

# GENDER, SOVEREIGNTY AND THE RISE OF A SEXUAL SECURITY REGIME IN INTERNATIONAL LAW AND POSTCOLONIAL INDIA

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*In this paper, I use the recent 'Delhi rape' case that received global attention in 2012 to trace how an appalling episode of violence against a woman is articulated within stable categories of gender and invites state intervention in the form of criminal justice, stringent sentencing and a strengthened sexual security regime. I argue that the stability of gender and gender categories based on the binary of male and female has been an integral feature of international law and has been maintained partly through an overwhelming focus on sexual violence against women by states as well as non-state actors. This focus relies on a statist approach to sovereignty, where advocacy is directed at the state for redress and protection, primarily in the form of carceral measures, which in turn translate into a tightening of the sexual security regime. By continuing to appeal to the state as a central custodian of women's rights, feminist and human rights advocacy has failed to address the ways in which power is dispersed and does not operate in a top-down manner. It also operates in terms of domination, subjugation and subject constitution. I examine how a security discourse operates to regulate, discipline and manage gender in the context of three areas of international law: anti-trafficking interventions in international human rights law; wartime rape in international criminal law; and the 'taming of gender' in the context of the Security Council resolutions 1325 and 1820 on gender, peace and security.*

## CONTENTS

I	Introduction .....	317
II	Unmaking Sovereignty .....	321
III	Unpacking Gender in International Law .....	325
IV	Security Discourse and the Regulation, Discipline and Management of Gender in International Law .....	332
	A Sex Trafficking in International Human Rights Law .....	332
	B Gender, Wartime Rape and the International Criminal Court .....	336
	C Security Council Resolutions 1325 and 1820 in International Humanitarian Law .....	338
V	Conclusion .....	342

## I INTRODUCTION

In December 2012, a young 23-year-old woman and her male companion were returning home at 9:30pm having watched a screening of the *Life of Pi*<sup>1</sup> at a well-known multiplex cinema in New Delhi. They waited for one of Delhi's

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<sup>1</sup> *Life of Pi* (Directed by Ang Lee, 20<sup>th</sup> Century Fox, 2012).

unreliable and erratic public buses and even tried to hail a three-wheeler auto rickshaw, but to no avail. Eventually, a private bus with tinted windows slowed and a young man posing as a conductor invited them aboard. There were six men on the bus, pretending to be passengers. As the bus pulled away, a nightmare on the streets of Delhi began. Two hours later the two were dumped, stripped naked and bleeding, on a road near Delhi's glistening new international airport. The young woman had been brutally gang-raped and had suffered traumatic injuries as the result of an iron rod being inserted into her. She subsequently died of these injuries. The young man had been beaten and lay on the ground with a broken leg.

This event triggered massive protests on the streets of Delhi and throughout the country. It also provoked reactions from around the world, including from international human rights groups, women's groups, the international media, scholars, academics and the United Nations. During the course of these events, the political classes in India continued to make public statements about women's safety that only served to further aggravate the situation and increase the ire of the protestors.<sup>2</sup> Right-wing groups weighed in with cries about Indian cultural values being in danger from overexposure to sex through Western influences, television and Valentine's Day celebrations.<sup>3</sup> Many of the protestors, predominantly consisting of young men and women, called for the death penalty to be imposed in rape cases and demanded that the streets be made safe for this new generation of working women born in the crucible of neoliberal market reforms. Moreover, there were a spate of measures promoted at the local and state levels that targeted women's mobility and freedom of expression and sought to further contain and cabin women's sexuality, the 'flaunting' of which was regarded as the central factor in inviting rapes.<sup>4</sup>

The outpouring of anger and outrage on the streets of Delhi and elsewhere forced the federal government to set up the Committee on Amendments to the Criminal Law ('Verma Committee') to make recommendations on legal reforms

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<sup>2</sup> See, eg, Press Trust of India, *'Rape of Grown Ups Understandable but Not of Minors': Chhattisgarh BJP Leader Stuns with Remarks* (10 January 2013) NDTV <<http://www.ndtv.com/article/india/rape-of-grown-ups-understandable-but-not-of-minors-chhattisgarh-bjp-leader-stuns-with-remarks-315631>>; *Bizarre Comments by Politicians on Rape in India* (4 January 2013) International Business Times <<http://www.ibtimes.co.in/articles/420585/20130104/rape-case-india-politicians-irresponsible-statements.htm>>.

<sup>3</sup> See Fatima Mazhar Khan, *Right Winger Hindu Group, Claims Valentine's Day Leads to Rape in India* (12 February 2013) Carbonated.tv <<http://www.carbonated.tv/news/right-winger-hindu-group-claims-valentines-day-leads-to-rape-in-india>>; Palash Ghosh, *Delhi Gang-Rape: Right-Wing Leader Claims Sex Crimes Caused by Western Influences, Urban Living* (8 January 2013) International Business Times <<http://www.ibtimes.com/delhi-gang-rape-right-wing-leader-claims-sex-crimes-caused-western-influences-urban-living-999992>>.

<sup>4</sup> Agence France-Presse, *In India's Villages, Delhi Rape Spurs Restrictions* (9 January 2013) NDTV <<http://www.ndtv.com/article/india/in-india-s-villages-delhi-rape-s-purs-restrictions-315010>>; Nilanjana Bhowmick, 'The Real Shame: India's Patriarchy Roars Back after Delhi Gang Rape', *Time* (online), 18 January 2013 <<http://world.time.com/2013/01/18/the-real-shame-indias-patriarchy-roars-back-after-delhi-gang-rape/>>.

in the area of sexual violence.<sup>5</sup> The Verma Committee made its recommendations within a self-imposed deadline of one month. While its 627-page report was in many respects unwieldy and often contradictory, some of its central recommendations were bold and sought to confront sexual violence. The report did so employing the discourse of rights rather than an outdated notion of 'Indian womanhood' based on chastity, conservative sexual morality, honour and purity, which frames most discussions and laws dealing with sexual rights in India.<sup>6</sup> Most importantly, the Verma Committee stated that the issue of sexual violence needed to be addressed through a woman's right to bodily integrity, sexual autonomy and legal recognition of adult consensual sexual relationships.<sup>7</sup> The call for a marital rape law and opposition to the demand for the death penalty in cases of sexual violence were also significant recommendations.<sup>8</sup>

Despite the far-sighted recommendations of the Verma Committee's report, the law ultimately enacted by the Parliament of India left out almost every single one of the Committee's key recommendations that would have advanced the rights to gender equality and respect for women.<sup>9</sup> It imposed the death penalty in cases where rape leads to the death of the victim or permanent maiming, retained the provisions dealing with outraging the modesty of a woman, intensified the security apparatus of the state ostensibly to ensure the safety of women and

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<sup>5</sup> J S Verma, Leila Seth and Gopal Subramaniam, 'Report of the Committee on Amendments to Criminal Law' (Government of India Publication, 23 January 2013) i. The Committee was requested to review the existing laws and suggest amendments it thought would effectively address the issue of sexual violence. The Committee chose to address its mandate within the broader framework of *The Constitution of India* and the fundamental rights of citizens, including the right to individual autonomy and bodily integrity.

<sup>6</sup> In the context of postcolonial India, anti-colonial nationalism reproduced an understanding of gender that was deeply integrated into the idea of the Indian nation and its deep-rooted need to distinguish the idea of India from the West — and Indian women from Western women. The early women's movement drew on the logic of 'Indian womanhood'; that is, it reconstructed the identity of women as mothers of the nation to argue for greater economic and political reforms and, subsequently, for sexual equality. The movement was successful in securing political representation and constitutional equality rights for women. But it was less successful in the private sphere where the discourse of equality proved unable to displace the ideological construction of women as dutiful wives and mothers and was thus unable to bring about reform within the private sphere of the family. Indian womanhood continued to inform the legal campaigns on rape in India in the late 1980s. The campaigns did have some effect on the struggle over the social and cultural meaning of rape and they made inroads in revealing the violence that women experienced and in condemning that violence. Yet the public debate on rape was overwhelmingly focused on the shame and dishonour that rape brought on the women and their families. Ultimately, the rape campaigns were unable to alter the statutory definition of rape or transform the legal meaning of rape. Nor did the campaigns succeed in displacing the problematic constructions of consent or the assumptions about women's sexuality: see generally Ratna Kapur and Brenda Cossman, *Subversive Sites: Feminist Engagements with Law in India* (Sage, 1996).

<sup>7</sup> Verma, Seth and Subramaniam, above n 5. The recognition of adult consensual sexual relationships emerges from the Committee's recommendations that the law be made gender-neutral (at 416), that the marital rape exemption be removed (at 117), that same sex relationships be given constitutional protection and that the right to sexual orientation be recognised as a human right (at 51, 54 and 406).

<sup>8</sup> Ibid 117, 245.

<sup>9</sup> *Criminal Law (Amendment) Act, 2013* (India) Act No 13 of 2013 ('CLA Act').

retained the exemption of marital rape from the purview of the criminal law.<sup>10</sup> The new law set up a legal edifice focused primarily on security, sexual surveillance and law and order. The end result left intact the dominant gender arrangements, which were based on discrete categorisations of male and female, as well as a conservative understanding of female sexuality as passive, vulnerable and encased in a stultifying interpretation of Indian cultural values. At the same time it augmented the muscular power of the state to regulate and discipline the sexual behaviour of its citizens in the direction of fewer rights and more surveillance.<sup>11</sup>

In this paper, I trace how an appalling episode of violence against a woman comes to be articulated within stable categories of gender and invites state intervention in the form of criminal justice, stringent sentencing and a strengthened sexual security regime. I argue that the stability of gender, and of gender categories based on the binary of male and female, has been an integral feature of international law ('IL') and has been maintained partly through an overwhelming focus on violence against women by states as well as non-state actors. This focus relies on a statist approach to sovereignty where advocacy is directed at the state for redress and protection primarily in the form of carceral measures, which in turn translate into a tightening of the sexual security regime. By continuing to appeal to the state as the central custodian of women's rights, feminist and human rights advocacy has failed to address the ways in which power is dispersed and the fact that power does not operate exclusively in terms of inequality, mal-distribution and exploitation. Power is also articulated in terms of domination, subjugation and subject constitution.<sup>12</sup> As Michel Foucault argued, it is the power that circulates through the social — whether in terms of discipline or capital or other forms of bio-power — that needs to be addressed and transformed, rather than adopting a top-down, state-centric approach to power.<sup>13</sup> It is my contention that the centrality of the sovereign in advocacy on sexual violence has partly contributed to the reaffirmation of the categories of

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<sup>10</sup> The addition of the death penalty clause seems somewhat superfluous in light of the fact that rape that results in death is tantamount to murder, which is already a capital offence under s 302 of the *Indian Penal Code, 1860* (India) Act No 45 of 1860 ('*Indian Penal Code*'). For an overview of the recommendations of the Verma Committee's report that were accepted or rejected by the government in its ordinance, see *Read: Ordinance vs Verma Commission Recommendation* (1 February 2013) NDTV <<http://www.ndtv.com/article/india/read-ord-inance-vs-verma-commission-recommendations-325436>>.

<sup>11</sup> Four of the accused in the Delhi rape case were ultimately convicted under the law as it stood before it was amended and, on 13 September 2013, they were awarded the death penalty. Sections 303 and 304 of the *Indian Penal Code* provide a maximum penalty of death in cases of murder. The fifth of the accused committed suicide while being held in custody awaiting trial and the sixth, who was just under 18 years old and hence considered a juvenile when the crime was committed, received a punishment of three years (the maximum that the law allows for in such cases). In arriving at a conviction, the system appears to have worked under the legal provisions as they existed prior to the *CLA Act*, which did not have retrospective effect. The death sentence was awarded under the already existing provisions that allow judges to impose such a sentence in the 'rarest of rare' murder cases. The outcome puts into question the need for more laws and, more importantly, compels a deeper interrogation of the purposes served by the recent legal changes.

<sup>12</sup> See Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton University Press, 1995).

<sup>13</sup> Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972–1977* (Colin Gordon et al trans, Harvester Press, 1980).

gender and sexuality and strengthened the border policing of these categories. In this paper, I analyse the dispersed operations of power in the arena of gender in the context of IL — operations that move beyond a state-centric focus — and trace the work that gender does in the establishment and rise of a sexual security regime. This regime does not operate consistently with traditional understandings of state sovereignty, but through discursive processes that inform women's rights advocacy in the international and domestic contexts.

In Part II of this paper, I unpack dominant understandings of sovereignty in IL, focusing on the critiques made by Third World Approaches to International Law ('TWAAIL') scholarship as well as postcolonial theory. In Part III, I provide a brief narrative of how gender and the gendered 'Other' have predominantly been addressed in IL. I discuss how the colonial and neoliberal technologies of power ensure the stability of gender categories while also producing a hierarchy of gender that is displaced onto a First World–Third World divide. In Part IV, I trace the work that gender does in various sites within IL and how it facilitates the rise of a sexual security regime. I argue that feminist advocacy in IL has been implicated in this process of regulating, disciplining and managing gender through a security discourse. I briefly illustrate these outcomes in the context of anti-trafficking interventions in international human rights law ('IHRL'); wartime rape in international criminal law ('ICL'); and the 'taming of gender' in the context of the Security Council resolutions 1325 ('Resolution 1325')<sup>14</sup> and 1820 ('Resolution 1820')<sup>15</sup> on gender, peace and security.

In Part V, I return to the case of the 'Delhi rape' to illustrate how the work that gender does in IL converges with a neoliberal political rationality that contains, disciplines and manages the potential for gender disruption. The convergence of state and non-state interests in the form of a stricter sexual security regime and a re-emphasis on carceral strategies leaves us with a question: can gender ever be a force for liberation in circumstances where state and market interests are partly based on securing the stability of gender and sexual norms through a carceral approach rather than facilitating women's rights?

## II UNMAKING SOVEREIGNTY

The discussion on gender and sovereignty in this paper is located within the tradition of TWAAIL scholarship.<sup>16</sup> The dominant narrative of the making of sovereignty in IL has largely been based on a Westphalian model in which states are self-contained and their territorial integrity is maintained.<sup>17</sup> TWAAIL has challenged this dominant narrative, arguing specifically that the idea of

<sup>14</sup> SC Res 1325, UN SCOR, 4213<sup>th</sup> mtg, UN Doc S/RES/1325 (31 October 2000) ('Resolution 1325').

<sup>15</sup> SC Res 1820, UN SCOR, 5916<sup>th</sup> mtg, UN Doc S/RES/1820 (19 June 2008) ('Resolution 1820').

<sup>16</sup> See generally James Thuo Gathii, 'TWAAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography' (2011) 3 *Trade, Law and Development* 26; Karin Mickelson, 'Taking Stock of TWAAIL Histories' (2008) 10 *International Community Law Review* 355.

<sup>17</sup> See generally Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2002).

sovereignty was born in the crucible of the colonial encounter.<sup>18</sup> It has developed a new theoretical and constructivist approach to contemporary IL, drawing on the political-ideological movements that arose from the 1955 Bandung Conference where many newly independent states assembled in solidarity against continued Western imperialism and sought to create a new paradigm for international relations.<sup>19</sup>

TWAIL reveals how the dominant narrative of sovereignty has been constructed against a denial of sovereignty to peoples who remained under colonial rule and, in turn, sustained and facilitated the continued economic and political power of the colonial rulers. TWAIL posits the idea that IL is composed of multiple competing narratives with the stories of the Third World being amongst them as its constitutive 'darker side'.<sup>20</sup> It focuses on the erasure of broad segments of Third World people from IL. Bhupinder Chimni has been a key exponent of the idea of TWAIL and has identified its various components by revisiting and complicating the narratives of the past, present and future of IL.<sup>21</sup> He argues that since the 16<sup>th</sup> century, IL has been integrally linked to the colonial project, where the very idea of state sovereignty and the formulation of international legal concepts relating to the acquisition of territory, recognition and state responsibility came to be shaped in and through the colonial encounter. The central axis of distinction operated against a civilisational divide in which the 'non-European' natives were viewed as being backward and primitive and as having to be brought into the purview of law through the civilising mission of the colonial power. This power would determine the norms of inclusion as well as the grounds for exclusion. Invariably, the acquisition of territory was justified

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<sup>18</sup> For a seminal work on the implications of the colonial encounter for the development of international law and sovereignty, see Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 *Harvard International Law Journal* 1. See also Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005); Antony Anghie, 'Francisco de Vitoria and the Colonial Origins of International Law' (1996) 5 *Social & Legal Studies* 321.

<sup>19</sup> See, eg, George McTurnan Kahin, *The Asian-African Conference: Bandung, Indonesia, April 1955* (Cornell University Press, 1956). See also Partha Chatterjee, 'Empire and Nation Revisited: 50 Years after Bandung' (2005) 6 *Inter-Asia Cultural Studies* 487; Dipesh Chakrabarty, 'The Legacies of Bandung: Decolonization and the Politics of Culture' in Christopher J Lee (ed), *Making a World after Empire: The Bandung Moment and Its Political Afterlives* (Ohio University Press, 2010) 45.

<sup>20</sup> In Anghie's words: 'the colonial confrontation is central to an understanding of the character and nature of international law': Anghie, *Imperialism, Sovereignty and the Making of International Law*, above n 18, 36.

<sup>21</sup> See, eg, B S Chimni, 'The Past, Present and Future of International Law: A Critical Third World Approach' (2007) 8 *Melbourne Journal of International Law* 499. While the use of the term 'Third World' has been contested, Chimni argues that the term is an analytical concept used to examine the existential condition of people living in the Third World, given their shared history of subjugation to colonialism and neo-colonialism: see B S Chimni, 'Third World Approaches to International Law: A Manifesto' in Antony Anghie et al (eds), *The Third World and International Order: Law, Politics and Globalization* (Martinus Nijhoff, 2003) 47; Makau Mutua, 'What is TWAIL?' (2000) 94 *American Society of International Law Proceedings of the Annual Meeting* 31. See also Balakrishnan Rajagopal, 'Locating the Third World in Cultural Geography' (1999) 15 *Third World Legal Studies* 1; Ashis Nandy, 'Shamans, Savages and the Wilderness: On the Audibility of Dissent and the Future of Civilizations' (1989) 14 *Alternatives* 263, 275; Trinh T Minh-Ha, *Woman, Native, Other: Writing Postcoloniality and Feminism* (Indiana University Press, 1989) 107.

on the basis of the civilising mission and individual sovereignty was recognised primarily for the transfer of territory to the colonial power.<sup>22</sup>

Chimni argues that during the early phase of TWAIL, the critique was not designed to repudiate IL but to produce a truly universal IL as opposed to the faux universalism that had been designed by the Western colonial powers.<sup>23</sup> These powers cited the differences between themselves and the ‘Other’ to justify their discriminatory treatment of non-European rulers and native populations as well as the preferential treatment of the colonial power’s own citizens.<sup>24</sup> This practice continues to operate in the contemporary period where the civilisational standard has been replaced with notions of good governance and development.<sup>25</sup>

The early TWAIL scholars focused their attention on the exclusion of Third World nations from the practices and rituals of IL and on efforts to prevent them from gaining freedom from colonial rule so as to become self-governing sovereign nation-states.<sup>26</sup> These scholars regarded a former colony’s transformation into a modern nation-state — romantically construed as the attainment of the ‘political kingdom’ — as the recipe for emancipation.<sup>27</sup> A more fundamental critique of the sovereign structure on which IL was based remained largely absent. Sovereign power continued to be viewed in hierarchical terms, exemplified by the establishment of the UN’s veto system.<sup>28</sup> The ways in which the politics of gender, race, religion and class operated in the constitution of the state remained unaddressed.<sup>29</sup>

This first generation of TWAIL scholars, referred to by Sundhya Pahuja as ‘midnight’s international lawyers’,<sup>30</sup> operated on a nationalist, modernist and anti-colonial register in which the attainment of a unitary and hierarchical sovereignty was central. They remained uncritically liberal in their vision. The inheritance of TWAIL from the practices of this group of scholars was the

<sup>22</sup> See, eg, Anghie, *Imperialism, Sovereignty and the Making of International Law*, above n 18, 98–9, 113–14, 209–10.

<sup>23</sup> Chimni, ‘Past, Present and Future of International Law’, above n 21, 502.

<sup>24</sup> See generally Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier, 1979).

<sup>25</sup> See generally James Thuo Gathii, ‘Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law’ (1999) 5 *Buffalo Human Rights Law Review* 107; James Thuo Gathii, ‘Imperialism, Colonialism, and International Law’ (2007) 54 *Buffalo Law Review* 1013; Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press, 2003) pt II.

<sup>26</sup> See Frederick E Snyder and Surakiart Sathirathai (eds), *Third World Attitudes toward International Law: An Introduction* (Martinus Nijhoff, 1987). This book contains a collection of representative writings from legal scholars belonging to this group.

<sup>27</sup> Captured by the clarion call of Kwame Nkrumah, the extremely influential first Prime Minister of independent Ghana: ‘Seek ye first the political kingdom and all things will be added to it’: quoted in Ali Mazrui, ‘Nkrumah: The Leninist Czar’ (1966) 26 *Transition* 9, 12. On the acceptance of the modern Western nation-state as the ‘norm’ by these scholars, see Vasuki Nesiiah, ‘Placing International Law: White Spaces on a Map’ (2003) 16 *Leiden Journal of International Law* 1; Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press, 2011). Pahuja refers to adopting the juridical form of the nation-state as the ‘price of audibility’ in international law: at 45.

<sup>28</sup> See generally Prabhakar Singh, ‘Indian International Law: From a Colonized Apologist to a Subaltern Protagonist’ (2010) 23 *Leiden Journal of International Law* 79.

<sup>29</sup> See generally Rajagopal, *International Law from Below*, above n 25.

<sup>30</sup> Pahuja, *Decolonising International Law*, above n 27, 113.



politics of anti-imperial solidarity and a minimally shared critique of Euro-modernity. Subsequent TWAIL scholars have developed an analytical edge, transforming the project into a critical one.<sup>31</sup> They have focused increasingly on how IL has become an agent for globalisation and for the implementation of neoliberal market reforms.<sup>32</sup> Their analysis disrupts the dominant narratives of modernity, denaturalising the relationships of dominance and subordination that underlie such narratives. TWAIL simultaneously exposes how master narratives have failed to pay attention to the uneven and layered histories of the world and how the history of IL has been produced through moments of rupture, crisis and disruption.<sup>33</sup> Some of these arguments resonate with other critical traditions within IL, such as the New Approaches to International Law.<sup>34</sup>

TWAIL needs to be located within the tradition of the broader theoretical school of postcolonial theory and the subaltern studies project that have critically analysed the circuits of power through which knowledge has been produced. These projects interrogate the linear, progressive narrative of history that constitutes the citadel of liberal doctrine as well as the relationship between power and colonial knowledge-production.<sup>35</sup> They further interrogate the assumptions about the 'Other' against which knowledge-production operates as well as the understandings of agency and the resistive subject that have emerged in response to the pressures of the colonial encounter.<sup>36</sup> Postcolonial theory provides the critical analytical bite that is essential in order to render the project of IL productive for those who have been relegated to its margins by being either disempowered or regulated and disciplined to ensure IL's stability. They challenge accounts that, assuming the Enlightenment is the starting point, argue that the emergence of the nation-state and individual sovereignty reflects the gradual

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<sup>31</sup> References to early and later Third World Approaches to International Law ('TWAIL') are scattered throughout the scholarship, though these different trajectories are characterised in different ways. Anghie and Chimni divide the scholarship into TWAIL I and TWAIL II: Antony Anghie and B S Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) 2 *Chinese Journal of International Law* 77, 79. Gathii refers to a strong and a weak strain of TWAIL: James Thuo Gathii, 'International Law and Eurocentricity' (1998) 9 *European Journal of International Law* 184, 191. Mutua discusses two trends in TWAIL — the affirmative reconstructionists and the minimalist assimilationists: Mutua, above n 21, 32.

<sup>32</sup> Chimni, 'Past, Present and Future of International Law', above n 21, 503–7.

<sup>33</sup> Sundhya Pahuja, 'Decolonization and the Eventness of International Law' in Fleur Johns, Richard Joyce and Sundhya Pahuja (eds), *Events: The Force of International Law* (Routledge, 2011) 91.

<sup>34</sup> See, eg, David Kennedy, 'When Renewal Repeats: Thinking against the Box' (2000) 32 *New York University Journal of International Law and Politics* 335; Christopher Weeramantry and Nathaniel Berman, 'The Grotius Lecture Series' (1999) 14 *American University International Law Review* 1515; Hilary Charlesworth, 'International Law: A Discipline of Crisis' (2002) 65 *Modern Law Review* 377.

<sup>35</sup> See, eg, Edward W Said, *Orientalism* (Penguin, first published 1978, 1995 ed). See also Edward W Said, *Culture and Imperialism* (Knopf, 1993); Ranajit Guha and Gayatri Chakravorty Spivak (eds), *Selected Subaltern Studies* (Oxford University Press, 1988).

<sup>36</sup> See, eg, Edward W Said, 'Representing the Colonized: Anthropology's Interlocutors' (1989) 15 *Critical Inquiry* 205.



transition of civilisation from the primitive to a modern and evolved form.<sup>37</sup> By unmasking the view of history as emanating from the heart of Europe and exposing how it ultimately served the colonial enterprise, postcolonial theory challenges the emergence of IL as a signifier of human progress and a straightforward unambiguous pursuit.<sup>38</sup> Modernity's thesis of 'history as progress' is viewed as an exclusionary fiction and IL is regarded as the apparatus for sustaining unequal structures of power — whether in the form of slavery or empire — and a subordinating or civilising tool of the 'superior power'. This conception has implications for understanding how power operates in and through legal discourse and exposes the artificiality of the separation between the domestic and the international.

### III UNPACKING GENDER IN INTERNATIONAL LAW

Feminist international legal scholars have predominantly sketched the story of gender in IL.<sup>39</sup> While the early scholarship primarily focused on inclusion, postcolonial and critical feminist scholars gradually drew attention to the structural biases in IL and how women's inequality was either positioned as

<sup>37</sup> Wendy Brown, *Politics Out of History* (Princeton University Press, 2001) 6. Dipesh Chakrabarty has argued that Western historical study has posited a singular future for the masses of the world in which justice and modernity are equated with being 'European': Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton University Press, 2000) 33. Further, Chakrabarty states that cultures are marked as being in the process of transition, sitting in the 'imaginary waiting room of history' before they can claim the right to be modern: at 8. See also Dipesh Chakrabarty, 'Radical Histories and Question of Enlightenment Rationalism: Some Recent Critiques of "Subaltern Studies"' (1995) 30 *Economic & Political Weekly* 751; Dipesh Chakrabarty 'Postcoloniality and the Artifice of History: Who Speaks for "Indian" Pasts?' (1992) 37 *Representations* 1.

<sup>38</sup> See, eg. Anghie, 'Francisco de Vitoria and the Colonial Origins of International Law', above n 18; Joan Wallach Scott, *Gender and the Politics of History* (Columbia University Press, 1988).

<sup>39</sup> The initial scholarship in feminist international law in the 1990s drew on a more liberal intellectual tradition. In the early part of the 21<sup>st</sup> century the scholarship proliferated into a number of areas and also saw the emergence of some more critical and postcolonial feminist legal voices. The most important early work was: Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613. This was followed by a rapid proliferation of scholarship on feminism and international law: see, eg. Dorinda G Dallmeyer (ed), *Reconceiving Reality: Women and International Law* (American Society of International Law, 1993); Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, 2000). For works in other international legal arenas such as security, state sovereignty, self-determination, humanitarian law and human rights law: see, eg. Anne Orford 'The Politics of Collective Security' (1996) 17 *Michigan Journal of International Law* 373; Karen Knop, 'Re/Statements: Feminism and State Sovereignty in International Law' (1993) 3 *Transnational Law & Contemporary Problems* 293; Shelley Wright, 'Women and the Global Economic Order: A Feminist Perspective' (1995) 10 *American University Journal of International Law and Policy* 861; Rhonda Copelon, 'Recognizing the Egregious in the Everyday: Domestic Violence as Torture' (1994) 25 *Columbia Human Rights Law Review* 291; Catharine A MacKinnon, 'On Torture: A Feminist Perspective on Human Rights' in Kathleen E Mahoney and Paul Mahoney (eds), *Human Rights in the Twenty-First Century: A Global Challenge* (Martinus Nijhoff, 1993) 21; Shelley Wright, *International Human Rights, Decolonisation and Globalisation: Becoming Human* (Routledge, 2001); Karen Knop (ed), *Gender and Human Rights* (Oxford University Press, 2004). For a more critical feminist intervention: see generally Doris Buss and Ambreena Manji (eds), *International Law: Modern Feminist Approaches* (Hart, 2005).

being outside the remit of IL or included on terms that reproduced both gender and cultural stereotypes.<sup>40</sup> The objective was then to restructure IL rather than seek to be included and to produce regimes that focused on structural abuse and new understandings of state responsibility.<sup>41</sup> But challenging the foundations of IL and its modes of operation was no easy task and was met with considerable resistance.<sup>42</sup> As Doris Buss and Ambreena Manji have argued, '[i]nternational lawyers may not change *what* they do or *how* they do it, but they now seem willing to tolerate feminists at their side *as* they do it'.<sup>43</sup>

The dominant narrative of gender in IL is based on the reproduction of the idea that sex is a stable, natural category and gender a social construction that can be altered and manipulated. Gender is related to sex, a biological category. This dichotomisation has informed feminist advocacy in the international legal arena under the banner of 'women's rights are human rights', in which sex is treated as the primary site for female subordination. The term 'gender' instead of 'sex' has also been increasingly deployed within human rights advocacy and by UN institutions,<sup>44</sup> projecting the idea that something is being done about violations of women's human rights while simultaneously ensuring that the category of gender itself remains unchallenged. The sex/gender distinction as based on a nature/nurture divide has not only reproduced sex and sexuality as a biological category but it has also been implicitly heterosexual.

This dominant narrative on sex/gender was initially launched into crisis by the work of Judith Butler, who focused on sex as discursively and culturally produced in and through gender rather than a naturalised pre-existing body.<sup>45</sup> Butler recast gender as a repetitious performance, simultaneously a re-enactment as well as a constant re-experiencing of a set of meanings that are socially

<sup>40</sup> See, eg, Karen Engle, 'International Human Rights and Feminisms: When Discourses Keep Meeting' in Doris Buss and Ambreena Manji (eds), *International Law: Modern Feminist Approaches* (Hart, 2005) 47, 52–4; Vasuki Nesiah, 'Discussion Lines on Gender and Transitional Justice: An Introductory Essay Reflecting on the ICTJ Bellagio Workshop on Gender and Transitional Justice' (2006) 15 *Columbia Journal of Gender and Law* 799; Ratna Kapur, 'The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics' (2002) 15 *Harvard Human Rights Journal* 1.

<sup>41</sup> Charlesworth, Chinkin and Wright, 'Feminist Approaches to International Law', above n 39, 644.

<sup>42</sup> See, eg, Hilary Charlesworth, 'Cries and Whispers: Responses to Feminist Scholarship in International Law' (1996) 65 *Nordic Journal of International Law* 557.

<sup>43</sup> Doris Buss and Ambreena Manji, 'Introduction' in Doris Buss and Ambreena Manji (eds), *International Law: Modern Feminist Approaches* (Hart, 2005) 1, 3 (emphasis in original).

<sup>44</sup> See, eg, United Nations High Commissioner for Refugees, 'Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons: Guidelines for Prevention and Response' (Guidelines, May 2003) 11–12 <<http://www.unhcr.org/protect/PROTECTION/3f696bcc4.pdf>>. Despite the pervasive use of the term 'gender' its meaning has remained highly contested — see, for example, the extremely ambiguous definition of the term reflecting the tension between feminists and conservatives in *Report of the Fourth World Conference on Women*, UN Doc A/CONF.177/20/Add.1 (27 October 1995) annex IV ('Statement by the President of the Conference on the Commonly Understood Meaning of the Term "Gender"').

<sup>45</sup> See, eg, Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, 1990); Judith Butler, *Bodies that Matter: On the Discursive Limits of 'Sex'* (Routledge, 1993). For a discussion of the implications of Butler's theoretical interventions in relation to gender for international law, see Brenda Cossman, 'Gender Performance, Sexual Subjects and International Law' (2002) 15 *Canadian Journal of Law and Jurisprudence* 281.

attached to it.<sup>46</sup> Gender is the apparatus through which sex was produced and rendered as 'pre-discursive' and normal.<sup>47</sup>

The issue of sex and sexuality as it has emerged in human rights advocacy within the universal dynamic of the 'gay rights as human rights movement'<sup>48</sup> has also been the subject of critique by queer theorists.<sup>49</sup> For the most part, human rights advocacy has been focused on the universalising dynamic of human rights pushing through 'LGBT rights' as 'universal human rights'. The critique by queer theorists exposes the specific ways in which men who have sex with men ('MSM') have been essentialised in IL and in international human rights partly as a result of lesbian, gay, bisexual and transgender ('LGBT') advocacy at a global level. This advocacy considers MSM to be a non-identitarian category that signifies same-sex behaviour or practices. For example, Joseph Massad argues that a certain modern Western conception of sexuality and sexual identity is seen as replacing other forms of sexual practice that are not hinged to 'identity'. He specifically links this process to the earlier universalisation of women's rights by Western white feminist activists that sought to hegemonically represent all women globally.<sup>50</sup>

Influenced by Massad's work, several scholars argue that the focus on LGBT rights as 'universal human rights' reduces the multiplicity of these non-identitarian practices to the singular dominant model of 'Western' sexuality that is underpinned by gender dichotomisation and a hetero- and homosexual binary and exports this idea of LGBT rights through human rights discourses and

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<sup>46</sup> Butler, *Bodies that Matter*, above n 45, 140. Butler's theory draws on Foucault's notions of disciplinary and regulatory power to argue that sex operates as a norm whose regulatory power 'produces the bodies it governs': at xi. Disciplinary power is a mechanism for normalising the subject through different structures and institutions, such as schools, the clinic, the asylum, the prison or sexual practices. Foucault critiqued the continued attempt to analyse political power in terms of sovereignty that focused on the various components of a nation-state, such as the legislative, judicial and executive branches of government. Such a model does not address the ways in which this dominant theory of sovereignty disguises the more capillary form of disciplinary power that has arisen in the context of a bourgeois society: see Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan trans, Vintage Books, 1977) [trans of: *Surveiller et punir; naissance de la prison* (first published 1975)]. Golder and Fitzpatrick have argued that the law also features within this argument, though Foucault's work pays little attention to the role of law in his more dispersed understanding of power: see Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009) ch 1.

<sup>47</sup> Cossman, above n 45, 282. Further, Margaret Davies argues that neither sex nor gender are natural and refers to the idea of law as sexing its subjects, rather than to law as gendered, in order to move away from the sex/gender distinction. She similarly argues that law is heterosexed, indicating its heteronormative moorings: Margaret Davies, 'Taking the Inside Out: Sex and Gender in the Legal Subject' in Ngaire Naffine and Rosemary J Owens (eds), *Sexing the Subject of Law* (LBC Information Services, 1997) 25.

<sup>48</sup> See, eg, Amnesty International, *Breaking the Silence: Human Rights Violations Based on Sexual Orientation* (Amnesty International USA, 1994).

<sup>49</sup> For a classic work of queer theory, see Eve Kosofsky Sedgwick, *Epistemology of the Closet* (University of California Press, 1990). See also Sara Ahmed, *Queer Phenomenology: Orientations, Objects, Others* (Duke University Press, 2006).

<sup>50</sup> Joseph Massad, 'Re-Orienting Desire: The Gay International and the Arab World' (2002) 14 *Public Culture* 361, 361–2. See also Joseph A Massad, *Desiring Arabs* (University of Chicago Press, 2007).

practices globally.<sup>51</sup> LGBT or same-sex practitioners come to be characterised as lacking identity and in need of liberation in order to uncover their true ‘identity’, thus setting the stage for unleashing interventionist civilising missions into Third World states. At the same time, the ‘true identity’ to which these subjects are aligned is configured as a ‘universal’ or ‘global’ gay identity in LGBT international human rights advocacy. This advocacy construes the global gay as an exclusionary identity category that also erases or submerges other sexual identifications.<sup>52</sup> The effect of this process has been to reduce the multiplicity of sexual identities and practices to the imperialism of the global gay.

Queer theory thus rebukes the dominant understanding of sex as stable and sexuality as a naturalised, normalised, biological identity. It argues that sexuality takes many diverse forms and in certain non-Western societies also exists outside of the categories of gay or lesbian identities just as various forms of gender also exist outside of Western-specific models of gender.<sup>53</sup> By interrogating the idea of pre-existing gay or lesbian identities awaiting liberation through sex rights, the

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<sup>51</sup> See, eg, Kristen L Walker, ‘Capitalism, Gay Identity and International Human Rights Law’ (2000) 9 *Australasian Gay and Lesbian Law Journal* 58. Walker argues, at 62, that the globalisation of gay identity is seeing an increase in human rights based on gay and lesbian identity: ‘a claim to “gay and lesbian rights” as human rights depends on an understanding that the identities “gay” and “lesbian” are universal in the sense that they are present in all cultures, not just in the west’. See also Sonia Katyal, ‘Exporting Identity’ (2002) 14 *Yale Journal of Law and Feminism* 97; Aeyal Gross, ‘Queer Theory and International Human Rights Law: Does Each Person Have a Sexual Orientation?’ (2007) 101 *American Society of International Law Proceedings of the Annual Meeting* 129. Gross argues, at 129–30, with regard to Principle 3 of the *Yogyakarta Principles* on the application of international human rights law in relation to sexual orientation and gender identity, that

[t]he principles define sexual orientation broadly, but in a way that maintains an understanding of sexual orientation as a distinct component in the identity of the self, determined based on the similarity or difference between one’s gender and the gender of one’s object of desire. Sexual orientation thus defined is a feature of modern Western societies, but is not necessarily a feature of all human societies: this conception of sexual orientation is not characteristic of societies that do not subscribe to the modern Western concept of sexuality, which divides people into hetero- and homosexuals. For example, in societies where men have sex with men, but not necessarily exclusively, and apart from any specific sexual identity, the idea that these men have a sexual orientation thus defined, which is integral to their humanity, represents an exportation of the Western model of sexual orientation.

See also International Commission of Jurists, ‘The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity’ (March 2007) 11 <<http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/08/Yogyakarta-Principles-publication-2007-eng.pdf>> (‘*Yogyakarta Principles*’); Aeyal M Gross, ‘Sex, Love, and Marriage: Questioning Gender and Sexuality Rights in International Law’ (2008) 21 *Leiden Journal of International Law* 235.

<sup>52</sup> Tom Boellstorff, ‘BUT DO NOT IDENTIFY AS GAY: A Proleptic Genealogy of the MSM Category’ (2011) 26 *Cultural Anthropology* 287, 288. See also Wayne Morgan, ‘Queering International Human Rights Law’ in Carl Stychin and Didi Herman (eds), *Law and Sexuality: The Global Arena* (University of Minnesota Press, 2001) 208.

<sup>53</sup> See, eg, David M Halperin, *One Hundred Years of Homosexuality: And Other Essays on Greek Love* (Routledge, 1990); Dennis Altman, ‘Global Gaze/Global Gays’ (1997) 3 *GLQ* 417; John C Hawley (ed), *Post-Colonial, Queer: Theoretical Intersections* (State University of New York Press, 2001); Hassan El Menyawi, ‘Activism from the Closet: Gay Rights Strategising in Egypt’ (2006) 7 *Melbourne Journal of International Law* 28; Jasbir K Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Duke University Press, 2007) ch 2.

critique exposes how a rights discourse centred on sexuality as identity is constitutive of these identities.<sup>54</sup>

These insights have been valuable in understanding how gender is structured within IL. But there is also a need to draw on the analytical insights of TWAIL and postcolonial feminism to understand how the gendered 'Other' is constructed. While male and female bodies have been overwhelmingly understood in the international legal arena as naturally different, these very bodies have also been displaced onto a First World–Third World divide, which operates to reinforce a civilisational difference and the cultural superiority of the West. Gender needs to be understood through the relationship between power and knowledge-production and the construction of the colonial 'Other'. In epistemological terms this involves the ways in which non-European objects of knowledge were reconstituted in the colonial encounter through a range of disciplines, including law, to make them comprehensible to the West. In other words, this feature tells us how the 'Other' came to be produced, constructed and made intelligible to the West.<sup>55</sup> These identities were not imposed merely through armies but through textual knowledge and education, historical writing, science, anthropological accounts and law.<sup>56</sup> This knowledge was constructed against definitions and assumptions about colonial masculinity, femininity, culture and historical difference as well as what and who constituted the universal.<sup>57</sup> This process of knowledge-production is critical to understanding how assumptions about culture, gender difference and the 'Other' have come to be produced and continue to operate in the contemporary moment and how human rights becomes the new saviour of victims from savages.

In the case of the gendered 'Other', tradition and antiquity — cast as primitive and serving libidinal desires — have operated to make moral judgments about

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<sup>54</sup> Gross, 'Queer Theory and International Human Rights Law', above n 51. Consider, in particular, Gross's discussion on how the *Yogyakarta Principles* offer liberation through the recognition of sexual orientation and gender identity rather than freedom from these identities: at 132. See also Gross, 'Sex, Love, and Marriage', above n 51. More recent conversations about the boundaries of the meaning of 'queer' have occurred with some scholars suggesting that 'queer' is not necessarily about sexuality and sexual identity but rather something that one 'does' rather than something one 'is' and that there is 'nothing in particular to which it necessarily refers': David M Halperin, *Saint Foucault: Towards a Gay Hagiography* (Oxford University Press, 1995) 62. See also Jonathan Goldberg, 'After Thoughts' in Janet Halley and Andrew Parker (eds), *After Sex? On Writing since Queer Theory* (Duke University Press, 2011) 34.

<sup>55</sup> See generally Said, *Orientalism*, above n 35; Michel Foucault, *The History of Sexuality* (Robert Hurley trans, Pantheon Books, 1978–86) vols 1–3 [trans of *Histoire de la sexualité* (first published 1976–84)]; Foucault, *Power/Knowledge*, above n 13; Michel Foucault, 'Nietzsche, Genealogy, History' in Donald F Bouchard (ed), *Language, Counter-Memory, Practice: Selected Essays and Interviews* (Donald F Bouchard and Sherry Simon trans, Cornell University Press, 1977) 139 [trans of: *Nietzsche, la généalogie, l'histoire* (first published 1971)].

<sup>56</sup> See generally Bernard S Cohn, *Colonialism and Its Forms of Knowledge: The British in India* (Princeton University Press, 1996); Gauri Viswanathan, *Masks of Conquest: Literary Study and British Rule in India* (Columbia University Press, 1989).

<sup>57</sup> On the production of colonial masculinity: see, eg, P K Vijayan, 'Outline for an Exploration of Hindutva Masculinities' in Brinda Bose (ed), *Translating Desire: The Politics of Gender and Culture in India* (Katha, 2002) 82; Mrinalini Sinha, *Colonial Masculinity: The 'Manly Englishman' and the 'Effeminate Bengali' in the Late Nineteenth Century* (Manchester University Press, 1995); Gyan Prakash, *Another Reason: Science and the Imagination of Modern India* (Princeton University Press, 1999).

the native subject and the treatment of women. These arguments were deployed to partly facilitate the establishment and continuation of colonial rule in India.<sup>58</sup> Difference in treatment was justified by placing the society at the primitive end of the civilisation scale, partly on the basis of what were characterised as the society's barbaric and uncivilised practices in relation to women.<sup>59</sup> Civilisational achievement became a necessary prerequisite to progress and entitlement to the benefits of the universal project.<sup>60</sup> As Sunder Rajan argues, the production of the categories of 'universal' and 'human' as covering everyone everywhere, combined with the knowledge-production of a cultural 'Other' as primitive and hence non-human or subhuman, obscures the taint of Westernisation that lay nestled in the tension between the universal and the local — and between woman and human.<sup>61</sup> While cultural arguments are set up as the central obstacle to women's human rights in the Third World, the economic structures of development through First World structural adjustment policies that undermine the health and wellbeing of women in the Third World are largely ignored. The focus on culture as the primary reason for the deprivation of rights not only reinforces the image of women as victims, but also the idea of culture as an inherently negative feature of the Third World. Gender becomes the vehicle for reintroducing notions of primitiveness and backwardness, while also invisibilising the systemic ways in which rights are undermined through economic development.<sup>62</sup> Gender remains a noun and an object to be rescued by the universalising project of human rights rather than a verb that works to reinforce the First World–Third World divide and distinctions between 'us' and 'them'. This deployment of gender and the gendered 'Other' continues to inform

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<sup>58</sup> See, eg, Nathaniel Berman, "'The Appeals of the Orient': Colonized Desire and the War of the Rif" in Karen Knop (ed), *Gender and Human Rights* (Oxford University Press, 2004) 195. Berman offers a gendered reading of colonialism which is also productive of international law and politics. See also Nathaniel Berman, 'The Nationality Decrees Case, or, of Intimacy and Consent' in *Passion and Ambivalence: Colonialism, Nationalism, and International Law* (Martinus Nijhoff, 2012) 283.

<sup>59</sup> See Katherine Mayo, *Mother India* (Harcourt, Brace and Company, 1927). Here an American feminist discussed the treatment of women in India, arguing that it justified the denial of self-rule to Indians: see Mrinalini Sinha, 'Introduction' in Mrinalina Sinha (ed), *Selections from the Controversial 1927 Text: Mother India* (University of Michigan Press, 2003) 1.

<sup>60</sup> See Uday Singh Mehta, *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought* (University of Chicago Press, 1999) (unpacking the ways in which liberalism was based on promises of universality and justified exclusions in practice). See also Javed Majeed, *Ungoverned Imaginings: James Mill's The History of British India and Orientalism* (Oxford University Press, 1992) (discussing how *The History of British India* provided part of the theoretical basis for the liberal endeavour to 'liberate' India from its own culture: see James Mill, *The History of British India* (Baldwin, Cradock and Joy, 1817)). But see Sankar Muthu, *Enlightenment against Empire* (Princeton University Press, 2003) (tracing the under-studied strand of 18<sup>th</sup> century liberal thought on anti-imperialism in the work of Denis Diderot, Immanuel Kant and Johann Gottfried Herder). See also Gerrit W Gong, *The Standard of 'Civilization' in International Society* (Oxford University Press, 1984) (mapping the operation of an exclusionary 'standard of civilisation' constraining entry of non-European states into the international legal order during the 19<sup>th</sup> century).

<sup>61</sup> Rajeswari Sunder Rajan, 'Women's Human Rights in the Third World' in Nicholas Bamforth (ed), *Sex Rights: The Oxford Amnesty Lectures 2002* (Oxford University Press, 2005) 119, 119–25.

<sup>62</sup> *Ibid* 124.



the international legal order more generally and feminist advocacy more specifically.

Postcolonial feminists have exposed how the gendered ‘Other’ is often viewed as even more victimised, vulnerable and in need of protection than her First World counterpart.<sup>63</sup> These critiques examine how over-generalised claims about women have informed women’s rights advocacy and universalised women’s experience of gender inequality. Chandra Mohanty points out how such generalisations assume that “‘women’ have a coherent group identity within the different cultures ... prior to their entry into social relations’.<sup>64</sup> These generalisations are hegemonic in that they represent the problems of privileged women, who are often (though not exclusively) white, Christian, Western, middle-class and heterosexual.<sup>65</sup> Such generalisations, based on an abstract notion of strategic sisterhood, efface the problems, perspectives and political concerns of women marginalised because of their class, race, religion, ethnicity and/or sexual orientation.<sup>66</sup> It is an approach that depicts women in other cultural contexts as perpetually marginalised and underprivileged and it has serious implications for the strategies adopted to remedy the harms that women experience — particularly strategies that focus on rescuing brown women from brown men through stringent punishment, incarceration and a strengthening of the techniques of sexual surveillance.

In the contemporary period the categories of gender and sexuality are being managed and controlled in and through a neoliberal political rationality, which Wendy Brown has argued is not simply about the market, but extends and disseminates market values to all institutions and social actions.<sup>67</sup> This mode of governance represents part of the continuing shift away from understanding power as something located exclusively within a sovereign state and operating in a top-down manner.<sup>68</sup> It is an understanding of power in which market demands for efficiency and stability are partly pursued in and through legal discourse as a normalising mechanism, which disciplines, corrects and regulates life. At the same time, the move towards a society of control employs carceral means to suppress those subjects who can threaten the stability and viability of the neoliberal enterprise. It is this neoliberal rationality that in part explains the

<sup>63</sup> See, eg, Kapur, ‘Tragedy of Victimization Rhetoric’, above n 40.

<sup>64</sup> Chandra Talpade Mohanty, ‘Under Western Eyes: Feminist Scholarship and Colonial Discourses’ in Chandra Talpade Mohanty, Ann Russo and Lourdes Torres (eds), *Third World Women and the Politics of Feminism* (Indiana University Press, 1991) 51, 70.

<sup>65</sup> See generally Norma Alarcón, ‘The Theoretical Subject(s) of *This Bridge Called My Back* and Anglo-American Feminism’ in Carole R McCann and Seung-Kyung Kim (eds), *Feminist Theory Reader: Local and Global Perspectives* (Routledge, 2003) 404.

<sup>66</sup> See generally Aihwa Ong, ‘Strategic Sisterhood or Sisters in Solidarity? Questions of Communitarianism and Citizenship in Asia’ (1996) 4 *Indiana Journal of Global Legal Studies* 107. See also Vasuki Nesiiah, ‘Toward a Feminist Internationality: A Critique of US Feminist Legal Scholarship’ in Ratna Kapur (ed), *Feminist Terrains in Legal Domains: Interdisciplinary Essays on Women and Law in India* (Kali for Women, 1996) 11 (arguing that feminist universalism masks global structural contradictions in gender oppression); Inderpal Grewal, ‘“Women’s Rights as Human Rights”: Feminist Practices, Global Feminism, and Human Rights Regimes in Transnationality’ (1999) 3 *Citizenship Studies* 337.

<sup>67</sup> Wendy Brown, ‘Neoliberalism and the End of Liberal Democracy’ in *Edgework: Critical Essays on Knowledge and Politics* (Princeton University Press, 2005) 37.

<sup>68</sup> See generally Foucault, *The History of Sexuality*, above n 55.



demand for the death penalty after the Delhi rape by a young, progressive generation of Indians who were born in the crucible of globalisation and market-based sensibilities. This is an idea to which I will return in Part V of this paper.

#### IV SECURITY DISCOURSE AND THE REGULATION, DISCIPLINE AND MANAGEMENT OF GENDER IN INTERNATIONAL LAW

These critiques of sovereignty and gender in IL serve as a space-clearing gesture in order to understand the ways in which power operates in a dispersed manner in and through the categories of gender (as well as class, caste, race and religion) rather than upon it. In what follows I use the critical insights on sovereignty and gender discussed above to briefly trace the work that gender does in various arenas of IL in order to illustrate how it is regulated, disciplined and managed through a sexual security regime. Feminist interventions have at times been implicated in this process where a focus on sexual violence and victimisation has encouraged a carceral vision; the strengthening of law enforcement mechanisms and border controls; and a curtailment of sexual speech and expression. At the same time, appropriating gender to strengthen the security apparatus of the state serves the state's priorities of market efficiency and stability. I illustrate my argument by focusing on three sites in IL: sex trafficking in the context of IHRL; wartime rape in the *Rome Statute of the International Criminal Court* ('*Rome Statute*') in ICL; and Security Council resolutions 1325 and 1820 on peace, gender and security in international humanitarian law.

##### A *Sex Trafficking in International Human Rights Law*

In the international human rights arena gender has been largely framed within the campaigns fighting violence against women. The turning point came at the 1993 Vienna World Conference on Human Rights when the human rights community came to recognise that violence against women in the home or private sphere could be subject to human rights scrutiny.<sup>69</sup> While the 1994 Cairo Conference on Population and Development,<sup>70</sup> the Beijing World Conference for

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<sup>69</sup> World Conference on Human Rights, *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (12 July 1993) 7 para 18 ('*Vienna Declaration*');

The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community.

The *Vienna Declaration* further provides, at 19 para 38, that

the World Conference on Human Rights stresses the importance of working towards the elimination of violence against women in public and private life, the elimination of all forms of sexual harassment, exploitation and trafficking in women, the elimination of gender bias in the administration of justice and the eradication of any conflicts which may arise between the rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism.

<sup>70</sup> *Report of the International Conference on Population and Development*, UN Doc A/CONF.171/13/Rev.1 (1995).

Women<sup>71</sup> and the adoption of the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*<sup>72</sup> have been important milestones for women's human rights, the proliferation of resolutions and declarations addressing sexual violence against women has received the most attention.<sup>73</sup> The most recent addition is the agreement on ending violence against women adopted at the 57<sup>th</sup> session of the Commission on the Status of Women in 2013.<sup>74</sup>

States have responded to the recognition of sexual violence in IL largely through a strengthening of the law and order agenda and a focus on criminal justice provisions. A carceral vision has been acutely evident in the area of anti-trafficking interventions, where a focus on border controls, raid and rescue operations by law enforcement officials and a zero tolerance campaign aimed at targeting individuals engaged in sex trafficking are amongst the dominant responses.<sup>75</sup>

In the context of anti-trafficking interventions in the 1990s and the first decade of the 21<sup>st</sup> century, gender continues to be aligned with victimisation, vulnerability and sexual oppression. The *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* ('*UN Trafficking Protocol*') epitomises how the trafficked subject is constituted in and through

<sup>71</sup> See *Beijing Declaration and Platform for Action* as contained in *Report of the Fourth World Conference on Women*, UN Doc A/CONF.177/20/Rev.1 (17 October 1995) ch I.

<sup>72</sup> *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 6 October 1999, 2131 UNTS 83 (entered into force 22 December 2000).

<sup>73</sup> See, eg, *Declaration on the Elimination of Violence against Women*, GA Res 48/104, UN GAOR, 48<sup>th</sup> sess, 85<sup>th</sup> plen mtg, Agenda Item 111, Supp No 49, UN Doc A/RES/48/104 (20 December 1993). See also *Report of the Committee on the Elimination of Discrimination against Women: Eleventh Session*, UN GAOR, 47<sup>th</sup> sess, Supp No 38, UN Doc A/47/38 (1993) pt I ('*General Recommendation 19 (Eleventh Session): Violence against Women*'). This general recommendation provides that discrimination against women includes gender-based violence. That is, violence directed against a woman because she is a woman or violence that affects women disproportionately. It further states that gender-based violence is a form of discrimination that inhibits a woman's ability to enjoy rights and freedoms on an equal basis. Along similar lines, the United Nations Economic and Social Council endorsed the resolution of the UN Commission on Human Rights to appoint a special rapporteur on violence against women, its causes and consequences, for a three-year term: *Question of Integrating the Rights of Women into the Human Rights Mechanisms of the United Nations and the Elimination of Violence against Women*, ESC Dec 1994/254, UN ESCOR, 42<sup>nd</sup> plen mtg, Agenda Item 5(d), Supp No 1, UN Doc E/1994/94 (22 July 1994). Similarly, the UN Economic and Social Council also endorsed the resolution of the UN Commission on Human Rights to appoint a special rapporteur on trafficking for a three-year term: *Special Rapporteur on Trafficking in Persons, Especially Women and Children*, ESC Dec 2004/228, UN ESCOR, 14<sup>th</sup> mtg, Agenda Item 2, Supp No 1, UN Doc E/2004/INF/2/Add.1 (2 July 2004).

<sup>74</sup> See Commission on the Status of Women, *Report on the Fifty-Seventh Session*, UN ESCOR, Supp No 7, UN Doc E/2013/27 and E/CN.6/2013/11 (2013) 1.

<sup>75</sup> See especially Elizabeth Bernstein, 'Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns' (2010) 36 *Signs* 45. See also Kamala Kempadoo, 'Introduction: Globalizing Sex Workers' Rights' in Kamala Kempadoo and Jo Doezema (eds), *Global Sex Workers: Rights, Resistance, and Redefinition* (Routledge, 1998) 1, 11–12; Janie Chuang, 'Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts' (1998) 11 *Harvard Human Rights Journal* 65; Prabha Kotiswaran, *Dangerous Sex, Invisible Labor: Sex Work and the Law in India* (Princeton University Press, 2011).

IHRL.<sup>76</sup> The definition of trafficking under the *UN Trafficking Protocol* is arguably intended to cover instances such as the case of a woman from a developing country who ends up enslaved at a garment factory in the United States; or a man smuggled from a North African country into Europe and then forced to harvest crops under threat of beatings or death; or a Nepali woman who is taken across the Indian border and held against her will to work as a prostitute. However, in popular discourse trafficking has invariably been conflated with women who are duped, forced or deceived with the promise of legitimate jobs, kidnapped and then sold into prostitution. Unfortunately, the broad array of situations of abuse and exploitation that constitute trafficking has been overshadowed by a focus on 'sex trafficking'.<sup>77</sup>

While the definition of trafficking in the *UN Trafficking Protocol* extends beyond the specific issue of prostitution, it retains its focus on prostitution and violence against women in the broader public arena. States throughout the world have enacted legislation in response to the anti-trafficking campaign. However, this response has invariably lapsed into the use of sexual and moral surveillance techniques over women while also betraying a visceral concern over border security. This concern reflects an increasing obsession with national security, law and order and border protection in the context of globalisation and free market ideology. These interventions have produced a fierce debate over whether these initiatives have either advanced women's rights or solved the problem of trafficking.<sup>78</sup>

The anti-trafficking campaigns have triggered the establishment of a vast network of laws designed to regulate cross-border movements through a criminal justice and law and order approach. This legal web is overwhelmingly informed by assumptions of female migration as invariably forced and sex workers as invariably trafficked into the trade.<sup>79</sup> While rights to migration, freedom of movement and equality exist in international and domestic laws, such rights do not in and of themselves disrupt the normative assumptions about female migration and the female migrant subject. She continues to be constituted either as a victim to be rehabilitated and protected from a clandestine criminal regime of smugglers and traffickers who facilitate her movement or a sexual and cultural

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<sup>76</sup> See *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, opened for signature 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003) ('*UN Trafficking Protocol*').

<sup>77</sup> Cf *ibid* art 3. The *UN Trafficking Protocol* contains strong law enforcement provisions and the first ever international definition of 'trafficking in persons'. Note especially art 3, which deals with the issue of consent in relation to trafficking: '(b) the consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used'. For a discussion of the conflation of trafficking with sex trafficking, see Janie A Chuang, 'Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy' (2010) 158 *University of Pennsylvania Law Review* 1655, 1694–9.

<sup>78</sup> See, eg, Global Alliance against Traffic in Women, 'Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World' (Research Report, 2007) <[http://www.gaatw.org/Collateral%20Damage\\_Final/singlefile\\_CollateralDamagefinal.pdf](http://www.gaatw.org/Collateral%20Damage_Final/singlefile_CollateralDamagefinal.pdf)>; Chuang, 'Rescuing Trafficking from Ideological Capture', above n 77, 1705–24; Kotiswaran, above n 75.

<sup>79</sup> See Ratna Kapur, *Makeshift Migrants and Law: Gender, Belonging, and Postcolonial Anxieties* (Routledge, 2010).

contaminant to be cleansed, removed or expelled. These constructions of the female migrant in legal discourse continue to reproduce the logic of the 'Other' that has informed the colonial project.<sup>80</sup> This logic regards women as victims in need of rescue from an inferior or barbaric people and culture as well as serving to justify the processes of empire as a means of civilising the 'native'.<sup>81</sup>

At the same time, as Elizabeth Bernstein notes, feminists and conservatives alike share the state's construction of gender and its focus on a carceral vision that seeks to incarcerate men who are badly behaved.<sup>82</sup> These seemingly politically opposed groups share a commitment to market-based solutions to contemporary social problems. The result has been to target, police and criminalise economically and racially marginalised populations, emphasise border controls and use donor funding and threats of withdrawal of non-humanitarian aid to bully countries into curtailing prostitution.<sup>83</sup> The focus on sex trafficking is not simply based on traditional gender stereotypes but is portrayed as a modernising project. The solutions to these issues are articulated in terms of the restoration of the heterosexual familial order and of criminal justice, as well as imagined in corporate and consumer terms. Victims of sex trafficking are reintegrated into their original familial spaces, incarcerated for their own protection or encouraged to set up small-scale business enterprises to manufacture goods that are advertised as having been produced by trafficked victims.<sup>84</sup>

The anti-trafficking interventions partly illustrate how an entire regulatory regime can be established without necessarily addressing the problem that triggered its establishment: the exploitation of, and violence against, women who move or are moved across borders by clandestine networks of traffickers and smugglers. The interventions — which depend on a law and order, criminal justice approach; the objectification of women who move through the lens of victimisation; and the appeal to states for redress — produce an edifice that may be missing the point altogether. As in the case of the Delhi rape, such interventions do not empower the women who are the primary objects of concern, but strengthen the state's regulatory apparatus and intensify the sexual surveillance of women's lives. Moreover, the focus on border controls and the criminal law in anti-trafficking interventions has not discouraged movement, but encouraged and strengthened the rise of a clandestine migrant mobility regime, pushing those who cross borders into increased situations of vulnerability, exploitation and abuse.<sup>85</sup>

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<sup>80</sup> See generally Sumanta Banerjee, *Dangerous Outcast: The Prostitute in Nineteenth Century Bengal* (Seagull Books, 1998).

<sup>81</sup> Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* (Glass House, 2005) 142–50.

<sup>82</sup> Bernstein, above n 75, 66.

<sup>83</sup> Chuang, 'Rescuing Trafficking from Ideological Capture', above n 77, 1706–10. Consider, for example, the threat of withdrawal of non-humanitarian, non-trade-related foreign assistance for non-compliance with the minimum standards for the elimination of trafficking set out in the US's *Victims of Trafficking and Violence Protection Act of 2000*, 22 USC § 7101 (2002). See also United States Department of State, *Trafficking in Persons Report* (June 2013) <<http://www.state.gov/j/tip/rls/tiprpt/>>.

<sup>84</sup> Bernstein, above n 75, 64.

<sup>85</sup> See, eg, Global Alliance against Traffic in Women, 'Collateral Damage'.

## B Gender, Wartime Rape and the International Criminal Court

One important recent achievement in the arena of women's rights has been the incorporation of gender into the statute of the International Criminal Court ('ICC'). The *Rome Statute* defines gender as follows: 'For the purpose of this *Statute*, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above'.<sup>86</sup> As Janet Halley has illustrated in her meticulous analysis of feminist engagements with the drafting process of the *Rome Statute*, a consensus emerged that was based on an updated radical feminism that was committed to a structuralist understanding of female subordination and male domination.<sup>87</sup> This consensus was enthusiastically facilitated and accepted by males of the international elite from Western states who accepted this voice as authoritative on the 'badness of rape' and the need for specific criminal law reforms to end the impunity of rapists.<sup>88</sup>

Feminist interventions were quite single-mindedly focused on trying to prohibit rape in war and prosecute it vigorously.<sup>89</sup> Gradually, the feminist focus expanded to cover not only rape in the context of war and in relation to belligerent forces, but to view these things as being part of a global war against women. The argument was that the acceptability of rape in peacetime causes rape in conflict. The argument was based on a capacious conception of male domination where rape was re-imagined as part of a bigger male war against women.<sup>90</sup> Quite specifically, feminists wanted the ICC to have unlimited jurisdiction over sexual harms. As Halley notes, in the end, the *Rome Statute* makes it a crime to perpetrate 'rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2(f), enforced sterilization or any other form of sexual violence'.<sup>91</sup> In addition, the statute also makes criminal 'any other form of sexual violence' when committed in international conflict if it 'so

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<sup>86</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 7(3) ('*Rome Statute*').

<sup>87</sup> Janet Halley, 'Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law' (2008) 30 *Michigan Journal of International Law* 1, 2. In a previous article, Halley examined the representations of rape by feminists in the prosecution and adjudication of cases in the International Criminal Tribunal for the former Yugoslavia ('ICTY') and the International Tribunal of Rwanda ('ICTR'): Janet Halley, 'Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict' (2008) 9 *Melbourne Journal of International Law* 78.

<sup>88</sup> Halley, 'Rape at Rome', above n 87, 79–80.

<sup>89</sup> See Rhonda Copelon, 'Surfacing Gender: Reconceptualizing Crimes against Women in Times of War' in Alexandra Stiglmeier (ed), *Mass Rape: The War against Women in Bosnia-Herzegovina* (University of Nebraska Press, 1994) 197; Hilary Charlesworth, 'Feminist Methods in International Law' (1999) 93 *American Journal of International Law* 379, 390–1.

<sup>90</sup> Halley, 'Rape at Rome', above n 87, 100.

<sup>91</sup> *Ibid* 101–2; *Rome Statute* arts 8(2)(b)(xxii), (e)(vi).

constitute[s] a grave breach of the *Geneva Conventions*'.<sup>92</sup> In the context of internal armed conflict, any other form of sexual violence is covered if it 'also constitutes[s] a serious violation of article 3' that is common to the *Geneva Conventions*.<sup>93</sup> And finally, while the crime of 'gender violence' was not incorporated into the *Rome Statute* as advocated by feminists, persecution on the basis of gender was made a crime against humanity.<sup>94</sup>

As Halley argues, the definition of gender was a central arena of contest in the drafting process of the *Rome Statute*.<sup>95</sup> The struggle was between those who regarded gender as 'socially constructed' and conservatives who were intent on attributing a biological basis to the term, referring only to male and female. The meaning finally adopted indicated a compromise whereby gender was defined as referring 'to the two sexes, male and female, within the context of society'. In addition, the *Rome Statute* states that the term 'gender' 'does not indicate any meaning different from the above'.<sup>96</sup>

The specific focus on the criminal law and carcerality that was a central feature of feminist advocacy in the drafting process of the *Rome Statute* reflects part of 'a broader set of technologies of power' and indicates a shift towards a 'biopolitical regulation of the species-body rather than the mere disciplining of the individual body'.<sup>97</sup> In other words, gender in the context of international criminal law continues to operate as a stable category, yet the function that it performs is to regulate and manage behaviour and conduct while also disciplining such behaviour and conduct. The goal is to move sexual violence up the ladder of the criminal law, to demand more stringent sentences and to make sex crimes a specific set of indictable offences. This goal is to be partly achieved by using the repressive apparatus of the state to alter or eliminate a specific kind of behaviour that harms women. The end result is not only an alignment of progressive actors with the coercive aspects of the state regulatory structure, it also further entrenches the idea of women as victims and men as perpetrators in

<sup>92</sup> *Rome Statute* art 8(2)(b)(xxii). See also *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (collectively, '*Geneva Conventions*').

<sup>93</sup> *Rome Statute* art 8(2)(b)(xxii). See also *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950).

<sup>94</sup> *Rome Statute* art 7(1)(h).

<sup>95</sup> Halley, 'Rape at Rome', above n 87, 105. Halley's discussion draws largely on the work of Valerie Oosterveld who was also involved in the drafting process and was part of the Canadian delegation: see Valerie Oosterveld, 'The Definition of "Gender" in the *Rome Statute of the International Criminal Court*: A Step Forward or Back for International Criminal Justice?' (2005) 18 *Harvard Human Rights Journal* 55.

<sup>96</sup> *Rome Statute* art 7(3).

<sup>97</sup> Sune Sandbeck, 'Towards an Understanding of Carceral Feminism as Neoliberal Biopower' (Paper presented at 2012 Annual Conference of the Canadian Political Science Association, University of Alberta, 13–15 June 2012) 1 <<http://www.cpsa-acsp.ca/papers-2012/Sandbeck.pdf>>.

the context of war and conflict — while being oblivious to political, economic or historical context. The gender arrangements are both simplified and reaffirmed and a sexual security regime is erected to govern sexual conduct and incarcerate people for ‘bad’ behaviour. This thinking informed the interventions in the Delhi rape case, highlighting how international norms and laws produced as abstract and universal concomitantly construct and rework domestic norms.<sup>98</sup>

### C Security Council Resolutions 1325 and 1820 in International Humanitarian Law

The latest interventions on gender have arrived in the form of the adoption of *Resolution 1325* and *Resolution 1820*. *Resolution 1325* ‘[e]ncourages the Secretary-General to ... increase ... the participation of women at decision-making levels in conflict resolution and peace processes’.<sup>99</sup> The purpose behind women’s participation in *Resolution 1325* is explained in *Resolution 1889* where the Security Council ‘[reiterated] the need for the full, equal and effective participation of women at all stages of peace processes given their vital role in the prevention and resolution of conflict and peacebuilding’ and also ‘[reaffirmed] the key role women can play in re-establishing the fabric of recovering society’.<sup>100</sup> Embedded in *Resolution 1325*, the accompanying resolutions and the edifice of UN mechanisms and documents that enable them, is the notion that women are inherently peace-loving, speak ‘in a different voice’ — a gentler, more modulated tone — than men and are genetically programmed to pursue peace and conflict resolution. These assumptions are

<sup>98</sup> The relationship between the domestic and the international is articulated in the many discussions on the relationship between race, gender, sexuality and empire: see, eg, Ann Laura Stoler, *Carnal Knowledge and Imperial Power: Race and the Intimate in Colonial Rule* (University of California Press, 2002); Anne McClintock, *Imperial Leather: Race, Gender and Sexuality in the Colonial Contest* (Routledge, 1995); Alison Blunt and Gillian Rose, ‘Introduction: Women’s Colonial and Postcolonial Geographies’ in Alison Blunt and Gillian Rose (eds), *Writing Women and Space: Colonial and Postcolonial Geographies* (Guilford Press, 1994) 1; Eve Kosofsky Sedgwick, *Between Men: English Literature and Male Homosocial Desire* (Columbia University Press, 1985).

<sup>99</sup> *Resolution 1325*, UN Doc S/RES/1325, para 2. *Resolution 1325* has been hailed as ‘the first resolution ever passed by the Security Council that specifically addresses the impact of war on women, and women’s contributions to conflict resolution and sustainable peace’: PeaceWomen, *SCR 1325: The Text* <<http://www.peacewomen.org/pages/about-1325/scr-1325-the-text>>. Similarly, the UN Development Fund for Women celebrated the resolution as a ‘watershed political framework’: UN Women, *Security Council Resolution 1325 Turns 5* (31 October 2005) <[http://www.unifem.org/news\\_events/story\\_detailaf58.html](http://www.unifem.org/news_events/story_detailaf58.html)>. See also Dianne Otto, ‘The Security Council’s Alliance of Gender Legitimacy: The Symbolic Capital of *Resolution 1325*’ in Hilary Charlesworth and Jean-Marc Coicaud (eds), *Fault Lines of International Legitimacy* (Cambridge University Press, 2010) 239. Otto argues that the resolutions were partly adopted to shore up the Security Council’s own credibility on issues of gender: at 274.

<sup>100</sup> SC Res 1889, UN SCOR, 6196<sup>th</sup> mtg, UN Doc S/RES/1889 (5 October 2009) Preamble (*‘Resolution 1889’*). *Resolution 1889* puts in place institutional measures to ensure greater implementation of *Resolution 1325*.



strewn across the field of IL more generally and the women's human rights industry more specifically.<sup>101</sup>

A similar allusion to women's role in the peace process can be found in the UN Secretary-General's address at the time of the meeting of the Security Council to discuss and vote on *Resolution 1325*. The Secretary-General began by acknowledging that in times of conflict 'women bear more than their fair share of the suffering'.<sup>102</sup> Women, however, were also more peaceful than men — they were 'better equipped than men to prevent or resolve [conflict]'.<sup>103</sup> This was because

[f]or generations, women have served as peace educators, both in their families and in their societies. They have proved instrumental in building bridges rather than walls. They have been crucial in preserving social order when communities have collapsed ... Partly for that reason, we are making special efforts to recruit more women for our own peacekeeping and peace-making missions, and make all our operations more aware of gender issues.<sup>104</sup>

It was within the context of these resolutions that Ban Ki-moon initiated his campaign, 'United to End Violence against Women', in February 2008. The United Nations General Assembly also decided to create a powerful agency to deal exclusively with gender-related activities.<sup>105</sup> The focus of these initiatives remained the instrumental value of having women incorporated into the pursuit of international peace and security. In some ways, this shift into the security discourse has enhanced the value attached to women's human rights within the UN discourse, especially as it has the backing of the Security Council and its most powerful members. At the same time, it reproduces gender essentialism and assumptions of women as naturally inclined towards caring and pursuing peace and also frames gender issues within a security framework.

The underlying assumption informing *Resolution 1325* — that women inherently speak in a different voice than men — in turn implies that a gender perspective can be injected into the peace process, and women's rights secured, simply by having women around the table. *Resolution 1325* therefore affords relatively little scope to challenge the terms of the debate. The only role for women is to ensure that within these set and immutable terms, their concerns are

<sup>101</sup> For example, at the 10<sup>th</sup> anniversary of *Resolution 1325*, the Committee on the Elimination of Discrimination against Women issued a statement declaring that women are 'widely recognized as effective agents of peace': Committee on the Elimination of Discrimination against Women, 'Statement of the Committee on the Elimination of Discrimination against Women on the 10<sup>th</sup> Anniversary of Security Council *Resolution 1325* on "Women, Peace and Security"' (Statement, 12–30 July 2010) <[http://www.ohchr.org/Documents/HR\\_Bodies/CEDAW/Statements/Statement\\_SCR\\_1325.pdf](http://www.ohchr.org/Documents/HR_Bodies/CEDAW/Statements/Statement_SCR_1325.pdf)>.

<sup>102</sup> United Nations, 'Secretary-General Calls for Council Action to Ensure Women Are Involved in Peace and Security Decisions' (Press Release, SG/SM/7598, 24 October 2000).

<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

<sup>105</sup> *System-Wide Coherence*, GA Res 64/289, UN GAOR, 64<sup>th</sup> sess, 104<sup>th</sup> plen mtg, Agenda Item 114, Supp No 49, UN Doc A/RES/64/289 (21 July 2010). See also United Nations Entity for Gender Equality and the Empowerment of Women, *About UN Women* (2013) <<http://www.unwomen.org/en/about-us/about-un-women>>.

aired and addressed. In the process, an ‘ethic of care’<sup>106</sup> comes to frame the discourse and the very terms of peace promotion are de-radicalised or simply dismissed.<sup>107</sup> *Resolution 1325* thus plays no counter-hegemonic role in advocating the participation of women in peace processes. Gender categories remain intact and fixed. The resolution and subsequent follow-up reports equate female participation with a gender perspective<sup>108</sup> rather than as an analytical category for interrogating the unarticulated assumptions of the international legal regime. It is framed within the terms of a biologically determined perspective common to all women.<sup>109</sup> It is also a perspective that marginalises or disregards an entire body of feminist critique that interrogates such a framing.<sup>110</sup>

With the incorporation of ‘peace and security’ into the women’s human rights discourse, funding has been specifically targeted at centring women as vital instruments in the pursuit of international peace and security. Accompanying this move, a battalion of experts — including women’s protection advisors in peacekeeping missions — provide regular reports on sexual violence and resolution progress. The agendas of civil society groups are being driven by the agendas of donors in pursuit of this project in a manner similar to what occurred in relation to the anti-trafficking industry.

*Resolution 1325* creates a framework for decision-making without any focus on the normative content of the decisions made or any role in problematising the category of gender. The focus of actors in the field strategising on ways in which to achieve the maximum implementation of the resolution, best practices, training programs, awareness creation about the resolution and petitioning stakeholders to implement the resolution constantly give the impression that

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<sup>106</sup> See Carol Gilligan, *In a Different Voice: Psychological Theory and Women’s Development* (Harvard University Press, 1982). Gilligan describes an ‘ethic of care’ as central to women’s moral perspectives: at 74. Cf Catharine A MacKinnon, ‘Difference and Dominance: On Sex Discrimination’ in *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987) 32 (arguing that gender is an issue of power rather than difference). See also Jeanne L Schroeder, ‘Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence’ (1990) 75 *Iowa Law Review* 1135; Joan C Williams, ‘Domesticity as the Dangerous Supplement of Liberalism’ (1991) 2(3) *Journal of Women’s History* 69; Pamela S Karlan and Daniel R Ortiz, ‘In a Different Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda’ (1992) 87 *Northwestern University Law Review* 858.

<sup>107</sup> See Anne Orford, ‘Feminism, Imperialism and the Mission of International Law’ (2002) 71 *Nordic Journal of International Law* 275, 282.

<sup>108</sup> See, eg, *Report of the Secretary-General on Women and Peace and Security*, UN Doc S/2007/567 (12 September 2007).

<sup>109</sup> On the concept of gender as an analytical category, see Dianne Otto, ‘A Sign of “Weakness”? Disrupting Gender Certainties in the Implementation of Security Council *Resolution 1325*’ (2006) 13 *Michigan Journal of Gender & Law* 113, 122.

<sup>110</sup> See Hilary Charlesworth, ‘The Hidden Gender of International Law’ (2002) 16 *Temple International & Comparative Law Journal* 93, 95; Hilary Charlesworth, ‘Transforming the United Men’s Club: Feminist Futures for the United Nations’ (1994) 4 *Transnational Law and Contemporary Problems* 421; Dianne Otto, ‘The Exile of Inclusion: Reflections on Gender Issues in International Law over the Last Decade’ (2009) 10 *Melbourne Journal of International Law* 11. Otto argues that while there are considerable victories within the UN system the feminist project is simultaneously losing ground: at 25. See also Angela Raven-Roberts, ‘Gender Mainstreaming in United Nations Peacekeeping Operations: Talking the Talk, Tripping over the Walk’ in Dyan Mazurana, Angela Raven-Roberts and Jane Parpart (eds), *Gender, Conflict, and Peacekeeping* (Rowman & Littlefield, 2005) 43.

something serious is being done to address women's rights.<sup>111</sup> As Sari Kouvo argues, gender mainstreaming has become a goal in itself, as opposed to it being an effective tool for advancing gender equality.<sup>112</sup> And the category of gender itself remains unproblematised. The work that gender does is to effectively reproduce an essentialised and naturalised understanding of the category 'woman'.

These representations of gender in the international legal regime — as fixed categories that are firmly embedded — invites remedies and responses advocated by feminists, human rights advocates and the sovereign state that have little to do with promoting women's rights. Women's groups and human rights groups have continued to imagine that the international and national legal orders are heavily consolidated in a top-down understanding of sovereign power. They focus considerable attention on criminal justice, law and order and tightening the security apparatus of the state, all of which justify restrictions on women's rights and regulate and discipline sexual conduct — for the protection of women.

This carceral vision of feminism does not produce a positive future for women nor address the dispersed forms of power that impact on, or constitute, gender.<sup>113</sup> A specific thread of feminism is being coopted within the larger agenda of IL.<sup>114</sup> The turn to expertise in the context of feminism, or what Halley calls 'governance feminism', has led feminist activists to water down their demands and to smooth over differences — differences that exist because of deeply controversial issues of ideology.<sup>115</sup> These are put aside for the sake of space and voice. Feminism in this sense becomes a technocratic enterprise. It is no longer a means of interrogating and challenging current practices and structures — including a neoliberal political rationality that serves to perpetuate gender inequality or, indeed, the very categories of male, female, masculinity,

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<sup>111</sup> For a discussion of how these normative processes become entrenched through the 'post-conflict industry' and deflect attention from the struggles that would have challenged social structures, see Vasuki Nesiah, 'The Specter of Violence that Haunts the *UDHR*: The Turn to Ethics and Expertise' (2009) 24 *Maryland Journal of International Law* 135, 149–52.

<sup>112</sup> Sari Kouvo, *Making Just Rights? Mainstreaming Women's Human Rights and a Gender Perspective* (Iustus Förlag, 2004) 333.

<sup>113</sup> See Brown, above n 12.

<sup>114</sup> See generally Halley, 'Rape at Rome', above n 87. Halley describes this form of engagement as governance or structural feminism. *Contra* Otto, 'Exile of Exclusion', above n 110, 13 (arguing that the institutional reception and management of feminist ideas works to divest them of their emancipatory content and, therefore, preferring to represent the result as 'cooption' rather than 'governance feminism', which implies that the result is intentional).

<sup>115</sup> See, eg, Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton University Press, 2006); Janet Halley et al, 'From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism' (2006) 29 *Harvard Journal of Law & Gender* 335.

femininity — but a means of facilitating and legitimising the existing project of IL in the guise of addressing women's concerns.<sup>116</sup>

There is a strong urge on the part of feminists to engage with decision-makers in a dialogue in the global arena and, as some argue, to harness the transformative potential of existing objective and neutral norms of IL to meet women's concerns.<sup>117</sup> This is the role, for example, being played by feminists within the peace and conflict resolution paradigm. Anne Orford critiques this move as 'unthinkingly ... limited to joining the humanitarian mission of international law'.<sup>118</sup> She argues that 'feminism simply ends up facilitating the existing projects and priorities of militarised economic globalisation in the name of protecting and promoting the interests of women'.<sup>119</sup>

In the process, a stable and normalised understanding of gender continues to be performed within the international legal arena. The ways in which the market is harnessing gender to advance the project of neoliberal economic processes, together with a framing of gender issues within a carceral vision and security discourse, continues to reproduce gender categories as normalised, naturalised and stable. This process remains problematic as gender remains a noun, or an adjective, but not a verb.<sup>120</sup> Not only is gender aligned with an understanding of 'woman' as a biological category, she also remains vulnerable. This vulnerability is primarily addressed within the context of sexual violence, inviting interventions that conform to the normative gender script. This makes it worse for the Delhi rape victim and everyone else, as it continues to reproduce the categories of male and female as natural and normalised and women as invariably victims in need of rescue, saving and protection. Reproducing these normative arrangements not only produces ahistorical and universal accounts of gender and sexuality, it closes down the possibilities of change in existing gender and sexual arrangements.

## V CONCLUSION

In the international legal arena, as well as in the domestic space, legal responses are producing more cabined and regulated sexual subjects and are reinforcing gender categories. These outcomes cannot be celebrated as outright victories for women's rights. Instead, they mark a strengthening of the surveillance techniques that have regulated sexual conduct while falling short of conferring juridical entitlements on a fully legible subject. Gender is reinscribed as stable and normal. The international is not separate and apart from the

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<sup>116</sup> Orford, 'Feminism, Imperialism and the Mission of International Law', above n 107, 283. See also Otto, 'The Exile of Inclusion', above n 110. Otto argues that the adoption of *Resolution 1325* was itself an attempt by the Security Council to bolster its flagging legitimacy by demonstrating its dedication to the collective good, including to women. She bases this argument on the finding that *Resolution 1325* does not make any attempt to address the structural causes of women's inequality. In this way, '[d]e-linking gender mainstreaming from the goal of gender equality is a very effective way to remove any feminist political content': at 21.

<sup>117</sup> See, eg, Bruno Simma and Andreas L Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93 *American Journal of International Law* 302, 306.

<sup>118</sup> Orford, 'Feminism, Imperialism and the Mission of International Law', above n 107, 278.

<sup>119</sup> *Ibid* 283.

<sup>120</sup> Cossman, above n 45, 281.

domestic because the gendered, sexual and cultural dichotomies that permeate the narratives of nation-states and sovereignty are informed by the vocabularies of both. Explorations of gender and sexuality in the international arena that are informed by the legacies of colonialism as well as contemporary neoliberal market agendas also inform the construction of gender, sexuality and culture in the domestic locales and vice versa.<sup>121</sup>

These institutional manoeuvres have become the outward manifestations of the notion that something is being done about women's rights, that an important social justice project is being pursued with intent and perseverance. At the international level, what is emerging is the construction of a collective voice that affirms the sisterhood. The complex politics and dissonant voices are crowded out by a position that is cast in terms of common sense and moral responsibility. Violence against women continues to frame women's human rights issues and enables the debate to take place on the discursive terrain of security.<sup>122</sup>

I conclude by revisiting the case of the Delhi rape and the protests and responses it provoked, which appeared at one level to be a demand for women's rights to bodily integrity and sexual autonomy. While the protests exemplified a shift away from the traditionalism in which gender has been encased, they also represented a shift in the direction of a neoliberal political rationality that is increasingly characterising and shaping the terms of gender within the global context and international legal arena.

When the protestors came out in droves demanding justice for the Delhi rape victim, young women made up a large part of their ranks. The victim was representative of a generation of young Indian women born in the era of globalisation and neoliberal market reforms. The young Delhi rape victim was herself emblematic of the aspirations of millions of young Indian women in the 21<sup>st</sup> century. Coming from a lower income bracket, her parents sold their land to support her desire to become an educated professional and she would, in turn, support the education of her younger siblings.

This image of the aspiring Indian woman in a neoliberal setting challenges the normative understanding of 'Indian womanhood' that has informed ideas of femininity in postcolonial India. This notion has been based on the idea of Indian women as self-sacrificing, dutiful, honourable, heterosexual and, most importantly, chaste — an ideal that was integral to the struggle for freedom and the move to forge a national identity that was distinct from the West. The presence of young women on the Indian streets after the Delhi rape marked another moment in the effort to transform understandings of 'Indian womanhood' and its accompanying assumptions about female and male, femininity and masculinity. Some of the placards on the streets distanced

<sup>121</sup> Nesiiah, 'Placing International Law', above n 27, 3–4.

<sup>122</sup> See, eg, United Nations Assistance Mission in Afghanistan, 'Silence is Violence: End the Abuse of Women in Afghanistan' (Report, 8 July 2009) <<http://www.afghan-web.com/woman/afghanwomenabuse.pdf>> (focusing on the violence faced by women in private and public life in Afghanistan). See also Natalie Florea Hudson, *Gender, Human Security and the United Nations: Security Language as a Political Framework for Women* (Routledge, 2010) 1 (quoting from an interview with an UN official who describes how moving human rights concerns to the discursive terrain of security is essential to get traction on such issues from politicians); Halley, 'Rape at Rome', above n 87 (describing the activism surrounding the inclusion of sexual violence within the scope of substantive crimes in international criminal law institutions).

themselves from the familial understandings of 'Indian womanhood' that have curtailed and cabined women's freedom. 'I am not your mother, daughter, sister or wife. I am a citizen. I demand equal rights'. The slogan was a powerful reminder of how rights are important for articulating subjectivity and legibility in law as well as in the public arena. This demand converges with the idea of choice and agency free from patriarchal constraints.

At the same time, the protestors on the Delhi streets and elsewhere marked the arrival of a particular form of sovereign autonomy. A neoliberal political rationality provides the contemporary framing of sovereignty within the context of gender and sexuality. It is an articulation of sovereignty in the direction of sexual autonomy and sexual expression that is both political and personal. The dress and fashion styles of the new generation of young Indians repudiated the oft-repeated claim that dress was somehow the trigger for the rape. At the same time this expression of subjectivity is constituted within the context of a neoliberal economic and social management, which reduces human life to economic calculations and rational transactions.<sup>123</sup> It produces a subjectivity where individual freedom is understood in terms of freedom of the market and trade. It becomes 'hegemonic as a mode of discourse' and internalised as a common sense way in which to understand and interpret the world.<sup>124</sup> In this respect, it produces a subjectivity that is neither resistive nor counter-hegemonic.

While the protests were deeply political in their demands they also coincided with the emergence of the consumer citizen in India, who is partly a product of the marketised space, where freedom is aligned with consumption rather than subversive expressions of gender or sexuality. This consumer citizen is demanding greater efficiency, which includes the provision of safe and secure public transport facilities to facilitate participation in the market arena. The Delhi rape victim was returning from watching a film at a multiplex, with a young man — an experience that has become commonplace for this new generation of young Indians. She represented an experience of gender in the public space that constitutes the new model of citizenship and conceptions of the good life. The market has enabled young people to exercise choice and display their credentials as consumer citizens and individuals.<sup>125</sup> Yet at the material and discursive levels, it is unclear that this display of agency has produced significant gender disruptions. The potential for gender to 'go rogue' is pre-empted by the disciplining influences of the market, where the subject is responsible, self-disciplined and well-groomed.

While the language of rights was central to the sentiments expressed on the street, it is not self-evident that these expressions emerged as part of a counter-hegemonic initiative. While this new generation is invested in competing and consuming without the interference of a bloated state, it somewhat contradictorily continues to appeal to the state to ensure stability and security to facilitate the exercise of this freedom. At the same time, this freedom is embedded in the idea of the self-sufficiency of the individual and successful

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<sup>123</sup> See generally Brown, above n 67.

<sup>124</sup> David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2005) 3.

<sup>125</sup> Anne M Cronin, 'Consumerism and "Compulsory Individuality": Women, Will and Potential' in Sara Ahmed et al (eds), *Transformations: Thinking Through Feminism* (Routledge, 2000) 273.

competition in the marketplace — and the idea that the market is inherently non-coercive. There is an illusion that the individual can be in control of her life, while collective struggles and institutions that enable self-sufficiency are undermined.<sup>126</sup> Neoliberal conceptions of gender are unlikely to bring about a rupture in the existing normative understandings of gender in ways that actually move in the direction of more freedom.

The security apparatus that was strengthened in light of the protests was partly propelled by market demands for stability and efficiency and, hence, greater policing.<sup>127</sup> In some ways, the interests of the protestors and the state coincided in the sexual surveillance techniques that were ultimately adopted. This convergence perhaps represents justice for women who are exhausted of being pawed, groped and ogled the minute they enter the public realm, while it also operates as a disciplining technique of modern power and a condition for legibility.<sup>128</sup> The criminal law, which has been the primary tool of feminists and states engaged with issues of gender in IL, has provided a justification for states to strengthen law enforcement agencies, adopt stringent sentences and strengthen border control as well as to cabin and contain sexual expression in the name of women's rights and gender justice. However, as discussed, such interventions serve to strengthen social and political control, rather than to empower those who are demanding recognition and action.

This discussion raises the question about the possibility of gender justice. When the idea of state sovereignty is unpacked, and the processes of IL are exposed as already pursuing a normative understanding of gender, does this not limit the possibility of realising freedom and justice? If so, then what is the actual impact of these processes? Do they simply reinstitute the normative arrangements as opposed to destabilising them? Perhaps what is more important than pursuing an elusive and illusory idea that rights represent the power that the individual has taken away from a sovereign state is to address the ways in which gender is pursued and the work that it does. It is not necessarily a force for radical change, but it is the work it does in the hands of those who wield power that needs to be addressed and which should be the project of a transformative agenda.

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<sup>126</sup> See, eg, Rachel Simon-Kumar, 'The Analytics of "Gendering" the Post-Neoliberal State' (2011) 18 *Social Politics* 441; Andrea Cornwall, Jasmine Gideon and Kalpana Wilson, 'Reclaiming Feminism: Gender and Neoliberalism' (2008) 39(6) *Institute of Development Studies Bulletin* 1.

<sup>127</sup> See generally Todd Gordon, 'The Political Economy of Law-and-Order Policies: Policing, Class Struggle, and Neoliberal Restructuring' (2005) 75 *Studies in Political Economy* 53.

<sup>128</sup> See generally Andrew Barry, Thomas Osborne and Nikolas Rose (eds), *Foucault and Political Reason: Liberalism, Neo-Liberalism and Rationalities of Government* (University of Chicago Press, 1996).