

INTERNATIONAL LAW FROM THE BOTTOM UP: FRAGMENTATION AND TRANSFORMATION

BARBARA STARK*

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* Barbara Stark. Professor of Law, Hofstra Research Fellow, and Associate Dean for Intellectual Life, Maurice A. Deane School of Law, Hofstra University. Early versions of this Article were presented at a Hofstra Faculty Workshop, the New York International Law Scholars Workshop at St. John's Law School, and the ASIL Inaugural Research Forum at UCLA. I am deeply grateful to Chris Borgen and Laura Dickinson for their careful reading and invaluable suggestions; to Kristen Boon, Claire Kelly, Peggy McGuinness, Mark Shulman, and Jennifer Trahan for their helpful comments; to reference librarian Patricia Kasting, Bilal Sultan and Sophia Ekhert for diligent research assistance; to Lauren B. Connell for a thoughtful and rigorous edit; to the American Society of International Law and its Executive Director, Elizabeth Anderson, and to Clara Brillembourg and Kristine Huskey, Co-Chairs of the Women in International Law Interest Group, for appointing me to the Society's observer delegation to the CEDAW sessions at the U.N. in July 2012, and to Joyce Amore Cox for her skill and patience in preparing the manuscript.

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1. FROM THE BEGINNING

Since the Treaty of Westphalia in 1648, international law has basically been understood as law governing the relations among sovereign nation states.¹ With minor exceptions, such as regimes governing maritime commerce (the law merchant) and agreements regarding the treatment of religious minorities (like the mutual commitments of tolerance among Christian states in the Treaty of Westphalia itself), nation states were the major subjects of international law. States were autonomous, independent, and equal. States were governed by laws to which they all consented, in the form of bilateral or multilateral treaties and customary practices to which they acceded over time. Positivists, such as Emmerich de Vattel, argued that states were bound *only* by such laws.² Enlightenment philosophers, such as Jean-Jacques Rousseau, argued that

¹ See LORI F. DAMROSCH ET AL., *INTERNATIONAL LAW* xv (5th ed. 2009) (“[I]nternational law has been understood as the law made by states to govern relations among them.”); LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS, VALUES AND FUNCTIONS* 21 (1989) (offprint from the 216 *Collected Courses*, (1989-IV)) (“International law is the normative expression of the international polity which has States as its basic constituent entities.”); MARK WESTON JANIS & JOHN E. NOYES, *INTERNATIONAL LAW 1-2* (4th ed. 2011) (“An important part of international law has consequently had to do with the establishment of a set of mutually agreed-upon rules respecting the nature of these states and their fundamental rights and obligations inter se.”). *But see* BENNO TESCHKE, *THE MYTH OF 1648: CLASS, GEOPOLITICS AND THE MAKING OF MODERN INTERNATIONAL RELATIONS* (2003) (arguing that this is a simplistic account of a more complicated reality).

² DAVID J. BEDERMAN, *INTERNATIONAL LAW FRAMEWORKS* 3 (3d ed. 2010) (noting that positivism viewed States as “subject to no moral authority above them”).

natural law principles should also be binding on states. Despite differing views on the legitimate sources of international law, it was generally accepted that it governed states alone.³

1.1. Transformation

The system was radically transformed after World War II. Stunned by the Holocaust, world leaders swore, "Never again!"⁴ In that brief moment of solidarity, beginning with Articles 55 and 56 of the UN Charter (recognizing fundamental freedoms and the obligations of states to respect them) and culminating in the International Bill of Rights,⁵ sovereign states recognized the human rights of their own people.⁶ These rights included civil and

³ For a rousing and exhaustively documented rebuttal, see Jordan J. Paust, *Nonstate Actor Participation in International Law and the Pretense of Exclusion*, 51 VA. J. INT'L L. 977 (2011) (arguing that nonstate actors have played a significant role in shaping international law). See also MARY ELLEN O'CONNELL ET AL., *THE INTERNATIONAL LEGAL SYSTEM* 1 (6th ed. 2010) ("While states dominated consideration in the first edition [1973], that dominance is no longer warranted.").

⁴ This was the *crie de coeur* of the Military Tribunal at Nuremberg, the drafters of the Universal Declaration of Human Rights, and the survivors of the Holocaust. For sources on the Military Tribunal at Nuremberg, see Charter of the International Military Tribunal at Nuremberg, Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 279 (establishing military tribunals for the punishment of war criminals); TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* (1992) (recounting the trials of Nuremberg defendants). For information on the Universal Declaration of Human Rights, see Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (proclaiming the dignity and equality of all individuals); JOHN P. HUMPHREY, *HUMAN RIGHTS & THE UNITED NATIONS: A GREAT ADVENTURE* (1984) (detailing the passage of the Universal Declaration of Human Rights). For stories of Holocaust survivors, see ELIE WIESEL, *NIGHT* (Stella Rodway trans., Bantam Books 1982) (1958) (recounting Wiesel's harrowing experience in the Auschwitz and Buchenwald concentration camps during the Holocaust); *THE SORROW AND THE PITY* (Télévision Rencontre Société Anonyme 1969) (interviewing survivors of the Nazi occupation in France).

⁵ The International Bill of Rights consists of the Universal Declaration, *supra* note 4; the International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); and the International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR]. See generally *The International Bill of Rights*, U.N. Doc. ST/HR/1/Rev.6, U.N. Sales No. E.02.XIV.4 (Vol. I, Part 1) (2003), available at <http://www.ohchr.org/Documents/Publications/Compilation1.1en.pdf>.

⁶ See, e.g., MARY ANNE GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001) (documenting the work of the commission led by Eleanor Roosevelt tasked with putting together this

political rights, familiar to Americans from our own Constitution, as well as less familiar economic, social, and cultural rights, including the right to health and the right to an adequate standard of living. The recognition of individual human beings as subjects of international law was the first major sea change in international law from the bottom up.

The second major change, which also followed World War II, was decolonization. This change was less radical than the human rights idea in that it did not challenge the basic premise that states were the major subjects of international law. But it was more radical in that it claimed statehood for former colonial territories that, like individuals, had never before been considered legal subjects. Rather, they had been viewed as the property of the 'civilized' Western states. There were fewer than fifty states in 1945 when the UN Charter was drafted.⁷ Now there are almost two hundred members of the United Nations.⁸ Few share the culture and history of the European states, which were the cornerstone of the Westphalian system. In *their* histories, the Western states were the enemies and the oppressors.⁹

The more recent members of the international system of states, in general, are less industrialized and poorer than the Western

International Bill of Rights). For another version of the story, see INTERNATIONAL LAW AND ITS OTHERS 2 (Anne Orford ed., 2006) ("[E]xplor[ing] international law as a record of attempts to think about what happens at the limit of modern political organization"); BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE 174-75 (2003) (explaining "at least two ways in which the Third World is displaced by the West and is made invisible in this historiography").

⁷ Forty-nine original states ratified the U.N. Charter and there are currently 193 members. See U.N. Charter, available at <http://treaties.un.org/doc/Publication/CTC/uncharter-all-lang.pdf> (listing original signatories). See also *History of the United Nations*, UNITED NATIONS, <http://www.un.org/aboutun/history.htm> (last visited Mar. 17, 2013) (providing a brief overview of the formation of the United Nations, including a summary of the international organizations that preceded it).

⁸ See *UN Member States*, UNITED NATIONS, <http://www.un.org/depts/dhl/unms/whatisms.shtml> (last visited Mar. 13, 2013) (listing the different methods in which the current 193 U.N. member states joined the organization). See also Brigitte Stern, *A Conversation with Oscar Schachter*, 91 AM. SOC'Y INT'L L. PROC. 343, 343 (1997) (recounting wryly his advice to install sixty seats in the U.N. General Assembly during construction as one of his biggest mistakes as an international lawyer).

⁹ RAJAGOPAL, *supra* note 6, at 9-10.

states. They have been known by many different terms, including the “Third World,”¹⁰ the “Group of 77,”¹¹ the “Global South,”¹² and the “Least Developed Countries” (LDCs),¹³ which is the term used here.

The LDCs and human rights both challenge international law from the bottom up.¹⁴ Both defy the political status quo. Both seek

¹⁰ See Balakrishnan Rajagopal, *From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions*, 41 HARV. INT’L L.J. 529, 529 n.1 (2000) (explaining his choice of the term “Third World,” which includes “a contingent and shifting cultural-territoriality which may encompass states and social movements”). See also Gerard Chaliand, *Third World: Definitions and Descriptions*, THIRD WORLD TRAVELER, http://www.thirdworldtraveler.com/General/ThirdWorld_def.html (last visited Mar. 17, 2013) (noting that “Third World” is a term originally used to distinguish those nations that neither aligned with the West nor with the East during the Cold War); *infra* Part 3.1.

¹¹ See *About the Group of 77*, THE GROUP OF 77 AT THE UNITED NATIONS, <http://www.g77.org/doc/> (last visited Mar. 17, 2013) (“The Group of 77 is the largest intergovernmental organization of developing countries in the United Nations . . .”). The Group of 77 was established on June 15, 1964 by the signatories to the *Joint Declaration of the Seventy-Seven Countries*, issued at the end of the first session of the United Nations Conference on Trade and Development (UNCTAD) in Geneva. *Id.* While these groups overlap, membership shifts over time.

¹² See *United Nations Dialogue with the Global South*, UNITED NATIONS, <http://www.un.org/globalsouth/> (last visited Mar. 17, 2013) (describing the background and activities of the “UN Dialogue with the Global South,” a project to cultivate relationships between the U.N. and universities in developing nations). See also *American University Center for the Global South*, AM. U., <http://www1.american.edu/academic.depts/acainst/cgs/about.html> (last visited Mar. 17, 2013) (“The nations of Africa, Central and Latin America, and most of Asia [are] collectively known as the Global South [It] includes nearly 157 . . . recognized states in the world, and many have less developed or severely limited resources.”).

¹³ According to the United Nations Office of the High Representative for Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (U.N.-OHRLLS):

The Least Developed Countries (LDCs) represent the poorest and weakest segment of the international community. Extreme poverty, the structural weaknesses of their economies and the lack of capacities related to growth, often compounded by structural handicaps, hamper efforts of these countries to improve the quality of life of their people.

Least Developed Countries: About Least Developed Countries, U.N.-OHRLLS, <http://www.un.org/special-rep/ohrlls/ohrlls/UNOHRLLS/new/en/ldc/related/58/index.html> (last visited Mar. 21, 2013).

¹⁴ As Professor Dickinson noted when reviewing this paper at the UCLA Research Forum, *supra* asterisk note, comparing the effects of a shifting group of states—the LDCs—with those of a shifting group of NGOs and IOs—human

to dilute the authority of the older sovereign states. Both question the distribution of global resources. Both generate a rich rhetoric of empowerment, equality, and independence.

But there are serious tensions between these two bottom-up projects. Human rights advocates point out that LDCs often deny the human rights of their own minorities or their own women.¹⁵ LDCs, in turn, charge that human rights are a pretext for interfering with their domestic politics. Some claim that 'human rights' are not in fact 'universal,' but a Western imposition.¹⁶

At the same time, however, the LDCs and human rights remain interdependent. The human rights of the world's poorest populations cannot be realized, for example, if the states in which

rights advocates—on an ever-evolving body of international law is dealing with "apples and oranges." Laura Dickinson, Oswald Symister Colclough Research Professor of Law, George Washington University, Comments at the Inaugural ASIL Research Forum at UCLA (Nov. 5, 2011). For international lawyers, however, messy realities come with the territory. See *infra* Part 1.2. (describing the fragmentation of international law).

¹⁵ See generally *Country Reports on Human Rights Practices for 2011*, U.S. DEP'T OF STATE, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm> (last visited Mar. 30, 2013) (providing a comprehensive database of human rights reports organized by country and region). In particular within this collection, see U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011: AFGHANISTAN 33 (2011), available at <http://www.state.gov/documents/organization/186669.pdf> (noting that Afghanistan remains "a very dangerous country for women."); U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011: DEMOCRATIC REPUBLIC OF THE CONGO 1 (2011), available at <http://www.state.gov/documents/organization/186395.pdf> (reporting ongoing "[s]ocietal discrimination against and abuse of women and children"); U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011: NEPAL 1 (2011), available at <http://www.state.gov/documents/organization/186683.pdf> ("Discrimination against women was a problem, and citizenship laws that discriminate based on gender contributed to statelessness. Domestic violence against women remained a serious problem, and dowry-related deaths occurred."). See also AMNESTY INTERNATIONAL REPORT 2011: THE STATE OF THE WORLD'S HUMAN RIGHTS (2011), available at http://files.amnesty.org/air11/air_2011_full_en.pdf (discussing issues related to women and minority rights per individual country).

¹⁶ See, e.g., Ratna Kapur, *Human Rights in the 21st Century: Take a Walk on the Dark Side*, 28 SYDNEY L. REV. 665, 674 (2006) ("Assertions about the universality of human rights simply deny the reality of those whom it claims to represent and speak for, disclaiming their histories and imposing another's through a hegemonising move."); Jiang Qing & Daniel A. Bell, *A Confucian Constitution for China*, N.Y. TIMES, July 10, 2012, at A25, available at http://www.nytimes.com/2012/07/11/opinion/a-confucian-constitution-in-china.html?_r=0 (arguing in favor of the Confucian concept of "humane authority").

they live are systematically disadvantaged by the agreements governing world trade.¹⁷ Nor can the LDCs expect to be treated as legitimate sovereign states when their human rights violations appall the rest of the world.¹⁸

1.2. Fragmentation

Both bottom-up projects share an increasingly fragmented world. During roughly the same period that LDCs and human rights have been emerging, international law has been dramatically expanding and diversifying, as set out in the Report of the International Law Commission on the Fragmentation of International Law (ILC Report).¹⁹ As set out in the ILC Report, fragmentation refers to several related phenomena, including:

¹⁷ See Eleanor M. Fox, *Globalization and Human Rights: Looking Out for the Welfare of the Worst Off*, 35 N.Y.U. J. INT'L L. & POL. 201, 211 (2002) (arguing that the agreements governing world trade "block the markets that the developing countries need to root their own economies").

¹⁸ See *Situations and Cases*, ICC, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx (last visited Mar. 21, 2013) (listing cases regarding government officials from the Democratic Republic of the Congo, Central African Republic, Uganda and Sudan tried or currently being tried at the International Criminal Court (ICC) for crimes, including crimes against humanity, war crimes, and genocide). These cases include *Prosecutor v. Dyilo*, Case No. ICC-01/04-01/06, at 36, Decision on Sentence (July 10, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1438370.pdf> (sentencing Dyilo to fourteen years imprisonment after being convicted, as co-perpetrator, of war crimes in the Democratic Republic of the Congo consisting of "conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities in the context of an internal armed conflict"); *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, Second Warrant of Arrest (July 12, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc907140.pdf> (alleging five counts of crimes against humanity, two counts of war crimes and three counts of genocide against defendant, all occurring in Sudan); *Prosecutor v. Kony*, Case No. ICC-02/04-01/05, Warrant of Arrest (July 8, 2005), <http://www.icc-cpi.int/iccdocs/doc/doc97185.pdf> (charging defendants with crimes against humanity and war crimes in Uganda including sexual enslavement, rape, attack against civilian population, enlisting of children and cruel treatment).

¹⁹ Rep. of the Study Group of the Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, 58th Sess., May 1–June 9, July 3–Aug. 11, 2006, U.N. Doc., A/CN.4/L.682 (Apr. 13, 2006) (finalized by Martti Koskenniemi, Chairman), at 8. See generally Hubert Isak, *The 'Second Pillar' in a Union without Pillars – A New Quality of the Common Foreign and Security Policy with the Treaty of Lisbon?*, in *INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION* (Isabelle Buffard et. al eds., 2008) (honoring by festschrift Gerhard Hafner, who initiated the study of fragmentation by the ILC in 2000); Ruti Teitel & Robert Howse, *Cross-*

[T]he emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice. What once appeared to be governed by "general international law" has become the field of operation for such specialist systems as "trade law", "human rights law", "environmental law", . . . and even such exotic and highly specialized knowledges as "investment law" or "international refugee law" etc. — each possessing their own principles and institutions.²⁰

According to the ILC Report, there is concern that international law is losing coherence, certainty, and predictability because it lacks dependable mechanisms for reconciling inconsistencies.²¹

This Article examines the relationship between fragmentation and the simultaneous bottom-up transformation of international law. While this relationship is complex, it can be characterized, in general, as positive insofar as conflicts between wealthy, powerful top-down entities, such as industrialized states²² and the international organizations (IOs) which they control,²³ and 'bottom-up' human rights constituencies are concerned. That is, in such contexts, these two developments reflect and reinforce each other. Where top-down entities are in tension with human rights, fragmentation is likely to work to the advantage of the latter. Indeed, human rights advocates contribute to fragmentation, and

Judging: Tribunalization in a Fragmented but Interconnected Global Order (N.Y.U. Law Sch. Public Law & Legal Theory, Working Paper No. 09-04, 2009), available at <http://ssrn.com/abstract=1334289>.

²⁰ *Fragmentation of International Law*, *supra* note 19, at 11.

²¹ *Id.* at 12.

²² Like the LDCs, these states have been known by several different terms, including the "First World," the "West," the "global North," and the "civilized states." These are 'top down,' not necessarily in their internal organization, but in their relations with poorer states, or powerless constituencies within states.

²³ Andre Soliani, *BRICs Said to Seek End to West's Monopoly on Leadership of World Bank, IMF*, BLOOMBERG (Apr. 13, 2011, 7:06 AM), <http://www.bloomberg.com/news/2011-04-13/brics-said-to-seek-end-to-u-s-western-europe-monopoly-of-world-bank-imf.html> ("The management structure of the institutions needs to reflect changes in the world economy.") According to Brazilian President Dilma Rousseff, the BRICs—Brazil, Russia, India, China and South Africa—"will insist on the fact that governance at the IMF and the World Bank cannot be a systematic rotation between the U.S. and Europe, with the other countries excluded." *Id.*

in some areas are largely responsible for it, for precisely this reason.

Where top-down entities are in tension with LDCs, in contrast, fragmentation generally benefits those on top. The proliferation of “legal institutions and spheres of legal practice”²⁴ enables wealthy states and even non-state actors, such as multinationals, to outlawyer the LDCs, further marginalizing them. Indeed, top-down entities contribute to fragmentation, and in some areas are largely responsible for it, for precisely this reason.

The thesis here is that fragmentation supports human rights even as it undermines LDCs. This is a preliminary project and it is theoretical rather than empirical.²⁵ My objective is to explore some

²⁴ *Fragmentation of International Law*, *supra* note 19, at 11.

²⁵ Although I draw on pertinent data, *see, e.g., infra* notes 32, 35, I prefer a theoretical approach here for two reasons. First, data are largely unavailable or flawed for large segments of the world’s women, especially those women on the bottom. *See, e.g., U.N. DEP’T ECON. & SOC. AFF., THE WORLD’S WOMEN 2010: TRENDS AND STATISTICS*, at xii, U.N. Doc. ST/ESA/STAT/SER.K/19, U.N. Sales No. E.10.XVII.11 (2010) [hereinafter *WORLD’S WOMEN 2010*] (listing the impediments to a meaningful empirical analysis of gender). Second, even if data were available, its usefulness, especially in projects like this, remains an open question. As Hilary Charlesworth and Christine Chinkin note:

Empirical data, however accurate their collection and collation, reveal only a partial picture of any situation and may obscure the realities of complex social and political ordering. In times of rapid change, especially in economic, social and legal matters, reliance upon such data can be misleading in that it lags behind subsequent developments. Moreover, UN concern with women-specific statistics appears to have peaked in 1995

HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* 5 (2000). *See also* OONA A. HATHAWAY & HAROLD HONGJU KOH, *FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS* 239-40 (2006) (acknowledging criticism of Hathaway’s methodology in analyzing the commitment and compliance records of nations under human rights treaties). As Ryan Goodman and Derek Jinks note more generally in their critique of Oona Hathaway’s statistical model for evaluating the effectiveness of human rights treaties:

But because the stakes are so high, it is important that we make accurate connections between what the law does and what happens on the ground. Those connections cannot be ascertained through the research design that Hathaway employed. Perhaps the answer is to discard this type of statistical modelling [sic] and adopt a softer kind of empiricism, something more sociological than economic. Perhaps it’s something else.

Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 *EUR. J. INT’L L.* 171, 183 (2003). *But see* Gregory Shaffer & Tom Ginsburg, *The*

of the effects of the fragmentation of international law on its bottom-up transformation and to suggest some of the possibilities, as well as the limits, of that transformation in the process.

Part 2 of this Article examines the effects of the fragmentation of international law on women's human rights. Part 3 describes the impact of fragmentation on LDCs. Part 4 draws on the frameworks developed in the first two parts to analyze the effects when the two coincide; that is, the effects of fragmentation on women's human rights in LDCs.

Both the limits and the possibilities of fragmentation have been brought into sharp relief by the recent global economic crisis.²⁶ A rising tide may or may not lift all boats, but when the tide is out it is clear who is left high and dry.²⁷ While "the global recession, contrary to economists' expectations, did not increase poverty in the developing world,"²⁸ it certainly didn't help. There has been a small drop in the number of people living below \$2 per day, but "[t]he number of people living *between* \$1.25 and \$2 has almost doubled from 648 million to 1.18 billion between 1981 and 2008."²⁹

Empirical Turn in International Legal Scholarship, 106 AM. J. INT'L L. 1, 19-25 (2012) (noting the importance of empirical work in human rights scholarship).

²⁶ See, e.g., G.A. Res. 63/303, U.N. Doc. A/RES/63/303 (July 13, 2009) (addressing the issues caused by the world financial and economic crisis) [hereinafter *U.N. Resolution on World Economic Crisis*]; *infra* note 271 (setting out the World Bank's predictions for women). But see, e.g., Hanna Rosin, *The End of Men*, THE ATLANTIC (June 8, 2010, 9:00 AM), <http://www.theatlantic.com/magazine/archive/2010/07/the-end-of-men/308135/> ("[F]or the first time in human history . . . the global economy is evolving in a way that is eroding a historical preference for male children, worldwide.").

²⁷ The most recent report from the World Bank, somewhat surprising, "shows a broad reduction in extreme poverty." Annie Lowrey, *Extreme Poverty in Developing World is Down Despite the Recession, Report Says*, N.Y. TIMES, Mar. 7, 2012 at A4. This decrease may simply reflect the fact that the world's poorest had no jobs, housing, savings, benefits, or pensions to lose. As the Bank notes, moreover, "[l]ags in data availability mean that 2008 is the most recent year we can make a reliable global estimate . . ." SHAOHUA CHEN & MARTIN RAVALLION, AN UPDATE TO THE WORLD BANK'S ESTIMATES OF CONSUMPTION POVERTY 1 (Mar. 1, 2012), available at http://siteresources.worldbank.org/INTPOVCALNET/Resources/Global_Poverty_Update_2012_02-29-12.pdf. Nor does the data reflect *intra*-household distribution, which overwhelmingly favors males. See, e.g., WORLD'S WOMEN 2010, *supra* note 25, *passim* (providing several statistics to illustrate different aspects of general population patterns).

²⁸ Lowrey, *supra* note 27.

²⁹ Chen & Ravallion, *supra* note 27, at 3. Many question the usefulness of GNP or per capita expenditure as meaningful indicators. See, e.g., MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 5-6

The benefits of additional laws, fora, non-governmental organizations (NGOs) and other mechanisms for furthering women's human rights usually fail to offset the costs of living in an LDC.

But the fragmentation of international law is an ongoing process, and women's human rights in LDCs are far from a lost cause. Indeed, as journalists Nicholas D. Kristof and Sheryl WuDunn proclaim, "[It] is the . . . cause of our time."³⁰ Legal scholar Dianne Otto is less blunt, but no less provocative: "[F]eminist engagement with human rights law . . . has barely begun and it is hard to predict what new opportunities and insights will emerge."³¹

2. HOW FRAGMENTATION AFFECTS WOMEN'S HUMAN RIGHTS

This Part analyzes the relationship between the structural and normative transformation of international law in the context of women's human rights. There are three reasons for this focus. First, regrettably (if conveniently for my purposes here), women are at the bottom in virtually every state, by virtually any indicator. They are poorer, both in terms of income and wealth;³² they have less political power;³³ and, despite their general exclusion from armed combat,³⁴ they are overwhelmingly more likely to be victims of violence.³⁵ They are also at the bottom of virtually any minority group recognized in human rights law.³⁶

(2006) (setting out an alternative to GNP that focuses on "human capabilities . . . what people are actually able to do and be").

³⁰ Nicholas D. Kristof & Sheryl WuDunn, *The Women's Crusade*, N.Y. TIMES MAG., Aug. 23, 2009, at 28.

³¹ Dianne Otto, *Lost in Translation: Re-scripting the Sexed Subjects of International Human Rights Law*, in INTERNATIONAL LAW AND ITS OTHERS 318, *supra* note 6, at 356. See also MARILOU MCPHEDRAN ET AL., THE FIRST CEDAW IMPACT STUDY: FINAL REPORT 9 (2000) [hereinafter FIRST CEDAW IMPACT STUDY] (proclaiming that the Report is the first "grass roots study of [CEDAW]" and "just the beginning" of research in this area).

³² Women perform 66% of the world's work, but they earn only 10% of the world's income, and own merely 1% of the world's property. *Facts and Figures on Women, Poverty and Economics*, U.N. DEV. FUND FOR WOMEN, http://web.archive.org/web/20091022132333/http://www.unifem.org/gender_issues/women_poverty_economics/facts_figures.php (last visited Mar. 17, 2013).

³³ WORLD'S WOMEN 2010, *supra* note 25, at 112-120.

³⁴ CHARLESWORTH & CHINKIN, *supra* note 25, at 258.

³⁵ The roughly 163 million missing women is a population made up by aborted female fetuses or victims of female infanticide. See U.N. Population Fund,

Second, women's human rights have generated a substantial jurisprudence,³⁷ including multiple fora in which their claims may be raised. This context, accordingly, provides plentiful examples of the fragmentation of international law. Third, and finally, women comprise roughly half the global population,³⁸ giving my argument substantive heft. While I do not claim that my thesis holds true in all contexts, if it is persuasive here, it should not be dismissed as trivial.

2.1. Women's Rights

'Human' rights, of course, include the rights of women as well as the rights of men. Women, like men, are entitled to all of the protections and assurances set out in the International Bill of

4th Asia Pacific Conference on Reproductive and Sexual Health and Rights, Oct. 29-31, 2007, *Sex-Ratio Imbalance in Asia: Trends, Consequences and Policy Responses: Executive Summary 1*, available at http://www.unfpa.org/gender/docs/studies/summaries/reg_exe_summary.pdf (explaining that women are not included in mortality statistics, moreover, which are accordingly skewed). See also CHARLESWORTH & CHINKIN, *supra* note 25, at 218 ("The Human Rights Committee, for example, has outlined the scope of the right to life without reference to the issue of female infanticide, although more recently its comments on states' reports indicate a broader approach.").

³⁶ See, e.g., Forum on Minority Issues: Guaranteeing the Rights of Minority Women, Nov. 29, 2011, *Empowering Minority Women to Claim Their Rights: Identifying Effective Practices*, U.N. OHCHR ("[M]inority women face double or intersectional discrimination . . .").

³⁷ As noted above, however, this jurisprudence should still be considered to be in its early stages. See CHARLESWORTH & CHINKIN, *supra* note 25, at 120 (proposing sexual equality and reproductive equality for inclusion in a revised list of *jus cogens* norms); *supra* note 31.

³⁸ There are 57 million more men than women. WORLD'S WOMEN 2010, *supra* note 25, at vii. See *World Population*, INSTITUT NATIONAL D'ÉTUDES DÉMOGRAPHIQUES, http://www.ined.fr/en/everything_about_population/faq/theme_1/bdd/q_text/are_there_more_men_or_more_women_in_the_world_/question/53/ (last visited Mar. 26, 2013) (stating that the number of men and women in the world is roughly equal, though men hold a slight lead with 102 men for 100 women, as of 2010). See also *World Population Prospects, the 2010 Revision: Frequently Asked Questions*, U.N. DEP'T OF ECON. & SOC. AFFAIRS (Oct. 31, 2011), <http://esa.un.org/unpd/wpp/Other-Information/faq.htm#q4> (explaining in question four that Oct. 31, 2011 "is a symbolic date" because it is when the world population will reach roughly 7 billion). But see U.N. Population Fund, *supra* note 35 (noting "a dramatic increase" in the proportion of males to females in Asia and concluding that "if the continent's overall sex ratio was the same as elsewhere in the world, in 2005 Asia's population would have included almost 163 million more women and girls").

Rights.³⁹ Nondiscrimination has been a cornerstone of international human rights since 1948 and the Universal Declaration, the Civil Covenant, and the Economic Covenant all bar discrimination on the basis of sex.⁴⁰ Women are even singled out for special treatment in Article 10 of the Economic Covenant, which assures mothers special protections while pregnant and after giving birth.⁴¹

Feminists argued that existing human rights were inadequate, however, for two reasons.⁴² First, as a practical matter, women in

³⁹ See Universal Declaration of Human Rights, *supra* note 4.

⁴⁰ See, e.g., ICESCR, *supra* note 5, art. 2.2 (“The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to . . . sex”); *id.* art. 3 (“The State Parties . . . ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.”); *id.* art. 7(a)(i) (“[R]ecogniz[ing] the right of everyone to the enjoyment of just and favourable conditions of work . . . [including] fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work”); CCPR Human Rights Comm., General Comment 28: Equality of Rights Between Men and Woman (Article 3), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000) (“The full effect of this provision is impaired whenever any person is denied the full and equal enjoyment of any right. Consequently, State should ensure to men and women equally the enjoyment of all rights provided for in th[is] Covenant.”); Otto, *supra* note 31, at 349 (describing the ICCPR rights as “reimagin[ed] . . . as a woman”). *But see* Comm. on Econ., Soc., & Cultural Rights, General Comment N. 16, Article 3: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights 3, ¶ 8, U.N. Doc E/C.12/2005/3 (May 13, 2005) (“Substantive equality for men and women will not be achieved simply through the enactment of laws or the adoption of policies that are gender-neutral on their face. . . . States parties should take into account that such laws, policies and practice can fail to address or even perpetuate inequality between men and women, because they do not take account of existing economic, social and cultural inequalities”); *Montréal Principles on Women’s Economic, Social and Cultural Rights*, 26 HUM. RTS. Q. 760 (2004) (noting deep disagreement about the nature of gender equality).

⁴¹ ICESCR, *supra* note 5, art. 10.2 (“Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.”).

⁴² Important early examples of the burgeoning scholarship on women’s human rights include: HUMAN RIGHTS OF WOMEN (Rebecca J. Cook ed., 1994); NATALIE KAUFMAN HEVENER, INTERNATIONAL LAW AND THE STATUS OF WOMEN (1983); RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW (Dorinda Dallmeyer ed., 1993); 1 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW (Kelly D. Askin & Dorean M. Koenig eds., 1999); WOMEN’S RIGHTS, HUMAN RIGHTS (Julie

fact remain second-class citizens, subordinated throughout the world,⁴³ despite their equal treatment in these foundational human rights instruments.

Second, from a more theoretical perspective, feminists exposed the gendered assumptions of human rights discourse itself. Human rights law incorporates a male perspective, they argued; it focuses on issues or problems that affect men more than women, or that affect men differently than they affect women. Rights, historically, are claims of the citizen against the state. But citizens, historically, were male and their claims reflected the interests, concerns, and social reality of men. In Aristotle's *polis*, men alone were citizens, and therefore rights-holders.⁴⁴ Civil rights, such as the right to freedom of expression, assume a capacity for participation in public life and for moving about freely in the world, that historically, and in much of the contemporary world,⁴⁵ has little relation to women's experience.

2.2. Fragmentation of the Law

Women's rights became a focus of international law in the 1990s.⁴⁶ Faced with the dearth of law addressing women's

Peters & Andrea Wolper eds., 1995); Arvonne S. Fraser, *Becoming Human: The Origins and Development of Women's Human Rights*, 21 HUM. RTS. Q. 853 (1999).

⁴³ See *supra* notes 32–36.

⁴⁴ D. BRENDAN NAGLE, *THE HOUSEHOLD AS THE FOUNDATION OF ARISTOTLE'S POLIS* (2006). As Brenda Cossman further explains, "citizenship has always been sexed." Brenda Cossman, *Sexual Citizens: Freedom, Vibrators, and Belonging*, in GENDER EQUALITY: DIMENSIONS OF WOMEN'S EQUAL CITIZENSHIP 289, 290 (Linda C. McClain & Joanna L. Grossman eds., 2009).

⁴⁵ See, e.g., Caryle Murphy, *Saudi Women Demand Driving Rights*, GLOBAL POST (June 15, 2011), <http://www.globalpost.com/dispatch/news/regions/middle-east/saudi-arabia/110615/saudi-womens-rights-driving-rights> ("[T]he driving ban is increasingly upsetting Saudi women, who now make up more than half of the country's university students. Graduating in record numbers, they are looking for jobs and they want to drive themselves to work, to the shopping mall, to the grocery store and to their children's schools."). See also Abdullah Qazi, *The Plight of the Afghan Woman*, AFGHANISTAN ONLINE (last updated Dec. 9, 2010), <http://www.afghan-web.com/woman/> (noting the remnants of the Taliban rule under which women were forbidden to work or leave the house without a male escort).

⁴⁶ HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 159 (2d ed. 2000). Steiner and Alston contend that, prior to the 1990s, "[o]f the several blind spots in the early development of the human rights movement, none is as striking as that movement's failure to give to violations of women's (human) rights the attention . . . that they require." *Id.* at 158. This is not

experience, women's advocates sought empirical data to substantiate that experience.⁴⁷ They also demanded the disaggregation of existing data on the basis of sex. They pressed for new laws on multiple fronts, including human rights and humanitarian law, expanded interpretations of existing law, and new fora in which to present these new claims.

The well-known lacunae in international law—the absence of an international 'Supreme Court,'⁴⁸ an international legislature, and an international executive⁴⁹—have been recognized as a major factor in its fragmentation.⁵⁰ These lacunae have also been a boon for women's human rights. First, the absence of these institutions means that there are many fewer male-dominated institutions to gain access to, and transform.⁵¹ Second, as Anne Orford points

to suggest that they were ignored. For an account of the long years of hard work by the Commission on the Status of Women (CSW), created in 1946, see Barbara Stark, *Women's Rights*, in 5 OXFORD ENCYCLOPEDIA OF HUMAN RIGHTS 341, 344–49 (David Forsythe ed., 2009).

⁴⁷ See, e.g., MARILYN WARING, IF WOMEN COUNTED 74–91 (1988) (noting that women's work is economically invisible, not appearing in national statistics).

⁴⁸ The decisions of the International Court of Justice (ICJ) have no precedential value. Statute of the International Court of Justice art. 59, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993, available at <http://www.icj-cij.org/documents/?p1=4&p2=2&p3=0> [hereinafter ICJ Statute]. The decisions of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) are similarly *ad hoc*. See generally Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808, at art. 1. (May 3, 1993), annexed to Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808, U.N. Doc. S/25704 (1993) [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955, art. 1 (Nov. 8, 1994) [hereinafter ICTR Statute].

⁴⁹ See BEDERMAN, *supra* note 2, at 9 (positing that if international law was comprised of its own executive, legislature, and judiciary, it would be transformed into "World Government" which is "the antithesis of international law"); LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 7 (2d ed. 1979) (asserting the need to analyze "the system" which is the international legal community, to understand how nations use law in the context of international relations).

⁵⁰ See Rep. of the Study Group of the Int'l Law Comm'n, *supra* note 19, at 10 (noting the absence of legislature).

⁵¹ For a rigorous comparative analysis of German and European Community political quotas, see ANNE PETERS, WOMEN, QUOTAS AND CONSTITUTIONS 221–25, 254–55 (1999).

out, it affords "space amongst rules and institutions in which to discover 'opportunities for political engagement.'"⁵²

Third, the peculiarities of international lawmaking are useful for feminists for some of the same reasons that they are conducive to fragmentation. International lawmaking, while difficult and contentious,⁵³ often develops simultaneously on multiple fronts. As a corollary, consensus is not a prerequisite. Unlike statutes, for example, treaties are binding only on those states that choose to adhere to them. So a relatively radical instrument, like the Convention on the Elimination of All Forms of Discrimination Against Women ("Women's Convention" or "CEDAW"),⁵⁴ can be drafted because, unlike a domestic statute, it does not require the participation of those who oppose it from the beginning.⁵⁵

⁵² Anne Orford, *A Jurisprudence of the Limit*, in INTERNATIONAL LAW AND ITS OTHERS 1, *supra* note 6, at 16-17 (citing DAVID KENNEDY, THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM 131 (2004)).

⁵³ Indeed, international lawmaking is often so contentious that no law is made at all; in many areas there are more gaps than law. The growing body of international law on reproductive rights, for example, does not directly address the issue of abortion. The Convention on the Elimination of All Forms of Discrimination Against Women, *infra* note 54, does not ensure the right to abortion, reflecting the lack of consensus among states. See, e.g., Conseil constitutionnel [CC] [Constitutional Court] decision No. 18030, Jan. 15, 1975, JCP II (Fr.) (upholding France's abortion law as consistent with art. 2 of the Declaration of the Rights of Man and of the Citizen). See generally Law No. 239 of 24 March 1970 on the Interruption of Pregnancy, as amended by Law No. 564 of 19 July 1978 and Law No. 572 of 12 July 1985 (Fin.), available at <http://cyber.law.harvard.edu/population/abortion/Finland.abo.htm> (permitting, in Finland, abortions under certain conditions); Florian Miedel, *Is West Germany's 1975 Abortion Decision a Solution to the American Abortion Debate?: A Critique of Mary Ann Glendon and Donald Kommers*, 20 N.Y.U. REV. L. & SOC. CHANGE 471 (1993) (discussing a 1975 West German court decision which struck down a law that failed to criminalize abortions in first trimester). Finland's restrictive laws reflect its "more conservative culture," despite its "common legal heritage and close ties with Sweden." David Bradley, *Convergence in Family Law: Mirrors, Transplants and Political Economy*, 6 MAASTRICHT J. EUR. & COMP. L. 127, 134 (1999).

⁵⁴ The Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR Supp. No. 46, U.N. Doc. A/34/46, at 193-98 (Sept. 3, 1981) [hereinafter CEDAW] (creating CEDAW and describing its powers).

⁵⁵ While states may choose to participate in order to exercise a moderating influence on the drafters, as Beth Simmons has shown, participation may have unintended consequences. See BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS 237 (2009) (explaining that "Japan's efforts during negotiations were minimal, and largely directed toward softening

Feminists have also drawn on the unique characteristics of customary international law (CIL)⁵⁶ to further women's rights.⁵⁷ CIL provides a process through which "soft law," that is, 'law' that is precatory or aspirational, rather than legally binding, can 'harden' over time, and become legally binding. States may persistently dissent from CIL, and thereby exempt themselves from its coverage.⁵⁸ However, their failure to do so may leave them bound to norms, such as the norm against domestic violence, that they might have preferred to ignore.⁵⁹

2.2.1. *Multiple Laws*

In addition to the prohibitions on discrimination cited above,⁶⁰ several human rights instruments explicitly focus on women. In

the treaty's language and reducing its scope" and describing Japan's eventual ratification, without reservations).

⁵⁶ Treaties and custom are the two major sources of international law. See ICJ Statute, *supra* note 48, art. 38 (directing the ICJ to apply treaties and custom, among other sources, when resolving international disputes). For examples of scholars who are skeptical about custom's capacity to bind, see generally Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998); Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997). But see generally Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998) (refuting the arguments put forth by Bradley and Goldsmith). CIL has also evoked protest from new states that chafe at being bound by law that they had no role in making. See, e.g., J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 465 (2000) (discussing the difficulty in determining if states have accepted international law norms and the reasons for states' reluctance to adopt these laws).

⁵⁷ This is hardly to suggest that CIL always benefits women. See CHARLESWORTH & CHINKIN, *supra* note 25, at 45 (noting that the customary norm against discrimination, for example, is much weaker in the context of gender than race).

⁵⁸ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. d (1987) (noting that states that dissent while law is still in the process of development are not bound by that law).

⁵⁹ See, e.g., Sally Engle Merry, *Human Rights and Transnational Culture: Regulating Gender Violence Through Global Law*, 44 OSGOODE HALL L.J. 53, 56 (2006) ("[B]ecause gender violence is deeply embedded in systems of kinship, religion, warfare, and nationalism, its prevention requires major social changes in communities, families, and nations.").

⁶⁰ See *supra* notes 39–41.

1967, the Commission on the Status of Women (CSW)⁶¹ drafted the Declaration on the Elimination of All Forms of Discrimination Against Women,⁶² and in 1974, the legally binding Women's Convention was drafted.⁶³ It was adopted by the General Assembly in 1979⁶⁴ and came into force in 1981.⁶⁵ CEDAW addresses women's actual subordination as well as the gendered assumptions of human rights law.⁶⁶ First, CEDAW requires States Parties to address discrimination in fact as well as in law, including in discriminatory "social and cultural patterns of conduct."⁶⁷ Second, CEDAW authorizes "temporary special measures aimed at accelerating *de facto* equality"; that is, the state may take temporary affirmative measures to level the playing field to compensate for historical discrimination.⁶⁸ Third, CEDAW explicitly addresses reproduction and reproductive work, requiring state support for both and further requiring states to educate men regarding their responsibility for reproductive work.⁶⁹

In addition to CEDAW, instruments focusing on women include: the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women,⁷⁰ the Convention on the Political Rights of Women,⁷¹ the Convention on

⁶¹ See *supra* note 46.

⁶² See Declaration on the Elimination of Discrimination Against Women, G.A. Res. 2263, U.N. Doc. A/RES/2263 (Nov. 7, 1967), available at <http://www.unhcr.org/refworld/docid/3b00f05938.html> (stating policies against all forms of gender discrimination).

⁶³ See CEDAW, *supra* note 54.

⁶⁴ See Marsha A. Freeman, *Women: Convention on the Elimination of Discrimination Against Women*, in 5 OXFORD ENCYCLOPEDIA OF HUMAN RIGHTS, *supra* note 46, at 331 (noting that the adoption was "in time for a signing ceremony at the opening of the Second World Conference on Women held in Copenhagen, Denmark, in 1980").

⁶⁵ See CEDAW, *supra* note 54.

⁶⁶ See *supra* Part 2.1.

⁶⁷ See CEDAW, *supra* note 54, art. 5.

⁶⁸ See *id.*, art. 4 (authorizing temporary affirmative measures by States).

⁶⁹ See *id.*, art. 5(b) (requiring states "[t]o ensure that family education includes a proper understanding of maternity as a social function and the recognition of a common responsibility of men and women in the upbringing and development of their children").

⁷⁰ G.A. Res. 54/4, annex, U.N. GAOR, 54th Sess., Supp. No. 49 (Vol. I), U.N. Doc. A/RES/54/4 (Oct. 15, 1999).

⁷¹ Convention on the Political Rights of Women, *opened for signature* Mar. 31, 1953, 193 U.N.T.S. 135 (entered into force July 7, 1954).

Consent to Marriage, Minimum Age for Marriage and Registration of Marriages,⁷² and the Convention on the Nationality of Married Women.⁷³ The International Criminal Court (ICC),⁷⁴ as well as the *ad hoc* criminal tribunals, all address women's rights.⁷⁵ The International Bank for Reconstruction and Development (World Bank)⁷⁶ and the International Monetary Fund (IMF),⁷⁷ while notably less proactive, also address gender. The World Bank has a policy,⁷⁸ procedure,⁷⁹ strategy,⁸⁰ and action plan⁸¹ on gender, although critics note that "actual efforts to engender investments are fairly weak and projects and policies often make impoverished

⁷² Convention on Consent to Marriage, Minimum Age for Marriage and Registration for Marriages, *adopted* Nov. 7, 1962, 521 U.N.T.S. 231 (entered into force Dec. 9, 1964).

⁷³ Convention on the Nationality of Married Women, G.A. Res. 1040 (XI), (Aug. 11, 1958).

⁷⁴ See Rome Statute of the International Criminal Court, *adopted* July 17, 1998, 2187 U.N.T.S. 90, art. 54(1)(b) (entered into force July 1, 2002) ("The Prosecutor shall . . . respect the interests and personal circumstances of victims and witnesses, including . . . gender as defined in article 7, paragraph 3 . . . and take into account the nature of the crime, in particular where it involves . . . gender violence . . .").

⁷⁵ See *infra* text accompanying notes 93-101 (describing the process through which rape became recognized as a war crime).

⁷⁶ See Articles of Agreement of the International Bank for Reconstruction and Development, art. I, Dec. 27, 1945, 60 Stat. 1440, 2 U.N.T.S. 134 (listing the purposes of the International Bank for Reconstruction and Development).

⁷⁷ See generally Articles of Agreement of the International Monetary Fund, art. I, Dec. 27, 1945, 60 Stat. 1401, 2 U.N.T.S. 39, available at <http://www.imf.org/external/pubs/ft/aa/index.htm> (outlining the purposes of the International Monetary Fund).

⁷⁸ See generally The World Bank, *Gender and Development*, BP 4.20, in THE WORLD BANK OPERATIONS MANUAL 1 (Mar. 2003) (stating the World Bank's policy objectives).

⁷⁹ See generally *The World Bank Gender and Development Policy Framework – A Guidance Note*, THE WORLD BANK (2003), <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTGENDER/0,,contentMDK:22550450~pagePK:210058~pPK:210062~theSitePK:336868,00.html> (evaluating the World Bank's procedures for resolving gender issues).

⁸⁰ See generally THE WORLD BANK, *INTEGRATING GENDER INTO THE WORLD BANK'S WORK: A STRATEGY FOR ACTION* (2002) (explaining the World Bank's strategies for implementing policies to counter gender issues).

⁸¹ See generally THE WORLD BANK, *GENDER EQUALITY AS SMART ECONOMICS: A WORLD BANK GROUP GENDER ACTION PLAN* (2006) (planning responses to gender issues confronting the World Bank).

women worse off.”⁸² The IMF has “confirm[ed] their commitment to gender equality,” although it has no actual policy on gender.⁸³ Commitments to ‘mainstreaming’ have become ubiquitous,⁸⁴ if ambiguous.⁸⁵ Women are also the subjects of innumerable soft law initiatives, including the Millennium Development Goals (MDGs).⁸⁶

Although rights discourse historically neglected women’s concerns,⁸⁷ feminists have shown how rights can be transformed. The recognition of violence against women, including domestic violence,⁸⁸ as a violation of women’s human rights provides an instructive example. Historically, most violence against women was *not* viewed as a violation of women’s human rights because it was not perpetuated by the state. Rather, it was considered ‘private,’ ‘natural,’ or ‘cultural.’ Women’s groups brought the issue of violence against women to international attention.⁸⁹ The

⁸² CTR. FOR INT’L ENVTL LAW (CIEL), GENDER JUSTICE: A CITIZEN’S GUIDE TO GENDER ACCOUNTABILITY AT INTERNATIONAL FINANCIAL INSTITUTIONS 3 (2007), available at http://www.ciel.org/Publications/GenderJustice_Jun07.pdf.

⁸³ *Id.* at 5. The Guidance Note for Fund Staff mentions gender, but “gender” is omitted from the other five Guidance Notes. *Id.*

⁸⁴ See also United Nations, Econ. & Soc. Council, Comm. on Human Rights, Report on the Special Rapporteur on Violence Against Women, Framework for Model Legislation on Domestic Violence, ¶ 13, U.N. Doc. E/CN.4/1996/53/Add.2, Feb. 2, 1996, available at <http://193.194.138.190/Huridocda/Huridoca.nsf/TestFrame/0a7aa1c3f8de6f9a802566d700530914>.

⁸⁵ See Nicholas Piálek, *Is This Really the End of the Road for Gender Mainstreaming? Getting to Grips with Gender and Institutional Change, in CAN NGO’S MAKE A DIFFERENCE? THE CHALLENGE OF DEVELOPMENT ALTERNATIVES* 279, 281 (Antony J. Bebbington et al. eds., 2008) (“[T]ransition from gender-rich policy to gender-poor practice is frequently cited as an example of policy evaporation . . .”). See also Hilary Charlesworth, *Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations*, 18 HARV. HUM. RTS. J. 1, 13 (2005) (“[The ‘mainstreaming’] policy has served to justify the reduction of resources for specialized women’s units within U.N. agencies.”).

⁸⁶ See U.N. DEP’T OF ECON. & SOC. AFFAIRS, THE MILLENNIUM DEVELOPMENT GOALS REPORT 2011 20-23 (Lois Jenson, ed.), U.N. Sales No. E.11.I.10 (2011), available at http://www.un.org/millenniumgoals/11_MDG%20Report_EN.pdf (proclaiming the promotion of gender equality and empowerment of women as the third Millennium Development Goal).

⁸⁷ See *supra* Part 2.1.

⁸⁸ See Merry, *supra* note 59, at 56 (describing the effects of recognition of domestic violence as a human rights violation).

⁸⁹ See, e.g., MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 165-198 (1998) (explaining the swift and recent development of transnational networks on

three World Conferences on Women organized in connection with the UN Decade for Woman between 1975 and 1985 provided fora.⁹⁰ Some women's groups lobbied for recognition of rape as a war crime.⁹¹ Others urged the international community to mobilize against female genital surgeries (FGS).⁹² Still others focused on domestic violence.⁹³ Their work culminated in the 1993 Declaration on the Elimination of Violence Against Women,⁹⁴ which recognizes that violence against women both violates and "impairs or nullifies [women's] enjoyment of [human] rights and freedoms."⁹⁵

This was not binding law, but it was a crucial step toward binding law. The appointment of the Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, added to the momentum. Coomaraswamy launched a series of fact-finding missions and her office prepared over two dozen reports on violence against women.⁹⁶ Though CEDAW does not explicitly

violence against women); Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT'L L. 379, 387 (1999) (noting efforts of women's organizations in influencing international tribunals to recognize "fuller responses to sexual violence").

⁹⁰ See generally Rep. of the World Conference to Review & Appraise the Achievements of the U.N. Decade for Women: Equality, Dev. & Peace, Nairobi, Kenya June 15–26, 1985, U.N. Doc. A/CONF.116/28/Rev.1, U.N. Sales No. E.85.IV.10 (1985); Rep. of the World Conference of the U.N. Decade for Women: Equality, Dev. & Peace, Copenhagen, Den., July 14–30, 1980, U.N. Doc. A/CONF.94/35, U.N. Sales No. E.80.IV.3 (1980); Rep. of the World Conference of the Int'l Women's Year, Mexico City, Mex., June 19–July 2, 1975, U.N. Doc. E/CONF.66/34, U.N. Sales No. E.76.IV.1 (1976).

⁹¹ See U.N. Dep't of Pub. Info., Women and Violence, U.N. Doc. DPI/1772/HR (Feb. 1996), <http://www.un.org/rights/dpi1772e.htm> (stating that the Platform for Action adopted at the Fourth World Conference on Women declared that rape in armed conflict is a war crime and could, under certain circumstances, be considered genocide); *infra* text accompanying notes 93–100.

⁹² See *Legislation and Other National Provisions*, INTER-PARLIAMENTARY UNION, <http://www.ipu.org/wmn-e/fgm-prov.htm> (last visited Apr. 9, 2013) (describing the organization's efforts to "systematically . . . gather information on the current state legislation and other national provisions dealing directly or indirectly with the issue of female genital mutilation").

⁹³ According to Keck and Sikkink, the first comprehensive survey of U.N. research on the subject was *Violence Against Women in the Family*, Sales No. E.89.IV.5. (1989). KECK & SIKKINK, *supra* note 89, at 179 n.51.

⁹⁴ G.A. Res. 48/104, U.N. Doc. A/RES/48/104, (Dec. 20, 1993).

⁹⁵ *Id.* ¶ 5.

⁹⁶ See, e.g., Fifth South Asia Regional Ministerial Conference, Celebrating Beijing Plus Ten, Islamabad, Pak., May 3–5, 2005, *The Varied Contours of Violence*

prohibit violence against women, in General Recommendation No. 19, the Committee explained that gender-based violence is a *form* of discrimination and therefore included in CEDAW's bar against gender discrimination in general.⁹⁷ Now, a state's acquiescence or failure to take effective measures to combat domestic violence, FGS, or wartime rape, is recognized as a violation of women's human rights.⁹⁸

Women's rights advocates similarly transformed humanitarian law by demanding the inclusion of rape as a war crime in the statutes of the international war crimes tribunals. As Patricia Viseur Sellers notes, "The issuance of sound, reasoned sexual assault jurisprudence is an acknowledged achievement of the ICTY."⁹⁹ Historically, rape was viewed as a 'private act' and an inevitable part of war.¹⁰⁰ Even early recognition of rape as a war crime focused on rape as a crime against "the husband's 'honor'".¹⁰¹ Women's advocates argued that rape was a crime

Against Women in South Asia, available at http://www.pangeaonlus.org/download/mappamondo/dossier/DSS_Conferenza_2005_05_VariousContourViolence.pdf (presenting Coomaraswamy's report on the particular cultural and religious practices that exacerbate the problem of violence against women in South Asia).

⁹⁷ U.N. Dep't of Econ. & Soc. Affairs, Comm. on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 19: Violence Against Women, ¶ 7, U.N. Doc. A/47/38 (1992), <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> ("Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention.").

⁹⁸ See S.C. Res. 1820, ¶ 3, U.N. Doc. S/RES/1820 (June 19, 2008) ("Notes that rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide [and] stresses the need for the exclusion of sexual violence crimes from amnesty provisions in the context of conflict resolution processes. . . .") (emphasis omitted).

⁹⁹ Patricia Viseur Sellers, *Individual(s') Liability for Collective Sexual Violence*, in GENDER AND HUMAN RIGHTS 153, 155 (Karen Knop ed., 2004). At the time of writing, Sellers was the Legal Advisor for Gender-related Crimes and trial attorney in the Office of the Prosecutor for the ICTY. *Id.* at 153.

¹⁰⁰ Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law*, 46 MCGILL L.J. 217, 220 (2000) (explaining the "trivializ[ation]" of rape during war).

¹⁰¹ *Id.* at 220-221 ("[A]s rape was in the *Hague Convention* of 1907 and the *Geneva Conventions*, it was implicitly so, categorized as an offence against 'family honour and rights' or as 'outrages against personal dignity' or 'humiliating and degrading treatment'. The *Fourth Geneva Convention* called for 'protect[ion]

against the woman herself even if her husband was its intended target.¹⁰² This understanding of rape was subsequently clarified in the Statute of the International Criminal Tribunal for Rwanda,¹⁰³ the Rwandan Tribunal in the *Akayesu* case,¹⁰⁴ and in the Statute of the International Criminal Court.¹⁰⁵

2.2.2. Multiple Fora

Women's advocates have not only generated new laws but have also expanded the available fora in which claims arising under these new laws may be addressed. In addition to the

against [rape as an] ... attack on their honour,' but rape was not treated as violence, and was therefore not named in the list of 'grave breaches' subject to the universal obligation to prosecute.").

¹⁰² *Id.*

¹⁰³ See ICTR Statute, *supra* note 48, art. 3 ("The International Tribunal for Rwanda shall have the power to prosecute persons responsible for [rape] when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. . ."). See also Marlise Simons, *U.N. Court, for First Time, Defines Rape as War Crime*, N.Y. TIMES, June 28, 1996, <http://www.nytimes.com/1996/06/28/world/un-court-for-first-time-defines-rape-as-war-crime.html> (detailing the United Nations tribunal announcement of the indictment of eight Bosnian Serb military and police officers in connection with rapes of Muslim women in the Bosnian war, marking the first time sexual assault has been treated separately as a crime of war).

¹⁰⁴ Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶¶ 685-95, 730-34 (Sept. 2, 1998) ("Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.").

¹⁰⁵ See Rome Statute, *supra* note 74, art. 7(1) ("For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: . . . [r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity. . ."). See also WOMEN'S INITIATIVES FOR GENDER JUSTICE, GENDER REPORT CARD ON THE INTERNATIONAL CRIMINAL COURT 2010 (Nov. 2010), available at http://www.iccwomen.org/news/docs/GRC10-WEB-11-10-v4_Final-version-Dec.pdf (assessing the implementation by the ICC of the Rome Statute, Rules of Procedure and Evidence and Elements of Crimes and, in particular, the gender mandates they embody); *The International Criminal Court: Fact Sheet 7—Ensuring Justice for Women*, AMNESTY INT'L (Apr. 12, 2005), <http://www.amnesty.org/en/library/asset/IOR40/006/2005/en/73581868-d50c-11dd-8a23-d58a49c0d652/ior400062005en.html> (proclaiming the Rome Statute as "a model of international best practice for national legal systems to follow").

international tribunals noted above,¹⁰⁶ these include regional courts,¹⁰⁷ such as the European Court of Human Rights¹⁰⁸ and the Inter-American Court of Human Rights,¹⁰⁹ and the hearings of the human rights treaty committees,¹¹⁰ as well as national courts.¹¹¹

¹⁰⁶ See *supra* notes 93–100 and accompanying text (describing recognition of rape as a war crime by the ICTY, the ICTR, and the ICC); Rome Statute, *supra* note 74.

¹⁰⁷ See, e.g., Rachel A. Cichowski, *Women's Rights, the European Court, and Supranational Constitutionalism*, 38 L. & SOC'Y REV. 489 (2004) (focusing on how the European Court of Justice influenced the development and creation of women's rights, such as integrating with other governments, limiting jurisdiction, and engaging advocates).

¹⁰⁸ See, e.g., *A, B & C v. Ireland*, 2010 Eur. Ct. H.R. 2032 (holding that Ireland had failed to implement the constitutional right to a legal abortion in violation of Article 8's guarantee of the right to respect for private and family life).

¹⁰⁹ See *Rosendo Cantú v. Mexico*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216 (Aug. 31, 2010), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_216_esp.pdf (finding Mexican military officers responsible for the rape and torture of Ms. Rosendo Cantú and her daughter, and, among other sanctions, ordering the Mexican government to conduct a thorough investigation of the case, adopt several legislative reforms, and pay for the victims' medical and psychological treatment), *Fernández Ortega v. Mexico*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 215 (Aug. 30, 2010), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_215_esp.pdf (making similar findings against the Mexican military as in the *Rosendo Cantú* case). See, e.g., Carson Osberg, *Inter-American Court Holds that Mexico Violated the Human Rights of Two Women Raped by Mexican Military Personnel*, THE HUMAN RIGHTS BRIEF (Nov. 16, 2010), <http://hrbrief.org/2010/11/inter-american-court-holds-that-mexico-violated-the-human-rights-of-two-women-raped-by-mexican-military-personnel/> (concluding that the Mexican military justice system is inherently unsuited to investigate human rights violations allegedly perpetrated by members of armed forces).

¹¹⁰ See, e.g., *Vertido v. Philippines*, U.N. Doc. CEDAW/C/46/D/18/2008 (Sept. 1, 2010) (finding that the Philippines violated its obligations under the Optional Protocol to protect against gender-based stereotypes after a judgment issued in a rape case).

¹¹¹ See *Bhe v. Magistrate*, 2005 (1) SA 580 (CC) (S. Afr.) (holding unconstitutional the sections of the Black Administration Act 38 of 1927 which excluded women from inheriting property in the light of South Africa's obligations under CEDAW); *McBain v. Victoria* (2000) 99 FCR 1009 (Austl.) (holding that a state act preventing a doctor from performing *in vitro* fertilization was unlawful since its wording was inconsistent with CEDAW); see also *Municipal Corporation of Delhi v. Female Workers*, (2000) 3 S.C.C. 224 (India) (holding that CEDAW article 11, which governs marriage and maternity, must be read into employment contracts in India); *Roches v. Wade*, Action No. 132 (S. Ct. of Belize 2004) available at http://www.belizelaw.org/supreme_court/judgements/2004/sc/civil/132_of_2004.pdf (holding that Belize had an affirmative duty to eliminate discrimination against unmarried pregnant women as a signatory to CEDAW); *Humaira v. Khokhar*, (1999) 2 CHRLD 273 (High Ct. of Lahore) (Pak.)

2.3. *More and Less*

More laws and more fora do not necessarily mean that more women are enjoying more rights. Indeed, the proliferation of law and fora could be diversionary, sapping resources better focused on a smaller range of targets.¹¹² Nor do improvements in women's literacy or employment, or even in domestic family laws, necessarily mean that women are enjoying greater rights. Globally, women's labor force participation during the past twenty years has increased compared to that of men, for example, but this difference may be more attributable to a *decline* in men's labor force participation during that same period.¹¹³ While half of the countries worldwide meet the international standard for maternity leave, similarly, there is a persistent gap between law and practice.¹¹⁴

The issue is complicated and the data are mixed, as the authors of *The First CEDAW Impact Study* readily acknowledge: "We have used stories, research, statistics, reports, local, regional and world conferences, and a myriad of indicators to assist in this critical task. A multidimensional, multifaceted approach is needed—as diverse as the lives and experiences of women."¹¹⁵ The contributors to *The World's Women 2010*,¹¹⁶ similarly, recognize the methodological challenges in producing global assessments where there is little agreement regarding measurement standards or methods. The extent to which improvement, if any, can be attributed to fragmentation compounds the problem.

Yet both *The First CEDAW Impact Study* and *The World's Women*, along with other recent studies, show real progress in some areas, such as declining gender disparities in youth literacy rates,¹¹⁷ a

(holding that a coerced marriage is not lawful in the light of article 16 of CEDAW that Pakistan as a signatory abides by).

¹¹² See Charlesworth, *Not Waving, supra* note 85 (explaining how 'mainstreaming' detracts from women's agencies at the U.N.).

¹¹³ WORLD'S WOMEN 2010, *supra* note 25, at 75-77.

¹¹⁴ *Id.* at 75.

¹¹⁵ Andrew Byrnes & Jane Connors, *Introduction, in* FIRST CEDAW IMPACT STUDY 11, *supra* note 31, at 11.

¹¹⁶ WORLD'S WOMEN 2010, *supra* note 25, at xii.

¹¹⁷ *Id.* at viii.

decline in material mortality rates,¹¹⁸ and the decline of FGS.¹¹⁹ In higher income countries, women's human rights are increasingly relied upon in a range of contexts. In Germany, for example, women have drawn on multiple laws and fora, including European Community Directives, and anti-discrimination legislation in the United Kingdom and the former German Democratic Republic, to promote non-discriminatory labor legislation, recognition of child-rearing, and abortion legislation.¹²⁰

At the same time, however, women in lower income countries show a troubling lack of progress. Women comprise roughly sixty to eighty percent of the export manufacturing workforce in the developing world, a sector the World Bank believes is being hard hit during the economic crisis.¹²¹ In Arab states, fewer than one third of women are in the labor force.¹²² In sub-Saharan Africa and South Asia, eighty percent of women workers are in 'vulnerable employment;' that is, low income jobs with few rights.¹²³

As demonstrated in *The World's Women 2010*, moreover, women bear the brunt of poverty in poor households.¹²⁴ In Pakistan and Yemen, for example, girls in the poorest quintile are far more likely to leave primary school than boys.¹²⁵ Where households lack access to clean water and energy, similarly, women do most of the additional work and suffer most of the harmful health effects.¹²⁶

¹¹⁸ Denise Grady, *Maternal Deaths in Sharp Decline Across the Globe*, N.Y. TIMES, April 14, 2010, at A1 (citing study in *The Lancet* showing a "significant drop worldwide in the number of women dying each year from pregnancy and childbirth, to about 342,900 in 2008 from 526,300 in 1980.").

¹¹⁹ WORLD'S WOMEN 2010, *supra* note 25, at x.

¹²⁰ FIRST CEDAW IMPACT STUDY, *supra* note 31, at 19. See also Janet Benshoof, *How International Law Could Radically Change the Definition of Gender Equality in the United States: CEDAW and Reproductive Rights*, in GLOBAL JUSTICE CENTER WHITE PAPER SERIES: "NEW VISIONS FOR INTERNATIONAL LAW AND U.S. FOREIGN POLICY 2008" 1 (2008) (highlighting differences between international and U.S. interpretations of abortion cases and international courts citing CEDAW in striking down laws criminalizing abortion).

¹²¹ U.N. WOMEN, *supra* note 32.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ WORLD'S WOMEN 2010, *supra* note 25, at 168.

¹²⁵ *Id.*

¹²⁶ *Id.*

3. HOW FRAGMENTATION AFFECTS LDCs

The fragmentation of international law, especially the proliferation of specialized topics and fora set out in the ILC Report, has had a substantial impact on LDCs. This Part first explains how fragmentation has affected their self-definition. Second, it analyzes the impact of multiple, uncoordinated international regimes on the LDCs, including the 'development' and free trade regimes.¹²⁷ Third, this Part concludes with a few examples of the growing body of legal doctrine that keeps LDCs on the defensive.

3.1. Political Frames

The fragmentation of international law reflects and reinforces the political fragmentation of the LDCs themselves, from a relatively monolithic 'Third World,'¹²⁸ to the less unified but still intact 'Group of 77' ('G-77'),¹²⁹ to the factionalized 'LDCs,'¹³⁰ defined by bureaucrats, competing with each other for a sliver of a rapidly shrinking pie. The Third World emerged from the former European colonies. As David Bederman explains, World War II "accelerated the process of decolonization. The British and French colonial empires collapsed by the early 1960's and by the 1980's there remained no part of the world under unwilling colonial domination by Europeans."¹³¹ The Third World—a collection of non-aligned states—was wooed by the capitalist, democratic West—including the United States and Europe—and the socialist East—including the Soviet Union and its satellites.

A generation of legal scholars from the newly independent states developed sophisticated approaches toward international law.¹³² As Antony Anghie and B.S. Chimni summarize their work,

¹²⁷ These are obviously not the only international regimes operative in LDCs. They participate in, and are subject to, *inter alia*, human rights, the MDG, the Law of the Sea, and the ICC. I focus on 'development' and fair trade because of their impact and visibility.

¹²⁸ See *supra* note 10. See also SUNDHYA PAHUJA, DECOLONISING INTERNATIONAL LAW 261-262 (2011) (explaining her strategic choice to use 'Third World').

¹²⁹ See *supra* note 11.

¹³⁰ See *supra* note 13.

¹³¹ BEDERMAN, *supra* note 2, at 5.

¹³² See, e.g., R.P. ANAND, CONFRONTATION OR COOPERATION?: INTERNATIONAL LAW AND THE DEVELOPING COUNTRIES (1987); MOHAMMED BEDJAOU, TOWARDS A

Third World Approaches to International Law (TWAIL) "indicted colonial international law for legitimizing the subjugation and oppression of Third World peoples."¹³³ Some TWAIL scholars argued that the developed states owed the Third World compensation for colonialism and the benefits that the developed states still reaped from it.¹³⁴

In 1964, the former colonies, then newly independent states, formed the G-77.¹³⁵ Most of these states had high hopes for the UN and sought to advance their claims for a fairer international economic system through international lawmaking.¹³⁶ In 1967, Arvid Pardo of Malta suggested in the General Assembly that the deep seabed should be considered the "common heritage of mankind."¹³⁷ In 1970, this was formalized into the Declaration of Principles Governing the Seabed and the Ocean Floor.¹³⁸ A few years later, in 1974, the G-77 drafted the UN Declaration on the Establishment of a New International Economic Order (NIEO).¹³⁹ This initiative recognized that these states constituted seventy percent of the world's population, but accounted for only thirty percent of the world's income.¹⁴⁰ In furtherance of the "[f]ull permanent sovereignty of every state over its natural resources and all economic activities," the NIEO affirmed the rights of the new sovereign states to "nationalization or transfer of ownership to its

NEW INTERNATIONAL ECONOMIC ORDER (1979); Alejandro Alvarez, *Latin America and International Law*, 3 AM J. INT'L L. 269 (1909) (exploring how Latin American nations contributed to the formation of the international legal system by looking at three distinct periods of Latin America's diplomatic history); see also U.N. LIBRARY, *THE THIRD WORLD AND INTERNATIONAL LAW: SELECTED BIBLIOGRAPHY - 1955-1982*, 1983 (containing a comprehensive list of works written by third world authors reflecting their countries' attitudes toward aspects of international law).

¹³³ Antony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT'L L. 77, 80 (2003).

¹³⁴ See R.P. Anand, *Attitude of the Asian-African States Toward Certain Problems of International Law*, 15 INT'L & COMP. L.Q. 55, 55-56 (1966) (discussing international law and the increasing involvement of Asian and African states).

¹³⁵ See *supra* note 11.

¹³⁶ Anghie & Chimni, *supra* note 133, at 81.

¹³⁷ DAMROSCH ET AL., *supra* note 1, at 1446.

¹³⁸ G.A. Res. 2749 (XXV) (Dec. 17, 1970).

¹³⁹ G.A. Res. 3201 (S-VI), U.N. Doc. A/9556 (May 1, 1974). For a detailed and systematic review and analysis of the issues, see *THE NEW INTERNATIONAL ECONOMIC ORDER: THE NORTH-SOUTH DEBATE* (Jagdish N. Bhagwati ed., 1977).

¹⁴⁰ G.A. Res. 3201, *supra* note 139, art. 1.

nationals.”¹⁴¹ The G-77 viewed the NIEO as “one of the most important bases of economic relations between all peoples and all nations.”¹⁴²

Many in the First World, however, viewed the NIEO as confiscatory.¹⁴³ Their numbers enabled the G-77 to pass resolutions in the General Assembly over the objections of the Western industrialized states. But when Libya tried to nationalize Western property without adequate compensation, as the NIEO would have allowed, it was firmly rebuffed.¹⁴⁴ As Anghie concludes, “[f]ew of the NIEO initiatives had an enduring impact on international law and the international economic system.”¹⁴⁵ While the G-77 is still operative, it now consists of 130 states, fewer than half (49) of which are LDCs. This composition is reflected in its fragmented agenda.¹⁴⁶

3.2. Multiple Regimes

Since decolonization, the LDCs have been an ongoing focus of the global North and the international system created after World War II. Indeed, distinct international regimes address their ‘development’ (or lack thereof), and their growing role in world trade. While each regime explicitly seeks to “boost economic growth”¹⁴⁷ or facilitate its participation in global trade, the results have generally been discouraging. Rather, the development and

¹⁴¹ *Id.* art. 4(e).

¹⁴² *Id.* art. 7.

¹⁴³ See, e.g., David Kennedy, *The “Rule of Law,” Political Choices, and Development Common Sense*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 95, 125-27 (David M. Trubek & Alvaro Santos eds., 2006) (“[F]or those who possess wealth, surrendering more of that wealth begins to look confiscatory”). For an excellent overview, see *Note on Historical Attitudes Concerning Expropriation*, in DAMROSCH ET AL., *supra* note 1, at 1083-86.

¹⁴⁴ *Texaco v. Libya*, 53 I.L.R. 389 (Int’l Arbitral Trib. 1977).

¹⁴⁵ ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 245 (2005).

¹⁴⁶ See, e.g., 33rd Annual Meeting of Ministers for Foreign Affairs of the Group of 77, Sept. 25, 2009, *Ministerial Declaration*, <http://www.g77.org/doc/Declaration2009.htm> (last visited Mar. 17, 2013) (stating, *inter alia*, different priorities of: LDCs (¶¶ 21-22); middle-income developing countries (¶ 23); low-income developing countries (¶ 24); countries emerging from conflict (¶ 25); and countries experiencing serious draught or desertification (¶ 35)).

¹⁴⁷ See *infra* note 155.

trade regimes have in many cases made things worse for the LDCs, as described below.

3.2.1. 'Development'

The Bretton Woods Institutions (BWIs), including the IMF¹⁴⁸ and World Bank,¹⁴⁹ have a significant impact in LDCs. As Balakrishnan Rajagopal explains, because of their "enormous resources," the BWIs shape economic and social policy, development, and "even the very structure of the state."¹⁵⁰ Galit A. Sarfaty, similarly, has described how the World Bank shapes the domestic law of borrowing states.¹⁵¹ As Nobel prize-winning economist Joseph Stiglitz notes, credit has been extended to borrowing states even when it has not been sought.¹⁵²

Those who met at Bretton Woods in 1944 established BWIs to finance reconstruction in Europe after World War II.¹⁵³ In 1960, the International Development Association (IDA) was established within the World Bank to focus on the needs of the poorest states.¹⁵⁴ The premise was that 'boosting economic growth'

¹⁴⁸ See *supra* note 77.

¹⁴⁹ See *supra* note 76; *How We Classify Countries*, THE WORLD BANK, <http://data.worldbank.org/about/country-classifications> (last visited Mar. 17, 2013) (noting that the World Bank's main criterion for classifying countries is gross national income per capita).

¹⁵⁰ RAJAGOPAL, *supra* note 6, at 95-96.

¹⁵¹ Galit A. Sarfaty, Note, *The World Bank and the Internalization of Indigenous Rights Norms*, 114 YALE L.J. 1791, 1796-1801 (2005).

¹⁵² JOSEPH E. STIGLITZ, MAKING GLOBALIZATION WORK 216 (2007).

¹⁵³ See Elizabeth A. Mandeville, *United Nations Development Programme*, in 5 OXFORD ENCYCLOPEDIA OF HUMAN RIGHTS 150, *supra* note 46, at 150-51 ("[Following World-War II, there were] two new grand efforts in international cooperation and relations—the human rights movement, which sought to assure that these political and civil rights were globally afforded and protected, and the development movement, which sought to create standards of living and institutions of support in the development world to foster economies (and thus societies) in which these freedoms could be guaranteed."). See generally BARRY E. CARTER, PHILLIP R. TRIMBLE & CURTIS A. BRADLEY, INTERNATIONAL LAW 483-84 (4th ed. 2003) (recounting the formation of the IMF and World Bank at the conference in Bretton Woods, New Hampshire in 1944); JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 11-12 (2003) (describing the economic goals of the global institutions formed at the Bretton Woods conference).

¹⁵⁴ CARTER ET AL., *supra* note 153, at 486.

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through trade was the key to reducing ‘poverty and inequality.’¹⁵⁵ This was not only the premise of the BWIs, but of many private investors and their lawyers. As David Stewart explains,

[S]tates with little or no experience in private international law matters, and those that lack the necessary legal infrastructure to participate actively and effectively in the globalized economy, tend to be severely disadvantaged in international trade, investment, and capital markets. One of the purposes of the private international law project is to assist them in gaining the knowledge and experience needed to overcome this deficiency. In this sense, private international law, broadly conceived, is an important—even essential—tool of international economic development and progress.¹⁵⁶

Other authors question this premise. Arturo Escobar argues that liberal ideology has shaped development discourse for its own purposes, beginning with the “discovery” of poverty after World War II.¹⁵⁷ As Majid Rahnema points out:

[N]obody . . . seems to have a clear, and commonly shared, view of poverty. For one reason, almost all the definitions given to the word are woven around the concept of ‘lack’ or ‘deficiency.’ This notion reflects only the basic relativity of the concept. What is necessary and to whom? And who is qualified to define all that? ¹⁵⁸

¹⁵⁵ ARTURO ESCOBAR, ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD 21-24 (Sherry B. Ortner et al. eds., 1995).

¹⁵⁶ David P. Stewart, *Private International Law, the Rule of Law, and Economic Development*, 56 VILL. L. REV. 607, 611 (2011).

¹⁵⁷ ESCOBAR, *supra* note 155, at 21.

¹⁵⁸ *Id.* at 21 (quoting MAJID RAHNEMA, GLOBAL POVERTY: A PAUPERIZING MYTH (1991)). See generally 50 YEARS IS ENOUGH: THE CASE AGAINST THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND (Kevin Danaher ed., 1994) (containing a collection of essays criticizing the IMF and the World Bank’s “notion of progress”); WILLIAM EASTERLY, THE WHITE MAN’S BURDEN: WHY THE WEST’S EFFORTS TO AID THE REST HAVE DONE SO MUCH ILL AND SO LITTLE GOOD 13-14 (2006) (explaining, for example, that, when agencies hand out free nets, they “are often diverted to the black market . . . or wind up being used as fishing nets or wedding veils”).

As Kerry Rittich explains, the Washington Consensus assumes “that the implementation of efficiency enhancing rules is an uncontentious goal, that everyone stands to gain from free trade, that property and contract rights are the paramount legal entitlements, and that rule-based regimes ‘level the playing field’ and ensure fairness among otherwise unequal parties.”¹⁵⁹ This has been criticized as the self-serving ideology of the developed states.¹⁶⁰ Bob Sutcliffe observes that the development story is captured in the metaphor of a journey—nation states start from roughly the same place, but at different times.¹⁶¹ Thus, the LDCs are today where Europe was in the fourteenth century. For Sutcliffe, “[t]he form of travel is characterized by the transfer of labour from low-productivity agriculture to higher-productivity industry and modern services.”¹⁶² But everyone ends up at the same place, with high consumption matching high productivity. Economic progress brings electricity, toilets, education, urbanization, medical services, longer lives, democracy, and human rights—in short, modernization.

¹⁵⁹ Kerry Rittich, *Enchantments of Reason/Coercions of Law*, 57 U. MIAMI L. REV. 727, 739-40 (2003). See *Death of the Washington Consensus?*, WORLD ECONOMIC FORUM (Jan. 29, 2009), <http://www.weforum.org/sessions/summary/death-washington-consensus> (summarizing a panel discussion at the World Economic Forum in Davos on the viability of the Washington Consensus given the economic recession). This discussion concluded that “[t]alk of the death of the Washington Consensus is exaggerated, although parts of it will need revision in light of the global economic crisis. The core principles of consensus - good economic governance, trade liberalization and fiscal discipline - remain valid [b]ut, given the controversy surrounding it, the Consensus may need a new name.” *Id.* See also Kennedy, *supra* note 143, at 129 (observing that, under the Washington Consensus, “[a]n economy was now imagined as a ‘market’ in which individual economic actors transact with one another Government is there less to manage the economy than to support the market. Moreover, there is no reason to think of economies in *national* terms.”); David M. Trubek & Alvaro Santos, *Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 1, *supra* note 143 at 1, 17 (discussing critical analyses of development theory).

¹⁶⁰ See generally ESCOBAR, *supra* note 155; RAHNEMA, *supra* note 158.

¹⁶¹ See Bob Sutcliffe, *The Place of Development in Theories of Imperialism and Globalization*, in *CRITICAL DEVELOPMENT THEORY: CONTRIBUTIONS TO A NEW PARADIGM* 135, 135 (Ronaldo Munck & Denis O’Hearn eds., 1999) (analogizing the shifting of labor from agriculture to industry and services as the “form of travel” in the “journey”).

¹⁶² *Id.* at 135.

The metanarrative of development has given rise to three major critiques. Each challenges one of its underlying premises. First, the 'polarization critique' argues that everyone does not end up in the same place. Rather, Europe developed, and as a result, nations polarized into developed and underdeveloped states. This result was set and unalterable by the end of the nineteenth century. As Sutcliffe explains, "Underdevelopment is, like Dorian Gray's portrait, development's alter ego."¹⁶³ The underdeveloped states can *never* catch up, in part because of all of the trash—from environmental degradation to corrupt regimes—the developed states have left in their wake.

Second, the 'attainability critique' is grounded in the realization that it is physically impossible for the whole world to reach the same destination and enjoy the level of consumption enjoyed by those in the West. Rather, because of greenhouse gases, contaminants, and nonrenewable resources, development "cannot be generalized . . . without causing an apocalypse."¹⁶⁴

Third, and finally, a broad range of 'desirability critiques' suggest that not everyone aspires to such levels of consumption. These critiques are diverse, ranging from those who seek spiritual, rather than material fulfillment, to those living off the land or off the grid, who seek a different *kind* of material fulfillment. What these critiques have in common is their rejection of high consumption/high productivity. They see "[rich developed states] full of needy, oppressed and unfulfilled people."¹⁶⁵ In short, even if it were possible for the entire world to live like Americans, many would rather not.

Some critics argue that development continues the destructive processes of colonialism, eviscerating local cultures.¹⁶⁶ Others

¹⁶³ *Id.* at 136 (emphasis omitted).

¹⁶⁴ *Id.* at 137. See JARED DIAMOND, *COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED* 498 (2005) (discussing how our society is on a non-sustainable course, leading to various environmental problems).

¹⁶⁵ Sutcliffe, *supra* note 161, at 138.

¹⁶⁶ See, e.g., Jane Jenson & Boaventura de Sousa Santos, *Introduction: Case Studies and Common Trends in Globalization*, in *GLOBALIZING INSTITUTIONS: CASE STUDIES IN REGULATIONS AND INNOVATION* 9, 11 (Jane Jenson & Boaventura de Sousa Santos eds., 2000) (defining globalization as "the process by which a given local condition or entity succeeds in . . . extending its reach over the globe and, in doing so, develops the capacity to designate a rival social condition or entity as local").

point out that a significant portion of aid dollars never leaves the developed states.¹⁶⁷ Instead, it pays the salaries of consultants, bureaucrats, and technical advisors in Washington and Geneva.¹⁶⁸

The IMF was revamped following the April 2009 meeting of G-20 leaders in London to address the “collapsing world economy.”¹⁶⁹ Its resources were tripled to \$750 billion and it was authorized to issue an additional \$250 billion on its own.¹⁷⁰ The focus, however, has been on rescue packages for Hungary, Iceland, Latvia, and other developed states.¹⁷¹ The LDCs are not its current priority.¹⁷² Even if they were, IMF resources amount to merely three percent of the world’s current account payments, in contrast to the more than fifty percent it controlled when it was established in 1944.¹⁷³

While the most recent Bank Report indicates real, even surprising, progress,¹⁷⁴ the World Bank concedes that the Report assumes an improvement in ‘poverty’ using the \$1.25 per day standards of the *poorest* ten to twenty countries.¹⁷⁵ Nor do the data reflect access to healthcare, schooling or inequality within households, all of which disproportionately affect women.¹⁷⁶

¹⁶⁷ See, e.g., OXFAM AMERICA, SMART DEVELOPMENT: WHY US FOREIGN AID DEMANDS MAJOR REFORM 22-24 (2008) (describing how the U.S. will tie its aid by requiring a recipient to spend some or all of its funding on American goods and services, sending the aid on a “round trip” back to the U.S.).

¹⁶⁸ *Id.* at 22, 24 (pointing out that the United States frequently includes clawback provisions in aid packages). See also THE WORLD BANK, IMPLEMENTING THE BANK’S GENDER MAINSTREAMING STRATEGY: FY08 ANNUAL MONITORING REPORT 11 (2009) (“Competition for [Gender Action Plan (GAP)] funding elicits ‘new’ work on gender. In the first call for proposals, 66 percent of proposals submitted were from Bank staff who already worked on gender issues.”).

¹⁶⁹ Peter Gumbel, *International Monetary Fund 2.0.*, TIME, April 20, 2009, <http://www.time.com/time/magazine/article/0,9171,1890118,00.html>.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² As one blogger suggests, this might require a transformation within the IMF, of ‘values’ (the “DNA, the assumptions, default solutions, and logic of its staff”) as well as institutional norms, arguably requiring a thorough housecleaning, including “hir[ing] a load of feminists.” Duncan Green, *IMF 2.0 or Same Old, Same Old - Has the Fund Really Changed Its Tune?*, OXFAM BLOG (May 7, 2009, 12:05 PM), <http://www.oxfamblogs.org/fp2p/?p=254>.

¹⁷³ Gumbel, *supra* note 169.

¹⁷⁴ See *supra* notes 27-29.

¹⁷⁵ Chen & Ravillion, *supra* note 27, at 1.

¹⁷⁶ *Id.*

3.2.2. Free Trade

It has been argued that global trade regimes also benefit developed states at the expense of LDCs.¹⁷⁷ Trade liberalization does not make everyone better off. Even when it *does* “make the country as a whole better off, it results in some groups being worse off.”¹⁷⁸ The rules for world trade are established through periodic negotiations or “rounds” of talks among the members of the WTO, whose agendas are set by the wealthy industrialized states. The Uruguay Round, for instance, promised a “Grand Bargain” in which the LDCs would accept new rules on intellectual property, investments and services in exchange for a reduction of agricultural subsidies and textiles quotas in the industrialized states.¹⁷⁹ In fact, however, the industrialized states benefited from the Grand Bargain, but sub-Saharan Africa lost \$1.2 billion.¹⁸⁰ Industrialized countries made no concessions on agricultural subsidies and left textile quotas in place for ten years.¹⁸¹

Eleanor Fox argues that the elimination of subsidies by the WTO Member States would be the single most effective and far-reaching measure to improve human welfare in the developing world. As she explains:

The human costs of unfair trade are immense. If Africa, East Asia, South Asia, and Latin America were each to increase their share of world exports by one per cent, the

¹⁷⁷ James Gathii has recently noted that regional trade agreements are following suit. James Thuo Gathii, *The Neoliberal Turn in Regional Trade Agreements*, 86 WASH. L. REV. 421 (2011). See generally Symposium, *The Human Element: The Impact of Regional Trade Agreements on the Human Rights and the Rule of Law*, 42 U. MIAMI INTER-AM. L. REV. 197 (2011) (articles describing a range of mostly negative effects of such agreements).

¹⁷⁸ STIGLITZ, *supra* note 152, at 68.

¹⁷⁹ *Id.* at 77.

¹⁸⁰ *Id.*

¹⁸¹ The United States opened its markets to African cotton producers in 2005. *Id.* at 80-81. But the United States does not import cotton. Indeed, cotton subsidies make it the world’s largest cotton *exporter* and effectively makes competition by the LDCs impossible. *Id.* at 85-86. See also Kenneth A. Bamberger & Andrew T. Guzman, *Keeping Imports Safe: A Proposal for Discriminatory Regulation of International Trade*, 96 CAL. L. REV. 1405, 1445 (2008) (arguing that encouraging competition among United States and foreign companies, while simultaneously enforcing safety regulations, would significantly benefit U.S. consumers).

resulting gains in income could lift 128 million people out of poverty If the nations of the WTO were to adopt one and only one human welfare measure, elimination of [subsidies in trade barriers] should be the measure.¹⁸²

Indeed, “[r]ich countries have cost poor countries three times more in trade restrictions than they give in total development aid.”¹⁸³

Five years after the World Trade Organization’s (WTO) Uruguay Round, protesters disrupted the next round scheduled to begin in Seattle in 1999. Following the debacle of the “Battle in Seattle,” the WTO convened in a more remote location—Doha, Qatar—to avoid large protests.¹⁸⁴ Although the Doha Round was touted as a “development round,” again, there were few real concessions to the LDCs.¹⁸⁵ A growing number of legal scholars

¹⁸² Fox, *supra* note 17, at 211. *But see* U.N. DEP’T OF ECON. & SOC. AFFAIRS, THE MILLENNIUM DEVELOPMENT GOALS REPORT 2007 28, U.N. Sales No. E.07.I.15 (2007), available at <http://www.un.org/millenniumgoals/pdf/mdg2007.pdf> (noting that the elimination of trade barriers benefits some LDCs at the expense of others).

¹⁸³ STIGLITZ, *supra* note 152, at 78.

¹⁸⁴ See *The Battle in Seattle*, THE ECONOMIST, Nov. 27, 1999, at 21 (describing how over a thousand groups had planned to swamp Seattle); Paul Reynolds, *Eyewitness: The Battle of Seattle*, BBC NEWS (Dec. 2, 1999, 4:07 PM), <http://news.bbc.co.uk/2/hi/547581.stm> (describing the state of “civil emergency” in Seattle). For a perceptive account of what was at stake, see Clyde Summers, *The Battle in Seattle: Free Trade, Labor Rights, and Societal Values*, 22 U. PA. J. INT’L ECON. L. 61, 61-89 (2001). Several scholars have analyzed the “Battle of Seattle” in the larger context of global governance. See, e.g., Michael A. Livermore, *Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation, and the Codex Alimentarius*, 81 N.Y.U. L. REV. 766, 779 n.62, 780 n.63 (2006) (providing resources to support the idea that street protests are a symptom of a more general anxiety surrounding the ability of international organizations to usurp the power of national states); Richard B. Bilder & Richard Falk, *Recent Books on International Law*, 96 AM. J. INT’L L. 264, 267 (2002) (reviewing SUSAN MARKS, *THE RIDDLE OF ALL CONSTITUTIONS: INTERNATIONAL LAW, DEMOCRACY, AND THE CRITIQUE OF IDEOLOGY* (2000) and GREGORY H. FOX & BRAD R. ROTH, *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* (2000)) (advocating that Marks should have included a chapter on anti-corporate globalization efforts to address concerns about her approach).

¹⁸⁵ Some argued that the collapse of the Doha Round of WTO talks precluded agreement on effective measures to “lift millions out of poverty, curb rich countries’ ruinous farm support and open markets for countless goods and services.” *The Future of Globalisation*, THE ECONOMIST, July 29, 2006, at 11.

question how effectively the WTO could support the LDCs, and their people, even if that was its objective.¹⁸⁶

3.3. Doctrine

3.3.1. In the Courts

As noted above, the prospects of global trade and investment, whether with the affluent OECD states or the up-and-coming BRICS (Brazil, Russia, India, China, and South Africa), offer the most immediate – and substantial – payoff for LDCs.¹⁸⁷ But foreign investors or trading partners can often protect their interests through a range of legal doctrines. In American courts, for example, the doctrines of *forum non conveniens* and the restrictive theory of sovereign immunity limit the access of LDCs as plaintiffs to American courts and make it easier to sue them here, as set out below.

3.3.1.1. Forum Non Conveniens

While plaintiffs may generally choose their forums, under the doctrine of *forum non conveniens*, American courts may grant a defendant's motion to dismiss where an alternative, more appropriate, forum is available. As the Supreme Court noted in *Piper Aircraft v. Reyno*,¹⁸⁸ factors persuading a court to do so include "'private interest factors' affecting the convenience of the litigants" as well as "'public interest factors' affecting the convenience of the forum."¹⁸⁹

Forum non conveniens is used to deny access to foreign plaintiffs seeking relief against western multinationals.¹⁹⁰ This lockout

¹⁸⁶ See, e.g., Andrew T. Guzman, *Trade, Labor, Legitimacy*, 91 CAL. L. REV. 885, 885-89 (2003) (discussing the dilemmas posed by the integration of the ILO Core Rights Labor Standards into the WTO); Chantal Thomas, *Should the World Trade Organization Incorporate Labor and Environmental Standards?*, 61 WASH. & LEE L. REV. 347, 379-86, 401-03 (2004) (explaining some of the difficulties in negotiating common agreements); Elissa Alben, Note, *GATT and the Fair Wage: A Historical Perspective on the Labor-Trade Link*, 101 COLUM. L. REV. 1410, 1411-20 (2001) (putting the relationship between labor and trade in historical perspective).

¹⁸⁷ See *supra* Part 3.2.2.

¹⁸⁸ 454 U.S. 235 (1981).

¹⁸⁹ *Id.* at 241.

¹⁹⁰ See generally, *Bi v. Union Carbide Chemicals*, 984 F. 2d 582 (2d Cir. 1993) (affirming dismissal of the Bhopal case based on the doctrine of *forum non*

allows U.S. multinationals to avoid liberal American discovery rules and generous American juries.¹⁹¹ Following the accident at the Union Carbide plant in Bhopal, India, for example, methyl isocyanate gas was released, killing more than 2,000 people and injuring as many as 200,000.¹⁹² A lawsuit brought by the Indian government, along with 144 private lawsuits, was consolidated in a complaint filed in the Southern District of New York.¹⁹³

The case was dismissed on the ground that the private, as well as the public factors, 'tilted' toward India. The Court of Appeals upheld the dismissal. *Forum non conveniens* enables multinationals to benefit from the same lax laws, limited enforcement capacity, and favorable exchange rates that make foreign investment in the developing world so profitable in the first place.¹⁹⁴

A few foreign courts have sought to provide alternatives. In Lago Agrio, Ecuador, for example, a court recently entered a judgment against Chevron in the amount of \$9 billion for polluting remote tracts of the Ecuadorean jungle.¹⁹⁵ Before the ruling could

conveniens); B.S. Chimni, *An Outline of a Marxist Course on Public International Law*, in *INTERNATIONAL LAW ON THE LEFT: REEXAMINING MARXIST LEGACIES* 53, 77-78 (Susan Marks ed., 2008) ("Doctrines such as *forum non conveniens* have been used 'maximally [to] deny foreign mass disaster plaintiffs their day in their chosen forum.'"). *But see* *Wiwa v. Anderson*, No. 96 Civ. 8386 (KMW), 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. Feb. 22, 2002) (denying defendant's motion to dismiss on *forum non conveniens* grounds action by son of Ken Saro-Wiwa and others against two European oil companies).

¹⁹¹ See Sidney K. Smith, Note, *Forum Non Conveniens and Foreign Policy: Time for Congressional Intervention?* 90 TEX. L. REV. 743 (2012) (urging the adoption of a federal standard to preempt state law in transnational cases).

¹⁹² Mark W. Janis, *The Doctrine of Forum Non Conveniens and the Bhopal Case*, 34 NETH. INT'L L. REV. 192 (1987). See also Upendra Baxi, *Writing About Impunity and Environment: The 'Silver Jubilee' of the Bhopal Catastrophe*, 1 J. OF HUM. RTS. & THE ENVTL. 23 (2010), available at <http://upendrabaxi.net/documents/Writing%20About%20Impunity%20-%20Bhopal%202009.pdf> (deploring the "corporate colonization of human rights discourse").

¹⁹³ See *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842, 844 (S.D.N.Y. 1986) (*Bhopal I*) (summarizing the procedural history of the case).

¹⁹⁴ Julia Hueckel, Comment, *Rebalancing Legitimacy and Sovereignty in International Investment Agreements*, 61 EMORY L.J. 601, 601 (2012) (arguing that "clearer, more rule-like provisions" in investment agreements will both improve legitimacy of arbitrations and better protect state sovereignty).

¹⁹⁵ Simon Romero & Clifford Krauss, *Chevron is Ordered to Pay \$9 Billion by Ecuador Judge*, N.Y. TIMES, Feb. 15, 2011, at A4. The Chevron case (originally against Texaco, subsumed by Chevron in 2001) has been going on for eighteen years. See Patrick Radden Keefe, *Reversal of Fortune*, THE NEW YORKER, Jan. 9, 2012 ("The dispute is now considered one of the nastiest legal contests in memory, a

be enforced, however, Chevron filed a suit in the United States alleging 'conspiracy to extort.'¹⁹⁶ At the company's request, the American judge issued a temporary restraining order and, a day later, international arbiters ordered Ecuador to suspend the enforcement of any judgment.¹⁹⁷

3.3.1.2. *The Restrictive Theory of Sovereign Immunity*

Historically, the acts of a sovereign state could not be the basis for a claim in another sovereign state. This rule was grounded, as Chief Justice Marshall observed in *Schooner Exchange v. McFaddon*,¹⁹⁸ in the "perfect equality and absolute independence of sovereigns."¹⁹⁹

After World War I, however, states began using their own ships to trade, and there was widespread debate regarding the ongoing utility of the rule granting them absolute immunity in connection with their growing commercial enterprises.²⁰⁰ This debate resulted in the Brussels Convention on the Unification of Certain Rules Relating to Immunity of State-owned Vessels,²⁰¹ adopting the restrictive theory of sovereign immunity. Under this theory, foreign sovereigns engaging in commerce are subject to suit as if they were private individuals or multinational corporations. In the United States, the restrictive theory of sovereign immunity has been codified in the Foreign Sovereign Immunity Act of 1976.²⁰²

The restrictive theory originally gained a foothold in the United States during the Cold War and the rise of state-trading

spectacle almost as ugly as the pollution that prompted it."). The saga continues. Bloomberg News, *Judge in Chevron Case Declines to Reject Award*, N.Y. TIMES, July 31, 2012, http://www.nytimes.com/2012/08/01/business/energy-environment/judge-in-chevron-case-declines-request.html?_r=0 (noting refusal of a federal judge to find an \$18.2 billion judgment unenforceable, but leaving an injunction against the award in place).

¹⁹⁶ Romero & Krauss, *supra* note 195.

¹⁹⁷ *Id.*

¹⁹⁸ 11 U.S. (7 Cranch) 116 (1812).

¹⁹⁹ *Id.* at 137.

²⁰⁰ See DAMROSCH ET AL., *supra* note 1, at 854-56 (tracing the development of the restrictive form of sovereign immunity throughout the first half of the twentieth century).

²⁰¹ Apr. 10, 1926, 176 L.N.T.S. 199 (concluded in French).

²⁰² 28 U.S.C. §§ 1330, 1602-1611 (2006).

companies.²⁰³ LDCs are more likely than the more affluent states to engage in such activities.²⁰⁴ Many states in the developing world still claim absolute immunity for their state-trading companies²⁰⁵ and the “number of FSIA cases is rising every year.”²⁰⁶ As B.S. Chimni notes, the restrictive theory disadvantages LDCs, which, unlike private enterprises, cannot pass losses on to their shareholders.²⁰⁷

3.3.2. *The ‘War on Terror’*

President George W. Bush declared ‘War on Terror’ after September 11, 2001.²⁰⁸ Historically, terrorist attacks have been treated as crimes.²⁰⁹ As Mary Ellen O’Connell explains, the use of the term ‘war’ represents a deliberate legal strategy with important legal consequences.²¹⁰ First, it legitimates extrajudicial killings. Second, it allows the U.S. military to detain ‘enemy combatants’ until the end of hostilities.²¹¹ Third, it is open-ended, both temporally and in terms of the methods devised to address it. President Bush declared that, “[This War] will not end until every terrorist group of global reach has been found, stopped, and

²⁰³ See *Changed Policy Concerning the Grant of Sovereign Immunity to Foreign Governments*, in 26 Dep’t St. Bull. 969, 984 (1952) (“The Department has now reached the conclusion that such immunity should no longer be granted in certain types of cases.”).

²⁰⁴ Chimni, *supra* note 190, at 75.

²⁰⁵ DAMROSCH ET AL., *supra* note 1, at 859.

²⁰⁶ Symeon C. Symeonides, *Choice of Law in the American Courts in 2003: Seventeenth Annual Survey*, 52 AM. J. COMP. L. 9, 20 (2004).

²⁰⁷ Chimni, *supra* note 190, at 75.

²⁰⁸ Address to the Nation on the Terrorist Attacks, 37 WEEKLY COMP. PRES. DOC. 1301 (Sept. 11, 2001).

²⁰⁹ MARY ELLEN O’CONNELL, *INTERNATIONAL LAW AND THE USE OF FORCE* (2d ed. 2009).

²¹⁰ *Id.* at 8.

²¹¹ It also elevates terrorists to the status of prisoners of war under the Geneva Conventions. Christopher Greenwood, *Scope of Application of Humanitarian Law*, in *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* 39, 42 (Dieter Fleck ed., 1995). The United States has refused to treat them as POWs, however, on the ground that terrorists are in fact ‘unlawful combatants,’ since they are members of a ‘non-state terrorist group.’ O’CONNELL, *supra* note 209, at 604.

defeated.”²¹² As O’Connell observes, this goal could take some time.²¹³

The Obama Administration has repudiated the phrase ‘War on Terror.’²¹⁴ But as Legal Adviser Harold Koh confirmed in his address on October 22, 2011 at the International Law Weekend, the United States is engaged in an “ongoing armed conflict against Al Qaeda.”²¹⁵ As of Spring 2012, the United States was engaged in armed conflict in Iraq, Afghanistan, Pakistan, Somalia, Yemen, and Libya.²¹⁶ Four of these states are LDCs. The Obama Administration has ordered over 250 drone strikes in Pakistan alone since 2009, at a cost of more than 1,400 lives.²¹⁷ Drone attacks have continued, as have unauthorized incursions on the territory of sovereign states, including the killing of Osama Bin Laden.²¹⁸

From the perspective of many in LDCs, the “uniqueness of the despicable acts of terrorism that 9/11 signifies [are] vastly overstated . . . [and] the U.S. or its allies have subjected third-world peoples to massive and long-running terror campaigns”²¹⁹ They note that 9/11 has not only been used to justify targeted

²¹² Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1348 (Sept. 24, 2001).

²¹³ Mary Ellen O’Connell, *When Is a War Not a War? The Myth of the Global War on Terror*, 12 ILSA J. INT’L & COMP. L. 535, 536 (2006) (“This was not the ‘war on drugs’ or ‘war on poverty’, this was ‘World War III.’”).

²¹⁴ Michael Hirsh, *One Year After Bin Laden’s Death: A New World*, NAT’L J. (Apr. 27, 2012, 4:03 PM), <http://www.nationaljournal.com/nationalsecurity/one-year-after-bin-laden-s-death-a-new-world-20120427> (quoting State Department official’s remark that “the War on Terror is over.”).

²¹⁵ As Peter Bergen recently explained, Obama has declared “war against Al Qaeda and its allies.” Peter L. Bergen, *Warrior in Chief*, N.Y. TIMES, Apr. 28, 2012, <http://www.nytimes.com/2012/04/29/opinion/sunday/president-obama-warrior-in-chief.html?pagewanted=all>. Bergen is the author of *MANHUNT: THE TEN-YEAR SEARCH FOR BIN LADEN- FROM 9/11 TO ABBOTTABAD* (2012).

²¹⁶ *Warrior in Chief*, *supra* note 215.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ Obiora Chinedu Okafor, *The Third World, International Law, and the “Post 9/11 Era”*: An Introduction, 43 OSGOODE HALL L.J. 1, 2-3 (2005) (noting consensus among the contributors to the symposium).

attacks, like those noted above, but also the Bush doctrine of 'pre-emptive' war, including the 2003 war in Iraq.²²⁰

As Antony Anghie observes, "[t]he debate surrounding [nuclear] non-proliferation has [also] now acquired a very different complexion" ²²¹ While the West insists that it must retain nuclear capacity for self-defense (in case terrorists obtain nuclear weapons), it seeks to limit the right of self-defense to "certain civilized states."²²² Anthony Carty, similarly, suggests that, the 'War on Terror' is simply the most recent iteration of the U.S. project to "restore political control over the [global] South."²²³ This is a recurring theme in a recent symposium, *Third World Approaches to International Law After 9/11*.²²⁴ A group of distinguished contributors situate the Western response to 9/11 in a broader global context. They note, with trepidation, that some in the West seem to regret the end of colonialism. Indeed, as Anghie concludes, the 'War on Terror' has given rise to "the argument made by influential academics and diplomats . . . that what this disorderly and unstable world requires is in fact a return to an imperial system."²²⁵

²²⁰ See, e.g., Matthew Craven et al., 'We Are Teachers of International Law', 17 LEIDEN J. INT'L L. 363 (2004) (explaining why European international law professors felt obliged to protest what Martii Koskeniemi called 'Bush's war.').

²²¹ Antony Anghie, *The War on Terror and Iraq in Historical Perspective*, 43 OSGOODE HALL L.J. 45, 54 (2005).

²²² *Id.* at 55.

²²³ Anthony Carty, *Marxism and International Law: Perspectives for the American (Twenty-First) Century?*, in INTERNATIONAL LAW ON THE LEFT, REEXAMINING MARXIST LEGACIES 169, 198 (Susan Marks ed., 2008). He concludes, rather, that, "Marxist interpretations of imperialism [still] offer us the most convincing explanations as to why the violence of the United States increases by the year." *Id.* at 169. But see Detlev F. Vagts, *Book Reviews*, 103 AM. J. INT'L L. 178, 179 (2009) (book review) (quoting Carty, *supra*, at 169) (criticizing Carty's "updated theory of capitalist imperialism" as "complicated and somewhat implausible"). See generally, UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW (Michael Byers & Georg Nolte eds., 2003) (including essays exploring the implications of U.S. hegemony in contexts including sovereign equality and the use of force).

²²⁴ See Okafor, *supra* note 219 (presenting the overarching themes as a guest editor for the symposium issue); *Osgoode Hall Law Journal – Special Issues*, OSGOODE HALL LAW SCHOOL (2006), <http://www.ohlj.ca/english/specissues.htm> (providing the name and date of the symposium along with the corresponding journal issue and volume numbers).

²²⁵ Anghie, *supra* note 221, at 65. For a sharp and provocative analysis of the impact of the 'War on Terror' on women's human rights in the United States, see

4. HOW FRAGMENTATION AFFECTS WOMEN'S HUMAN RIGHTS IN LDCs

As explained in Part 3, the fragmentation of women's human rights law has produced a vast, and still expanding, array of laws and fora. This expansion is a real boon for educated, middle-class women with access to these laws and fora, as well as for less-educated, poorer women whom the former sometimes champion.²²⁶ As shown in Part 3, however, the fragmentation of international law has been better for those in the global North than for the LDCs and their nationals, who are generally outlawyered.

Both of these effects reflect, and reinforce, the larger-scale fragmentation of human rights that began during the Cold War, when the holistic conception of rights set out in the Universal Declaration was rejected.²²⁷ Despite rhetoric about the interdependence of civil/political rights ('negative rights') and economic, social and cultural rights ('positive rights'),²²⁸ two 'separate but equal' covenants were drafted and entered into force in the 1970s.²²⁹ When the Cold War ended, with the collapse of the Soviet Union in the early 1990s, economic rights were forgotten.²³⁰

Catherine Powell, *Lifting Our Veil of Ignorance: Culture, Constitutionalism, and Women's Human Rights in Post-September 11 America*, 57 HASTINGS L.J. 331 (2005).

²²⁶ See, e.g., CATHARINE A. MACKINNON, ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES 196-201 (2006) (describing MacKinnon's work on behalf of Bosnian and Croat survivors). But see Karen Engle, *Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, 99 AM. J. INT'L L. 778 (2005) (explaining why those championed may not always be well-served).

²²⁷ As Philip Alston explains, the Economic Covenant was widely denounced in the United States as 'socialist.' Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT'L L. 365, 366, 378 (1990).

²²⁸ See Indivisibility and Interdependence of Economic, Social, Cultural, Civil, and Political Rights, G.A. Res. 44/130, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/Res/44/130, ¶ 2 (Dec. 15, 1989) (urging that states "pursue policies directed towards the implementation, promotion and protection of economic, social, cultural, civil and political rights").

²²⁹ See *supra* note 5.

²³⁰ See, e.g., Robert Howse, *The End of the Globalization Debate: A Review Essay*, 121 HARV. L. REV. 1528, 1529 (2008) (book review) ("[B]y the end of the Cold War, the old struggle between right and left over the governance of the economy and the redistribution of wealth within the advanced liberal democracies had yielded to a new pro-market consensus.").

Social safety nets were abandoned and the rhetoric of 'freedom' – especially free markets – prevailed.²³¹

Now, in an era of unprecedented global inequality,²³² 'rights' are generally understood as 'civil and political rights.' This fragmentation of human rights, and the virtual erasure of economic rights, profoundly shapes women's human rights in LDCs.

This Part first explains why the fragmentation of law that has been used to promote women's rights elsewhere is less effective in LDCs.²³³ This Part then explains why women in LDCs are more likely than men to feel the brunt of the consequences when fragmentation disadvantages LDCs.

4.1. *How Women's Human Rights in LDCs Differ from Women's Human Rights Elsewhere*

4.1.1. *A Pinched Conception of 'Rights'*

Most LDCs have ratified most of the major human rights treaties.²³⁴ As Oona Hathaway notes, however, "monitoring and enforcement . . . are often minimal."²³⁵ It is left to non-

²³¹ See Barbara Stark, *At Last? Ratification of the Economic Covenant as a Congressional-Executive Agreement*, 20 *TRANSNAT'L L. & CONTEMP. PROBS.* 107, 133-135 (2011) (noting historical changes in the way political administrations responded to international treaties).

²³² As a recent U.N. study explains, global wealth is distributed so that "the richest 2 percent of adult individuals own half of all global wealth . . ." James B. Davies et al., *World Distribution of Household Wealth*, UNU-WIDER 2008, Discussion Paper No. 2008/03 7 (Feb. 2008).

²³³ For a provocative empirical study, showing that social rights litigation does more for middle and upper class groups than those at the bottom, see David Landau, *The Reality of Social Rights Enforcement*, 53 *HARV. INT'L L.J.* 189 (2012).

²³⁴ Compare *United Nations Treaty Collection*, UNITED NATIONS, <http://treaties.un.org/Pages/UNTSONline.aspx?id=1> (last visited Mar. 17, 2013) (containing a database searchable by participant to see which LDCs joined the international human rights treaties) with *Least Developed Countries: Country Profiles*, U.N.-OHRLLS, <http://www.un.org/special-rep/ohrls/ohrls/UNOHRLLS/new/en/ldc/related/62/index.html> (last visited May 7, 2013) (listing the LDC member states of the U.N.-OHRLLS).

²³⁵ Oona Hathaway, *Do Human Rights Treaties Make a Difference?* 111 *YALE L. J.* 1935, 2007 (2002) ("Monitoring and enforcement of human rights treaty obligations are often minimal, thereby making it difficult to give the lie to a country's expression of commitment to the goals of a treaty.").

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governmental organizations (NGOs), already spread thin,²³⁶ to pressure states in which human rights are often perceived as a low priority, lacking the political urgency of assuring security (or 'public order') and addressing never-ending disasters. As Collier points out, moreover, few NGOs head to the LDCs where the 'bottom billion' subsist, where the risks are high, and the likelihood of a good outcome are low.²³⁷

To the extent that human rights are addressed in LDCs, moreover, they have been downsized. Economic, social, and cultural rights are rarely mentioned. Rather, as Upendra Baxi explains:

[T]he paradigm of the Universal Declaration of Human Rights is being steadily supplanted by a trade-related, market-friendly, human rights paradigm. This . . . insists . . . upon the promotion and protection of the collective rights of global capital in ways that "justify" corporate well-being and dignity over that of human persons.²³⁸

This narrow conception of human rights is especially hard on women in LDCs.

Most states in the developed world, with the conspicuous exception of the United States, recognize basic economic and social rights. These states, moreover, have the resources to assure these rights. Thus, women's rights to health care, including pre-natal and maternity care, and an adequate standard of living are the norm. This is reflected in the long life spans and low maternal mortality rates taken for granted in most of the OECD states.²³⁹

Women's human rights cannot be realized in LDCs in the same ways that they may be realized in better-off countries. Some

²³⁶ *Id.* at 2008 ("As a consequence, the failure of a country to comply with its treaty obligations is, in most cases, unlikely to be revealed and examined except by already overtaxed NGOs.").

²³⁷ PAUL COLLIER, *THE BOTTOM BILLION: WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT* 4 (2007) ("The World Bank has large offices in every major middle-income country but not a single person residing in the Central African Republic.").

²³⁸ Upendra Baxi, *Voices of Suffering and the Future of Human Rights*, 8 *TRANSNAT'L L. & CONTEMP. PROBS.* 125, 163-164 (1998).

²³⁹ *WORLD'S WOMEN 2010*, *supra* note 25, at vii-viii.

brehtaking strides have been taken,²⁴⁰ and women's rights in LDCs may in fact improve the lives of women as compared to the lives of men. But LDCs lack the requisite infrastructure—the courts, lawyers, and critical mass of rights-literate women for whom civil and political rights are a priority—that make these rights so useful in better-off states.

As recently as twenty-five years ago, for example, the UN noted that most women in the developing world had never heard of 'women's human rights.'²⁴¹ Many women in LDCs remain unaware of these rights.²⁴² This lack of awareness may be attributable, in part, to women's disproportionate illiteracy.²⁴³ Despite the proliferation of laws addressing women's human rights, and fora in which such claims may be brought, few women in LDCs have actual access to either. To the extent they do have access, moreover, it is almost exclusively in connection with civil and political rights, which are rarely their priority.

Even if 'rights' only refer to civil and political rights, they may still improve the lives of women in LDCs. States may adopt reforms that make them look 'modern,' for example, such as the Protocol on the Rights of Women in Africa, ratified by fifteen African states.²⁴⁴ The Protocol assures women unprecedented safeguards for sexual and reproductive health in a region noted for the "worst indicators of women's health—particularly reproductive health."²⁴⁵ Family law reforms, similarly, may appear quite progressive. As Cynthia Bowman and other scholars have explained, however, even when family law is reformed in LDCs,

²⁴⁰ Maternal mortality rates have plummeted, for example. Grady, *supra* note 118.

²⁴¹ Stark, *Women's Rights*, *supra* note 46. See also FIRST CEDAW IMPACT STUDY, *supra* note 31, at 18 ("[A]wareness of [CEDAW's] potency as an instrument to amend domestic legislation is often limited.").

²⁴² See NUSSBAUM, *supra* note 29, at 113-14 (describing the impact of a government-sponsored consciousness-raising program in India).

²⁴³ WORLD'S WOMEN 2010, *supra* note 25, at viii ("[W]omen account for two thirds of the world's 774 million adult illiterates a proportion that is unchanged over the past two decades.").

²⁴⁴ Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, July 11, 2003, CAB/LEG/66.6; reprinted in Martin Semalulu Nsibirwa, *A Brief Analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women*. 1 Afr. Hum. Rts. L.J. 40 (2001).

²⁴⁵ D. MARIANNE BLAIR ET AL., *FAMILY LAW IN THE WORLD COMMUNITY* 797-98 (2d ed. 2009).

the new laws often co-exist with more traditional regimes in yet another example of the fragmentation of law.²⁴⁶ While the new law may formally assure equality, for example, customary regimes, under which all property belongs to the husband, may well persist.²⁴⁷

Even if women cannot claim economic rights, a few may benefit from what Nicholas Kristof enthusiastically touts as “Do-It-Yourself Foreign Aid.”²⁴⁸ In a special *Women’s Empowerment Issue* of the *New York Times Magazine*,²⁴⁹ he describes a school in Nepal,²⁵⁰ a factory in Rwanda,²⁵¹ and an international organization, *Run for Congo Women*.²⁵² He concedes that:

It’s fair to object that activists like Doyne are accomplishing results that, however noble, are minuscule. Something like 101 million children aren’t attending primary school

²⁴⁶ See *id.* at 93-97, 206-207 (describing alternative family law regimes in South Africa and Kenya). See also CYNTHIA GRANT BOWMAN & AKUA KUENYEHIA, *WOMEN AND LAW IN SUB-SAHARA AFRICA* (2003) (exploring the interactions between customary family law and statutory family law in African countries and the effects of this dual system on women). But see Celestine I. Nayamu, *How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?*, 41 HARV. INT’L L.J. 381, 417 (2000) (urging reformers to “appropriate the openings present in local cultural or religious traditions, while simultaneously working toward changing the larger social matrix of national legislation, constitutions, and administrative institutions”).

²⁴⁷ BLAIR ET AL., *supra* note 245, at 207.

²⁴⁸ Nicholas D. Kristof, *The D.I.Y. Foreign-Aid Revolution*, N.Y. TIMES MAG., Oct. 24, 2010, at 48, 49. There are, of course, scores of well-intentioned and effective efforts to promote well-being throughout the LDCs that benefit women, even if they do not focus on them. Nor are these efforts necessarily grounded in ‘rights’ claims. See, e.g., Michael Kimmelman, *Rescued by Design*, N.Y. TIMES, Oct. 23, 2011, at AR1 (reviewing a show in the U.N. visitors’ lobby showcasing projects, from a community cooker fueled by refuse in Kibera, Kenya to floating community lifeboats that serve as schools, libraries, and health clinics in Bangladesh); *Small Fixes*, N.Y. TIMES (SPECIAL ISSUE), Sept. 27, 2011, at D1 (describing “low-cost innovations that are making a big difference” from biodegradable toilet bags to drinking straws that filter out pathogens). See also Scott L. Cummings, 61 J. LEGAL EDUC. 711 (2012) (reviewing *STONES OF HOPE: HOW AFRICAN ACTIVISTS RECLAIM HUMAN RIGHTS TO CHALLENGE GLOBAL POVERTY* (Lucie E. White & Jeremy Perelman eds., 2012) (sharing inspiring accounts of self-help activity by Africans).

²⁴⁹ Kristof, *supra* note 248.

²⁵⁰ *Id.* at 49.

²⁵¹ *Id.* at 50.

²⁵² *Id.* at 51.

around the world, so 220 kids in Doyne's school constitute the teensiest drop in the bucket.

* * *

All that is true — but it's equally true if you happen to be that drop in the bucket, Doyne is transforming your life.²⁵³

Kristof argues that free markets promote women's human rights. The strength and appeal of his argument reflects the strength and appeal of market rhetoric. As Stiglitz, Rittich and others have shown, however, markets do far more for the financiers and investment banks that control them, and the states that support them, than for women in LDCs.²⁵⁴ Even in India, which is a major success story, there is little mobility for women at the bottom.²⁵⁵

4.1.2. 'Rights' as Claims Against the State

It seems logical that both bottom-up projects would benefit from combining their efforts. What is 'good for women' must be good for the LDCs in which they live. If what is 'good for women' means educating women, or assuring them greater access to resources, this proposition is demonstrably true. As the World Bank recently noted, siphoning resources to women not only benefits them, but their families and communities: "A host of studies suggests that putting earnings in women's hands is the intelligent thing to do to speed up development and the process of overcoming poverty. Women usually reinvest a much higher portion in their families and communities than men, spreading wealth beyond themselves."²⁵⁶ But because of the fragmentation of

²⁵³ *Id.*

²⁵⁴ See *supra* Part 3.2.

²⁵⁵ See Lydia Polgreen, *Scaling Caste Walls With Capitalism's Ladders*, N.Y. TIMES, Dec. 22, 2011, at A1, A12 ("[A] Dalit entrepreneur is still much more likely to be a poor woman who has no choice but to start a small, low-profit margin business because so few other options are open to her, said Annie Namala, a researcher and activist who has worked on Dalit issues. A survey completed this year of Dalit women entrepreneurs in Delhi and Hyderabad found that most made less than \$100 a month from their business. 'These are basically survival enterprises,' Ms. Namala said.").

²⁵⁶ *Why Is Women's Economic Empowerment Important for Development?*, THE WORLD BANK, http://siteresources.worldbank.org/INTGENDER/Resources/womens_economic_empowerment.pdf (last visited Mar. 17, 2013) [hereinafter

rights described above,²⁵⁷ women in LDCs can only get more if *others* in LDCs get less. 'Rights' can only be asserted against their own state; there is no 'common heritage,' as envisioned in the NIEO,²⁵⁸ from which women may draw, benefiting their states as well as themselves.

Thus, 'what is good for women' may well be viewed as a threat to the state. It might mean the end of a fragile coalition, for example. Or it may be too costly because it might antagonize religious leaders.²⁵⁹ Conflict over already-meager resources is inevitable.²⁶⁰ Newly independent states have often sidelined women's rights in the interest of national solidarity. Women themselves often put national solidarity ahead of their own needs. This makes sense; if they can join in a revolution that will make the state more responsive to their needs, as the anti-colonial revolutions all promised forty years ago and as the anti-oligarch uprisings in the Middle East promise now, it is probably their best bet.²⁶¹ If they do not put aside their own interests, moreover, others may do so for them.²⁶²

World Bank, *Women's Economic Empowerment*] ("This could be one reason why countries with greater gender equality tend to have lower poverty rates."). See also *Educating Women Saves Children, Study Finds*, N.Y. TIMES, Sept. 17, 2010, at A7 (citing study published in the *Lancet* stating that "giving young women an education resulted in saving the lives of more than four million children worldwide in 2009"); U.N. WOMEN, *supra* note 32 ("There is a direct link between increased female labour participation and [GDP] growth.").

²⁵⁷ See *supra* Part 4.

²⁵⁸ See *supra* Part 3.1.

²⁵⁹ This is not limited to LDCs, of course. See, e.g., Ethan Bronner & Isabel Kershner, *Israeli Women Core of Debate on Orthodoxy*, N.Y. TIMES, Jan. 15, 2012, at A1 (describing how successive Israeli governments have made deals with an ultra-Orthodox group that insists on the exclusion of women).

²⁶⁰ See *supra* Part 2.3.

²⁶¹ See Hamza Hendawi, *Yemen Uprising Binds Women from Many Walks of Life*, BOSTON.COM, Nov. 5, 2011, http://www.boston.com/news/world/middleeast/articles/2011/11/05/yemen_uprising_binds_women_from_many_walks_of_life/ (explaining how women in Yemen are fighting to keep a voice for their rights amid the tumult of Yemen's landmark revolt). But see Mona Eltahawy, *Why Do They Hate Us?: The Real War On Women Is In The Middle East*, FOREIGN POL'Y, May/June 2012, available at http://www.foreignpolicy.com/articles/2012/04/23/why_do_they_hate_us (noting that Yemen, where 55% of women are illiterate and 79% are not in the labor force, is the lowest-ranked country on the World Economic Forum's *Global Gender Gap Report*).

²⁶² See Kareem Fahim, *Libya Revolt Sidelines Women, Who Led It*, N.Y. TIMES, May 19, 2011, <http://www.nytimes.com/2011/05/20/world/africa/20benghazi>.

In addition, a state may claim that women's human rights conflict with its own 'culture,' and represent a Western imposition.²⁶³ This response may generate a backlash against women.²⁶⁴ Charges that women are rejecting their culture may also spur them to form alliances with groups outside the state,²⁶⁵ raising further questions about their loyalty. As Chandra Mohanty notes, the meanings of cultural expression may well change over time in response to such backlashes or alliances.²⁶⁶

Other states rarely pressure LDCs to treat their women fairly. States could impose economic sanctions, such as those imposed by the Security Council on South Africa in connection with apartheid.²⁶⁷ Although gender apartheid has been well

html?pagewanted=all (explaining how Libyan women who initiated the revolution have been sidelined by men who have seized leadership positions in the nascent government). *But see* Anne Barnard, *Libya's Battle-Tested Women Hope Gains Last*, N.Y. TIMES, Sept. 12, 2011, at A1 (noting that women played a crucial role in the revolution and that "many women never want to go back [to traditional roles]").

²⁶³ See CHARLESWORTH & CHINKIN, *supra* note 25, at 222 ("While concerns of cultural relativism arise with respect to human rights generally, it is striking that 'culture' is much more frequently invoked in the context of women's rights than in any other area."). See generally, Karen Knop, Ralf Michaels & Annelise Riles, *From Multiculturalism to Technique: Feminism, Culture, and the Conflict of Laws Style*, 64 STAN. L. REV. 589 (2012) (proposing a "creative shift of gears" for approaching this issue).

²⁶⁴ See CHARLESWORTH & CHINKIN, *supra* note 25, at 225 (citing Arati Rao's "series of questions to assess claims of culture, particularly those used to counter women's claims of rights: whose culture is being invoked? what is the status of the interpreter? in whose name is the argument being advanced? and who are the primary beneficiaries of the claim?"). *But see* NUSSBAUM, *supra* note 29, at 46-47 (rejecting generalizations about "Indian culture," and noting that "India is probably the most diverse single nation in the world.").

²⁶⁵ See KECK & SIKKINK, *supra* note 89, at 221 (noting that, "[w]hen channels between the state and its domestic actors are blocked . . . NGOs bypass their state and directly search out international allies to try to bring pressure on their states from outside.").

²⁶⁶ Mohanty distinguishes, for example, between "Iranian middle-class women [who] veiled themselves during the 1979 revolution to indicate solidarity with their veiled, working class sisters, [and] contemporary Iran [where] mandatory Islamic laws dictate that all Iranian women wear veils." CHANDRA TALPADE MOHANTY, *FEMINISM WITHOUT BORDERS: DECOLONIZING THEORY, PRACTICING SOLIDARITY* 34 (2003).

²⁶⁷ See CHARLESWORTH & CHINKIN, *supra* note 25, at 267-268 ("The General Assembly and Security Council have denounced discrimination against women and girls in Afghanistan . . . Some Western aid agencies have discontinued operations in Afghanistan. With different political agendas, some states have also

documented in many LDCs, such sanctions have never been considered.²⁶⁸ Indeed, no state refuses to have diplomatic relations with any other state on this ground. No boycotts have even been threatened.

Nor can the IMF and World Bank be depended upon.²⁶⁹ Rather, their interventions amount to small, if not unwelcome, infusions of cash, whether in the form of subsidies or jobs for LDC nationals. Thus, while the *actual* elimination of discrimination against women would radically transform LDCs, the international law of women's human rights does not.²⁷⁰

4.2. Women in LDCs

No one seriously questions women's relative impoverishment, even among the poorest populations. The ongoing global economic crisis makes them especially vulnerable.²⁷¹ Violations of

spoken out against the Taliban's policies with respect to women, including India, Iran and the institutions of the EU. Despite this criticism, sanctions have not been imposed by the Security Council It has been noted that, since 1979, the major role of women in Afghan politics has been as 'symbols of legitimization for political groups led by men.'").

²⁶⁸ By 'gender apartheid,' I refer to the exclusion of women from the public sphere, including the denial of the right to vote. *See id.*, at 17 ("Indeed, the international focus on racial discrimination and apartheid based on race has often allowed sex discrimination and apartheid based on sex to go unchallenged."). *See generally*, Rebecca J. Cook, *The Elimination of Sexual Apartheid: Prospects for the Fourth World Conference on Women*, in 5 AMERICAN SOCIETY OF INTERNATIONAL LAW: ISSUE PAPERS ON WORLD CONFERENCES (1995).

²⁶⁹ *See* CIEL, *supra* note 82, at *passim* (observing that loans made by the World Bank and IMF tend to have a disproportionately negative impact on women and girls).

²⁷⁰ *See, e.g.*, Heather Cottin, *The IMF Rapes the World*, THE WORKER (Jul. 7, 2011, 6:49 PM), http://www.workers.org/2011/us/dsk_0714/ (accusing Dominique Strauss-Kahn of "administer[ing] a program of worldwide rape of women and children" through propagating IMF policies which caused poor women and children worldwide to become further impoverished). *See also* Christine Ahn & Kavita Ramdas, *The IMF: Violating Women Since 1945*, FOREIGN POLICY IN FOCUS (May 19, 2011), http://www.fpif.org/articles/the_imf_violating_women_since_1945 ("IMF-mandated government cutbacks in social welfare spending have often been achieved by cutting public sector jobs, which disproportionately impact women. Women hold most of the lower-skilled public sector jobs, and they are often the first to be cut. Also, as social programs like caregiving are slashed, women are expected to take on additional domestic responsibilities that further limit their access to education or other jobs.").

²⁷¹ *See* World Bank, *Women's Economic Empowerment*, *supra* note 256 ("The World Bank identified 33 developing countries where women and girls in poor

women's human rights, moreover, often affect *all* women in a particular state, such as across-the-board lower pay for comparable work or lack of access to reproductive healthcare.

There are always counter-examples. A state's inability to govern may create 'space' in which women can organize or take action.²⁷² In Somalia, for example, Dr. Hawa Abdi has established a clinic, school, and food program that supports nearly 100,000 refugees.²⁷³

The global crisis may be easing for some,²⁷⁴ but even in the United States, the crisis continues for many.²⁷⁵ Europe remains teetering on the brink,²⁷⁶ as protests rise against austerity, and Italy, the region's third largest economy, joins Greece, Portugal, and Spain as officially 'fragile.'²⁷⁷ The issues rending Europe, such

households are particularly vulnerable to the effects of the global economic and food crises. Fifteen of these, mostly in Sub-Saharan Africa, are likely to see a particularly dangerous mix for women and girls, with slowing economic growth, fewer girls in school, and higher levels of infant and child mortality. The World Bank now projects an additional 200,000 to 400,000 infant deaths per year between 2009 and 2015 if the crisis persists.").

²⁷² See, e.g., CHARLESWORTH & CHINKIN, *supra* note 25 (describing women's initiatives in South West Africa).

²⁷³ Mohammed Ibrahim & Jeffrey Gettleman, *Under Siege in War-Torn Somalia, a Doctor Holds Her Ground*, N.Y. TIMES, Jan. 8, 2011, at A1 (indicating that Dr. Hawa Abdi's hospital could house "400 beds, 3 operating theaters (still badly damaged from the attack), 6 doctors, 43 nurses, an 800-student school and an adult-education center that teaches women how to cook nutritious meals and make clothes.").

²⁷⁴ See, e.g., Daniel Costello, *The Drought Is Over (at Least for C.E.O.'s)*, N.Y. TIMES, Apr. 9, 2011, <http://www.nytimes.com/2011/04/10/business/10comp.html?pagewanted=all> (finding that the median pay for top executives at 200 major companies was \$9.6 million last year).

²⁷⁵ See Motoko Rich, *Feeble Job Numbers Show Recovery Starting to Stall*, N.Y. TIMES, July 9, 2011, at A1 (providing new Labor Department statistics showing an increase in unemployment to 9.2%).

²⁷⁶ See Liz Alderman & Rachel Donadio, *Debt Ratings Cut for 9 Countries Amid Euro Woes*, N.Y. TIMES, Jan. 14, 2012, at A1 (noting that down-graded credit ratings, along with ongoing problems in Greece, "underscore that even as Europe's debt turmoil enters its third year, no clear solutions are yet in sight."); Landon Thomas, Jr., *In Euro Zone, Debt Pressure Tightens Grip*, N.Y. TIMES, July 23, 2012, <http://www.nytimes.com/2012/07/24/business/global/in-euro-zone-debt-pressure-tightens-grip.html> (describing "escalation of crisis"). See also Keith Bradshier, *China Output Slows Sharply; Ripples Feared*, N.Y. TIMES, May 25, 2012, at A1-A3 (noting that "China's unexpected economic difficulties are starting to unnerve investors in world markets").

²⁷⁷ See Daniel Bases & Walter Brandimarte, *Moody's May Downgrade Italy on Rates, Growth Concern*, REUTERS, Jun. 17, 2011, <http://www.reuters.com/>

as disappearing pensions and shrinking social safety nets, remain unimaginable luxuries in the LDCs. There, the economic crisis is grim. As set out in the *UN Resolution on World Economic Crisis*:²⁷⁸

Developing countries, which did not cause the global economic and financial crisis, are nonetheless severely affected by it. The economic and social progress achieved during recent years, in particular on internationally agreed development goals, including the Millennium Development Goals, is now being threatened in developing countries, particularly least developed countries Women also face greater income insecurity and increased burdens of family care.²⁷⁹

Fragmentation allows financial markets to exploit *ad hoc* arrangements and resist the 'global economic governance' called for by the UN Commission of Experts on Reforms of the International Monetary and Financial System.²⁸⁰ Indeed, the G-20 scoffs at the ineffectual calls by Miguel d'Escoto, the President of the General Assembly, for "new global institutions, authorities and advisory boards."²⁸¹ Absent any form of centralized regulation, as Stiglitz explains, fragmentation encourages a "'race to the bottom,'

article/2011/06/17/us-italy-moodys-review-idUSTRE75G5AX20110617 (describing Italy's economic recovery as "fragile"). Some analysts have attributed the dismal situation in Europe to Basel II, which allowed banks to evaluate their own assets. See, e.g., Joe Nocera, *Sheila Bair's Bank Shot*, N.Y. TIMES MAG., July 10, 2011, <http://www.nytimes.com/2011/07/10/magazine/sheila-bairs-exit-interview.html?pagewanted=all> ("The European Banks, lacking adequate capital, were crushed by the financial crisis. Big banks in places like Ireland and Iceland collapsed. Germany doled out hundreds of billions of dollars to shore up its banks. Even today, banks in Europe are in far worse shape than they are in the U.S.").

²⁷⁸ See U.N. Resolution on World Economic Crisis, *supra* note 26.

²⁷⁹ *Id.* at 2.

²⁸⁰ See *The Commission of Experts of the President of the UN General Assembly on Reforms of the International Monetary and Financial System: Key Perspectives*, UNITED NATIONS, http://www.un.org/ga/president/63/commission/key_perspectives.pdf (last visited Mar. 17, 2013) (exhorting Member States to take a collective action to resolve the crisis and reform the economic institutions to regulate the markets).

²⁸¹ Neil MacFarquhar, *At U.N., A Sandinista's Plan for Recovery*, N.Y. TIMES, May 24, 2009, <http://www.nytimes.com/2009/05/25/world/25nations.html> (explaining that d'Escoto's initiative breached U.N. etiquette because "traditionally, before any conference, the General Assembly president appoints a couple of ambassadors as 'facilitators' who consult widely and then propose a working document.").

with countries with lax regulation competing to attract financial services."²⁸²

The crisis is not over, of course, and its impact remains to be seen. In some states, and in some sectors, women have suffered less than men.²⁸³ But the global economic crisis contributes to a longer-term, and more disturbing, trend. A recent study by the Harvard School of Public Health provides a "sobering picture" of poor women in fifty-four poor and middle-income countries.²⁸⁴ Noting that changes in average height have long been relied upon by researchers as a proxy for changes in the group's standard of living, the study describes the decline and stagnation in average heights among women born in the last two decades in these countries, compared to their mothers and grandmothers. For these women, the world is "not getting to be a better place For them, it's getting worse."²⁸⁵

5. CONCLUSION

Part 1 has described the ongoing bottom-up transformation of international law as a normative process and the simultaneous fragmentation of international law as a structural process. It set out the major thesis of this Article; i.e., that the structural transformation of international law – fragmentation – both supports and undermines the normative bottom-up transformation of international law in the context of women's human rights.

Part 2 has shown how the fragmentation of international law has been a qualified boon for women's human rights. Even if states continue to deny women their rights, increasing numbers of

²⁸² Joseph E. Stiglitz, *A Real Cure for the Global Economic Crackup*, THE NATION, July 13, 2009, at 11.

²⁸³ See Rosin, *supra* note 26 (noting the erosion of the preference for male children).

²⁸⁴ See Donald G. McNeil, Jr., *Very Poor Women Are Smaller, As Are Their Chances at a Better Life*, N.Y. TIMES, April 26, 2011, at D6 (quoting the lead author of the Harvard study, S. V. Subramanian, and summarizing the study's findings). *But see* RODERICK FLOUD ET AL., THE CHANGING BODY: HEALTH, NUTRITION, AND HUMAN DEVELOPMENT IN THE WESTERN WORLD SINCE 1700 (2011) (describing a different, more comprehensive study of how technological progress has 'supersized' those in the affluent West).

²⁸⁵ McNeil, *supra* note 284, at D6. *See also* Jeffrey Gettleman, *For Somali Women, Pain of Being a Spoil of War*, N.Y. TIMES, Dec. 28, 2011, at A1 (noting increase in rapes accompanying the breakdown of the clan system).

women are asserting them, especially in those states that are no longer among the world's poorest. In Egypt, for example, thousands of women recently took to the streets to demonstrate against the abuse of an earlier wave of female protesters.²⁸⁶ At the same time, however, many women are worse off.

Part 3 describes the impact of fragmentation on LDCs. It has shown, first, how the LDCs have been fragmented politically. Second, it has explained how the fragmentation of international law has subjected LDCs to multiple regimes with often disastrous results. Third, it has described the impact of new doctrines on LDCs, including the 'War on Terror.'

Part 4 has shown how women in LDCs have been ill-served by the pinched conception of human rights since the end of the Cold War. Indeed, it has pitted them against their already hard-pressed states, in a demoralizing zero-sum game.

Neither the transformation nor the fragmentation of international law is a natural or inevitable process. Rather, both result from a series of strategic legal initiatives by those who seek to further a broad range of often competing objectives, from women's human rights²⁸⁷ to corporate profits to redistribution of resources. International law is particularly conducive to such initiatives because of the lacunae discussed above;²⁸⁸ i.e., there are so few inter-governmental institutions to constrain them.

But these initiatives rely on law. They are impossible without infrastructure, including courts and honest judges. They are impossible unless people are *aware* of their own human rights²⁸⁹ and have access to skilled lawyers, capable of maneuvering through increasingly complex legal regimes. They are impossible, often, without the resources to support sustained, high-stakes

²⁸⁶ See David D. Kirkpatrick, *March in Cairo Draws Women by Thousands*, N.Y. TIMES, Dec. 21, 2011, at A1 (describing "the biggest women's demonstration in modern Egyptian history, the most significant since a 1919 march against British colonialism inaugurated women's activism here, and a rarity in the Arab world").

²⁸⁷ See *supra* Part 2. See generally, JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006) (describing feminists' 'will to power').

²⁸⁸ See *supra* text accompanying notes 48-50.

²⁸⁹ See *supra* note 241 (noting the lack of awareness of CEDAW's potential uses in amending national legislation).

litigation.²⁹⁰ These are all in short supply in LDCs, especially for women.²⁹¹

²⁹⁰ See, e.g., Keefe, *supra* note 195 (describing eighteen-year lawsuit against Chevron).

²⁹¹ See, e.g., STIGLITZ, *supra* note 152, at 208 (urging legal aid for developing states); Seyom Brown & Vanda Felbab-Brown, *Nepal, On the Brink of Collapse*, N.Y. TIMES, June 5, 2012, <http://www.nytimes.com/2012/06/06/opinion/nepal-on-the-brink-of-collapse.html> (“[M]ost institutions [are] malfunctioning and . . . bribery and political connection rule the day.”).