that the distinctive social definition, treatment, and status of women as a sex relative to men are recognizable in diverse forms all over the world.⁸⁸ Both women's subordination and their resistance to it have been global all along, predating what is now called globalization—a moment of perception catching up to women's longtime reality. Gender hierarchy is a global system. National particularities in the form of states have given some of it the exemption of culture, legally ratified as sovereign jurisdiction, casting the rest of it as natural, when it is simply transnational. This renders every form of oppression known to woman either a cultural universal or a cultural particularity—meaning respectively, neither either can or should be done about them. Nowhere is sexuality not central to keeping women down.

Nowhere are the universal and the culturally particular, in their versions of sameness to and difference from men, not vaunted as reasons why that lesser place is woman's rightful place and as reasons to do nothing about it.⁸⁹

Seeing women's world—both status and struggle to change it—as the globe thus stands in inherent tension with subsuming women and their rights into, and to, states, which, from the standpoint of democratic values, have not represented their interests well. The international arena, in beginning to recognize these interests, has been more democratic in this sense than states are. The international arena thus presents at once a specific problem of organized male dominance and a distinctive series of opportunities for opposing it.

In this light, work for women within nations, however essential, amounts to seeking equality for women in one country, a task ultimately incapable of achievement in isolation. Even as solutions to women's subordination into one system need to be diversely tailored with care to the local forms of that system, as women in one country achieve more equality, men seek out women with fewer options elsewhere—a pattern observable sexually in sex trafficking, sex tourism, and mail-order brides and economically in labor trafficking, international outsourcing to sweatshops, and relocation of production in dominant countries to sources of cheap female labor in countries whose gross domestic product is less than that of some of the multinational corporations that locate there.⁹⁰ No more than clean air can women's equality really be successfully achieved in one country, giving global concreteness to the understanding that no woman will be free until all women are equal. On the positive side, perhaps customary international law, generally regarded as a conservative instrument, is one level on which women's numbers and global mobilization as a conscious force can become a strength.

On each of these four critical dimensions of the maleness of states, it is not that the international is not male, but rather that, it is in the international arena that some of the deepest changes for women can be observed to be taking place. Why? Part of the reason, possibly, is distance. It attenuates the male bond somewhat, reducing, along with

men's identification with other men, impunity, and sometimes corruption. Distance enhances what men call objectivity, meaning they do not identify with the men involved, therefore they can be fair. Subordinating behavior is often far more visible to them when "other" men do it, opening a space for women to have their oppression seen, even acted upon. A corollary is the suggestion that corruption is a dynamic of male dominance, the abuse of power for substantive self-dealing for those who are close vitiating the rule of law. That address to women's issues might become part of men's politics with each other is both a step up for women as well as a hazard of human status in medias res.

It is no accident that it has been women's insistence on institutionalizing address to sexual violence against them that has impelled these changes. As the mountain of women moves, the state in its male form is arguably becoming anachronistic, even obsolete. Increasingly a shell of force, if with considerable remaining clout, the state never has monopolized the means of violence within its borders—the basis for its claim to legitimate rule—unless male violence against women is seen as encompassed within that. Its illegitimacy more naked by the day, the state may be increasingly irrelevant to women, who have never had men's stake in it anyway.⁹¹ In the absence of states' tools of implementation, international law—like women largely lacking access to legitimate force to compel adherence to its will—has had to develop a wider range of means to be effective. International law in this sense has been feminized compared with states by being denigrated for relying on forms of enforcement other than physical aggression. Not to valorize lack of enforcement, but force is not all there is to effectiveness or even to power. Women tend to comply with the dictates and limits of male dominance even when not individually forced to do so, just as most decisions of the International Court of Justice are complied with even though it commands no military forces.⁹²⁹³ For years, the Berlin Wall was feared and unassailable concrete and wire with armed guards, but what held it up did not change the day it came down. People dismantled the Berlin Wall with their bare hands the day the world stopped believing in it.

Sexual violation is not merely one example of male power and official impunity. It is not only social ground zero of the inequality of the sexes. It may be law's ultimate

challenge in its male incarnation. Considered private, sexual violation is shared and structures the public order. Widely attributed to sexual difference, sexual abuse enacts dominance. Rationalized as consensual, it is coerced. Endlessly moralized, it is sexually political. Effectively ignored in any proportion to its actual occurrence, romanticized by society, it is condoned. The international work against it has exposed sexual violation as a crime of inequality of status, to which those who are low in status and its power are subjected, to which those who are subjected are lowered. Its centrality to women's inequality to men, and to some men's inequality with other men, has been found to play out through culture and religion, the institution of the family, and norms of dignity, honor, respect, in war and in what is called peace. Because sexual abuse dehumanizes, no material recompense or punishment can fully restore its harm. Official force alone, although essential, will not end it, and can make it worse. Recognition of human rights against it can begin to give back the humanity the rapist takes away. Beginning with intimate inviolability, seeking humanity, it is women's global consciousness of human status against this denied atrocity that is exploding across the still-potent artifice of states' frontiers, erupting through the fissures of state subordination, and rising from the ashes of states' collapse.

FOOTNOTES

¹ Documentation includes the many international reports of state inaction worldwide on crimes of violence where women are the victims. See, e.g., Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women, Radhika Coomaraswamy, Special Rapporteur, E/CN.4/2001/73 (23 January 2001); TBA

² See, e.g., Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* 165-198 (1998). TBA

³ For a brief, lucid discussion of how "the challenge of human rights is inextricably bound up with the history of the modern state," see Christian Tomuschat, *Human Rights Between Idealism and Realism* 7, 6-23 (2003).

⁴ See "Crimes of War, Crimes of Peace," No. 14; "Women's September 11th: Rethinking the International Law of Conflict," at No. 25.

⁵ Their desire for justice led to our federal lawsuit in New York under the Alien Tort Claims Act, 28 U.S.c. § 1350, *Kadic v. Karadzic*, 70 F3d 232 (2d Gr. 1995), *reh'g denied*, 74 F3d 377 (2d Gr. 1996), *cert. denied*, 518 U.S. 1005 (1996), by named individuals and

groups against the leader of the Bosnian Serbs, Radovan Karadzic, for atrocities under his command and control in Bosnia-Herzegovina and some parts of Croatia.

⁶ "Genocide's Sexuality," at No. 22, and "Defining Rape Internationally: A Commentary on *Akayesu*," at No. 23, discuss these themes.

⁷ See, e.g., "The Promise of CEDAW's Optional Protocol," at No. 6.

⁸ Of course, this idea is not entirely new. Civil remedies have been included, for example, in the nonbinding rulings of the United Nations Human Rights Committee since it began finding that states parties that violate the International Covenant on Civil and Political Rights (ICCPR), 999 U.N.T.S. 171, have an obligation to repair and compensate the victim for damage. U.N. Hum. Rts. Comm., Views on Uruguay Communication No. 8/1977, *submitted by Beatriz Weisman et al.*, CCPR/C/9/D/8/1977 (adopted on Apr. 3, 1980), *reprinted in Selected Decisions Under the Optional Protocol*, UN. Doc. CCPR/C/OP/1 at 45, 49, q 17 (1985). They can also be found in the European Convention for the Protection of Human Rights and Fundamental Freedoms art. 41, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention] ("just satisfaction"); American Convention on Human Rights art. 63, adopted Nov. 22, 1969, O. A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention] ("fair compensation"); and the Convention Against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment or Punishment art. 14(1), Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Torture Convention]. The International Criminal Tribunal for the Former Yugoslavia (ICTY)

refers victims to national courts for this purpose, ICTY *Rules of Procedure and Evidence* 106, U.N. Doc. IT/32 (1994), *reprinted in 33 International Legal Materials* 484; the Rome Statute of the International Criminal Court arts. 77 and 79, July 17, 1998, U.N. Doc. A/CONF.183/9, *37 International Legal Materials* 999 [hereinafter Rome Statute] permits a Victim Trust.

⁹ For an inspired tracing of this international legal process, see Arvonne Fraser, "Becoming Human: The Origins and Development of Women's Human Rights," 21 *Human Rights Quarterly* 853 (1999).

¹⁰ The ways in which women have been failed by international human rights in both senses is the topic of "Are Women Human?" at No. 4.

¹¹ This was first argued in Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (1989), and further elaborated regarding the United States throughout Catharine A. MacKinnon, *Women's Lives, Men's Laws* (2005).

¹² Again, MacKinnon, *Toward a Feminist Theory of the State*, makes this argument at length. The now ubiquitous term "sexual politics" is from Kate Millett, *Sexual Politics* (1970).

¹³ People might be forgiven for not understanding in what sense these terms are used, being subtle, complex, still under-theorized, as well as fundamental, challenging and changing how many things have been understood and conceptualized.

¹⁴ This, too, is argued in MacKinnon, *Toward a Feminist Theory of the State*.

¹⁵ See, e.g., Robert Dahl, “Can International Organizations Be Democratic? A Skeptic’s View,” in Ian Shapiro and Casiano Hacker-Cordon , eds, *Democracy’s Edges*, 19 (1999); Andrew Moravcsik, “Is there a ‘Democratic Deficit’ in World Politics? A Framework for Analysis,” *Government and Opposition* (2004); TBA

¹⁶ See, e.g., Peter T. Mancias, *The Death of the State* (1974); *Global Law Without a State*, Gunther Teubner ed. (1997); TBA

¹⁷ These two themes are interconnected in various ways. For example, some opponents of globalization argue that it produces democratic deficit. Of course, defenders of international institutions do not support all global dynamics just because they are global.

¹⁸ These four dimensions form the core of the analysis of MacKinnon, *Toward a Feminist Theory of the State*, there observed as areas in which male dominance can be found, rather than advanced, as here, as definitive of maleness in states *per se*.

¹⁹ See the abortion discussion in MacKinnon, *Toward a Feminist Theory of the State*, above note 11, at 184.

²⁰ The foundational discussion of this theme is Hilary Charlesworth, Christine Chinkin, and Shelley Wright, "Feminist Approaches to International Law," 85 *American Journal of International Law* 613, 625-630 (1991).

²¹ This point is discussed more fully in "Women's September 11th: Rethinking the International Law of Conflict," at No. 25.

²² *Id.*

²³ Karel Vasak, "A 30-Year Struggle," *UNESCO Courier*, 29 (Nov. 1977), apparently first used this term. See Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law, A Feminist Analysis* 203-207 (2000) [hereinafter Charlesworth and Chinkin, *Boundaries*], for further discussion in feminist terms.

²⁴ *United States v. Morrison*, 529 U.S. 598 (2000).

²⁵ See Rebecca J. Cook, "Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women," 30 *Virginia Journal of International Law* 643 (1990); Charlesworth and Chinkin, *Boundaries*, above note 20, at 102113. See generally *Human*

Rights as General Norms and a State's Right to Opt Out- Reservations and Objections to Human Rights Conventions (J. P. Gardner ed., 1997).

²⁶ See Cook, "Reservations," above note 21, at 713; Rebecca J. Cook, "State Responsibility for Violations of Human Rights," 7 *Harvard Human Rights Journal* 125, 172-173 and 173 n.257 (1994); Louis Henkin, "U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker," 89 *American Journal of International Law* 341,345 (1995).

²⁷ Torture Convention art. 21; ICCPR art. 41; International Convention on the Elimination of All Forms of Racial Discrimination art. 11, Jan. 4, 1969, 660 U.N.T.S. 195 [hereinafter CERD]; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families art. 76, Dec. 18, 1990, 30 International Legal Materials 1317(entered into force July 1, 2003).

²⁸ The law of the United States illustrates the basic concepts as they often exist in national law in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989); *Princz v. Federal Republic of Germany*, 26 F3d 1166 (D.C. Gr. 1994); Foreign Sovereign Immunities Act of 1976 § 1604, 90 Stat, 2891 (codified as amended at 28 U.S.C. § 1330, 1602-1611 (2000) ("a foreign state shall be immune from the jurisdiction" of U.S. courts except as provided in §§ 1605-1607).

²⁹ This analysis is discussed further in "Disputing Male Sovereignty," in MacKinnon, *Women's Lives, Men's Laws*, above note 11, at 206.

³⁰ Rome Statute arts. 12 and 13.

³¹ *Are Women Human?* Part III discusses this case, *Kadic v. Karadzic*, 70 F3d 232 (2d Cir. 1995).

³² See "Women's September 11th," at No. 25 for extensive discussion.

³³ See "Toward a New Theory of Equality," in *Women's Lives, Men's Laws*, above n. 11.

³⁴ See "Nation building in Canada," at No. 10, and "Equality Remade: Violence Against Women," at No. 11. The South African Constitution built on Canadian developments. See, e.g., *S. v. Baloyi*, 2000 (2) SA 425 (CC) para. 11 (S. Afr.) (finding that the Prevention of Family Violence Act had to be construed under the Constitution and thus "understood as obliging the State directly to protect the right of everyone to be free from private or domestic violence"); *Carmichele v. Minister of Safety and Security*, 2001 (4) SA 938 (CC) para. 44 (S. Afr.) (deciding that law enforcement officials owed a woman who had been raped a legal duty to protect her under the circumstances and that they had negligently and unlawfully failed to do so, such that they were legally liable to her, since "[i]n some circumstances there would also be a positive component which obliges the State and its organs to provide appropriate protection to everyone through laws and

structures designed to afford such protection"). *Carmichele* at para. 45 distinguished its view that the South African Constitution requires the state to protect individuals from the view of the same question taken by the U.S. Supreme Court that it has no such responsibility, as stated in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). For background, see generally Mark S. Kende, "Stereotypes in South African and American Constitutional Law: Achieving Gender Equality and Transformation," 10 *Southern California Review of Law and Women's Studies* 3 (2000) (arguing that South African constitutionalism reflects the antidominance gender equality model adopted in Canada). For discussion of the equality approach taken in Canada, see "Making Sex Equality Real," at No.7, "Nation building in Canada," at No. 10, and "Equality Remade: Violence Against Women," at No. 11.

³⁵ Catharine A. MacKinnon, *Sex Equality* (2001, 2007), examines this distinction in detail conceptually and comparatively.

³⁶ See "Sex Equality Under the Constitution of India: Problems, Prospects, and 'Personal Laws,'" at No. 13.

³⁷ See "On Sex and Violence: Introducing the Antipornography Ordinance in Sweden," at No.9

³⁸ This analysis is developed in MacKinnon, "Toward a New Theory of Equality," in *Women's Lives, Men's Laws*, above note 11, at 44, and explored throughout MacKinnon, *Sex Equality*.

³⁹ See U.N. Hum. Rts. Comm., General Comment 18: Non-discrimination, para. 7, 37th Sess. (1989), U.N. Doc. HRI/GEN/1/Rev. 1 at 26 (1994).

⁴⁰ See Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 UN.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

⁴¹ CEDAW states that "'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women ... on a basis of equality of men and women ... of human rights and fundamental freedoms," not just such distinctions made by state actors. CEDAW art. 1. CEDAW goes on to condemn sex discrimination "in all its forms" and to call for legislation creating "sanctions where appropriate," presumably against private actors who discriminate against women. *Id.* arts. II and II(b). Crucially, CEDAW explicitly calls on states parties "[t]o take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise." *Id.* art. II(e). It also addresses the need "[t]o modify the social and cultural patterns of conduct of men and women," areas clearly involving private acts and customs. *Id.* art. V(a). By condemning "all forms of traffic in women and exploitation of prostitution by women," CEDAW obviously refers to the mainly private commercial sex

trade. Id. art. VI. CEDAW requires the protection of women's rights among the obviously private "non-governmental organizations and associations." Id. art. VII(c). Finally, the various provisions dealing with women's rights protection in education, employment, health care, rural areas, marriage, and family relations necessarily reach the so-called private sector, as far as states parties are involved in these areas, which involvement tends to be substantial. Id. arts. X-XVI.

⁴² CEDAW Committee, *General Recommendation No. 19: Violence Against Women* (11th Sess. 1992), UN. Doc. A/47/38 at 1 (1993).

⁴³ The U.S. Congress achieved this recognition in passing the Violence Against Women Act, but the U.S. Supreme Court in *United States v. Morrison*, 529 U.S. 598 (2000), later struck down this provision as exceeding the federal legislative power. For analysis, see MacKinnon, "Disputing Men's Sovereignty," in *Women's Lives, Men's Laws*, above note 11, at 206.

⁴⁴ See, e.g., the CEDAW Committee's finding that "to overcome centuries of male domination of the public sphere, women ... require the encouragement and support of all sectors of society." U.N. Comm. on the Elimination of Discrimination Against Women (CEDAW Committee), *General Recommendation No. 23-- Political and Public Life para. 15* (16th Sess. 1997), UN. Doc. N52/38/Rev.1 Part II at 61 (1997) (on CEDAW art. 7); see also CEDAW Comm., *General Recommendation No. 21" Equality in Marriage and Family Relations para 12* (13th Sess. 1992), U.N. Doc. N49/38 at 1 (1994) ("Even where

de jure equality exists, all societies assign different roles, which are regarded as inferior, to women."). Verging further on this awareness is the 2005 report on its inquiry into the abduction, rape, and murder of hundreds of women in Ciudad Juarez, Mexico, with impunity, in which the CEDAW Committee described the importance of a full "realization of the extent of the problem, as a phenomenon that goes beyond isolated cases in a structurally violent society." CEDAW Comm., *Report on Mexico Produced by the Committee on the Elimination of Discrimination Against Women Under Article 8 of the Optional Protocol to the Convention, and Reply from the Government of Mexico para 34*, U.N. Doc. CEDAW/C/2005/0P.8/MEXICO (Jan. 27, 2005). The CEDAW Committee required focus on "resolving the underlying socio-cultural problem. Along with combating crime, resolving the individual cases of murders and disappearances, finding and punishing those who are guilty, and providing support to the victims' families, *the root causes of gender violence in its structural dimension and in all its forms-whether domestic and intra-family violence or sexual violence and abuse, murders, kidnappings, and disappearances must be combated, specific policies on gender equality adopted and a gender perspective integrated into all public policies.*" *Id.* (emphasis added).

⁴⁵ Basic Documents Pertaining to Human Rights in the Inter-American System 101, Organization of American States, Inter-American Commission on Human Rights, Inter-American Court of Human Rights, Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belem do Para), OENSer.L/V/I.4 rev. 8, 22 May 2001, 33 *International Legal Materials* 1534 (entered into force Mar. 5, 1995) [hereinafter, *Convention of Belem do Para*].

⁴⁶ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, *opened for Signature* July 11, 2003, OAU. Doc. CAB/LEG/66.6 (1999), available at <http://www.achpr.org> [*hereinafter African Protocol*].

⁴⁷ Convention of Belem do Para preamble; art. 1.

⁴⁸ Id. arts. 2, 3, 3(g).

⁴⁹ Id. art. 6, art. 8.

⁵⁰ *African Protocol*, art. 17(1) ("Women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies."); id. art. 10(1) ("Women have the right to a peaceful existence and the right to participate in the promotion and maintenance of peace."); id. art. 19 ("Women shall have the right to fully enjoy their right to sustainable development.").

⁵¹ For further discussion, see MacKinnon, "Toward a New Theory of Equality," in *Women's Lives, Men's Laws*, above note 11, at 44; "Sex Equality Under the Constitution of India: Problems, Prospects, and 'Personal Laws,'" at No. 13; "On Sex and Violence: Introducing the Antipornography Ordinance in Sweden," at No.9; "Nation building in Canada," at No. 10.

⁵² African Protocol art. 1(j).

⁵³ Id. art. 4(2)(a).

⁵⁴ Id. art. 3(4).

⁵⁵ Id.

⁵⁶ A range of views on the subject can be found in Radhika Coomaraswamy, "'To Bellow like a Cow': Women, Ethnicity, and the Discourse of Rights," in *Human Rights of Women National and International Perspectives* 39 (Rebecca J. Cook, ed., 1994); Abdullahi A. An-Na'im, "State Responsibility Under International Human Rights Law to Change Religious and Customary Laws," in *Human Rights of Women*; Isabelle R. Gunning, "Arrogant Perception, World-Traveling, and Multicultural Feminism: The Case of Female Genital Surgeries," 23 *Columbia Human Rights Law Review* 198 (1992).

⁵⁷ African Protocol art. 6(c) (states parties are to enact legislation to guarantee that "monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected").

⁵⁸ Id. art. 5 chapeau and 5(b) ("States Parties shall take all necessary legislative and other measures to eliminate such [harmful] practices, including ... prohibition, through

legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them.").

⁵⁹ Id. art. 13(e) and (h).

⁶⁰ Id. art. 14(I)(a) and (1) (b).

⁶¹ The circumstances are "sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus." Id. art. 14(1)(c).

⁶² Ratified by the requisite 15 states, the African Protocol came into force November 25, 2005.

⁶³ On this point, the Inter-American Court of Human Rights has stated that "this Court considers that the principle of equality before the law, equal protection before the law and non-discrimination belongs to jus cogens, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person, owing to gender ... is unacceptable." *Juridical Condition and Rights of the Undocumented Migrants*, Advisory

Opinion OC-18, 2003 (requested by Mexico), Inter-Am. Ct. H.R. (Ser. A) No. 18/03, at 101 (Sept. 17, 2003).

⁶⁴ Beijing Declaration and Platform for Action, Fourth World Conference on Women, Sept. 15, 1995, A/CONF. 177/20 (1995) and A/CONF. 177/20/Add. 1 (1995), endorsed by G.A. Res. 50/203, U.N. Doc. A/RES/50/203 (Dec. 22, 1995) [hereinafter Beijing Declaration]; Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, at 217 (1993); Declaration on the Elimination of Discrimination Against Women art. 3, G.A. Res. 2263 (XXII), U.N. Doc. A/6880 (Nov. 7, 1967).

⁶⁵ See, e.g., U.N. Charter art. 1, para. 3; Universal Declaration of Human Rights art. 2, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., 71, U.N. Doc. A/ 810 (Dec. 10, 1948); ICCPR arts. 3 and 26 (entered into force Mar. 23, 1976); International Covenant on Economic, Social and Cultural Rights, art. 3, opened for signature Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976); American Convention arts. 1 and 27 (entered into force July 18, 1978); European Convention art. 14 (entered into force Sept. 3, 1953); African (Banjul) Charter on Human and Peoples' Rights preamble, arts. 2 and 18, adopted June 27, 1981, 21 International Legal Materials 58 (entered into force Oct. 21, 1986). Sex discrimination is even prohibited in armed conflict by Common Article 3 of the Geneva Conventions. See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (requiring protection for civilians "without any adverse distinction founded on . . . sex . . .").

⁶⁶ See Equality Now, *Words and Deeds: Holding Governments Accountable in the Beijing + 10 Review Process* (Mar. 2004, updated May 2005 available at www.equalitynow.org); Jessica Neuwirth, "Inequality Before the Law: Holding States Accountable for Sex Discriminatory Laws Under the Convention on the Elimination of All Forms of Discrimination Against Women and Through the Beijing Platform for Action," 18 *Harvard Human Rights Journal* 19 (2005).

⁶⁷ The General Assembly's Declaration on the Elimination of Discrimination Against Women, Article 3, went further, mandating taking all appropriate measures to eradicate "practices which are based on the idea of the inferiority of women." Declaration on the Elimination of Discrimination Against Women art. 3, G.A. Res. 2263 (XXII), U.N. Doc. A/6880 (Nov. 7, 1967).

⁶⁸ See, e.g., rape as a crime against humanity in the Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, S.C. Res. 955, U.N. SCOR, 3453 mtg. at 3, U.N. Doc. S/RES/955, Annex (1994), art. 3(g), reprinted in 33 *International Legal Materials* 1598, 1602 [hereinafter *ICTR Statute*]; see also "Defining Rape Internationally: A Commentary on Akayesu," at No. 23.

⁶⁹ This is true from the Protocol to Amend the International Agreement for the Suppression of the White Slave Traffic, signed at Paris on May 18, 1904, and the International Convention for the Suppression of the White Slave Traffic, signed at Paris on May 4, 1910, May 4, 1949, 2 U.S.T. 1997, 98 U.N.T.S. 103, to the 1949 Convention, Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Mar. 21, 1950, 96 U.N.T.S. 271, to the breakthrough language of the Palermo Protocol, see Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, (entered into force Sept. 8, 2003). For further discussion and documentation, see "Pornography as Trafficking," at No. 24.

⁷⁰ For a discussion of the tension between normative and empirical in determinations of customary international law, see Anthea Elizabeth Roberts, "Traditional and Modern Approaches to Customary International Law: A Reconciliation," *95 American Journal of International Law* 757 (2001).

⁷¹ On standards for customary international law, see Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055, T.S. No. 993 (custom being "evidence of a general practice accepted as law"); *North Sea Continental Shelf* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), 1969 I.C.J. 5, 43-44 (Feb. 20); *Military and Paramilitary Activities* (Nicaragua v. United States), 1986 I.C.J. 14, 98 186 (June 27). For a range of views on the process, see Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989); Anthony A. D'Amato, *The*

Concept of Custom in International Law (1971); Bruno Simma and Philip Alston, "The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles," 1988-1989 *Australian Yearbook of International Law* 82; W. Michael Reisman, "The Cult of Custom in the Late 20th Century," 17 *California Western International Law Journal* 133 (1987). For an authoritative overview, see International Law Association, "Statement of Principles Applicable to the Formation of General Customary International Law," London Conference (2000). For a focused discussion of gender discrimination in the context of the scope of customary human rights law, as well as under jus cogens and standards for obligations erga omnes, see Oscar Schachter, *International Law in Theory and Practice* 340-345 (1991).

⁷² See Catharine A. MacKinnon and Reva Siegel, eds., *Directions in Sexual Harassment Law* (2005).

⁷³ M.C. v. Bulgaria, No. 39272/98, ECHR (4 December 2003).

⁷⁴ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998).

⁷⁵ Gacumbitsi v. Prosecutor, ICTR-2001-64-A, Appeals Chamber, 7 July 2006.

⁷⁶ See Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against

Transnational Organized Crime, (entered into force Sept. H, 2003) (Palermo Protocol);
US trafficking law TBA.

⁷⁷ CERD preamble.

⁷⁸ CEDAW preamble.

⁷⁹ To combat the discrimination inherent in traditional roles, CEDAW directs states parties to "take all appropriate measures . . . (a) [t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women," and "(b) [t]o ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children." *Id.* art. 5; see also *id.* art. 10(c) (dealing with "elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education"). In addition, CEDAW speaks specifically to culture in other areas. See *id.* arts. 1, 3 and 13(c); see also *id.* art. 2(f) (directing states parties "[t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women"). CEDAW deals directly with prostitution by calling on states parties "to suppress all forms of traffic in women and exploitation of prostitution of women." *Id.* art. 6. On reproduction, CEDAW requires, *inter alia*, states parties "eliminate

discrimination against women in the field of employment in order to ensure . . . [t]he right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction." Id. art. 11(f).

⁸⁰ Canada is an exception, see *Regina v. Keegstra*, [1990] 3 S.C.R 697.

⁸¹ *Prosecutor v. Nahimana, Barayagwiza, and Ngeze*, Case No. ICTR 99-52-T, Judgment and Sentence (Dec. 3, 2003) (appeals pending) [hereinafter *Nahimana*]. See Catharine A. MacKinnon, "International Decision: *Prosecutor v. Nahimana, Barayagwiza, and Ngeze*," 98 *American Journal of International Law* 325 (2004).

⁸² The radio broadcasts, the massacres, and the cause and effect between the two are vividly chronicled from firsthand observation by Romeo Dallaire, head of UNAMIR, along with his disgust with those distant authorities who insisted on preserving the freedom of speech of the broadcasters while people were slaughtered as a result of them. See Romeo Dallaire, *Shake Hands with the Devil* 123, 133, 227, 230, 261, 272, 277, 375 (2003).

⁸³ *Nahimana*, paras. 139, 152, 188, 245, 1079. The media figures were charged with murder as well as its incitement, but they were inexplicably not prosecuted for rape, even though rapes were often committed at the same time by the same people in similar relation to the publications as the killings.

⁸⁴ See "Pornography's Empire," at No. 12; "Pornography as Trafficking," at No. 24; Part II, Section B of MacKinnon, *Women's Lives, Men's Laws*, above note 11, at 297.

⁸⁵ On the latter, for one investigation, see Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* 165-198 (1998).

On the distinction between groups in themselves and for themselves, see Jean-Paul Sartre, *Being and Nothingness* (Hazel E. Barnes, trans., 1956).

⁸⁶ See, e.g., Beijing Declaration, above note 58; Implementation of the Nairobi Forward-Looking Strategies for the Advancement of Women, G.A. Res. 161, U.N. GAOR, 49th Sess., Agenda Item 97, U.N. Doc. A/Res/49/161 (1995) (the Nairobi document itself dates from 1985); Programme of Action of the International Conference on Population and Development, U.N. Doc. A/CONF. 171/13 (1994) (Cairo); United Nations World Conference on Human Rights: Vienna Declaration and Program of Action, 32 International Legal Materials 1661 (1993) (registering the substantial input of the parallel mobilization of women in its "women's rights are human rights" breakthrough); Forward-Looking Strategies for the Advancement of Women, Nairobi, July 15-26, 1985, Report of the World Conference to Review and Appraise Achievements of the United Nations Decade for Women: Equality, Development and Peace, U.N. Doc. A/Conf.116/28/Rev.1(1986); Report of the World Conference of the International Women's Year, Mexico City, U.N. Doc. E/CONF.66/34 (1976).

⁸⁷ See, for a prominent instance, Diane Otto, "Lesbians? Not in My Country: Sexual Orientation and the Beijing World Conference on Women," 20 *Alternative Law Journal* 288 (1995).

⁸⁸ See "Sex Equality Under the Constitution of India: Problems, Prospects, and `Personal Laws," at No. 13; "On Sex and Violence: Introducing the Antipornography ordinance in Sweden," at No. 9; "Nationbuilding in Canada," at No. 10.

⁸⁹ For more extensive discussion of some of the issues raised here, see "Postmodernism and Human Rights," at No. 5.

⁹⁰ See, e.g., Shu-Ju Ada Cheng, "Labor Migration and International Sexual Division of Labor: A Feminist Perspective," in *Gender and Immigration* 43 (Debra L. DeLaet and Gregory Kelson, eds., 1999); Dan Gatmaytan, "Death and the Maid: Work, Violence, and the Filipina in the International Labor Market," 20 *Harvard Women's Law Journal* 229 (1997); Nicole L. Grimm, "The North American Agreement on Labor Cooperation and Its Effect on Women Working in Mexican Maquiladoras," 48 *American University Law Review* 179 (1998); Suzanne H. Jackson, "To Honor and Obey: Trafficking in 'Mail-Order Brides,'" 70 *George Washington Law Review* 475 (2002).

⁹¹ This is no more a moral argument that some peoples should not have their own states than that women should not have or control them.

⁹² See Colter Paulson, "Compliance with Final Judgments of the International Court of Justice Since 1987," 98 *American Journal of International Law* 434 (2004) (reviewing empirical studies of countries' compliance with the Court's decisions throughout its history and finding that compliance levels are, and have always been, quite high).